UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 6491 / December 1, 2023

ADMINISTRATIVE PROCEEDING
File No. 3-21807

In the Matter of **EAGAN CAPITAL MANAGEMENT, LLC** **Respondent.**	**ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS, PURSUANT SECTIONS 203(e) AND 203(k) OF THE INVESTMENT ADVISERS ACT OF 1940, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant Sections 203(e) and 203(k) of the Investment Advisers Act of 1940 ("Advisers Act"), against Eagan Capital Management, LLC ("ECM" or the "Respondent").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over it and the subject matter of these proceedings, which are admitted, the Respondent consents to the entry of this Order Instituting Administrative and Cease-and-Desist Proceedings Pursuant to Sections 203(e) and 203(k) of the Investment Advisers Act of 1940, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order ("Order"), as set forth below.

III.

On the basis of this Order and Respondent's Offer, the Commission finds[1] that:

Summary

This matter involves violations by Eagan Capital Management, LLC ("ECM"), a registered investment adviser, of Section 206(4) of the Advisers Act and Rules 206(4)-2 thereunder, commonly referred to as the "custody rule" from 2018. ECM violated the custody rule in two respects related to two private real estate operating company ("REOC") funds that it advised, (i.e., Rochester 153, LLC ("Rochester") and Verity Investments, LLC ("Verity")) (collectively, the "REOC Funds" or the "Funds") in which ECM's other advisory clients invested. First, ECM had custody of certain ECM clients' membership interests in the REOC Funds but did not comply with the requirements set forth in the custody rule. Second, ECM had custody of the REOC Funds' funds and securities but did not comply with the requirements set forth in the custody rule with respect to those assets.

ECM also violated Section 206(4) of the Advisers Act and Rule 206(4)-7 thereunder because it failed to adopt and implement written policies and procedures reasonably designed to prevent violations of the Advisers Act and the rules thereunder.

Respondent

1. ECM is a New York limited liability company with its principal office and place of business in Fayetteville, New York. ECM has been registered with the Commission as an investment adviser since March 2008. Client assets are invested in mutual funds, equities, ETFs and the REOC Funds. On its Form ADV dated March 9, 2023, ECM reported that it had approximately $73.2 million in regulatory assets under management.

Other Relevant Individual

2. Edward W. Eagan ("Eagan"), is and has been the sole owner, Managing Member, and Chief Compliance Officer ("CCO") of ECM since its inception. He was associated with a registered broker-dealer from March 2007 to December 2018, but has not been associated with any other registered broker-dealer since then. Eagan held Series 6, 7, 24, 63, and 65 licenses.

Other Relevant Entities

3. EWE, LLC ("EWE"), is a New York limited liability company established by Eagan in November 2003, with its principal office and place of business in Fayetteville, New York. From at least April 25, 2019 until March 1, 2021, Eagan and/or members of Eagan's family

[1] The findings herein are made pursuant to Respondent's Offer of Settlement and are not binding on any other person or entity in this or any other proceeding.

held 100% of the membership interests in EWE. Eagan was EWE's designated Manager until December 2, 2021. Eagan receives no salary from EWE, which operates as a "pass through" entity with all proceeds from investments passed to Rochester or Verity.

4. Rochester, is a Delaware limited liability company established in December 2017, with its principal place of business in Syracuse, New York. Rochester is a REOC fund that offers the sale of membership interests in it and acquires, holds, renovates, leases, manages and disposes of single-family rental ("SFR") homes located in Rochester, New York and other cities across the United States. At least half of Rochester's assets are invested in real estate that it manages directly, while the other half of Rochester's assets ultimately are invested in companies that own, develop, rent, manage, or finance real estate. Rochester's Board of Managers ("Rochester Board") consists of three officers who have exclusive authority to manage and control all aspects of Rochester, including, but not limited to making the ultimate decision regarding investments. Approximately 43 percent of Rochester's investments are notes issued by EWE, which uses the proceeds from these loans to Rochester to make investments on terms that have been recommended by Eagan and approved by the Rochester Board.

5. Verity, is a Delaware limited liability company established in December 2020, with its principal place of business in Syracuse, New York. Verity is a REOC fund that offers the sale of membership interests in it and acquires, holds, renovates, leases, manages and disposes of real estate with a focus on SFRs and commercial real estate, and invests in companies that own, develop, rent, manage, or finance real estate. At least half of Verity's assets ultimately are invested in real estate that it manages directly. Verity's Board of Managers ("Verity Board") consists of three officers who have exclusive authority to manage and control all aspects of Verity, including, but not limited to making the ultimate decision regarding investments. Approximately 92 percent of Verity's investments are notes issued by EWE, which uses the proceeds from these loans to Verity to make investments on terms that have been recommended by Eagan and approved by the Verity Board.

Background

6. The custody rule is designed to protect investment advisory clients from the loss, misuse, or misappropriation of their funds and securities. The custody rule provides that "it is a fraudulent, deceptive, or manipulative act, practice or course of business within the meaning of section 206(4) of the Advisers Act… for [a registered investment adviser] to have custody of client funds or securities unless" the adviser implements an enumerated set of requirements to prevent loss, misuse, or misappropriation of those assets. *See* Rule 206(4)-2(a).

7. An investment adviser has custody of client assets if it holds, directly or indirectly, client funds or securities, or if it has the ability to obtain possession of those assets. *See* Rule 206(4)-2(d)(2). An adviser also has custody if it or its "related person" has possession of client funds or securities or has authority to obtain possession of them in connection with advisory services provided to clients. *Id.* Custody includes, among other things, "[a]ny arrangement…under which you are authorized or permitted to withdraw client funds or securities

maintained with a custodian upon your instruction to the custodian" and "[a]ny capacity (such as …managing member of a limited liability company or a comparable position for another type of pooled investment vehicle…)" that gives the adviser or one of its supervised persons legal ownership of or access to client funds or securities. *Id*. A "related person" is defined as any person, directly or indirectly, controlling or controlled by the adviser, and any person that is under common control with the adviser. *See* Rule 206(4)-2(d)(7). "Control" is defined as "the power, directly or indirectly, to direct the management or policies of a person, whether through ownership of securities, by contract, or otherwise." *See* Rule 206(4)-2(d)(1).

8. Under the custody rule, an investment adviser who has custody of client assets must, among other things: (i) ensure that a qualified custodian maintains the clients assets; (ii) notify the client in writing of accounts opened by the adviser at a qualified custodian on the client's behalf, (iii) have a reasonable basis for believing that the qualified custodian sends account statements at least quarterly to clients, except if the client is a limited liability company for which the adviser or a related person is a managing member, the account statements must be sent to each member, and (iv) ensure that client funds and securities are verified by actual examination each year by an independent public accountant at a time chosen by the accountant without prior notice or announcement to the adviser (i.e., the "surprise examination" requirement). *See* Rule 206(4)-2(a)(1) – (5). The written agreement with the accountant must provide for the first examination to occur within six months of becoming subject to the requirement and require, among other things, that the accountant file a Form ADV-E with the Commission within 120 days of the date chosen by the accountant to perform the examination, which states that the accountant has examined the client funds and securities and describes the nature and extent of the examination. *See* Rule 206(4)-2(a)(4).

9. The custody rule further provides that an investment adviser "shall be deemed to have complied with" the independent verification requirement and is not required to satisfy the notification and accounts statements delivery requirements with respect to a fund if the fund is subject to audit at least annually and "distributes [the fund's] audited financial statements prepared in accordance with generally accepted accounting principles["GAAP"] to all … members…within 120 days of the end of [the fund's] fiscal year" ("Audited Financials Alternative"). *See* Rule 206(4)-2(b)(4).

Facts

10. Since at least 2018, ECM, through its sole owner and Managing Member, Eagan, has provided investment advice to the REOC Funds. The REOC Funds are each managed by their respective Board of Managers ("Fund Board" or collectively the "Fund Boards"). The Fund Boards' officers were selected by Eagan in connection with the formation of the Funds. In formal resolutions dated January 24, 2018 and December 10, 2020, for Rochester and Verity, respectively, each Fund Board engaged Eagan's services as an investment adviser. This role includes, but is not limited to, recommending investments to the REOC Funds and assisting the Fund Boards in the investigation, evaluation, inspection, acquisition, management and disposition of real estate and other investments acquired or managed by the REOC Funds.

11. Eagan is also responsible for most day-to-day operations of the REOC Funds which includes, among other things, managing the REOC Funds' finances. Eagan has full check writing and wire issuing authority for the REOC Funds' bank accounts. While Eagan makes investment recommendations to the REOC Funds, the Fund Boards make the ultimate decision regarding investments.

12. Eagan himself is an investor in the REOC Funds, as were approximately 105 of ECM's advisory clients, which include certain members of Eagan's family. ECM holds the paper membership interests in the REOC Funds of 43 advisory clients at its principal place of business.

13. ECM clients are each charged a 0.75% advisory fee on assets under management at ECM, including their interests in the REOC Funds. The compensation agreement authorizes the REOC Funds to pay the fee directly to ECM. Consequently, ECM, through Eagan, is able to sign off on and issue advisory fee payments directly from the REOC Funds' bank accounts to ECM, in addition to authorizing and initiating wire transfers of the REOC Funds' money to outside entities.

14. From at least October 2018 through the present date, the REOC Funds entered into several real estate investment contracts where they issued loans to EWE (which the Funds used as a pass-through entity), the proceeds of which EWE used to acquire real estate on behalf of the Funds. Eagan oversaw these transactions and had access to the loan proceeds as well as the REOC Funds' money, including cash dividends that were wired back into EWE's bank accounts to be paid out to ECM clients invested in the Funds or reinvested into the Funds. Since its inception, Eagan has had full check writing and wire issuing authority for EWE's bank accounts. On or about December 2, 2021, the operating agreement for EWE was amended reassigning control as Manager from Eagan to the President of the REOC Fund Boards. From at least April 25, 2019 until March 1, 2021, Eagan and/or members of Eagan's family held 100% of the membership interests in EWE, but they have had no membership interest since March 2021. As of July 31, 2021, EWE's outstanding loan balances amounted to 43.29% of Rochester's total assets and 91.83% of Verity's total assets.

15. Accordingly, ECM had custody of the paper membership interests in the REOC Funds of 43 advisory clients who were investors in the REOC Funds and it also had custody of the REOC Funds' funds and securities.

16. With respect to the paper membership interests in the REOC Funds, ECM held them for 43 ECM clients at ECM's principal place of business from at least October 2018. From at least 2018 through 2021, ECM failed to engage an independent public accountant to verify by actual examination at least once during each calendar year the client funds and securities of which it had custody, including these membership interests, as required by 206(4)-2(a)(4) (commonly referred to as the "surprise" examination requirement). In 2022, ECM engaged an accountant to perform a surprise exam with respect to these membership interests.

17. With respect to the REOC Funds, from at least October 2018, ECM failed to comply with the requirements of the custody rule set forth in Rule 206(4)-2(a) or comply with the Audited Financials Alternative.

18. ECM failed to engage an independent public accountant to verify by actual examination at least once during each calendar year the REOC Funds' funds and securities for each year from October 2018, as required by Rule 206(4)-2(a)(4) for those accounts. Nor did it comply with the requirements of the Audited Financials Alternative by having the Funds audited and by distributing the audited financials for the Funds as described under Advisers Act Rule 206(4)-2(b)(4).

19. ECM also failed to comply with the requirement that every investment adviser registered with the Commission adopt and implement written policies and procedures reasonably designed to prevent violations of the Advisers Act and the rules thereunder. *See* Rule 206(4)-7(a). ECM failed to adopt and implement any written policies and procedures reasonably designed to prevent violations concerning the custody of client funds and securities.

Violations

20. Section 206(4) of the Advisers Act prohibits an investment adviser from engaging in acts, practices or courses of business that are fraudulent, deceptive, or manipulative, as defined by the Commission in rules and regulations promulgated under the statue. Proof of scienter is not required to establish a violation of Section 206(4) of the Advisers Act and the rules thereunder. *See SEC v. Steadman*, 967 F.2d 636, 647 (D.C. Cir. 1992). Among other things, Rule 206(4)-2 requires registered investment advisers with custody of client funds or securities to have independent public accountants conduct surprise examinations of those client funds or securities, or to have private fund clients timely distribute to their investors annual audited financial statements prepared in accordance with GAAP. Rule 206(4)-7 requires, among other things, that an investment adviser registered with the Commission adopt and implement written policies and procedures reasonably designed to prevent violation of the Advisers Act and rules thereunder.

21. As a result of the conduct described above, ECM willfully[2] violated Section 206(4) of the Advisers Act and Rules 206(4)-2 and 206(4)-7 thereunder.

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[2] "Willfully," for purposes of imposing relief under Section 203(e) of the Advisers Act "'means no more than that the person charged with the duty knows what he is doing.'" *Wonsover v. SEC*, 205 F.3d 408, 414 (D.C. Cir. 2000) (quoting *Hughes v. SEC*, 174 F.2d 969, 977 (D.C. Cir. 1949)). There is no requirement that the actor "also be aware that he is violating one of the Rules or Acts." *Tager v. SEC*, 344 F.2d 5, 8 (2d Cir. 1965). The decision in *The Robare Group, Ltd. v. SEC*, which construed the term "willfully" for purposes of a differently structured statutory provision, does not alter that standard. 922 F.3d 468, 478-79 (D.C. Cir. 2019) (setting forth the showing required to establish that a person has "willfully omit[ted]" material information from a required disclosure in violation of Section 207 of the Advisers Act).

Undertakings

22. Respondent ECM has undertaken to:

a. Retention of Independent Compliance Consultant. Within ninety (90) days after the date of this Order, ECM shall retain the services of an independent compliance consultant ("Independent Consultant") not unacceptable to the Commission staff and provide a copy of this Order to the Independent Consultant. No later than ten (10) days following the date of the Independent Consultant's engagement, Respondent shall provide the Commission staff with a copy of the engagement letter detailing the Independent Consultant's responsibilities, which shall include the reviews and reports to be made by the Independent Consultant as set forth in this Order. The Independent Consultant's compensation and expenses shall be borne exclusively by ECM.

b. Independent Consultant's Review. ECM shall require the Independent Consultant conduct a comprehensive review and assist the Respondent in developing and implementing written compliance policies and procedures reasonably designed to promote Respondent's compliance with the Advisers Act with respect to the custody of client funds and securities.

c. Respondent shall require the Independent Consultant to submit a written report (the "Report") to the Respondent and to Commission staff within 180 days of ECM's engagement of the Independent Consultant. The Report shall include a description of the review performed, the names of the individuals(s) who performed the review, its findings and recommendation for changes or improvements to the policies, procedures, systems, and internal controls, and a procedure for implementing the recommended changed and improvements.

d. Respondent shall, within ninety (90) days of receipt of each of the Independent Consultant's reports, adopt all recommendations containing the reports, provided, however, that within thirty (30) days after the date of the applicable report, Respondent shall in writing advise the Independent Consultant and the Commission staff of any recommendations that it considers to be unduly burdensome, impractical, or inappropriate. With respect to any recommendation that Respondent considers to the unduly burdensome, impractical, or inappropriate, Respondent need not adopt that recommendation at the time but shall instead propose in writing an alternative policy or procedure designed to achieve the same objective or purpose as that recommended by the Independent Consultant. Respondent shall engage in good faith negotiations with the Independent Consultant in an effort to reach agreement on any recommendations objected to by Respondent. In the event that Respondent and the Independent Consultant are unable to agree on an alternative proposal within sixty (60) days, Respondent and Independent Consultant shall jointly confer with the Commission staff to resolve the matter. In the event that, after conferring with the Commission staff, Respondent and the Independent Consultant are unable to agree on an alternative proposal, Respondent will abide by the recommendations of the Independent Consultant.

e. Within thirty (30) days of Respondent's adoption and implementation of all of the recommendations in the Independent Consultant's reports that the Independent Consultant deems appropriate, as determined pursuant to the procedures set forth herein, Respondent shall certify in writing to the Independent Consultant and the Commission staff that Respondent has adopted and implemented all recommendations in the applicable report. The Commission staff may make reasonable requests for further evidence of compliance, and Respondent agrees to provide such evidence. Unless otherwise directed by the Commission staff, all reports, certifications, and supporting material shall be sent to Tejal D. Shah, Associate Regional Director, Division of Enforcement, New York Regional Office, Securities and Exchange Commission, 100 Pearl Street, Suite 20-100, New York, NY 10004-2616.

f. Respondent shall cooperate fully with the Independent Consultant and shall provide the Independent Consultant with access to such of its files, books, records and personnel as reasonably requested for the Independent Consultant's review, including access by on-site inspection.

g. To ensure the independence of the Independent Consultant, Respondent (1) shall not have the authority to terminate the Independent Consultant or substitute another independent consultant for the initial Independent Consultant without prior written approval of the Commission staff; and (2) shall compensate the Independent Consultant and persons engaged to assist the Independent Consultant for services rendered pursuant to this Order at their reasonable and customary rates.

h. For the period of engagement and for a period of two years from completion of the engagement, Respondent shall not (i) retain the Independent Consultant for any other professional services outside of the services described in this Order; (ii) enter into any other professional relationship with the Independent Consultant, including any employment, consultant, attorney-client, auditing or other professional relationship; or (iii) enter, without prior written consent of the Commission staff, into any such professional relationship with any of the Independent Consultant's present or former affiliates, employers, directors, officers, employees, or agents acting in their capacity as such.

i. The reports by the Independent Consultant will likely include confidential financial, proprietary, competitive business or commercial information. Public disclosure of the reports could discourage cooperation, impede pending or potential government investigations or undermine the objectives of the reporting requirement. For these reasons, among others, the reports and the contents thereof are intended to remain and shall remain non-public, except (1) pursuant to court order, (2) as agreed to by the parties in writing, (3) to the extent that the Commission determines in its sole discretion that disclosure would be in furtherance of the Commission's discharge of its duties and responsibilities, or (4) is otherwise required by law.

j. For good cause shown, the Commission staff may extend any of the procedural dates relating to the undertakings. Deadlines for procedural dates shall be counted in calendar days, except that if the last day falls on a weekend or federal holiday, the next business day shall be considered to be the last day.

23. Respondent shall certify, in writing, compliance with the undertakings set forth above. The certification shall identify the undertakings, provide written evidence of compliance in the form of a narrative, and be supported by exhibits sufficient to demonstrate compliance. The Commission staff may make reasonable requests for further evidence of compliance, and Respondent agrees to provide such evidence, and Respondent agrees to provide such evidence. The certification and supporting material shall be submitted to Steven G. Rawlings, Assistant Regional Director, Division of Enforcement, New York Regional Office, Securities and Exchange Commission, 100 Pearl Street, Suite 20-100, New York, NY 10004-2616, with a copy to the Office of Chief Counsel of the Enforcement Division, no later than sixty (60) days from the date of the completion of the undertakings.

IV.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions agreed to in Respondent ECM's Offer.

Accordingly, pursuant to Sections 203(e) and 203(k) of the Advisers Act, it is hereby ORDERED that:

A. Respondent cease and desist from committing or causing any violations and any future violations of Section 206(4) of the Advisers Act and Rules 206(4)-2 and 206(4)-7 thereunder.

B. Respondent is censured.

C. Respondent shall, within 14 days of the entry of this Order, pay a civil money penalty in the amount of $50,000 to the Securities and Exchange Commission for transfer to the general fund of the United States Treasury, subject to Exchange Act Section 21F(g)(3). If timely payment is not made, additional interest shall accrue pursuant to 31 U.S.C. § 3717.

Payment must be made in one of the following ways:

(1) Respondent may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;

(2) Respondent may make direct payment from a bank account via Pay.gov through the SEC website at http://www.sec.gov/about/offices/ofm.htm; or

(3) Respondent may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and hand-delivered or mailed to:

Enterprise Services Center
Accounts Receivable Branch
HQ Bldg., Room 181, AMZ-341

6500 South MacArthur Boulevard
Oklahoma City, OK 73169

Payments by check or money order must be accompanied by a cover letter identifying Eagan Capital Management, LLC as a Respondent in these proceedings, and the file number of these proceedings; a copy of the cover letter and check or money order must be sent to Tejal D. Shah, Associate Regional Director, Division of Enforcement, Securities and Exchange Commission, New York Regional Office, 100 Pearl Street, Suite 20-100, New York, New York 10004-2616.

D. Amounts ordered to be paid as civil money penalties pursuant to this Order shall be treated as penalties paid to the government for all purposes, including all tax purposes. To preserve the deterrent effect of the civil penalty, Respondent agrees that in any Related Investor Action, it shall not argue that it is entitled to, nor shall it benefit by, offset or reduction of any award of compensatory damages by the amount of any part of Respondent's payment of a civil penalty in this action ("Penalty Offset"). If the court in any Related Investor Action grants such a Penalty Offset, Respondent agrees that it shall, within 30 days after entry of a final order granting the Penalty Offset, notify the Commission's counsel in this action and pay the amount of the Penalty Offset to the Securities and Exchange Commission. Such a payment shall not be deemed an additional civil penalty and shall not be deemed to change the amount of the civil penalty imposed in this proceeding. For purposes of this paragraph, a "Related Investor Action" means a private damages action brought against Respondent by or on behalf of one or more investors based on substantially the same facts as alleged in the Order instituted by the Commission in this proceeding.

E. Respondent shall comply with the undertakings enumerated in paragraph 22 above.

By the Commission.

Vanessa A. Countryman
Secretary