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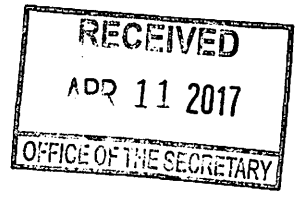

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-17387

In the Matter of

DONALD F. ("JAY") LATHEN, JR., EDEN ARC CAPITAL MANAGEMENT, LLC, and EDEN ARC CAPITAL ADVISORS, LLC

Respondents.

DIVISION OF ENFORCEMENT'S POST-HEARING BRIEF

DIVISION OF ENFORCEMENT
Nancy A. Brown
Judith Weinstock
Janna I. Berke
Lindsay S. Moilanen
New York Regional Office
Securities and Exchange Commission
Brookfield Place
200 Vesey Street, Suite 400
New York, New York 10281
(212) 336-1023 (Brown)
(703) 813-9504 (fax)

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PRELIMINARY STATEMENT

This case is about a former Wall Street investment banker, Donald Lathen, who thought he stumbled on a "loophole" in bond prospectuses that would make him significant money. Lathen paid terminally-ill people to be temporary account holders before they died. He recruited "Participants" by offering a flat fee to use their name on joint accounts in which he would buy bonds that contained survivor's options—features of retail bonds that allowed early redemption at par once the beneficial owner died. If Lathen could buy the bonds at a discount on the secondary market, and put them in the Participants' names, he could quickly reap large profits when the Participants died.

Once he realized how generous the profits were, Lathen set up a Fund and solicited investors to finance the purchase of the bonds. He promised investors that Fund assets would be safe from any claims by Participants or their relatives. Thus arose Respondents' dilemma: If they protected the Fund's assets and returns, they had to destroy the Participants' interest in the bonds. But if the Participants had no interest in the bonds, Respondents' requests for redemption would be rejected because the bond issuers required the death of the beneficial owner to exercise the survivor's option.

In an effort to meet these competing—indeed conflicting—demands, Respondents opted to create the appearance that the Participants and Lathen held beneficial ownership together in joint tenancy, when in fact they had none. While Respondents stripped the Participants of their beneficial interests, and ensured that Lathen's own interest was pledged in full to the Fund, they hid these arrangements from the bond issuers. Lathen and EACM submitted redemption requests that called Lathen and the Participants "owners" or "beneficial owners" of the notes in valid joint tenancies. They hid the Participant Agreements, and they hid Fund documents showing that

Lathen held the notes as "nominee" for the Fund and had "no beneficial interest" in the bonds, and hoped the issuers would not ask any questions. This was fraud in connection with a sale of securities.

Respondents' scheme necessarily violated the Custody Rule. To create the appearance of beneficial ownership, the Fund's Adviser, run by Lathen, had to put Fund assets in the name of Lathen and the Participants. But the Custody Rule's simple mandate requires that Fund assets be held in the Fund's name to prevent misappropriation. The Adviser did not do that. As such, it violated the Custody Rule, aided and abetted by Lathen.

ARGUMENT

I. RESPONDENTS VIOLATED THE ANTIFRAUD PROVISIONS OF THE SECURITIES ACT AND THE EXCHANGE ACT

The antifraud provisions of the Securities Exchange Act of 1934 ("Exchange Act") and the Securities Act of 1933 ("Securities Act") prohibit (1) making a materially false or misleading statement, or using a fraudulent device; (2) with scienter, or, in the case of Securities Act Sections 17(a)(2) and (a)(3), with negligence; (3) in connection with the sale, or in the offer or sale, of securities. SEC v. Monarch Funding Corp., 192 F.3d 295, 308 (2d Cir. 1999).

A. Respondents' Statements Were False and Misleading

In attempting to redeem survivor's option ("SO") bonds from issuers, Respondents wrote the following letter: "[Participant], a joint owner"—or a "joint and beneficial owner" in some letters—"on the above-referenced account, recently passed away. As the surviving joint owners on the account, we would like to exercise the survivor's option with respect to the following notes in the account." These statements were made in connection with bond redemptions where the

offering materials required beneficial ownership to exercise the survivor's option. (E.g., PFOF¶¶106-9.)[1] For example, one prospectus at issue read:

> The "Survivor's Option" is a provision in a note pursuant to which we agree to repay that note, if requested by the authorized representative of the ***beneficial owner*** of that note, following the death of the ***beneficial owner*** of the note....
>
> The death of a person holding a ***beneficial ownership interest*** in a note as a joint tenant ... will be deemed the death of a ***beneficial owner*** of that note...

The prospectuses universally required evidence to substantiate that the decedent was a beneficial owner at the time of death. For example:

> To obtain repayment pursuant to exercise of the Survivor's Option for a note, the deceased beneficial owner's authorized representative must provide . . . appropriate evidence satisfactory to the trustee and us . . . that the deceased was the beneficial owner of the note at the time of death . . . .((PFOF¶108(b).)

And, the beneficial ownership interest was frequently defined as "the right, immediately prior to such person's death, to receive the proceeds from the disposition of the Note" or the person holding the economic privileges and risks of ownership. (PFOF¶¶113.)

Exchange Act Section 10(b) and Securities Act Section 17(a) prohibit "'half-truths'—literally true statements that create a materially misleading impression ...." SEC v. Gabelli, 653 F.3d 49, 57 (2d Cir. 2011), rev'd on other grounds, Gabelli v. SEC, 133 S. Ct. 1216 (2013). When a party to a securities transaction "'discloses material facts ... [he] assumes a duty to speak fully and truthfully on those subjects.'" In re Galectin Therapeutics, Inc. Secs. Litig., 843 F.3d 1257, 1275 (11th Cir. 2016) (citations omitted); see also City of Roseville Emps. Ret. Sys. v.

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[1] Citations to "PFOF" refer to the paragraphs of the Division's Proposed Findings of Fact. Terms defined there are used herein. Citations to "SFOF" refer to the paragraphs of the Stipulated Findings of Fact adopted by the Court in an Order, entered March 31, 2017. A Timeline of Relevant Events is in Appendix A.

EnergySolutions, Inc., 814 F. Supp. 2d 395, 410 (S.D.N.Y. 2011) ("[O]nce a party chooses to speak, it has a 'duty to be both accurate and complete.'") (internal quotations omitted); Matter of James A. Winkelmann, Sr., Rel. No. ID-1116, 2017 WL 1047106, at *48 (Mar. 20, 2017) ("a person who discloses material facts must speak fully and truthfully, and provide complete and non-misleading information with respect to the subjects on which he undertakes to speak, and incomplete disclosures implicate a duty to disclose whatever additional information is necessary to rectify the misleading statements.") (internal quotations omitted). Whether a statement is misleading is judged from the point of view of a hypothetical objective investor. See Omnicare, Inc. v. Laborers Dist. Council Const. Indus. Pension Fund, 135 S. Ct. 1318, 1327 (2015).

The statements in Respondents' redemption letters—which falsely claimed that both Lathen and Participants owned the bonds without the many caveats to the purported ownership—were, at least, highly misleading. Neither Participants nor Lathen beneficially owned the bonds. And, as Lathen's own lawyer expressed, the various side agreements into which Respondents entered destroyed the joint tenancy that Respondents attempted to create. (PFOF¶¶836-837;871-2;874-5;904-909.)

First, the statements of ownership were contradicted by Respondents' agreements, including the Participant Agreement, the Investment Management Agreement ("IMA"), and the Profit Sharing Agreement ("PSA"). Participant Agreements, such as Joy Davis's, stated that she "[would] not be permitted to pledge, borrow against, or withdraw funds from the Account(s) without the express written permission of Lathen, which permission may be withheld in Lathen's sole discretion." (PFOF¶311.) Davis also signed over to Lathen the right to open the account (which Lathen did on her behalf) and to transfer funds or securities into and out of the account (which Lathen also did). (PFOF¶¶310;312.) She did all this before her account was opened.

(PFOF¶¶321,309-10.) Further, Lathen executed a second agreement—his IMA—wherein he promised that he would hold assets in the JTWROS accounts as "nominee" for the Fund, and divested all "legal or beneficial interest in the SO Investments." (PFOF¶357.) The PSA, executed in 2013, similarly eliminated the Participants' and Lathen's interests, transferring all interests in the profits of the accounts to the Fund. (PFOF¶374.) Under these agreements neither Lathen, nor the Participants were beneficial owners of the SO notes.

Second, Respondents' letters of redemption contradicted what Respondents told investors—namely, that the assets in the JTWROS accounts belonged to the Fund. Respondents characterized any theoretical attempt by Participants to access the assets in the JTWROS accounts as a misappropriation, telling investors that "strict governance protections and funds flow protocols" would be placed on the accounts in order to assure them that neither Lathen nor the Participants would misappropriate assets in the accounts.[2] (PFOF¶589-90;592.) Lathen told prospective investors that "as a practical matter, the Participants are not informed about any details of the JTWROS account (e.g., the name of the brokerage firm, the account number, etc.)" and that "even if [Participants] found out where the account was carried and called the brokerage firm to attempt a withdrawal, they wouldn't be successful." (PFOF¶346.) He gave further assurances, including that Participants could not remove assets from the JTWROS accounts because "Jay Lathen has full discretion to move assets from one JTWROS account to another at any time." (PFOF¶346;287.)

Third, the attributes of beneficial ownership resided with the Fund. Respondents reported in their audited financial statements that the entire net asset value of the JTWROS accounts were Fund assets. (PFOF¶292.) The Fund carried all JTWROS brokerage expenses. (PFOF¶293.)

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[2] No such "strict governance protections and funds flow protocols" were placed on the JTWROS accounts, nor any account control agreements. (PFOF¶592.)

Fund investors paid all taxes associated with the profits in the JTWROS accounts—including receiving the benefits of capital gains treatment associated with redeeming the bonds. (PFOF¶¶288;810.) Investors were told that Participants "do not bear any expenses or liabilities, including any costs associated with the purchase of securities in their accounts." (PFOF¶¶288;526.)

Finally, Lathen's redemption letters contradicted what he was telling, and how he was treating, Participants. Participants were told they were getting $10,000 "full stop" and "the conversation kind of ends." (PFOF¶¶44;273;282.) Participants, most of whom had "never had a brokerage account," understood that they were not entitled to additional funds. (PFOF¶282.) No Participant ever asked about the "mechanics of a brokerage account" and, as Davis testified, "it was more or less like a Make a Wish thing ... [Respondents] were going to give me $10,000 for me to do what I wanted to do."[3] (PFOF¶¶282,320.) Moreover, Respondents deliberately endeavored to keep Participants ignorant about the JTWROS accounts by signing the account opening documents under a power of attorney and instructing the broker-dealers not to send account statements to the Participants. (PFOF¶¶281;283-284.)

Respondents freely moved Participant assets from one account to another. (PFOF¶296-297.) When Lathen discovered that a Participant's death was imminent he would transfer assets into that account to generate an immediate profit. (PFOF¶297.) Conversely, when Respondents learned Joy Davis was cured of cancer, they transferred all assets out of Davis' account without her knowledge. (PFOF¶322;325-7.) As Lathen acknowledged, by emptying and closing Davis's

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[3] David Jungbauer, purportedly a joint tenant on the accounts, also understood that he had no financial interest in the accounts. (PFOF¶¶360;362). Jungbauer was added as a nominee accountholder, to ensure that Participants would not outlive Lathen. (PFOF¶359.)

account, Respondents severed the joint tenancy without offering Davis anything, let alone her "moiety."[4] (PFOF¶¶325-327;611.)

Having spoken by submitting the redemption requests to the issuers, Respondents assumed the duty to "speak fully and truthfully on those subjects." Galectin Therapeutics, 843 F.3d at 1275. They did not. They withheld the Participant and Fund Agreements, and other facts bearing on beneficial ownership, denying the issuers the whole truth to which they were entitled to determine Lathen's eligibility to redeem the SO notes. See also In re Bristol Myers Squibb Co. Secs. Litig., 586 F. Supp. 2d 148, 167 (S.D.N.Y. 2008) (finding a cognizable claim where defendants failed to disclose secret oral side agreements).

B. Respondents' False and Misleading Statements Were Material

Misleading statements are considered material if "there is a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the total mix of information available." SEC v. DiBella, 587 F.3d 553, 565 (2d Cir. 2009) (citation and quotation marks omitted). Materiality is generally a "mixed question of law and fact." SEC v. Mayhew, 121 F.3d 44, 51 (2d Cir. 1997). It is "judged according to an objective standard." In re Vivendi, S.A., Secs. Litig., 838 F.3d 223, 250 (2d Cir. 2016).

Here, the materiality of the many omitted caveats and restrictions on Lathen's and the Participants' purported ownership of the bonds is plain. First, Lathen himself understood their materiality to issuers. He warned his investors that the issuers might not agree that Respondents' SO redemptions were valid. (PFOF¶¶416-418;423-424.) He told one investor that he would not be "open-kimono" with issuers/trustees "for obvious reasons" and that he could not sue an issuer to

[4] In support of his "beneficial ownership" claims, Lathen had his lawyer tell an issuer that the Participants were entitled to half of the account assets. (PFOF¶611.)

force payment on the SO because "the publicity around the case could alert other issuers to my strategy and cause them to tighten up the loopholes in their docs and/or decline to make payments to me."[5] (PFOF¶¶427-428.)[6]

Second, the Participant Agreements were material to the issuers. Issuers who learned about the Participant Agreements testified that they were material to an eligibility determination.[7] (PFOF¶¶116-125.) For example, Robustelli from GECC called the Participant Agreement "critical" to their eligibility determination. (PFOF¶124.) And issuers who found out about the Participant Agreements contemporaneously conveyed their views on materiality to Lathen, both in rejecting his requests and explaining why they were doing so. For example, in 2013, Goldman Sachs ("Goldman") explained that their review of the Participant Agreements and Powers of Attorney that Respondents finally provided led them to conclude that the deceased was not the beneficial owner of the notes, and that the joint tenancies were not valid. (PFOF¶¶130;135;451.) GECC explained that the Participant Agreements stripped the deceased of beneficial ownership rights and invalidated the joint tenancies. (PFOF¶165.) In 2014, trustee US Bank's attorney wrote to Lathen's attorney, after finally receiving the Participant Agreements, that "those Participation Agreements materially bear upon the eligibility of such submissions" (PFOF¶240) and, upon review of such Participant Agreements, there was not "satisfactory evidence or information

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[5] When Lathen did get sued by the issuer Prospect, he only agreed to turn materials over under a non-disclosure agreement and he made an unsuccessful attempt to seal the docket. (PFOF¶¶1007-1008;1013.) Lathen also bound Participants to confidentiality. (PFOF¶332.)

[6] Lathen acknowledged the importance of the Participant Agreement to an understanding of his arrangement by sending it to his lawyers. (PFOF¶¶421;707;870.)

[7] Respondents did not call a single trustee or issuer witness to testify at the hearing. (PFOF ¶63.)

indicating the existence of a joint tenancy..." (PFOF¶239.)[8] Indeed, neither Goldman nor Prospect had ever refused a redemption request based upon a survivor's option aside from Respondents'. (PFOF¶¶248-249.)

After finally obtaining the Participant Agreements, some issuers went beyond just refusing to redeem and told Respondents their omission of those agreements was fraudulent:

- GECC told Lathen that his Participant Agreement "presents evidence of a scheme designed to create the appearance that the deceased person was a joint tenant or beneficial owner of the securities (when, in reality, the deceased person was not the beneficial owner of the securities)...." (PFOF¶¶163) see also (PFOF¶167) ("it has become clear that GE Capital has been the recipient of an attempted fraud by Mr. Lathen"; and "When Mr. Lathen opened the brokerage account, he checked a box on the application stating "Joint Tenants with Right of Survivorship. If the owner dies his/her interest passes to the surviving owner. This was simply not true. . . . It appears to us that Mr. Lathen made a false representation on the brokerage account application when he checked that box.") (PFOF¶165.)

- Prospect Capital brought a claim against Lathen and EACM in New York State Supreme Court for "fraudulent conduct designed to profit from the deaths of terminally ill individuals." (PFOF ¶200.)

- Goldman expressed: "As reflected in the Participant Agreements that Mr. Lathen executed (and undoubtedly drafted), Mr. Lathen is engaged in an investment scheme – a 'highly unusual absolute return fixed income strategy' – whereby he attempts to profit by creating the appearance of a 'joint account' with the identities of terminally ill patients who have absolutely no economic interest in the accounts at issue." (PFOF¶257.)

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[8] That certain issuers did redeem after seeing the Participant Agreement does not answer the materiality question. First, the inquiry is an objective one. Vivendi, 838 F.3d at 250. Second, Respondents provided no evidence that those issuers—most of whom issued CDs--were provided with full disclosure. (PFOF¶63;412.) And, CD prospectuses differ from bond prospectuses. (PFOF¶41.)

Nor did Respondents provide evidence of why these issuers redeemed. Galbraith, who, along with Lathen and Robinson, threatened to sue those issuers and report them to regulators, conceded that they may have redeemed because "they didn't want to litigate." (PFOF¶¶604;609;1004-1006.)

C. Respondents Acted with Scienter

Scienter, under Exchange Act Section 10(b) and Securities Act Section 17(a)(1), is a mental state embracing an intent to deceive, manipulate, or defraud. Ernst & Ernst v. Hochfelder, 425 U.S. 185, 193 n.12 (1976). Either knowing misconduct or reckless disregard for the truth will establish scienter. Novak v. Kasaks, 216 F.3d 300, 308 (2d Cir. 2000). The Division can demonstrate recklessness by showing that Respondents' conduct presented a "danger [of misleading]" that "was either known to the defendant or so obvious that the defendant must have been aware of it." Id. (citations and quotation marks omitted); accord Matter of Joseph P. Doxey, Rel. No. 33-10077, 2016 WL 2593988, at *2 (S.E.C. May 5, 2016).

Here, Respondents acted with the requisite scienter. They understood the true nature of their ownership structure, understood that the issuers might dispute that ownership, and made a decision to submit their redemption requests without the side agreements and other relevant information concerning the true nature of Lathen's and the Participants' ownership interests. (PFOF¶413-414;424.) And, Lathen conceded at the hearing and through other evidence that he knew the Participant Agreements were material to the issuers' determinations. (PFOF¶421-422.) Thus, when Respondents told the issuers that Lathen and the Participants were the "owners" of the SO bonds, they consciously withheld material information necessary to allow the issuers to evaluate that claim.

Respondents' appreciation of the materiality of the information they were withholding from the issuers is underscored by their words and actions. In their PPMs, Respondents acknowledged that the issuers might take a "contrary view" as to the validity of Respondents' redemption requests. (PFOF¶424.) As Lathen assured one prospective investor, all the issuer or trustee would see was the "registration on the account as a JTWROS." They would not "see the Participant

Agreement so they are not privy to where the capital is sourced and how the economics of the account have been shared between the Participant and the fund." (PFOF¶341.)

Because of Lathen's familiarity with SO bond prospectuses, Respondents were fully aware that beneficial ownership was a necessary predicate to redemption and they acknowledged as much from the start. (PFOF¶¶39-41.) In his investor presentations, Lathen noted that the "decedent must have been a beneficial owner of the bond at the time of death." (PFOF¶420). Lathen made a similar concession in an affidavit he submitted in litigation with Prospect. (PFOF¶420.) And if Lathen harbored any doubts of what evidence issuers found important, those doubts were removed when first Goldman and then GECC rejected his redemptions after seeing his Participant Agreement. (PFOF¶¶93;95;130;162-3;456.) Despite that confirmation, however, Lathen continued to submit his redemption requests to other issuers without including his agreements. (PFOF¶413.)

Lathen made the decision to submit his redemption requests without disclosure of the relevant side-agreements. As he testified, he sought no advice from counsel on the issue of disclosure to issuers, and showed his redemption letters to no attorneys. (PFOF¶651-652;690;753.) Rather, lawyers he consulted appear to have gratuitously warned him of the need to make a full disclosure to all "third parties," and that he should act carefully. (PFOF¶¶889-890;742.)

Lathen received other warnings that his redemption requests were fraudulent. In September 2013, Lathen learned that the SEC had charged other individuals with fraud in a factually similar case involving the purchase of SO instruments with terminally-ill individuals ("SEC v. Staples"). (PFOF¶449.) Similarly, in late 2013, FINRA began investigating Respondents' broker-dealers in relation to Lathen's accounts, leading two brokers to terminate Respondents' business. (PFOF¶¶443-444.) Despite that knowledge, Respondents deliberately

withheld from issuers the true nature of the arrangement between Lathen, the Fund, and Participants. (PFOF¶¶413-414;424.)

Respondents' scienter can also be inferred by their efforts to fight issuer attempts to ferret out the truth. For example, Respondents resisted furnishing the information that Prospect requested, calling the additional information request "both unnecessary and inappropriate." (PFOF¶218.) Lathen rebuffed GECC's requests for information too, and never provided them with the IMA or PSA. (PFOF¶¶157;169.) Of course, Respondents did so because by that time, Goldman had already denied Respondents' redemption requests after seeing the Participant Agreements, and Lathen knew his strategy had a limited shelf life. As he had foreseen in 2012, his scheme would work for only "some period of time until it doesn't, in which case the trade will have played out." (PFOF¶425.) Not wanting the profits to end, and not wanting to have to "fold up shop and return money to investors," (PFOF¶426) Respondents sought to avoid both regulatory scrutiny and publicity. (PFOF¶¶428-429;432.) For that reason, Lathen never complained to the SEC, nor did he sue any of the issuers that refused to honor his SO redemption requests.[9] (PFOF¶¶429;432). And, in dealing with issuers and regulators, Respondents sought to use "stealth and tact," threatening to sue issuers but never actually doing so. (PFOF¶¶429;432-433.)[10]

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[9] Lathen's complaints to the CFPB and NYDFS were consistent with avoidance of regulatory scrutiny. Lathen complained to two regulators that had no jurisdiction over Respondents, and misrepresented himself as an aggrieved consumer. (PFOF¶¶141;438-440.)

[10] Lathen's motivation to keep issuers in the dark was apparent. [redacted]

Respondents' scienter is also evident in the repeated iterations of their Participant Agreement, each designed to address issuer pushback, not to give the Participants any meaningful interest in the accounts. As Lathen put it, he had "crafted the Participant Agreement in a manner which is intended to defeat the straw man argument in the event the issuer ever does see the Participant Agreement and tries to challenge the putback." (PFOF¶341.)

For example, Respondents removed language from the original Participant Agreement prohibiting the Participant from "exercis[ing] any right of ownership with respect to the Investments or other assets from the Account(s)." (PFOF¶¶333-334;342.) But because he knew that the brokers enforced a "double signature" requirement on the accounts which precluded a Participant from accessing the funds without his consent, (PFOF¶¶285;901;902), this revision – like them all – was just window dressing. As Lathen well knew, Respondents simply could not give Participants a true beneficial ownership interest in the JTWROS accounts, because doing so would compromise the Fund's interests and investor's money. As he conceded at the Hearing, he could not revise the Participant Agreement to give the Participants 50% of the account because he needed to "protect the [F]und" and he did not want Participants to "come and say, 'I want to withdraw funds from the account'" when that was "'not possible' because the 'discretionary line agreement prohibits that.'" (PFOF¶345.)

Nor did Lathen try to disguise the Participants' lack of ownership from anyone other than the issuers. For example, in response to a subpoena requesting account information for Davis to determine her eligibility for social services, Robinson wrote: "Under the terms of our financial assistance program, the $10,000 payment is a one-time event. Ms. Davis will not receive any additional payment from us now or in the future." (PFOF¶275.) And, in an EndCare brochure,

Respondents told Participants that "[f]inancial assistance comes in the form of a one-time cash payment made within 15 business days of enrollment." (PFOF¶274.)

Any claim by Lathen, the "smartest guy in the room," that he had a misunderstanding about the import of his own Agreements, is simply not credible. (PFOF¶29.) Farrell told Lathen that the IMA stripped both Lathen and the Participant of beneficial ownership, and that the Participant Agreement he was then using (and continued to use) gave the Participants an insufficient ownership interest to support a valid joint tenancy. (PFOF¶¶835-836;872.) She also shared with him similar concerns about the PSA, when Lathen finally furnished it to her nine months after drafting it himself despite his ongoing retention of Hinckley Allen. (PFOF¶¶904-9).[11] Lathen ignored Farrell's advice, and even worse, Respondents continued to redeem SO bonds in accounts governed by both the IMA and PSA, claiming that Lathen and Participants were "owners" or "beneficial owners" of the bonds. (PFOF¶¶913-914;409;460.) But it was not only his lawyer's advice that Lathen ignored. Lathen also ignored the multiple red flags waving all around, including that issuers and trustees were repeatedly citing his Participant Agreement as disqualifying, and in some cases, the basis of a fraud; SEC v. Staples; and multiple FINRA investigations into his strategy.

D. Lathen and EACM Are Liable for the False and Misleading Statements in the Redemption Letters

Lathen and EACM are liable for the false and misleading statements in the redemption letters. Respondents concede that Lathen was the principal author of the redemption letters and that he signed them. (SPOF¶59;PFOF¶405.) As they were Lathen's statements, he is subject to

[11] Lathen's motivation for withholding the PSA is obvious. When Farrell saw it, she advised that he revise it. Had he told her that he had not done so and that he was still submitting redemptions for accounts governed by its terms (PFOF¶¶913-914), she might well have withdrawn from the representation or told him to stop.

Rule 10b-5(b) liability for them as the "maker" under Janus Capital Grp. v. First Derivative Traders, 564 U.S. 135, 142 (2011). That he wrote many of them on EACM's letterhead attributes the statements to EACM as well. And when the redemption letters were not written on EACM letterhead, they were often accompanied by account statements that were titled with Lathen's and the Participant's name "c/o Eden Arc Capital Management," making the whole submission attributed to EACM. (PFOF¶402.)

It does not matter that brokers were the means by which Respondents' misleading statements were communicated to the issuers. Because Respondents "retained ultimate control over both the content of the communication" and the decision to make the statement, they are not insulated from liability. SEC v. Pentagon Capital Mgmt. PLC, 725 F.3d 279, 286-87 (2d Cir. 2013). See also Janus, 564 U.S. at 142 ("maker" of the false statement required by Rule 10b-5(b) is the one with "ultimate authority over the statement, including its content and whether and how to communicate it"); Matter of Timothy S. Dembski, Rel. No. 33-10326, 2017 WL 1103685, at *7 (S.E.C. Mar. 24, 2017) (respondent who supplied false statements for lawyer's inclusion in PPM was maker of statements even if lawyer drafted other portions of PPM); Matter of S.W. Hatfield, CPA, Rel. No. 34-73763, 2014 WL 6850921, at *6 (S.E.C. Dec. 5, 2014) (CPA's audit reports were "made" by him even though company publicly filed them with the Commission). Indeed, as Janus itself made clear, "as long as a statement is made, it does not matter whether the statement was communicated directly or indirectly to the recipient." 564 U.S. at 147 n.11.[12]

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[12] This is particularly so where the respondent, as here, knew and intended that his statements would be transmitted to the victims. SEC v. Merkin, 2012 WL 5245561, at *7 (S.D. Fla. Oct. 3, 2012) (granting summary judgment to Commission for defendant's false statements because defendant "was fully aware how the statement would be communicated"). Lathen understood and intended that the brokers would pass his redemption letters onto the issuers. (PFOF¶403;404.) After all, that was the only way his redemptions would be paid.

E. EACA and EACM (Through Lathen) Knowingly Engaged in Deceptive Conduct in Furtherance of Lathen's Scheme to Defraud the Issuers

Rule 10b-5(a) prohibits "employ[ing] any device, scheme, or artifice to defraud." 17 C.F.R. §240.10b-5(a). And Rule 10b-5(c) prohibits "engag[ing] in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person." 17 C.F.R. §240.10b-5(c); see also 15 U.S.C. §77q(a)(1) (making it unlawful, in the offer or sale of a security, "to employ any device, scheme or artifice to defraud"); 15 U.S.C. §77q(a)(3) (making it unlawful, in the offer or sale of a security, "to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser").

"[P]rimary liability under Rule 10b-5(a) and (c) extends to any defendant whose 'challenged conduct in relation to a fraudulent scheme constitutes the use of a deceptive device or contrivance,' even if a misstatement 'made' by another person for purposes of Rule 10b-5(b) "creates the nexus between the scheme and the securities markets." Matter of Dennis J. Malouf, Rel. No. 33-10115, 2016 WL 4035575, at *8 (citations omitted) (S.E.C. July 27, 2016) pet. filed, No. 16-9546 (10th Cir. Sept. 8, 2016); see also id. at *11, *12 (applying the rule to Sections 17(a)(1) and (3)). The Commission has applied the same rule to those like EACA and EACM (PFOF¶61) who obtain money by means of another's untrue statement under Section 17(a)(2). Dembski, 2017 WL 1103685, at *7.

Under Section 17(a) and Rules 10b-5(a) and (c), EACA and EACM, through their sole managing member, Lathen, knowingly engaged in their own acts of deception in furtherance of Lathen's scheme to defraud. Lathen signed the IMA, PSA and Discretionary Line Agreement ("DLA") on behalf of EACM and the Fund—by powers derived from EACA, the General Partner of the Fund. (PFOF¶¶191,365.) Through those agreements, Lathen conveyed all of his interest in

the joint accounts to the Fund. EACA and EACM knew[13] that hiding those agreements from issuers was essential to their ability to perpetrate the fraud and reap the profits. (PFOF¶¶121,124, 138.)

Lathen even hid EACA's and EACM's PSA from his own lawyer. Once he knew what Farrell thought about the IMA—that it rendered him without a beneficial or economic interest in the account (PFOF¶872; 874-876)—he purposefully withheld the PSA from her, ostensibly fearing the same reaction to his new agreement. And, as predicted, she confirmed that it destroyed his beneficial interest. (PFOF¶904-09.)

EACA further signed the Account Control Agreement (on behalf of the Fund) that Lathen apparently engineered in response to a request from the SEC Exam staff to cover up his failure to protect investors in the manner he promised to do in the DLA and PPM. He sent that agreement to no one else, and testified that it was never implemented. (PFOF¶¶592, 594-97.)[14]

F. Respondents Were Also Negligent in Failing to Disclose the Truth to the Issuers

Sections 17(a)(2) and (3) of the Securities Act require only that Respondents acted negligently. Negligence is "[t]he omission to do something which a reasonable man ... would do ...." Black's Law Dictionary, 1032 (6th ed. 1991). The Commission has held that evidence sufficient to demonstrate scienter will also establish negligence for purposes of Securities Act Sections 17(a)(2)-(3). See, e.g., Matter of Anthony Fields, Rel. No. IA-4028, 2015 WL 728005, at *14 (S.E.C. Feb. 20, 2015) (finding that respondent "acted with scienter" and, as a result of the same conduct, "willfully violated" Section 17(a)(3)); Matter of Johnny Clifton, Rel. No. 33-9417,

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[13] Lathen's scienter is imputed to EACA and EACM. In the Matter of Warwick Capital Mgmt., Inc., Rel. No. IA-2694, 2008 WL 149127at *9 & n.33 (SEC Jan. 16, 2008).

[14] Lathen, himself, is liable under Section 17(a) and Rules 10b-5(a) and (c) because of his repeated false and misleading statements to issuers.

2013 WL 3487076, at *10 n.67 (S.E.C. July 12, 2013) ("Because the evidence establishes that [respondent] acted with scienter, a negligence analysis [under Section 17(a)(3)] is unnecessary.") Where, as here, the Respondent prevented a counterparty from learning material information about the offer or sale of securities, the Division has made out a Section 17(a)(3) violation. See Malouf, 2016 WL 4035575, at *14 (finding respondent liable for violations of 17(a)(1) and (3) based on the same failure to correct disclosures). Thus, for all the reasons set out above with respect to Exchange Act Section 10(b) and Securities Act Section 17(a)(1), Respondents violated Securities Act Sections 17(a)(2)-(3).

G. Respondents' Fraud Was in Connection with (or in the Offer or) Sale of Securities

Respondents' redemptions were in connection with the sale, and in the offer and sale, of securities. Section 10(b)'s "in connection with" requirement is given a "broad interpretation," Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit, 547 U.S. 71, 85 (2006), requiring only that the false statement or omission at issue "somehow touches upon or has some nexus with any securities transaction." SEC v. Stanard, 2009 WL 196023, at *27 (S.D.N.Y. Jan. 27, 2009) (internal quotation omitted). The same broad interpretation applies to Section 17(a)'s requirement that the fraud be "in the offer or sale" of a security. United States v. Naftalin, 441 U.S. 768, 773 (1979) ("The statutory terms, which Congress expressly intended to define broadly ... are expansive enough to encompass the entire selling process"). Courts hold that redeeming securities—i.e., selling them back to the issuer—satisfies the "in connection with the purchase or sale" and "in the offer or sale" elements. E.g., Drachman v. Harvey, 453 F.2d 722, 737& n.2 (2d Cir. 1971) (en banc) (redemption of a convertible debenture satisfied the "in connection with" requirement); Marcus v. Quattrocchi, 2014 WL 521340, at *14 (S.D.N.Y. Feb. 4, 2014) (redeeming securities can satisfy the "in connection with" requirement). Here, there can be no

question that bonds registered with the Commission, were securities, and that their redemption by the issuer constitutes a "sale" of the note back to the issuer.[15]

II. EACM, AIDED AND ABETTED BY LATHEN, WILLFULLY VIOLATED THE ADVISERS ACT SECTION 206(4) AND RULE 206(4)-2 THEREUNDER

A. EACM Violated the Custody Rule

The Investment Advisers Act of 1940 ("Advisers Act") Section 206(4) prohibits an investment adviser from "engag[ing] in any act, practice, or course of business which is fraudulent, deceptive, or manipulative." 15 U.S.C. §80b-6(4). Rule 206(4)-2, the Custody Rule, promulgated thereunder, requires that advisers with custody of client assets put in place a set of procedural safeguards to prevent the loss, misuse, or misappropriation of those assets. Winkelmann, 2017 WL 1047106, at *57. Advisers must maintain client funds and securities in a separate account for each client in the client's name, or in accounts containing assets of only the adviser's clients, in the adviser's name as agent or trustee. 17 C.F.R. §275.206(4)-2. A claim brought under the Custody Rule does not require a showing of scienter and thus "'[l]ack of intent is no defense.'" Winkelmann, 2017 WL 1047106 at* 57 (quoting In the Matter of Abraham & Sons Capital, Inc., IA Rel. No. 1956, 2001 WL865448, at *8 & n.28 (S.E.C. July 31, 2001)).

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[15] That the statements were not made publicly is of no moment. Neither Section 17(a) of the Securities Act nor Section 10(b) of the Exchange Act requires that Respondents' false or misleading statement be publicly disseminated in order to be actionable. See Naftalin, 441 U.S. at 770, 772 (finding defendant violated Section 17(a) by making false representing to brokers); see also Matter of Francis V. Lorenzo, Rel. No. 33-9762, 2015 WL 1927763, at *6-9 (S.E.C. 2015) (email sent to only two investors violated Section 10(b)). While Respondents' redemption requests were sent only to the issuers, they were nonetheless sent in the offer and sale, and in connection with the sale, of securities.

1. The Fund Was EACM's Client

By Respondents' own admissions, the Fund—and not Participants nor Fund investors—was EACM's client. EACM reported in Item 7 of its Forms ADV that it was investment adviser to one private fund—EACP—and, in Item 9, it reported having only one client. (PFOF¶¶462;465;469;478;504-5; 495-503;504-505.)

2. EACM Had Custody of the Fund's Assets

It cannot be disputed that EACM has custody of Fund assets. (PFOF¶472.) An adviser has custody of client assets if "a related person holds, directly or indirectly, client funds or securities, or has any authority to obtain possession of them, in connection with advisory services." 17 C.F.R. §275.206(4)-2(d)(2). Custody includes, "[a]ny capacity (such as general partner of a limited partnership...) that gives you or your supervised person legal ownership of or access to client funds or securities." Id.

Lathen was the managing member of EACM and EACA. (SFOF¶¶5;7-8.) And, Lathen had access to the JTWROS accounts.[16] (SFOF¶¶16;58.) As Lathen admitted, "as a general partner of a fund, I'm deemed to have custody of everything." (PFOF¶482; see also ¶¶494;495-503;515.)

3. The Securities in the JTWROS Accounts Belonged to the Fund and Had to Be Held in the Fund's Name

The client "funds or securities" that had to be properly custodied were the assets in the JTWROS accounts. (PFOF¶¶466-7.)

a. Participants Enlisted Before 2013

This point is most obvious for those JTWROS accounts governed by the IMA.[17] The IMA made clear that Lathen was holding the assets in the JTWROS accounts "as nominee for and on

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[16] Even assuming that the Fund's asset was the right to income under EACP's agreements, Lathen had access to the Promissory Note certificating those rights, which was never sent to a qualified custodian. (PFOF¶486.)

behalf of the partnership only." (PFOF¶357.) Lathen, the Adviser and the Fund agreed that Lathen had "no legal or beneficial interest in the SO Investments." (Id.; see also PFOF¶358).

Likewise, the Fund held itself out as owner of the assets in the joint accounts in its PPM (PFOF¶32-3), Fund financials (PFOF¶519-20;522), and in EACM's management representation letter to its auditors (PFOF¶514).

The Division's expert, Martin Lybecker, agreed. Having reviewed the Forms ADV, financial statements, tax returns and various agreements in place for accounts opened prior to 2013, he concluded that the assets in the JTWROS accounts "were the funds and securities of the Fund (not Mr. Lathen and not the Participants) and ... should have been held in a proper custody account in the name of the Fund." (PFOF¶477.)

Because the pre-January 2013 accounts were open through 2016 (PFOF¶¶350-2;381), EACM violated the Custody Rule in every year it was registered with the Commission.

b. Participants Signed up After 2013

Similarly, JTWROS accounts for Participants signed up after 2013, when Respondents changed their agreements so the Fund purportedly loaned money to Lathen, and later to Lathen and the Participants, continued to be assets of the Fund subject to the Custody Rule. (PFOF¶474.)

Post-2013, nothing changed—not the economics of the transactions; not the flow of funds; not the representations to investors in the Forms ADV; not the treatment of the assets in the Adviser's financials; not Lathen's individual taxes nor the Fund investors' taxes. (PFOF¶¶288;290;292;295; 383; 495-503;520;523-4;812.) The Fund continued to receive all the economic benefits from assets that Respondents would like the Court to believe were simply "collateral." For example:

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[17] The PSA provided that accounts opened prior to 2013 were governed by the IMA. (PFOF¶381.)

- EACM's Form ADVs reported that the Adviser had custody of Fund assets and the gross asset value of the Fund was equal to the amount in the JTWROS accounts, inclusive of margin. (PFOF¶¶488-513.)

- Lathen continued to "nominee" gains in the JTWROS accounts to the Fund in his personal tax returns, and the Fund continued to issue K-1s to investors allotting capital gains treatment for the bonds that were redeemed in the JTWROS accounts;[18] (PFOF¶¶811-12.)

- The Fund paid all brokerage and clearing charges relating to the JTWROS accounts, which were reported in the Fund financials as expenses to the Fund (even though the PSA did not state that the Fund would cover such "expenses"—only that Lathen would "assign all profits and losses he derives" from the JTWROS accounts to the Fund). (PFOF¶¶293,374-5;815.)

(See also PFOF¶526; see generally PFOF¶¶465-468;474.)

Under the IMA and the DLA, the relationship between Adviser, Fund and bonds is just as one would expect: EACM managed a pool of securities for the Fund; the Fund had 100% economic exposure to that pool, and in return, EACM collected management fees. If an adviser could simply "loan" client assets to itself, by signing agreements on behalf of all relevant parties, to avoid the regiments of the Custody Rule, it would be the exception that swallowed the rule.

Even if the Fund's assets were merely the right to loan repayments and income under various agreements, Respondents still violated the Custody Rule. The Custody Rule requires that advisers keep all client assets with a qualified custodian. 17 C.F.R. 275.206(4)-2(a)(1). The Custody Rule provides an exemption for uncertificated privately offered securities. Id. at 275.206(4)-2(b)(2). That exemption does not apply here. Lathen's DLA was in fact certificated by a Promissory Note. (PFOF¶¶365;485.) If the Fund's asset was the right to income under the

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[18] Lathen's tax lawyer, Bruce Hood, told him that in order for the Fund's investors to treat gains from the bond redemption as capital gains, the Fund had to own the securities, and Lathen had to act as a nominee. (PFOF¶789-96) Hood further told Lathen that if the Fund loaned money to Lathen to invest in the SO notes, gains from such redemptions would be treated as ordinary income to Fund investors. (PFOF¶¶791;805-9.) Lathen did not follow that advice. (PFOF¶¶375;810.)

DLA, then the promissory note had to be held by a qualified custodian. (PFOF¶475.) Lathen acknowledged that it was not. (PFOF¶486.)

In any event, this argument is clearly a post hoc one made up for this proceeding. When confronted with the Custody Rule violation by the Exam Staff, EACM did not argue that the note was uncertificated, but that the Adviser was in substantive compliance because its financials were audited annually—which is no defense to this strict liability offense.[19] (PFOF¶534.)

B. Lathen Aided, Abetted and Caused EACM's Custody Rule Violation

Aiding and abetting liability is proven where: (1) there was a primary violation; (2) the alleged aider and abettor provided substantial assistance to the primary violator; and (3) the alleged aider and abettor provided such assistance with the necessary state of mind. See DiBella, 587 F.3d at 566-67; Graham v. SEC, 222 F.3d 994, 100 (D.C. Cir. 2000). Substantial assistance requires that the Respondent in some way associated himself with the venture, that he participated in it as something that he wished to bring about, and that he sought by his action to make it succeed. SEC v. Apuzzo, 689 F.3d 204, 212-13 (2d Cir. 2012). Scienter is satisfied if Respondents knew of or recklessly disregarded the wrongdoing and their role in furthering it. Matter of vFinance Invs., Inc., Rel. No. 62448, 2010 WL 2674858, at *13 (S.E.C. July 22, 2010).

Causing liability requires proof that: (1) there was a primary violation; (2) an act or omission by the respondent was a cause of the violation; and (3) the respondent knew, or should have known, that his conduct would contribute to the violation. Matter of Robert M. Fuller, Rel. No. 33-8273, 2003 WL 22016309, at *4 (Aug. 25, 2003), pet. denied, 95 F. App'x 361 (D.C. Cir.

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[19] Whatever the relevance of this argument, it has no application to 2015 because Lathen admitted that the Fund's financials were not audited for that year. (SFOF¶17.) Indeed, there is no evidence that a surprise examination was done in 2015 either. EACM's failure to circulate audited financials for the fiscal year 2015, or to get a surprise examination, also violates the Custody Rule.

2004); see 15 U.S.C. §80b-3(k)(1). Negligence is sufficient to establish liability for causing a primary violation that does not require proof of scienter. See Matter of KPMG Peat Marwick LLP, Rel. No. 34-43862, 2001 WL 47245, at *19 & n.100 (S.E.C. Jan. 19, 2001), pet. den. 289 F.3d 109 (D.C. Cir. 2002). A respondent who aids and abets a violation is necessarily a cause of the violation. Matter of Sharon M. Graham, Rel. No. 34-40727, 1998 WL 823072, at *7 n.35 (Nov. 30, 1998), aff'd, 222 F.3d 994 (D.C. Cir. 2000).

As established above, there has been a primary violation. And, Lathen substantially assisted that violation. As sole control person and the senior-most employee of EACM's two person staff, Lathen executed each step that caused EACM's Custody Rule violation: Lathen executed, and signed on behalf of all parties, the agreements that caused the Adviser to put the Fund's money into Lathen's and the Participants' names. (PFOF¶¶354;368;373.) Lathen opened the JTWROS accounts (SFOF¶58;PFOF¶¶281;321); and Lathen transferred investor funds into those accounts. (PFOF¶¶294-6.)

Further, at minimum Lathen was extremely reckless in his substantial assistance of EACM's Custody Rule violation. He was the CEO, CCO, CFO, CIO, managing member and founder of EACM. (SFOF¶4.) He was the sole person who could act on EACM's behalf. The Compliance Manual, wherein Lathen acknowledged that EACM had a fiduciary duty to the Fund, stated that "Eden Arc will maintain Fund assets with a qualified custodian in a separate account for each client under that Fund's name, or in accounts that contain only Fund assets, under the Fund's name or Eden Arc's name as agent or trustee for the Fund. The CFO [Lathen] is responsible for causing Fund assets to be held with qualified custodians . . . ." (PFOF¶515; see also PFOF¶¶517;575.)

In Exhibit A to the Compliance Manual, Lathen acknowledged that he had read and understood the policies and procedures set forth therein, and agreed to abide by them. (PFOF¶516.) Lathen also signed and certified under penalty of perjury that the Fund's assets were custodied by qualified custodians on EACM's Forms ADV. (PFOF¶¶488-90;492-3;509-13.)

Lathen cannot point to a failure to understand the law to excuse his violation. Recently, the Commission reaffirmed that securities professionals are held to the highest standards in carrying out their duties: "[Respondent] claimed that he was unaware of the custody rules, but advisers are obligated to know the custody rules; [Respondent's] claimed lack of awareness was at least reckless." Matter of Larry C. Grossman, Rel. No. 4543, 2016 WL 5571616, *8 (S.E.C. Sept. 30, 2016); see also Abraham & Sons, 2001 WL 865448, at *8.

Lathen purports to have "deep regard and respect . . . for the securities laws." (PFOF¶616; see also PFOF¶11.) And Lathen testified that he understood as an investment adviser, it was important to be accurate. (PFOF¶12.) His fastidiousness was on display at trial when it came to his bottom line. But when it came to his responsibilities as CCO for the Adviser's compliance, the contrast is stark.

It is implausible that Lathen missed the directives in his own Compliance Manual. And his failure to respond to the issue once his compliance consultant and the SEC Exam Staff told him that EACM was violating the Custody Rule makes it more likely that Lathen simply has no regard for regulatory requirements. In January of 2015, based upon concerns raised orally by SEC Exam staff, Lathen's consultants at Mission Critical sent Lathen a Draft Risk Assessment and Gap Analysis which noted that "current account arrangements are not in compliance with [EACM's] procedure because they are in the JT accounts in Jay's and participant's names without the Fund's name" and marked the failing as a "High" risk. (PFOF¶545.) It also noted that "Eden Arc did not

conduct any annually [sic] reviews as required by 206(4)-7 since its initial SEC registration on 10/31/12." (Id.) These deficiencies were then reiterated to Lathen by SEC Exam staff in their deficiency letter. (PFOF¶573.) Notwithstanding Lathen's representations in EACM's compliance manual that EACM would "respond vigorously when wrongdoing or possible indications of wrongdoing are identified" there is no evidence that Lathen took steps to remedy the (1) the violation that Exam staff identified, nor (2) the risks that Mission Critical identified. (PFOF¶518.)

III. REMEDIES REQUESTED

The Division seeks a permanent collateral bar; cease-and-desist orders; disgorgement of ill-gotten gains and pre-judgment interest; and civil penalties.

A. A Permanent Bar Should Be Imposed on Lathen and EACM

Advisers Act Sections 203(e) and (f) and Investment Company Act Section 9(b) authorize the Commission to bar an investment adviser and its associated individuals if the sanction is in the public interest and the adviser or associated person has (i) willfully violated any provision of the Securities Act or the Exchange Act, 15 U.S.C. §80b-3(e), (f) and 15 U.S.C. §80a-9(b)(2), or (ii) willfully aided and abetted another person's violation of the Advisers Act, or its rules or regulations. Id. §80b-3(e), (f) and 15 U.S.C. §80a-9(b)(3). A "willful violation of the securities laws means intentionally committing the act which constitutes the violation and does not require that the actor also be aware that he is violating one of the Rules or Acts." Hatfield, 2014 WL 6850921, at *9 (internal quotations omitted). Lathen and EACM have violated Securities Act Section 17(a) and Exchange Act Section 10(b), and EACM willfully violated, aided and abetted by Lathen, the Custody Rule. Thus, the Division need only show that a permanent industry bar is in the public interest.

In assessing the public interest, the Commission considers

> the egregiousness of [respondent's] actions (including his aiding and abetting of [his entity]'s fraudulent conduct, the isolated or recurrent nature of the infraction, the degree of scienter involved, his recognition of the wrongful nature of his conduct, the sincerity of his assurances against future violations, and the likelihood that his occupation will present opportunities for future violations.

Matter of Edgar R. Page, Rel. No. IA-44002016 WL 3030845, at *5 (S.E.C. May 27, 2016) (citing Steadman v. SEC, 603 F.2d 1126, 1140 (5th Cir. 1979), aff'd on other grounds, 450 U.S. 91 (1981)) (the "Steadman factors"). "[N]o one factor is dispositive." Id. (citation omitted).

The Steadman factors establish that Lathen should receive a permanent industry bar from association. Lathen's conduct continued for over four years. His actions were intentional and brazen in the face of apparent warning signs (e.g., concerns expressed by his own attorneys, SEC v. Staples, issuers claiming fraud, FINRA investigations into Lathen's broker-dealers, SEC Exam Staff findings). He put the entire compliance function under his own supervision, but thought nothing of putting Fund assets in his own name and the name of strangers, while falsely telling investors he had erected account controls.

Aside from the charged conduct, Lathen made other untrue statements. As late as 2014, Lathen falsely advertised that he donated 15% of EndCare's profits to charity. (PFOF¶¶ 582;883.) He gave the Exam Staff an account control agreement allegedly written in 2013, omitting that it had never been provided to any third party. (PFOF¶¶599-600). He sought to keep the identity of his broker from FINRA. (PFOF¶¶444;447;995). He tried to hide the identity of JPMC as a custodian from prospective investors, for fear that they would learn that JPMC terminated the relationship. (PFOF¶528;584). He told investors that his investment in the Fund was a significant portion of his liquid net worth, when he had no money invested in the Fund. (PFOF¶¶585-587). He told investors that he had received a "letter" from the SEC instead of truthfully disclosing that EACM, the Lathens, Jungbauer, and Robinson had all received subpoenas

issued "In the Matter of Eden Arc Capital Management, LLC (NY-9197)." (PFOF¶¶612-613;SFOF¶15.) Respondents told an issuer that they represented "a group of retail investors who, you may have mercenarily judged, do not have the stomach or financial resources to fight you." (PFOF¶609; see also PFOF¶¶604-608.) But they told Participants that Lathen was not acting as their investment adviser. (PFOF¶¶56.)

Lathen demonstrated in various ways that he was not committed to compliance, despite his professed respect for regulators. (PFOF¶¶565-574;616.) Much like his conduct vis-à-vis the issuers, Lathen only wanted to give SEC exam staff the entire picture "if it doesn't hurt [him]." (PFOF¶576.) In explaining why he violated his own Limited Partnership Agreement by taking his management fees early, he testified that he did so only after he deregistered – as if his freedom from the Commission's periodic inspections gave him license to violate his own investor agreements. (PFOF¶568). He stated that he "didn't want to wait, you know, an extra period of time" and that he estimated the amount because "there's no need for precision when there's accuracy..." (PFOF¶¶570-572.) And yet, at the Hearing, Lathen could not identify any of his own wrongdoing, aside from the fact that he wished his Participant Agreements were stronger in some unspecified way. (PFOF¶615.)

As a sophisticated investment professional, who held an MBA with distinction, securities licenses, including a supervisory license, worked at two large investment banks as a Managing Director, was the CCO (among other titles) of EACM—Lathen knew better. (SFOF¶¶2;3;4.) Lathen failed to follow EACM's Code of Ethics, which required Lathen to avoid engaging in fraudulent and manipulative practices, to act with honesty, integrity, and professionalism, and to adhere to federal and state securities laws, rules, and regulations. (PFOF¶11.) Alarmingly, Lathen intends to remain in the investment management industry with the same level of vigilance as

before. (PFOF¶617.) For all the reasons Lathen should be barred, so too should EACM, his wholly-owned entity. A permanent bar is in the public interest.

B. Cease-and-Desist Orders Should Be Imposed on All Respondents

Pursuant to Section 8A of the Securities Act, Section 21C of the Exchange Act, and 203(k) of the Advisers Act, all Respondents should be ordered to cease and desist from committing or causing violations of and any future violations of Securities Act Section 17(a), Exchange Act Section 10(b) and Advisers Act Section 206(4).

To establish grounds for a cease-and-desist order, the Division must show that there is some likelihood of future violations, although "a single past violation ordinarily suffices to establish a risk of future violations." Matter of OptionsXpress, Inc., Rel. No. 33-10125, 2016 WL 4413227, at *34 (S.E.C. Aug. 18, 2016) (citation omitted), order corrected on other grounds, Rel. No. 33-10206, 2016 WL 4761083 (S.E.C. Sept. 13, 2016). The Commission considers the same Steadman factors to determine whether a cease-and-desist order is appropriate. KPMG, 2001 WL 47245, at *23. For all the reasons cited in Section III.A., supra, a cease-and-desist order should be entered.

The Commission additionally considers "whether the violation is recent, the degree of harm to investors or the marketplace resulting from the violation, and the remedial function to be served by the cease-and-desist order in the context of any other sanctions." Hatfield, 2014 WL 6850921, at *10 (internal quotations and citations omitted). The additional factors point to the necessity for a cease-and-desist order against Respondents. All of the violations occurred as recently as 2016, even after receipt of a Wells notice. (PFOF¶460.) And the Custody Rule violations continued even after identified by both SEC Exam Staff and Respondents' own

compliance consultant. (PFOF¶¶545;573). Consequently, Respondents are likely to commit future violations and cease-and-desist orders should be imposed.

C. Disgorgement of Respondents' Ill-Gotten Gains Should Be Ordered

The Division seeks disgorgement from Respondents pursuant to Securities Act Section 8A(e) and Exchange Act Section 21B(e). Disgorgement should be calculated as the management fees and incentive fees collected by EACA and EACM and paid for by the Fund from the Fund's inception to February 2016 in connection with SO bond redemptions.

"Disgorgement is an equitable remedy designed to deprive a wrongdoer of his unjust enrichment and to deter others from violating the securities laws." Matter of Montford and Co., Rel. No. IA-3829, 2014 WL 1744130, at *22 (S.E.C. May 2, 2014), pet. den., 793 F.3d 76 (D.C. Cir. 2015) (internal quotations omitted). The amount of disgorgement "need only be a reasonable approximation of profits causally connected to the violation." Id. (quoting SEC v. Patel, 61 F.3d 137, 139 (2d Cir. 1995)).

EACM earned management fees of $41,652 and EACA earned incentive fees of $486,509 attributable to SO bonds redeemed throughout the period. (PFOF¶645;647.) Prejudgment interest is regularly awarded to "prevent[] the violator from profiting from their securities violations." Matter of Richard P. Sandru, Rel. No. 34-70161, 2013 WL 4049928, at *8 (S.E.C. Aug. 12, 2013) (citation omitted). Total disgorgement with prejudgment interest on all management and incentive fees earned on redeemed bonds amounts to $607,527.41. (See Appendix B.)

D. Second Tier Penalties Are Appropriate for the Securities Act and Exchange Act Violations and Third Tier Penalties for the Custody Rule Violations

Second tier penalties for the fraud violations should be imposed here. Pursuant to Securities Act Section 8A(g), Exchange Act 21B(a) and Advisers Act Section 203(i), the same three-tier penalty structure applies. For conduct from 2011-2013, for violations that involve

"fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement," civil penalties of $75,000 for a natural person or $375,000 for an entity are authorized; for conduct from 2014-2105 civil penalties of $80,000 for a natural person and $400,000 for an entity are authorized. 15 U.S.C. §77h-1(g); 15 U.S.C. §78u-2(a); 15 U.S.C. §80b-3(i).[20]

The Division has proven violations that involved fraud, deceit, manipulation or deliberate or reckless disregard of a regulatory requirement and thus penalties should be awarded at the second tier. Six factors are considered when determining whether penalties serve the public interest: (1) whether the violation involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement, (2) the resulting harm to other persons, (3) any unjust enrichment and prior restitution, (4) the respondent's prior regulatory record, (5) the need to deter the respondent and other persons, and (6) such other matters as justice may require. E.g., 15 U.S.C. §78u-2(c); 15 U.S.C. §80b-3(i)(3).

Here, second tier penalties are in the public interest for Respondents' flagrant deception of issuers, which constitutes fraud. There is an obvious need to deter these Respondents as well as others from similar conduct.

For EACM's and Lathen's violations related to the Custody Rule, third tier penalties are appropriate because the violations "involved fraud, deceit, manipulation or deliberate or reckless disregard of a regulatory requirement," and the violation, "directly or indirectly . . . created a significant risk of substantial losses to other persons." 15 U.S.C. §80b-3(i)(2)(C).

A Custody Rule violation is a "fraudulent, deceptive or manipulative act practice or course of conduct," and merits third tier penalties. 17 C.F.R. §275.206(4)-2. But even were it less than fraudulent, year-after-year violations—after Lathen was told by his lawyers that the

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[20] These figures represent the inflation-adjusted statutory amounts imposed by the Debt Collection Improvement Act of 1996. 17 C.F.R. §§201.1004, 201.1005.

Fund was the true owner of the assets, and while Lathen bore the sole responsibility for EACM's compliance program—meant that he and EACM were, at the very least, recklessly disregarding their regulatory requirements. (PFOF¶541;545;573.)

And the violations "created a significant risk of substantial losses" to Fund investors–the very risk that the Custody Rule was meant to mitigate. From the time EACM registered in 2012 through 2016, Lathen held Fund assets in accounts in his and the Participants' names, giving Lathen the unfettered ability to abscond with the funds and securities. That such risk did not materialize is of no moment. Third tier penalties are appropriate when merely the risk of significant harm, as here, is present. For 2013, authorized third tier penalties for individuals are $150,000 and $725,000 for entities; for 2014-2015, those amounts are $160,000 and $775,000, respectively.

The Division calculates the resulting penalties as $6,125,000 for EACM, $3,850,000 for EACA, and $1,240,000 for Lathen, as laid out in Appendix C.

CONCLUSION

For all the foregoing reasons, and based on the entire record herein, the Division of Enforcement respectfully requests that the Court find that Respondents have violated Exchange Act Section 10(b) and Rule 10b-5 thereunder, Securities Act Section 17(a), Advisers Act Section 206(4) and Rule 206(4)-2 thereunder, and imposing appropriate sanctions as detailed herein.

Dated: April 7, 2017
New York, New York

DIVISION OF ENFORCEMENT

Nancy A. Brown
Judith Weinstock
Janna Berke
Lindsay S. Moilanen
Securities and Exchange Commission
New York Regional Office
Brookfield Place, 200 Vesey Street, Suite 400
New York, New York 10281
Tel. (212) 336-1023 (Brown)
Fax (703) 813-9504

APPENDIX A

IN THE MATTER OF DONALD "JAY" LATHEN, JR., ET AL.

TIMELINE OF RELEVANT EVENTS

Date	Event	PFOF or SFOF Cite
Pre-2009		
September 2008	Lathen is laid off from Citigroup.	SFOF ¶ 3
Fall 2008	**[REDACTED]**	PFOF ¶ 639
2009		
April 2, 2009	Lathen engages Katten Muchin • Katten advises Lathen that he should not execute his strategy through as a hedge fund. • Katten does not advise Lathen that his strategy is legal.	Lathen Ex. 1052 PFOF ¶ 693 PFOF ¶¶ 719-722; 748
July 3, 2009	Lathen opens his first joint account with a terminally ill individual.	PFOF ¶ 706
October 30, 2009	Grundstein forwards Tractenberg's informal "memo" on joint tenancies to Lathen. The memo is generic—discussing joint tenancies with non-family members. It does not address the Participant Agreement.	PFOF ¶ 696 PFOF ¶¶ 697, 698, 702, 703, 712
November 2009	Lathen and Katten Muchin engagement ends.	Div. Ex. 687
2010		
2010	Lathen starts buying Survivor's Option bonds using money contributed by Rosenbach and his own money.	PFOF ¶ 5
May 2010	Lathen seeks tax advice from Bruce Hood.	SFOF ¶ 82
June 18, 2010	Hood advises Lathen that capital gains treatment may be obtained on Fund income so long as Lathen and the Participants hold the assets as agents for the Fund, and fund is the true owner of the assets, even if the arrangement is not disclosed to the issuers.	PFOF ¶¶ 776 -781
October 14, 2010	Lathen sends Eric Roper an October 2010 Investor Presentation that states that "[p]rior to launching business, EndCare received advice from counsel that strategy is legal." Domina, from Katten, testified that he wouldn't have told Lathen that the strategy was legal.	PFOF ¶¶ 763, 748
October 20, 2010	Lathen engages Gersten Savage to prepare a private placement memorandum, a limited partnership agreement and subscription documents for a domestic investment limited partnership.	PFOF ¶ 758

Date	Event	PFOF or SFOF Cite
2011		
January 12, 2011	Hood provides Lathen with memo re tax consequences of fund structure and advises that "it will be necessary for the Fund to 'own' the securities" and for Lathen to act as a nominee owner in order for the Fund to receive capital gains treatment from the redemption of the Survivor's Option ("SO") notes.	PFOF ¶¶ 789, 792
May 2011	Lathen launches EACP, with EACM as investment manager, and EACA as GP. Lathen is managing member of EACA and EACM. Lathen is also CEO, CCO, CFO, CIO of EACM.	SFOF ¶¶ 4, 6, 7, 8
	EACM, EACP, Lathen and Jungbauer enter into the Investment Management Agreement, whereby Lathen and Jungbauer agree to act as nominee for the fund in purchasing survivor's option investments. Lathen and Jungbauer disclaim beneficial ownership interest in any SO bonds purchased.	PFOF ¶¶ 355, 357
May 11, 2011	James McCord Participant Agreement is executed. That agreement states, among other things: > Participant agrees that he/she is not be [sic] permitted to pledge, borrow against, withdraw or exercise any right of ownership with respect to the Investments or other assets in the Account(s) without the express written permission of Lathen, which permission may be withheld in Lathen's sole discretion. Despite removing this language from subsequent Participant Agreements Respondents continued to redeem bonds in both McCord accounts into 2012.	PFOF ¶¶ 333, 342, 343
June 28, 2011	Joy Davis Participant Agreement is executed. The agreement states, among other things: > Participant agrees that he/she will not be permitted to pledge, borrow against, or withdraw funds from the Account(s) without the express written permission of Lathen, which permission may be withheld in Lathen's sole discretion.	PFOF ¶ 334
September 8, 2011	Lathen tells SecureVest that "prior to launching business, Eden Arc received advice from counsel that the strategy is	PFOF ¶ 393

Date	Event	PFOF or SFOF Cite
	legal."	
October 5, 2011	Lathen sends CL King his investor presentation, which includes the representation that Eden Arc had received legal advice that strategy was legal.	PFOF ¶ 655
2012		
March 2012	After receiving information about a source of funding for Lathen's joint accounts, JPMC tells SecureVest that it no longer wishes to transact for Lathen's account.	PFOF ¶¶ 387, 397
April 10, 2012	EACP's 2011 Audited Financial Statements are issued. They state that "[EACP] establishes joint accounts with terminally-ill individuals ("Participants") and individuals acting as representatives of [EACP] ("Nominee"). The Partnership provides funds to the joint accounts under a Nominee agreement to make investments in securities which contain a 'survivor's option' or similar feature."	PFOF ¶ 519
April 20, 2012	Marion Korn Participant Agreement is executed. The agreement states, among other things: > In the event that Lathen and the Designees should pre-decease the Participant, Participant, or if applicable, Participant's estate hereby agree to cooperate with Investors or their designated agent to liquidate the Account(s). Once liquidated, any funds contributed by Investors to the Accounts would be returned to them. The remaining value in the Account(s), if any, would then be divided 95% to Investors and 5% to Participant or their estate.	PFOF ¶ 335
July 2012	Farrell and Flanders tell Lathen that his IMA and form of Participant Agreement do not work to create valid joint tenancies.	PFOF ¶¶ 835, 876-77
July 30, 2012	Lathen executes an Amended Engagement Letter with Hinckley Allen.	PFOF ¶ 860
September 13, 2012	Farrell advises Lathen that he should not transfer securities among Participant joint accounts. Lathen continued to do so with frequency.	PFOF ¶¶ 934-35, 296
September 14, 2012	Lathen files EACM's Form ADV, which first acknowledges that EACM has custody of client assets,	PFOF ¶¶ 488, 494, 495

Date	Event	PFOF or SFOF Cite
	which are held by qualified custodians in the form of the brokerage firms where the JTWROS accounts are housed.	
October 2012	EACM becomes SEC-registered investment adviser.	SFOF ¶ 5
December 20, 2012	Hinckley Allen issues Final Caramadre Memo in which they advise Lathen, among other things, to ensure that "representations to third parties" "should not misrepresent the nature or the intent of the Program," and decline to address the validity of his joint tenancies.	PFOF ¶¶ 831, 889, 893
2013		
January 22, 2013	Lathen learns that Participant Davis is cured, and he instructs broker to close the account and move all funds out of it.	PFOF ¶¶ 322, 323, 325
January 24, 2013	Lathen, on behalf of EACP (through EACA) and EACM, executes the Profit Sharing Agreement and the Discretionary Line Agreement. Lathen himself drafts the Profit Sharing Agreement, despite the fact that he has retained Hinckley Allen and they have been giving him advice on the joint tenancies.	PFOF ¶¶ 365, 368 PFOF ¶¶ 815, 904
January 31, 2013	Lathen on behalf of himself and on behalf of EACP (through EACA) executes Promissory Note between Lathen and EACP.	Div. Ex. 193
February 26, 2013	Lathen files Amendment to EACM's Form ADV. It continues to acknowledge custody of the Fund's assets.	PFOF ¶ 488 PFOF ¶ 497
March 2013	EACM's first establishes Compliance Policies and Procedures, which put Lathen in charge of all aspects of the Compliance program, including the Custody Rule. The following month Lathen signs EACM's form of acknowledgement of provisions of Compliance Manual, acknowledging that he understands his responsibilities under the Manual. Around this time, EACM also establishes a Code of Ethics, which he was charged with administering and enforcing, and which required Lathen to adhere to federal and state securities laws, rules and regulations.	PFOF ¶¶ 515, 517 PFOF ¶ 516 PFOF ¶ 516
March 15, 2013	EACP's 2012 Audited Financial Statements are issued.	PFOF ¶¶ 519, 522

Date	Event	PFOF or SFOF Cite
	They continue to assert that the Fund establishes JTWROS accounts and to emphasize the nominee arrangement.	
April 1, 2013	Lathen files EACM's Annual Amendment to Form ADV. It continues to acknowledge custody of Fund assets, housed with the brokers that hold the JTWROS accounts.	PFOF ¶ 488 PFOF ¶ 498
June 2013	Lathen engages Eric Roper to amend Fund's PPM, LPA and subscription agreement.	PFOF ¶ 760
July 2013	Lathen prepares Due Diligence Questionnaire (DDQ) for EACP and EACM for distribution to EACP investors Among other things, the DDQ identifies the Fund as invested in the SO instruments.	PFOF ¶ 525 PFOF ¶ 526
July 2013	EACP PPM was amended. Like the 2011 PPM, this version continues to identify the Fund as the investor in the SO instruments; continues to tell investors that there are account control agreements in place—when in fact there were none; and continues to advise of the risk that issuers might disagree with the propriety of Lathen's strategy.	PFOF ¶¶ 417, 591
August 15, 2013	GS Bank requests more information about Lathen's redemptions of its CDs.	PFOF ¶ 126
August 22, 2013	Lathen responds to GS Bank's request for more information.	PFOF ¶ 127
September 2013	Lathen learns that the SEC has filed suit against Benjamin and Sydney O'Neal Staples, two individuals who were opening joint brokerage accounts with terminally-ill patients in order to redeem survivor's option bonds.	PFOF ¶ 449
September 25, 2013	Lathen sends Farrell the Profit Sharing Agreement, and Farrell advises that agreement destroys joint tenancies and suggests revisions; Farrell also advises that the income from the accounts would be ordinary income to the Fund, not capital gains.	PFOF ¶¶ 904-13
September 25, 2013	Sidley Austin, representing GS Bank, formally rejects Lathen's CD redemptions.	PFOF ¶ 130
September 27, 2013	Flanders, retained by Lathen, responds to Sidley Austin regarding GS Bank's rejection of Lathen's CD	PFOF ¶ 840

Date	Event	PFOF or SFOF Cite
	redemptions.	
October 2, 2013	Lathen engages Mission Critical as compliance consultants. Lathen rejects the engagement that would have provided him with the full suite of services. In the ten months between the time Mission Critical was engaged through the time the SEC Exam Staff began its EACM examination– the total amount billed was under 25 hours. Mission Critical's engagement letter makes clear that EACM is responsible for establishing and maintaining an effective compliance program.	PFOF ¶ 539 PFOF ¶ 538 PFOF ¶ 548 PFOF ¶ 541
October 4, 2013	Flanders has a telephone conversation with Sidley Austin.	PFOF ¶ 841
October 20, 2013	Lathen sends Flanders the GS Bank CD Disclosure Statement for first time.	PFOF ¶ 842
October 25, 2013	Farrell tells Lathen that the bond prospectuses required that the Participants have "substantially all of the beneficial ownership interest" in the note during his or her lifetime.	PFOF ¶ 929
Late 2013	CL King terminated Respondents' business due to FINRA's examination of CL King regarding Respondents' business.	PFOF ¶ 442-443
2014		
2014	Sometime in 2014, Lathen changes his redemption letters to call the Participants "joint and beneficial owners."	SFOF ¶ 13
January 23, 2014	US Bank asks for more information about Lathen's joint accounts at the request of Prospect Capital, for whose bonds Lathen had submitted redemption requests.	PFOF ¶ 194
January 29, 2014	Lathen writes to Freeney at US Bank, and refuses to provide requested information as "unnecessary and inappropriate"	PFOF ¶ 218
February 4, 2014	Lathen submits complaint to CFPB and NY DFS about GS Bank. In both complaints, Lathen portrayed himself as an individual investor.	PFOF ¶¶ 434-37
February 7, 2014	Lathen tells counsel for the Staples that Barclays agreed to pay his redemptions after he threatened to sue.	PFOF ¶ 255

Date	Event	PFOF or SFOF Cite
February 20, 2014	Hood tells Lathen that if he adopts a loan structure by which the Fund loans money to him for purchase of securities, the interest on the loan and profits transferred to the Fund under a "participation feature" would be taxable as ordinary income. Notwithstanding this advice, both Lathen's and the Fund's taxes filed in 2014 reflect that the Fund's investors were issued K-1s reflecting capital gains treatment based on the redemption of the SO bonds and CD.	PFOF ¶¶ 805, 807-08 PFOF ¶ 290; Div. Ex. 306
February 21, 2014	GS Bank responds to Lathen's CFPB complaint, copying Lathen, and calls Lathen's redemption requests "an investment scheme . . . involv[ing] representing to banks (including GS Bank) that he is a true owner of an account, contrary to fact."	PFOF ¶ 142
February 25, 2014	Nannette Goldstein Participant Agreement is executed. The agreement states, among other things: Participant shall receive no additional payments with respect to the Account(s) unless the Account(s) are terminated and the funds in the Account(s) are disbursed prior to Participant's death"	PFOF ¶ 337
March 11, 2014	GECC, through BONY, notifies Lathen that it was rejecting his redemptions of its notes.	PFOF ¶ 95
March 12, 2014	Mission Critical sends Lathen the definition of "regulatory assets under management."	PFOF ¶ 543
March 31, 2014	Lathen files EACM's Annual Amendment to Form ADV. It continues to acknowledge custody of fund assets, housed with the brokers that hold the JTWROS accounts and reports that the gross asset value of EACP is $44 million, which is the fair value of the assets in the JTWROS accounts, inclusive of securities purchased on margin, rather than amounts due under a loan.	PFOF ¶ 488 PFOF ¶ 499, 500, 507
April 29, 2014	EACP's 2013 Audited Financial Statements are issued. Although these financials no longer reflect that EACM establishes accounts with terminally-ill participants, it nonetheless continues to treat the assets in the JTWROS account as Fund assets—accounting for the fair value of the SO instruments, rather than any amounts that would be due under a loan.	PFOF ¶ 521 PFOF ¶¶ 523-24

Date	Event	PFOF or SFOF Cite
April 28, 2014	Robustelli of GECC asks Lathen to send him more information about the joint accounts.	PFOF ¶ 157
May 13, 2014	GS Bank responds to Lathen's NY DFS complaint.	PFOF ¶ 145
May 16, 2014	Lathen files EACM's Amended Form ADV. It continues to acknowledge custody of fund assets, housed with the brokers that hold the JTWROS accounts.	PFOF ¶ 488 PFOF ¶ 500
May 28, 2014	Lathen provides Robustelli (GECC) with a Participant Agreement, power of attorney and account opening documents for one Participant.	PFOF ¶ 158
May 29, 2014	Lathen writes to Grundstein that he will use "stealth and tact" in disputes with issuers.	PFOF ¶ 433
June 18, 2014	GS Group Inc., through BONY, notifies Lathen's broker that it was rejecting four note redemptions submitted by him.	PFOF ¶ 93
June 27, 2014	FSW asks Lathen to take his business elsewhere.	PFOF ¶ 443
June 30, 2014	Prospect sues Lathen for, among other things, fraud in connection with his survivor's option redemptions.	PFOF ¶ 200
July 1, 2014	Lathen engages Galbraith as litigation counsel. Before he's retained, Galbraith informs Lathen that he has asked another lawyer to consider writing an opinion for Lathen on the validity of his joint tenancies; that lawyer declined.	PFOF ¶ 939 PFOF ¶ 988 and Div. Ex. 729
July 2014	Lathen (through Galbraith) provides Prospect with Participant Agreements under a NDA.	PFOF ¶ 199
July 2014	Galbraith provides US Bank with a Participant Agreement.	PFOF ¶ 996
August 2014	In response to learning of FINRA's investigation of CL King and First Southwest and its relationship with Lathen, Lathen and counsel reached out to FINRA and engaged in efforts to persuade it that strategy was lawful.	PFOF ¶ 446
August 14, 2014	US Bank, through counsel, notifies Lathen's counsel that the Trustee has determined that Lathen's redemption requests are ineligible.	PFOF ¶ 239

Date	Event	PFOF or SFOF Cite
Fall of 2014	SEC notifies Lathen of SEC exam.	SFOF ¶ 14
September 4, 2014	Lathen tells Galbraith that he should reject US Bank's invitation to provide any additional material or evidence respecting the validity of the joint tenancies in addition to the Participant Agreements.	PFOF ¶ 976
September 19, 2014	US Bank, through counsel, sets out its reasoning for rejecting Lathen's redemption requests in a letter to Galbraith.	PFOF ¶ 241
September 30, 2014	Robustelli of GECC confirms GECC's decision to reject Lathen's redemptions and explains GECC's reasoning—including that Lathen is not a beneficial owner of the SO bonds.	PFOF ¶ 163
October 3, 2014	Mission Critical sends Lathen the text of the Custody Rule.	PFOF ¶ 544
October 10, 2014	Chivers of Weil Gotshal, representing GECC, confirms GECC's decision to reject Lathen's redemptions and explains GECC's reasoning – including that Lathen is not a beneficial owner of the SO bonds, and his joint tenancies are invalid. He writes: "When Mr. Lathen opened the brokerage account, he checked a box on the application stating 'Joint Tenants with Right of Survivorship. If the owner dies his/her interest passes to the surviving owners.' This was simply not true. . . it appears to us that Mr. Lathen made a false representation on the brokerage account application when he checked that box."	PFOF ¶ 165
November 6, 2014	In response to SEC Exam Staff information request, Lathen transmits a January 31, 2013 executed Account Control Agreement – which was never provided to brokers or, apparently, anyone other than his compliance consultants to forward along to the SEC's exam staff.	PFOF ¶ 596
December 29, 2014	US Bank, through counsel, sets out its contrary interpretation of NY Banking Law Section 675(a).	PFOF ¶ 243
2015		
January 5, 2015	Chivers of Weil Gotshal responds to Lathen's revised Participant Agreement, confirming GECC's decision to reject the redemption and calling the redemptions an "attempted fraud."	PFOF ¶¶ 113, 167

Date	Event	PFOF or SFOF Cite
January 11, 2015	Mission Critical sends Lathen a Draft Risk Assessment and Gap Analysis noting EACM's violation of Custody Rule.	PFOF ¶ 545
January 15, 2015	SEC Exam Staff issues deficiency letter to Lathen.	SFOF ¶ 19
February 2015	Lathen receives SEC investigatory subpoena.	SFOF ¶ 15
February 4, 2015	Lathen indicates in an email that he does not want FINRA to find out who his new broker is.	PFOF ¶ 995
February 13, 2015	Lathen responds to the SEC Exam Staff's Deficiency Letter.	SFOF ¶ 19 Div. Ex. 309
February 13, 2015	Marcelleus Brown Participant Agreement is executed. The agreement states, among other things: Upon the Effective Date, the Participant (or its designee) will receive a $10,000 distribution from the Account(s)...there is no assurance that the Investments will be profitable or that the account owners will receive additional distributions from the Account(s) beyond the initial distribution to the Participant referenced above.	PFOF ¶ 338
March 31, 2015	Lathen Files EACM's Annual Amendment to Form ADV. It continues to acknowledge custody of Fund assets, housed with the brokers that hold the JTWROS accounts.	PFOF ¶¶ 488, 501
April 28, 2015	EACP's 2014 Audited Financial Statements are issued It continues to treat the assets in the JTWROS account as Fund assets—accounting for the fair value of the SO instruments, rather than any amounts that would be due under a loan.	PFOF ¶¶ 523-24
June 2015	Freeney of US Bank sends letters to issuer clients, Caterpillar, Federal Farm Credit, Citi, and National Rural, alerting them to Lathen's redemptions of their bonds and US Bank's conclusions about his eligibility.	PFOF ¶¶ 228-29
June 2015	Lathen's counsel Galbraith threatens to sue CIT respecting its rejection of Lathen's redemptions	PFOF ¶ 254
July 2015	Federal Farm Credit Funding Corp. reviews Lathen's Participant Agreements and account opening documents and determines to reject his redemptions.	PFOF ¶ 97

Date	Event	PFOF or SFOF Cite
September 2, 2015	At US Bank's request, Galbraith provides US Bank with Lathen's 2015 Discretionary Line Agreement. US Bank only learned about the Discretionary Line Agreement by reviewing a Participant Agreement that referred to it.	PFOF ¶¶ 977-79 PFOF ¶ 978
September 10, 2015	US Bank, through counsel, notifies Galbraith that its review of Lathen's Discretionary Line Agreement does not change its determination and raises concern that there may be other material documents that Lathen has not provided.	PFOF ¶¶ 981-82
September 22, 2015	Robinson tells BMO Harris that if it does not pay on Lathen's CD Redemptions, Eden Arc will sue and file complaints with BMO's regulators	PFOF ¶ 253
October 2015	Lathen's attorney threatens to sue BMO Harris on Lathen's behalf and to file complaints with the CFPB and OCC.	PFOF ¶ 253
December 2015	Lathen receives Wells notice from SEC.	PFOF ¶ 460
December 2015	Lathen changes redemption letters to add that EACP "provided financing for the" accounts and that the Participant and he "entered into a written agreement governing the account."	PFOF ¶ 410
2016		
January 4, 2016	Lathen files EACM's Annual Amendment to Form ADV. It continues to acknowledge custody of fund assets, housed with the brokers that hold the JTWROS accounts.	PFOF ¶¶ 488, 503
February 23, 2016	Lathen files EACM's Form ADV-W.	PFOF ¶ 491
Post- February 2016	**[REDACTED]**	PFOF ¶¶ 568-69

APPENDIX B

Year	Disgorgement Amount (Redeemed Bonds)	Prejudgment Interest	Total (Disgorgement + Prejudgment Interest)
Management Fees			
2011	$ 12,653	$ 2,395.24	$ 15,048.24
2012	15,834	2,442.90	18,276.90
2013	9,282	1,116.56	10,398.56
2014	3,740	326.51	4,066.51
2015	143	7.90	150.90
Total	$ 41,652	$ 6,289.11	$ 47,941.11
Incentive Fees			
2012	$ 439,660	$ 67,831.33	$ 507,491.33
2013	35,139	4,226.97	39,365.97
2014	11,606	1,013.26	12,619.26
2015	104	5.74	109.74
Total	$ 486,509	$ 73,077.30	$ 559,586.30
Total: Management Fees and Incentive Fees for Redeemed Bonds			
	$ 528,161	**$ 79,366.41**	**$ 607,527.41**

APPENDIX C

Respondent	Violations		Number of Violations	Penalty Tier and Amount	Penalty
	Statute	Years Violated			
EACM	• Securities Act Section 17(a)	2011-2013[1]	3	Second Tier ($375,000)	$1,125,000
		2014-2015[2]	2	Second Tier ($400,000)	$ 800,000
	• Exchange Act Section 10(b)	2011-2013	3	Second Tier ($375,000)	$1,125,000
		2014-2015	2	Second Tier ($400,000)	$ 800,000
	• Advisers Act Rule 206(4)-2	2013	1	Third Tier ($725,000)	$ 725,000
		2014-2015	2	Third Tier ($775,000)	$1,550,000
Total			13		$6,125,000
EACA	• Securities Act Section 17(a)	2011-2013	3	Second Tier ($375,000)	$1,125,000
		2014-2015	2	Second Tier ($400,000)	$ 800,000
	• Exchange Act Section 10(b)	2011-2013	3	Second Tier ($375,000)	$1,125,000
		2014-2015	2	Second Tier ($400,000)	$ 800,000
Total			10		$3,850,000

[1] The Division has used the lower adjustments applicable to violations occurring before March 5, 2013 for the entire 2013 period. 17 C.F.R. § 201.1004.

[2] The Division has used the lower adjustments applicable to violations occurring before November 2, 2015 for the entire 2014-2015 period. 17 C.F.R. § 201.1005.

APPENDIX C

Lathen	• Securities Act Section 17(a)	2011-2013 2014-2015	3 2	Second Tier ($75,000) Second Tier ($80,000)	$ 225,000 $ 160,000
	• Exchange Act Section 10(b)	2011-2013 2014-2015	3 2	Second Tier ($75,000) Second Tier ($80,000)	$ 225,000 $ 160,000
	• Advisers Act Rule 206(4)-2 (aiding and abetting)	2013 2014-2015	1 2	Third Tier ($150,000) Third Tier (160,000)	$ 150,000 $320,000
Total			13		$1,240,000[3]

[3] The Division's calculation of penalties is conservative. If it were to calculate penalties on a per violation basis, as permitted by statute, it would include every redemption request submitted to an issuer as a separate violation of the antifraud provisions of Section 17(a) because the Securities Act covers both fraudulent sales as well as offers that result in no completed sales. See Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 733-34 (1975) (in comparison to Section 10(b), 17(a) "provide[s] a remedy to those who neither purchase nor sell securities").

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-17387

In the Matter of

DONALD F. ("JAY") LATHEN, JR., EDEN ARC CAPITAL MANAGEMENT, LLC, and EDEN ARC CAPITAL ADVISORS, LLC,

Respondents.

Certificate of Service

I hereby certify that I served the Division of Enforcement's Post-Hearing Brief, dated April 7, 2017and the appendices attached thereto on this 7th day of April 2017, on the below parties by the means indicated:

Harlan Protass
Clayman & Rosenberg LLP
305 Madison Avenue, Ste 1301
New York, New York 10165
Attorneys to Respondents
(By E-mail)

The Honorable Jason S. Patil
Administrative Law Judge
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-2557
(Courtesy copy by E-mail)

Brent Fields, Secretary
Office of the Secretary
U.S. Securities and Exchange Commission
100 F. Street, N.E.
Washington, D.C. 20549-2557
(UPS (original and three copies))

Nancy A. Brown