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

10 In the Matter of) FILE NO. 925-2761
11)
12 THE CALIFORNIA CORPORATIONS) FINAL ORDER TO DISCONTINUE
COMMISSIONER,) VIOLATIONS PURSUANT TO
13) CORPORATIONS CODE SECTION 25249
14 Complainant,)
15 v.)
16 AUSTIN LEMOINE CAPITAL)
MANAGEMENT, (AUSTIN JOSEPH)
LEMOINE, DBA),)
17)
18 Respondent.)
19 _____)

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21 TO: Mr. Austin Joseph Lemoine, dba
Austin Lemoine Capital Management
22 1020 Guinda Street
23 Palo Alto, California 94301

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

6 2. On or about February 26, 1999, the Commissioner commenced a regulatory
7 examination of Austin. The examination revealed violations of the Corporate Securities Law of
8 1968 (Corporations Code section 25000 et seq.) and the regulations enacted thereunder (California
9 Code of Regulations, title 10 section 260.000 et seq.).

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

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

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

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1 5. California Code of Regulations, Title 10, section 260.241.3 sets forth the specific books
2 and records required to be maintained by investment advisers. Subdivisions (a)(4) and (j) of section
3 260.241.3 provide as follows¹:

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

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

8 (j) Any investment adviser who is subject to the minimum financial requirements of Section
9 260.237.1 or Section 260.237.2 as applicable, shall, in addition to the records otherwise
10 required under this section, maintain a record of the proof of money balances of all ledger
11 accounts in the form of trial balances and a record of the computations of net capitals and
12 aggregate indebtedness pursuant to Section 260.237.1 of these rules or minimum net worth
13 pursuant to Section 260.237.2 of these rules (as of the trial balance date). The trial balances
14 and computations shall be prepared currently at least once a month.

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

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

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

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

¹ Various provisions of the California Code of Regulations, Title 10, were amended and became 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.

1 7. The Department's examiner found during the regulatory exam on February 26, 1999,
2 that Austin did not reconcile its bank accounts. (California Code of Regulations, Title 10, section
3 260.241.3, subdivision (a)(4)). Additionally, Austin did not prepare and maintain trial balances and
4 computations of net capital and aggregate indebtedness on a monthly basis. (California Code of
5 Regulations, Title 10, section 260.241.3, subdivision (j)). Therefore, the Department was unable to
6 determine at the time of the examination if Austin was in compliance with the net capital
7 requirements under California Code of Regulations, Title 10, section 260.237.1.

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

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

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

25 11. The Department's examiner found during a subsequent regulatory exam on July 17,
26 2003, that Austin still failed to reconcile its bank accounts. (California Code of Regulations, Title
27 10, section 260.241.3, subdivision (a)(4)). Additionally, Austin did not prepare and maintain trial
28 balances and computations of net capital and aggregate indebtedness on a monthly basis. (California

1 Code of Regulations, Title 10, section 260.241.3, subdivision (j)). Therefore, the Department was
2 unable to determine at the time of the examination if Austin was in compliance with the net capital
3 requirements under California Code of Regulations, Title 10, section 260.237.1.

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

8 13. Corporations Code section 25249, which became effective January 1, 1999,
9 authorizes the Commissioner to issue an order directing any investment adviser to discontinue any
10 violation of any provision of the Corporate Securities Law of 1968 and any rule promulgated
11 thereunder. Specifically, Corporations Code section 25249 provides, in relevant part:

12 If, after examination or investigation, the commissioner has reasonable grounds to believe
13 that any...investment adviser has violated any law or rule binding upon it, the commissioner
14 shall, by written order addressed to the...investment adviser, direct the discontinuance of the
15 violation. The order shall be effective immediately, but shall not become final except in
16 accordance with the provisions of Section 25251.

17 14. Corporations Code section 25251 provides:

18 (a) No order issued pursuant to Section 25249 or 25250 may become final except after
19 notice to the affected broker-dealer or investment adviser of the commissioner's intention to
20 make the order final and of the reasons for the finding. The commissioner shall also notify
21 the broker-dealer or investment adviser that upon receiving a request the matter shall be set
22 for hearing to commence within 15 business days after receipt of the request. The broker-
23 dealer or investment adviser may consent to have the hearing commence at a later date. If no
24 hearing is requested within 30 days after the mailing or service of the required notice, and
25 none is ordered by the commissioner, the order may become final without a hearing and the
26 broker-dealer or investment adviser shall immediately discontinue the practices named in the
27 order. If a hearing is requested or ordered, it shall be held in accordance with the provisions
28 of the Administrative Procedure Act (Chapter 5 (commencing with Section 11500) of Part 1
of Division 3 of Title 2 of the Government Code), and the commissioner shall have all of the
powers granted under that act. If, upon the conclusion of the hearing, it appears to the
commissioner that the broker-dealer or investment adviser is conducting business in an
unsafe or injurious manner or is violating any law of this state, or any rule binding upon it,
the commissioner shall make the order of discontinuance final and the broker-dealer or
investment adviser shall immediately discontinue the practices named in the order.

(b) The broker-dealer or investment adviser may within 10 days after an order is made final
commence an action to restrain enforcement of the order. If the enforcement of the order is

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not enjoined within 10 days by the court in which the action is brought, the broker dealer or investment adviser shall comply with the order.

WHEREFORE, good cause showing, and pursuant to Corporations Code section 25241, the Commissioner finds that Austin Joseph Lemoine, d.b.a. Austin Lemoine Capital Management has willfully violated California Code of Regulations, Title 10, section 260.241.3, subdivisions (a)(4) and (j) and hereby makes final the Order to Discontinue Violations Pursuant to Corporations Code Section 25249 issued by the Commissioner on March 29, 2006.

Dated: May 30, 2006
Los Angeles, California

WAYNE P. STRUMPFER
Acting California Corporations Commissioner

By: _____
ALAN S. WEINGER
Acting Deputy Commissioner
Enforcement Division