

1 WAYNE P. STRUMPFER
Acting California Corporations Commissioner
2 ALAN S. WEINGER (CA BAR NO. 86717)
Acting Deputy Commissioner
3 SEAN M. ROONEY (CA BAR NO. 188843)
Corporations Counsel
4 DEPARTMENT OF CORPORATIONS
320 West 4th Street, Suite 750
5 Los Angeles, California 90013-2344
Telephone: (213) 576-7500

6 Attorneys for Complainant

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, |) | DISCONTINUE VIOLATIONS PURSUANT |
| |) | TO CORPORATIONS CODE SECTION 25249 |
| 14 v. |) | 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:

26
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.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

(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
8 15, 2003, that Austin still failed to reconcile its bank accounts. (California Code of Regulations, title
9 10, 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 25249, which became effective January 1, 1999,
2 authorizes the Commissioner to issue an order directing any investment adviser to discontinue any
3 violation of any provision of the Corporate Securities Law of 1968 and any rule promulgated
4 thereunder. Specifically, Corporations Code section 25249 provides, in relevant part:

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

10 14. Corporations Code section 25251 provides:

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

28 (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
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.

 15. By reason of the foregoing, Austin has willfully violated Corporations Code section
25241 and California Code of Regulations, title 10, section 260.241.3, subdivisions (a)(4) and (j),
justifying the issuance of an Order to Discontinue Violations. Austin, as a licensee, is obligated to
have knowledge of, and to comply with, the provisions of the Corporate Securities Law of 1968 and
the regulations thereunder to maintain its investment adviser certificate. Furthermore, on March 3,

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1999; April 4, 2003; and September 23, 2003, the Department notified Austin of the requirements of California Code of Regulations, title 10, section 260.241.3, subdivisions (a)(4) and (j). Austin has continued to violate both subdivisions, despite the Department's actual notification and Austin's assurances of future compliance.

16. Therefore, pursuant to Corporations Code section 25249, the Commissioner has issued an order directing Austin to discontinue violating Corporations Code section 25241 and California Code of Regulations, title 10, section 260.241.3, subdivisions (a)(4) and (j).

WHEREFORE, good cause showing, and pursuant to Corporations Code section 25251, the California Corporations Commissioner hereby notifies Austin Lemoine Capital Management (Austin Joseph Lemoine, d.b.a.) of his intention to make final the Order to Discontinue Violations Pursuant to Corporations Code Section 25249.

Dated: March 29, 2006
Los Angeles, California

WAYNE P. STRUMPFER
Acting California Corporations Commissioner

By: _____
SEAN M. ROONEY
Corporations Counsel
Enforcement Division