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

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Respondents Donald F. Lathen, Jr., Eden Arc Capital Management, LLC and Eden Arc Capital Advisors, LLC (the "Eden Arc Respondents"), by and through their undersigned counsel, respectfully submit the following memorandum of law in opposition to the Division of Enforcement's Motion to Correct Manifest Errors of Fact, dated August 28, 2017.

ARGUMENT

I.

LEGAL STANDARD

Rule 111(h) of the SEC's Rules of Practice provides that any party to any administrative proceeding may file a motion to correct a "manifest error of fact" if "the basis for the motion is a patent misstatement of fact in the initial decision." A "manifest error" is one "that is plain and indisputable, and that amounts to a complete disregard of the controlling law or the credible evidence in the record." In the Matter of Raymond James Fin. Servs., Inc., et al., S.E.C. Release No. 622, 2005 WL 3778678, at *1 (Oct. 14, 2005) (citation omitted). See also In the Matter of Marketxt, Inc., et al., S.E.C. Release No. 624, 2006 WL 372656, at *1 (Jan. 5, 2006) ("Black's Law Dictionary defines a manifest error as '[a]n error that is plain and indisputable, and that amounts to a complete disregard of the controlling law or the credible evidence in the record'"). Indeed, the Commission itself noted that motions to correct manifest errors are properly filed "only if they contest a patent misstatement of fact in the initial decision." See Adoption of Amendments to the Rules of Practice and Related Provisions and Delegations of Authority of the Commission, S.E.C. Release No. 34-52846 (Nov. 29, 2005).

II.

THIS COURT SHOULD DENY THE DIVISION'S MOTION BECAUSE NONE OF THE PURPORTEDLY FACTUAL ERRORS UPON WHICH ITS MOTION IS BASED COULD REASONABLY AFFECT THE OUTCOME HEREIN

Courts adjudicating motions to correct manifest errors pursuant to Rule 111 of the SEC's Rules of Practice have made crystal clear that a "manifest error of fact must be an error that could reasonably affect the outcome of the decision." In the Matter of Raymond James Fin. Servs., 2005 WL 3778678, at *1. See also In the Matter of Marketxt, 2006 WL 372656, at *1 ("For an error of fact to be a manifest error it must be an error that could reasonably affect the outcome of the decision"). Indeed, the one case upon which the Division relies in setting forth the legal standard for motions to correct manifest errors of fact itself instructs that "[a]n error of fact is 'manifest' if it could reasonably affect the outcome of the decision." In the Matter of Paul Edward "Ed" Lloyd, Jr., CPA, S.E.C. Release No. 3047, 2015 WL 13322401, at *1 (Aug. 18, 2015) (Div. Mem.[1] at 2).

Here, none of the purported manifest errors of fact upon which the Division's motion is based could or would affect the ultimate "outcome" that this Court reached – that is, its dismissal of all charges against the Eden Arc Respondents. And the Division does not even argue that any such purported errors of fact could or would affect the ultimate "outcome" that this Court reached. By way of example only, this Court's dismissal of all charges against the Eden Arc Respondents did not turn on the amount of funds raised by Eden Arc Capital Partners, LP (the "Fund"), whether $5.85 million or $22 million or some other dollar figure. (Div. Mem. at 2-3.) Likewise, this Court's dismissal of all charges against the Eden Arc Respondents did not

[1] "Div. Mem." refers to the Division of Enforcement's Motion to Correct Manifest Errors of Fact, dated August 28, 2017.

hinge on its interpretation of Ehrlich v. Wolf, No. 113413/10, 2011 N.Y. Misc. LEXIS 630 (Sup. Ct. Jan. 11, 2011). (Div. Mem. at 6.) And, this Court's dismissal of all charges against the Eden Arc Respondents did not depend on whether Participant Agreements were governed by the IMA or the DLA and PSA. (Id. at 7.)

Given the foregoing, the Division's motion to correct manifest errors of fact fails as a matter of law. This Court therefore should deny it in its entirety.

III.

THIS COURT SHOULD REJECT THE DIVISION'S CHALLENGES TO THIS COURT'S FACTUAL FINDINGS

Notwithstanding the Division's protestations to the contrary, this Court should (if it does not otherwise deny the Division's motion for the reasons detailed above) reject the Division's attempts at challenging this Court's findings.

A. Division Challenge No. 1

The Division challenges this Court's finding as to the amount of funds raised by the Fund – $5.85 million (as reflected on Pages 12-13 of the Initial Decision) or approximately $22 million (as reflected on Pages 2-3 of the Div. Mem.).

This Court should reject the Division's challenge because this Court's statement as to the amount of funds raised by the Fund was correct in the context in which it was made. Specifically, the challenged statement appears in a section of the Initial Decision entitled "Lathen disclosed his investment strategy to investors," in which this Court (among other things) described and quoted from the Fund's initial Private Placement Memorandum dated March 2011. (Initial Decision at 12-13.) This Court's statement concerning the raising of approximately $5.85 million for the Fund accurately describes the amount raised by the Fund pursuant to that initial Private Placement Memorandum.

The Eden Arc Respondents do not dispute that the Fund raised additional capital after its initial capital raise pursuant to its Amended Private Placement Memorandum. Likewise, the Eden Arc Respondents do not dispute that the Fund's assets under management grew after it raised additional capital and as investor profits accumulated in the Fund. The foregoing, though, does not undermine the accuracy of the challenged statement in the context in which it was made in the Initial Decision, particularly considering numerous other references in the Initial Decision to the Fund having more than $5.85 million under management, which findings indicate that this Court knew when it issued the Initial Decision that the Fund had assets greater than the initial $5.85 million over the course of its existence. See, e.g., Initial Decision at 30-31 (referencing the assets under management as reported on the Fund's Forms ADV) and Initial Decision at 31 (referencing the Fund's financial statements).

B. Division Challenge No. 2

The Division's second argument concerning an allegedly manifest error of fact relates to the following statement in the Initial Decision:

> 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.

(Div. Mem. at 3.)

The Division argues that the foregoing statement is manifestly erroneous because Mr. Lathen testified that he removed certain language that Gersten Savage added to the Participant Agreement. That Mr. Lathen may have removed language from the version of the Participant Agreement that Gersten Savage drafted/edited does not necessarily mean (as the Division would have this Court find) that he somehow viewed that language as compromising his investment strategy. Put differently, it is entirely consistent for this Court to have found that Mr. Lathen "did not see anything" in the version of the Participant Agreement that Gersten

Savage drafted/edited that would undermine or be inconsistent with his investment strategy, on the one hand, and Mr. Lathen's removal of language from that Participant Agreement, on the other hand.

Indeed, the Participant Agreements contain pages of language, much of which has little, if anything, to do with the validity of Mr. Lathen's investment strategy. By way of example only, all Participant Agreements provide for the payment of $10,000 to Participants. Likewise, all Participant Agreements explain that Participants have no obligation to fund the JTWROS accounts. Neither of those provisions have anything to do with the validity of Mr. Lathen's investment strategy.

Thus, removal of language from the Participant Agreement does not in-and-of-itself constitute an admission or acknowledgment that such language potentially compromises the validity of Mr. Lathen's investment strategy. Simply put, just because Mr. Lathen removed language from the version of the Participant Agreement that Gersten Savage drafted/edited does not mean that he had some "realization," as the Division contends, that that language jeopardized his investment strategy. Finally, this Court addressed at length the "exercise of any right of ownership" language in the McCord Participant Agreements' on Page 52 of the Initial Decision. In doing so, this Court expressly rejected the Division's contention that such language was inconsistent with or undermined the validity of the JTWROS or Mr. Lathen's investment strategy.

C. Division Challenge No. 3

The Division's third argument concerning an allegedly manifest error of fact relates to this Court's "inclination" with respect to the impact of the terms of two Participant Agreements and all Participant Agreements that followed on the validity of the JTWROS that Mr. Lathen formed with Participants. The Division's challenge – even if accurate – does not

amount to an error that is "plain and indisputable" in that the challenged language amounts to a legal conclusion or, as described in the Initial Decision, this Court's "inclination." In the Matter of Raymond James Fin. Servs., 2005 WL 3778678, at *1. Likewise, the Division's challenge, for the same reason, does not amount to "a complete disregard of the controlling law or the credible evidence in the record." Id. In any event, the testimony upon which the Division purports to rely in support of its challenge does not, in fact, support its position. In particular, it is clear from the testimony itself that Mr. Lathen is referencing what a third party – not himself – might infer from the restriction on withdrawing funds. As Mr. Lathen testified, "we wanted to be clear that the fact that we were prohibiting the participant from withdrawing funds from the account could not be construed by a third party looking at it as sort of having constructively deprived them of their beneficial interest in the account." (Tr. at 3272:22-3273:2 (emphasis added).)

D. Division Challenge No. 4

The Division's fourth argument concerning an allegedly manifest error of fact relates to the following statement in the Initial Decision:

> 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.

(Div. Mem. at 4.) The Division argues that that statement is manifestly erroneous because "[t]here is no evidence that Gersten Savage and Mission Critical ever worked in conjunction with each other on any of the Partnership's ADVs." (Div. Mem. at 5.)

Initially, the Division does not contest the accuracy of the first portion of the quoted sentence – to wit, "Gersten Savage also assisted in drafting the Partnership's initial Form ADV." Indeed, the testimony upon which the Division relies actually supports the conclusion that the foregoing statement is true and accurate. In particular, Mr. Lathen testified as follows:

constitute a "plain and indisputable" erroneous factual conclusion and does not arise from a disregard of "controlling law" or "credible evidence in the record." In the Matter of Raymond James Fin. Servs., 2005 WL 3778678, at *1. Simply put, this Court did not rely on Ehrlich for any determination that impacted upon its decision to dismiss all charges against the Eden Arc Respondents. The Division's challenge therefore fails as a matter of law.

In any event, this Court correctly found that Ehrlich supports the factual conclusions that this Court reached. Ehrlich stands for the proposition that two parties can acknowledge but then contract around the survivorship provisions of a JTWROS account. The Division seems to suggest that the timing of such an agreement is somehow germane to this Court's reference to Ehrlich in the Initial Decision. The Division is wrong because this Court referenced Ehrlich (in the context of the Initial Decision's discussion of the provisions of Mr. Lathen's various Participant Agreements) for the general proposition that parties can and sometimes do contract around the survivorship features of a JTWROS account. See Initial Decision at 53 ("Thus, it could be that parties to a joint tenancy may separately contract to limit one party's survivorship rights without severing the joint tenancy. According to this approach, one could interpret the participant agreement as acknowledging participants' right of survivorship, but separately requiring them to agree to give up the funds"). Moreover, it bears noting that Kevin Galbraith, Esq. testified at length (Tr. at 2880 et seq.) about the numerous New York cases he had reviewed and discussed with Mr. Lathen in which courts upheld the validity of JTWROS, notwithstanding the existence of separate side agreements.

F. Division Challenge No. 6

The Division's sixth argument concerning an allegedly manifest error of fact relates to the following statement in the Initial Decision:

> 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 funds, and removed the 95/5 language regarding survivorship.

(Div. Mem. at 6.) The Division seems to suggest that the foregoing statement is purportedly manifestly erroneous because brokerage firms required the signatures of both joint tenants to withdraw funds from any JTWROS brokerage account and because the limited Power of Attorney form that Mr. Lathen procured from Participants permitted him to withdraw funds from JTWROS brokerage accounts without the actual signature of his joint tenants. The Division's argument, though, misses the point because the challenged statement in the Initial Decision speaks about language within the Participant Agreement and the Division's challenge speaks about brokerage firm policies outside the Participant Agreement. In any event, this Court thoroughly addressed the import of the limited Power of Attorney form. See Initial Decision at 55, Footnote 20.

G. Division Challenge No. 7

The Division's seventh argument concerning an allegedly manifest error of fact relates to the following statement in the Initial Decision:

> 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.

(Div. Mem. at 7.) The Division argues that that statement is purportedly manifestly erroneous because the DLA and PSA did not "supplant the IMA for any account opened prior to the date of the PSA." (Id.)

The Division's challenge fails for two primary reasons. First, this Court's finding neither time-limits its analysis of the IMA nor suggests, as the Division claims, that this Court

believed that Custody Rule compliance under the IMA was somehow moot after January 2013. Indeed, this Court exhaustively discussed the applicability of the Custody Rule to the IMA on Pages 64-65 of the Initial Decision. Second, in the unlikely event that this Court believed that the IMA "regime" ended in January 2013, the Division's argument still does not amount to a manifest error of fact because this Court concluded that operation of Mr. Lathen's investment strategy using the IMA did not violate the Custody Rule. And, if operation of Mr. Lathen's investment strategy using the IMA did not violate the Custody Rule in January 2013, it certainly could not have done so at later times.

CONCLUSION

Accordingly and for all of the foregoing reasons, the Eden Arc Respondents respectfully submit that this Court should deny the Division of Enforcement's Motion to Correct Manifest Errors of Fact in its entirety.

Dated: New York, NY
August 31, 2017

Respectfully submitted,

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/s/

By: _____
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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that on August 31, 2017 I caused a true and correct copy of the foregoing THE EDEN ARC RESPONDENTS' OPPOSITION TO THE DIVISION OF ENFORCEMENT'S MOTION TO CORRECT MANIFEST ERRORS OF FACT, dated August 31, 2017, to be served upon the parties listed below via e-mail and/or Federal Express Overnight Mail:

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

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/s/

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