UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

Administrative Proceedings Rulings
Release No. 5051 / September 15, 2017

Administrative Proceeding
File No. 3-17387

In the Matter of

**Donald F. ("Jay") Lathen, Jr.**,
**Eden Arc Capital Management, LLC**, and
**Eden Arc Capital Advisers, LLC**

**Order on Motion to Correct Manifest Errors of Fact**

On August 28, 2017, the Division of Enforcement submitted a timely motion to correct seven manifest errors of fact in the initial decision issued on August 16, 2017. *See* 17 C.F.R. §§ 201.111(h), .160(a). Respondents submitted a response in opposition.

I consider each of the Division's arguments in light of my limited authority over the proceeding once the initial decision has issued; I may only correct manifest errors of fact. *See Alchemy Ventures, Inc.*, Securities Exchange Act of 1934 Release No. 70708, 2013 WL 6173809, at *3 & n.25 (Oct. 17, 2013). Under the Securities and Exchange Commission's Rules of Practice, a "motion to correct is properly filed . . . only if the basis for the motion is a patent misstatement of fact in the initial decision." 17 C.F.R. § 201.111(h). Such motions may not "contest the substantive merits of [an] initial decision." Adoption of Amendments to the Rules of Practice and Related Provisions and Delegations of Authority of the Commission, 70 Fed. Reg. 72,566, 72,567 (Dec. 5, 2005). A manifest, or patent, error of fact is an error that is "plain and *indisputable*, and that amounts to a *complete disregard* of . . . the credible evidence in the record." *Manifest Error*, *Black's Law Dictionary* (10th ed. 2014) (emphasis added).

**1. "Lathen solicited a few dozen investors for the Partnership, and ultimately about fifteen invested approximately $5.85 million. Tr. 3252-53."** Initial Decision at 13.

The Division points out that, *initially*, fifteen investors invested $5.85 million, but later, additional investors provided further capital. Mot. at 2-3. The motion is GRANTED as to the first error, and the initial decision is CORRECTED by amending the text as follows:

> Lathen solicited a few dozen investors for the Partnership, and initially about fifteen invested approximately $5.85 million. Tr. 3252-53. Later, others invested as well, and at its peak, the Partnership managed around $22 million in assets. Tr. 160, 3496; *see* DX 636 (enumerating the number of investors and amount invested in each year of the Partnership's operation).

**2. "Lathen reviewed the documents drafted by Gersten Savage and did not see anything that seemed to be inconsistent with or would undermine his investment strategy. Tr. 643."** Initial Decision at 22.

This finding is not patently untrue. Lathen testified that upon reviewing the documents drafted by Eric Roper and his associates at Gersten Savage, he did not see anything that seemed inconsistent with or would undermine his investment strategy. Tr. 643. Lathen later saw a problem with the participant agreement and removed a phrase stating that the participant could not "exercise any right of ownership," which "was presumably added by Eric Roper." Tr. 3260-62. However, that fact does not indicate that Lathen necessarily thought the phrase undermined his strategy, *i.e.*, invalidated the joint tenancy. Significantly, Lathen never explained why he removed the language. The motion is DENIED as to the second error.

**3. "I am convinced that Lathen had a sincere good faith belief that each version of the participant agreement created valid joint tenancies."** Initial Decision at 55.

The Division argues that "[t]his conclusion is controverted . . . by Lathen's own admission that he believed the McCord Participant Agreement to improperly restrict a Participant's beneficial ownership interest, and that determination led him to change that language in the agreement." Mot. at 4. The Division is incorrect, as the finding it highlights is not patently untrue. As noted above, Lathen did not explain why he removed the phrase prohibiting the exercise of any right of ownership from the McCord participant agreement. Even if, as the Division suggests, Lathen removed it

because he thought it could be interpreted as interfering with the participant's beneficial ownership, there is no evidence that he thought it invalidated the joint tenancy. The motion is DENIED as to the third error.

**4. "Gersten Savage also assisted in drafting the Partnership's initial Form ADV and assisted with some of the updates to it in conjunction with the fund's compliance consultant, Mission Critical. Tr. 591-92, 596, 2237-38."** Initial Decision at 21.

The Division correctly notes that there is no evidence that Gersten Savage worked together with Mission Critical on the updates to the Partnership's Forms ADV. Mot. at 5-6. The most natural reading of this sentence erroneously suggests that they did so. I therefore GRANT the motion as to the fourth error, and since Mission Critical's role is described elsewhere in the findings of fact, Initial Decision at 9, 30, I CORRECT the initial decision as follows:

> Gersten Savage also prepared the Partnership's initial Form ADV. Tr. 591-92, 596.

**5. "On the other hand, one could interpret the participant agreement as acknowledging survivorship and merely contracting around it. There is support for this view in New York law. In *Ehrlich v. Wolf*, No. 113413/10, 2011 N.Y. Misc. LEXIS 630 (Sup. Ct. Jan. 11, 2011), there was a dispute over an account opened by the decedent and a Mr. Wolf. The estate of the decedent submitted an agreement in which Wolf agreed to transfer the balance of the joint accounts to the estate upon decedent's death. *Id.* at *4."** Initial Decision at 53.

The Division's contention, that I misinterpreted *Ehrlich*, is not a factual error, and not an appropriate subject of the present motion. Nonetheless, the Division appears to be correct in its reading of the case. Mot. at 6. The agreement Wolf signed that may have obligated him to turn over funds remaining in the joint account was signed after the decedent's death, when there was no longer any joint tenancy. *Ehrlich*, 2011 N.Y. Misc. LEXIS 630 at *4. Therefore, the case does not support the view that parties to an existing joint tenancy may contract around survivorship by side agreement. But this does not change the fact that New York law is fundamentally unsettled on the question of whether one can contract around survivorship and retain a valid joint tenancy. The parties have identified no New York court that has ruled on the matter. *See* Initial Decision at 53. *Ehrlich* was an unpublished

trial court decision, and my conclusion that New York law is unsettled did not—and cannot—depend on it.[1] The motion is DENIED as to the fifth error.

**6. "Respondents started using a fourth version of the participant agreement in February 2013 after signing the DLA and PSA in January 2013. DX 72, 190, 193, 332; *see* Tr. 3332-33, 3336-37. This agreement removed restrictions on participants' use and withdrawal of the funds, and 'removed the 95/5 language' regarding survivorship. Tr. 3333-34."** Initial Decision at 54.

The Division argues that this passage is factually incorrect because other documents, including the powers of attorney entered into between Lathen and participants, and other factors—such as dual signature requirements on the joint accounts—restricted the participants' use and withdrawal of the funds. Mot. at 6-7. I was referring, however, only to the text of the participant agreement itself—it removed all *language* restricting participants' use and withdrawal of the funds. I discussed my view of the additional restrictions on the accounts elsewhere in the decision, and found that they did not negatively impact the validity the joint tenancies. Initial Decision at 49, 55 n.20. The motion is DENIED as to the sixth error.

**7. "To determine whether there was a violation of the custody rule, I must consider the language of the side agreements that governed the joint accounts—the IMA until January 2013, and the DLA and PSA thereafter."** Initial Decision at 63.

The Division argues that this sentence is manifestly incorrect because I do not acknowledge that the investment management agreement (IMA) continued to govern joint accounts opened before the discretionary line agreement (DLA) and profit sharing agreement (PSA) were signed. Mot. at 7. However, I expressly found that fact earlier in the decision. Initial Decision at 12. The sentence could have been clearer if I had explicitly stated that the agreements governed accounts *opened* during the relevant periods—or omitted dates entirely. But any unintended ambiguity in an introductory

---

[1] The text of the *Ehrlich* decision itself is inconsistent. It initially states that the side agreement was signed on January 18, 2010, but later refers to it as the "January 18, 2009 agreement." *Ehrlich*, 2011 N.Y. Misc. LEXIS 620, at *6. The 2009 date misled me; but upon reflection, it must be a typographical error, because the agreement pertains to the joint account, which was not opened until July 20, 2009. *See id.* at *1. Additionally, it was agreed to by an attorney for the estate, which means the decedent had died. *See id.* at *4.

sentence regarding a detail that is immaterial to the analysis that follows is not an indisputable error. The motion is DENIED as to the seventh error.

_____

Jason S. Patil
Administrative Law Judge