UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
NEW YORK REGIONAL OFFICE
200 VESEY STREET, SUITE 400
NEW YORK, NY 10281-1022

NANCY A. BROWN
TELEPHONE: (212) 336-1023
brownn@sec.gov

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By Email (alj@sec.gov)

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

Re: In the Matter of Donald F. ("Jay") Lathen, Jr., Admin. Proc. File No. 3-17387

Dear Judge Patil:

We write to object to Respondents' submission yesterday of "Amended" filings.

At the end of the hearing, the Court set a briefing schedule to which all parties agreed. When that schedule proved insufficient for Respondents, the Court amended the briefing schedule to give Respondents an extension of time. Most recently, the Court granted Respondents' request for leave to submit their financial disclosure submissions after the record was closed and to address their inability to pay defense on Sur-Reply, rather than in their opposition, as originally directed.

Despite these numerous accommodations to Respondents, Respondents yesterday -- approximately one hour after the Division filed its final sur-reply in this matter, and all briefing has been completed -- sought to proffer new arguments in the guise of "amendments" to their proposed Findings of Fact, calling them mere "additional citations to the record and exhibits admitted into evidence at the hearing." (Letter of Harlan Protass, dated June 8, 2017.) In fact, however, those "amendments" are not merely additional citations. They are substantive, and late, replies to the Division's arguments, a reply that the Court's briefing schedule did not allow and which prejudices the Division. Putting aside the unfairness of allowing Respondents to essentially grant themselves an extension from a briefing schedule the Court set at their request, Respondents' "amendments" prejudice the Division in substantive ways.

First, the "amendments" deprive the Division of the opportunity to respond to newly cited Exhibits and hearing testimony. So, for example, where Respondents' proposed findings were unsupported by any record citation, and the Division responded accordingly, Respondents have now offered citations. But in doing so now, Respondents have unilaterally denied the Division the opportunity to respond to those citations. And the sandbagging affects not only the Division's Responses to the Respondents' Proposed Findings of Fact, but also the Division's briefing on the substantive issues, which the Division necessarily based on the Respondents' original submissions.

Second, in the case of proposed Findings that Respondents had originally supported with citations, Respondents' "amendments" substantively change or add to arguments Respondents first made, and to which the Division responded, in an attempt to have the last word. Respondents' "amendment" to their Proposed Finding of Fact 226 provides an illustration. Respondents' original RPFOF 226 provided:

> 226. In 2012, Eden Arc Capital Management pre-emptively registered as an Investment Advisor with the SEC, inviting further regulatory scrutiny into their business before it was required. (Tr. 648:12-18).

Respondents' "amended" 226 includes not just additional citations, but an entirely new argument that attempts to answer the Division's response:

> 226. In 2012, Eden Arc Capital Management pre-emptively registered as an Investment Advisor with the SEC, inviting further regulatory scrutiny into their business before it was required. (Tr. 648:12-18). *(See also SEC Rule203 (m)-1 ("For purposes of section 203(m) of the Act (15 U.S.C. 80b-3(m)), an investment adviser with its principal office and place of business in the United States is exempt from the requirement to register under section 203 of the Act if the investment adviser: (1) Acts solely as an investment adviser to one or more qualifying private funds; and (2) Manages private fund assets of less than $150 million") and https://www.sec.gov/divisions/investment/midsizedadviserinfo.htm ("In addition, a mid-sized adviser that is required to register with the SEC, may elect to not register if it can rely on an exemption from registration, such as those for certain advisers to private funds").)*

The reason for the "amendment" was clearly to give Respondents an opportunity to answer the Division's response to their original, and inaccurate, proposed finding. The Division's response had pointed out that Respondents were *required* to register as a New York-domiciled investment adviser with between $25 million and $100 million assets under management:

> **Division Response:** Denied, as the cited testimony does not support this proposed Finding. While Lathen testified that registering with the SEC "would make it more likely that you would be on the regulator's radar screen," Respondents offered no testimony that Lathen sought to "invite" such scrutiny.
>
> In addition, Lathen testified that one of the reasons he registered as an Investment Adviser was because he thought that being SEC-registered would make an investment in the Fund more attractive to investors. (PFOF¶60.) In any event, once EACM had $25 million assets under management—which Lathen declared it anticipated having within 120 days of registration in EACM's initial Form ADV— it was required to register

with the SEC. (Div. Ex. 1 at Section 2.A.(9).) Mid-sized advisers—i.e. those with assets under management between $25 million and $100 million—"must register with the commission: (1) if the adviser is not required to be registered as an investment adviser with the securities commissioner (or any agency or office performing like functions) of the state in which it maintains its principal office and place of business; or (ii) if registered with that state, the adviser would not be subject to examination as an investment adviser by that securities commissioner." 76 FR 42950-01, at *42952, 2011 WL 2783991, Release No. IA-3221, (Final Rule).

EACM's principal (and only) place of business is New York. New York is a state whose advisers are not subject to examination by state authorities and, therefore, advisers in New York with over $25 million under management are required to register with the Commission. Id. at 42961 ("[A]dvisers with their principal office and place of business in Minnesota, New York and Wyoming with assets under management between $25 million and $100 million must register with the Commission."); see also Division of Investment Management: Frequently Asked Questions Regarding Mid-Sized Advisers, available at https://www.sec.gov/divisions/investment/midsizedadviserinfo.htm ("After July 21, 2911, a mid-sized adviser must register with the Securities and Exchange Commission if it . . . is not subject to examination as an adviser by the state where it maintains its principal office and place of business. . . . A mid-sized adviser with its principal office and place of business in either of those states"—New York or Wyoming—"is not 'subject to examination' by the state securities authority and would have to register with the SEC.") (See also PFOF¶506.) Therefore, EACM would have been required to register with the Commission once it hit $25 million under management, and it appears that EACM was using early registration with the Commission as a marketing tool to solicit investments and achieve its goal of reaching $25 million in assets under management. (See PFOF¶60.)

Under the Court's multiple briefing schedules, each side was given the chance to respond to the other's proposed findings of fact, but not to reply to its adversary's responses. Respondents have granted themselves the unilateral right to a reply.

Accordingly, the Division objects to the Respondents' June 8, 2017 submissions and respectfully requests (1) that the Court reject Respondents' Amended filings, or (2) if the Court allows them to be submitted, that the Court grant the Division an opportunity to respond to the

"amended" filings, as well as to submit its own amendments to the Division's proposed Findings and briefing, as necessary to respond to Respondents' amendments.

Respectfully submitted,

Nancy A. Brown

cc: Harlan Protass, Esq.
Paul Hugel, Esq.
Christina Corcoran, Esq.
(via email)