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BEFORE THE DEPARTMENT OF FINANCIAL PROTECTION AND INNOVATION
OF THE STATE OF CALIFORNIA

In the Matter of:)	CRD NO.: 110018
)	
THE COMMISSIONER OF FINANCIAL PROTECTION AND INNOVATION,)	(1) ACCUSATION TO REVOKE INVESTMENT ADVISER CERTIFICATE
Complainant,)	
)	
v.)	AND
)	
ATLAS CAPITAL MANAGEMENT, INC. and TRACY DENNIS TOWNER,)	(2) STATEMENT IN SUPPORT OF ORDER LEVYING ADMINISTRATIVE PENALTIES
Respondents.)	
)	
)	(Corporations Code sections 25232 and 25252)

The Commissioner of Financial Protection and Innovation (Commissioner) of the Department of Financial Protection and Innovation (Department) alleges and charges as follows:

I.
Introduction

1. The Commissioner has jurisdiction over the licensing and regulation of persons engaged in the business of investment advising under the Corporate Securities Law of 1968 (CSL)

1 (Cal. Corp. Code, §§ 25000 - 25707), and the rules and regulations promulgated thereunder (C.C.R.,
2 tit. 10, § 260.000 et seq.).

3 2. At all relevant times, Atlas Capital Management, Inc. (Atlas) was a California
4 Corporation formed on January 17, 1997, with a principal business address at 2625 Townsgate Road,
5 Suite 200, Thousand Oaks, California 91361. On or about June 2, 2022, the California Secretary of
6 State terminated Atlas’s corporate status.

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8 **II.**
9 **Statement of Facts**

10 3. On September 12, 1997, the Commissioner issued Atlas an investment adviser
11 certificate under Corporations Code section 25230.

12 4. Craig Arsenault (Arsenault) was Atlas’s co-owner and president from January 1, 2001
13 through at least December 31, 2018.

14 5. Tracy Dennis Towner (Towner) was Atlas’s co-owner from January 1, 2001 through
15 at least December 31, 2018.

16 6. Towner became Atlas’s sole owner on December 31, 2018. Towner and Atlas are
17 collectively referred to herein as “Respondents.”

18 **A. U.S. Securities and Exchange Commission Action Against Atlas and Arsenault**

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20 7. On December 13, 2018, the U.S. Securities and Exchange Commission (SEC) filed a
21 complaint in the United States District Court for the Central District of California (*SEC v. Craig*
22 *Arsenault et al.* (Case No. 8-18-cv-02220)) against Atlas, Arsenault, and one other entity, ACT
23 Global Investments (ACT). The complaint alleged that Arsenault misrepresented the use of Atlas
24 investors’ funds in an ACT fund, provided clients with deceptive account statements that made it
25 appear as if these investments were generating substantial income when they were not, and
26 misappropriated and misused over \$1 million of the client money invested with ACT.

27 8. On February 27, 2019, Towner consented to entry of judgment on behalf of Atlas.
28 Arsenault consented to entry of judgement on his own behalf on February 28, 2019.

1 9. On March 4, 2019, the court entered judgment that permanently enjoined Atlas, in
2 connection with the purchase or sale of any security, from employing any scheme to defraud,
3 making material misrepresentations or omitting to state material facts, and engaging in any
4 transaction, practice or course of business which operates or would operate as a fraud or deceit upon
5 the purchaser, in violation of section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5
6 thereunder, section 17(a) of the Securities Act of 1933 or sections 206(1) and (2) of the Investment
7 Advisers Act of 1940 (SEC Judgment). The court also ordered Atlas to pay disgorgement, pre-
8 judgment interest, and a civil penalty to be determined at a later date upon motion by the SEC.

9 10. Also, on March 4, 2019, the court entered judgment that permanently enjoined
10 Arsenault, in connection with the purchase or sale of any security, from employing any scheme to
11 defraud, making material misrepresentations or omitting to state material facts, and engaging in any
12 transaction, practice or course of business which operates or would operate as a fraud or deceit upon
13 the purchaser, in violation of section 17(a) of the Securities Act of 1933 or sections 206(1) and (2) of
14 the Investment Advisers Act of 1940 (Arsenault Judgment). The court also ordered Arsenault to pay
15 disgorgement, prejudgment interest, and a civil penalty to be determined at a later date upon motion
16 by the SEC.

17 11. On March 15, 2019, Arsenault stipulated to a SEC order barring him from association
18 with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer
19 agent, or nationally recognized statistical rating organization (Arsenault SEC Bar Order).

20 **B. Misrepresentations and Omissions to the Commissioner About the SEC Action**

21
22 12. Investment advisers are required to submit registration applications to the SEC and
23 state securities agencies on a form specified by the SEC, known as a form ADV (Form ADV).

24 13. Investment advisers are required, under Corporations Code section 25241 and section
25 260.241.4, subdivision (a), of title 10 of the California Code of Regulations (CCR), to promptly
26 amend the Form ADV to disclose certain material changes to the Commissioner.

27 14. Investment advisers and associated persons are prohibited, under Corporations Code
28 section 25245, from willfully making any untrue statement of a material fact in any application,

1 notice, or report filed with the commissioner, or willfully omitting to state in any such application,
2 notice, or report any material fact which is required to be stated therein.

3 15. Form ADV Part I, Item 11 asks several “yes” or “no” questions regarding the
4 investment adviser’s disciplinary history. Question H(1)(a) asks, “Has any domestic or foreign court
5 in the past ten years, *enjoined* you or any *advisory affiliate* in connection with any *investment-*
6 *related* activity.” (Emphasis added.)

7 16. Under the Form ADV General Instructions and Glossary, “Enjoined” is defined to
8 include being subject to a mandatory injunction, prohibitory injunction, preliminary injunction, or
9 temporary restraining order, and “Investment-Related” is defined to include activities that pertain to
10 securities, commodities, banking, insurance, or real estate.

11 17. Form ADV Part II requires investment advisers to provide a brochure to prospective
12 clients and provide an updated brochure to existing clients at least annually. Item 9 of the brochure
13 requires investment advisers to disclose any disciplinary events that are material to a client’s or
14 prospective client’s evaluation of the advisory business or the integrity of the firm’s management,
15 including a civil action in which the firm or a management person was the subject of a permanent
16 injunction from violating an investment-related statute.

17 18. Respondents filed a report with the Commissioner on March 4, 2019, disclosing
18 Towner as Atlas’s sole owner and chief executive officer.

19 19. On at least three separate occasions, on March 4, 2019, July 27, 2020, and September
20 15, 2020, Respondents filed an amended Form ADV with the Commissioner. In each instance,
21 Respondents violated Corporations Code section 25245 by answering “No” to Question H(1)(a) of
22 Form ADV Part I, Item 11, affirmatively representing that no court had enjoined Atlas from
23 investment-related activity. On each occasion, such statement was not true. The federal district
24 court in the Central District of California permanently enjoined Atlas from violating federal
25 securities law on March 4, 2019.

26 20. Respondents violated Corporations Code section 25245 at least three additional times
27 by failing to disclose the SEC Judgment on Part II of Atlas’s Form ADV submitted to the
28 Commissioner on March 4, 2019, July 27, 2020, and September 15, 2020.

1 21. Respondents failed to promptly amend the Form ADV to disclose the SEC Judgment
2 in violation of Corporations Code section 25241 and California Code of Regulations, title 10, section
3 260.241.4.

4 **C. Failure to Amend Form ADV After Notice of Violation**

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6 22. On or around August 25, 2019, the Commissioner commenced a regulatory
7 examination of Atlas’s investment advisory business (Regulatory Exam).

8 23. Investment advisers and persons who control those investment advisers are charged
9 with knowing and understanding the laws and regulations, including the CSL and accompanying
10 regulations, applicable to maintaining their license and running their business.

11 24. On or around June 10, 2020, the Commissioner sent Atlas a regulatory letter asking
12 Respondents to: (1) disclose the SEC regulatory action on Atlas’s Form ADV; and (2) provide
13 written confirmation that Respondents had disclosed the SEC regulatory action to existing clients.

14 25. Respondents responded to the Commissioner on June 29, 2020, asserting that the SEC
15 action was not required to be disclosed. They also attached a copy of a letter sent to Atlas’s clients
16 on April 2, 2019. (The letter is discussed more fully below.)

17 26. Respondents filed at least two more deficient Form ADVs with the Commissioner on
18 July 27, 2020 and September 15, 2020. Both filings falsely stated that no court had enjoined Atlas
19 from any investment-related activity and failed to disclose the SEC Judgment in Part II of the Form
20 ADV in violation of Corporations Code section 25245.

21 **D. Misrepresentations to Investors About the SEC Judgment and Bar Order**

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23 27. Investment advisers are required, under Corporations Code section 25235 and
24 California Code of Regulations, title 10, section 260.235.4, to promptly inform existing and
25 prospective clients of all material facts with respect to any legal or disciplinary event that is material
26 to an evaluation of the investment adviser’s integrity and a financial condition of an adviser that is
27 reasonably likely to impair the ability of the advisor to meet contractual commitments. Failure to do
28 so constitutes a fraudulent, deceptive, or manipulative act, practice, or course of business.

1 28. Investment advisers and associated persons are prohibited, under Corporations Code
2 section 25238, from engaging in investment adviser activities in contradiction of such rules as the
3 Commissioner may prescribe designed to promote fair, equitable, and ethical principles.

4 29. Under CCR section 260.238, subdivision (h), misrepresenting to any advisory client
5 the qualifications of the adviser, its representatives, or any employees, or omitting to state a material
6 fact necessary to make the statements made regarding the qualification, services, or fees, in light of
7 the circumstances under which they are made, not misleading, does not promote “fair, equitable, or
8 ethical principles” as that term is used in Corporations Code section 25238.

9 30. Atlas sent a letter to its clients on or around April 2, 2019, approximately one month
10 after stipulating to the permanent injunction in the SEC action. The letter failed to disclose: the
11 SEC Judgment; the fact that the SEC could seek disgorgement, pre-judgment interest, and penalties
12 against Atlas at a future date (hereafter “Potential Adverse Financial Remedies”); and Arsenault’s
13 Judgment and SEC Bar Order. The letter, instead, announced:

14 Atlas has been vetted, analyzed and thoroughly reviewed by both the SEC and the
15 California Department of Business Oversight. Nothing has changed regarding the
16 safety and security of your investment funds. Your investments are not in any
17 danger as a result of the SEC investigation. Your money and investments with
18 Atlas Capital have been and continue to be secured.

19 31. Respondents violated Corporations Code section 25235 and California Code of
20 Regulations, title 10, section 260.235.4 by failing to promptly inform existing clients of all material
21 facts with respect to a legal or disciplinary event that is material to an evaluation of the investment
22 adviser’s integrity by failing to disclose:

- 23 a. the SEC Judgment;
- 24 b. the Potential Adverse Financial Remedies;
- 25 c. the Arsenault SEC Bar Order; and,
- 26 d. the Arsenault Judgment.

27 32. Respondents’ statements to investors in the April 2, 2019 letter were misleading, in
28 light of the circumstances which they were made, in at least three ways, in violation of Corporations
Code sections 25238 and California Code of Regulations, title 10, section 260.238, subdivision (h).

1 33. First, it was misleading for Respondents to tout that the Department had “vetted,
2 analyzed, and thoroughly reviewed” Atlas because Respondents had not disclosed the SEC
3 Judgment or the Potential Adverse Financial Remedies to the Department.

4 34. Second, it was misleading for Respondents to represent that Atlas’s services were
5 safe and secure without disclosing the SEC Judgment and Potential Adverse Financial Remedies to
6 investors.

7 35. Third, it was misleading for Respondents to state that Arsenault had resigned from
8 Atlas without disclosing the Arsenault SEC Bar Order and Arsenault Judgment.

9 36. On May 24, 2021, Arsenault entered into a Consent Order with the Commissioner,
10 stipulating to an order barring him from any position of employment, management, or control of any
11 investment adviser, broker-dealer, or commodity adviser, any officer, director, partner, employee of,
12 or person performing similar functions for, an investment adviser, or any other person.

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14 **III.**

15 **Applicable Law**

16 37. Corporations Code section 25235, subdivision (d), provides:

17 It is unlawful for any investment adviser, directly or indirectly, in this
18 state:

19 (d) To engage in any act, practice, or course of business which is
20 fraudulent, deceptive, or manipulative. The commissioner shall, for the
21 purpose of this subdivision, by rule define and prescribe means
22 reasonably designed to prevent such acts, practices, and courses of
23 business as are fraudulent, deceptive, or manipulative.

24 38. California Code of Regulations, title 10, section 260.235.4 provides in relevant part:

25 (a) It shall constitute a fraudulent, deceptive, or manipulative act, practice
26 or course of business within the meaning of Section 25235 of the Code
27 for any investment adviser to fail to disclose to any client or prospective
28 client all material facts with respect to:

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(2) A legal or disciplinary event that is material to an evaluation of the adviser's integrity or ability to meet contractual commitments to clients.

(b) It shall constitute a rebuttable presumption that the following legal or disciplinary events involving the adviser or a management person of the adviser (any of the foregoing being referred to hereafter as "person") that were not resolved in the person's favor or subsequently reversed, suspended, or vacated are material within the meaning of subsection (a)(2) of this rule for a period of 10 years from the time of one or more of the following events:

(1) A criminal or civil action in a court of competent jurisdiction in which the person:

...

(C) Was the subject of any order, judgment, or decree permanently or temporarily enjoining the person, or otherwise limiting the person, from engaging in any investment-related activity.

(2) Administrative proceedings before the Securities and Exchange Commission, any other federal regulatory agency, or any state agency (any of the foregoing being referred to as "agency") in which the person:

...

(B) Was found to have been involved in a violation of an investment-related statute or regulation and was the subject of an order by the agency (i) denying, suspending, or revoking the authorization of the person to act in, or barring or suspending the person's association with, an investment-related business; or (ii) otherwise significantly limiting the person's investment-related activities.

...

(c) The information required to be disclosed by subsection (a) shall be disclosed to existing clients promptly and to prospective clients (A) not less than 48 hours prior to entering into any written or oral investment advisory contract, or (B) no later than the time of entering into such contract if the client has the right to terminate the contract without penalty within five business days after entering into the contract.

39. Corporations Code section 25238 provides:

No investment adviser licensed under this chapter and no natural person associated with the investment adviser shall engage in investment advisory activities, or attempt to engage in investment advisory activities, in this state in contradiction of such rules as the commissioner may prescribe designed to promote fair, equitable and ethical principles.

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40. California Code of Regulations, title 10, section 260.238, subdivision (h), provides:

The following activities do not promote “fair, equitable or ethical principles,” as that phrase is used in Section 25238 of the Code:
...

(h) Misrepresenting to any advisory client, or any prospective advisory client, the qualifications of the adviser, its representatives or any employees, or misrepresenting the nature of the advisory services being offered or fees to be charged for such service, or omitting to state a material fact necessary to make the statements made regarding the qualifications, services or fees, in light of the circumstances under which they are made, not misleading.

41. Corporations Code section 25241, subdivision (a), provides:

Every broker-dealer and every investment adviser licensed under Section 25230 shall make and keep accounts, correspondence, memorandums, papers, books, and other records and shall file financial and other reports as the commissioner by rule requires, subject to the limitations of Section 15(h) of the Securities Exchange Act of 1934 with respect to broker-dealers and Section 222 of the Investment Advisers Act of 1940 with respect to investment advisers.

42. California Code of Regulations, title 10, section 260.241.4, subdivision (a), provides:

Each licensed broker-dealer and each licensed investment adviser shall, upon any change in the information contained in its application for a certificate (other than financial information contained therein) promptly file an amendment to such application setting forth the changed information.

43. Corporations Code section 25245 provides:

It is unlawful for any person willfully to make any untrue statement of a material fact in any application, notice, or report filed with the commissioner under this part, or willfully to omit to state in any such application, notice, or report any material fact which is required to be stated therein.

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IV.

Atlas’s Investment Adviser Certificate Should be Revoked

44. Corporations Code section 25232 provides in relevant part:
The commissioner may, after appropriate notice and opportunity for hearing, by order censure, deny a certificate to, or suspend for a period not exceeding 12 months or revoke the certificate of, an investment adviser, if the commissioner finds that the censure, denial, suspension, or revocation is in the public interest and that the investment adviser, whether prior or subsequent to becoming such, or any partner, officer or director thereof or any person performing similar functions or any person directly or indirectly controlling the investment adviser, whether prior or subsequent to becoming such, or any employee of the investment adviser while so employed had done any of the following:

(a) Has willfully made or caused to be made in any application for a certificate or any report filed with the commissioner under this division, or in any proceeding before the commissioner, any statement which was at the time and in the light of the circumstances under which it was made false or misleading with respect to any material fact, or has willfully omitted to state in the application or report any material fact which is required to be stated therein.

...

(c) Is permanently or temporarily enjoined by order, judgment, or decree of any court of competent jurisdiction from acting as an investment adviser, underwriter or broker-dealer or as an affiliated person or employee of any investment company, bank, or insurance company, or from engaging in or continuing any conduct or practice in connection with that activity, or in connection with the purchase or sale of any security.

...

(e) Has willfully violated any provision of the Securities Act of 1933, the Securities Exchange Act of 1934, the Investment Advisers Act of 1940, the Investment Company Act of 1940, the Commodity Exchange Act, or Title 4 (commencing with Section 25000), including the Franchise Investment Law, Division 5 (commencing with Section 31000), or the California Commodity Law of 1990, Division 4.5 (commencing with Section 29500), or of any rule or regulation under any of those statutes, or any order of the commissioner which is or has been necessary for the protection of any investor.

45. Corporations Code section 25242, subdivision (b), provides:

1 If the commissioner finds that any broker-dealer or investment adviser is
2 no longer in existence, or has ceased to do business as a broker-dealer or
3 investment adviser, . . . the commissioner may by order summarily revoke
4 the certificate of that broker-dealer or investment adviser.

4 46. An investment adviser must comply with various statutes, rules, and regulations to
5 maintain their license, including maintaining disclosing material events to the Commissioner and to
6 clients. The purpose of these statutes, rules, and regulations is to protect an investment adviser’s
7 clients and the investing public.

8 47. Respondents willfully made or caused to be made in a report filed with the
9 Commissioner statements, which at the time and in light of the circumstances under which they were
10 made, were false or misleading with respect to material facts, in violation of the CSL. Moreover,
11 Respondents willfully omitted to state in the report material facts which were required to be stated
12 therein.

13 48. Atlas is permanently enjoined by order and judgment from a federal court in the
14 Central District of California, from engaging in or continuing to violate federal investment adviser
15 and securities laws.

16 49. Further, pursuant to Corporations Code section 25242, subdivision (b), the
17 Commissioner has the authority to summarily revoke Atlas Capital Management’s investment
18 adviser certificate because the California Secretary of State terminated the corporate status of Atlas
19 Capital Management on June 3, 2022.

20 50. The Commissioner finds it in the public interest to revoke the investment adviser
21 certificate of Atlas Capital Management, Inc. due to the nature, duration, and severity of
22 Respondents’ conduct. Respondents willfully violated several provisions of the CSL, warranting the
23 summary revocation of Atlas’s investment adviser certificate pursuant to section 25232, subdivision
24 (e).

25 **V.**

26 **Order Levying Administrative Penalties**

27 51. Corporations Code section 25252 authorizes the Commissioner to issue an order
28 levying administrative penalties against any investment adviser for willful violations of any

1 provision of the CSL and any rules and regulations promulgated thereunder. Corporations Code
2 section 25252 provides, in pertinent part:

3 The commissioner may, after appropriate notice and opportunity for
4 hearing, by orders, levy administrative penalties as follows:

5 (a) Any person subject to this division, other than a broker-dealer or
6 investment adviser, who willfully violates any provision of this division,
7 or who willfully violates any rule or order adopted or issued pursuant to
8 this division, is liable for administrative penalties of not more than one
 thousand dollars (\$1,000) for the first violation, and not more than two
 thousand five hundred dollars (\$2,500) for each subsequent violation.

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

14 52. Atlas, as a licensee, and Towner as a person who managed, owned, and controlled
15 Atlas, were obligated to have knowledge of, and to comply with, the provisions of the CSL and the
16 regulations thereunder to maintain Atlas’s investment adviser certificate.

17 53. Pursuant to Corporations Code section 25403, any person who with knowledge
18 directly or indirectly controls or induces another person to violate a provision of the CSL, or any
19 person who knowingly provides substantial assistance to another person in violation of the CSL shall
20 also be liable for the violation.

21 54. Towner engaged in each of the violations discussed above, or alternatively Atlas
22 engaged in each of the violations discussed above, and Towner, as Atlas’s co-founder, sole owner,
23 and manager knowingly controlled and induced, or knowingly substantially assisted Atlas’s
24 violations of the CSL and accompanying regulations.

25 55. Pursuant to section 25252, the Commissioner finds good cause to levy \$50,000.00 in
26 administrative penalties against Atlas Capital Management, Inc. and Tracy Dennis Towner, jointly
27 and severally, as follows:
28

- 1 a. A penalty in the amount of \$2,500.00 for violating Corporations Code section
- 2 25235 and California Code of Regulations, title 10, section 260.235.4, by
- 3 engaging in an act, practice, or course of business which is fraudulent, deceptive,
- 4 or manipulative by failing to promptly disclose a legal or disciplinary event that is
- 5 material to an evaluation of the adviser's integrity to its clients;
- 6 b. Penalties in the amount of \$15,000.00 for violating Corporations Code section
- 7 25238 and California Code of Regulations, title 10, section 260.238, at least three
- 8 times, when Respondents engaged in investment advisory activities in
- 9 contradiction of the rules the Commissioner prescribed to promote fair, equitable
- 10 and ethical principles, as described herein.
- 11 c. A penalty of \$2,500.00 for violating Corporations Code section 25241 and
- 12 California Code of Regulations, title 10, section 260.241.4, by failing to promptly
- 13 amend the Form ADV filed with the Commissioner to disclose material
- 14 disciplinary events;
- 15 d. Penalties in the amount of \$15,000.00 for violating Corporations Code section
- 16 25245 by willfully misrepresenting to the Commissioner at least three times, on
- 17 Part I of its Form ADV, that Atlas was not subject to a civil court order enjoining
- 18 it from violating investment related activities when it was; and,
- 19 e. Penalties in the amount of \$15,000.00 for violating Corporations Code section
- 20 25245 by willfully failing to disclose the SEC Judgment to the Commissioner, at
- 21 least three times, on Part II of its Form ADV.

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23 **VI.**

24 **Relief Requested**

25 WHEREFORE, IT IS PRAYED that the investment adviser certificate of Atlas Capital
26 Management, Inc. be revoked under Corporations Code section 25232.

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WHEREFORE, IT IS FURTHER PRAYED that Atlas Capital Management, Inc and Tracy Dennis Towner pay administrative penalties to the Commissioner, jointly and severally, in the amount of at least \$50,000.00, or according to proof under Corporations Code section 25252.

Dated: October 20, 2022
San Francisco, California

CLOTHILDE V. HEWLETT
Commissioner of Financial Protection and Innovation



By _____
Joshua Schieber
Senior Counsel
Enforcement Division