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7
8 BEFORE THE DEPARTMENT OF CORPORATIONS
9 OF THE STATE OF CALIFORNIA

10 In the Matter of)	CASE NO.
)	
11 THE CALIFORNIA CORPORATIONS)	FILE NO. 925-2761
12 COMMISSIONER,)	
)	STATEMENT IN SUPPORT OF ORDER TO
13 Complainant,)	LEVY ADMINISTRATIVE PENALTIES
)	PURSUANT TO CORPORATIONS CODE
14 v.)	SECTION 25252 AND COMMISSIONER'S
)	INTENTION TO MAKE ORDER FINAL
15 AUSTIN LEMOINE CAPITAL)	
16 MANAGEMENT, (AUSTIN JOSEPH)	
17 LEMOINE, DBA),)	
)	
18 Respondent.)	
)	

19
20 Wayne P. Strumpfer, the Acting California Corporations Commissioner ("Commissioner") of
21 the Department of Corporations ("Department"), alleges and charges as follows:

22 1. Austin Lemoine Capital Management (Austin Joseph Lemoine DBA) ("Austin") holds
23 a valid and unrevoked investment adviser certificate issued by the Commissioner pursuant to
24 Corporations Code section 25230 on March 4, 1998. Austin is an investment adviser business
25 located at 1020 Guinda Street, Palo Alto, California 94301. Austin Joseph Lemoine is Austin's sole
26 proprietor.

1 2. On or about February 26, 1999, the Commissioner commenced a regulatory
2 examination of Austin. The examination revealed violations of the Corporate Securities Law of
3 1968 (Corporations Code section 25000 et seq.) and the regulations enacted thereunder (California
4 Code of Regulations, title 10 section 260.000 et seq.).

5 3. These violations included Austin’s failure to reconcile bank accounts and the failure to
6 prepare and maintain monthly computations of net capital and aggregate indebtedness for Austin.
7 (California Code of Regulations, title 10, section 260.241.3, subdivision (a)(4) & (j).) An
8 investment adviser is required to reconcile its bank accounts and to prepare and maintain monthly
9 computations of net capital and aggregate indebtedness, in part, to provide the Department with a
10 regulatory mechanism to validate a firm's liquidity and financial integrity to ensure that licensees
11 maintain the necessary net capital for the protection of the public. Austin’s violation of these books
12 and records provisions prevents the Department from determining as part of its regulatory exam, if
13 Austin meets the capital requirements imposed by the Corporate Securities Law of 1968 and the
14 regulations enacted thereunder.

15 4. Corporations Code section 25241 provides that investment advisers are required to
16 maintain books and records that are subject to examination by the Commissioner. Section 25241
17 provides, in relevant part, as follows:

18 [E]very investment adviser licensed under Section 25230 shall make and keep such
19 accounts, correspondence, memoranda, papers, books, and other records and shall file such
20 financial and other reports as the commissioner by rule requires, . . .

21 5. California Code of Regulations, title 10, section 260.241.3 sets forth the specific books
22 and records required to be maintained by investment advisers. Subdivisions (a)(4) and (j) of section
23 260.241.3 provide as follows¹:

24 (a) Every licensed investment adviser shall make and keep true, accurate and current the
25 following books and records relating to such person’s investment advisory business:

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27 ¹ Various provisions of the California Code of Regulations, title 10, were amended and became
28 effective April 3, 2003. This administrative action is based on violations that occurred under statutes
and rules prior to the effective date of the amendments.

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(4) All check books, bank statements, cancelled checks and cash reconciliations of the investment adviser.

(j) Any investment adviser who is subject to the minimum financial requirements of Section 260.237.1 or Section 260.237.2 as applicable, shall, in addition to the records otherwise required under this section, maintain a record of the proof of money balances of all ledger accounts in the form of trial balances and a record of the computations of net capitals and aggregate indebtedness pursuant to Section 260.237.1 of these rules or minimum net worth pursuant to Section 260.237.2 of these rules (as of the trial balance date). The trial balances and computations shall be prepared currently at least once a month.

6. Prior to April 3, 2003, California Code of Regulations, title 10, section 260.237.1 set forth the capital requirements for investment advisers. Subdivision (a)(2) of section 260.237.1 provided, in relevant part, as follows:

(a) No investment adviser who has any power of attorney from any investment advisory client to execute transactions . . . shall permit its total aggregate indebtedness to exceed 500% of its tangible net capital or permit its current aggregate indebtedness to exceed its current net capital; and,

(2) If the investment adviser has any power of attorney from any investment advisory client to execute transactions and does not have regular or periodic custody or possession of any of its investment advisory clients' securities or funds, except the receipt of prepaid subscriptions for periodic publications, or other investment advisory services, it shall at all times have and maintain tangible net capital of not less than \$5,000....

Subdivision (c) of section 260.237.1 provided that for purposes of section 260.237.1, subdivision (a), all financial information shall be determined in accordance with generally accepted accounting principles ("GAAP").

7. The Department's examiner found during the regulatory exam on February 26, 1999, that Austin did not reconcile its bank accounts. (California Code of Regulations, title 10, section 260.241.3, subdivision (a)(4).) Additionally, Austin did not prepare and maintain trial balances and computations of net capital and aggregate indebtedness on a monthly basis. (California Code of Regulations, title 10, section 260.241.3, subdivision (j).) Therefore, the Department was unable to determine at the time of the examination if Austin was in compliance with the net capital requirements under California Code of Regulations, title 10, section 260.237.1.

1 8. On March 3, 1999, the Department sent Austin a regulatory letter notifying the firm of
2 the exceptions discovered during the February 26, 1999 examination, including the violations of
3 California Code of Regulations, title 10, section 260.241.3, subdivisions (a)(4) and (j). Austin
4 responded that Austin would acquire new accounting computer software and henceforth would use
5 it to maintain Austin's general ledger, from which bank statements would be reconciled and monthly
6 trial balances and capital computations would be prepared.

7 9. The Department's examiner found during a subsequent regulatory exam on January 15,
8 2003, that Austin still failed to reconcile its bank accounts. (California Code of Regulations, title 10,
9 section 260.241.3, subdivision (a)(4).) Additionally, Austin did not prepare and maintain trial
10 balances and computations of net capital and aggregate indebtedness on a monthly basis. (California
11 Code of Regulations, title 10, section 260.241.3, subdivision (j).) Therefore, the Department was
12 unable to determine at the time of the examination if Austin was in compliance with the net capital
13 requirements under California Code of Regulations, title 10, section 260.237.1.

14 10. On April 17, 2003, Austin responded to the Department's regulatory letter noting the
15 exceptions to the January 15, 2003 examination. Austin pledged to reconcile its bank statements and
16 maintain monthly computations of the net capital balance and prepare written net capital reports as
17 part of its advisory records.

18 11. The Department's examiner found during a subsequent regulatory exam on July 17,
19 2003, that Austin still failed to reconcile its bank accounts. (California Code of Regulations, title 10,
20 section 260.241.3, subdivision (a)(4).) Additionally, Austin did not prepare and maintain trial
21 balances and computations of net capital and aggregate indebtedness on a monthly basis. (California
22 Code of Regulations, title 10, section 260.241.3, subdivision (j).) Therefore, the Department was
23 unable to determine at the time of the examination if Austin was in compliance with the net capital
24 requirements under California Code of Regulations, title 10, section 260.237.1.

25 12. On September 26, 2003, Austin responded to the Department's regulatory letter
26 noting the exceptions to the July 17, 2003 examination. Austin stated that it believed it had
27 adequately reconciled its bank statements and that its monthly computations of the net capital
28 balance were adequate.

1 13. Corporations Code section 25252, which became effective January 1, 1999,
2 authorizes the Commissioner to issue an order levying administrative penalties against any
3 investment adviser for willful violations of any provision of the California Securities Law of 1968
4 and any rule promulgated thereunder. Specifically, Corporations Code section 25252 provides, in
5 relevant part:

6 The Commissioner may, after appropriate notice and opportunity for hearing, by order levy
7 administrative penalties as follows:

8 ...
9 (b) Any broker-dealer or investment adviser that willfully violates any provision of this
10 division to which it is subject, or that willfully violates any rule or order adopted or issued
11 pursuant to this division and to which it is subject, is liable for administrative penalties of not
12 more than five thousand dollars (\$5,000) for the first violation, not more than ten thousand
13 dollars (\$10,000) for the second violation, and not more than fifteen thousand dollars
14 (\$15,000) for each subsequent violation.

15 By reason of the foregoing, Austin has willfully violated Corporations Code section
16 25241 and California Code of Regulations, title 10, section 260.241.3, subdivisions (a)(4) and (j),
17 justifying the imposition of administrative penalties. Austin, as a licensee, is obligated to have
18 knowledge of, and to comply with, the provisions of the Corporate Securities Law of 1968 and the
19 regulations thereunder to maintain its investment adviser certificate. Furthermore, on March 3,
20 1999; April 4, 2003; and September 23, 2003, the Department notified Austin of the requirements of
21 California Code of Regulations, title 10, section 260.241.3, subdivisions (a)(4) and (j). Austin has
22 violated both subdivisions, despite the Department's actual notification and Austin's assurances of
23 future compliance.

24 Therefore, pursuant to Corporations Code section 25252, the Commissioner seeks
25 administrative penalties for Austin's failure to reconcile bank statements and Austin's failure to
26 prepare and maintain monthly trial balances and computations of net and aggregate indebtedness in
27 willful violation of Corporations Code section 25241 and California Code of Regulations, title 10,
28 section 260.241.3, subdivisions (a)(4) and (j).

WHEREFORE, good cause showing, and pursuant to Corporations Code section 25252, the
California Corporations Commissioner prays for an order levying administrative penalties in the
amount of \$750 for each violation for a total of \$4,500.

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Dated: March 29, 2006
Los Angeles, California

WAYNE P. STRUMPFER
Acting California Corporations Commissioner

By: _____
SEAN M. ROONEY
Corporations Counsel
Enforcement Division