

1 MARY ANN SMITH
Deputy Commissioner
2 SEAN M. ROONEY
Assistant Chief Counsel
3 ROBERT R. LUX (SBN 189191)
Corporations Counsel
4 DEPARTMENT OF BUSINESS OVERSIGHT
5 320 W. Broadway, Suite 750
6 Los Angeles, CA 90013
7 (213) 576-6205 telephone
(213) 576-7180 facsimile

8 Attorneys for Complainant

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

12 In the Matter of) ENF FILE NO. 12510
)
13 THE COMMISSIONER OF BUSINESS) SETTLEMENT AGREEMENT BETWEEN
14 OVERSIGHT,) WILLIAM F. GUNDERSON AND
) GUNDERSON CAPITAL MANAGEMENT,
15 Complainant,) INC., AND THE CALIFORNIA
) DEPARTMENT OF BUSINESS OVERSIGHT
16 v.) RESOLVING:
)
17) 1. DESIST AND REFRAIN ORDER; and
18 Gunderson Capital Management, Inc., a)
California corporation; and Mr. William F.)
19 Gunderson, an individual,) 2. ORDER LEVYING ADMINISTRATIVE
Respondents.) PENALTIES

20
21
22 SETTLEMENT AGREEMENT

23
24 This SETTLEMENT AGREEMENT (“Agreement”) is entered into by and between the
25 Complainant, California Department of Business Oversight (“Department”), by and through the
26 California Commissioner of Business Oversight (“Commissioner”), and Respondents, William F.
27 Gunderson and Gunderson Capital Management, Inc., collectively referred to hereinafter as the
28 “Parties”.

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

RECITALS

This Agreement is made with reference to the following facts:

A. This action is brought to order Respondents William F. Gunderson and Gunderson Capital Management, Inc. to:

i. Desist and refrain from unlicensed investment adviser activities pursuant to section 25532(b) of the California Corporate Securities Law of 1968 (“CSL”); and,

ii. Pay penalties to the Department, pursuant to CSL section 25252(b), of sixty-five thousand dollars (\$65,000) for violations of CSL section 25230(a).

B. At all relevant times, Gunderson Capital Management, Inc. (“Gunderson Capital Management”) is a California corporation, formed June 28, 2006, with its principal place of business at 101 W. Broadway Street, #1975, San Diego, CA 92101.

C. At all relevant times, William F. Gunderson (“W. Gunderson”) is Gunderson Capital Management’s Agent for Service of Process and was the control person and principal of Gunderson Capital Management.

D. On August 21, 2012, Gunderson Capital Management filed an application on the adviser Form ADV with the Department for investment adviser certification, after being notified by the Securities and Exchange Commission (“SEC”) that it was no longer eligible to remain registered because Gunderson Capital Management did not have \$100 million in assets under management. The application disclosed that Gunderson Capital Management and W. Gunderson were engaged in investment adviser activities in California and were providing investment advice to California residents for a fee. The application also disclosed that W. Gunderson is the principal investment adviser for Gunderson Capital Management and that Gunderson Capital Management manages the assets under its control. Neither Gunderson Capital Management nor the principal of the firm, W. Gunderson, held a valid investment adviser certificate issued by the Department. The Department requested additional financial information, but Gunderson Capital Management failed to respond, and the Department abandoned the application.

1 E. Gunderson Capital Management’s registration with the SEC was cancelled on
2 February 6, 2013, pursuant to an SEC order and notification. Gunderson Capital Management
3 re-applied with the Department in California on May 15, 2013 and the Department sent another
4 deficiency letter to Gunderson Capital Management. Gunderson Capital Management again
5 failed to reply to the Department’s inquiries.

6 F. Gunderson Capital Management then withdrew its request for Department
7 registration and re-applied with the SEC, claiming that it was a multi-state adviser required to
8 be registered with the SEC. The SEC postponed the registration on August 13, 2013.

9 G. Gunderson Capital Management re-applied with the Department on August 30,
10 2013. The Department contacted the SEC on September 26, 2013, and was advised that the
11 SEC had sent Gunderson Capital Management a regulatory letter informing the firm that it did
12 not meet the multi-state adviser requirements.

13 H. The Department reviewed Gunderson Capital Management’s Form ADV on
14 October 4, 2013 and sent another deficiency letter requesting additional information.
15 Gunderson Capital Management submitted the requested information and disclosed that, since
16 February 6, 2013, it had collected a total of \$590,592.00 in investment advisor fees while
17 lacking investment advisor qualification in California.

18 I. Based on the facts set forth herein, the Department finds that William F.
19 Gunderson and Gunderson Capital Management, Inc. were engaged in unlicensed investment
20 adviser activities through the date hereof, in violation of CSL section 25230(a).

21 NOW, THEREFORE, for good and valuable consideration, and the terms and conditions set
22 forth herein, the Parties agree as follows:

23 TERMS AND CONDITIONS

24 1. **Purpose:** The purpose of this Agreement is to settle and resolve the issues
25 between the Parties hereto, for judicial economy and expediency, and to avoid the expense of a
26 hearing, and possible further court proceedings.

27 2. **Waiver of Hearing Rights:** W. Gunderson and Gunderson Capital Management
28 acknowledge the right to a hearing under the Corporate Securities Law of 1968 in connection with

1 the application for an investment adviser certificate and hereby waive that right to a hearing, and to
2 any reconsideration, appeal, or other right to review which may be afforded pursuant to the
3 Corporate Securities Law of 1968, the California Administrative Procedure Act, the California Code
4 of Civil Procedure, or any other provision of law, and by waiving such rights, consent to the
5 Penalties becoming final.

6 3. **Acknowledgement:** Without admitting the foregoing recitals of fact, W. Gunderson
7 and Gunderson Capital Management stipulate to the issuance of the order and acknowledge that this
8 action can be used in future proceedings that may be initiated by or brought before the Department.
9 The Parties agree that this Agreement and any acknowledgements hereunder shall not be admissible
10 or binding against W. Gunderson and Gunderson Capital Management in any action(s) brought
11 against W. Gunderson and/or Gunderson Capital Management by third parties that are not
12 signatories to this Agreement or in any other proceedings except as expressly permitted by this
13 paragraph 3 before the Department.

14 4. **Certification:** W. Gunderson and Gunderson Capital Management stipulate to
15 undertake all appropriate steps designed to assure full compliance with the laws of California in
16 connection with the licensing of W. Gunderson's and Gunderson Capital Management's business in
17 investment advisement. W. Gunderson and Gunderson Capital Management acknowledge that
18 failure to comply under this Agreement shall be a breach of this Agreement and shall be cause for
19 the Commissioner to immediately revoke any licenses held by, and/or deny any pending
20 application(s) of, W. Gunderson and Gunderson Capital Management, its successors and assigns, by
21 whatever names they might be known. W. Gunderson and Gunderson Capital Management hereby
22 waive any notice and hearing rights to contest such revocations and/or denial(s) which may be
23 afforded under the Corporate Securities Law of 1968, the California Administrative Procedure Act,
24 the California Code of Civil Procedure, or any other provision of law in connection with this action.

25 5. **Administrative Penalties:** W. Gunderson and Gunderson Capital Management
26 agree to pay, without admitting any fault or wrongdoing, to the Commissioner penalties totaling, in
27 the aggregate, sixty-five thousand dollars (\$65,000) ("Penalties"). Such Penalties shall be paid
28 within 30 days of the date of the Order. The check shall be made payable to "The Department of

1 Business Oversight,” and shall be sent by W. Gunderson and Gunderson Capital Management to the
2 following address:

3 Robert Lux, Corporations Counsel
4 Department of Business Oversight
5 320 W. 4th Street, Suite 750
6 Los Angeles, CA 90013

7 In the event the payment due date falls on a weekend or holiday, the payment shall be due the
8 next business day. W. Gunderson and Gunderson Capital Management acknowledge that failure to
9 timely pay the Penalties in this Agreement shall be a breach of this Agreement and shall be cause for
10 the Commissioner to immediately revoke any licenses held by, and/or deny any pending
11 application(s) of W. Gunderson and Gunderson Capital Management, their successors and assigns,
12 by whatever names they might be known. W. Gunderson and Gunderson Capital Management
13 hereby waive any notice and hearing rights to contest such revocations and/or denial(s) which may
14 be afforded under the Corporate Securities Law of 1968, the California Administrative Procedure
15 Act, the California Code of Civil Procedure, or any other provision of law in connection therewith.

16 6. **Future Actions by the Commissioner:** Other than as to the matters resolved
17 herein, the Commissioner reserves the right to bring any future action(s) against W. Gunderson and
18 Gunderson Capital Management and/or any of the officers, directors, shareholders, or employees of
19 W. Gunderson and Gunderson Capital Management for any and all unknown or future violations of
20 the Corporate Securities Act of 1968. Other than as to the matters resolved herein, this Agreement
21 shall not serve to exculpate W. Gunderson’s and Gunderson Capital Management’s or any of their
22 agents, officers, directors, shareholders, employees or attorneys from liability for any and all
23 unknown or future violations of the Corporate Securities Act of 1968.

24 7. **Effective Date:** This Agreement shall not become effective until signed and
25 dated by each of the parties hereto.

26 8. **Settlement Agreement Coverage:** The Parties hereby acknowledge and agree that
27 this Agreement is intended to constitute a full, final, and complete resolution of this matter
28 (including, but not limited to, any and all assertions by the Department that W. Gunderson and
Gunderson Capital Management have allegedly engaged in unlicensed investment adviser activity

1 through the effective date of this Agreement). The Parties further acknowledge and agree, except as
2 provided in paragraph 3, above, that nothing contained in this Agreement shall operate to limit the
3 Commissioner's ability to cooperate with any other agency, county, state or federal, and with any
4 prosecution, administrative, civil or criminal, brought by any such agency against W. Gunderson and
5 Gunderson Capital Management, based upon any of the activities alleged in this matter or otherwise.

6 9. **Independent Legal Advice:** Each of the Parties represents, warrants, and agrees that
7 it has received or been advised to seek independent legal advice from its attorneys with respect to the
8 advisability of executing this Agreement.

9 10. **No Other Representation:** Each of the parties represents, warrants, and agrees that
10 in executing this Agreement it has relied solely on the statements set forth herein. Each of the
11 parties further represents, warrants, and agrees that in executing this Agreement it has placed no
12 reliance on any statement, representation, or promise of any other party, or any other person or entity
13 not expressly set forth herein, or upon the failure of any party or any other person or entity to make
14 any statement, representation or disclosure of anything whatsoever. The parties have included this
15 clause: (1) to preclude any claim that any party was in any way fraudulently induced to execute this
16 Agreement; and (2) to preclude the introduction of parol evidence to vary, interpret, supplement, or
17 contradict the terms of this Agreement.

18 11. **Modifications and Qualified Integration:** No amendment, change or modification
19 of this Agreement shall be valid or binding to any extent unless it is in writing and signed by all of
20 the parties affected by it.

21 12. **Full Integration:** This Agreement is the final written expression and the
22 complete and exclusive statement of all the agreements, conditions, promises, representations, and
23 covenants between the parties with respect to the subject matter hereof, and supersedes all
24 discussions between and among the parties, their respective representatives, and any other person or
25 entity, with respect to the subject matter covered hereby.

26 13. **No Presumption From Drafting:** In that the parties have had the opportunity to
27 draft, review and edit the language of this Agreement, no presumption for or against any party
28 arising out of drafting all or any part of this Agreement will be applied in any action relating to,

1 connected to, or involving this Agreement. Accordingly, the parties waive the benefit of Civil Code
2 section 1654 and any successor or amended statute, providing that in cases of uncertainty, language
3 of a contract should be interpreted most strongly against the party who caused the uncertainty to
4 exist.

5 14. **Counterparts:** This Agreement may be executed in any number of counter-
6 parts by the Parties, and when each party has signed and delivered at least one such counterpart to
7 the other party, each counterpart shall be deemed an original and taken together shall constitute one
8 and the same Agreement. This Agreement may be executed via original signatures exchanged by
9 facsimile or electronic means.

10 15. **Headings and Governing Law:** The headings to the paragraphs of this
11 Agreement are inserted for convenience only and will not be deemed a part hereof or affect the
12 construction or interpretation of the provisions hereof. This Agreement shall be construed and
13 enforced in accordance with, and governed by, the laws of the State of California.

14 16. **Authority For Settlement:** The Parties each warrant and represent that such party
15 is fully entitled and duly authorized to enter into and deliver this Agreement. In particular, and
16 without limiting the generality of the foregoing, each party warrants and represents that it is fully
17 entitled to enter into the covenants, and undertake the obligations set forth herein.

18 17. **Public Record:** W. Gunderson and Gunderson Capital Management hereby
19 acknowledge that this enforcement action and Agreement will be a matter of public record.

20 //
21 //
22 //
23 //
24 //
25 //
26 //
27 //

28

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

18. **Voluntary Agreement:** The Parties each represent and acknowledge that he, she, or it, is executing this Agreement completely voluntarily and without any duress or undue influence of any kind from any source.

IN WITNESS WHEREOF, the Parties hereto have approved and executed this Agreement on the dates set forth opposite their respective signatures.

California Commissioner of Business Oversight

Dated: 2/18/14

By _____
MARY ANN SMITH
Deputy Commissioner
Enforcement Division

Dated: 2/12/14

Gunderson Capital Management, Inc.
By _____
WILLIAM F. GUNDERSON
Principal, Gunderson Capital Management, Inc.

Dated: 2/12/14

William F. Gunderson, an Individual
By _____
WILLIAM F. GUNDERSON