UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-17387

In the Matter of

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

Respondents.

DIVISION OF ENFORCEMENT'S MOTION TO CORRECT MANIFEST ERRORS OF FACT

DIVISION OF ENFORCEMENT
Nancy A. Brown
Judith Weinstock
Janna I. Berke
Lindsay S. Moilanen
New York Regional Office
Securities and Exchange Commission
Brookfield Place
200 Vesey Street, Suite 400
New York, New York 10281
(212) 336-1021 (Moilanen)

The Division of Enforcement ("Division") respectfully submits this Motion to Correct Manifest Errors of Fact in the Court's Initial Decision in this matter, dated August 16, 2017 ("ID"), pursuant to Rule 111 of the Commission's Rules of Practice, 17 C.F.R. § 201.11.

ARGUMENT

Commission Rule of Practice 111(h) provides that a motion to correct a manifest error of fact is properly filed "if the basis for the motion is a patent misstatement of fact in the initial decision." "A manifest error is 'an error that is plain and indisputable, and that amounts to a complete disregard of the credible evidence in the record.'" Matter of Paul Edward "Ed" Lloyd, Jr., CPA, Rel. No. 3047, 2015 WL 13322401, at *1 (Aug. 18, 2015) (quotations omitted). The following factual finding excerpts from the ID are each manifestly erroneous and should be corrected as contradicted by indisputable record evidence.

1. "Lathen solicited a few dozen investors for the Partnership, and ultimately about fifteen invested approximately 5.85 million." (ID at 13.)

This finding is controverted by Lathen's own testimony. Lathen testified that 15 investors invested $5.85 million "before [the fund] opened." (Tr. at 3252-53.) He also testified that the fund grew to 21 investors, 22, including the general partner. Additionally, Lathen testified that his fund grew to a high of $22 million in dollars invested and accumulated investor profits, net of margin.

> 3496: 15 **Q Now, at some point, you had 22 investors,**
> 3496:16 **including the general partner; is that right?**
> 3496:17 A It sounds about right.

> 160:4 **Q And what was the high watermark in terms of**
> 160:5 **assets under management?**
> 160:6 A I believe it was around $22 million.
> 160:7 **Q And when you say $22 million, you're**
> 160:8 **referring only to the amount of money that investors**
> 160:9 **put into the fund; is that right?**
> 160:10 A The amount that they put in plus the
> 160:11 accumulated profits that have been credited to their

160:12 capital accounts.
160:13 **Q And are you including margin in that number?**
160:14 A Yes. Those numbers are net of -- net of
160:15 margin.

See also Div. Exs. 3, 4, 5, 6, 7, 8, and 13 (Forms ADV and ADV amendments in which EACM reported that it had regulatory assets under management of $25 million or more.)

2. "Lathen reviewed the documents drafted by Gersten Savage and did not see anything that seemed to be inconsistent with or would undermine his investment strategy." (ID at 22.)

This finding is contradicted by Lathen's own testimony. Lathen testified that he reviewed the McCord Participant Agreement (that he alleged Roper of Gersten Savage prepared) and determined that it improperly prohibited McCord from the "exercise of any right of ownership." He further testified that that realization caused him to change the form of the Participant Agreement going forward to remove that restriction.

3258:10 **Q All right. This is the Patrick McCord**
3258:11 **agreement, right?**
3258:12 A Yes.
3258:13 **Q Is this the first participant agreement**
3258:14 **after you opened the fund?**
3258:15 A I believe it was. Certainly one of the
3258:16 very first if not the first.

3260:13 **Q Okay. And did you -- did you see any**
3260:14 **problems with this participant account when you**
3260:15 **signed it?**
3260:16 A Not when I signed it, no.
3260:17 **Q Okay. Did there come a time where you did**
3260:18 **see a problem with this agreement?**
3260:19 A Yes. The language that you just had me
3260:20 read was something that had not been in my
3260:21 participant agreement before.
3260:22 **Q Which language in particular? Can we go**
3260:23 **back a page?**
3260:24 A Sure.
3260:25 MR. HUGEL: Paragraph 3, please.
3261:1 THE WITNESS: Where it says, "Not be
3261:2 permitted to pledge, borrower against, withdraw or

3261:3 exercise any right of ownership."
3261:4 That "exercise any right of ownership" was
3261:5 not something that was in sort of the pre-Gersten
3261:6 Savage review of my participant agreement.
3261:7 BY MR. HUGEL:
3261:8 **Q How did it get into this one?**
3261:9 A This was presumably added by Eric Roper in
3261:10 connection with his review of the participant
3261:11 agreement. And I would imagine that he was sort of
3261:12 trying to, you know, protect the fund.
3261:25 **Q And when you noticed that language, what**
3262:1 **did you do?**
3262:2 A I removed it.

3. "My inclination is that the two McCord participant agreements and the agreements used during the DLA and PSA period did not interfere with the joint tenancy. The latter two agreement templates used during the IMA period may have prevented the successful creation of a joint tenancy. But any conclusion would be speculative in this proceeding, and in any event, as discussed below, I am convinced that Lathen had a sincere good faith belief that each version of the participant agreement created valid joint tenancies." (ID at 55.)

This conclusion is controverted, as noted above, by Lathen's own admission that he believed the McCord Participant Agreement to improperly restrict a Participant's beneficial ownership interest, and that determination led him to change that language in the agreement.

3272:18 A Could I -- could I just make one other --
3272:19 one other expansion on the earlier comment?
3272:20 You had asked why we had gone to this 5 --
3272:21 this 5 percent language. You know, I think we --
3272:22 you know, we wanted it to be clear that the fact
3272:23 that we were prohibiting the participant from
3272:24 withdrawing funds from the account could not be
3272:25 construed by a third party looking at it as sort of
3273:1 having constructively deprived them of their
3273:2 beneficial interest in the account.
3273:3 And so we felt the need to sort of
3273:4 explicitly state that -- their economics.

4. "Gersten Savage also assisted in drafting the Partnership's initial Form ADV and assisted with some of the updates to it in conjunction with the fund's compliance consultant, Mission Critical." (ID at 21.)

There is no evidence that Gersten Savage and Mission Critical ever worked in conjunction with each other on any of the Partnership's ADVs. In fact, Lathen admitted that Gersten Savage went out of business in the fall of 2012 and that Respondents did not hire Mission Critical until October 2013.

3507:14 **Q Let's take a look at Division Exhibit 3,**
3507:15 **please, the first page.**
3507:16 **This ADV is dated February 26th of 2013; is**
3507:17 **that right?**
3507:18 A That's what it looks like.
3507:19 **Q And Eric Roper was not representing you at that**
3507:20 **time; is that right?**
3507:21 A That's right.
3507:22 **Q So you filed this one by yourself, correct?**
3507:23 A No. I think this was filed with Mission
3507:24 Critical's assistance.
3507:25 **Q Well, we just saw you didn't have Mission**
3508:1 **Critical until October of 2013, right?**
3508:2 A Oh, I'm sorry. I was thinking 2016. My
3508:3 apologies. This would have been Gersten Savage.
3508:4 **Q Gersten Savage went out of business in the fall**
3508:5 **of 2012, right?**
3508:6 A Well, I don't remember -- I remember them sort
3508:7 of being in the process of disbanding. I don't remember
3508:8 exactly when they disbanded. My recollection is that
3508:9 there was someone at Gersten Savage working on this whose
3508:10 name escapes me. It was not Eric Roper. It was one of
3508:11 his other partners or colleagues. And they worked on
3508:12 this, I believe.
3508:13 **Q Even after the firm was out of business? You**
3508:14 **heard Eric Roper testify that the firm blew up in the**
3508:15 **fall of 2012, right?**
3508:16 A Yes. He did testify to that. My recollection
3508:17 is that we were potentially still dealing with someone at
3508:18 Gersten Savage. But I'm not -- I don't have perfect
3508:19 recall on this. I'd have to refresh my memory by looking
3508:20 at the e-mail exchanges between me and Gersten Savage.

3509:1 **Q Are you aware of any e-mails between you and**
3509:2 **some lawyer at Gersten Savage in February of 2013?**
3509:3 A I think I stated that I don't recall. But my
3509:4 recollection was that certainly, on the initial Form ADV
3509:5 that we filed in September of 2012, which would have

3509:6 been, you know, five months before this, we were using
3509:7 Gersten Savage. And I assume that we would still be
3509:8 using Gersten Savage. But without looking at my e-mails,
3509:9 I can't say for sure. So I don't recall.

5. "On the other hand, one could interpret the participant agreement as acknowledging survivorship and merely contracting around it. There is support for this view in New York law. In *Ehrlich v. Wolf*, No. 113413/10, 2011 N.Y. Misc. LEXIS 630 (Sup. Ct. Jan. 11, 2011), there was a dispute over an account opened by the decedent and a Mr. Wolf. The estate of the decedent submitted an agreement in which Wolf agreed to transfer the balance of the joint accounts to the estate upon [redacted]. *Id.* at *4." (ID at 53.)

In Ehrlich v. Wolf, the agreement by which Wolf agreed to transfer the balance of the joint accounts to the estate was formed after the [redacted], not prior to it, so it does not support the view that under New York, parties to a joint tenancy may contract around survivorship. See id. at *1 ("Ms. Ehrlich [redacted] *December 21, 2009*.... On or about *July 20, 2009*, a joint checking account titled Mr. David Wolf and Dina Ehrlich-Blumenthal had been opened. . . .); *4 ("The Estate, in support of its argument that the account was opened merely for the convenience of Ms. Ehrlich, submits an agreement entered into on *January 18, 2010*, signed by [Wof's lawyer] and agreed to by [the Estate's lawyer]. . . .") (emphasis added); see also Estate of Ehrlich, No. 113993/2010, 2013 N.Y. Misc. LEXIS 6964 (N.Y. Sup. Ct. Dec. 6, 2013), aff'd, 127 A.D.3d 613 (N.Y. App. Div. 1st Dep't 2015) (in a later opinion from the same case, court noted: "The complaint alleges that the subject funds belong to the Estate, and Wolf agreed to return them to the Estate pursuant to an agreement dated *January 18, 2010*.") (emphasis added).

6. "Respondents started using a fourth version of the participant agreement in February 2013 after signing the DLA and PSA in January 2013. This agreement removed restrictions on participants' use and withdrawal of the funds, and removed the 95/5 language regarding survivorship." (ID at 54.)

Throughout the life of the Partnership, and irrespective of which Participant Agreement Lathen was then using, participants' use and withdrawal of the funds in the joint accounts was

restricted. As Lathen testified, "the brokerage firms require[d] signatures of both owners . . . in connection with withdrawing funds from the accounts." (Tr. at 86; see also Tr. at 2675-76 (Farrell testifying that Lathen told her that brokerage firms required both account holders to sign any instructions); Div. Ex. 856.) Thus, even if the Participant Agreement did not explicitly restrict the Participants from accessing the joint accounts, as Lathen knew, the brokerage firms would not act on any Participant's instructions without his consent. But because of the Power of Attorney form (i.e. Div. Ex. 325) that Lathen had each Participant execute, he retained sole and unilateral control over the "use and withdrawal of the funds."

7. "To determine whether there was a violation of the custody rule, I must consider the language of the side agreements that governed the joint accounts—the IMA until January 2013, and the DLA and PSA thereafter." (ID at 63.)

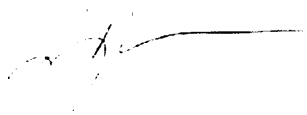
This finding of fact is controverted by the language of the PSA, in which Lathen made clear that the PSA would not supplant the IMA for any account opened prior to the date of the PSA. (Div. Ex. 72-p.1.) Therefore, the IMA, and its impact on the Eden Arc Capital Management's Custody Rule compliance, did not end as of January 24, 2013. Twenty-four joint accounts opened prior to January 24, 2013, held assets titled in the name of Lathen and a Participant after that date, including some that existed into 2015 and one that held assets into 2016. (Div. Ex. 963 – pp. 1-3.)

CONCLUSION

For the foregoing reasons, the Court should correct these manifest errors of fact in an Amended Initial Decision.

Dated: August 28, 2017
New York, New York

DIVISION OF ENFORCEMENT



Nancy A. Brown
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Janna I. Berke
Lindsay S. Moilanen
Securities and Exchange Commission
New York Regional Office
Brookfield Place, 200 Vesey Street, Suite 400
New York, New York 10281
Tel. (212) 336-1021 (Moilanen)
Email: moilanenl@sec.gov

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Certificate of Service

I hereby certify that I served the Division of Enforcement's Motion to Correct the Manifest Errors of Fact, dated August 28, 2017, on this August 28, 2017, on the below parties by the means indicated:

Harlan Protass, Esq.
Protass Law PLLC
260 Madison Avenue
New York, NY 10016
Attorney to Respondents
(By E-mail)

Paul Hugel, Esq.
Christina Corcoran, Esq.
Clayman & Rosenberg LLP
305 Madison Avenue, Ste 1301
New York, New York 10165
Attorneys to Respondents
(By E-mail)

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

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

Lindsay S. Moilanen