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

ADMINISTRATIVE PROCEEDING
File No. 3-17387

In the Matter of

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

THE EDEN ARC RESPONDENTS' POST-HEARING REPLY BRIEF

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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 Reply Brief.[1]

PRELIMINARY STATEMENT

The Division's Post-Hearing Reply Brief (the "Div. Reply Mem.") boils down to one principal argument: Mr. Lathen's claim of good faith reliance on counsel fails and does not vitiate the Division's assertion of scienter. The Division is wrong.

Initially, it bears noting that the Division failed entirely to address all the indicia of good faith in The Eden Arc Respondents' Post-Hearing Brief (the "Eden Arc Mem.") unrelated to the advice Mr. Lathen received from his attorneys, including, but not limited to, his consultations with a bevy of financial industry professionals (other than his attorneys), his total transparency with Participants, his registration as an investment adviser with the SEC and his aggressive litigation with Issuers who refused his redemption requests (and his challenges to such Issuers short of actual litigation). The Div. Reply Mem. does not rebut these other indicia of good faith, implicitly conceding that they establish Mr. Lathen's good faith and vitiate the Division's claim of scienter.

In any event, as detailed in the Eden Arc. Mem. and as further detailed below, the Division utterly failed to prove that Mr. Lathen acted with scienter – that is, the Division failed to establish that Mr. Lathen, with an intent to deceive, manipulate or defraud, or in reckless disregard for the truth, made any misleading statement or omission of a material fact when he was required to speak.

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[1] The abbreviations herein are the same as those in The Eden Arc Respondents' Post-Hearing Brief, dated May 5, 2017.

Rather, the Eden Arc Respondents established at trial and in their post-trial briefing that, based on (among other things) the advice they received from their attorneys, they acted in good faith at all times. Put differently, the Eden Arc Respondents established at trial and in their post-trial briefing that the Division failed to prove scienter and that, absent scienter, the Division's claims in the OIP fail. See Eden Arc Mem. at 19-24; 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"); United States v Peterson, 101 F.3d 375, 381 (5th Cir 1996) (a good faith reliance on the advice of counsel is "simply a means of demonstrating good faith and represents possible evidence of an absence of any intent to defraud").[2] The Eden Arc Respondents therefore respectfully submit that this Court should dismiss the OIP in its entirety.

ARGUMENT

I.

MR. LATHEN MADE FULL DISCLOSURE TO HIS ATTORNEYS, INCLUDING WITH RESPECT TO ISSUER DISCLOSURES

Contrary to the Division's assertions, Mr. Lathen made full disclosure to his attorneys, including with regard to disclosures to Issuers. Indeed, Mr. Lathen provided such information so that his attorneys could develop a full and complete understanding of his business and, in turn, provide him with well-informed advice as to how to operate his investment strategy in full compliance with the law.

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[2] Also, as detailed in the Eden Arc Mem., the Eden Arc Respondents established that Eden Arc Capital Management, LLC did not violate Section 206(4) of the Investment Advisers Act of 1940 or Rule 206(4)-2 promulgated thereunder (the "Custody Rule") and that Mr. Lathen did not aid or abet, or cause, any violation of the Custody Rule.

More particularly, all of Mr. Lathen's attorneys understood that his investment strategy involved the purchase and redemption of survivor's option bonds and CDs. All of Mr. Lathen's attorneys understood that those financial instruments were governed by written contracts, which contracts specified the documentary requirements for redemption. All of Mr. Lathen's attorneys knew that the formation with Participants of true and valid JTWROS in the form of the Joint Tenancy Accounts was central and critical to the success of his investment strategy. All of Mr. Lathen's attorneys knew that, after its formation, the Fund provided financing to the Joint Tenancy Accounts and that certain other contracts governed those financing arrangements. Moreover, Mr. Lathen's attorneys provided advice and drafted all of the documents pursuant to which Mr. Lathen operated his investment strategy, including the PPM, the Amended PPM, the LPA, the Amended LPA, the IMA, the original DLA and the subsequent DLA. And, finally, Mr. Lathen's attorneys, knowing how important true and legally valid JTWROS were to his investment strategy, continuously advised him on improving the strength of those joint tenancies.

The Division makes three arguments in an attempt at showing Mr. Lathen was not forthcoming with his attorneys. They all fail.

First, the Division argues that Mr. Lathen somehow "curate[d]" the materials he shared with his attorneys in seeking their legal advice (Div. Reply Mem. at 2) – that is, that he purportedly "sought no advice on his disclosures to issuers, and he provided his redemption letters to no lawyers" (Div. Reply. Mem. at 3). The Division's assertion amounts to nothing more than a failed attempt at creating the false impression that Mr. Lathen was not entirely forthcoming with his attorneys because he purportedly did not provide them with information or

documents (his redemption request letters) that the Division today claims (years later and with 20/20 hindsight) he purportedly should have provided.

In fact, Mr. Lathen's disclosures to his attorneys were fulsome and, at the very least, materially complete. That Mr. Lathen may have failed to anticipate the importance of his redemption request letter (to the extent it was not shared with Mr. Lathen's attorneys, either in documentary or oral form) does not change Mr. Lathen's state of mind (or the state of mind of his attorneys) at the time he shared documents and information with his attorneys and received advice from them. Indeed, there is nothing in the record to suggest that Mr. Lathen's attorneys would have rendered different advice, or reached a different conclusion, had he shown them his redemption request letter. Also, it bears noting that the Division has not even offered an argument as to why the redemption request letter was material to the advice provided by any of Mr. Lathen's attorneys and has not offered any argument as either why it was false or misleading, why Mr. Lathen knew or should have known same, or why Mr. Lathen knew or should have known that he would have been required to provide same to his attorneys.[3] In any event, there is nothing in the record to suggest that Mr. Lathen's attorneys would have rendered different advice, or reached different legal conclusions regarding the lawfulness of his investment strategy, if they had reviewed his redemption request letter. Indeed, the Division never asked any of Mr. Lathen's attorneys whether they would have provided different legal advice if they had reviewed his redemption request letter or even if they needed the redemption request letter to provide Mr. Lathen with the legal advice they provided.

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[3] Likewise, the Division's argument that Mr. Lathen did not act in good faith because there was a nine month period in which Ms. Farrell did not see the PSA (that Mr. Lathen drafted) is directly contradicted by Ms. Farrell's testimony, in which she stated that, even after learning of the PSA, she did not believe Mr. Lathen was required to disclose the Participant Agreement to Issuers.

Additionally, it bears repeating that Mr. Lathen's redemption request letter was submitted to his brokerage firms, not to Issuers or Trustees. Thus and to the extent that Mr. Lathen sought or was provided with advice relating to communications with and disclosures to Issuers and Trustees, his redemption request letter was irrelevant because it did not constitute an Issuer (or Trustee) communication. Moreover, the redemption request letter was just that – a letter communicating the fact that an individual was seeking to redeem a survivor's option bond or CDs, not a legal representation as to account or beneficial ownership. Neither brokerage firms nor Issuers nor Trustees relied on the contents of redemption request letters to determine beneficial ownership or make any other factual determination other than that the author of the letter sought redemption. Indeed, it would have nonsensical for them to blindly rely on ownership representations in a form letter when official brokerage firm records are required to substantiate beneficial ownership under Issuers' governing documents.[4]

Rather, as detailed in the Eden Arc Mem., Issuers (and Trustees) used the materials that Mr. Lathen's brokerage firms collected and submitted – such as account statements for the Joint Tenancy Accounts – to determine (among other things) beneficial ownership of the assets in those accounts. See Eden Arc Mem. at 4-6. Thus, Mr. Lathen's redemption letter was in no way material to the redemption process and any failure by Mr. Lathen's attorneys to review same was immaterial.

Even if the redemption letters were somehow deemed to be a material disclosure gap for purposes of Mr. Lathen's good faith reliance on counsel (which they should not), such

[4] Interestingly, the Division makes no attempt to coherently define "beneficial owner." Under virtually any definition of beneficial ownership, including definitions in issuer governing documents, Participants and Lathen were beneficial owners of the instruments in question. As such, the redemption letter statements are objectively true. See Lathen Ex. 1282 (Eden Arc Respondents' Supplemental Wells Submission (with Exhibits), dated March 28, 2016).

gap is corrected by the joint tenancy advice that Mr. Lathen received. As all of Mr. Lathen's attorneys testified, Mr. Lathen genuinely wanted to create valid joint tenancies. While there can be debate regarding whether or not he actually achieved such a result, there can be no debate that he intended to establish valid joint tenancies and that he believed he had established valid joint tenancies. The Division asserts that that joint tenancy advice does not "revive" his advice of counsel defense because it does not solve the problem of his failure to receive advice on his redemption letter. In fact, it does. Mr. Lathen believed, based principally on the advice he received from his attorneys concerning joint tenancies, that the statements he made in the redemption request letter were true and not misleading. Mr. Lathen therefore could not have knowingly or recklessly made the statements at issue in the redemption request letter even if this Court ultimately finds those statements to have been materially false or misleading.

The Division also wrongly claims that Mr. Lathen did not receive advice from his attorneys concerning communications with and disclosures to Issuers and Trustees. For example, Mr. Lathen received specific advice from Robert Flanders, Esq. concerning disclosure obligations to Issuers and Trustees when Mr. Flanders advised Mr. Lathen as follows:

> "[M]y advice to Mr. Lathen was to give [Issuers] exactly that [which they requested]. 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."

(Tr. at 2037:17-2041:1).[5] Likewise, with a full and complete understanding of Mr. Lathen's investment strategy, Eric. Roper, Esq. – who drafted the Fund's PPM, LPA, Subscription Agreement and IMA – never advised Mr. Lathen to provide additional disclosures to Issuers or

[5] The Division also offers the odd argument that Mr. Flanders was providing contractual, not securities, advice. (Div. Reply Mem. at 5 n 5.) Mr. Flanders' advice was nothing of the sort in that it related directly to what he believed Mr. Lathen would be required to disclose to Issuers – testimony that is arguably both contractual and securities-law related in nature.

Trustees. (RPFOF ¶ 117-20.) Finally, Ms. Farrell testified that she shared Mr. Flanders' view that there was no affirmative requirement for Mr. Lathen to make additional disclosures to Issuers or Trustees beyond what they sought. (RPFOF ¶ 88.) There can therefore be no doubt but that Mr. Lathen sought and received legal advice concerning disclosures to issuers.[6]

Second, the Division argues that Mr. Lathen sought advice on his legal relationship with participants from Katten, but did not provide Katten with his power of attorney form. Setting aside the fact that power of attorney forms are virtually all identical, it was Rob Grundstein of Katten who provided Mr. Lathen with a power of attorney form, not vice-versa. (Tr. at 2439:12-2440:19.) The Division also argues that there is no evidence that Beth Trachtenberg received a copy of the Participant Agreement. But there is likewise no evidence that Ms. Trachtenberg did not receive the Participant Agreement. Moreover, Mr. Grundstein testified that a significant amount of time billed by Katten's Trusts & Estates Department was written off. Billing records therefore are not a reliable source for determining whether or not she reviewed the Participant Agreement. The Division could have called Ms. Trachtenberg to testify that she did not receive or review the Participant Agreement. But the Division did not do so. Also, Mr. Lathen testified that he assumed that Ms. Trachtenberg had reviewed the Participant Agreement because he had specifically asked Katten for advice about it and she was the relevant

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[6] In light of the foregoing, the Division's argument that Mr. Lathen "never sought advice about his redemption letters is evidence itself that he knew they were inaccurate" is entirely false. (Div. Reply Mem. at 6.)

Likewise, Mr. Lathen did not seek a mere "'comfort opinion' that his business was not illegal." (Id.) Rather, Mr. Lathen sought concrete advice from his attorneys concerning the structure of and structuring of his investment strategy so as to assure that it was lawful. Indeed, it was his attorneys who suggested the various structures by which Mr. Lathen executed his investment strategy. They also drafted the documents necessary for such structures, including the IMA and DLA. Thus, Matter of Mohammed Riad, Rel. No. 34-78049A, 2016 WL 3627183, at *38 (SEC July 7, 2016) is inapposite in that the respondent there – unlike Mr. Lathen – did not request or receive specific advice about disclosures.

subject matter expert. (Tr. at 3192:20-3193:1.) In any event, Mr. Lathen received legal advice from Katten through Mr. Grundstein, who testified that Katten believed Mr. Lathen's investment strategy was perfectly lawful and that Ms. Tractenberg had advised that the JTWROS Mr. Lathen intended to form with Participants would be "perfectly good" joint tenancies. (Tr. at 2452:13-20, 2444:14-25.)

Third, the Division argues that Mr. Lathen did not disclose to Mr. Roper (or any other attorney) that "Katten warned him not to execute his strategy through a fund." (Div. Reply Mem. at 4-5.) The Division mischaracterizes the advice Mr. Lathen received from Katten. In fact, Katten simply advised Mr. Lathen that he would face a higher litigation risk if he expanded the number of transactions in which he engaged by executing his investment strategy using funds raised from third-party investors. (Tr. at 2452:5-8.)

Finally, the Division asserts that there is no evidence that Mr. Lathen shared Ms. Farrell's advice concerning the IMA with Mr. Galbraith. (Div. Reply Mem. at 5.) There would have been no reason for Mr. Lathen to have done so, though, because he engaged Mr. Galbraith after Ms. Farrell had restructured his business without the IMA. In any event, Mr. Lathen was engaged for purposes of litigation, not in a corporate capacity.[7]

[7] The Division spills unnecessary ink arguing bad faith with respect to Mr. Lathen's attempt at obtaining a formal legal opinion. (Div. Reply Mem. at 8.) Trying but failing to secure a formal legal opinion hardly constitutes bad faith.

II.

MR. LATHEN FOLLOWED THE ADVICE
HE RECEIVED FROM HIS ATTORNEYS

The Division asserts several arguments supportive of its claim that Mr. Lathen did not follow the advice he received from his attorneys. Again, the Division's arguments fail.

First, Mr. Lathen did not, as the Division absurdly suggests, "obtain[] advice as a shield for conduct [he] already knew was fraudulent." (Div. Reply Mem. at 7-8.) If that were the case, none of Mr. Lathen's lawyers would have testified – as they did – that (among other things) they believed: (A) Mr. Lathen's joint tenancies with Participants were true and valid; (B) Mr. Lathen's investment strategy was lawful; (C) Mr. Lathen's disclosures to Issuers were sufficient and that he had no affirmative requirement to disclose information to Issuers beyond what they asked for; or (D) Mr. Lathen should prevail in his disputes with Issuers. Indeed, Ms. Farrell specifically testified that she would have resigned her representation of Mr. Lathen if she believed he was engaged in unlawful or improper conduct. (RPFOF ¶ 89.) Notably, Ms. Farrell never did.

Second, even if Mr. Lathen's investment strategy constitutes a "loophole," a "loophole" is not, as the Division suggests, something that can only be "exploit[ed] if issuers did not know the complete truth about [Mr. Lathen's] relationship with Participants." (Div. Reply Mem. at 8.) Rather, a "loophole" by definition involves lawful conduct. See Cambridge Dictionary (a "loophole" is "an opportunity to legally avoid an unpleasant responsibility, usually because of a mistake in the way rules or laws have been written ('The new law is designed to close most of the tax loopholes')"); Merriam-Webster Dictionary (a "loophole" is "an ambiguity or omission in the text through which the intent of a statute, contract, or obligation may be evaded").

Third, that Mr. Lathen could not "find clear authority that his joint tenancies were valid" does not undermine his good faith reliance on the advice received from counsel. (Div. Reply Mem. at 8.) The Division mischaracterizes Mr. Galbraith's testimony. In fact, Mr. Galbraith testified that he had spent considerable time and effort studying New York statutory and case law concerning JTWROS and that he had concluded there was significant support in those statutes and cases to conclude that Mr. Lathen's JTWROS with Participants were valid and legally effective. (Tr. at 2862:17-2875:16.) If anything, Mr. Galbraith's advice and analysis strongly reinforces Mr. Lathen's good faith belief in the validity of his JTWROS with Participants.

Fourth, the Division's argument that Mr. Lathen failed to disclose to Ms. Farrell that he continued to redeem survivor's option bonds and CDs pursuant to the IMA after she advised him to structure his business differently is a "red herring." Ms. Farrell never told Mr. Lathen that executing his investment strategy using the IMA would be unlawful. Rather, she told him that he faced a higher – but not definitive – risk that his JTWROS could be found to be invalid. (Tr. at 2661:5-18.) And that is the reason she recommended that Mr. Lathen restructure his business without the IMA.[8]

[8] Mr. Lathen's continued redemption of survivor's option bonds and CDs after receiving the foregoing advice from Ms. Farrell does not mean, as the Division suggests, that Mr. Lathen "knew" such "redemptions were ineligible." (Div. Reply Mem. at 9.) Likewise, the Division's argument that Mr. Lathen "could no longer claim protection of advice of counsel" after Goldman rejected his redemption request is nonsense. (Id.) In fact, none of Mr. Lathen's attorneys testified that they believed Mr. Lathen's investment strategy was unlawful or improper. Rather, they consistently testified that Mr. Lathen faced litigation risk in executing his investment strategy. No basis therefore exists for deducing that Mr. Lathen should have concluded his investment strategy was unlawful or improper just because one Issuer (Goldman) rejected his redemption request.

Finally, The Division asserts that Mr. Lathen's disputes with issuers and the Division's complaint against the Staples should have somehow undermined Mr. Lathen's reliance in good faith on the advice he received from counsel. Mr. Lathen, though, continuously sought advice and guidance from outside counsel in the face of these new developments. Counsel from Hickley Allen and Mr. Galbraith advised him that his contractual claims against Issuers were not only tenable but robust. Such belief was further reinforced both by issuer disputes which were favorably resolved without litigation (e.g., Barclays, CIT and BMO) as well as Issuer changes to the language of their governing documents that had the effect of further reinforcing Mr. Lathen's belief in his contractual right to redemption. Finally, Mr. Lathen, with Mr. Galbraith, closely studied the Staples matter and reviewed the Staples' participant agreements, determining that they were materially different (and weaker) than his Participant Agreements in terms of properly preserving a true and legally valid JTWROS.[9]

[9] The Division also maintains that its Staples complaint should have alerted Mr. Lathen to amend his disclosures. (Div. Reply Mem. at 9-10.) But the Division's claims regarding the Staples' disclosure violations were inextricably tied to their purportedly deficient agreements with "participants," which the Division asserted had fully stripped "participant" interests in the Staples' joint accounts. Such was not the case with Mr. Lathen's Participant Agreements. Mr. Lathen therefore had no reasonable basis for concluding that his redemption request letters should be modified or that he would need to prospectively begin disclosing the omitted information. Notably and conveniently, the Division made no attempt at comparing Mr. Lathen's Participant Agreement and disclosures to Participants with those of the Staples.

III.

MR. LATHEN DID NOT IGNORE ADVICE THAT HE RECEIVED FROM HIS ATTORNEYS

The Division offers up a laundry list of purported "ignored advice" as evidence that Mr. Lathen did rely in good faith on the advice of his attorneys. (Div. Reply Mem. at 10-12.). These arguments are equally unpersuasive.

First, the Division recycles the gift tax advice provided by Beth Tractenberg as purportedly indicating that Mr. Lathen did not follow his attorneys' advice. As detailed at trial, though, Ms. Tractenberg's advice was incorrect. (Tr_3553:1-3554:2, Tr. 3667:11-3670:3.) Ignoring incorrect advice is evidence of good faith because it demonstrates Mr. Lathen's high level of engagement and diligence. Simply put, he did not blindly follow advice without understanding same.

Second, the Division argues that Mr. Lathen did not disclose to Mr. Roper (or any other attorney) that "Katten warned him not to execute his strategy through a fund." (Div. Reply Mem. at 4-5.) The Division mischaracterizes the advice Mr. Lathen received from Katten. In fact, Katten simply advised Mr. Lathen (among other things) concerning potential unregistered broker-dealer concerns. (Tr. at 2491:4-14.) In any event, Mr. Grundstein testified that he believed that Mr. Lathen's strategy was lawful, regardless of whether his operation was large or small. (Tr. at 2452:13-20, 2444:14-25 and 2512:1-2513:6.)

Third, changes to the version of the Participant Agreement that Mr. Roper prepared were made, as Mr. Lathen testified, after consultation with Mr. Roper. As he testified, Mr. Lathen thought changing the language would be an improvement. He conferred with Mr. Roper about the change and then made the change. (See Response to Division's PFOF No. 1019.) Doing so does not constitute "ignoring advice," as the Division asserts.

Fourth, Bruce Hood's 2014 tax advice is another "red herring." The advice referenced by the Division (Div. Reply Mem. at 11) relates to an investment structure that was contemplated but never implemented. (See Eden Arc Respondents Response to Division PFOF 808-12, 912 and 556). The Division deliberately conflates advice received on two different investment structures to misleadingly advance its "ignore advice" narrative.

Fifth, the Division's characterization of Ms. Farrell's so-called disregarded "IMA advice" is equally misleading. As detailed above, Ms. Farrell did not advise Mr. Lathen that his investment structure was unlawful and Ms. Farrell did not advise Mr. Lathen to stop making redemptions under the IMA just because improvements to his investment structure were contemplated or being made. (Tr. at 2625:12-15.) Thus, the Division has, again, mischaracterized attorney testimony and then "scolds" Mr. Lathen for failing to disclose same to Mr. Galbraith.

Sixth, the Division suggests that Mr. Lathen ignored advice from Ms. Farrell not to move funds and securities between Joint Tenancy Accounts. (Div. Reply Mem. at 12.) Yet, as Mr. Lathen testified and as an email from Ms. Farrell made clear, her advice in this regard contained an "other than" caveat – to wit, inter-account transfers were proper as long as they were treated as a repayment of debt in the transferring joint account and a loan drawdown on the receiving joint account. Indeed, Mr. Lathen testified that that was exactly how such transfers were accounted for. (Tr. at 3331:4-3332:9.)

Finally, Mr. Lathen did not disregard Mr. Galbraith's advice to "spell out" in the Participant Agreement that Participants held a 50% interest in the Joint Tenancy Accounts. In particular, the Division improperly relies on an intermediate draft of a potential revised version of the Participant Agreement. Initially, it is not clear who suggested the 50% language. In any

event, such language ultimately did not appear in that final version of the revised Participant Agreement, upon which Mr. Lathen and Mr. Galbraith agreed – a result that is more properly characterized as either Mr. Lathen accepting Mr. Galbraith's advice or attorney-client collaboration on work product. (Tr. at 3591:11-17.) It is not, as the Division wrongly asserts, an example of Mr. Lathen ignoring advice.

IV.

THIS COURT SHOULD STRIKE AND REJECT THE DIVISION'S NEGLIGENCE LIABILITY ARGUMENTS

The Division – in direct contravention of this Court's Post-Hearing Order – improperly introduces a new argument related to negligence under Sections 17(a)(2) and (3) of the Securities Act of 1933. In its initial post-hearing brief, the Division argued that the Court should find negligence "by default" if the Court also finds scienter to have been established. The Division now improperly advocates a new argument for negligence on a standalone basis. That argument should be stricken because the Division had the opportunity to, but did not, present it in its initial post-hearing brief. Moreover, we note that that the Division introduced no evidence at trial to support its newfound embrace of standalone negligence liability. Rather, the Division's entire presentation has always focused on scienter.

If the Court agrees not to entertain the Division's belated standalone negligence arguments, and insofar as the Division's claims under Section 17(a) of the Securities Act of 1933 and Section 10(b) of the Securities Exchange Act of 1934 (and Rule 10b-5 promulgated thereunder) fail, Respondents respectfully submit that this Court should dismiss all of the Division's negligence-based claims under Sections 17(a)(2) and 17(a)(3) of the Securities Act of 1933. 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").

If, however, the Court allows the Division's standalone negligence arguments to proceed (which it should not), Respondents offer the following. The Division, quoting from EACM's Code of Ethics, now alleges that Mr. Lathen purportedly "fell short" of "industry standards of care – honesty, integrity and professionalism" and "fell short of those standards by concealing the Participant and Fund Agreements from issuers." (Div. Reply Mem. at 18.) Likewise, the Division argues that Mr. Lathen was negligent in "deflecting issuer requests for additional information" and "lying in response to questions from issuers and his own lawyer." (Id.)

Initially, the Division provides no authority for why these standards of care should apply to the Eden Arc Respondents' arms-length dealings with Issuers. Rather, the key question is whether Mr. Lathen's disclosures to Issuers constitute a departure from what a reasonably prudent person would do under similar circumstances. Here, Mr. Lathen made what he genuinely believed to be true and not misleading statements to Issuers is his redemption request letters. Such statements were not only objectively true, but they were also true based on a reasonable interpretation of New York joint tenancy law, which understanding was informed

by the advice he received from counsel. The Division has not demonstrated how a reasonably prudent person would have acted differently than Mr. Lathen with respect to his redemption request letters. Mr. Lathen also received specific advice from Mr. Flanders that he was not required to disclose the omitted information. (See, e.g., Tr. at 2037:17-2041:1.)

Against such well-informed advice from counsel, the Division has not demonstrated that a reasonably prudent person would act differently and/or voluntarily disclose the omitted information to a non-fiduciary in an arms-length transaction. The Division's assertions regarding deflecting issuer requests and lying in response to questions from Issuers and his own lawyer are incorrect and unsupported by the record. (See Response to Division PFOF 218, 610 and 611.) Even if true (which they are not), such conduct does not amount to negligence. Thus, and because the Division offered no independent and specific evidence of Mr. Lathen's purported negligence, the Division's claims concerning alleged violations of Sections 17(a)(2) and (3) of the Securities Act of 1933 must fail.

V.

THIS COURT SHOULD DISMISS
THE OIP IN ITS ENTIRETY

The Division argues that the Eden Arc Respondents "offer no arguments against the remedies the Division seeks." (Div. Reply Mem. at 23.) The Division is wrong.

First, as the Division knows, the Eden Arc Respondents argued repeatedly in the Eden Arc Mem. that the Division did not establish any of the claims in the OIP, that this Court therefore should dismiss the OIP in its entirety and that this Court should impose no penalties whatsoever on the Eden Arc Respondents (whether financial or otherwise).

Second, as the Division also knows from the Eden Arc Respondents' proposed factual findings and objections to the Division's proposed factual findings, the Eden Arc

Respondents – based on Mr. Lathen's testimony and Mr. Lathen's Financial Disclosure Form – proposed numerous findings of fact concerning Mr. Lathen's inability to pay. Those proposed findings of fact support a finding that Mr. Lathen does not have an ability to pay disgorgement or any civil penalty.

Tellingly, the Division does not substantively contest Mr. Lathen's proposed findings of fact concerning his inability to pay. Rather, the Division asserts (repeatedly) that Mr. Lathen's Financial Disclosure Form was not admitted into evidence. To the extent that it was not admitted, its non-admission was an oversight in that all parties (including, we anticipate, this Court) expected that it had been and would have been entered into evidence. Indeed, no purpose is served by Mr. Lathen's completion of a Financial Disclosure Form as part of this Court's suggested inquiry into his inability to pay unless such form is admitted into evidence. Thus, and to the extent that Mr. Lathen's Financial Disclosure Form was not admitted into evidence, the Eden Arc Respondents now respectfully request that this Court enter that form into evidence (under seal) until this Court makes a finding, if any, as to liability for any of the claims set forth in the OIP as against any of the Eden Arc Respondents. Having had a copy of Mr. Lathen's Financial Disclosure Form since the time of trial, and having had the opportunity to thoroughly examine Mr. Lathen concerning same at trial, the Division cannot be heard to complain that it would in any way be prejudiced by the admission now into evidence of Mr. Lathen's Financial Disclosure Form.

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 26, 2017

Respectfully submitted,

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/s/

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that on May 26, 2017 I caused a true and correct copy of the attached THE EDEN ARC RESPONDENTS' POST-HEARING REPLY BRIEF, dated May 26, 2017, to be served upon the parties listed below via e-mail and UPS Overnight Mail:

Honorable Jason S. Patil
Administrative Law Judge
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/s/

Harlan Protass

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

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

THE EDEN ARC RESPONDENTS' RESPONSES AND OBJECTIONS TO THE DIVISION OF ENFORCEMENT'S STATEMENT OF FACTS

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The Eden Arc Respondents' Responses and Objections to
the Division of Enforcement's Proposed Findings of Fact

DRPFOF	The Eden Arc Respondents' Responses and Objections
1016	No objection to the statement, in context, which is that EACA is a pass-through entity for tax purposes.
1017	Denied / irrelevant. Mr. Galbraith was familiar with both the legal requirements and the contractually listed obligations for making redemption requests and advised Mr. Lathen on these disclosure-related topics. RPFOF ¶ 152. Mr. Galbraith also was aware of issuers who acknowledged the validity of Mr. Lathen's redemption requests and he disagreed with any issuer objections to the validity of those redemption requests. See RPFOF ¶ 169-174; 195.
1018	Denied. In addition to Mr. Lathen's testimony, there is abundant evident that Mr. Roper received the Participant Agreement and offered edits to it. See Lathen Ex. 1336. These suggestions were incorporated into the McCord Participant Agreement, which is the same in all material respects as prior versions of the Participant Agreement that Mr. Roper reviewed. See Div. Ex. 346 (McCord Agreement).
1019	Irrelevant. In addition to Mr. Lathen's testimony, there is abundant evident that Mr. Roper received and edited the Participant Agreement. See Lathen Exs. 1325, 1336; Tr. at 2217:21-2221:8. Furthermore Mr. Roper's poor memory regarding the Participant Agreements, in general, made it clear that questioning about details of specific edits would not be useful.
1020	Denied. Mr. Galbraith testified about his analysis (shared with Mr. Lathen) regarding the impact of side agreements on JTWROS accounts under New York statutory and common law. Mr. Galbraith made clear that he did not believe side agreements impacted the validity of same. See RPFOF ¶ 146.
1021	Mischaracterizes the testimony: Mr. Lathen was not speaking about whether a fund could be a joint tenant; rather, he was speaking about advice from Margaret Farrell, Esq., who testified that she found "no authority that you could not have a joint account with right of survivorship with an entity," but that she advised it was "questionable." See Tr. at 2623:10-14.
1022	Mischaracterizes the testimony. There is nothing inconsistent about Mr. Galbraith's understanding of the agreements and Respondents' actions. Mr. Galbraith's referenced statements and the cited transcript language discuss Mr. Lathen's inability to move funds from the Joint Tenancy Accounts to his own personal accounts (as opposed to moving funds as permitted under the IMA, including to a joint account with David Jungbauer).
1023	Mischaracterizes the testimony. Mr. Galbraith identified case law that directly supported the validity of the joint tenancies. The fact that no case was "factually on all fours" does not mean there was no direct support for the Eden Arc Respondents' legal position. See RPFOF ¶ 145. Mr. Galbraith also explained that his analysis was based on his evaluation of the case law and that there were no cases "factually on all fours with the investment strategy that [Mr. Lathen] was executing." However, Mr. Galbraith identified and advised Mr. Lathen as to many cases that supported the view that the joint tenancies at issue were valid.

DRPFOF	The Eden Arc Respondents' Responses and Objections
1024	No objection.
1025	No objection.
1026	Denied. See Response to Division's RPFOF No. 1022.
1027	No objection.
1028	Denied. See Response to Division's RPFOF No. 1022.
1029	No objection.
1030	Irrelevant. Mr. Galbraith testified about his analysis (shared with Mr. Lathen) regarding the impact of side agreements on JTWORS accounts under New York statutory and common law. Mr. Galbraith made clear that he did not believe side agreements impacted the validity of same. See RPFOF ¶ 146.
1031	No objection.
1032	No objection.
1032A	Agree as to Mr. Galbraith's memory, but denied as to whether these agreements impact survivorship rights in the JTWROS accounts.
1033	Mischaracterizes the testimony at Tr. at 2428:8-21. Mr. Grundstein himself described the Eden Arc Respondents' strategy as involving a "loophole" – his testimony did not address Mr. Lathen's use of the term.
1034	Irrelevant. See Respondents RPFOF ¶ 195 (Throughout the time that Mr. Lathen was having disputes with issuers, he was being assured by his legal counsel that his legal position was correct)/
1035	Irrelevant. See Respondents RPFOF ¶ 195 (Throughout the time that Mr. Lathen was having disputes with issuers, he was being assured by his legal counsel that his legal position was correct).
1036	Irrelevant. See Respondents RPFOF ¶ 195 (Throughout the time that Mr. Lathen was having disputes with issuers, he was being assured by his legal counsel that his legal position was correct).
1037	Irrelevant. All of Mr. Lathen's attorneys disagreed with other Issuers regarding the significance of the Participant Agreement and advised Mr. Lathen that it did not impact the validity of the JTWROS accounts. See RPFOF ¶ 92 (Hinckley Allen discussed with Mr. Lathen the terms of the relationship set forth between the parties, as set forth by the various agreements. Hinckley Allen's analysis and advice to Mr. Lathen was that the participant's ability or inability to access the joint accounts during Mr. Lathen's lifetime did not impact the business model because it did not change a person's economic interest in – and thus the validity of – the joint account); see also RPFOF ¶ 104 (Mr. Flanders "flat-out disagreed" with Goldman's arguments and relayed his position to Mr. Lathen. Specifically, Mr. Flanders did not believe that Mr. Lathen's investment strategy or side agreements between joint account holders had any bearing on the genuine nature of the joint account; RPFOF ¶ 195 (Throughout the time that Mr. Lathen was having disputes with issuers, he was being assured by his legal counsel that his legal position was correct).
1038	~~Irrelevan~~t. See Response to Division's RPFOF Nos. 1036-1037.

Dated: New York, NY
May 26, 2017

Respectfully submitted,

CLAYMAN & ROSENBERG LLP

/s/

By: _____

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that on May 26, 2017 I caused a true and correct copy of the foregoing THE EDEN ARC RESPONDENTS' RESPONSES AND OBJECTIONS TO THE DIVISION OF ENFORCEMENT'S STATEMENT OF FACTS, dated May 26, 2017, to be served upon the parties listed below via e-mail and/or UPS Overnight Mail:

Honorable Jason S. Patil
Administrative Law Judge
U.S. Securities and Exchange Commission
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Washington, DC 20549-2557

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/s/

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