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 RESPONSES TO RESPONDENTS' AMENDED PROPOSED FINDINGS OF FACT

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)

June 28, 2017

Division Response to RPFOF 15: The cited testimony does not support this proposed Finding. The cited testimony provides that US Bank received presentments from brokers to put or sell back their bond positions:

946:17 **Q So describe briefly the redemption**
946:18 **process, please, for survivor's options.**
946:19 A Sure. We receive presentments or packages
946:20 from brokers who are electing to put or sell back
946:21 their bond position under the terms of the survivor
946:22 option contingency in the indenture.
946:23 **Q Okay. And is the broker doing that for**
946:24 **the broker's own account?**
946:25 A No. They have their holders who would
947:1 present to them. And the broker would coordinate
947:2 the paperwork and then send it to us.

The new testimony cited also does not support this proposed finding. It states that US bank used account statements to help them determine who the beneficiary was and how long they held the bond that was being redeemed. (Tr. at 981:2-6.) The new Exhibit cited is a Prospect Capital bond prospectus that states that DTC is the party that exercises the Survivor's Option, and specifies what items need to be provided to the issuer, including "appropriate evidence satisfactory to the trustee (a) that the deceased was the beneficial owner of the note at the time of death and his or her interest in the note was owned by the deceased beneficial owner or his or her estate at least six months prior to the request for repayment."

Division Response to RPFOF 16: Denied, as the cited testimony and Exhibits do not support this proposed Finding. Div. Ex. 530 is an excerpt from a Federal Farm Credit Offering Circular which does not say that the brokerage firms had responsibility for submitting the documentation they believed necessary to satisfy the issuer's redemption requirements. It does say that the financial institution is not required to submit the form if it finds the "records specified in the Instructions supporting the above representations unsatisfactory." The brokerage account statements in Lathen Ex. 1941 do not "attest who the beneficial owner was at death," but they do "attest" to the identity of the account holders. The redemption packets submitted by the brokers also included Lathen's redemption request letters which "attested" to the identity of the beneficial owner. (See, e.g., Lathen Ex. 1941 – p. Lathen14691.) The newly referenced election form is not an attestation; rather, it is the clearing firm's (JPMorgan) repetition of the information provided by Lathen in his redemption letter. Indeed, Augie Cellitti—CEO of SecureVest (for which JPMorgan cleared), who was in a position to testify as to the determinations made by brokers—testified that he considered the broker's role to be that of a "pass through" for Lathen's documents and that they acted as Lathen's "agent" in the redemption process. (PFOF¶389.) He also testified that neither the broker nor the clearing firm had any role in determining the eligibility of Lathen's requests for redemptions of survivor's option instruments. (PFOF¶388.) Lathen called no one from JPMorgan to testify to its understanding of the reference to "deceased beneficial owner," or the firm's source for that information. In addition, Lathen cannot blame his fraud on brokers. Lathen had an independent duty under the securities laws to make his redemption letters, which Respondents knew and intended that

brokers would pass on to issuers and trustees (PFOF¶402-404), complete and accurate. (See Div. Post-Hearing Brief at 14-15, Div. Post-Hearing Reply Brief at 10, 12-15.)

Division Response to RPFOF 175: Denied, as the cited testimony and Exhibits do not support this proposed Finding.

> 3669:11 tell us this is what he was talking about with respect to
> 3669:12 a new ruling or not. I assume that's where you're going
> 3669:13 with this.

The cited Exhibit (417) is a single redemption letter concerning instruments of BOKF NA. This Exhibit was not admitted into evidence in native format, consequently, there is no documentary evidence in the record regarding Wells Fargo and BOA receiving expanded disclosure. Further, there is no documentary evidence of payments by Wells Fargo or Bank of America on Lathen's redemption requests pursuant to the form of redemption letter exemplified by Div. Ex. 417, nor is there any testimony of any such payments aside from Lathen's self-serving testimony. And as Begelman testified, the language Lathen added gave the recipient no information about the terms of any of the agreements referenced in it. (PFOF¶415.)

Division Response to RPFOF 177: Denied, as the cited testimony does not support this proposed Finding. There is no documentary evidence, nor is there any testimony, aside from Lathen's self-serving testimony, that any issuer paid after receiving Lathen's December 2015 redemption requests. See:

> 3407:21 **Roughly how many issuers received that**
> 3407:22 **document?**
> 3407:23 A It was more than -- I think it was between
> 3407:24 30 and 35 issuers, in that range.

Division Response to RPFOF 178: Denied, as the cited testimony and Exhibit do not support the portion of this proposed Finding that JPMCC submitted millions of dollars of redemption requests to issuers. The cited Exhibit is a request from JPMCC's AML Department requesting various documents and information from Lathen, and Lathen's response to JPMCC. See:

> 321:10 **Were you asked that question, and did you**
> 321:11 **give that answer?**
> 321:12 A If I may -- if I may clarify. JPMC was the
> 321:13 clearing firm. Securevest was my broker. When -- in
> 321:14 or around February of 2012, JPMC asked Securevest
> 321:15 questions about my business and asked me to provide
> 321:16 additional information.
> 321:17 I provided that information to Securevest.
> 321:18 Included in that was a copy of the participant
> 321:19 agreement. So I didn't technically provide it to JPM,
> 321:20 but I provided it to Securevest who was asking the
> 321:21 question that JPM asked.

321:22 So what we now know is that JPM -- as a
321:23 result of this investigation, we've seen JPM's files,
321:24 and we know, in fact, that Securevest did pass along
321:25 the participant agreement to them.

The newly cited testimony also does not support the proposed finding. It relates to Angela Sermeno's account only as of January 2012. It states nothing about the timing of the redemptions from this account, nor the value of the securities redeemed (rather than sold on the secondary market) from the account, nor what information was provided to the issuers from that account. Indeed, Lathen did not provide SecureVest with the Sermeno Participant Agreement until March 12, 2012. (PFOF¶398.) In any event, as Augie Cellitti—CEO of SecureVest (for whom JPMorgan cleared) testified, he considered the broker's role to be that of a "pass through" for Lathen's documents and that they acted as Lathen's "agent" in the redemption process. (PFOF¶389.) He also testified that neither the broker nor the clearing firm had any role in determining the eligibility of Lathen's requests for redemptions of survivor's option instruments. (PFOF¶388.) Finally, sometime around March of 2012, when JPMorgan's Anti-Money Laundering Department inquired about Lathen's accounts, (LE 2031;2037; Tr. at 2549:11-2550:11;2561:14-18), JPMorgan told SecureVest that it was terminating its clearing arrangement for Lathen's accounts. (PFOF ¶¶387;441.)

Division Response to RPFOF 179: Denied, as the cited Exhibits do not support the portion of this proposed Finding that Bank of New York continued to receive and honor redemption requests from Mr. Lathen after the SEC notified it of its investigation and subpoenaed it for records related to its actions, nor do they support the Finding that Bank of New York acted as trustee for the "bulk of the bonds redeemed by Lathen, or that it acted as "determination agent for GM and Bank of America." Lathen Exhibit 2077, a letter from Bank of New York to the Division, is dated January 30, 2015. Lathen Exhibit 2070 does not show any redemptions for GM and Bank of America subsequent to January 30, 2015. Moreover, Lathen Ex. 2070-a was not admitted into evidence, and therefore cannot serve as the basis of a proposed Finding. See:

3760:7 MR. HUGEL: And with respect to the
3760:8 spreadsheet, we offer in evidence the marked up version
3760:9 which we could call 2070A.
3760:10 JUDGE PATIL: Denied. You're welcome to make
3760:11 those arguments in your brief. But it's not what I would
3760:12 consider evidence.

The newly cited testimony and Exhibit do not say anything about whether or not Bank of New York "continued to receive and honor redemption requests from Mr. Lathen after the SEC notified it of its internal investigation and subpoenaed it for records related to its actions, nor that do they support the Finding that Bank of New York acted as trustee for the "bulk of the bonds redeemed by Lathen."

Division Response to RPFOF 206: This proposed Finding is argument and should be stricken pursuant to the Court's order. In any event, it is wrong. (See DRRPFOF¶197, supra; see also Letter from Judith Weinstock, dated May 8, 2017, attaching the "Form of Notice of Election to

Exercise Survivor's Option," in which Lathen represented that the Participant was the "deceased beneficial owner," a representation that was unnecessary if the issuers "recognized the primacy of the brokerage firm's books and records as relates to a definitive determination of beneficial ownership.") The newly-cited Lathen Ex. 1941, attaching the election form prepared by the clearing firm is not an attestation; rather, it is the clearing firm's (JPMorgan) repetition of the information provided by Lathen in his redemption letter. Indeed, Augie Cellitti—CEO of SecureVest (for whom JPMorgan cleared) who was in a position to testify as to the determinations made by brokers—testified that he considered the broker's role to be that of a "pass through" for Lathen's documents and that they acted as Lathen's "agent" in the redemption process. (PFOF¶389.) He also testified that neither the broker nor the clearing firm had any role in determining the eligibility of Lathen's requests for redemptions of survivor's option instruments. (PFOF¶388.) Lathen called no one from JPMorgan to testify to its understanding of the reference to "deceased beneficial owner," or the firm's source for that information. In addition, issuer testimony and evidence establish that "beneficial owner" was not synonymous with the titled owner on the account. (PFOF¶¶106;109;11-112; see also PFOF¶86;108.) If the account holder is necessarily the beneficial owner, issuers would have no need for a representation by Lathen; the account statements would provide the necessary evidence. But Respondents concede that all issuers required their redemption letter. (RPHB at 4.) Lathen himself understood the difference, acknowledging contemporaneously that the deceased had to have a beneficial interest in the accounts to be eligible for redemption. (PFOF¶420;847.) See also Div. Post-Hearing Reply Brief at 13.

Division Response to RPFOF 207: This proposed Finding is argument and should be stricken pursuant to the Court's order. Further, there is still no support cited for this proposed Finding, given that it is phrased as describing all issuers' governing documents, but the citation is merely to the prospectuses of three of the issuers, and therefore the Court should disregard it. In any event, once Lathen represented himself as a surviving joint owner on the account, he had a duty to speak accurately and fully. In addition, because the Fund was the true beneficial owner of the accounts, neither Lathen nor the Participant held any interest, and the joint tenancies were invalid, as Lathen knew. (PFOF¶¶905-909.) (See Reply Brief at Section I(G).)

Division Response to RPFOF 208: There is still no support cited for this proposed Finding, given that it is phrased as describing all issuers' governing documents, but the citation is merely to the prospectuses of three of the issuers, and therefore the Court should disregard it. To the extent the Court is inclined to consider it, admitted that the governing documents did not explicitly require the submission of any side agreements, but deny that their importance to the eligibility determination was unknown to Lathen or anyone else. (See Reply Brief at Section I(D).) As issuers testified, side agreements like Lathen's were material to the issuers' determination of eligibility because they defined the Participants' and Lathen's beneficial ownership (or lack thereof) in the bonds, and rendered both the Participant and Lathen ineligible to redeem under the survivor's option. (PFOF¶¶111,116-125.)

Division Response RPFOF 209: There is still no support cited for this proposed Finding, given that it is phrased as describing all issuers' governing documents, but the citation is merely to the prospectuses of three of the issuers, and therefore the Court should disregard it. To the

extent the Court is inclined to consider it, admitted, with the exception of the testimony noted in DRRPFOF¶182, supra.

Division Response to RPFOF 210: This proposed Finding is argument and should be stricken pursuant to the Court's order. Further, there is still no support cited for this proposed Finding, given that it is phrased as describing all issuers' governing documents, but the citation is merely to the prospectuses of three of the issuers, and therefore the Court should disregard it. To the extent that the Court is inclined to consider it, the Division notes that once a representation is made as to the redeeming party's eligibility, the redeeming party is required, under the securities laws, to fully and accurately disclose all material facts necessary to make such representation not materially misleading. (See Reply Brief at Section I(C).) Therefore, if such powers of attorney materially bore on the beneficial ownership of the decedent, the redeeming party, like Lathen here, must disclose it. As such, this proposed finding is irrelevant to the issues to be decided in this matter.

Division Response to RPFOF 211: This proposed Finding is argument and should be stricken pursuant to the Court's order. Further, there is still no support cited for this proposed Finding, given that it is phrased as describing all issuers' governing documents, but the citation is merely to the prospectuses of three of the issuers, and therefore the Court should disregard it. In any event, this proposed finding is irrelevant; whether Lathen's Participants were in poor health or advanced in age is unrelated to whether they were (or he was) a beneficial owner of the bonds, and irrelevant to whether Lathen fully disclosed the restrictions on their (and his) ownership in the bonds to the issuers in seeking to redeem them.

Division Response to RPFOF 212: This proposed Finding is argument and should be stricken pursuant to the Court's order. Further, there is still no support cited for this proposed Finding, given that it is phrased as describing all issuers' governing documents, but the citation is merely to the prospectuses of three of the issuers, and therefore the Court should disregard it. To the extent the Court is inclined to consider it, it is wrong. Beneficial ownership was required to redeem the survivor's option notes, and Lathen's side agreements and Fund agreements stripped the Participants of any such interest. (PFOF¶¶106-15;871-72;874-78;905-09.)

Division Response to RPFOF 213: This proposed Finding is argument and should be stricken pursuant to the Court's order. Further, there is still no support cited for this proposed Finding, given that it is phrased as describing all issuers' governing documents, but the citation is merely to the prospectuses of three of the issuers, and therefore the Court should disregard it. To the extent the Court is inclined to consider it, it is wrong. While the governing documents did not prevent a bondholder from encumbering his interest, beneficial ownership was required to redeem the survivor's option notes. (PFOF¶¶106-15.)

Division Response to RPFOF 217: The cited testimony and Exhibits support only that part of this proposed Finding that Cellitti received Lathen's investor presentation and his PPM. But, Lathen did not provide Securevest with the PPM until JPMorgan's Anti-Money Laundering Department requested more information. (LE 2031;2037;2043; Tr. at 2549:11-2550:11;2561:14-18.) Lathen provided information to SecureVest in response to JPMorgan's request, not SecureVest's own request. (PFOF¶¶387;397-99; LE2031;2032.) There is no reference to

Cellitti receiving any Participant Agreement in the cited testimony or Exhibits. And, there is no evidence that Lathen ever provided information to Securevest (but for his investor presentation), or anything at all to JPMorgan about his strategy, proactively during the onboarding process. (LE 2030.) Finally, sometime around March of 2012, JPMorgan told SecureVest that it was terminating its clearing arrangement for Lathen's accounts. (PFOF ¶¶387;441.)

Division Response to RPFOF 226: 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.)

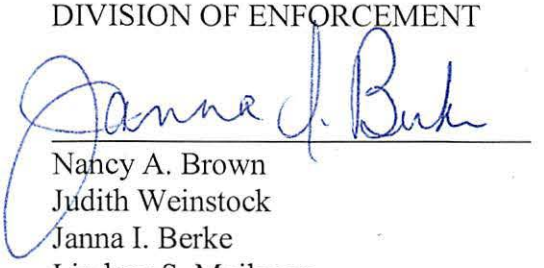
Finally, even assuming Adviser's Act Rule 203(m)-1 could apply to EACM under these facts, as Respondents newly argue, it does not, because at the time it registered, EACM was not acting "solely as an investment adviser to one or more qualifying private funds." At the time EACM registered, it reported that it had two clients – the Fund and one high net worth individual.

(PFOF¶¶495-98;504; Tr. at 345:4-346:14; 348:1-8; 350:11-24; 352:1-12; Div. Ex. 1 – pp. 12, 35; Div. Ex. 4 – pp. 13, 35.)

Division Response to RPFOF 247: Denied, as the cited testimony does not support this proposed Finding. The testimony establishes at most that, during the time he worked at Lehman, Lathen was unaware that he was the subject of disciplinary investigations.

Dated: June 28, 2017
New York, New York

DIVISION OF ENFORCEMENT



Nancy A. Brown
Judith Weinstock
Janna I. 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)
Email: brownn@sec.gov

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 Responses to Respondents' Amended Proposed Findings of Fact on June 28, 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
(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
(By UPS (original and three copies))

Janna Berke

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

JUDITH WEINSTOCK
TELEPHONE: (212) 336-9078
Weinstockj@sec.gov

June 28, 2017

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:

Attached please find, pursuant to the Court's Order, dated June 21, 2017, the Division of Enforcement's (the "Division") Post-Hearing Response to Respondents' Amended Filings.

The Division has responded only to those Amended proposed findings to which the Division considered a revised response necessary.

Finally, we note that notwithstanding the Court's prohibition on the use of Lathen Exhibit 1972 for its truth (Tr. at 3703:22-3704:12), and notwithstanding the Division's March 2, 2017 letter to the Court in which we notified the Court that Respondents' citations violated that ruling, Respondents have once again cited to Lathen Exhibit 1972 for its truth in their Amended Responses and Objections to the Division of Enforcement's Statement of Facts. (See Resp. 111.) We again respectfully request that the Court disregard the sentence that relates to the Exhibit and the citation thereto, as well as any argument that relies on the truth of the statements in that Exhibit, as well as Lathen Exhibits 1966, 1970, and 1971. (See Division letter, March 2, 2017.)

Respectfully submitted,

Judith Weinstock

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