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8 Attorneys for Complainant

9  
10 BEFORE THE DEPARTMENT OF BUSINESS OVERISGHT  
11 OF THE STATE OF CALIFORNIA

12 In the Matter of ) FILE NO. 167784 & 136733  
13 )  
14 THE COMMISSIONER of BUSINESS ) SETTLEMENT AGREEMENT BETWEEN  
OVERSIGHT, ) AUK CAPITAL, LLC, BRIAN O’NEIL AND  
15 ) THE CALIFORNIA DEPARTMENT OF  
Complainant, ) BUSINESSS OVERSIGHT RESOLVING:  
16 )  
v. ) 1. DESIST AND REFRAIN ORDER; and  
17 ) 2. ORDER LEVYING ADMINISTRATIVE  
Auk Capital, LLC and Brian O’Neil, ) PENALTIES  
18 )  
Respondents )

19  
20 SETTLEMENT AGREEMENT

21 This SETTLEMENT AGREEMENT ("Agreement") is entered into as of October \_\_, 2014,  
22 by and between the Complainant, California Department of Business Oversight (“Department”), by  
23 and through the California Commissioner of Business Oversight ("Commissioner") and the  
24 Respondents, Auk Capital, LLC and Brian O’Neil (hereinafter collectively the “Parties”).

25 RECITALS

26 This Agreement is made with reference to the following facts:

27 A. Auk Capital, LLC (“Auk”) is a California limited liability company, formed on August 24,  
28 2005, with its principal place of business at 916 Silver Spur, Ste 310, Rolling Hills Estates, CA

1 90274.

2 B. Brian O’Neil (“O’Neil”) is, and was at all relevant times herein the majority owner and sole  
3 control person of Auk. O’Neil is authorized to enter into this Agreement on behalf of both Auk and  
4 O’Neil.

5 C. On or about February 18, 2014, Auk filed an application for an investment adviser  
6 certificate with the Department. The application revealed that Auk and O’Neil were likely  
7 engaging in investment adviser activities without a license.

8 D. On its application, Auk admitted that it was currently providing investment advice. When  
9 the Department inquired about this activity, Auk fully cooperated, providing information showing  
10 that it had five (5) clients, with a total of seventy-five million (\$75,000,000.00) under management.  
11 The client information provided by Auk and O’Neil, themselves, show that they were engaged in  
12 unlicensed investment adviser activity in violation of CSL section 25230(a).

13 E. It is the intention and desire of the Parties to resolve this matter without the necessity of a  
14 hearing and/or other litigation.

15 NOW, THEREFORE, for good and valuable consideration, and the terms and conditions set  
16 forth herein, the Parties agree as follows:

17 TERMS AND CONDITIONS

18 1. **Purpose:** The purpose of this Agreement is to settle and resolve the matters between  
19 the Parties hereto, for judicial economy and expediency, and to avoid the expense of a hearing, and  
20 possible further court proceedings.

21 2. **Waiver of Hearing Rights:** Auk and O’Neil acknowledge the right to a hearing under the  
22 Corporate Securities Law of 1968 in connection with the application for an investment adviser  
23 certificate and hereby waive that right to a hearing, and to any reconsideration, appeal, or other right  
24 to review which may be afforded pursuant to the Corporate Securities Law of 1968, the California  
25 Administrative Procedure Act, the California Code of Civil Procedure, or any other provision of  
26 law, and by waiving such rights, consent to the Penalties becoming final.

27 3. **Acknowledgement:** Auk and O’Neil acknowledge the foregoing recitals of fact. The  
28 acknowledgment of Auk and O’Neil is for the purpose of this and any other future proceedings that

1 may be initiated by or brought before the Department. The Parties agree that this Agreement and  
2 any acknowledgements hereunder shall not be admissible or binding against Auk or O’Neil in any  
3 action(s) brought against Auk and O’Neil by third parties that are not signatories to this Agreement.

4 4. **Certification:** Auk and O’Neil stipulate to undertake all appropriate steps designed to  
5 assure full compliance with the laws of California in the conduct of its business. Auk and O’Neil  
6 acknowledge that failure to comply under this Agreement shall be a breach of this Agreement and  
7 shall be cause for the Commissioner to immediately revoke any licenses held by, and/or deny any  
8 pending application(s) of Auk, its successors and assigns, by whatever names they might be known.  
9 Auk hereby waives any notice and hearing rights to contest such revocations and/or denial(s) which  
10 may be afforded under the Corporate Securities Law of 1968, the California Administrative  
11 Procedure Act, the California Code of Civil Procedure, or any other provision of law in connection  
12 therewith.

13 5. **Administrative Penalties:** Auk and O’Neil agree to pay to the Commissioner penalties  
14 totaling two-thousand seven-hundred and fifty (\$2,750.00) (“Penalties”), within seven (7) days of  
15 the execution of this agreement. The check shall be made payable to “The Department of Business  
16 Oversight,” and shall be sent by Auk and O’Neil to the following address:

17 Erik Brunkal, Esq.  
18 Senior Corporations Counsel  
19 Department of Business Oversight  
20 1515 K St., Suite 200  
Sacramento, CA 95814

21 6. **Future Actions by the Commissioner:** The Commissioner reserves the right to bring  
22 any future action(s) against Auk and/or any of the officers, directors, shareholders, or employees of  
23 Auk for any and all unknown or future violations of the Corporate Securities Act of 1968. This  
24 Agreement shall not serve to exculpate Auk or any of the officers, directors, shareholders, or  
25 employees of Auk from liability for any and all unknown or future violations of the Corporate  
26 Securities Act of 1968.

27 7. **Effective Date:** This Agreement shall not become effective until signed, and delivered  
28 by all parties.

1 8. **Settlement Agreement Coverage:** The Parties hereby acknowledge and agree that this  
2 Agreement is intended to constitute a full, final, and complete resolution of this matter. The Parties  
3 further acknowledge and agree that nothing contained in this Agreement shall operate to limit the  
4 Commissioner's ability to assist any other agency, county, state or federal, with any prosecution,  
5 administrative, civil or criminal, brought by any such agency against Auk and/or O'Neil based upon  
6 any of the activities alleged in this matter or otherwise.

7 9. **Independent Legal Advice:** Each of the Parties represents, warrants, and agrees that it has  
8 received or been advised to seek independent legal advice from its attorneys with respect to the  
9 advisability of executing this Agreement.

10 10. **No Other Representation:** Each of the parties represents, warrants, and agrees that in  
11 executing this Agreement it has relied solely on the statements set forth herein and the advice of its  
12 own counsel. Each of the parties further represents, warrants, and agrees that in executing this  
13 Agreement it has placed no reliance on any statement, representation, or promise of any other party,  
14 or any other person or entity not expressly set forth herein, or upon the failure of any party or any  
15 other person or entity to make any statement, representation or disclosure of anything whatsoever.  
16 The parties have included this clause: (1) to preclude any claim that any party was in any way  
17 fraudulently induced to execute this Agreement; and (2) to preclude the introduction of parol  
18 evidence to vary, interpret, supplement, or contradict the terms of this Agreement.

19 11. **Modifications and Qualified Integration:** No amendment, change or modification of this  
20 Agreement shall be valid or binding to any extent unless it is in writing and signed by all of the  
21 parties affected by it.

22 12. **Full Integration:** This Agreement is the final written expression and the complete and  
23 exclusive statement of all the agreements, conditions, promises, representations, and covenants  
24 between the parties with respect to the subject matter hereof, and supersedes all discussions  
25 between and among the parties, their respective representatives, and any other person or entity, with  
26 respect to the subject matter covered hereby.

27 13. **No Presumption From Drafting:** In that the parties have had the opportunity to draft,  
28 review and edit the Language of this Agreement, no presumption for or against any party arising

1 out of drafting all or any part of this Agreement will be applied in any action relating to, connected  
2 to, or involving this Agreement. Accordingly, the parties waive the benefit of Civil Code section  
3 1654 and any successor or amended statute, providing that in cases of uncertainty, Language of a  
4 contract should be interpreted most strongly against the party who caused the uncertainty to exist.

5 **14. Counterparts:** This Agreement may be executed in any number of counter-parts by  
6 the Parties, and when each party has signed and delivered at least one such counterpart to the other  
7 party, each counterpart shall be deemed an original and taken together shall constitute one and the  
8 same Agreement.

9 **15. Headings and Governing Law:** The headings to the paragraphs of this Agreement are  
10 inserted for convenience only and will not be deemed a part hereof or affect the construction or  
11 interpretation of the provisions hereof. This Agreement shall be construed and enforced in  
12 accordance with, and governed by, the laws of the State of California.

13 **16. Authority For Settlement:** Each party warrants and represents that such party is fully  
14 entitled and duly authorized to enter into and deliver this Agreement. In particular, and without  
15 limiting the generality of the foregoing, each party warrants and represents that it is fully entitled to  
16 enter into the covenants, and undertake the obligations set forth herein.

17 **17. Public Record:** Auk and O’Neil hereby acknowledge that this Agreement will be a  
18 matter of public record.

19 **18. Voluntary Agreement:** The Parties each represent and acknowledge that he, she, or it  
20 is executing this Agreement completely voluntarily and without any duress or undue influence of  
21 any kind from any source.

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IN WITNESS WHEREOF, the Parties hereto have approved and executed this Agreement on the dates set forth opposite their respective signatures.

California Commissioner of Business Oversight

Dated: 10/10/14

By \_\_\_\_\_  
MARY ANN SMITH  
Deputy Commissioner  
Enforcement Division

Dated: 10/8/14

Auk Capital, LLC and Brian O'Neil

By \_\_\_\_\_  
BRIAN O'NEIL, individually and for  
Auk Capital, LLC