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

12 In the Matter of) FILE NO. 167784 & 136773
13)
14 THE COMMISSIONER of BUSINESS) 1. DESIST AND REFRAIN ORDER;
OVERSIGHT,) 2. ORDER LEVYING ADMINISTRATIVE
15) PENALTIES
16 Complainant,)
17 v.)
18 Auk Capital, LLC and Brian O'Neil,)
19 Respondents)

20
21 The Commissioner of Business Oversight ("Commissioner") of the Department of Business
22 Oversight ("Department") alleges and charges as follows:

23 **I. JURISDICTION AND VENUE**

- 24 1. The Commissioner brings this action pursuant to the provisions of California Corporations
25 Code sections 25252(a) and 25532(b), and the rules and regulations promulgated thereunder.
26 2. The Commissioner is authorized to administer and enforce the provisions of the
27 Corporate Securities Law of 1968, Corporations Code section 25000 et seq. ("CSL") and the
28 regulations thereunder at Title 10, California Code of Regulations ("CCR").

II. STATEMENT OF FACTS

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2 3. This action is brought to order Respondent Auk Capital, LLC, (“Auk”) and Brian O’Neil
3 (“O’Neil”) to:

4 (a) desist and refrain from unlicensed investment adviser activities pursuant to CSL section
5 25532(b); and,

6 (b) pay penalties to the Department for conducting unlicensed investment adviser activities
7 pursuant to section 25252(a) of two-thousand seven-hundred fifty (\$2,750) for all violations of
8 25230(a), combined.

9 4. At all relevant times, O’Neil was the majority owner and sole control person of Auk. Auk is
10 a California limited liability company, formed August 24, 2005, with its principal place of business
11 located at 916 Silver Spur, Ste 310, Rolling Hills Estates, CA 90274.

12 5. Auk originally filed an application for investment adviser certification on September 28,
13 2005. The application was approved by the Commissioner on January 25, 2006.

14 6. On December 11, 2009, Auk requested termination and the Commissioner terminated
15 registration on January 10, 2010.

16 7. On February 18, 2104, Auk reapplied for Investment Adviser certification.

17 8. The Commissioner is informed and believes that Auk and O’Neil provided investment
18 adviser services at all times between January, 2010 and February, 2014. Auk and O’Neil claim that
19 during the period in question they believed that their activities were exempt from the certification
20 requirement, as they believed they were entitled to a private fund adviser exemption.

21 9. However, on August 27, 2012, the Department adopted the new California Code of
22 Regulations, Rule 260.204.9, which no longer allows private fund advisers to rely on a self-
23 executing exemption from investment adviser registration in California. This rule required private
24 fund advisers relying on the exemption(s) in the new rule to file a notice with the Department and
25 pay an annual fee of \$125. The last date to file the notice and pay the fee was October 26, 2012 (60
26 days from the effectiveness of the new rule).

27 10. Auk and O’Neil failed to file notices in 2012 and 2013.

28 11. Auk and O’Neil failed to pay the Department annual fees of \$125 for either year.

1 12. On its pending application, Auk and O’Neil provided information that indicated Auk may
2 have been currently providing investment advice for a fee. When the Department inquired further
3 about this activity, Auk and O’Neil fully cooperated, providing information showing that they had
4 five (5) clients, with approximately seventy-five million dollars (\$75,000,00.00) under
5 management.

6 13. Due to the failure to file Rule 260.204.9 notices and fees in 2012 and 2013, Auk and O’Neil
7 engaged in unlicensed investment adviser activity in violation of CSL section 25230(a).

8 14. Neither Auk nor O’Neil held a valid investment adviser certificate issued by the Department
9 or the U.S. Securities and Exchange Commission (“SEC”), at the time the application was
10 submitted.

11 **III. ORDER TO DESIST AND REFRAIN FROM UNLICENSED INVESTMENT**
12 **ADVISER ACTIVITIES IN CALIFORNIA PURSUANT TO CORPORATIONS CODE**
13 **SECTION 25230(a) AND 25532 (b)**

14 15. Corporations Code section 25230 (a) provides, in pertinent part:

15 It is unlawful for any investment adviser to conduct business as an
16 investment adviser in this state unless the investment adviser has first applied for
17 and secured from the commissioner a certificate, then in effect, authorizing the
18 investment adviser to do so

18 16. Corporations Code section 25532(b) provides, in pertinent part:

19 If, in the opinion of the commissioner, a person has been or is acting as a
20 broker-dealer or investment adviser, or has been or is engaging in broker-dealer or
21 investment adviser activities, in violation of Section 25210, 25230, or 25230.1,
22 the commissioner may order that person to desist and refrain from the activity
23 until the person has been appropriately licensed or the required filing has been
24 made under this law.

24 17. Auk and O’Neil have conducted business as an investment adviser in this state without first
25 securing from the commissioner a certificate, then in effect, in violation of Corporations Code
26 section 25230(a).

27 18. Accordingly, Auk and O’Neil are hereby ordered to desist and refrain from acting as an
28 investment adviser in the State of California unless and until they have first applied for and secured

1 from the commissioner a certificate authorizing them to act as an investment adviser, or unless
2 exempt.

3 This Order is necessary, in the public interest, for the protection of investors, and consistent
4 with the purposes, policies, and provisions of the CSL.

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6 **IV. ORDER LEVYING ADMINISTRATIVE PENALTIES**

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8 19. Auk and O’Neil willfully violated the CSL by engaging in unlicensed investment adviser
9 activity, in violation of CSL section 25230(a).

10 20. CSL section 25245 states:

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

15 21. Corporations Code section 25252(b) authorizes the Commissioner to issue an order levying
16 administrative penalties against any investment adviser for willful violations of any provisions of
17 the California Securities Laws and any rules promulgated thereunder.

18 22. Corporations Code section 25252(b) provides, in relevant part:

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

26 Pursuant to Corporations Code section 25252(a), the commissioner hereby levies
27 administrative penalties against Respondents Auk and O’Neil in the amount of two-thousand five-
28 hundred (\$2,500.00) for violations of section 25230(a) over more than one year of advising clients
and collecting fees while unlicensed, plus an additional \$250.00 for fees Auk and O’Neil avoided
paying by failing to either become licensed in 2012 or filing an exemption notice and the
accompanying fees. This amount (\$2,750.00) shall be paid to the commissioner immediately, in

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full.

This Order is necessary, in the public interest, for the protection of investors, and consistent with the purposes, policies, and provisions of the CSL.

Dated: October 10, 2014
Sacramento, California

JAN LYNN OWEN
Commissioner of Business Oversight

By _____
MARY ANN SMITH
Deputy Commissioner
Enforcement Division