

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

ADMINISTRATIVE PROCEEDINGS RULINGS

Release No. 4723/March 31, 2017

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

ORDER ON STIPULATIONS

On March 29, 2017, the parties submitted their proposed factual stipulations. I commend the parties on reaching agreement on the stipulations. After reviewing the stipulations, I adopt them based on a preponderance of the evidence. I ORDER that the following findings of fact (FOF) are binding on the parties pursuant to 17 C.F.R. § 201.324:

- FOF 1. At the time of the administrative proceeding, Donald F. (“Jay”) Lathen, Jr., was forty-nine years old.
- FOF 2. Lathen graduated college in 1989 and got his MBA with distinction in 1993. At one point he held a Series 7 license and Series 24 and 63 licenses. A Series 24 license is for a supervisor.
- FOF 3. Lathen was a managing director in the investment banking department at Citigroup from July 2007 until September 2008, and received a two-year guaranteed contract at \$2.5 million a year, which Citigroup honored. While at Citigroup, he was co-head of Citigroup’s energy mergers and acquisition business in the United States. Prior to joining Citigroup, Lathen was a managing director at Lehman Brothers where he spent eleven years with its industry-leading global natural resources investment banking group. Over the course of his fifteen-year investment banking career, Lathen advised on over \$100 billion worth of completed transactions.
- FOF 4. Lathen is the chief executive officer, chief compliance officer, chief financial officer, chief investment officer, managing member, and founder of Eden Arc Capital Management, LLC (EACM).

- FOF 5. EACM is an investment adviser, registered with the Commission between October 2012 and February 2016, which was founded and controlled by Lathen. EACM acted as the investment manager to Eden Arc Capital Partners, LP (EACP or the Fund).
- FOF 6. EACP is a hedge fund established by Lathen in approximately May 2011.
- FOF 7. Eden Arc Capital Advisors, LLC (EACA), is the general partner of EACP.
- FOF 8. Lathen is the managing member of EACA.
- FOF 9. Survivor's option investments are typically marketed to retail investors.
- FOF 10. The survivor's option bonds were medium- and long-term bonds, with a life of anywhere from two to three years up to thirty years.
- FOF 11. EndCare was a marketing vehicle Lathen used to solicit participants.
- FOF 12. UCC liens in favor of the Fund were placed on each joint tenancy with the right of survivorship (JTWROS) account created after January 2013.
- FOF 13. Sometime in 2014, Lathen changed the language of the redemption letters from referring to participants as "joint owners" of the accounts to "joint and beneficial owners."
- FOF 14. The Commission notified Lathen of an exam of EACM in the fall of 2014.
- FOF 15. Lathen was personally subpoenaed by the Commission related to the Commission's investigation in February of 2015.
- FOF 16. Lathen had authority to access to all of the JTWROS accounts.
[REDACTED]
[REDACTED]
[REDACTED]
- FOF 19. On February 13, 2015, Lathen responded to a January 15, 2015, letter from examination staff of the Commission (exam staff letter).
- FOF 20. Citigroup Global Markets Holdings Inc. (CGMHI) offered retail medium term notes containing a survivor's option.
- FOF 21. CGMHI's survivor's option "is an option to elect repayment of the note prior to its stated maturity in the event of the death of the beneficial owner of the note."

- FOF 22. Barbara Mullaney is managing director and global head of Citi Private Client Solutions Group.
- FOF 23. Lathen redeemed notes issued by CGMHI, bearing the CUSIP 17307XFV8.
- FOF 24. Those retail medium-term notes were issued pursuant to a pricing supplement dated September 28, 2004, a prospectus supplement dated September 22, 2003, and a prospectus dated June 30, 2003.
- FOF 25. The paying agent for the retail medium-term notes issued at CUSIP 17307XFV8 was Citibank, N.A.
- FOF 26. Until April 2016, Roger Begelman was co-chief compliance officer for Goldman Sachs Bank USA, a subsidiary of Goldman Sachs Group, Inc.
- FOF 27. Ian Bell is operations manager in the payment and transfer division services of the corporate trust area at US Bank; he has served in that capacity since late 2012.
- FOF 28. Bell supervises the group that processes redemptions of US Bank clients' survivor's option notes.
- FOF 29. US Bank processes redemptions as trustee for clients issuing various debt securities under those issuances' indentures.
- FOF 30. In the typical redemption process for survivor's option notes, Bell's area receives presentments and packages from brokers who coordinate the paperwork for holders who are electing to put or sell back their bond position under the terms of the survivor option contingency in the indenture.
- FOF 31. Bell's area receives, reviews, and tracks the presentments.
- FOF 32. Beverly Freeney has been a vice president and relationship manager in the administration department of the corporate trust department at US Bank for over fourteen years.
- FOF 33. On January 29, 2014, Freeney received a letter from Lathen by email.
- FOF 34. Lathen's January 29, 2014, letter was attached to his January 29, 2014, email to Freeney.
- FOF 35. Tom Tabor is vice president in the corporate trust department of US Bank, where he has been managing the corporate trust area for four years.
- FOF 36. Tabor supervises Freeney in her role as relationship manager, a role that requires her to act as the client-facing person for the bank for the life of any bond issue for which the bank acts as trustee.

- FOF 37. Fred Robustelli is an associate general counsel for all funding transactions at General Electric Co. (GE). In that function, he and his team handle all of the debt securities issuances for GE and GE Capital (GECC), the financial services operation of GE.
- FOF 38. GECC notified investors if a particular CUSIP offered a survivor's option in the pricing supplement for each CUSIP. All of the GECC CUSIPs Lathen redeemed or sought to redeem during the relevant period offered a survivor's option.
- FOF 39. InCapital is a broker-dealer based out of Chicago that focuses primarily on fixed income distribution.
- FOF 40. Brian Walker is a managing director in the debt capital markets group at InCapital.
- FOF 41. InCapital has had over fifty corporate clients and has helped those clients issue approximately over 10,000 individual bonds with a total notional amount of approximately \$200 billion.
- FOF 42. All but two InCapital clients have offered survivor's option products.
- FOF 43. InCapital's client base today makes up approximately 100 percent of the overall market for survivor's option bonds.
- FOF 44. National Rural Utilities Cooperative Finance Corporation (CFC) is a cooperative of rural electric companies. Its primary function is to make loans to those companies. It raises money in the public and private markets and then lends capital to its owners.
- FOF 45. Matthew Wade is a securities supervisor at CFC.
- FOF 46. CFC issued InterNotes containing a survivor's option.
- FOF 47. Lathen attempted to redeem InterNotes issued by CFC.
- FOF 48. CFC issued a form of fixed rate InterNotes in connection with its November 17, 2011, prospectus supplement.
- FOF 49. Joseph Ferrero is general counsel of Prospect Capital Corporation (Prospect Capital).
- FOF 50. Prospect Capital issues InterNotes that contain a survivor's option.
- FOF 51. Lathen redeemed certain Prospect InterNotes bearing the CUSIPs 74348YBD2, 74348YBH3, 74348YBR1, 74348YBN0, and 74348YBP5.

- FOF 52. Lathen attempted to but was unable to redeem certain other Prospect InterNotes.
- FOF 53. US Bank is Prospect Capital's trustee for its InterNotes program.
- FOF 54. Duke Energy is a utility holding company that has electric power utilities in six states.
- FOF 55. Stephen De May is a senior vice president, tax, and the treasurer of Duke.
- FOF 56. Lathen redeemed Duke InterNotes bearing the CUSIP 26442KAA4.
- FOF 57. The Duke InterNotes bearing CUSIP 26442KAA4 were issued pursuant to a pricing supplement dated November 21, 2012, a prospectus supplement dated November 13, 2012, and a prospectus dated September 29, 2010.
- FOF 58. Lathen signed the account opening documents for the JTWROS accounts.
- FOF 59. Lathen was the principal author of the redemption letters and signed those letters.
- FOF 60. Allison Finnegan is a managing director and the general counsel for Federal Farm Credit Banks Funding Corporation (Funding Corp.), a government-sponsored enterprise that raises money for the Farm Credit system banks, who on-lend it to their affiliated associations to make loans that support agriculture in rural America.
- FOF 61. Finnegan's core responsibilities are to support two functions of the Funding Corp in a legal capacity: to prepare financial disclosures and to issue Farm Credit discount notes and bonds.
- FOF 62. The terms under which a Funding Corp. note could be redeemed under the survivor's option provision were identical for each of the CUSIPs Lathen sought to redeem during the relevant period (the Funding Corp. survivor's option terms), and were provided in the offering circular supplement, dated October 18, 2010.
- FOF 63. Funding Corp. notified investors if a particular CUSIP offered a survivor's option in the term sheets for each CUSIP, and each Funding Corp. note that Lathen sought to redeem contained a survivor's option.
- FOF 64. The processing agent for Funding Corp's survivor's option notes was US Bank.
- FOF 65. Denisse Alamo's mother, Doris Cubilette, was enrolled in EndCare from late 2009 until her death in June 2010, during which time Alamo was Cubilette's attorney in fact.
- FOF 66. Robert Grundstein met Lathen in college and has known him for thirty-two years.

- FOF 67. When Lathen engaged Katten Muchin Rosenman LLP in 2009, it was prior to his formation of a fund.
- FOF 68. Grundstein is now the chief compliance officer of both Sabby Management LLC and Sabby Capital LLC; Sabby Management is the SEC-registered adviser to two hedge funds.
- FOF 69. Jim Dean was in the same residential college as Lathen while at Rice University, and has been friends with him since 1986.
- FOF 70. Dean was vice president of strategic planning and analysis at Key Energy, and worked there from 1996-2000.
- FOF 71. Key Energy used Lehman Brothers for its investment banking until Lehman collapsed in 2008.
- FOF 72. Lathen worked on Lehman Brothers' Key Energy team until he left Lehman in 2007 for Citigroup.
- FOF 73. Dean was the primary point person besides the CFO, CEO, and COO on all financial and M&A-related activities while at Key Energy.
- FOF 74. Penn Virginia used Lehman Brothers for its investment banking until Lehman collapsed in 2008.
- FOF 75. Lathen worked on Lehman Brothers' Penn Virginia team until he left Lehman in 2007 for Citigroup.
- FOF 76. In Dean's view, Lathen was a thorough person who asked a lot of questions.
- FOF 77. In Dean's view, Lathen was not afraid to ask questions about things he did not know himself.
- FOF 78. Daren Domina is a partner with Haynes & Boone in the investment funds and private equity practice group.
- FOF 79. In 2009, Domina was a partner at Katten Muchin, specializing in broker-dealer and investment adviser regulatory matters.
- FOF 80. Domina has practiced law since 1992.
- FOF 81. Jack Governale was a partner in Katten Muchin's financial services group, and was the partner on Katten Muchin's representation of Lathen.

- FOF 82. In May 2010, Lathen sought tax advice from Bruce Hood, a partner at Wiggin & Dana LLP.
- FOF 83. In April 2009, Lathen retained Katten Muchin to provide him with legal advice concerning and relating to the structure of, and structuring of, his investment strategy.
- FOF 84. Lathen received legal advice from Katten Muchin concerning and relating to the structure of, and structuring of, his investment strategy as it existed at that time.
- FOF 85. Katten Muchin reviewed and provided comments on a 2009 version of a participant agreement.
- FOF 86. Lathen retained Gersten Savage LLP in August 2010 to provide him with legal advice concerning and relating to the structure of, and structuring of, his investment strategy.
- FOF 87. Lathen received legal advice from Gersten Savage LLP concerning and relating to the structure of, and structuring of, his investment strategy.
- FOF 88. Lathen received legal advice from Hinckley, Allen & Snyder LLP concerning and relating to the structure of, and structuring of, his investment strategy.
- FOF 89. Bruce Hood, Esq., formerly of Wiggin & Dana, provided Lathen with tax advice related to and concerning his investment strategy.
- FOF 90. On October 31, 2012, EACM's registration as an investment adviser with the Commission became effective.
- FOF 91. Lathen made all of his requests (all of which were in writing) for the redemption of survivor's option bonds and CDs in his own name.
- FOF 92. Lathen's redemption request letters included the following representations: (A) the participant was a joint owner, or joint and beneficial owner, of the brokerage account at issue; (B) the participant had died; and (C) Lathen was the surviving joint owner of the brokerage account at issue.
- FOF 93. The expert report of Martin E. Lybecker, dated November 7, 2016, did not opine upon the allegation in the OIP that Lathen aided, abetted, or caused EACM's alleged violation of Section 206(4) of the Investment Advisers Act of 1940 and/or Rule 206(4)-2 promulgated thereunder.
- FOF 94. The Division's expert witness, Lybecker, offered no conclusion concerning the allegations in the OIP that Lathen aided, abetted, or caused EACM's alleged violation of Section 206(4) of the Advisers Act and/or Rule 206(4)-2 promulgated thereunder.

- FOF 95. Lathen filed a complaint against Goldman Sachs Bank USA with the New York State Department of Financial Services.
- FOF 96. Lathen filed a complaint against Goldman Sachs Bank USA with the Consumer Financial Protection Bureau.
- FOF 97. Barclay's Bank initially refused to but ultimately agreed to redeem the survivor's option CDs that Lathen presented for redemption.
- FOF 98. In response to what it learned about Lathen's redemptions, General Electric Credit Corp. added the following language to its offering documents for survivor's option bonds: "For the avoidance of doubt, we also retain the right to reject in our sole discretion any exercise of the survivor's option where the deceased held no or only a minimal beneficial ownership interest in the notes and entered into arrangements with third parties in relation to the notes prior to death for the purpose of permitting or attempting to permit those third parties to directly or indirectly benefit from the exercise of the survivor's option."
- FOF 99. CGMHI's prospectus supplement dated September 22, 2003, provided that all questions as to the eligibility or validity of any exercise of the survivor's option will be determined by CGMHI in its sole discretion and those determinations will be final and binding on all parties.
- FOF 100. Goldman Sachs Group, Inc.'s pricing supplement dated December 3, 2012, provided that all questions regarding the eligibility or validity of any exercise of the survivor's option will be determined by Goldman Sachs Group.
- FOF 101. General Electric Credit Corp.'s prospectus supplement dated December 1, 2011, provided that all questions regarding the eligibility or validity of any exercise of the survivor's option will be determined by General Electric Credit Corp.
- FOF 102. Duke Energy Corp.'s InterNotes prospectus supplement dated November 13, 2012, provided that all questions regarding the eligibility or validity of any exercise of the survivor's option will be determined by Duke Energy Corp.
- FOF 103. Federal Farm Credit Banks Funding Corporation's offering circular dated October 18, 2010, provided that all questions as to eligibility or validity of any exercise of the survivor's option will be determined by Federal Farm Credit Banks Funding Corporation.
- FOF 104. National Rural Utilities Cooperative Finance Corporation's prospectus supplement dated November 17, 2011, provided that all questions regarding the eligibility or validity of any exercise of the survivor's option will be determined by National Rural Utilities Cooperative Finance Corporation.

- FOF 105. According to Lathen's testimony, Robert Milius, a managing director at Barclays and an investor in EACA never told Lathen that he believed Lathen's investment strategy was unlawful or violated any federal securities law or rule.
- FOF 106. According to Lathen's testimony, Steven Cohen, a registered investment adviser based on Long Island who also raises money for hedge funds, never told Lathen that he believed Lathen's investment strategy was unlawful or violated any federal securities law or rule.

Jason S. Patil
Administrative Law Judge