**UNITED STATES OF AMERICA**
**Before the**
**SECURITIES AND EXCHANGE COMMISSION**

**INVESTMENT ADVISERS ACT OF 1940**
**Release No. 4591 / December 20, 2016**

**INVESTMENT COMPANY ACT OF 1940**
**Release No. 32397 / December 20, 2016**

**ADMINISTRATIVE PROCEEDING**
**File No. 3-17740**

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| **In the Matter of**<br><br>**AUGUSTINE CAPITAL MANAGEMENT, LLC (F/K/A AUGUSTINE CAPITAL MANAGEMENT, INC.), JOHN T. PORTER, AND THOMAS F. DUSZYNSKI, CPA,**<br><br>**Respondents.** | **ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTIONS 203(e), 203(f), AND 203(k) OF THE INVESTMENT ADVISERS ACT OF 1940 AND SECTION 9(b) OF THE INVESTMENT COMPANY ACT OF 1940 AND NOTICE OF HEARING** |

**I.**

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Sections 203(e) and 203(k) of the Investment Advisers Act of 1940 ("Advisers Act") and Section 9(b) of the Investment Company Act of 1940 ("Investment Company Act") against Augustine Capital Management, LLC (f/k/a Augustine Capital Management, Inc.) ("ACM"); and pursuant to Sections 203(f), and 203(k) and Section 9(b) of the Investment Company Act against John T. Porter ("J. Porter") and Thomas F. Duszynski, CPA ("Duszynski") (collectively, ACM, J. Porter and Duszynski are referred to herein as the "Respondents").

**II.**

After an investigation, the Division of Enforcement alleges that:

1. Respondents J. Porter and Duszynski, together with Brian D. Porter, own Respondent Augustine Capital Management, LLC. ACM, in turn, acts as an investment adviser for Augustine Fund, L.P. (the "Fund"), a private fund.

2. Respondents caused the Fund to engage in conflicted transactions without disclosure to, or the consent of, the Fund's investors. Such consent was needed because the investment adviser had a conflict of interest and therefore could not give meaningful consent on behalf of the Fund. Respondents invested in and lent money to two entities in which the ACM owners had an interest. Respondents also lent an ACM owner, Duszynski, money to fund his investment in a business venture with other ACM owners. When the venture failed, Duszynski defaulted on the loan and saddled the Fund and its investors with the resulting losses.

3. Respondents collected nearly $1 million in investor funds by charging the Fund for ACM's expenses. These expenses, which under the investment documentation provided to investors were to be borne by ACM, included virtually all of ACM's overhead expenses – including the salaries of ACM employees. Additionally, even though J. Porter and Duszynski were themselves investors in the Fund, they exempted themselves and certain of their relatives who were investors in the Fund from paying their *pro rata* shares of the salaries of ACM employees.

4. The offering documentation ACM gave to investors provided that classes would be formed and that an investor's holdings in the Fund would be based upon when the investor made an investment in the Fund. In practice, however, Respondents unilaterally determined which investments were allocated to which investors, and how much cash was allocated to each investor's account. Respondents thereafter periodically reallocated various investors' holdings. Respondents improperly kept investors in the dark about what investments were allocated to them, and why.

5. Respondents provided investors with account statements that did not accurately reflect the market value of the underlying investments. Respondents privately concluded that one of the Fund's investments had been rendered worthless. But the account statements for the quarter did not capture adverse developments that occurred during that timeframe. Instead, in the account statements Respondents valued the investment at what the Fund had originally paid for the investment before their determination the investment was worthlesss.

**A. <u>Respondents</u>**

6. <u>Augustine Capital Management, LLC</u>, is an Illinois limited liability company, with its principal place of business in Chicago, Illinois. It is an unregistered investment adviser owned by J. Porter, Duszynski and Brian D. Porter. It was formed in 1997 to act as the investment adviser for the Fund, and is the general partner of the Fund. J. Porter and Duszynski control ACM.

7. John T. Porter, 62 years old, is a resident of Chicago, Illinois and is a one-third owner of ACM. He serves as its chief executive and chairman. He formerly was a futures trader and member of the Chicago Board of Trade. J. Porter has never been registered with the Commission in any capacity.

8. Thomas F. Duszynski, 61 years old, is a resident of Chicago, Illinois, and is a one-third owner of ACM, for which he serves as the chief operating officer, secretary and director. Duszynski was a licensed CPA in Illinois but his status is currently inactive. Duszynski has never been registered with the Commission in any capacity.

### B. Other Relevant Individual and Entity

9. Brian D. Porter ("B. Porter"), 58 years old, is a resident of Chicago, Illinois and is a one-third owner of ACM. He is J. Porter's brother. He was a futures trader and member of the Chicago Board of Trade.

10. Augustine Fund, L.P., is an Illinois limited partnership formed in 1997. It operates as a private fund and it meets the definition of a Pooled Investment Vehicle under Section 206(4)-8(b) of the Advisers Act. At all relevant times, ACM managed the Fund.

### C. Augustine Capital Management and the Augustine Fund

11. In 1997, J. Porter, B. Porter, and Duszynski formed ACM to serve as the investment adviser for a private fund they simultaneously launched, the Fund. ACM is the general partner of the Fund. J. Porter, B. Porter and Duszynski each hold a one-third ownership interest in ACM. J. Porter serves as ACM's chief executive officer and chairman. Duszynski is its chief operating officer. J. Porter and Duszynski handle the Fund's investment decisions and day-to-day operations. The Fund has operated continuously since 1997.

12. Between 2012 and 2015, the Fund had between 35 and 40 limited partners. During that time the net asset value of the Fund as calculated by ACM ranged between approximately $9 million and $14 million. The Fund is governed by a limited partnership agreement, subscription agreement and private offering memorandum ("PPM") (collectively the "Offering Documents").

13. Since the early 2000s, the Fund has suffered a number of losses, and its investments have become increasingly illiquid.

### D. Respondents Caused the Fund to Engage in Conflicted Transactions Without Disclosing the Conflict and Obtaining Consent.

14. In late 2011 and January 2012, J. Porter and Duszynski caused the Fund to make investments totaling $500,000 in a new trading venture, FT Investing, LLC ("FT Investing"), in which they and B. Porter held a majority ownership interest. The Fund had no investor advisory committee or other independent entity or person that could effectively consent to conflicted transactions. ACM never disclosed to investors that the Fund had invested in the venture, or that J. Porter and Duszynski had a significant ownership interest in it.

15. In December 2013, J. Porter and B. Porter bought out the Fund's interest in the venture for $380,000—causing investors to take a 24% loss on their investment. Respondents never apprised investors of this transaction, or of the conflict of interest inherent in the transaction.

16. From 2012 through 2014, the Fund made a series of undocumented loans to FT Trading, LLC ("FT Trading"), a wholly owned subsidiary of FT Investing. The loans were made to cover FT Trading's broker-dealer margin calls, which were wholly unrelated to the Fund. The Fund's internal records show that the outstanding balance on these loans reached more than $600,000 at times. Respondents claimed the Fund received a five percent interest rate on these loans. No loan documents reflected any such arrangement, nor did the Fund's bank records reflect that the Fund received any interest on these loans.

17. Reasonable investors would have considered it material that the Fund's monies were being used to make undocumented loans, without their consent, to cover the debts of an entity controlled by J. Porter, Duszynski and B. Porter.

18. Duszynski, J. Porter, B. Porter and others formed FT Investing in late 2011. In January 2012, Duszynski, with J. Porter's consent, took a $250,000 loan from the Fund to pay for his ownership interest in the venture. ACM treated this personal loan as one of the Fund's "investments" and allocated it to a subset of investors in the Fund. Nothing in the Offering Documents permitted the Fund to use Fund assets for personal loans to the directors of ACM. Respondents never told investors about this purported investment, let alone procured the investors' consent.

19. Instead, ACM, J. Porter and Duszynski actively concealed this loan from investors. In August 2014, three investors in the Fund requested a description of the investments they held as well as their value. Before they provided any information to the investors, Respondents struggled with how to describe the loan. An email written by J. Porter stated: "We need to discuss how to present the loan to Tom." In another email, he suggested: "We may want to make the loan to our co investor . . . due at the end of this year? That way [an Investor] will know the money is coming and will be less inclined to ask questions. Also, a co investors name should be kept private?" In response, Duszynski wrote: "As for [the loan to Duszynski], I'm not comfortable calling it something else. If we deceive them it could come back and bite us . . . . Maybe we reallocate some other stuff to the . . . just a thought." J. Porter had another idea: "Can we call it a loan to something not using your name?"

20. J. Porter prevailed, and Respondents ultimately agreed on the following verbiage, which was provided to the three investors in August 2014:

> Augustine Fund formerly held an investment in FT Investing, LLC. This investment was liquidated in December 2013. When the original investment was made, the Fund also made an interest-bearing loan to one of its co-investors in FT Investing. This loan is on track to be fully repaid on its maturity date in December 2014.

21. This description was misleading because it did not reflect the conflicted nature of the loan – that is, that the loan was made to Duszynski, a director of ACM. Additionally, it misrepresented the loan's repayment status, since by then Duszynski had not made begun repaying the loan.

22. Duszynski ultimately defaulted on the loan. He made one payment of $163,233 on the loan, with $86,767 left owing. This amount is still outstanding. Respondents made no collection efforts on the investors' behalf, nor did they charge Duszynski the 15 percent default interest rate expressly contemplated in the promissory note.

23. Reasonable investors would have considered it material both that the Fund's monies were used to make a substantial personal loan to a director of the general partner without the investors' consent, that the director ultimately defaulted on the loan, and that the Fund's managers made no attempt to collect on the loan following the director's default.

### E. <u>Respondents Improperly Charged Investors for ACM's Expenses</u>.

24. The Offering Documents entitle ACM to a management fee of one percent *per annum* of the partnership's net asset value. The management fee is intended to compensate ACM for its "overhead and expenses in managing the Partnership." The PPM allows ACM to charge the Fund for "operating expenses" incurred by the Fund, a term defined by the PPM to include communication costs, brokerage commissions, legal, accounting and auditing fees. The Offering Documents do not contemplate the Fund paying ACM's salaries, healthcare, rent, or other ACM expenses.

25. ACM nonetheless charged the Fund for ***all*** of ACM's expenses. Between 2012 through 2015, ACM totaled all of its expenses on a quarterly basis and deducted them as "operating expenses" from the investors' cash accounts in the Fund. These expenses were unauthorized and exceeded the one percent management fee that the Offering Documents authorized ACM to receive from the Fund.

26. ACM's purported "operating expenses" collected from the Fund included the salaries of Duszynski and two ACM employees: J. Porter's son and an administrative assistant. Additionally, Respondents made the Fund pay rent for ACM's office space and healthcare costs for J. Porter, B. Porter, Duszynski, J. Porter's son and ACM's administrative assistant.

27. The Fund also made transfers to J. Porter totaling more than $417,000 even though he was not owed these amounts as either salary or a profit distribution and he did not have sufficient available cash in his account in the Fund to cover these withdrawals.

28. J. Porter and Duszynski chose not to allocate any portion of the salary expenses to themselves as limited partners or certain of their relatives who were investors in the Fund. Thus, the remaining Fund investors paid more than a *pro rata* share of the ACM employee's salaries.

29. In 2003, certain investors approved a salary not to exceed $175,000 per year for J. Porter. The investors never agreed to pay the salaries of the other ACM employees.

30. Respondents failed to exercise reasonable care by overcharging the Fund by nearly $1 million for fees and expenses.

### F. **Respondents Concealed Losses and Bankruptcies from Investors.**

31. Respondents provided investors with account statements on a quarterly basis and gave summaries to certain investors in the relevant period. The quarterly statements were titled "Partner's Investment For The Calendar Quarter" and reflected the month and year of each statement. The quarterly statements included account values as of the date of the statement. The statements were misleading because they included values that were calculated by including the original cost of investments despite the fact that the Respondents had determined certain holdings were worthless and Respondents knew that certain fund holdings were in bankruptcy.

32. Critically, that disclosure failed to incorporate Respondents' revised valuation of certain investments as a result of bankruptcies that occurred during the period covered by the account statements. In May 2013, Respondents determined that one of the Fund's investments was "worthless." In September 2013 they decided that three other investments had no value.

33. In some cases Respondents ultimately discounted the value of these investments in documents supplied to investors. But they waited more than a year after first determining the investments were worthless or were in bankruptcy before doing so.

34. In May 2013, Duszynski emailed an investor about the Fund's investment in Company A: "It appears that our remaining investment in [Company A] is worthless." He copied J. Porter on the email. Four months later, in a letter to an investors' wife, Duszynski similarly wrote: "[Company A] is a publicly traded company that has no value, and which we will be writing off this year."

35. Respondents did not write off Company A until the fourth quarter of 2014—more than *a year and a half* after they had independently concluded the investment was "worthless."

36. In September 2013, Respondents engaged in similar deception concerning three other investments. These were all investments in which Respondents had concluded that "any future recovery is doubtful," and thus internally estimated their value at zero. But Respondents failed to account for such developments in the account statements they sent investors during the relevant period. Rather, in such statements to investors Respondents used the initial cost of the investments – which they called the "book value."

37. As discussed in paragraphs 38 through 43 below, two companies in which Respondents invested on the investors' behalf went bankrupt. In communications with investors and in account statements during that timeframe, Respondents misrepresented that these investments were worth what the Fund had initially paid for them years before the bankruptcies.

38. In 1999, the Fund made an investment of approximately $1.67 million in Company B. Thereafter, the company struggled. In November 2001, Respondents forced the company into bankruptcy. As part of the Chapter 11 reorganization, ACM assumed ownership of the company and Respondents transformed it into a publicly traded shell company. The Fund

thereafter invested an additional $1.53 million of Fund monies into the company, but to no avail. From 2004 through 2011, the company had no revenues, limited assets, and mounting liabilities.

39. Only in February 2012 did Respondents first notify the Fund's investors that Company B had been forced into bankruptcy more than a decade earlier. But even after that belated disclosure, Respondents then delayed writing off the Fund's $3.2 million investment until the first quarter of 2014.

40. Shortly after the Fund invested $150,000 in Company C, its wholly owned subsidiary and sole asset filed for bankruptcy – in September 2013. Respondents knew about the bankruptcy no later than October 2013. But in ACM's quarterly statements to investors, Respondents continued to carry Company C at the amount of the Fund's original investment in the company. They did so for years.

41. In August 2014, internal emails show that Respondents came close to disclosing the bankruptcy filing to three investors who had requested a summary of their holdings in the Fund. But they ultimately omitted this information in the summary sent to investors. Rather, as of 2015, in disclosures to the investors Respondents continued valuing Company C at the cost of the Fund's original investment in the company before the bankruptcy.

42. As a result, between the first quarter of 2012 and the fourth quarter of 2015 Respondents gave investors quarterly account statements with inflated valuations that did not accurately reflect the value of the investments.

43. Reasonable investors would have considered it material that two of the Fund's holdings—including one that had previously made up more than 20% of the Fund's Net Asset Value—were involved in bankruptcy proceedings, and that four other investments had no value. Reasonable investors would have also found it important that Respondents hid such information when Respondents supplied Fund investors with account statements that did not reflect the value of the investments in the wake of the bankruptcies and other events Respondents had determined impacted the value.

### G. Respondents Denied Investor Redemption Requests and Prevented Investor Exits from the Fund.

44. The PPM states that limited partnership interests are sold in successive classes, each class invests in the same investment(s), and new investors in the Fund are put into a new class. The classes do not share in the same investments as previous classes. The PPM also states that profits and losses will be shared on a *pro rata* basis by class.

45. In practice, however, that is not the way Respondents managed the Fund. Rather, Respondents never formed classes. During the relevant period, Respondents frequently transferred the investment holdings among and between the Fund's investors, a process they referred to as "reallocation." They did so without the investors' knowledge or consent.

46. In at least two instances, the reallocations prevented investors who sought to exit the Fund from doing so. In 2008 an investor requested that the Fund stop using his funds to make new investments, and to pay him any available cash in his account. The Fund maintained a

cash component allocated to each investor. J. Porter agreed to this request. Nonetheless, Respondents allocated at least three new investments to this investor in 2012. Doing so took more than $80,000 of this investor's available cash in the Fund.

47. In October 2012, another investor made clear to J. Porter in an email that "getting cashed out now is my number 1 objective." J. Porter promised to try to honor the investor's request. He copied Duszynski on his response. Rather than doing so, however, less than two weeks after he received the email, J. Porter instead directed that another investor's share of Duszynski's loan and VHGI – one of the bankrupt companies described above – be allocated to the requesting investor in exchange for the investor's available cash. This reallocation prevented the investor from withdrawing all his available cash from the Fund.

### H. J. Porter and Duszynski Were Investment Advisers, Committed Violations and Aided and Abetted and Caused ACM's Violations.

48. At all times, J. Porter and Duszynski managed the Fund's investments and made all final investment decisions for the Fund. They received salaries for advising the Fund.

49. J. Porter and Duszynski decided and directed that: (a) Fund monies were loaned to their private venture and to Duszynski; (b) the Fund invested in J. Porter and Duszynski's private venture; (c) all of ACM's expenses were charged to the Fund; (d) VHGI and the Duszynski loan "investment" were allocated to an investor after he directed Respondents not to make any further investments on his behalf; (e) ACM not disclose Duszynski's receipt of a personal loan from Fund assets; (f) ACM not disclose to investors that certain companies in which the Fund had invested were impacted by bankruptcy proceedings; (g) ACM continued to value investments at the original amount invested and delayed the write-off of other investments it had determined were worthless or were in bankruptcy; and (h) Fund holdings were allocated and reallocated in a manner inconsistent with the offering documents.

50. ACM owed fiduciary duties to the Fund. As investment advisers and associated persons of the investment adviser for the Fund, J. Porter and Duszynski were also fiduciaries.

51. Respondents breached their fiduciary duties to the Fund when they caused the Fund to engage in the above described transactions with FT Investing and FT Trading and caused the Fund to make a personal loan to Duszynski.

52. Respondents sent misleading account statements and other communications to Fund investors, and engaged in other acts, practices or courses of business that were fraudulent, deceptive, or manipulative by arbitrarily reallocating investment holdings within the Fund and not returning available cash to investors who sought to exit the Fund.

### I. Violations

53. As a result of the conduct described above, Respondents ACM, J. Porter and Duszynski willfully violated, Sections 206(1), 206(2) and 206(4) of the Advisers Act and Rule 206(4)-8(a).

54. As a result of the conduct described above, Respondents J. Porter and Duszynski willfully aided and abetted and caused the violations committed by ACM of Sections 206(1), 206(2) and 206(4) of the Advisers Act and Rule 206(4)-8(a).

**III.**

In view of the allegations made by the Division of Enforcement, the Commission deems it necessary and appropriate in the public interest that public administrative and cease-and-desist proceedings be instituted to determine:

55. Whether the allegations set forth in Section II hereof are true and, in connection therewith, to afford Respondents an opportunity to establish any defenses to such allegations;

56. What, if any, remedial action is appropriate in the public interest against ACM pursuant to Section 203(e) of the Advisers Act and Section 9(b) of the Investment Company Act, and against J. Porter and Duszynski pursuant to Sections 203(f) and Section 9(b) of the Investment Company Act, including, but not limited to, disgorgement pursuant to Section 203(j) and civil penalties pursuant to Section 203(i) of the Advisers Act; and

57. Whether, pursuant to Section 203(k) of the Advisers Act, Respondents should be ordered to cease and desist from committing or causing violations of and any future violations of Sections 206(1), (2) and (4) of the Advisers Act and Rule 206(4)-8(a).

**IV.**

IT IS ORDERED that a public hearing for the purpose of taking evidence on the questions set forth in Section III hereof shall be convened at a time and place to be fixed, and before an Administrative Law Judge to be designated by further order as provided by Rule 110 of the Commission's Rules of Practice, 17 C.F.R. § 201.110.

IT IS FURTHER ORDERED that Respondents shall file an Answer to the allegations contained in this Order within twenty (20) days after service of this Order, as provided by Rule 220 of the Commission's Rules of Practice, 17 C.F.R. § 201.220.

If Respondents fail to file the directed answers, or fail to appear at a hearing after being duly notified, the Respondents may be deemed in default and the proceedings may be determined against them upon consideration of this Order, the allegations of which may be deemed to be true as provided by Rules 155(a), 220(f), 221(f) and 310 of the Commission's Rules of Practice, 17 C.F.R. §§ 201.155(a), 201.220(f), 201.221(f) and 201.310.

This Order shall be served upon Respondents as provided for in Rule 141(a)(2)(iv) of the Commission's Rules of Practice, 17 C.F.R. § 201.141(a)(2)(iv).

IT IS FURTHER ORDERED that, pursuant to Rule 360(a)(2) of the Commission's Rules of Practice, 17 C.F.R. § 201.360(a)(2), the Administrative Law Judge shall issue an initial decision no later than 120 days from the occurrence of one of the following events: (A) The completion of post-hearing briefing in a proceeding where the hearing has been completed; (B) Where the hearing officer has determined that no hearing is necessary, upon completion of briefing on a motion pursuant to Rule 250 of the Commission's Rules of Practice, 17 C.F.R. § 201.250; or (C) The determination by the hearing officer that a party is deemed to be in default under Rule 155 of the Commission's Rules of Practice, 17 C.F.R. § 201.155 and no hearing is necessary.

In the absence of an appropriate waiver, no officer or employee of the Commission engaged in the performance of investigative or prosecuting functions in this or any factually related proceeding will be permitted to participate or advise in the decision of this matter, except as witness or counsel in proceedings held pursuant to notice. Since this proceeding is not "rule making" within the meaning of Section 551 of the Administrative Procedure Act, it is not deemed subject to the provisions of Section 553 delaying the effective date of any final Commission action.

By the Commission

Brent J. Fields
Secretary