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UNITED STATES OF AMERICA

Before the

SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-16130

In the Matter of SEAN COOPER Respondent.	**MOTION TO QUASH SUBPOENA TO THIRD PARTY WESTEND CAPITAL MANAGEMENT LLC FOR PRODUCTION OF DOCUMENTARY EVIDENCE**

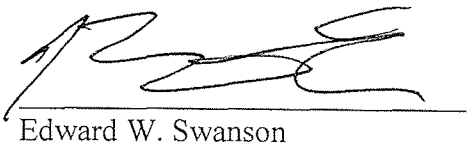
NOTICE

PLEASE TAKE NOTICE, that third party WestEnd Capital Management, LLC, hereby moves the Court for an order quashing plaintiff's third-party subpoena to WestEnd Capital Management, LLC. This motion is brought on the grounds that the subpoena seeks information on WestEnd's finances, books and records that is not properly the subject of discovery. This motion is based on Rule 232(e), the attached memorandum of points and authorities, the

concurrently-filed declaration of counsel, the files and records in this action, and upon such evidence and argument that the hearing officer may request.

Dated: November 13, 2014

Respectfully submitted,



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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The SEC has sued Sean Cooper for acts he committed between March 2010 and February 2012. However, Mr. Cooper served a subpoena on third party WestEnd Capital Management LLC seeking documents dating back to 2003. Mr. Cooper's theory of the discoverability of these documents is not that they will prove he did not act as the SEC alleges he did – taking excessive management fees from a hedge fund advised by WestEnd and thereby stealing from WestEnd's clients and his former business partners between 2010 and 2012. Instead, Mr. Cooper posits the documents will somehow prove a prior partner at WestEnd who left the firm in 2004 told him it was acceptable to take the fees in this manner. This is not a theory that passes muster under the limited scope of discovery allowed in administrative proceedings, or even the broader scope of discovery in federal court. Requiring production on such tenuous ground is particularly unreasonable and burdensome because doing so will require WestEnd to turn over private and sensitive financial information about the hedge fund and its clients to a man who not only misappropriated from them in the past but is adverse to them in other litigation. The subpoena should be quashed.

II. RELEVANT BACKGROUND

Relevant Entities and Individuals: WestEnd Capital Management, LLC ("WCM") is a registered investment advisor founded in 2002. WCM provides investment advice to individuals and is also the general partner to WestEnd Partners, L.P., a hedge fund ("the Fund"). The managing members of WCM at the time of founding were Sean Cooper, the respondent in this action, Gus Ozag, and Charles Bolton. In 2004, George Bolton, Charles's brother, joined WCM

as a partner. Charles Bolton left WCM in 2005. (Declaration of Britt Evangelist In Support of Motion to Quash ("Evangelist Decl."), ¶2.)

Management of the Fund: In 2003, Mr. Cooper formed the Fund. Pursuant to the Fund's offering circular, WCM was entitled to annual management fees of 1.5% of each investor's capital account balance, payable quarterly in advance at the beginning of each fiscal quarter. (WestEnd Admin. Order, File No. 3-16129, ¶ 6.) Mr. Cooper was responsible for managing the Fund's investment portfolio, made almost all of the investment decisions for the Fund, and coordinated the preparation of the Fund's financial statements. (*Id.* at ¶¶ 3, 5.) As WCM's compliance officer (from 2002-2007), Mr. Cooper was also responsible for WCM's back office financial operations and compliance matters. (*Id.* at ¶ 3,5.) Mr. Cooper also had sole control over the Fund's bank accounts and operations and collected the fees WCM earned from the Fund. (*Id.* at ¶ 5.)

The SEC Investigation and Mr. Cooper's Misappropriation: In April of 2012, the SEC conducted an onsite examination of WCM. (*Id.* at ¶ 7.) It came to the attention of WCM's other principals that from March 2010 through February 2012 Mr. Cooper had collected management fees from the Fund that exceeded what WCM had earned during that period. Mr. Cooper's actions were previously unknown to WCM's other principals. (*Id.* at ¶ 8.) After learning of Mr. Cooper's conduct, WCM (through its other principals) promptly expelled Mr. Cooper from the partnership and paid back the fees he had taken. (*Id.* at ¶ 9.) The SEC instituted an investigation into Mr. Cooper and WCM that resulted in the instant action against Mr. Cooper and an administrative settlement with WCM.

The SEC's Action Against Mr. Cooper: The SEC's current action against Mr. Cooper is based on his improper taking of Fund management fees from March 2010 through February

2012. (*See* Cooper Admin. Order, ¶ 1 [This proceeding involves fraud and breaches of fiduciary duty by Sean C. Cooper from 2010 to 2012."]; ¶ 2 ["[B]eginning in March 2010 and continuing through February 2012, Cooper began indiscriminately withdrawing money from the Fund."].) The SEC alleges Mr. Cooper misappropriated approximately $320,000 in fees from the Fund, which he routed to his personal bank accounts. (*Id.* at ¶2.) He is charged with defrauding his clients, in violation of Sections 206(1) and 206(2) of the Advisers Act (*id.* at ¶ 18), and conducting a manipulative or deceptive business practice, in violation of Section 206(4) of the Advisers Act. (*Id.* at ¶19.) The SEC also alleges Mr. Cooper signed a false Form ADV in 2011. (*Id.* at ¶ 3, 21.) The false statement in the Form ADV relates to Mr. Cooper's excessive withdrawals of management fees between 2010 and 2012. (*Id.* at ¶ 14 [statement in Form ADV was false because "Cooper indiscriminately withdrew purported management fees in excess of the annual 1.5% in 2010, 2011, and 2012."].) [1]

Other Litigation Between WCM and Mr. Cooper: After expelling Mr. Cooper from the firm, the remaining partners at WCM discovered that Mr. Cooper had absconded not only with the Fund's management fees but also with fees and profits from other aspects of WCM's business rightfully owing to them. They initiated arbitration proceedings against Mr. Cooper to recoup the management fees and other misappropriated funds. The case was tried before the Hon. William J. Cahill (Ret.) in February 2014. (Evangelist Decl., ¶3.) In October 2014, Judge Cahill issued a Final Award in the arbitration proceeding, finding in WCM's favor against Mr. Cooper on WCM's breach of contract, breach of fiduciary duty, conversion, and fraud and deceit claims, and awarding damages, attorney's fees, and costs. In total, the arbitrator found Mr.

[1] Because he was WCM's compliance officer during this time period, Mr. Cooper is also charged with aiding and abetting WCM's recordkeeping and compliance violations. (*Id.* at ¶ 20.)

Cooper liable to WCM and its remaining principals for more than $2.2 million. (*Id.* at ¶ 4.) In the near future, WCM will be filing a motion in district court to confirm the award, and counsel understands Mr. Cooper will be filing a motion to vacate that award. (*Id.* at ¶5.) Mr. Cooper has also filed a complaint in the Eastern District of Louisiana against WCM, its principals, employees and former employees alleging fraud, defamation, and other causes of action. (*Id.* at ¶6.; *see Cooper v. Bolton*, et al.,Case No. 2:12-cv-02934, Dkt. 1.)

III. THE SUBPOENA REQUESTS

On October 29, 2014, Mr. Cooper issued a subpoena to WCM seeking WCM's internal financial and accounting records dating back to "the inception" of the Fund, including the general ledger for the Fund (Request No. 1), all records or documents showing assets under management for each quarter (Request No. 2), and all records and documents reflecting management fees earned and/or paid (Request Nos. 4 and 5). (Evangelist Decl., ¶ 7.) WCM and Mr. Cooper have met and conferred and have been unable to resolve their differences regarding request numbers 1, 2, 4, and 5 of this subpoena. (*Id.* at ¶ 8.)[2]

[2] The parties did agree to certain modifications to Mr. Cooper's requests through meet and confer efforts. First, Mr. Cooper's requests initially sought documents from the "inception [of the Fund] to the present day." During meet and confer efforts, Mr. Cooper agreed not to seek documents post-dating Mr. Cooper's expulsion from the WCM partnership in June 2012. Second, as to request number 6, WCM agreed to produce a list of individuals rather than all records and documents identifying such individuals. Third, as to request number 3, WCM produced the Fund's Private Placement Memoranda, the Fund's Limited Partnership Agreement, the WCM Operating Agreement, and the WCM Revenue Agreement during the arbitration proceedings. Mr. Cooper advised that he is not seeking any documents aside from these via request number 3 and that he is in the process of reviewing his records to confirm he is in possession of these documents. (Evangelist Decl., ¶ 9.) As such, it is unnecessary for the hearing officer to address this request at this time, but WCM reserves the right to bring a supplemental motion to quash should Mr. Cooper decide he is seeking other documents through request number 3.

WCM informed Mr. Cooper that it objected to his requests and would move to quash them if necessary to the extent they sought information that pre-dated the 2010 to 2012 time period that is the subject of the SEC's action against him. WCM also informed Mr. Cooper that as to that operative time period, it is WCM's understanding that he already received information responsive to many of his requests by virtue of the discovery provided during the arbitration proceeding and through the SEC's production[3] in the instant action. (*Id.* at ¶ 10.) Specifically, WCM believes Mr. Cooper should have in his possession at least the following documents:

1. Audited financial statements for the Fund for the years 2009-2011;
2. The Fund's general ledger for 2010 and 2011;
3. IRS Schedule K-1 for the Fund's limited partners during the relevant time frame;
4. Income and expense statements for the Fund from 2010 - 2012 reflecting the amount of management fees paid by the Fund to WCM;
5. Allocation documents showing the equity positions for the Fund's limited partners during the relevant time frame; and
6. Bank statements for WCM's account at First Republic Bank and related wire transfers from the relevant time frame showing the transfer of management fees through that account and into Mr. Cooper's personal account.

(Evangelist Decl., ¶ 12.)

Mr. Cooper responded that while WCM's production during arbitration and the SEC's production in this case may have provided responsive documents for the time period covered by

[3] During the SEC's 2012 onsite examination, WCM produced all relevant financial documents to the SEC examiners. This production included books and records kept by WCM's third-party fund administrator at the time (e.g., the Fund's general ledger, the administrator's working papers, etc.). WCM understands that all documents received by the SEC from WCM during the examination have or will be produced to Mr. Cooper in this litigation. (Evangelist Decl., ¶11.)

the SEC's allegations, he requires documents dating back to the inception of the Fund in 2003. (*Id.* at ¶¶ 13-14.)

IV. ARGUMENT

A. Legal Standard

While under Rule 26(b)(1) of the FRCP, a subpoena may issue for documents if their production is "reasonably calculated to lead to the discovery of admissible evidence, in Commission administrative proceedings the permissible scope of discovery is more limited. Under the applicable administrative rule, a subpoena will be quashed where compliance with the subpoena would be unreasonable, oppressive, or unduly burdensome. (*In the Matter of David F. Bandimere and John O. Young*, Securities Act Release No. 746 (Feb. 5, 2013).) This standard is "entirely distinct" from that applicable under the Federal Rules of Civil Procedure. (*Id.*)

Even under the more permissible standard for discovery employed in district court, parties may only seek discovery of nonprivileged matter that is relevant to a specific "claim or defense." (Fed. R. C. Pro. 26(b)(1) [emphasis added].) Discovery of information broadly relevant to the subject matter of the litigation is not permitted without a showing of good cause. (*Id.*) Thus, even if federal court, "discovery is not a fishing expedition, [and] parties must disclose some relevant factual basis for their claim before requested discovery will be allowed." (*Milazzo v. Sentry Ins.*, 856 F.2d 321, 322 (1st Cir. 1988).) Federal courts have increasingly addressed the problem of "over-discovery," and the Federal Rules of Civil Procedure have undergone amendments to increase the district courts' power to supervise discovery and curb excesses. (*Mack v. Great Atlantic and Pacific Tea Co., Inc.*, 871 F.2d 179, 187 (1st Cir. 1989).) Courts have construed these amendments in specific reference to over-discovery, stating that litigants "ought not be permitted to use broadswords where scalpels will suffice, nor to undertake

wholly exploratory operations in the vague hope that something helpful will turn up." (*Id.*) Central to the decision to limit scope of discovery is the court's balancing of the seeking party's right to know against the protesting party's right to be free from unwarranted intrusions. (*Id.*) Courts do not tolerate irrelevant or overbroad excursions into the private records of others. (*See e.g., McArthur v. Robinson*, 98 F.R.D. 672, 674 (E.D. Ark. 1983.). And discovery will be denied where the information sought is too remote to any matter involved in the case. (*See also Food Lion, Inc. v. United Food & Coom'l Workers Int'l Union*, 103 F.3d 1007, 1012-13 (D.C. Cir. 1997); *Mack*, 871 F.2d at 187.)

B. The Subpoena Should be Quashed

Mr. Cooper's subpoena seeks a huge amount of information about the Fund's finances. With the exception of request number 1 which seeks copies of the Fund's general ledger, all of Mr. Cooper's requests broadly ask for "[a]ll records, documents and things" showing assets under management for each quarter (Request No. 2), and management fees earned and/or paid (Request No. 4 and 5) from "inception" of the Fund through June 2012. By making such broad requests, Mr. Cooper seeks information on every securities transaction entered into by the Fund, all payments by the Fund to its limited partners, all expenses paid by the Fund (e.g., to its broker), the Fund's tax returns, and many of the Fund's bank account statements for a period up to seven years before the allegations in this case even begin. Aside from documents relating to management fees owing and paid by the Fund to WCM in 2010 through 2012, none of this information is relevant to the claims against Mr. Cooper or his possible defenses. The document productions made by WCM and the SEC already include documents from this time period that are sufficient to allow Mr. Cooper to evaluate his liability and defenses. WCM should not be required to produce additional records. Mr. Cooper's subpoena is simply a fishing expedition for

sensitive financial information of a party adverse to him in other litigation and whose trust and confidences he already breached by absconding with management fees and other monies rightfully belonging to his former business partners. WCM therefore requests that the hearing officer quash the subpoena.

WCM anticipates Mr. Cooper will argue he is entitled to WCM's pre-2010 financial information on the theory that the records will reveal that the Fund's payment of management fees to WCM has never fully complied with the requirement in the Fund's Offering Circular that 1.5% of each investor's capital account balance be paid quarterly, in advance at the beginning of each fiscal quarter.

The pre-2010 history of Mr. Cooper's management of the Fund is not at issue in this proceeding. Whether or not Mr. Cooper took excessive or early management fees in prior years, is not probative of whether his actions from 2010 to 2012 were proper.[4] Nor could any of historical acts shed light on Mr. Cooper's state of mind in 2010 through 2012. On a factual level, actions allegedly occurring a seven years prior are too remote to any matter involved in the case to be discoverable. (*Food Lion, Inc.*, 103 F.3d 1007, 1012-13 (D.C. Cir. 1997); *Mack*, 871 F.2d at 187.) Legally, only the Section 206(1) and 206(2) violations require the SEC to prove Mr. Cooper acted with scienter,[5] recklessness and negligence, respectively. (*SEC v. Life Wealth Management, Inc.*, 2013 WL 1660860, *3 (C.D. Cal. 2013) ["[I]t is well established that negligence can [] establish liability under Section 206(2)."]; *Vernazza v. SEC*, 327 F.3d 851, 860

[4] It is unclear whether Mr. Cooper will argue that during the pre-2010 timeframe someone besides himself managed the withdrawal of the management fees. Aside from being factually inaccurate, these allegations – that someone else did something similar during a different time frame – are even less probative of the issues actually before the hearing officer.

[5] Scienter is not required for the Section 206(4) violations. (*E.g., S.E.C. v. Onyx Capital Advisors*, LLC, 2012 WL 4849890,*9 (E.D. Mich. 2012).)

(9th Cir. 2003) [for a section 206(1) violation, a showing of knowing or reckless conduct will suffice].) Both states of mind can easily be proved by a showing that Mr. Cooper acted in express violation of the provision regarding management fees in the Fund's offering circular. Nor can Mr. Cooper argue that the documents he seeks could provide a defense to the false statement allegation under Section 207 of the Act. Mr. Cooper admits he did not withdraw fees according to the provision in the Fund's offering circular; he simply argues he thought it was his practice to do so This does not make his statement that in the Form ADV that he did withdraw fees according to the Offering Circular any less knowing or any less false.

In addition to seeking information and documents irrelevant to the issues in this case, Mr. Cooper's requests seek information regarding investments made and profits earned by the Fund's limited partners. For example, request number 2 seeking any and all documents showing assets under management on a quarterly basis would require production of documents showing monies contributed and withdrawn by the Fund's investors, such as their quarterly net asset value statements. Such information is protected by those individuals' right to privacy. (*Valley Bank of Nevada v. Superior Court* (1975) 15 Cal.3d 652, 656-57 [right to privacy "extends to one's confidential financial affairs"]; *Cobb v. Superior Court* (1979) 99 Cal.App.3d 543, 550; *Charles O. Bradley Trust v. Zenith Capital LLC*, 2006 WL 798991 (N.D. Cal. Mar 24, 2006) [federal courts generally treat financial information as private]; *Soto v. City of Concord*, 162 F.R.D. 603, 616 (N.D.Cal.1995) ["Federal courts ordinarily recognize a constitutionally-based right of privacy that can be raised in response to discovery requests."]; F.R .C.P. 45(c)(3)(B)(i) (a court may quash a subpoena if it requires "disclosing a trade secret or other confidential research, development, or commercial information."].)To obtain private financial information, Mr. Cooper must establish both that he has a "compelling need" for the information and that the information

is "directly relevant" and "essential to the fair resolution" of the case. (*Alch v. Superior Court* (2008) 165 Cal.App.4th 1412, 1425 [*citing Britt v. Superior Court* (1978) 20 Cal.3d 844, 848; *Save Open Space Santa Monica Mountains v. Superior Court* (2000) 84 Cal.App.4th 235, 252]; *Rocky Mountain Medical Management, LLC v. LHP Hosp. Group, Inc.*, 2013 WL 6446704, *2 - 3 (D.Idaho 2013) [where party establishes that production of documents requires disclosure of confidential information, subpoenaing part "must demonstrate, in turn, that the information sought is relevant and material to the allegations and claims at issue in the proceedings"].) As discussed above, Mr. Cooper cannot do so.

Likewise, the subpoena seeks information about the Fund's and WCM's finances (e.g, bank statements showing the payment of the hedge fund fees and possibly tax returns). WCM and the Fund have a privacy interest in their financial records. While the constitutional right to privacy applies only to natural persons, corporate entities retain a privacy interest in books and records unrelated to claims in the litigation. (*Ameri-Medical Corp. v. Workers' Comp. Appeals Bd,*. 42 Cal.App.4th 1260, 1288-89 (1996) [defendant corporation "retain[ed] a privacy interest in financial and employment information unrelated" to plaintiff's claims, such that plaintiff did "not have an automatic right to unfettered access to books and records regarding [defendant's] overall business operation"]; *see also Charles O. Bradley Trust*, 2006 WL 798991 at *1 -2 (N.D. Cal. 2006) [corporate defendants "raised legitimate privacy concerns for non-party investors" and "articulated at the hearing a specific harm to their business interest—disclosure of sensitive client information in litigation would detract future investors from entrusting Defendants with their finances. Moreover, the private financial records of Defendants are not public."].) To obtain discovery despite privacy interests, it is not enough for Mr. Cooper to demonstrate the information is relevant to the subject matter of the action; he must show the information is

directly relevant to a cause of action. (*Britt*, 20 Cal.3d at 859-62.) The court must then "carefully balance" the privacy interests at stake against the need for such information to obtain just results in litigation. (*Valley Bank of Nevada v. Superior Court,* 15 Cal.3d 652, 657; *see also Mack*, 871 F.2d at 187 (1975) [central to the decision to limit scope of discovery is the Court's balancing of the seeking party's right to know against the protesting party's right to be free from unwarranted intrusions].) Here, whatever justification Mr. Cooper may conjure up for seeking this information, it does not outweigh the Fund's and its investors' privacy interests in this case. That is particularly true given that Mr. Cooper has already betrayed WCM's trust through his misappropriation of the management fees and other monies, and WCM and its principals are currently adverse to him in other litigation.

Finally, in addition to being overbroad as to time period and invading upon protected privacy interests, request numbers 2, 4 and 5 are overbroad because they seek "all records, documents and things" showing assets under management and fees due and paid. As summarized above, Mr. Cooper already has a substantial amount of documents from the 2010 to 2012 time period that will allow him to evaluate when management fees accrued and when and how they were paid by the Fund. He is not entitled to more than this. Assuming, *arguendo*, that Mr. Cooper is entitled to some records not already in his possession on these topics, he is not entitled to any and all of WCM's records. The hearing officer should order him to limit his requests to those specific records in the 2010 through 2012 time period that he actually needs to evaluate his purported defense. (*Mack*, 871 F.2d at 187 [stating litigants "ought not be permitted to use broadswords where scalpels will suffice"].)

In sum, Mr. Cooper already has access to the portions of WCM's and the Fund's financial information relevant to this proceeding. The information Mr. Cooper seeks outside of

the 2010 through 2012 time period is not relevant to a claim or defense at issue and will not help the parties or the hearing officer achieve just results in this case. It is thus not discoverable under either the more limited scope of discovery in this administrative proceeding or the more permissible standard for discovery employed in district court. Moreover, requiring WCM to produce sensitive financial information to a man who previously stole from its clients and who is currently suing its principals would be unreasonable, oppressive, or unduly burdensome. The subpoena should be quashed.

V. CONCLUSION

Based on the foregoing, WCM respectfully request that the hearing officer quash the subpoena.

Dated: November 13, 2014

Respectfully submitted,

Edward W. Swanson
Britt Evangelist
SWANSON & McNAMARA LLP
Attorneys for WESTEND MANAGEMENT COMPANY LLC

PROOF OF SERVICE

I, the undersigned, certify that I am a citizen of the United States, over the age of eighteen years, and not a party to the within cause; my business address is 300 Montgomery Street, Suite 1100, San Francisco, CA. On this date I caused to be served on the interested parties hereto, a copy of:

- **MOTION TO QUASH SUBPOENA TO THIRD PARTY WESTEND CAPITAL MANAGEMENT LLC FOR PRODUCTION OF DOCUMENTARY EVIDENCE**
- **DECLARATION OF BRITT EVANGELIST IN SUPPORT OF MOTION TO QUASH SUBPOENA TO THIRD PARTY WESTEND CAPITAL MANAGEMENT LLC FOR PRODUCTION OF DOCUMENTARY EVIDENCE**

(X) By placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Mail at San Francisco, California, addressed as set forth below.

(X) By serving a true copy by facsimile to the person and/or office of the person at the address set forth below.

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And:

(X) By emailing a true copy to the person and/or office of the person at the address set forth below.

(X) By delivering a true copy thereof to "Federal Express" to be delivered to the person at the address set forth below.

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

I certify under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this certificate has been executed on November 13, 2014 at San Francisco, California.

Alex Barkett