UNITED STATES OF AMERICA
Before the
U.S. SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-17387

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In the Matter of

DONALD F. LATHEN, JR.,
EDEN ARC CAPITAL MANAGEMENT, LLC,
EDEN ARC CAPITAL ADVISERS, LLC.

THE EDEN ARC RESPONDENTS' POST-HEARING BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Other

Respondents Donald F. Lathen, Jr., Eden Arc Capital Management, LLC and Eden Arc Capital Advisers, LLC (the "Eden Arc Respondents"), by and through their undersigned counsel, respectfully submit the following Post-Hearing Brief.

PRELIMINARY STATEMENT

Notwithstanding a three week hearing involving 27 witnesses, close to 4,000 pages of hearing transcript and almost 2,000 exhibits (which was preceded by an investigation of more than two years), the Division of Enforcement (the "Division") failed to establish that any of the Eden Arc Respondents violated Section 17(a) of the Securities Act of 1933 ("Section 17(a)"), Section 10(b) of the Securities Exchange Act of 1934 ("Section 10(b)") or Rule 10b-5 promulgated thereunder, as alleged in the Order Instituting Proceedings (the "OIP").

For purposes of Section 10(b) and Rule 10b-5 (and Section 17(a)), the Division must establish that Mr. Lathen, in connection with the purchase or sale of securities (or the offer or sale of securities for purposes of Section 17(a)), knowingly and deliberately (or negligently for purposes of Sections 17(a)(2) and (3)) made an untrue statement of a material fact or deliberately omitted to state a material fact (when he had a duty to speak) which would render the statements he did make misleading under the circumstances in which they were made. The statements that the Division asserts violated the aforementioned statutes and rules were those that Mr. Lathen made in redemption request letters that he sent to his brokerage firms in which he asked them to seek redemption of survivor's option bonds and CDs out of joint tenancy with rights of survivorship ("JTWROS") brokerage accounts (the "Joint Tenancy Accounts") that he had opened with terminally ill individuals ("Participants").

As the Eden Arc Respondents established at trial, Mr. Lathen neither made an untrue statement of a material fact nor deliberately omitted to state a material fact in those redemption request letters. Also, as detailed below, the Eden Arc Respondents established that:

- ~ Mr. Lathen did not share a fiduciary relationship with issuers of survivor's option bonds and CDs ("Issuers") and therefore had no duty to speak;

- ~ The statements in Mr. Lathen's redemption request letters, which he submitted to his brokerage firms, not to Issuers or their trustees ("Trustees"), were true and accurate in stating that: (1) each Participant was a "joint owner" or "joint and beneficial owner" of the Joint Tenancy Accounts when they died; and (2) Mr. Lathen was a "surviving" joint owner of such Joint Tenancy Accounts following Participant deaths;

- ~ The statements Mr. Lathen made in his redemption request letters were not rendered misleading because he omitted information concerning his contractual relationships with Participants and Eden Arc Capital Partners, LP (the "Fund"). Thus, the omitted information was not legally required to be disclosed to Issuers;

- ~ Mr. Lathen's statements in his redemption request letters were not material to redemption decisions of Trustees;

- ~ Mr. Lathen's statements in his redemption request letters were not made in connection with the purchase or sale of securities (or in connection with the offer or sale of securities);

- ~ The Fund did not own the Joint Tenancy Accounts or the survivor's option bonds and CDs therein, even if they received the economic benefits flowing therefrom;

- ~ Mr. Lathen did not act with the requisite level of scienter. Rather, he genuinely believed – based on, among other things, the advice he received from a number of reputable and competent attorneys over the years, that: (1) his investment strategy was wholly lawful and proper; (2) he and Participants formed true and legally valid JTWROS; (3) Participants were owners or beneficial owners of the Joint Tenancy Accounts and the survivor's option bonds and CDs therein; and (4) he was a surviving joint and beneficial owner after Participants died.

Additionally, contrary to the Division's assertion, Eden Arc Capital Management, LLC ("EACM") did not violate Section 206(4) of the Investment Advisers Act of 1940 or Rule 206(4)-2 promulgated thereunder (the "Custody Rule") because it did not own the funds and securities in the Joint Tenancy Accounts. Absent such a primary violation, Mr. Lathen could not, and did not, aid or abet, or cause, any violation of the Custody Rule.

The Eden Arc Respondents therefore respectfully request that this Court dismiss the OIP in its entirety as against each of them.

ARGUMENT

I.

THE EDEN ARC RESPONDENTS DID NOT VIOLATE THE ANTIFRAUD PROVISIONS OF THE SECURITIES ACT OF 1933 OR THE SECURITIES EXCHANGE ACT OF 1934

The Division did not establish that the Eden Arc Respondents violated Section 10(b), Rule 10b-5 or Section 17(a) principally because none of the Eden Arc Respondents had any communications with Issuers. Even if the Eden Arc Respondents had communicated with Issuers (which they did not), though: (1) none of the them shared a fiduciary relationship with Issuers and therefore had no "duty to speak"; (2) none of them made false or misleading statements to Issuers; (3) their statements to brokerage firms were not material to Issuers; and (4) their statements to brokerage firms were not made in connection with the purchase or sale of securities or in connection with the offer or sale of a security.

A. The Legal Standard for Violations of the Antifraud Provisions of the Securities Act of 1933 and the Securities Exchange Act of 1934

A violation of Section 10(b) and Rule 10b-5 requires proof that a respondent: (1) made a material misrepresentation or a material omission as to which he had a duty to speak, or used a fraudulent device; (2) with scienter; (3) in connection with the purchase or sale of securities. SEC v. First Jersey Securities, Inc., 101 F.3d 1450, 1467 (2d Cir. 1996). Essentially the same elements are required under Section 17(a), albeit in connection with the offer or sale of a security, though no showing of scienter is required for injunctive relief under Sections 17(a)(2) or 17(a)(3). Id. (citing Aaron v. SEC, 446 U.S. 680, 701-02 (1980)). See also SEC v. Price Waterhouse, 797 F. Supp. 1217, 1240 (S.D.N.Y. 1992) ("The elements of liability for violations of Section 17(a)(1) of the Securities Act, Section 10(b) of the Exchange Act and Rule 10b-5 in an injunction proceeding are the following: (1) a misrepresentation or omission (where a duty to speak exists); (2) of a material fact; (3) made with scienter; and (4) made in connection with the purchase or sale of securities").

B. – The Eden Arc Respondents Had No Communications With Issuers

Mr. Lathen did not communicate with Issuers when redeeming survivor's option bonds and CDs from the Joint Tenancy Accounts after Participant deaths. He therefore could not have made any false or misleading statements to Issuers. (Div. Mem. at 2-7.)[1]

Issuers' offering documents set forth the information that must be submitted in support of a redemption request. That information typically included: (1) a redemption request letter from the account holder or his/her authorized representative; (2) a certified death certificate; (3) a brokerage account statement from the date of death of one of the joint tenants demonstrating that the deceased joint tenant owned the bond or CD at the time of death; (4) the most recent month's account statement demonstrating that the bond or CD is still held in the account and that the deceased joint tenant's name is still on the account; (5) an election form signed by the brokerage firm attesting to the decedent's beneficial ownership of the bond; and

[1] "Div. Mem." refers to the Division of Enforcement's Post-Trial Brief, dated April 7, 2017.

(6) a letter from the brokerage firm attesting to the requestor's authority to make the request. See Tr.[2] at 1275:13-1278:5, Div. Ex.[3] 521 at 22 (Duke Energy's redemption requirements) and Div. Ex. 598 at 24 (Prospect Capital's redemption requirements).

Thus, upon a Participant's death, Mr. Lathen submitted a letter to the brokerage firm at which the Joint Tenancy Account for that Participant was held informing them that his joint tenant had died and asking that the brokerage firm seek redemption of the bonds and/or CD's identified in the letter. (See RPFOF[4] ¶¶ 6, 15; Div. Exs. 823, 932 and 989.) That brokerage firm, in turn, added whatever other documentation from its records was required by the Issuer pursuant to its governing documents. (See RPFOF ¶¶ 5, 16; Div. Exs. 987, 988 and 990.) And, upon determining that the combined records satisfactorily substantiated a claim for redemption, the brokerage firm prepared its own submission, which it independently sent (with the aforementioned documents) to the appropriate Issuer (or such Issuer's Trustee, delegated by the Issuer to process redemption requests and authorize redemptions) and which letter requested the redemption of the applicable bond or CD on behalf of Mr. Lathen. (RPFOF ¶¶ 5-6, 15-16.) As detailed at trial, Issuers' governing documents and Trustee processing guidelines provided that beneficial ownership is established by a brokerage firm's books and records and, in particular, the account statement and signed election form. (RPFOF ¶¶ 196-206.) Only the broker, not Mr. Lathen, can "speak" authoritatively as it relates to beneficial ownership of a bond or CD by a decedent at the time of death. (See, e.g., Div. Exs. 987, 988 and 990.)

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2 "Tr." refers to the hearing transcript in the instant matter.

3 "Div. Ex." refers to the exhibits offered by the Division of Enforcement at trial herein.

4 "RPFOF" refers to The Eden Arc Respondents' Statement of Facts, dated May 5, 2017 and submitted herewith.

Given the foregoing procedure, there can be no doubt but that Mr. Lathen had no communications with Issuers. And, absent such communications, Mr. Lathen could not have made any false or misleading statement to Issuers.

Notwithstanding the foregoing, the Division contends that Mr. Lathen is not "insulated from liability" because "[i]t does not matter that brokers were the means by which" his "misleading statements were communicated to the issuers" and because he purportedly "retained ultimate control over both the content of the communication and the decision to make the statement." (Div. Mem. at 15 (internal quotation marks omitted).)

In fact, Mr. Lathen did not control the content of communications between his brokerage firms and Issuers and did not control what statements those brokerage firms made to Issuers. Rather, the brokerage firm, not their clients (like Mr. Lathen), did. Mr. Lathen simply submitted a redemption request and death certificate to his brokerage firm. It, in turn, prepared its own redemption request package, which it, not Mr. Lathen, submitted to the appropriate Issuer (or Trustee), which submission superseded Mr. Lathen's redemption request letter. (RPFOF ¶¶ 5-6, 15-16; Tr. at 186:9-19 and 223:3-11.)

Thus, like the U.S. Supreme Court found in Janus Capital Group, Inc. v. First Derivative Traders, 131 S.Ct. 2296, 2302 (2011), "[f]or purposes of Rule 10b-5, the maker of a statement is the person or entity with ultimate authority over the statement, including its content and whether and how to communicate it." Here, not only did the brokerage firms have that "ultimate authority," but they were the only party that could (pursuant to Issuers' governing documents) speak authoritatively as to who a beneficial owner of a bond or CD was at the time of death of a Participant. None of the Eden Arc Respondents can be found to have violated Section 10(b) or Rule 10b-5 (or Section 17(a)) because Mr. Lathen did not have that "ultimate authority" over the statements that brokerage firms made to Issuers (or Trustees) concerning ownership of the Joint Tenancy Accounts. Lacking such authority, Mr. Lathen could not have "made" those statements.

The cases upon which the Division relies in support of its contention that Mr. Lathen communicated with Issuers are inapposite in that none involved two entities or individuals. In particular, the statement of one individual can be attributed to another if both are associated with the same entity. By contrast, the statement of one of Mr. Lathen's brokers to an Issuer cannot be attributed to Mr. Lathen because Mr. Lathen and his broker are not associated with the same entity. See In re Smith Barney Transfer Agent Litig., 884 F. Supp. 2d 152, 163-64 (S.D.N.Y. 2012) ("After *Janus*, defendants who signed misleading disclosure documents have often contended that only their company or its board of directors – and not they themselves – possessed 'ultimate authority.' But courts in this district and across the country have rejected this argument. Rather, courts consistently hold that signatories of misleading documents 'made' the statements in those documents, and so face liability under Rule 10b–5(b)"); In re Stillwater Capital Partners Inc. Litig., 858 F. Supp. 2d 277, 287-88 (S.D.N.Y. 2012) ("*Janus*, which involved two separate entities and whether statements of one could be attributed to the other, cannot be used to shield" a defendant who signed a document that other individuals at the same company communicated to third parties) (emphasis in original).

Thus, In the Matter of Timothy S. Dembski, Rel. No. 33-10326, 2017 WL 1103685, at *7 (S.E.C. Mar. 24, 2017), upon which the Division purports to rely, is inapposite because the respondent therein provided the statement at issue to his attorneys, who stood in his shoes when incorporating that statement into a private placement memorandum. Likewise, In the Matter of S.W. Hatfield, CPA, Rel. No. 34-73763, 2014 WL 6850921, at *6 (S.E.C. Dec. 5,

2014) is distinguishable because the respondent worked for the entity that filed the documents at issue with the SEC.[5]

C. The Eden Arc Respondents Made No Misrepresentations Or Misleading Statements to Issuers and, In Any Event, Had No Duty to Speak

The Division's core assertion is that the "statements in Respondents' redemption letters" concerning Mr. Lathen's survivor status omitted "the many caveats to . . . ownership" and therefore amounted to "half-truths – literally true statements that create a materially misleading impression." (Div. Mem. at 4-5 (internal quotation marks omitted).) The Division argues further that Mr. Lathen, having "disclose[d] material facts," had "a duty to speak fully and truthfully on those subjects." (Div. Mem. at 4-5 (internal citations omitted; internal quotation marks omitted).) Mr. Lathen, though, made no such misrepresentations or omissions. Moreover, he had no fiduciary relationship with issuers and therefore bore no duty of additional disclosure beyond the statements he made.

Issuers, in drafting their offering documents for survivor's option bonds and CDs, specified what information would be required for them to evaluate and consider a redemption request. As detailed above, each Issuer provided a list (largely similar from Issuer to Issuer) of the materials they wanted to review in connection with redemption requests. (RPFOF ¶¶ 6-11, 207-13; Tr. at 1275:13-1278:5, Div. Ex. 521 at 22 and Div. Ex. 598 at 24.) In doing so, Issuers could have listed any document they could possibly have wanted to review because they – and

5 Given the foregoing, it is not relevant whether Mr. Lathen submitted his redemption request letters on EACM or his personal letterhead. (Div. Mem. at 15.) Moreover, contrary to the Division's assertion that "Lathen understood and intended that brokers would pass his redemption letters onto the issuers," Mr. Lathen's brokerage firms did nothing of the sort. (Div. Mem. at 15 n. 12.) Rather, they received Mr. Lathen's redemption request letters and then prepared their own letters (which may have incorporated the contents of Mr. Lathen's letter), which they, in turn, independently submitted to Issuers.

they alone – determined that list of documents. In other words, if Issuers had wanted additional information or documents, they could have obtained them simply by so specifying in their offering documents. By way of example only, Issuers could have asked for any contracts or agreements impacting upon the relationship between joint tenants or any documents reflecting financing arrangements related to a joint account. But no Issuer did.

That Mr. Lathen did not affirmatively disclose all of the circumstances of his relationship with Participants as reflected in the various Participant Agreements or his relationship with the Fund – that is, the circumstances that the Division claims constitute actionable omissions (Div. Mem. at 4-5) – where he was not required to does not render the information he did provide misleading. Rather, disclosure is required under Section 10(b) and Rule 10b-5 (and Section 17(a)) "only when necessary 'to make [the] statements made, in the light of the circumstances under which they were made, not misleading.'" Matrixx Initiatives, Inc. v. Siracusano, 563 U.S. 27, 44-45 (2011) (citing 17 C.F.R. 240.10b-5(b)).

Here, the information Mr. Lathen provided to his brokerage firms which, in turn, was communicated to Issuers was, as detailed above, directly responsive to the information those Issuers requested in their offering documents. (Tr. at 186:6-19 and 223:3-11.) Put differently, Mr. Lathen (through his brokerage firms) gave issuers exactly what they asked for. And, when issuers asked for more information, Mr. Lathen gave them that additional information, too. (See, e.g., Tr. at 183:23-184:12, 321:12-21 and 296:4-6.) In an important exchange with this Court, one of Mr. Lathen's former attorneys, Robert Flanders, formerly of the Rhode Island Supreme Court and Hinckley Allen & Snyder LLP, articulated his basis for concluding that Mr. Lathen made no misrepresentations or omissions to Issuers. In particular, Mr. Flanders made the following statements as part of a longer dialogue with the Court (Tr. at 2037:17-2041:1):

- "[Issuers] had complete freedom to declare whatever materials they wanted to see as part of a redemption request, such as a death certificate. Or if they had wanted to see a family relationship element. They could have put that in their documents."

- "[M]y advice to Mr. Lathen was to give them exactly that. Anything else that they weren't requiring was – they had themselves deemed not to be important or material, and, therefore, there was no need for him to go beyond that."

In any event, Mr. Lathen's statements regarding account ownership in letters to his brokerage firms were identical to what those brokerage firms, as the authoritative voice on the question of account ownership, "told" Issuers and Trustees regarding beneficial ownership of the Joint Tenancy Accounts. Those statements were neither false nor misleading because the information omitted from them – Mr. Lathen's relationship with the Fund and Participants — would not have changed the meaning of the statements made by the brokerage firms or himself regarding ownership of the Joint Tenancy Accounts. See McDonald v. Kinder-Morgan, Inc., 287 F.3d 992, 998 (10th Cir. 2002) (duty to disclose only arises where statement made is material and omitted fact is material to the statement in that it alters the meaning of the statement) (internal quotation marks omitted).

Additionally, it bears noting that "an omission is actionable under the securities laws only when the [party] is subject to a duty to disclose the omitted facts." Stratte-McClure v. Morgan Stanley, 776 F.3d 94, 101 (2d Cir. 2015). See also Chiarella v. U. S., 445 U.S. 222, 230 (1980) (same). Here, the Division failed to establish through any testimony or evidence that Mr. Lathen and Issuers shared a fiduciary relationship. As such, Mr. Lathen had no affirmative duty to disclose details about his relationship with Participants, including the Participant Agreements or other details regarding the Joint Tenancy Accounts or the financing arrangement with the

Fund. See Stratte-McClure, 776 F.3d at 101 ("an omission is actionable under the securities laws only when the [party] is subject to a duty to disclose the omitted facts").

The Division argues that Mr. Lathen's lack of fiduciary duty is irrelevant because he had a duty to speak fully once he started speaking. (Div. Mem. at 3-4.) Even if true, such a duty would arise only if the prior statement was material and the omitted information rendered it misleading. Neither circumstance is present here. See Winer Family Trust v. Queen, 503 F.3d 319, 330 (3d Cir. 2007) (no duty to disclose information related to a public statement where statement itself was "true" and nondisclosure of additional information did not render the statement "misleading or untrue").

D. • The Division's Contentions Concerning Beneficial Ownership of the Bonds and CDs in the Joint Tenancy Accounts Fail

Notwithstanding the foregoing, the Division makes several contentions as to why "[n]either Participants nor Lathen beneficially owned the bonds" in the Joint Tenancy Accounts and why the Division believes the statements in Mr. Lathen's redemption letters "were, at least, highly misleading." (Div. Mem. at 4.)

First, the Division contends that the "various side agreements into which Respondents entered destroyed the joint tenancies that Respondents attempted to create." (Div. Mem. at 4.) The Division is wrong. Rather, given the current state of the law, there can be no doubt but that Mr. Lathen and Participants formed true and legally valid JTWROS, regardless of any "side agreements." In fact, Mr. Lathen took great care in constructing his "side agreements" with the express purpose of preserving the legal validity of his joint tenancies.

In particular and pursuant to the terms of the Participant Agreements, Mr. Lathen and the Participants (and sometimes others) opened Joint Tenancy Accounts. Their doing so created presumptively valid JTWROS because N.Y. Banking Law § 675 specifically provides that a JTWROS is formed by the method by which Mr. Lathen and Participants opened the Joint Tenancy Accounts. See In re Estate of Farrar, 129 A.D.3d 1261, 1263 (3d Dep't 2015) ("[w]here an account has been formed in compliance with [§ 675], it is presumed, absent a showing of fraud or undue influence, that the depositors intended to create a joint tenancy with rights of survivorship") (internal quotation marks omitted). This presumption applies equally whether the account is a standard joint savings account or a joint brokerage and investment account. In re Estate of Corcoran, 63 A.D.3d 93, 97 (3d Dep't 2009). Moreover, the case law makes clear that there are only very limited bases by which the statutory presumption of a valid JTWROS can be overcome, none of which are present here.

Mr. Lathen and Participants entered into the Participant Agreement, which expressly provided that a Joint Tenancy Account would be opened and that the phrase "joint tenancy with rights of survivorship" or the letters "JTWROS" would appear on the face of those accounts, thereby establishing valid JTWROS under New York law. (RPFOF ¶¶ 138-39.) Once the facts giving rise to the presumption of validity are established, "the burden then shifts to the party challenging the survivorship rights 'to establish – by clear and convincing evidence – fraud, undue influence, lack of capacity or . . . that the account[] [was] only opened as a matter of convenience and [was] never intended to be [a] joint account[].'" Farrarr, 129 A.D.3d at 1264 (quoting Corcoran, 63 A.D.3d at 93).

The Division offered no evidence or argument to suggest that there was fraud, undue influence or lack of capacity in the formation of the Joint Tenancy Accounts. Proving the invalidity of those Joint Tenancy Accounts therefore turns on establishing that they were convenience accounts. But they were not convenience accounts.

A convenience account is an account established for the convenience of the account's holders – typically, for example, a grandparent, say, adding a grandson to an account for the convenience of having the grandson write checks and pay bills on the grandparent's behalf – and is not intended to create a right of survivorship. See, e.g., Farrar, 129 A.D.3d at 1264; Matter of Stalter, 270 A.D.2d 594, 597 (3d Dep't 200). Here, by contrast, both the brokerage account agreement and the Participant Agreement expressly provided for bilateral survivorship. That survivorship right was integral to why Mr. Lathen and Participants established the Joint Tenancy Accounts. Moreover, that intent was also disclosed to investors in the Fund. (See Div. Ex. 365 at 27-28.)

No legal precedent exists for the proposition that a separate contract between two owners of a JTWROS account, especially a contract in which survivorship is expressly preserved, eviscerates the presumption of validity or otherwise vitiates the intent of the parties to form a valid JTWROS. This is true regardless of the particular details of how the accounts were funded. See Corcoran, 270 A.D.2d at 596 (concluding that circumstantial proof, such as the fact that only one tenant contributed money to the account, is "hardly . . . conclusive" as to the intent of the parties); In re Estate of Grancaric, 91 A.D.3d 1104, 1105-06 (3d Dep't 2012) (finding no convenience account where a third party funded the account and neither joint owner had true economic interest in account because the intent to create JTWROS was demonstrated).

The Division's arguments regarding the import of specific provisions of the Participant Agreements as regards the validity of the joint tenancies Mr. Lathen formed with Participants are unpersuasive. For instance, the Division notes that Participants, in some versions of the Participant Agreement, agreed not to "pledge, borrow against, or withdraw funds from the" Joint Tenancy Accounts and agreed to permit Mr. Lathen to open brokerage accounts under their names. (Div. Mem. at 4.) Likewise, Participants provided Mr. Lathen with a limited power of attorney and authorized him to transfer assets into and out of the Joint Tenancy Accounts indicates. (Id.) No authority exists, though, and the Division offered no authority supportive of the proposition that, the contents of an agreement like the Participant Agreement or a legally valid Power of Attorney somehow vitiates an otherwise valid JTWROS.

Second, the Division argues that Mr. Lathen's redemption request letters contradicted what he told Fund investors concerning ownership of the survivor's option bonds and CDs in the Joint Tenancy Accounts. (Dev. Mem. at 5.). The Division is wrong. Mr. Lathen clearly and consistently told Fund investors that he was forming JTWROS with Participants. Indeed, he explicitly advised Fund investors of the risks and consequences to them if he should predecease a Participant. (Div. Exs. 365-70 – PPMs for the Fund.)

Third, the Division asserts that Mr. Lathen's redemption letters were misleading because "the attributes of beneficial ownership resided with the fund." (Div. Mem. at 4.) The Division is, again, wrong. The governing documents for the bonds make clear that the "beneficial owner" is the titled account holder in the brokerage firm's books and records. (RPFOF ¶¶ 196-206; Div. Ex. 521 (Duke Energy); Div. Ex. 598 (Prospect Capital).) Indeed, this is the reason that redemption documentation submitted to Issuers or Trustees includes a brokerage account statement and broker election form substantiating a decedent's beneficial ownership of a bond at the time of death. Under this framework, Mr. Lathen and Participants – as joint tenants – were beneficial owners pursuant to the terms of Issuers' governing documents themselves. Furthermore, it bears noting that those governing documents typically provided that the death of "a tenant by the entirety, joint tenant or tenant in common will be considered the death of a beneficial owner." (Tr. at 719:20-25, 769:18-23 and 1177:18-25.)

Notwithstanding the foregoing, the Division posits that the Fund was the beneficial owner of the bonds and CDs in the Joint Tenancy Accounts because it was entitled to repayment of the loans it made to Mr. Lathen and/or Participants and a share of the profits generated in those accounts. But only Mr. Lathen and the Participant – not the Fund – were legally authorized to sell, transfer or otherwise dispose of assets in the Joint Tenancy Accounts because they are the only individuals with legal title to those assets (according to the brokerage firm account documents and internal policies).

Finally, what Mr. Lathen and the Participant agree to do with the proceeds of a bond or CD after redemption has no bearing on whether they were beneficial owners of those assets during their lives, at the time of a Participant's death or at the time of redemption.

E. w Even If the Eden Arc Respondents Made Misrepresentations w or Omissions to Issuers, They Were Not Material w

Even if the Division established that the Eden Arc Respondents made misrepresentations or omissions to Issuers in connection with bond and/or CD redemptions (which it did not), the Division still did not establish that any such misrepresented or omitted information was material to Issuers or Trustees.

First, Mr. Lathen's statements in his redemption letters regarding account ownership were not material to Issuers. Rather, as detailed above and as detailed in their governing documents, Issuers (and Trustees) relied on the brokerage firm's books and records (the account statements and election form) as the authoritative voice on beneficial ownership. No Issuer or Trustee testified at trial that they saw, much less materially relied upon, anything other than those books and records, including Mr. Lathen's redemption request letter, with regards to account ownership determination.

Second, as detailed above, the omitted information did not render the statements in Mr. Lathen's redemption request letter untrue or misleading. He therefore had no legal obligation to clarify those statements by providing any omitted information, particularly considering the "circumstances" under which his statements had been made. Here, Mr. Lathen's statements were made in letters sent to his brokerage firms for the express purpose of requesting that they seek redemption of bonds or CDs on behalf of Mr. Lathen. They were not made to Issuers (or Trustees) and were not made for purposes of establishing account ownership. These circumstances strongly support the conclusion that the omitted information did not make his actual statements untrue or misleading. And such a finding should end the inquiry.

Even if this Court concludes that Mr. Lathen's statements were rendered untrue or misleading by the omitted information, though, the Division still did not establish that such omitted information would be material to the issuers under the "reasonable investor" standard governing such interpretation. Initially, nothing in Issuers' governing documents indicates that any of the omitted information would be relevant to any Issuer (or Trustee) redemption decision. Indeed, Issuers' governing documents are silent on the topic of "side agreements" or financing agreements. Rather, only title at the brokerage firm is relevant under Issuers' governing documents for purposes of establishing beneficial ownership. Also, Issuer testimony at trial is irrelevant to a "reasonable investor" inquiry of materiality. In particular, the redemptions at issue herein are governed by Issuers' governing documents and this Court should confine its materiality analysis to the "four corners" of those documents. Under any fair reading of those contracts, the omitted information is *per se* immaterial.

Finally, any Issuer testimony regarding the purported materiality of information concerning Mr. Lathen's contractual relationship with Participants and the Fund must be weighed against Mr. Lathen's experiences with Issuers who did not testify at trial, the written declarations of other Issuers in the Staples case, and the Issuers/Trustees with whom the Division spoke during its investigation but who the Division did not to call to testify at trial. (RPFOF ¶¶ 169-89.) Mr. Lathen successfully redeemed bonds with scores of other issuers, dozens of which were explicitly aware of the existence of the Participant Agreement (after he voluntarily changed his disclosures in his redemption request letters in December 2015). (RPFOF ¶¶ 176-77.) At least three issuers (Barclays, CIT and BMO) even saw the Participant Agreement. (RPFOF ¶¶ 169, 172, 173.) Three of Mr. Lathen's most profitable bond issuers (GMAC, Springleaf and MBIA) explicitly told the Division in connection with the Staples case that they would still have redeemed the Staples bonds even if they had known about the Staples' side agreements. (RPFOF ¶ 187.) Several other Issuers, including Bank of America, Countrywide, and Societe Generale, delegated validity determination decision to their trustee, Bank of New York ("BONY"), the largest bond trustee in the marketplace. BONY itself told the SEC in the Staples case that they relied on account titling to determine beneficial ownership, just as Mr. Lathen maintains. (Id.) Staff of the Division had multiple conversations with BONY employees regarding Mr. Lathen. Notably, the Division did not call any BONY witness to testify at trial, even though profits realized by Mr. Lathen under BONY-administered bonds dwarfed the profits of issuers that the SEC did call to testify. Also of note, BONY continued to approve Mr. Lathen's redemption requests well after they were contacted by the SEC. (Id.)

The totality of this evidence suggests that the Issuers that the Division called to testify at trial do not reflect what a typical Issuer would do under the same circumstances, much less what a disinterested "reasonable investor" might do. (RPFOF ¶¶188-89.) In any event, any liability imposed by the Court should be strictly limited to the Issuers who testified at trial.

F. Œ The Eden Arc Respondents' Statements to Issuers Were Not Made In Connection With the Purchase or Sale of Securities and Were Not Made In Connection With the Offer or Sale of Securities

Contrary to the Division's contention, Mr. Lathen's statements to his brokerage firms were not made in connection with the purchase or sale of (or the offer or sale of) securities. The Division therefore cannot establish this jurisdictional requirement for the alleged violations of the federal securities laws set forth in the OIP.

In particular, the law has long recognized the functional differences between a redemption and a sale. As the U.S. Supreme Court held in 1939, "[p]ayment and discharge of a bond is neither sale nor exchange within the commonly accepted meaning of the words." United States v. Fairbanks, 306 U.S. 436, 437 (1939). Even "early" redemption is not a sale. "[I]n common speech a maker's paying a note prior to maturity in accordance with its terms would not be regarded as a 'purchase.'" SEC v. Sterling Precision Corp., 393 F.2d 214, 217 (2d Cir. 1968).

Other courts have similarly viewed the redemption of debt securities. For example, the Third Circuit held that "[b]etween the redemption of a bond and the sale or exchange thereof, there is a clear distinction. Such redemption is merely the payment of an obligation according to its terms. It is in no way a sale or exchange." Felin v. Kyle, 102 F.2d 349, 350 (3d Cir. 1939). See also Bingham v. Commissioner, 105 F.2d 971, 972 (2d Cir. 1939) ("Any theoretical concept of a sale of the notes to the maker in return for what he gave up to get them back must yield before the hard fact that he received nothing which was property in his hands but had merely succeeded in extinguishing his liabilities by the amounts which were due on the notes. There was, therefore, no sale of the notes to him in the ordinary meaning of the word and no exchange of assets for assets since the notes could not, as assets, survive the transaction").

Here, the Division does not claim that Mr. Lathen sold any of the bonds or CDs at issue to third parties. Instead, the Division asserts that his redemptions from Issuers constituted a purchase or sale of a security. According to the law in this circuit and elsewhere, though, such a transaction simply does not constitute a "purchase" or a "sale."

Other than its citations to general principles of securities law, the Division relies principally on two cases – Drachman v. Harvey, 453 F.2d 722 (2d Cir. 1971) and Marcus v. Quattrochi, Case No. 08-CV-9514 (VB), 2014 WL 521340 (S.D.N.Y. Feb. 4, 2014) – to support its contention that Mr. Lathen's redemption of survivor's option bonds constitutes a purchase or sale of securities. Both cases, though, are inapposite because the Division relies on both to purportedly establish the meaning of the phrase "in connection with" – an issue of no relevance here. Rather, the relevant issue here is whether Mr. Lathen's redemption of survivor's option bonds and CDs constituted a "purchase" or "sale" of securities. As detailed above, his redemptions do not.

II.

THE DIVISION HAS NOT ESTABLISHED SCIENTER

The Division must establish that the Eden Arc Respondents acted with scienter to establish the securities fraud claims alleged in the OIP – that is, that they, with either an "intent to deceive, manipulate or defraud" or a "reckless disregard for the truth," made a misleading statement or omission of a material fact. (Div. Mem. at 10.) The only such statements at issue herein are, again, those that Mr. Lathen made in the redemption requests he sent to his brokerage firms. Mr. Lathen's dealings with his attorneys (and certain other relevant facts) conclusively demonstrate that, in making those statements, Mr. Lathen lacked the requisite level of intent required to establish any violation of the antifraud provisions of the federal securities laws.

A. Evidence of Good Faith in the Form of Following Advice Received From Counsel

A "good faith" defense based on advice received from counsel is "simply a means of demonstrating good faith and represents possible evidence of an absence of any intent to defraud." United States v Peterson, 101 F.3d 375, 381 (5th Cir 1996). See also Howard v SEC, 376 F.3d 1136, 1147-1148 (D.C. Cir. 2004) ("Reliance on the advice of counsel need not be a formal defense; it is simply evidence of good faith, a relevant consideration in evaluating a defendant's scienter"). Indeed, as one former SEC commissioner put it, the "reliance defense . . . is not really a defense at all but simply some evidence tending to support a defense based on due care or good faith." Bevis Longstreth, Reliance on Advice of Counsel as a Defense to Securities Law Violations, 37 Bus. Law 1185, 1187 (1982).

Here, Mr. Lathen sought the advice of counsel almost from the inception of his business and continued to receive guidance from attorneys, including Robert Grundstein of Katten Muchin & Rosenman ("Katten"), Eric Roper of Gersten Savage, Robert Flanders and Margaret Farrell of Hinckley Allen & Snyder ("Hinckley Allen") and Kevin Galbraith – throughout the evolution of his investment strategy. Mr. Lathen made full disclosure of his investment strategy to all such attorneys. (See RPFOF ¶¶ 30, 63, 64, 109, 131, 132.) And, Mr. Lathen reasonably relied on such attorneys, who provided him with the following advice (among other advice) concerning his investment strategy:

- Katten understood that a valid joint tenancy was "a necessary conduit for [Mr. Lathen] to implement [his investment] strategy" and Mr. Grundstein, based on advice he received from Katten's Trust & Estates Department, advised Mr. Lathen that his plan for forming the Joint Tenancy Accounts "would" result in the formation of "perfectly good joint tenanc[ies]." (RPFOF ¶ 38.)

- Mr. Roper drafted the Fund's Private Placement Memoranda, Limited Partnership Agreement and Subscription Agreement. (RPFOF ¶ 110.) Significantly, he also drafted the Investment Management Agreement and was responsible for developing and adding language to that agreement identifying and designating Mr. Lathen as a "nominee" for the Fund. (RPFOF ¶ 112.) With full comprehension of Mr. Lathen's investment strategy and the risks of issuer-conflict, Mr. Roper never advised Mr. Lathen to provide additional disclosures to Issuers or Trustees. (RPFOF ¶ 117-20.)

- Mr. Lathen received legal advice from Hinckley Allen concerning and relating to the structure of, and structuring of, his investment strategy. (SFOF ¶ 88.) Mr. Flanders believed there was nothing inappropriate about Mr. Lathen's investment strategy. (RPFOF ¶ 67.) He also advised Mr. Lathen that there were no disclosure requirements to Issuers and Trustees other than the documents Issuers specifically requested in their "adhesion contracts," referring to the bond prospectuses and CD disclosure statements. (RPFOF ¶ 71-72, 75.) Mr. Flanders also advised Mr. Lathen that he did not believe Mr. Lathen was required to disclose "side agreements" pertaining to the Joint Tenancy Accounts to Issuers or Trustees because the Issuers themselves "did not deem it to be material" when they compiled their lists of required materials for redemptions. (RPFOF ¶ 72.)

- Ms. Farrell testified that she did not believe Mr. Lathen was engaging in any improper or unlawful conduct and that she would have told Mr. Lathen (and terminated her representation of him) if she had believed same. (RPFOF ¶ 85.) She also shared Mr. Flanders' view that there was no affirmative requirement for Mr. Lathen to make additional disclosures to Issuers or Trustees beyond what Issuers asked for. (RPFOF ¶ 88.) And she also rendered ongoing advice to the Eden Arc Respondents regarding their investment strategy and business model because she is a corporate transactional attorney and the firm's "go-to person" on securities law. (RPFOF ¶ 89.)

- Mr. Galbraith concluded, and advised Mr. Lathen, that Mr. Lathen's joint tenancies were valid under N.Y. Banking Law § 675 and the relevant common law. (RPFOF ¶¶ 133-34.)

In addition, it bears noting that none of those attorneys ever advised Mr. Lathen that the Joint Tenancy Accounts were anything but true and legally valid JTWROS. None of those attorneys ever advised that Mr. Lathen's investment strategy was anything but lawful. And, none of those attorneys ever suggested that Mr. Lathen would be making a false statement by representing himself as a surviving joint owner of the Joint Tenancy Accounts. Finally, it was clear from the testimony of Mr. Lathen's attorneys that their views regarding the lawfulness of his business have not changed since the time they provided that advice.

B. Other Evidence of Good Faith

In addition to the foregoing, a number of other factual indicators support the Eden Arc Respondents' claim of good faith – indicators that further undermine any claim that Mr. Lathen acted with scienter (or, as detailed below, acted negligently).

First, in addition to his extensive consultation with legal counsel, Mr. Lathen worked with and sought assistance from a bevy of financial professionals, including compliance professionals, auditors, independent administrators, third party marketers and brokerage firms. All of these professionals were fully aware of the details of Mr. Lathen's investment strategy. None ever hinted that they thought Mr. Lathen's investment strategy might violate the federal securities laws. (RPFOF ¶¶ 214-20, 233-37.)

Second, not even the Division alleges that investors in the Fund or Participants were defrauded. Rather, Mr. Lathen was completely transparent with both categories of individuals, including with respect to the risks associated with his investment strategy. None questioned the legality of his investment strategy. (RPFOF ¶¶ 221-24, 238-42.)

Third, Mr. Lathen operated in the public spotlight and openly invited regulatory scrutiny. (RPFOF ¶¶ 225-30.) In particular, Eden Arc Capital Management, LLC ("EACM") voluntarily registered with the SEC as an investment advisor. (RPFOF ¶¶ 226; See, e.g., Div. Exs. 1, 2, 3, et seq.) As such, EACM made regular filings with the SEC and was subject to review and inspection by the SEC. Nobody who thought s/he was engaged in securities fraud would voluntarily register with the very agency charged with investigating securities fraud.

Fourth, when he had a dispute with Goldman arising from its refusal to honor a redemption request, Mr. Lathen went so far as to actually invite governmental scrutiny by filing complaints with the New York State Financial Authority and the Consumer Financial Protection Board. (RPFOF ¶¶ 227-28; Div. Exs. 574, 575, 577, 578 and 590.)

Fifth, Mr. Lathen did not try to fly below Issuers' radar screens. Rather, he often bombarded the same Issuer with multiple, high-value redemption requests from different Participant accounts in short periods of time, virtually guaranteeing scrutiny. (RPFOF ¶¶ 19-20.) He did so because he believed that Issuers were obligated to redeem the bonds he presented for redemption.

Sixth, when an Issuer disputed its redemption obligation, Mr. Lathen, rather than just selling the bonds back in to the market, engaged with that Issuer, explained his strategy and attempted to demonstrate that they had a contractual obligation to honor his redemption request. Indeed, Mr. Lathen even expended significant monies on outside legal counsel (primarily Mr. Flanders and Mr. Galbraith) to advocate his position and attempt to force Issuers to comply with their contractual obligations. Several issuers redeemed his bonds after seeing his "side agreements." (RPFOF ¶¶ 169-79.) And, significantly, several others changed the survivor's option language in their governing documents after their dealings with Mr. Lathen. (RPFOF ¶¶ 180-83.)These interactions underscored in Mr. Lathen's mind the lawfulness of his strategy and the validity of his contractual claims to redemption.

Seventh, when the daughter of a now-deceased Participant, Dennisse Alamo, told Mr. Lathen in 2011 that the Division had contacted her, Mr. Lathen told her to speak freely with the Division because neither he nor she had anything to be afraid of or hide. (RPFOF ¶ 229.)

Eighth, Mr. Lathen sought to educate FINRA, the brokerage firms' primary regulator, about his business model and sought guidance from FINRA to ensure brokerage firms were addressing any concerns which FINRA may have had. (RPFOF ¶¶ 129, 225.)

Finally, Mr. Lathen relied on his attorneys' interpretation of the law, including N.Y. Banking Law § 675 and the case law in New York relating to JTWROS. Based on the significant guidance he received, it was perfectly reasonable for Mr. Lathen to believe in good faith that his joint tenancies were valid and legally effective.

The bottom line is that Mr. Lathen's actions were wholly inconsistent with what one would expect of an individual who believes that he is engaging in a fraudulent investment scheme. That conduct persuasively negates the intent element – i.e., scienter – of the Division's claim.

C. None of the Eden Arc Respondents Acted Negligently

In addition to scienter, the OIP alleges that the Eden Arc Respondents acted negligently in violation of Section 17(a)(3) of the Securities Act of 1933.

The Division, however, offered no evidence, elicited no testimony and otherwise presented no substantive argument (either before or after trial, including in the Division's Post-Trial Brief) concerning the Eden Arc Respondents' purported negligence. Rather, the Division essentially claims that it established negligence because it established scienter (which, in any event, it did not establish). (Div. Mem. at 17-18.) Absent same, this Court should dismiss the Division's claimed violations of Section 17(a)(3). See Matter of David J. Montanino, Securities

Act Release No. 773 (S.E.C. April 16, 2015) (Grimes, J.) ("The fact that liability under paragraphs (2) and (3) can be based on negligence is largely academic in this matter. The Division's entire presentation from the OIP to post-hearing briefing, has been based on assertions that Montanino acted with scienter. In post-hearing briefing, the Division has done nothing more than note that negligence is a sufficient predicate for finding liability under some of the provisions at issue. Negligence is thus not at issue") (internal citations omitted); Matter of John Thomas Capital, Securities Act Release No. 9703, 2015 SEC LEXIS 257, at *3 (S.E.C. Jan. 20, 2015) ("the Commission . . . is not obliged to independently sift through the record to identify and develop arguments that a party fails to advance with clarity").

III.

EDEN ARC CAPITAL MANAGEMENT, LLC DID NOT VIOLATE THE CUSTODY RULE AND MR. LATHEN DID NOT AID, ABET OR CAUSE ANY VIOLATION OF THE CUSTODY RULE

A. The Provisions of the Custody Rule

Section 206(4) of the Investment Advisers Act of 1940 provides that "[i]t shall be unlawful for any investment adviser . . . to engage 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 promulgated thereunder (the "Custody Rule") prohibits investment advisers from having custody of client funds or securities unless the adviser maintains those assets with a qualified custodian "[i]n a separate account for each client under that client's name" or "[i]n accounts that contain only [his] clients' funds and securities, under [his] name as agent or trustee for the clients." 17 C.F.R. § 275.206(4)-2(a). There is no requirement under the Custody Rule, though, to hold client assets that are not funds or securities (as defined by the Custody Rule) in compliance with the provisions of the Custody Rule.

B. w The Division's Allegations Concerning the Custody Rule

The Division makes two claims with respect to the Custody Rule. First, it asserts that the Fund owned the funds and securities in the Joint Tenancy Accounts. (OIP ¶¶ 65-67.) As such, the Division maintains that EACM – the Fund's investment adviser – should have held, but did not hold, those funds and securities in compliance with the Custody Rule. Second, the Division asserts that Mr. Lathen aided and abetted, or caused, EACM's purported violation of the Custody Rule. (Id.) Neither of the Division's claims has merit.[6]

C. Mr. Lathen and Participants, Not the Fund, Owned the Funds and Securities in the Joint Tenancy Accounts

Contrary to the Division's contentions, the Fund did not own the funds and securities in the Joint Tenancy Account, regardless of whether the relationship between the Fund and Mr. Lathen/Participants was governed by the Investment Management Agreement ("IMA") or the Discretionary Line Agreement ("DLA") / Profit Sharing Agreement ("PSA"). Rather, those agreements make clear that Mr. Lathen and Participants owned those assets. As such, the funds and securities in the Joint Tenancy Accounts did not have to be held in a form that complied with the Custody Rule.[7]

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6 In support of its allegations concerning the Custody Rule, the Division makes three claims: (1) the Fund was EACM's client; (2) EACM had custody of the Fund's assets; and (3) the Fund's assets were the funds and securities in the Joint Tenancy Accounts. (Div. Mem. at 20-21.)

The Eden Arc Respondents do not dispute that the Fund was EACM's client or that EACM had custody of the Fund's asserts. As detailed herein, though, Mr. Lathen and Participants, not the Fund, owned the funds and securities in the Joint Tenancy Accounts.

7 That Martin Lybecker, the Division's expert witness, reached the conclusion in his expert report concerning the Custody Rule (Div. Ex. 171) advocated for by the Division is undermined by his testimony at trial. In particular, he conceded that there could not be a violation of the custody rule if an investment advisor did not have custody of client funds or securities (Tr. at 1366:5-15) and repeatedly conceded that several analogous hypothetical circumstances indicate

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First, as detailed above, Mr. Lathen and Participants formed true and legally valid JTWROS when they opened the Joint Tenancy Accounts, regardless of the agreements into which they entered (the Participant Agreement) and regardless of the agreements into which the Fund and Mr. Lathen/Participants entered (the IMA, DLA and/or PSA). As such, Mr. Lathen and Participants had actual legal title to the assets of the Joint Tenancy Accounts, including the funds (i.e., cash) and securities (i.e., survivor's option bonds and CDs) held therein. Indeed, from the perspective of New York law, the agreements with the Fund have no impact on the question of who has legal title to the funds and securities in the Joint Tenancy Accounts.[8]

Second, from the perspective of the brokerage firms that held the Joint Tenancy Accounts, Mr. Lathen and Participants were the only individuals whose names appeared on the account documents and therefore were the only persons who owned and had legal title to the Joint Tenancy Accounts and the assets therein. None of the brokerage firms that held the Joint Tenancy Accounts would have accepted a buy, sell or transfer order from anyone other than Mr. Lathen or a Participant, including, for example, a representative of the Fund. Thus, from the

(... continued)

that the Fund does not own the bonds and CDs in the Joint Tenancy Accounts. (Tr. at 1366:16-1367:9).

8 To the extent that this Court finds that the IMA and its "nominee" language undermines the Eden Arc Respondents' position concerning whether the Fund is an owner of the bonds and CDs in the Joint Tenancy Accounts, it should initially note that Participants were not a party to the IMA. It therefore would not have been possible to register the accounts in only the Fund's name because the Fund was not the sole owner of the Joint Tenancy Accounts and the assets therein. In any event, as detailed above, Mr. Lathen relied in good faith on advice received from Eric Roper of Gersten Savage concerning the structure of, and structuring of, his investment strategy using the IMA and it's "nominee" language. Indeed, Mr. Roper prepared the IMA and came up with the idea "nominee" language and structure for Mr. Lathen. The same applies to Mr. Lathen's reliance in good faith upon Margaret Farrell of Hinkley Allen & Snyder concerning operation of Mr. Lathen's investment strategy using the DLA, which her firm created for Mr. Lathen.

brokerage firms' perspectives, the terms of IMA, DLA and PSA are not relevant to the question of who owned the Joint Tenancy Accounts and the funds and securities therein.

Third, the same applies to taxes. Both the state and federal governments recognize Mr. Lathen and Participants, not the Fund, as the individuals who earned taxable income from the Joint Tenancy Accounts. Thus, from the perspective of the "real world," Mr. Lathen and Participants, and Mr. Lathen and Participants only, owned the Joint Tenancy Accounts and all the funds and securities therein. The fact that Mr. Lathen may have allocated out incomc from his tax return to the Fund does not change the fact that he and Participants were the owners of the Joint Tenancy Accounts and funds and securities therein from a tax perspective.

Fourth, the Division improperly conflates receipt of the economic benefits flowing from the funds and securities in the Joint Tenancy Accounts with ownership of those funds and securities. (Div. Mem. at 21-22.)[9] Simply put, ownership of the assets in the Joint Tenancy Accounts by Mr. Lathen and Participants is not vitiated because they entered into contracts pursuant to which they agreed to transfer the proceeds of the funds and securities in those accounts to the Fund. Put differently, the Fund does not own the funds and securities in the Joint Tenancy Accounts just because they benefit financially from them. Indeed, the Fund does not need to own those assets to benefit from them.[10] Moreover, if Mr. Lathen were to predecease

[9] The Division's conflating of ownership and economic interest applies to both the period of time in which the IMA was in effect (pre-January 2013 to 2016) and the period of time in which the DLA and PSA were in effect (after 2016).

[10] That, for example, "EACM's Form ADV 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," or that the "Fund paid all brokerage and clearing charges" associated with the Joint Tenancy Accounts, has no bearing on the question of whether Mr. Lathen and

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a Participant, the Fund's economics would not reflect ownership because the assets in the Joint Tenancy Accounts would become the property of the Participant by operation of law – that is, by operation of the JTWROS into which they entered.

Finally, statements and representations by the Fund concerning its purported ownership of the funds and securities in the Joint Tenancy Account (whether in the Fund's Private Placement Memoranda, the Fund's financial statements or EACM's representation letter to its auditors) could not possibly impact upon the identity of the true owner of such assets, even if they are inconsistent with same.[11]

D. The Fund's Assets Were Not Subject to the Custody Rule

As detailed above, Mr. Lathen and Participants, not the Fund, owned the funds and securities in the Joint Tenancy Accounts. The Fund, in turn, owned assets that are not subject to the Custody Rule. Specifically, the Fund's assets were advances to Mr. Lathen, loans to Mr. Lathen (and in some cases Mr. Lathen and Participants) and the right to share in the profits of the Joint Tenancy Accounts. (Div. Exs. 72, 183-85, 190-93.)

While the IMA was effective (Joint Tenancy Accounts established under Participant Agreements executed before January 2013), the Fund advanced cash to Mr. Lathen "as nominee for and on behalf of the Partnership." (Div. Ex. 191.) Mr. Lathen, in turn, used that cash to purchase (with Participants pursuant to the Participant Agreement) survivor's option bonds and CDs in the Joint Tenancy Accounts. No document other than the IMA itself

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Participants owned the funds and securities in the Joint Tenancy Accounts. (Div. Mem. at 21-22.)

11 Likewise, though Respondents dispute the Division's assertion that the fund "held itself out as owner of the asserts in the joint accounts in its PPM . . . Fund financials . . . and in EACM's management representation letter to its auditors" (Div. Mem. at 21), such statements would – even if accurate – have no bearing on Joint Tenancy Account ownership.

evidences those advances to Mr. Lathen – no promissory note and no other form of written debt obligation. As such, it cannot be reasonably argued that that contractual obligation or the IMA itself is a fund or security subject to the Custody Rule. Rather, it is, at most, a promise to repay with which Mr. Lathen and Participants might comply (and fulfill their contractual obligations) or might breach (and risk suit for breach of contract).

Likewise, while the original DLA and PSA (Div. Ex. 190 and Div. Ex. 72, respectively) was effective (Joint Tenancy Accounts established under Participant Agreements executed between January 2013 and January 2015), the Fund loaned cash to Mr. Lathen which he used to purchase (with Participants pursuant to the Participant Agreement) survivor's option bonds and CDs in the Joint Tenancy Accounts. Those loans were evidenced by a Promissory Note. (Div. Ex. 193.) Pursuant to the terms of the DLA, the Fund owned that Promissory Note, not the funds and securities in the Joint Tenancy Accounts themselves. The same applies to the subsequent DLA (between the Fund, Mr. Lathen and Participants) (e.g., Div. Exs. 183, 184 and 185), though such subsequent DLAs were not evidenced by Promissory Notes.

Perhaps in anticipation of the Eden Arc Respondents' arguments, the Division asserts that the aforementioned Promissory Note was a certificated security and should have been maintained at a qualified custodian. However, the Promissory Note bore no resemblance to a certificated security. It was non-negotiable, non-transferable and did not even reflect a specific dollar amount. (Div. Ex. 193; Tr. at 3675:18-3677:24.) Additionally, the Promissory Note was payable to the Fund and only the Fund, not to "holder" or bearer. (Tr. at 3676:11-13.) Finally, there was no ownership registry of the Promissory Note which would evidence record ownership, as would be typical for a certificated security.

In short, the Promissory Note was not a security, much less a certificated security. As such, and contrary to the Division's contention, the Promissory Note was, at most, a privately offered uncertificated security which is plainly not subject to the Custody Rule. 17 C.F.R. § 275.206(4)-2(b)(2).[12] Even if the Court were to find that the Promissory Note was a privately offered, certificated security, it would still be exempt from being maintained with a qualified custodian based on the SEC's own updated guidance it issued in August 2013 (See https://www.sec.gov/divisions/investment/guidance/im-guidance-2013-04.pdf.)

Finally, the Division now asserts (for the first time in its Post-Hearing Brief) that EACM was not in compliance with the Custody Rule because it did not circulate audited financials for fiscal 2015. That assertion is patently false. EACM withdrew from SEC registration in February 2016 (Tr. at 559:5-15), before the 120 day deadline to circulate audited financials for fiscal year 2015. EACM therefore was fully compliant with the Custody Rule at the time of its registration withdrawal.

E. o Mr. Lathen Neither Aided Nor Abetted Nor o Caused Any Violation of the Custody Rule o

As detailed above, EACM did not violate the Custody Rule. Absent such a primary violation, Mr. Lathen cannot be found to have aided and abetted any violation of the Custody Rule. See SEC v. DiBella, 587 F.3d 553, 566-67 (2d Cir. 2009) (aiding and abetting liability is established when: (1) there has been a primary violation; (2) the alleged aider and abettor provided substantial assistance to the primary violator; and (3) the alleged aider and

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12 The SEC website's explains this concept. See "Staff Responses to Questions About the Custody Rule," dated September 1, 2013 (found at http://www.sec.gov/divisions/investment/custody_faq)030510.hrm (explaining that if an investment adviser manages client assets that are not funds or securities, Rule 206(4)-3 does not apply, as it only applies to client funds and securities). The Division's expert witness, Martin Lybecker, confirmed the same. (Tr. at 1366:5-15.)

abettor provided such assistance with the necessary state of mind); Graham v. SEC, 222 F.3d 994, 100 (D.C. Cir. 2000) (same). Likewise, absent a primary violation, Mr. Lathen cannot be found to have caused any violation of the Custody Rule. See Matter of Robert M. Fuller, Rel. No. 33-8273, 2003 WL 22016309, at *4 (Aug. 25, 2003) ("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). It also bears noting that the Division's expert witness, Martin Lybecker, confirmed in his testimony that his expert report did not opine upon the question of Mr. Lathen's purported liability for violations of the Custody Rule. (Tr. at 1360:19-1362:23.)

Additionally, even if this Court should find that EACM violated the Custody Rule (which it should not), it should still find that Mr. Lathen did not aid or abet, or cause, any such violation because he did not, for the reasons detailed above, have the requisite level of scienter required to aid or abet, or cause, a violation of the Custody Rule. See Matter of vFinance Invs., Inc., Rel. No. 62448, 2010 WL 2674858, at *13 (S.E.C. July 22, 2010) (scienter is satisfied if a respondent knew of or recklessly disregarded wrongdoing and his/her role in furthering it). Rather, as detailed above, Mr. Lathen acted in good faith at all times and believed that the Fund did not own funds or securities.[13]

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[13] Notwithstanding the inapplicability of the Custody Rule to the Joint Tenancy Accounts, it bears noting that EACM employed numerous safekeeping procedures consistent with the Custody Rule, including the following: (A) all accounts were maintained at a Qualified Custodian; (B) all accounts were reconciled on a monthly basis by the Fund's administrator, Integrated Investment Solutions; (C) the Fund was audited on an annual basis by Eisner Amper, a PCAOB registered accounting firm, with such audited financials delivered to Fund investors within 120 days of year end; (D) no EACM employee other than Mr. Lathen, a joint owner of the Joint Tenancy Accounts, had access to the Joint Tenancy Accounts; and (E) the two signature policies of the brokerage firms would not have permitted any withdrawals from the Joint Tenancy Accounts without Mr. Lathen's signature. The safeguards put in place by the Eden Arc

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CONCLUSION

Accordingly and for all of the foregoing reasons, the Eden Arc Respondents respectfully submit that this Court should dismiss the OIP in its entirety as against all of the Eden Arc Respondents.

Dated: New York, NY
May 5, 2017

Respectfully submitted,

CLAYMAN & ROSENBERG LLP

/s/

By: ______________________

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(... continued)

Respondents therefore are substantively identical to the requirements of the Custody Rule because, as the general partner of a pooled investment vehicle such as the Fund, Mr. Lathen's rights to obtain custody of client funds and securities from a Fund-titled brokerage account are indistinguishable from his rights to obtain custody of funds and securities as a joint owner of the Joint Tenancy Accounts. In other words, investors in the Fund would have enjoyed no greater safety under the Division's suggested remedy (e.g., registering the funds and securities in the Fund's name at a qualified custodian) than they had under Mr. Lathen's actual safekeeping practices.

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that on May 5, 2017 I caused a true and correct copy of the attached THE EDEN ARC RESPONDENTS' POST-HEARING BRIEF, dated May 5, 2017, to be served upon the parties listed below via e-mail and UPS Overnight Mail:

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

Brent Fields, Secretary
Office of the Secretary
U.S. Securities and Exchange Commission
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May 5, 2017

VIA E-MAIL AND UPS OVERNIGHT MAIL

Honorable Jason S. Patil
Administrative Law Judge
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Re: In the Matter of Donald F. Lathen, Jr., Eden Arc Capital Management, LLC and Eden Arc Capital Advisors, LLC, Admin. Proc. File No. 3-17387

Dear Judge Patil:

This firm represents respondents Donald F. Lathen, Jr., Eden Arc Capital Management, LLC and Eden Arc Capital Advisers, LLC (the "Eden Arc Respondents") in the referenced matter.

Pursuant to the several Post-Hearing Orders herein, enclosed please find copies of the following documents (all of which are dated May 5, 2017): (1) The Eden Arc Respondents' Post-Hearing Brief; (2) The Eden Arc Respondents' Statement of Facts; (3) The Eden Arc Respondents' Responses and Objections to the Division of Enforcement's Statement of Facts (which addresses the redacted version of the Division of Enforcement's Statement of Facts, filed on April 18, 2017); and (4) The Eden Arc Respondents' Statement of Facts, and Responses and Objections to the Division of Enforcement's Statement of Facts, Concerning Donald F. Lathen, Jr.'s Inability to Pay (which we respectfully submit under seal).

Thank you for your consideration and attention to this matter.

Respectfully submitted,

/s/

Harlan Protass

Encls.

cc: Nancy Brown, Esq. (via e-mail)
Judith Weinstock, Esq. (via e-mail)
Janna Berke, Esq. (via e-mail)
Lindsay Moilanen, Esq. (via e-mail)
Brent Fields, Secretary (via U.S. Mail)