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 RESPONSES TO RESPONDENTS' PROPOSED FINDINGS OF FACT

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1. Survivor's option investments ("SO investments") contain special redemption rights typically in the form of a par put, which allows the investment to be sold back to the issuer at par prior to the maturity date in the event of the death of an owner. (Tr. 65:18-23).

Division Response: Admitted that survivor's option instruments contain redemption rights, typically in the form of a par put, which allows the instrument to be sold back to the issuer at par prior to the maturity date. The triggering event, however, is the death of the *beneficial* owner of the instruments—not simply the owner—a fact that Lathen communicated to investors and potential investors in his marketing materials. (Div. Exs. 2042 – p. 22; 2064 – p. 20; 461 – p. 20; see also PFOF¶420.)[1]

2. Generally, the governing documents of an SO investment would require the deceased owner to be a "beneficial owner." However, issuer testimony at trial showed that there is no consistent definition of the term "beneficial owner"— and the governing documents provided no definition whatsoever beyond standard "Book entry" language under which beneficial ownership is defined as the registered holder with the brokerage firm. *See, e.g.*, (A) Tr. at 751:7-25 (Citigroup); (B) Tr. at 1873: 12-16 (Federal Farm Credit); and (C) Tr. at 822:15-20 (Goldman Sachs); *see infra* ¶¶193-200.

Division Response: Denied. (See generally PFOF¶113.) A number of offering materials contained a pertinent definition of beneficial ownership or beneficial interest. For example, the Note issued by National Rural Utilities Cooperative Finance Corporation ("CFC"), which required a beneficial ownership interest to redeem pursuant to the survivor's option, contained the following definition:

> For purposes of the Survivor's Option, a person shall be deemed to have had a '***beneficial ownership interest***' in this Note if such person or such person's estate had the right, immediately prior to such person's death, to receive the proceeds from the disposition of this Note, as well as the right to receive payment of the principal of this Note. (PFOF¶113(g) (citing Div. Ex. 972 – Exhibit 4.5 – p. 176).)

Similarly, the prospectus from Bank of America contained the following definition of beneficial owner:

> A ***beneficial owner*** of a note is a person who has the right, immediately prior to such person's death, to receive the proceeds from the disposition of that note, as well as the right to receive payment of the principal of the note. (PFOF¶113(h) (citing Div. Ex. 975 – p. 44).)

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[1] "PFOF" refers to the Division's Proposed Findings of Fact, submitted in The Division of Enforcement's Statement of Facts, dated April 7, 2017 as well as its Supplemental Statement of Facts, dated May 19, 2017, submitted herewith.

Brian Walker, managing director at InCapital—whose clients make up nearly 100 percent of survivor's option bond issuers—testified that Bank of America's provision was fairly consistent across the industry, and that he had never seen a definition of beneficial ownership that was materially different from this provision. (PFOF¶¶71(h);113(h).)

The beneficial ownership language in the "Book Entry" provisions, which discusses the registered holders at DTC, clearly does not apply to the survivor's option provision. Registered holders—brokers such as JP Morgan and Morgan Stanley—cannot die and are not the beneficial owners for purposes of the survivor's option provision. See:

1254:8 **Q Mr. Hugel just asked you some questions**
1254:9 **about the beneficial interest in a portion of the**
1254:10 **process that you and I did not go over in direct,**
1254:11 **and I'm going direct your attention to it again.**
1254:12 **We're on page 20 of Division Exhibit 545,**
1254:13 **which you will find at tab 2 of your binder.**
1254:14 A Okay.
1254:15 **Q And that's the material that he read to**
1254:16 **you from -- is under a title called "registration**
1254:17 **and settlement"; is that right?**
1254:18 A Yes.
1254:19 **Q And the material that appears there under**
1254:20 **all relates to, as the title suggests, "registration**
1254:21 **and settlement"?**
1254:22 A Correct.
1254:23 **Q Now, in your experience, can a broker die?**
1254:24 A Excuse me?
1254:25 **Q Can a broker die –**
1255:1 A Yes.
1255:2 **Q -- a broker-dealer?**
1255:3 A Can a broker-dealer die?
1255:4 **Q Uh-huh.**
1255:5 A No.
1255:6 **Q So if we turn to the survivor's option**
1255:7 **section, which begins two pages before that on page**
1255:8 **18, and under the first paragraph where it describes**
1255:9 **the survivor option -- the survivor's option, is the**
1255:10 **beneficial owner referred to there the**
1255:11 **broker-dealer?**
1255:12 A No.
1255:13 **Q So what is the relationship between the**
1255:14 **term "beneficial interest" and "beneficial owner"**
1255:15 **under registration and settlement and the term**
1255:16 **"beneficial owner" under the survivor's option**
1255:17 **section of the prospectus supplement?**
1255:18 A I mean, this section relating to DTC

1255:19 really relates to the mechanical method by which
1255:20 interests can be transferred.
1255:21 I don't think anyone would suggest --
1255:22 although, DTC is the -- is the legal owner of the
1255:23 notes strictly for the ease of transferring book
1255:24 entry securities.
1255:25 There's no substantive -- I don't think
1256:1 anyone suggests that DTC has an ownership --
1256:2 beneficial ownership interest itself in the notes.

3. Nonetheless, Mr. Lathen's attorneys unanimously advised that the survivor's option could be exercised through the use of a "joint tenancy with right of survivorship" or "JTWROS." (Tr. 2444:1-25; 2650:5-18; 2233:9-2236:4; 2872:7-17; 2885:16-22).

Division Response: The cited testimony does not support this proposed Finding. None of the testimony cited supports the proposition that Lathen's attorneys "advised that the survivor's option could be exercised through the use of a "joint tenancy with right of survivorship" or "JTWROS"—and taken together, the testimony refutes that any such advice was provided or "unanimous."

4. A joint tenancy with right of survivorship is governed by New York Banking Law Section 15[2] and applies to the brokerage accounts used by Respondents. (Tr. 2863:22-2864:12).

Division Response: This proposed Finding is an argument and a legal conclusion and should be stricken pursuant to the Court's order. (See Post-Hearing Order, p. 3, dated Feb. 24, 2017 "Any proposed finding of fact that contains argument will be stricken.") In any event, for the purposes of the federal securities laws, the relevant question is whether Lathen disclosed all material facts about his and the Participant's beneficial ownership of the notes he was seeking to redeem.

5. Pursuant to issuers' offering documents, only a brokerage firm associated with the Depository Trust Corporation "DTC," which is the legal holder of the bonds, is authorized to make a redemption request of an issuer. (Tr.1229:2-22; 1582:10-15; 1583:20-22; 1638:7-14; 1240:16-1242:4; 1639:16-1640:12).

Division Response: The cited testimony does not support this proposed Finding. The passages cited by Respondents appear to stand for the proposition that for certain issuances where DTC or its nominee is the registered holder of a Global Note, DTC or its nominee will be the only entity through which redemptions can be made. The passages do not discuss the brokerage firms associated with DTC, as Respondents represent.

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[2] The Division assumes that the reference is meant to be to Banking Law § 675.

6. Generally, the governing documents of an SO investment identify specific materials that must be submitted to exercise the survivor's option. Mr. Lathen would typically provide only a redemption request letter and a certified death certificate to the brokerage firm, which would make determinations about what additional information to send to the issuer. (Tr. 1800:1-23; 1806:13-17).

Division Response: Admitted that the governing documents of a survivor's option instrument generally identify materials that must be submitted to evidence eligibility to exercise the survivor's option. Those documents are not always "specific"—for example, most offering documents called for "appropriate evidence" to demonstrate beneficial ownership, as well as "any additional evidence" that the issuer or trustee may require. (See PFOF¶108.)

Further, the testimony cited is that of Michael Robinson discussing what materials he collected and provided to brokers—including Lathen's redemption letters, death certificates, and potentially also brokerage statements, certificates of domicile and proof of original ownership. (See Tr. 1800:25-1801:12.) The cited testimony reflects nothing about any independent broker determinations "of what additional information to send to the issuer." Indeed, Augie Cellitti—CEO of SecureVest who, unlike Robinson, is in a position to testify as to the determinations made by brokers—testified that he considered SecureVest's role to be that of a "pass through" for Lathen's documents and that they acted as Lathen's "agent" in the redemption process. (PFOF¶389.)

7. Some issuers also had specific holding period requirements, and requested copies of current and past account statements demonstrating the holding period, as well as a letter from the brokerage firm attesting to the requestor's authority to make the request. (Tr. 976:22-977:1; 1275:13-1278:5, Div. Ex. 521 at 22 (detailing the information required by Duke Energy for redemption of their survivor's option bonds) and Div. Ex. 598 at 24 (detailing the information required by Prospect Capital for redemption of their survivor's option bonds)).

Division Response: Admitted that some issuers had specific holding period requirements, and that issuers (or trustees, as the cited testimony supports) requested copies of current and past account statements demonstrating the holding period. Indeed, all of the redemption packets admitted into evidence included relevant account statements, as Respondents admit. (See RPFOF¶16[3] ("Redemption packets submitted by brokers to trustees and issuers contained broker account statements and an election form, both of which attested to who the beneficial owner was at death.").) However, the cited testimony and exhibits do not support a finding that issuers requested a "letter from the brokerage firm attesting to the requestor's authority to make the request."

8. Issuers' governing documents did not specifically request information regarding sources of funding for the bonds, confirmation of access to

[3] "RPFOF" refers to Respondents' Proposed Findings of Fact and "DRRPFOF" to the Division's Responses to Respondents' Proposed Findings of Fact.

brokerage accounts, evidence of future property interests in bond proceeds or the existence of any side agreements between joint account holders with respect to the bonds. (Tr. 832:12-833:1; 1806:21-1808:13).

Roger Begelman, Goldman Sachs, Tr. 832:12-833:1

Q. So if we can get the list of documents . . . SEC Exhibit 569, page 2, I believe. Okay.

Q. So is it fair to say, I guess, these were supplement documents; you were asking for things that hadn't been provided in connection with the initial -- with the redemption request?

A. These were not provided with the initial redemption request, that's correct.

Q. It's documents that Goldman didn't ask for in connection with its initial redemption request, and you're asking for them now; is that fair to say?

A. That's -- that's fair to say.

Division Response: Denied. The prospectuses and other offering documents called for evidence sufficient to prove beneficial ownership. (PFOF¶108.) Depending on the circumstances—for example, when agreements materially impact beneficial ownership, as here—then those agreements should have been included to present a complete and not misleading picture of beneficial ownership, as several issuers pointed out to Lathen once they were apprised of the true nature of his relationship to the Participants. (PFOF¶¶240;256-58.)

9. On the other hand, some governing documents included broad provisions suggesting that issuers or trustees could request further information evidencing beneficial ownership and had undefined "sole discretion" to make a payment determination. (Tr. 772:8-773:9).

Roger Begelman, Goldman Sachs, Tr. 772:8-773:9

Q. Okay. So -- thank you. So if you would read to the bottom, again, of Exhibit 562, page 8, beginning with "All questions."

A. "All questions regarding the eligibility or validity of any exercise of the survivor's option will be determined by us, in our sole discretion, which determination will be finding -- will be final and binding on all parties."

Q. Okay. Thank you. Now, if you just look at 2(A).

JUDGE PATIL: Excuse me. Excuse me. On that last sentence, just looking at it for what it says, what stops Goldman Sachs from saying, Oh, we're not going to let you exercise the survivor's option; you can't redeem the bond? I mean, what prevents that from taking place?
Not that you would do it. I'm saying, obviously you would act in good faith and, you know, generally, but --

THE WITNESS: I would say other than bad faith, nothing.

Division Response: Admitted that prospectuses and offering materials contained language requiring information sufficient to prove beneficial ownership (PFOF¶108), and that all provided

that either the issuer or the trustee had sole discretion to determine eligibility under the survivor's option.

10. None of the governing documents at issue required a specific relationship between the deceased beneficial owners of a survivor's option bond or CD and the surviving owners making a redemption request. (Tr. 2430:19-2431:6; 1999:11-2000:1).

Division Response: Denied. CDs are not "at issue," and therefore what the offering documents for those instruments required are not at issue either. Further, the prospectuses all required that the deceased beneficial owner and the person submitting the redemption request have a relationship sufficient to give the person making the redemption request authority to do so. (See PFOF¶108.)

11. None of the governing documents at issue limited the sale of the instruments or the exercise of the survivor's option feature to "retail investors." They could be and were sold to third parties and institutions. (Tr. 760:6-13; 815: 20-816:1).

Division Response: Admitted that the cited testimony supports a Finding that for those issuers' survivor's option instruments, there was no prohibition against selling them to non-retail investors. However, each issuer who testified said that the survivor's option instruments were marketed to retail investors. (PFOF¶¶34;72-78;SFOF¶9.) That is because the feature had no benefit to institutions since they cannot die. (PFOF¶80.) Nor can they hold valid joint tenancies with persons who can die. Island Fed'l Credit Union v. Smith, 60 A.D.3d 730 (2d Dep't 2009). Further, the cited testimony indicates that the survivor's option securities were marketed and sold through broker dealers; not that they were purchased and held by institutions.

12. Mr. Lathen's redemption request letters to his brokerage firm were in his own name, and were either on his own personal letterhead or on the letterhead of Eden Arc Capital Management. (SFOF¶92; Lathen Ex. 2071; Tr. 827:24 - 828:7; 830:22-831:7; 1903:21-24; 1905:23-25).

Division Response: Admitted.

13. Mr. Lathen's redemption request letters contained only three representations: (1) the Participant was a joint owner, or joint and beneficial owner, of the brokerage account at issue; (2) the Participant had died; and (3) Mr. Lathen was the surviving joint owner of the brokerage account at issue. (SFOF¶92). As of December 2015, after the SEC instituted the instant proceedings taking issue with the sufficiency of Respondents' disclosures, additional disclosures were added to the redemption letters, as a precautionary measure. (Tr. 623:16-624:11; Lathen Ex. 2071).

Division Response: Denied, as the cited testimony and Exhibit do not support this proposed Finding (except to the extent it incorporates SFOF¶92). In addition, the SEC did not institute the instant proceeding as of December 2015. This proceeding was instituted in August of 2016.

14. Mr. Lathen submitted redemption requests to his brokers promptly following the death of the Participants or, if a holding period was required for a particular bond, promptly after the holding period was satisfied. (Tr.668:5-14).

Division Response: The cited testimony does not support this proposed Finding in that it does not refer to the timeliness of Lathen's submissions.

15. Mr. Lathen submitted his requests only to his brokers, rather than directly to issuers, because that is what was required by the issuer's governing documents. (Tr. 918:2-19; 946:17-947:2).

Division Response: The cited testimony does not support this proposed Finding. The cited testimony only provides that US Bank received presentments from brokers to put or sell back their bond positions:

946:17 **Q So describe briefly the redemption**
946:18 **process, please, for survivor's options.**
946:19 A Sure. We receive presentments or packages
946:20 from brokers who are electing to put or sell back
946:21 their bond position under the terms of the survivor
946:22 option contingency in the indenture.
946:23 **Q Okay. And is the broker doing that for**
946:24 **the broker's own account?**
946:25 A No. They have their holders who would
947:1 present to them. And the broker would coordinate
947:2 the paperwork and then send it to us.

16. The brokerage firms had responsibility for submitting whatever documentation they believed was necessary to satisfy the issuer's redemption requirements. Issuers' instructions to brokers about how to submit redemption requests specifically informed them that they had no obligation to make the redemption request if they thought it was improper. (SEC Ex. 530, p. 66). Redemption packets submitted by brokers to trustees and issuers contained broker account statements and an election form, both of which attested to who the beneficial owner was at death. *See, e.g.*, Lathen Ex. 1941).

Division Response: Denied, as the cited testimony and Exhibits do not support this proposed Finding. Div. Ex. 530 is an excerpt from a Federal Farm Credit Offering Circular which does not say that the brokerage firms had responsibility for submitting the documentation they believed necessary to satisfy the issuer's redemption requirements. It does say that the financial institution is not required to submit the form if it finds the "records specified in the Instructions supporting the above representations unsatisfactory." The brokerage account statements in Lathen Ex. 1941 do not "attest who the beneficial owner was at death," but they do "attest" to the identity of the account holders. The redemption packets submitted by the brokers also included

Lathon's redemption request letters which "attested" to the identity of the beneficial owner. (See, e.g., Lathen Ex. 1941 – p. Lathen14691.)

17. Sometimes brokerage firms used "clearing agents" to service their accounts. Among other things, the clearing agents would physically hold the accounts and provide statements and confirmations. (Tr. 2526:10-2527:1).

Division Response: Admitted.

18. Mr. Lathen made full disclosures to the brokerage firms carrying his accounts during the relevant time period. The brokers were aware that this was part of the fund's investment strategy, and they either knew of or had in their possession copies of the Participant Agreement. (Tr. 1787:7-1788:1; 1789:10-1790:7; Lathen Ex. 2028; Tr. 2522:1-2523:4; Lathen Ex. 2032; Tr. 2636:16-24).

Division Response: This proposed Finding is argument and should be stricken. (See Post-Hearing Order, p. 3, dated Feb. 24, 2017 "Any proposed finding of fact that contains argument will be stricken.") To the extent the Court is inclined to consider this proposed Finding, there is no evidence Lathen made "full disclosures." In particular, there is no evidence that he shared the PSA with any broker, nor is there any evidence that he shared the IMA with GFG, CL King, FSW, or Wedbush, and there is no evidence that he shared the IMA with SecureVest and JPMC before 2012, when JPMC asked for it. (Lathen Exs. 2040, 2042). In addition, Lathen sent at least two of the brokers an investor presentation that contained the following representation: "Prior to launching its business, Eden Arc received advice from counsel that the strategy is legal." (PFOF¶¶393;655.) Augie Cellitti testified that both SecureVest and JPMC relied on such representation. (PFOF ¶394.) Finally, the phrase "this was part of the fund's investment strategy. . ." is unclear.

19. Mr. Lathen did not space out his redemption requests so as to avoid scrutiny by issuers or trustees. To the contrary, he often submitted multiple redemption requests to the same issuer or trustee, with respect to multiple bonds, which Mr. Lathen held in multiple joint accounts with various individuals who did not share his last name. (Lathen Ex. 2021; Tr. 1808:14-1809:17; 1903:4-1905:25; Tr. 1911:15-24)

Goldman Sachs (Tr. 911:15-24)

Q. All right. So recapping, so in a short period of time, Mr. Lathen had submitted $2.5 million in redemption requests for CDs; he had made these requests under three different joint accounts; none of the joint accountholders were named Lathen; the redemption requests were all on the letterhead of his hedge fund; and the documents that you got in connection with that indicated he had $26 million of these instruments, right?

A. That seems correct, yes, sir.

Division Response: Admitted that from time to time, Lathen submitted multiple redemption requests to the same issuer or trustee, with respect to multiple bonds, which Lathen held in multiple joint accounts with Participants. The cited testimony and Exhibit do not support the rest of this proposed Finding.

20. Indeed, the issuers who testified for the Division stated that they immediately noticed the redemption packages submitted by Mr. Lathen's brokerage firm because of either the high amount of money involved or the repetitive nature of requests in Mr. Lathen's name in connection with different people who did not share his last name. (Tr. 776:16-777:13; 1901:13-22; 1902:7-9).

Roger Begelman, Goldman Sachs, Tr. 766:16-777:13

Q. So have you ever heard of a man named Jay Lathen, Donald Lathen?
A. Yes.
Q. And how did you become familiar with that name?
A. I became familiar with that name when people from the bank's treasury department came to me to inform me that there were a number of redemption requests which included an individual and Mr. Lathen.
Q. And were those with respect to bonds or CDs?
A. Both.
Q. Okay. And what did this person who came to you tell you about the redemptions?
A. That there seemed to be a lot of them. More than one, more than two, as I recall. And that it seemed unusual that we would have one individual on so many redemption requests. As a consequence, we set up -- you call it a surveillance or review so that if anymore came in, we would be notified. And we did some research on who the requestor was and the nature of the requests, and then we asked for additional information.

Roger Begelman, Goldman Sachs, Tr. 1913:9-23

Q. This was not the run-of-the-mill redemption request? That was pretty obvious, right?
A. We had not seen where an individual had sought a redemption more than once. So we, obviously, looked into it to see what was behind it.
Q. We'll get to that. But my question is: Just from the nature of the redemption request itself, it stood out like a sore thumb?
A. It was the first time we had ever seen it, clearly.
Q. Okay. And as a result of this information you sought, you decided that you would conduct a further investigation, right?
A. Yes.

Ian Bell, U.S. Bank, Tr. 951:23-952:13

Q. Are you familiar with a man named Donald Lathen?
A. Yes.
Q. And how are you familiar with him?
A. He had submitted several elections through his broker.

Q. And what time frame are we talking about?
A. Mid to late 2013, early 2014.
Q. And how did this come to your attention?
A. A processor that reported to me had presented an issue that she had thought needed to be escalated specific to Mr. Lathen's elections. The dollar amounts were extremely high for the product, as well as he had come under several deceased holders that had seemingly no relationship to one another.

Division Response: Denied, to the extent that this proposed Finding implies that the redemption requests that alerted Begelman and Bell (the two issuers referenced in the cited testimony) were the first redemptions that Lathen had made of either Goldman Sachs' or US Bank client's survivor's option instruments. In fact, as Robinson pointed out to Farrell when Goldman Sachs rejected Lathen's redemptions in the fall of 2013, Lathen had made several successful redemptions of Goldman Sachs' survivor's option instruments prior to that date "without comment or delay." (PFOF¶917 (Div. Ex. 751).).

21. Issuers seeking more information about Mr. Lathen and Eden Arc were easily able to (and did) find it through publicly available information, including information on Mr. Lathen's background, his relationship to Eden Arc, and the nature of the strategy. (Tr. 798:5-14; 799:14-22; Lathen Ex. 2020; Tr. 1914:17-1915:21).

Division Response: Denied, as the cited testimony and Exhibit do not support this proposed Finding, except with respect to Goldman Sachs' efforts to ferret out more information about Lathen through its own web searches. There is no evidence that other issuers were able to find more information about Lathen and Eden Arc through publicly available information, "easily" or not. In addition, this proposed Finding is irrelevant to this securities enforcement matter since there is no requirement that victims of securities fraud undertake any due diligence.

22. Additionally, issuers and their trustees were entitled to, and sometimes requested additional information from Respondents' brokers. (Tr. 778:10-18; 781:13; 977:23-978:11).

Division Response: Admitted.

23. When the validity determination agent (issuer or trustee) requested more information from the brokers, Mr. Lathen would ensure that the brokers got the issuers the information they requested. (Tr. 783:1-12; Div. Ex. 569; Tr. 791:5-8; Div. Ex. 570, Tr. 916:15-24; Tr.1201:8-12; Div. Ex. 557).

Division Response: Denied. The evidence showed that Lathen delayed or resisted providing information to issuers or trustees when they asked for it. (PFOF¶¶157-58;218-19;226.) When Lathen did provide information, he provided as little as possible, and there is no evidence that he gave any issuer his IMA or PSA. (PFOF¶¶169;413-14;974-80;983.)

In addition, the phrase "validity determination agent" was created by Lathen, as opposed to a term used in the governing documents of survivor's option instruments. See:

> 3641:23 **Q Mr. Lathen, where does the term "validity**
> 3641:24 **determination agent" come from?**
> 3641:25 A It comes from the -- I don't know if the term
> 3642:1 is exactly used in the prospectus. But that's a term
> 3642:2 that's used in the industry overall.
> 3642:3 **Q But it doesn't say that term in any of the**
> 3642:4 **prospectuses; is that right?**
> 3642:5 A It says any -- usually, the term that you see
> 3642:6 in the prospectus language is all questions regarding the
> 3642:7 eligibility for exercise or the validity of claims
> 3642:8 associated with an exercise, shall be determined by Party
> 3642:9 X in their sole discretion. So that's -- most
> 3642:10 prospectuses have that language. And then that tells you
> 3642:11 who is the validity determination agent for that
> 3642:12 instrument.

> 3642:18 **Q But it's not in any of the first bond**
> 3642:19 **prospectuses; is that right?**
> 3642:20 A I don't know if the term "validity
> 3642:21 determination agent" is used in the bond prospectus.

24. Mr. Lathen retained Katten Muchin's legal services in 2009, two years prior to the launch of the fund. (Lathen Ex. 1052; Tr. 2427:3-5).

Division Response: Admitted that Lathen retained Katten Muchin approximately two years prior to the launch of the Fund.

25. Robert Grundstein, Esq., was the attorney who oversaw the client relationship and the primary contact at the firm. Beth Tractenberg, Esq. and Darren Domina, Esq. also rendered legal advice. (Tr. 3182:11-20).

Division Response: Admitted.

26. Robert Grundstein, Esq. earned degrees from Rice University and New York University School of Law. (Tr. 2422: 23-2423:9).

Division Response: Admitted.

27. Robert Grundstein's legal practice focused predominantly on the areas of corporate and securities law. He is currently the General Counsel, Chief Operating Officer, and Chief Compliance Officer of Sabby Capital Management, an SEC-registered investment adviser to a hedge fund. (Tr. 2423:16-2424:16; 2426:305; SFOF ¶ 68).

Division Response: Admitted, except the cited testimony does not support the proposed Finding that Grundstein's legal practice in 2009 focused predominantly on the areas of corporate and securities law. In fact, as he testified (and as Respondents note in RPFOF¶28), in 2009, he was "was a hedge fund lawyer." (Tr. 2424:2-3.)

28. During the time of his representation of Mr. Lathen, Mr. Grundstein was a hedge fund lawyer in financial services group of Katten Muchin Rosenman LLP, where he worked from 2004 through 2011. (Tr. 2423:16 – 2424:16; 2426:305; SFOF¶68).

Division Response: Admitted.

29. Mr. Grundstein described Mr. Lathen's investment strategy as "a brilliant idea" that allowed Lathen to take advantage of a "loophole" in survivor's option securities. (Tr. 2428:8-15).

Q. What's your understanding of what type of legal support Jay was seeking from you?

A. Jay had what -- he and I discussed it, what I thought was just a brilliant idea. He had found a -- found a security that had a loophole in it that allowed him -- particularly given the bond environment at the time, the ability to make very large returns very quickly.

Division Response: The cited testimony does not support this proposed Finding because it makes no reference to Lathen's investment strategy, and Katten's retention was pre-Fund, and therefore pre-strategy. (PFOF¶681.) As Grundstein testified, he believed that "Jay and Kathy were going to form a joint tenancy, open a securities account and then gift a portion of a securities account to the participant" (Tr. 2444:17-20), that the Participant would not be a relative, and they would purchase survivor's options bonds and redeem them upon death of the Participant. (RPFOF¶34.) In addition, Grundstein testified that Katten gave Lathen no advice on his disclosures to issuers, nor did he see any submission that Lathen was making to issuers. (PFOF¶¶690;719-20.)

30. Mr. Grundstein explained that Mr. Lathen was seeking counsel to ensure what he was doing was legal and it was being done in an appropriate manner. (Tr. 2428:19-21).

Division Response: Admitted, again noting that Katten Muchin was retained pre-Fund. (PFOF¶681.)

31. Katten Muchin received "full disclosure" of Mr. Lathen's strategy and facts. (Tr. 2429:4-14.)

Division Response: This proposed Finding is argument and should be stricken pursuant to the Court's order. To the extent the Court is inclined to consider it, Katten Muchin's advice to Lathen was pre-Fund, and thus, pre-strategy, and related to the purchasing of survivor's option bonds with a terminally-ill individual. (PFOF¶¶681;693.) Katten Muchin never saw the

Power of Attorney Lathen ultimately executed with Participants (PFOF¶¶712-15), nor any submission Lathen was making to issuers. (PFOF¶¶720;737.) In addition, Grundstein did not recall seeing any documents other than one version of a Participant Agreement and a couple of prospectuses—and it is not clear whether these prospectuses were for securities in which Lathen traded. (See PFOF¶690.) See also:

2429:15 **Q Okay. Do you recall if you reviewed any**
2429:16 **documents in connection with your representation of**
2429:17 **Mr. Lathen?**
2429:18 A I vaguely do remember that there was a
2429:19 participation agreement that we looked at.
2429:20 **Q Any other documents?**
2429:21 A Not that I recall.

2450:1 **Q Not only documents that Mr. Lathen**
2450:2 **prepared but also publicly --**
2450:3 A Yeah. I recall looking at -- you know, at
2450:4 least two or three or more prospectuses just to --
2450:5 just to see how the survivor option was built into
2450:6 it.

2471:14 **Q Okay. But you don't recall giving him**
2471:15 **advice about his disclosure obligations with respect**
2471:16 **to issuers; isn't that correct?**
2471:17 A I don't recall, no.
2471:18 **Q And you don't recall Mr. Lathen asking for**
2471:19 **that advice, right?**
2471:20 A I don't recall him asking or not asking. I
2471:21 purely don't recall.

2499:5 **Q Okay. But you hadn't given him any advice**
2499:6 **on his disclosures to issuers, right?**
2499:7 A Disclosures to issuers -- yeah, like, I
2499:8 said, I don't think we -- I don't recall having
2499:9 given any advice to Jay regarding disclosures to
2499:10 issuers.

32. Attorneys at Katten Muchin received, reviewed and edited the Participant Agreement. (Tr. 2429:15-19; 2439:2-4; Lathen Ex. 1036; Tr. 3184:9-13). They did so before the Trusts & Estates Department rendered any advice regarding the joint tenancies. (Tr. 3190:22 – 3192:12).

Division Response: Denied that "attorneys at Katten Muchin received, reviewed and edited the Participant Agreement." Domina testified that he did not edit the Participant Agreement. (PFOF¶743.) Although Grundstein reviewed a pre-Fund Participant Agreement, he did not forward it to Tractenberg, who prepared an informal memo on joint tenancies, and there is no

evidence that Tractenberg saw the Participant Agreement; Grundstein testified that he is "fairly confident that" Tractenberg did not review it. (PFOF¶¶697-703.)

33. Attorneys at Katten Muchin also reviewed several bond prospectuses to inform their counsel to Mr. Lathen. (Tr. 2429:22-2430:6; 3148:9-10).

Division Response: Denied, as the cited testimony does not support this proposed Finding; there is no evidence attorneys at Katten Muchin other than Grundstein reviewed bond prospectuses. Indeed, Domina did not. (PFOF¶737.) The second citation above is unrelated to this topic or the proposed Finding:

3148:9 I went to work for a small investment bank
3148:10 in Houston called Weisser Johnson. Frank Weisser,

34. Mr. Grundstein recalled that he reviewed bond prospectuses to see if there were any terms that required any specific relationship between joint tenants, or that would otherwise preclude Mr. Lathen's strategy, and he found that "there was no such restriction." (Tr. 2430:19-2431:6).

Q. What was that?
A. You know, we were looking -- I don't recall if there were some that did do this, but we were looking to see if there was anything in the -- in the terms of these securities that required the joint tenant to be, say, a father-son owner or cousin, and there wasn't.
Q. Did you --
A. At least in the ones that we looked at and were -- felt that Jay could certainly implement a strategy, there was no such restriction. I don't recall if there were others where the issuers did, in fact, have such limitations.

Division Response: Admitted.

35. Katten Muchin provided Mr. Lathen with a power of attorney form that Mr. Lathen used in his business. (Lathen Ex. 825; Tr.2439:12-2440:19; 3186:9-12).

Division Response: Denied, as the cited testimony and Exhibit do not support this proposed Finding, except that Grundstein provided a sample power of attorney to Lathen. However, there is no evidence of how Lathen revised the sample, or how or whether he used this power of attorney in his business. (See PFOF¶715.)

36. Katten Muchin also received and reviewed a copy of a presentation Mr. Lathen had put together to use with hospices. (Tr. 3184:14-18).

Division Response: Admitted.

37. Katten Muchin advised Mr. Lathen to have non-disclosure agreements in place when he met with prime brokers to prevent them from engaging in the strategy themselves. (Lathen Ex. 1029; Tr. 2441:11-24).

Division Response: Denied, as the cited testimony and Exhibit do not support this proposed Finding. Grundstein testified that he was not certain who proposed that Lathen put non-disclosure agreements in place to prevent prime brokers from engaging in the strategy themselves. (Tr. 2411:18-24.) Further, the Exhibit is dated January 19, 2010 (Lathen Ex. 1029), long after Katten Muchin's representation of Lathen had ended, so Grundstein was offering Lathen no legal advice, but simply advice as a friend, if he offered any at all. (See PFOF¶718.)

38. The attorneys at Katten Muchin understood that a valid joint tenancy was "a necessary conduit for [Mr. Lathen] to implement the strategy." (Tr. 2444:1-10.) Accordingly, Katten Muchin's Trust & Estates department evaluated the strategy and concluded that it "would form a perfectly good joint tenancy." (Tr. 2441:25-2442:10; 2443:7-18; 2444:22-25; Div. Ex. 735).

Robert Grundstein, Esq., Tr. 2444:1-24

Q. Thank you. What was your understanding of the role that joint tenancies were to play in Mr. Lathen's investment strategy?
A. It was a necessary conduit for him to implement the strategy.
Q. In what regard?
A. The survivor option required a death of one of the joint tenants in a joint tenancy with right of survivorship in order to trigger the put option.
Q. And did Katten conduct any research into joint tenancies?
A. Yes.
Q. And did Katten reach any conclusions as to the joint tenancies that Mr. Lathen intended to form?
A. As I recall that he was -- Jay and Kathy were going to form a joint tenancy, open a securities account and then gift a portion of a securities account to the participant. And I don't think -- the trustee department thought that there was a -- that that would form a perfectly -- perfectly good joint tenancy.

Division Response: Denied, as the cited testimony and Exhibit do not support this proposed Finding. As noted above, (DRRPFOF¶29), Lathen consulted Katten Muchin pre-Fund, and so pre-strategy; Grundstein understood that "Jay and Kathy were going to form a joint tenancy, open a securities account and then gift a portion of a securities account to the participant" (Tr. 2444:17-20), that the Participant would not be a relative, and they would purchase survivor's options bonds and redeem them upon death of the Participant. (RPFOF¶34.) In addition, with respect to the joint tenancy advice, all Tractenberg knew was that "the client intends to purchase corporate bonds to be held in a brokerage account. He will pay the cost of the bonds, which he will hold as joint tenants with rights of survivorship with his wife and a third party." (PFOF¶697.) There is no evidence that she saw the Participant Agreement or the Power of Attorney or considered either one in her "evaluation" of Lathen's joint tenancies. (PFOF¶¶696-703;712;713.)

39. Katten Muchin's Trust & Estates Department spent "a large amount of time" and "an absurd amount of money" researching the joint tenancy issue. Mr. Grundstein admitted that T&E Department's work was excessive and a large

portion of the billings were written off as a courtesy to Mr. Lathen. (Tr. 2449:20-2451:3).

Division Response: Admitted that Grundstein testified to these facts, but Grundstein was not able to quantify the amount of time he asserted was written off by the Trust & Estates Department, and there was no documentary evidence of these alleged extra hours. Respondents did not call Tractenberg to testify. (PFOF¶716.) Division Exhibit 682 shows that Tractenberg billed 2.8 hours for the Lathen engagement. (PFOF¶749.) In addition, this proposed Finding is irrelevant to any issue in this matter.

40. Beth Tractenberg, a partner in the Trusts & Estates Department, collaborated with Mr. Grundstein regarding the joint tenancy research. (Div. Ex. 735, Tr. 3189:2- 3190:31; 2442:5-2443:24).

Division Response: Denied, as the cited testimony does not support this proposed Finding. Other than the fact that Tractenberg forwarded her informal memo to Grundstein, there is no evidence in the cited transcript and Exhibit that Tractenberg and Grundstein "collaborated" on the joint tenancy research.

41. Though the Katten Muchin attorneys believed that there would be "headline risk" and the potential for regulatory scrutiny of the strategy due to the strange aspect of "profiting from the death of strangers," they told Mr. Lathen that his investment strategy was "smart" and "perfectly legal." Their advice to him was to "keep it small" to avoid scrutiny, but they believed his strategy was legal, regardless of its size or scale. (Tr. 2451:10-2452:10; 2438:22 - 2437:7).

Robert Grundstein, Esq. (Tr. 2451:10-2452:10) (Tr. 2438:22-2437:7).

Q. Did you express any view as to the legality of Mr. Lathen's strategy?

A. Yeah. We thought that the -- the actual strategy, just buying -- we thought that there was nothing illegal that was -- it was perfectly legal to buy these bonds in joint tenancies and right of survivorship with whoever in the joint tenancy – in a valid joint tenancy. And if one of the joint tenants were to -- were to become deceased, to profit from that.

Q. Okay. Yes. I was about to ask you about that. You testified, as I recall, that your advice to Mr. Lathen was to keep it small and not make it too big. Again, can you repeat the -- tell me why it was that that was your advice?

A. Just to avoid regulatory scrutiny. The less eyes that are looking at this, the less chance that somebody would take offense to the way that you're making money and come after you.

Q. Did you believe then or do you believe now that the size of Mr. Lathen's operations has any link to the legality of it?

A. I personally don't.

Q. I will repeat the question. If Mr. Lathen's operations were small, did you believe that they would be legal or illegal?

A. Legal.

Q. Okay. If Mr. Lathen's operations were large, did you believe they would be legal or illegal?

A. Legal. . .

Jay Lathen (Tr. 3188:8-20)

Q. In general, what advice did Katten give you about your proposed business model?

A. You know, they advised that it was legal. That the joint tenancies were valid. And that, you know, needed to be -- needed to make sure that my disclosures with participants were robust. I mean, the thing that we've done from the very beginning is, we never wanted our participants to think that we're doing this out of the goodness of our heart. That I'm actually running a business and making a profit. So those were the kind of takeaways from their advice.

Division Response: Denied, as the cited testimony does not support this proposed Finding. Domina testified that he would not have told Lathen that his strategy, even as it was presented to him in 2009, was legal. (PFOF¶748.) Grundstein testified that he thought the following "strategy" was "perfectly legal": "buy[ing] these bonds in joint tenancies and right of survivorship with whoever in the joint tenancy—in a valid joint tenancy. -- we thought that there was nothing illegal that was -- it was perfectly legal to buy these bonds in joint tenancies and right of survivorship with whoever in the joint tenancy – in a valid joint tenancy. And if one of the joint tenants were to -- were to become deceased, to profit from that." (Tr. 2452:11-20.) That was not the strategy that Lathen employed through the Fund. And in fact, Grundstein further testified that Katten told Lathen that he should not form a hedge fund for the purposes of deploying his strategy. (PFOF¶693.) Domina further warned Lathen that he should not conduct his strategy as a business because he could be deemed an investment adviser or a broker-dealer. (PFOF¶740.)

42. Mr. Lathen two several articles in the *Wall Street Journal* about the investment strategy. The first article that referred to the strategy was published in February of 2010. (Tr. 3202:5-3203:7).

Division Response: To the extent that Respondents mean to propose a Finding that Lathen saw two articles in the *Wall Street Journal* about Joseph Caramadre in 2010, the Division admits that two such articles appeared, with the first "focused around his – an investment strategy related to variable annuities with insurance companies that involved terminally ill individuals" and that "there was one paragraph...that mentioned Mr. Caramadre also had another unrelated corporate strategy involving corporate bonds," and that Lathen testified that he read them at some point. (Tr. 3202:18-24.)

43. About one month later, on March 10, 2010, the *Wall Street Journal* published a more substantial story about the strategy. The story was referenced on the front page. It opined that the investment strategy was legal and included quotes from lawyers and other securities industry professionals vouching for

the strategy's validity and legality. (Lathen Ex. 1110; Tr. 656:13-660:17; 3203:8-3212:12).

Division Response: Denied, as the cited Exhibit does not support this proposed Finding. The article referenced does not "opine that the investment strategy was legal" nor does it "include[] quotes from lawyers and other securities industry professionals vouching for the strategy's validity and legality." The article does quote one lawyer as saying that the bond prospectus does not prevent people from buying bonds with terminally-ill individuals. Nor does the article purport to discuss *Lathen's* strategy or the execution thereof; it makes no reference to any side agreements, or to any required disclosures of such strategy. (Lathen Ex. 1110.)

44. Specifically, the article states "Legal and financial experts say there is nothing to prevent investors from buying the bonds with a dying relative or even a stranger who is terminally ill." The article quotes an attorney at Mayer Brown, "who has worked on bond offerings with survivor's-option provisions," stating that the strategy is not prohibited by a typical prospectus. It also includes a quote from a spokesperson at survivor's option bond issuer AIG, stating that "the bond's fine print doesn't prohibit such activity." (Lathen Ex. 1110).

Division Response: Admitted.

45. The article highlighted the success of Joseph Caramadre, another investor, in executing the strategy. It mentioned Mr. Caramadre's success in defending the strategy in a civil suit in federal court. (Lathen Ex. 1028).

Division Response: Denied. The Exhibit does discuss Joseph Caramadre, but there is no evidence that Caramadre and Lathen were engaged in the same "strategy." It also states that Caramadre's wife reaped profits from his strategy. It mentions two lawsuits: one in which Caramadre is not named, and another in which Caramadre was named but was still pending. (Lathen Ex. 1110.)

46. The article contributed to Mr. Lathen's belief that issuers were aware of the existence of his investment strategy, and that it was a contractually valid and legal strategy. (Lathen Ex. 1028; Tr.656:23-657:12; 663:8-17).

Jay Lathen (Tr. 3215:24 – 3216:9)

Q. Mr. Lathen, what effect, if any, did reading this *Wall Street Journal* article about Mr. Caramadre have on your view of the investment strategy?

A. Yeah. I mean, it reinforced the view that I already had, which was that it was legal. I think it was the first time, though, that issuers themselves and a lawyer for -- who drafts a lot of the prospectuses had said it. So it was -- that gave it a little bit more credibility and made it more tangible.

Division Response: Denied, as the cited Exhibit does not support this proposed Finding that anyone quoted in the article was commenting on a strategy like Lathen's, where he had executed side agreements with Participants and a Fund that he planned to hide from the issuers. And, if

Lathen held the belief that his was a valid and legal strategy, he offered no explanation for his pursuit of a legal opinion from many different lawyers to confirm the validity of his joint tenancies. (PFOF¶653.) In addition, Lathen did not believe that issuers were aware of his strategy. (PFOF¶¶416-17;423;427-29;432-33.)

47. When the article was published, Mr. Lathen corresponded with his attorney at Katten Muchin about the article, stating he was "glad to see that there was no moral outrage" about the strategy, and that "the opinion expressed that there was nothing illegal or improper about it, including the acknowledgement from the AIG guy that the prospectus allowed it." (Lathen Ex. 1028).

Division Response: Denied, as the cited Exhibit does not support this proposed Finding. In March 2010, Grundstein was not Lathen's lawyer, nor was anyone else at Katten. (PFOF¶¶681;683;717;718;749.)

48. Mr. Lathen first retained Hinckley Allen & Snyder ("Hinckley Allen") in 2010, which was before Mr. Lathen launched the fund. The firm was retained first by Lathen personally and then later on behalf of Eden Arc as well. (Tr. 1982:19-1982-4).

Division Response: Admitted.

49. Respondents received legal counsel from Robert Flanders, Esq., a Litigation Department partner, and Margaret Farrell, Esq., Chair of the Securities Group, at Hinckley Allen. (Tr. 1978: 7-10).

Division Response: Admitted, noting that Farrell was not even aware of Lathen's existence until summer 2012. (PFOF¶857.)

50. Before joining Hinckley Allen, Mr. Flanders served as a Justice on the Rhode Island Supreme Court, the state's highest court, for eight and a half years. (Tr. 1974:21 1975:1; Lathen Ex. 2028). During Mr. Flanders' time on the bench, he wrote over 400 legal opinions. (Tr. 1975:8-13).

Division Response: Admitted.

51. Mr. Flanders is a graduate of Harvard Law School and Brown University, and is a member of Phi Beta Kappa. (Lathen Ex. 2028; Tr. 1974:12-14; 1975:22-23).

Division Response: Admitted.

52. Mr. Flanders had more than 20 years of experience in private practice before being appointed to the Rhode Island Supreme Court. (Tr. 1974:18-24.) Mr. Flanders is admitted to practice law in the state and federal courts of New

York and Rhode Island, the First Circuit Court of Appeals and the U.S. Supreme Court. (Tr. 1976:12-22).

Division Response: Admitted.

53. Ms. Farrell graduated from Smith College, attended Georgetown Law, and finished her degree at Cincinnati Law School after getting married. (Lathen Ex. 2066; Tr. 2601:20-25).

Division Response: Admitted.

54. Ms. Farrell is Chair of the Securities Law Practice Group at Hinckley Allen. (Tr. 2602:12-14.) She is a general corporate practitioner with an emphasis on securities law. (Tr. 2061:12-2601:15).

Division Response: Admitted.

55. Ms. Farrell's counsel to Mr. Lathen began in mid-2012, around the time that the Hinckley Allen entered into an amended engagement agreement with Mr. Lathen and Eden Arc. (Tr. 2604:7-10).

Division Response: Admitted that the cited testimony supports a Finding that Farrell first learned of Lathen's existence in 2012.

2604: 7 **When did you first become aware of Mr.**
2604: 8 **Lathen's existence?**
2604: 9 A My best recollection is the summer of
2604: 10 2012, I think.
2604: 11 **Q Okay. And what context did you learn of**
2604: 12 **him?**
2604: 13 A I had a litigation partner, Robert
2604: 14 Flanders, who apparently had been contacted by Mr.
2604: 15 Lathen. And he had some questions relating to
2604: 16 securities law matters. And he asked me to assist.

56. Before testifying, Mr. Flanders met with the Respondents one time and also had dinner with the attorneys for the Division of Enforcement to "give complete and fair access to both sides." (1976:23-1978:6).

Division Response: Denied. In addition to meeting with the Respondents' counsel at their offices for 90 minutes the day before appearing, Flanders testified that he had spoken to Mr. Protass and Ms. Kirschner, also representing Respondents, on other occasions.

1977:5 **Q And was that the first time that you ever**
1977:6 **met with anyone from my office?**
1977:7 A In person, I believe. I did speak with
1977:8 Mr. Protass and, I think, Ms. Kirschner before that.

57. Before testifying, Ms. Farrell met with Respondents one time and voluntarily participated in a lengthy telephone interview with the Division of Enforcement. (Tr. 2603:7-19).

Division Response: Denied. Respondents' counsel insisted on participating in the telephone interview offered by Farrell to the Division of Enforcement. (Decl. of Nancy A. Brown, executed Dec. 29, 2016, ¶5.) In addition, Farrell had multiple other contacts with Respondents' counsel in advance of the hearing.

2602:21 **Q And can you just tell the Court how many**
2602:22 **times we've met and what the circumstances were?**
2602:23 A We met once in -- we met once in
2602:24 Providence just to talk in general, I guess, about
2602:25 my testimony. And I met you again today.
2603:1 **Q And we've spoken on the phone?**
2603:2 A Yes, we've spoken on the phone. I guess a
2603:3 couple of -- I think once, twice -- I'm not sure,
2603:4 because I had a call with you, I've had a call with
2603:5 Attorney Kirshner, and I don't know who was always
2603:6 on the call.

58. Pursuant to the Respondents' privilege waiver, Hinckley Allen disclosed more than 1,000 documents including: (A) every privileged communication exchanged between Hinckley Allen and the Respondents; (B) all drafts, including redlines and final versions, of every document created by Hinckley Allen for the Respondents that were exchanged with them; and (C) all attorney work product referencing Hinckley Allen communications with the Respondents, all of which the Respondents had never before seen. *See* The Respondents' Memorandum of Law in Opposition to the Division of Enforcement's Motion to Compel Hinckley, Allen & Snyder; dated January 5, 2017; Hinckley, Allen & Snyder LLP's Objection the Division of Enforcement's Motion to Compel, dated January 5, 2017.

Division Response: Denied. Respondents cite to no page of the cited Memorandum of Law for the Finding offered that Hinckley Allen produced more than 1,000 documents because that fact appears nowhere in that document. Accordingly, there is no evidence to support that proposed Finding. Respondents are correct, however, that Hinckley Allen produced numerous documents not produced by Respondents in their document production on September 29, 2016 of 173 emails, which they represented as "all" communications with their attorneys (PFOF¶665), including emails between Hinckley Allen and Lathen. As to the portion of this proposed Finding that Respondents had never seen these documents before, there is no citation to any evidence because it is simply not factual. Obviously, Respondents had seen their own (although unproduced) communications with Farrell and Flanders. And as Respondents conceded at the hearing, they have long had Hinckley Allen's entire file, including materials that went unproduced, because they insisted on reviewing all of the materials prior to production:

286:21 My understanding is Hinckley Allen has
286:22 provided us with documents for work product. We had
286:23 to review everything, because we had potential
286:24 attorney-client privilege issues, which we may have
286:25 wanted to assert with respect to their documents. And
287:1 I think we need to look at those initially.

59. The Division attempted to preclude Hinckley Allen from testifying at the hearing due to the failure of both Respondents and Hinckley Allen to provide all relevant information, and the fact that Hinckley Allen provided no relevant advice. See Division of Enforcement's Motion to Compel dated December 29, 2016, and Division of Enforcement's Motion in Limine dated January 11, 2017.

Division Response: Denied. After the Respondents' incomplete and inadequate September 2016 production of 173 emails constituting what they claimed to be the entire universe of their privileged communications (PFOF¶665), the Court warned Respondents that failing to comply with its Orders requiring a full production of all communications with their lawyers on the subject of "the structure and structuring" of the joint tenancies would result in a preclusion order. (Order, dated Oct. 8, 2016.) The Division respectfully refers the Court to the facts and circumstances of its subsequent motions to compel that complete production set out in its Proposed Findings of Fact (PFOF ¶¶661-679) which resulted in the production of responsive documents even after the hearing began.

Further, it has been, and continues to be, the Division's position that Respondents' failure to seek or obtain advice about their disclosure obligations under the federal securities laws (as admitted by Respondents (PFOF¶¶651-52)) ends the inquiry into their advice-of-counsel defense, rendering Flanders' and Farrell's testimony, along with the many other lawyers Respondents consulted, irrelevant.

60. Mr. Flanders recalled that Mr. Lathen sought counsel from him in 2010 after reading the *Wall Street Journal* article about survivor's option investments, executed by one of Mr. Flanders' clients, Joseph Caramadre ("Caramadre"). (Tr.1978:11-22).

Division Response: Admitted.

61. Mr. Lathen initially sought and received legal advice from Mr. Flanders about his investment strategy and to keep up with and avoid any regulatory and legal issues affecting Caramadre. (Tr. 1983:5-17; 1997:7-10; 3216:15 - 3217:5).

Jay Lathen, Tr. 3216:15-3217:5

Q. And what did Mr. Flanders tell you about this investment strategy?
A. I mean, he said that, you know, his client Caramadre had been doing it for several years. And that, you know, it was a legal strategy. And, you know,

nonetheless, he had -- Mr. Caramadre had encountered some legal difficulties on his putting back variable annuities to the insurance companies. And Mr. Flanders was representing him in those disputes. So I wanted to, you know, seek his counsel on -- you know, generally around my strategy, and, obviously, be kept abreast of any issues that arose with respect to Caramadre and his survivor's option strategy, which at that time there really weren't any issues.

Division Response: Admitted.

62. Mr. Lathen also received legal advice from Hinckley Allen concerning and relating to the structure of, and structuring of, his investment strategy. (SFOF¶88).

Division Response: Admitted. Prior to 2012, Flanders offered Lathen limited advice focused on distinguishing his situation from the Caramadre situation. Lathen signed an amended engagement letter with Hinckley, Allen & Snyder LLP in 2012, the scope of which was twofold: (1) to prepare a Memorandum that would summarize the issues raised for the Fund's Business Model by the allegations against defendants in the Grand Jury Indictment against Joseph Caramadre and Raymour Radhakrishnan and how EndCare's Financial Assistance Program may be distinguished from the activities which are the subject of the Caramadre indictment; and (2) advice and related legal services with respect to the Fund's Investment Strategy and Business Model. However, Farrell testified to a litany of areas potentially covered by that latter description on which Hinckley Allen was not undertaking to provide advice, including Lathen's limited partnership agreement, his private placement memorandum, his duties and obligations under the Investment Company Act, his duties and obligations under the Advisers Act, his Form ADV filing obligations, his compliance manual, his obligations under the Custody Rule, nor any advice respecting the tax implications of his business or strategy (other than Farrell comments to Lathen in September 2013 after reviewing his PSA). (See PFOF¶¶819;859;860;861;865; Div. Ex. 747.) See also:

2608:25 **Q And what's your recollection about the**
2609:1 **scope of this -- we'll call it the amended**
2609:2 **engagement letter, because this was obviously --**
2609:3 **this was the second go-around.**
2609:4 **So what was your understanding about the**
2609:5 **scope of the amended engagement letter?**
2609:6 A Well, he had -- the primary focus of the
2609:7 engagement was to review the Caramadre indictment
2609:8 and to identify if there were any issues associated
2609:9 with what Caramadre had done that would have, in
2609:10 fact -- you know, be relevant to what Mr. Lathen was
2609:11 doing. And to make sure that he was not doing
2609:12 anything inappropriate.
2609:13 In the course of preliminary discussions,
2609:14 I raised some concerns, I think, about the structure
2609:15 of his arrangements. And so it was also to look at

2609:16 whether or not that structure needed or would be
2609:17 advisable to modify that structure to make sure that
2609:18 it was compliant.

2756:14 **Q All right. Okay. Now, what revisions did**
2756:15 **you make to Mr. Lathen's limited partnership**
2756:16 **agreement?**
2756:17 A We were not engaged to do anything on the
2756:18 limited partnership agreement.
2756:19 **Q Okay. What revisions did you make to his**
2756:20 **PPM?**
2756:21 A His --
2756:22 **Q Private placement memorandum.**
2756:23 A We did not make revisions to that.
2756:24 **Q Okay. Did you give him any advice at all**
2756:25 **regarding his duties and obligations under the**
2757:1 **Investment Company Act?**
2757:2 A No.
2757:3 **Q How about his duties and obligations under**
2757:4 **the Adviser's Act?**
2757:5 A No.
2757:6 **Q Did you review his ADV?**
2757:7 A No.
2757:8 **Q Review his compliance manual?**
2757:9 A No.
2757:10 **Q Advise him in any respect about the**
2757:11 **Custody Rule?**
2757:12 A No.
2757:13 **Q And you already testified that you gave no**
2757:14 **advice, didn't offer any advice on the tax**
2757:15 **implications of his business and strategy, right?**
2757:16 A No. Not any expressed on the treatment of
2757:17 payments, but probably modest advice about
2757:18 characteristics of investment income.
2757:19 **Q As we saw in the profit sharing agreement,**
2757:20 **right?**
2757:21 A Yes.

2759:11 **Q Okay. So if Mr. Lathen or anyone else**
2759:12 **claimed that you had assumed responsibility for**
2759:13 **pointing out to him all the issues with his business**
2759:14 **and investment strategy, you would take issue with**
2759:15 **that, wouldn't you?**
2759:16 A Yes, I mean, I think -- yeah.

63. Mr. Lathen made full disclosure to Hinckley Allen of all material facts concerning and relating to his investment strategy, including all documents associated with the operation of that strategy. (Tr. 1983:18-1985:9; 2005:22-2006:2; 2061:11-2062:10; 2102:11-19; 2605:8-22).

Division Response: This proposed Finding is argument and should be stricken pursuant to the Court's order. To the extent the Court is inclined to consider it, Flanders did not see (1) the Fund's financial statements; (2) Lathen's taxes; (3) the 1099s sent to Participants; or (4) prior to 2012, the IMA or PSA (if he ever saw the PSA (PFOF¶838)). He did not know Lathen had closed a joint account with a Participant who had been cured or that Participants did not know where brokerage accounts would be held. Farrell did not see the (1) Profit Sharing Agreement until September 2013—months after its implementation in January 2013; (2) the Security and Account Control Agreement Lathen alleges was in place in January 2013; or (3) anything related to issuer disclosures. In addition, neither Flanders nor Farrell understood what Lathen was submitting to issuers. There is no evidence that Flanders knew that Lathen continued to redeem accounts governed by the IMA and the pre-January 2013 Participant Agreement, or that Farrell told him about the PSA and that it should be revised, or that Lathen was continuing to redeem securities held in accounts governed by the unrevised PSA. (See PFOF¶¶654;821;850;851;854-56;863;904;910;913;915;916;926;928; Div. Exs. 2022;749; 38;841.) See also:

2717:13 **Q Okay. Fair enough. And he realized in**
2717:14 **the ordinary course he wasn't -- you realized in the**
2717:15 **ordinary course he wasn't providing the profit**
2717:16 **sharing agreement to issuers, right?**
2717:17 A I don't recall anything about that, to be
2717:18 honest.
2717:19 **Q Okay. You don't recall knowing what he**
2717:20 **was providing to issuers; is that right?**
2717:21 A Exactly.
2728:5 **Q Okay. Well, as you understood what he had**
2728:6 **submitted, it didn't provide complete information**
2728:7 **regarding the purpose and nature of the program,**
2728:8 **right?**
2728:9 A I don't know what he had provided.

2126:6 **Q Now, taking you back, Mr. Flanders, to the**
2126:7 **time frame of 2010 and 2011.**
2126:8 **You didn't review the bond prospectuses at**
2126:9 **that time, correct?**
2126:10 A I don't believe so.
2126:25 **Q Okay. And, again, in that 2010-2011 time**
2127:1 **frame, you didn't review the participant agreement**
2127:2 **at that time, correct?**
2127:3 A I don't believe so.
2127:4 **Q Nor the investment management agreement?**
2127:5 A No. Again, the focus during that period

was the Caramadre situation and him verbally telling me what he was doing vis-a-vis the participants.
And I don't believe we got into specific document review. I could be wrong about that, but I just don't remember.
Q Okay. And as far as you remember, Mr. Lathen didn't provide you the private placement memorandum until about 2012 time frame; is that right?
A I don't recall him doing so.
Q Okay. And is it fair to say that in the 2010 and 2011 time frame, you relied on Mr. Lathen's representations to you in terms of his business?
A Yes.
Q Okay.
A I relied on them throughout, not just during that period.

At the time that you were writing the Caramadre memo in the fall of 2012, you understood that Mr. Lathen was preparing a profit sharing agreement, right --
A Yes.
Q -- between him and the fund to ensure that the interests on the notes and the profits in the accounts after redemption of the securities would be shared with the fund, right?
A Would be shared, yes.
Q But you never saw it prior to issuing the Caramadre memo, correct?
A Correct.

Q Okay. But by that point in August of 2013, you hadn't seen the profit sharing agreement, correct?
A That's correct.
Q So you asked Mr. Lathen to send it to you, didn't you?
A Yes.

Q All right. And you understood that Mr. Lathen had, in fact, entered into an account control agreement, correct?
A I knew that there had been communications back and forth about one, so I assumed that was done.

2740:10 **Q Okay. And the second paragraph says, "My**
2740:11 **partner, Matt Doring, will be working on the account**
2740:12 **control agreement and will forward a draft to you**
2740:13 **while I am out of the office."**
2740:14 **Do you see that?**
2740:15 A Yes.

2740:22 **And do you have any reason to doubt that**
2740:23 **he did forward an account control agreement to Mr.**
2740:24 **Lathen?**
2740:25 A I have no reason to doubt.

2741:1 **Q Okay. Let's look at Division Exhibit 841.**
2741:2 Do you recognize it?
2741:3 A It appears to be a document prepared by
2741:4 our office.
2741:5 **Q And it's a document that was prepared for**
2741:6 **Mr. Lathen, right?**
2741:7 A Yes.

2742:8 **Q And the function of this agreement is to**
2742:9 **put C.L. King on notice of the fund's security**
2742:10 **interest in the joint accounts, right?**
2742:11 A No. It control -- account control
2742:12 agreement requires the broker to manage access to
2742:13 the accounts so they have to be on notice; they
2742:14 actually have to be bound. And my recollection is
2742:15 that C.L. King did not have a standard form.

2742:22 **Q Okay. Now, Mr. Lathen never executed this**
2742:23 **document, did he?**
2742:24 A I don't know that.

2743:6 **Q Okay. Have you ever seen this document**
2743:7 **before?**
2743:8 A I don't believe so.

2757:22 **Q And we've already discussed that you were**
2757:23 **not aware of that aspect of Mr. Lathen's investment**
2757:24 **strategy that related to his redemption requests,**
2757:25 **right?**
2758:1 A Correct.

64. Mr. Lathen provided Hinckley Allen with documents he was using in connection with his investment strategy, including the Private Placement

Memorandum (Lathen Ex. 1831), the Participant Agreement and Power of Attorney (Lathen Ex. 1832), the EndCare Application (Lathen Ex. 1833), the Endcare Brochure (Lathen Ex. 1834), the Investment Management Agreement (Lathen Ex. 2025) and tax memorandum (Lathen Ex. 1830) (e-mail transmitting documents); Tr. 2005:22-2009:3; 2012:2-2013:14; 2615: 6-14; 2616:4-2617:7; 2619-13-23).

Division Response: The cited testimony and Exhibits do not support this proposed Finding for any period prior to June 2012.

2006:13 **Q So if you could take a look, please, at**
2006:14 **Lathen 1830 and tell me what that is.**
2006:15 A Yes, I do have that in front of me.
2006:16 This is an email from Mr. Lathen dated
2006:17 June 14, 2012. And I do have that.
2006:18 **Q Okay. And could you just take a moment to**
2006:19 **just read the email and tell me what the essence of**
2006:20 **it is.**
2006:21 A This is, as it says, a follow-up of a
2006:22 telephone conversation we had. And he was wanting
2006:23 us to potentially give him, quote, some sort of
2006:24 comfort opinion from my business model, closed
2006:25 quote.
2007:1 And he attached various documents that he
2007:2 thought were being pertinent to that end.

Further, the IMA was provided to Hinckley Allen in June 2012 and the tax memorandum was provided in July 2012. (Lathen Ex. 2024 – p. 1; Lathen Ex. 2025 – p. 1.)

65. Mr. Flanders advised Mr. Lathen that the problem for Mr. Caramadre was misrepresentations to participants. He emphasized that Mr. Lathen should make and document full disclosure to participants about the investment strategy. (Tr. 1986: 23-1987:25; 1996:22-25; 1997:8-10, 17-25; 1998:1-17; Lathen Ex. 2026 (Caramadre plea agreement and Agreed Statement of Facts); Tr. 2015:1-8; 2015:20-2016:6).

Division Response: Admitted.

66. Although Mr. Caramadre ultimately took a plea pertaining to allegations of fraud against participants, he was never indicted for securities fraud or sued by the SEC after they conducted an investigation. (Tr. 2016:7-25; 2018:5-9).

Division Response: Denied. Flanders testified that the SEC did conduct an investigation that Flanders was unsuccessful in trying to stay on Caramadre's behalf, and Caramadre was sued by the SEC. We respectfully refer the Court to the Initial Decision in In the Matter of Joseph A. Caramadre, CPA, Rel. No. ID-765 (Apr. 6, 2015).

2016:7 **Q And do you know if the SEC ever**
2016:8 **investigated Mr. Caramadre in connection with either**
2016:9 **of his investment strategies?**
2016:10 A I believe they initiated an investigation.
2016:11 And, in fact, we went to court to try and stay that
2016:12 investigation, because it was happening while he was
2016:13 under indictment, as I recall.
2016:14 And the Court refused to stay the SEC
2016:15 investigation. And the subpoena that had -- they
2016:16 had served on Caramadre and so forth, ruled that he
2016:17 had to comply with the SEC requests, including
2016:18 documentary evidence and the like, notwithstanding
2016:19 that he was facing an indictment at the time.
2016:20 **Q And did Mr. Caramadre provide those**
2016:21 **documents that he --**
2016:22 A I believe he did. Although, to my
2016:23 knowledge, unless I was somehow cut out of the
2016:24 picture, the SEC investigation never went anyplace
2016:25 and never -- never proceeded beyond that.
2017:1 I was never contacted -- although, I
2017:2 obviously notified the SEC that I was representing
2017:3 him in that matter.
2017:4 After he produced documents and perhaps
2017:5 even gave a deposition or testified, that was the
2017:6 last that I've ever heard of him.

2114:5 **Q And if you could tell us on the top right**
2114:6 **what it says.**
2114:7 A "Initial decision release No. 765,
2114:8 administrative proceeding file No. 316388."
2114:9 JUDGE PATIL: This is a -- it's an AP
2114:10 decision?
2114:11 MS. WEINSTOCK: Correct.
2114:12 JUDGE PATIL: Oh.
2114:13 BY MS. WEINSTOCK:
2114:14 **Q And it relates to Joseph Caramadre; is**
2114:15 **that right?**
2114:16 A Yes, it appears to be. This is after he
2114:17 was convicted of wire fraud and sentenced and so
2114:18 forth.
2114:19 **Q Okay. And it says the date is April 6 of**
2114:20 **2015; is that right?**
2114:21 A Correct.
2114:22 **Q Okay.**
2114:23 MS. WEINSTOCK: And, Your Honor, the

2114:24 Division moves Exhibit 2039 into evidence.
2114:25 JUDGE PATIL: Denied. I'll take judicial
2115:1 notice of it.

67. Notwithstanding Mr. Caramadre's participant-disclosure issues, Mr. Flanders believed that there was nothing inappropriate about either Mr. Caramadre's or Mr. Lathen's investment program itself. He believed the strategy was "taking advantage. . . of a loophole in the bond documents." (Tr. 1998:11-24).

But he was -- he was not, in my view, doing anything inappropriate -- had he been – made appropriate disclosures and not engaged in alleged fraud with respect to the participants, I didn't believe there was anything inappropriate about the investment program that he otherwise had put together.

He was taking advantage, as was Lathen, of a loophole in the bond documents that allowed investors to take advantage of the early death of one of the joint accounts, by converting a long-term bond program into a short-term, stepped-up payment from the discounted purchase price to the full par value of the bond.

Division Response: Denied. Flanders' advice to Lathen was as to his contractual rights and obligations under the Prospectus, and did not speak to Lathen's obligations under the federal securities laws. (PFOF¶824.) Nor did Lathen provide Flanders with complete disclosure. (DRRPFOF¶63, supra.) Finally, Flanders also testified that he agreed with everything Farrell put in the Final Caramadre Memo, which included advice that Lathen make full disclosure to all third parties. (PFOF¶¶832;889-892.)

68. Mr. Flanders noted that survivor's option bonds were marketed to the elderly population. He believed that bond issuers were aware of – and consciently took the risk – that a bondholder would die in the short-term and exercise the survivor's option soon after it was purchased. (Tr. 1998:25 – 1999:11).

And because these bonds were marketed, in my view, to elderly population that typically might include the elderly parent and their adult child, the issuers were taking the risk that one or more of the accountholders wasn't in great health and might die before the 30-year term bond matured. But they were willing to do that, because they were apparently having a program that was capturing a large segment of the market, and they were willing to take the risk that some people might die before the 30-year term was up.

Division Response: Admitted.

69. Specifically, Mr. Flanders emphasized that the bondholders did not place any limitations on the health of bondholders or relationships between joint

account holders, and did not require disclosure of any agreements limiting or restricting any rights. (Tr. 1999:11-2000:1).

They weren't making any healthcare requirements as a limitation on who could take advantage of this program. They did not specify that there had to be some familial relationship in order to be a participant as a joint accountholder. They did not require disclosure of any agreements between the joint accountholders that might restrict or limit their rights in any way. So they were opening themselves to situations like the one that Caramadre and Lathen were attempting to exploit, and that was a market risk that they undertook. And it was totally within their power to correct that by putting language in the offering documents that would either have a healthcare requirement or a familial relationship requirement.

Division Response: The cited testimony does not support this proposed Finding that bondholders "did not require disclosure of any agreements limiting or restricting any rights." In any event, Flanders testified that he could not recall when, if ever, he saw a bond prospectus (Tr. 2102:1-10), and he admitted that he did not even review a CD Disclosure Statement until after he had asserted a position on it in Lathen's behalf to the issuer. (PFOF¶843.) In addition, Flanders did not advise Lathen on his disclosure obligations vis-a-vis the federal securities laws. (PFOF¶824.)

2102:3 **Q You hadn't seen a bond prospectus, had**
2102:4 **you?**
2102:5 A Regarding Goldman?
2102:6 **Q Yes.**
2102:7 A I don't remember.
2102:8 **Q Okay. And you don't recall seeing any**
2102:9 **other bond prospectuses; is that right?**
2102:10 A Again, I don't remember.

70. Mr. Flanders described bond issuers as "the lord of their offers" – which he explained meant that the bond issuers wrote and were bound by the terms of their own offers, and that those terms did not preclude Mr. Lathen's investment strategy. (Tr. 2000:2-6).

They were the lord of their offers. And they had chosen not to do that. All they said is that you have to have a joint account, beneficial ownership. And if one of you dies, you'll get a stepped-up payment.

Division Response: Admitted that Flanders only reviewed Lathen's strategy (to the extent Lathen disclosed it to him) from the perspective of contract law, to which the principle of "lord of their offers" is relevant. But denied that Flanders even considered, let alone advised Lathen, that the Prospectuses (which he could not recall seeing (DRRPFOF¶69)) permitted Lathen's conduct. Flanders did not advise Lathen on his disclosure obligations vis-a-vis the federal securities laws. (PFOF¶824.)

2038:24 **JUDGE PATIL: Why are you using the phrase**

2038:25 **"lords of their offers"?**
2039:1 THE WITNESS: Because it goes back to
2039:2 basic contract law. If you make an offer to
2039:3 somebody, the law is that you are the lord of your
2039:4 offer. You can put whatever terms you wish in your
2039:5 offer.
2039:6 If someone accepts your offer, they're
2039:7 bound by those terms.
2039:8 But if the terms are not in the offer,
2039:9 then they're not part of the deal, the contract.
2039:10 And this is basically an offer, a contract
2039:11 that was put out to bond purchasers, and they were
2039:12 asked to accept the offer by buying it. And by
2039:13 buying it, they agreed to abide by the terms of the
2039:14 offer.
2039:15 If they put in there they wanted a family
2039:16 relationship to be established before you could
2039:17 exercise the death put option on a joint account,
2039:18 then you had to accept that.
2039:19 But if it wasn't there, then -- then there
2039:20 was no ability to require you to substantiate a
2039:21 family relationship before you could realize on the
2039:22 death put bond.
2039:23 So that's what I mean by that.
2039:24 **JUDGE PATIL: Okay. So you can refresh my**
2039:25 **contract law recollection. What do you attempt to**
2040:1 **convey by the use of the phrase "adhesion contract"?**
2040:2 THE WITNESS: That these weren't
2040:3 negotiable. These were public bonds that were put
2040:4 out there, on a take-it-or-leave-it basis.
2040:5 If you want to buy this bond, here is
2040:6 what you got to do in order to get the benefits of
2040:7 it.
2040:8 So they were adhesion in the sense that
2040:9 this wasn't something that Mr. Lathen or anybody
2040:10 else had a chance to negotiate with the issuers.
2040:11 They put it out there. These were the terms. You
2040:12 take our terms or you don't buy our bond. You buy
2040:13 our bond, you're stuck with the terms that are in
2040:14 there.
2040:15 But, conversely, we're not going to ask
2040:16 you to jump through other hoops and clear other
2040:17 hurdles that aren't in our documents, because we
2040:18 haven't asked you to do that.
2040:19 So, in essence, to me it is a contract
2040:20 offer analogy: Here's the offer we're making. If

2040:21 you accept it; you have to adhere to our terms.
2040:22 But we're not going to later impose other
2040:23 conditions that we didn't put into our document,
2040:24 because now we somehow think they're important. And
2040:25 if you didn't tell us that, we're not going to honor
2041:1 our contract.

71. Mr. Flanders advised Mr. Lathen that there were no disclosure requirements to the issuers and trustees other than documents specifically requested in the "adhesion contracts," referring to the bond prospectuses and CD disclosures. (Tr. 2000:7-12).

So, in my view, this was a perfectly lawful situation. And there were no disclosure requirements to the issuers and the trustees and the brokerage houses, other than what they were requesting in their adhesion contracts that they provided to these public investors.

Division Response: The cited testimony does support the portion of this proposed Finding that Flanders advised Lathen that there were no disclosure requirements to the issuers and trustees under contract law. The reference to "adhesion contracts," underscores the nature of Flanders' advice, which was with respect to Lathen's contractual rights and obligations, not his obligations under the securities laws. (See DRRPFOF¶70, supra.) In fact, Flanders also testified that he agreed with Farrell's advice in the Final Caramadre Memo which advocated that Lathen make full disclosure to all third parties. (PFOF¶¶832;889 ("Representations to third parties...must not misrepresent...the nature of the relationship between Participants and you and/or EndCare. Further, such representations should not misrepresent the nature or intent of the Program");891.)

72. Mr. Flanders did not believe Mr. Lathen was required to disclose side agreements pertaining to the joint accounts to issuers because the issuers themselves "did not deem it to be material when they structured the program." (Tr. 2033:11-2034:1).

Q. And you testified a moment ago that the --these agreements between the joint accountholders weren't something that the issuer asked for, but couldn't Mr. Lathen have given it to them anyway?
A. He could have.
Q. Objection. Leading.
Court: Sustained. [4]
Q. Did you believe that he was required to?
A. No.
Q. Why not?
A. Because they didn't deem it to be material when they structured this program.

[4] Respondents' citation to questions and answers to which the Division's objection was sustained is entirely improper and should not be considered.

Division Response: Denied. First, Respondents established no foundation for Flanders' belief. There is no evidence that Flanders reviewed a bond prospectus pre-2012, and he testified that he could not recall whether he ever did, (PFOF¶822; DRRPFOF¶69, supra), so his testimony about what the issuers deemed material is unreliable, at best. In addition, because Flanders testified that he agreed with the advice in the Final Caramadre Memo, he apparently changed his mind regarding what Respondents should disclose. (PFOF¶¶832;889 ("Representations to third parties...must not misrepresent...the nature of the relationship between Participants and you and/or EndCare. Further, such representations should not misrepresent the nature or intent of the Program.");891.)

73. Mr. Flanders did not believe the bond prospectuses contained any terms that would prohibit what Mr. Lathen was doing. (Tr. 2041:18-2042:3).

Court: I'm sorry. Let me -- Okay. I think I know where you're going with this, and it is a reasonable question. Just have to ask it a different way. What understanding did you have about whether any of these contracts you've been talking about contain terms that prohibited his strategy, if any?
A. Yeah. My understanding was that they didn't. They contained no terms that would prohibit what he was doing.

Division Response: Denied. First, Respondents established no foundation for Flanders' belief. There is no evidence that Flanders reviewed a bond prospectus pre-2012, and he testified that he could not recall whether he ever did, (PFOF¶822; DRRPFOF¶69, supra), so his testimony about what the prospectuses contained is unreliable, at best. In addition, because Flanders testified that he agreed with the advice in the Final Caramadre Memo, he apparently changed his mind regarding what Respondents should disclose to third parties. (PFOF¶¶832;889 ("Representations to third parties...must not misrepresent...the nature of the relationship between Participants and you and/or EndCare. Further, such representations should not misrepresent the nature or intent of the Program.");891.)

74. Although Hinckley Allen did not review any specific redemption letters, they had reviewed the bond prospectuses and were aware that Mr. Lathen had to make such requests. They also knew that the bond documents contained certain requirements and specified certain documents to be provided and representations to be made in connection with those requests. (Tr. 2035:12-2036:2; Lathen Ex. 872; Tr. 2617:11-2619:1).

Division Response: Admitted that Lathen never showed his redemption letters to anyone at Hinckley Allen and that Farrell testified that she had reviewed a bond prospectus (PFOF¶929). Her review of a bond prospectus may have been the reason that, when she learned that Lathen had not disclosed the Participant Agreement to Goldman Sachs, she objected to including a claim that the JTWROS account statement "tell[s] the whole truth," in the letter to Goldman Sachs that Flanders sent (PFOF¶921), and that she correctly predicted that Goldman Sachs would maintain that they had not been provided with full disclosure. (PFOF¶916.) Flanders could not recall whether he ever saw a bond prospectus. (DRRPFOF¶69, supra.) Thus there is no foundation for the cited testimony about his view of what the prospectuses required.

75. Mr. Flanders advised Mr. Lathen to provide issuers or trustees with whatever the brokers or issuers were requiring, but no more. He viewed the fact that there were no requests for information about side agreements or other such relationships between the parties to mean that the issuers were not entitled to later suggest that such information was material. (Tr. 2038:1-2041:1).

Court: And why the "but no more" part?
A. Because I viewed them, as I said earlier, to be the lords of their offers. And these were, in my view, adhesion contracts where they set the terms on which consumers or others who would buy these in the open market could exercise this option. And they had complete freedom to declare whatever materials they wanted to see as part of a redemption request, such as a death certificate. Or if they had wanted to see a family relationship element. They could have put that in their documents. So they were basically telling the public and any holders of these, This is what we think is important and critical before you can lawfully exercise your option. So my advice to Mr. Lathen was to give them exactly that. Anything else that they weren't requiring was -- they had themselves deemed not to be important or material, and, therefore, there was no need for him to go beyond that.

Court: Why are you using the phrase "lords of their offers"?
A. Because it goes back to basic contract law. If you make an offer to somebody, the law is that you are the lord of your offer. You can put whatever terms you wish in your offer. If someone accepts your offer, they're bound by those terms. But if the terms are not in the offer, then they're not part of the deal, the contract. And this is basically an offer, a contract that was put out to bond purchasers, and they were asked to accept the offer by buying it. And by buying it, they agreed to abide by the terms of the offer. If they put in there they wanted a family relationship to be established before you could exercise the death put option on a joint account, then you had to accept that. But if it wasn't there, then -- then there was no ability to require you to substantiate a family relationship before you could realize on the death put bond. So that's what I mean by that.

Court: Okay. So you can refresh my contract law recollection. What do you attempt to convey by the use of the phrase "adhesion contract"?
A. That these weren't negotiable. These were public bonds that were put out there, on a take-it-or-leave-it basis. If you want to buy this bond, here is what you got to do in order to get the benefits of it.
So they were adhesion in the sense that this wasn't something that Mr. Lathen or anybody else had a chance to negotiate with the issuers. They put it out there. These were the terms. You take our terms or you don't buy our bond. You buy our bond, you're stuck with the terms that are in there.

But, conversely, we're not going to ask you to jump through other hoops and clear other hurdles that aren't in our documents, because we haven't asked you to do that.
So, in essence, to me it is a contract offer analogy: Here's the offer we're making. If you accept it, you have to adhere to our terms. But we're not going to later impose other conditions that we didn't put into our document, because now we somehow think they're important. And if you didn't tell us that, we're not going to honor our contract.

Division Response: Admitted that this testimony supports a Finding that Flanders' advice was confined to Lathen's general rights and obligations under contract, not securities, law. To the extent that this proposed Finding suggests Flanders' understanding of what the prospectuses required—even as a matter of contract law—it is unreliable and lacks foundation given Flanders' testimony that he could not recall when, if ever, he saw a bond prospectus. (See DRRPFOF¶69, supra.)

76. During the course of the representation, Mr. Flanders shared information with Mr. Lathen about the legal and regulatory framework pertinent to survivor's option investment strategy, including keeping Mr. Lathen informed regarding the status of Caramadre's litigation. (Tr. 1992:21-1993-11).

Division Response: The cited testimony does not support this proposed Finding, except that it reflects that Flanders kept Lathen informed about the status of the Caramadre litigation:

1992:21 **Q Now, you were retained sometime in 2010.**
1992:22 **Up until the time that you entered into a**
1992:23 **new engagement letter with Mr. Lathen, what, if any,**
1992:24 **legal services did you provide to him?**
1992:25 A Again, my recollection is that I basically
1993:1 provided him whatever information I could share with
1993:2 him on the status of the Caramadre litigation and
1993:3 whatever regulatory or other issues that were public
1993:4 knowledge.
1993:5 And shared with him other information I
1993:6 had and was able to run down, such as this
1993:7 attorney -- this letter from the attorney general
1993:8 and other correspondence of like ilk where
1993:9 regulators were informing issuers and trustees who
1993:10 were balking at making payments with Mr. Caramadre,
1993:11 and I shared that with Mr. Lathen.

77. During the course of the representation, Mr. Flanders discussed and shared with Mr. Lathen examples of regulators intervening with issuers on Mr. Caramadre's behalf. For example, Mr. Flanders shared a copy of a letter written by the Rhode Island Attorney General's Office to the Bank of New

York in support of Mr. Caramadre's survivor's option bond investment strategy. (Tr. 1988:8-1989:2; 1992:12-16; Lathen Ex. 1843, 1848).

Division Response: Denied, as the cited testimony and Exhibits do not support this proposed Finding. They reflect that one letter was written in 2008 by the Rhode Island Department of Attorney General to request that the Bank of New York "comply with its fiduciary obligation to consummate its payments to Mr. Caramadre or provide Mr. Caramadre with a full disclosure, in writing, as to the lawful reasons for any non-payment or delay of payment." The letter was written before Caramadre's scheme was discovered. (Div. Ex. 488 (attaching Caramadre Indictment, returned Nov. 17, 2011).) The letter does not say that the Attorney General's office has made a finding that there is no legitimate reason for Bank of New York's failure to make payment; rather, it states that the "materials [Caramadre] has provided to this office contain no legitimate reason or basis for the failure to discharge [BNY's] obligations or [BNY's] denial of payment." (Lathen Ex. 1848 – p. 1.) The other letter that Flanders provided to Lathen (Lathen Ex. 1846) is a letter in which Jefferson National Life Insurance Company ("JNL") states that it has been "victimized" by a "scheme" involving:

> identification of terminally ill persons who had no familial or significant relationship with the non-natural personal contractowners [sic] or the controlling person(s) of the contractowners. These terminally ill persons then agreed to be the named annuitant and signed the variable annuity application. The contractowners were then able to allocate and reallocate the account value in the variable annuity contracts, including to very speculative investment options, knowing that when the annuitant died, the contract owner would always receive their premium payments back and might receive more if their trading had been successful. The scheme clearly never contemplated the offer and sale of variable annuities for any of the legitimate financial planning objectives these investment vehicles can fulfill.
> (Lathen Ex. 1846 – p. 2.)

78. The Rhode Island Attorney General's Office letter stated that the Attorney General's Office found no legitimate reason or basis for Bank of New York's failure to discharge its obligations or its denial of payment. (Tr. 1991:1-4; Lathen Ex. 1843, 1848.) It also emphasized the Bank of New York's fiduciary duty to consumers and the resulting "significant hardship" to consumers from Bank of New York's delay in discharging its obligations. (Tr. 1991:5-16; Lathen Ex. 1843, 1848).

Division Response: Admitted that the cited Exhibits contain the quoted language. But the Rhode Island Department of Attorney General letter to the Bank of New York was written before Caramadre's scheme was discovered. (Div. Ex. 488 (attaching Caramadre Indictment, returned Nov. 17, 2011).) And the letter does not say that the Attorney General's office has made a finding that there is no legitimate reason for Bank of New York's failure to make payment. The statement regarding "significant hardship" to Caramadre is based solely on Caramadre's complaint. Specifically, the letter states: "According to Mr. Caramadre's complaint, your delay in discharging your obligations to Mr. Caramadre is resulting in significant hardship to him and Rhode Islanders similarly situated." It should be noted that there is no mention in the letter of

Caramadre buying survivor's option bonds with terminally-ill individuals, so it is unclear if the Rhode Island Attorney General's Office was aware of this when the attorney wrote the letter.

79. Among other things, the Rhode Island Attorney General's Office letter included a formal request that the bank "immediately comply with its fiduciary obligations to consummate its payments to Mr. Caramadre" or provide full disclosure for its failure to do so. (Tr. 1991:21-3; Lathen Ex. 1843, 1848).

Division Response: Denied, as the cited testimony and Exhibits do not support this proposed Finding. In the letter, the Rhode Island Attorney General's Office requested that the Bank of New York "comply with its fiduciary obligation to consummate its payments to Mr. Caramadre or provide Mr. Caramadre with a full disclosure, in writing, as to the lawful reasons for any non-payment or delay of payment." (Lathen Ex. 1848 – p. 1.)

80. Mr. Flanders recalled that after receiving this letter, Bank of New York honored the redemption requests and paid according to the terms of the contract. (Tr. 1992:17-20).

Division Response: Admitted.

81. Mr. Lathen viewed this information as confirmation that his strategy was legal and, in fact, issuers had a contractual obligation to redeem the bonds.

Jay Lathen, Tr. 3218:20 – 3219:11
Q. And from your discussions with Mr. Flanders, was it your understanding that Bank of New York did in fact redeem these bonds after receiving this letter?
A. Yes. That was my understanding, yes.
Q. And what effect, if any, did this information have on you?
A. You know, I think it -- it was another data point to add to the mix. I had seen the Wall Street Journal article where -- you know, quotes from third parties saying that this was -- was valid. And here we have Bank of New York who's, you know, sort of the biggest bond trustee in the world, and the biggest bond trustee in the survivor's option market effectively, you know, seeing these as valid contractual claims.

Division Response: The cited testimony does not support this proposed Finding. Lathen testified that the information was only "another data point to add to the mix." And in fact, the evidence shows that Lathen knew that what he was doing was not legal. (See Division of Enforcement Reply Brief, dated May 19, 2017 ("Reply Brief") at Section I(A).)

82. Respondents executed a new retainer agreement with Hinckley Allen in July of 2012. (Lathen Ex. 2023; Tr. 2000:24-2001:8; Lathen Ex. 1891; Tr. 2146:1 25; SEC Exhibit 747).

Division Response: Admitted.

83. The new retainer agreement called for Hinckley Allen to provide legal counsel regarding Respondent's investment strategy and business model. (Tr. 2001:16-20). It also requested the preparation of a memorandum ("the Caramadre Memo") summarizing the issues raised by the allegations against Mr. Caramadre and setting forth how Mr. Lathen investment strategy was distinguishable from Mr. Caramadre's. (Lathen Ex. 2023; Tr. 2001:21-2002:3).

Division Response: Admitted that the scope of the amended engagement letter was twofold:

> Advice and related legal services with respect to Eden Arc Capital Partners' Investment Strategy and Business Model . . . and the preparation of a memorandum . . . as described below. (Lathen Ex. 2023.)

As Peggy Farrell described it, the engagement's primary focus was to review the Caramadre indictment and to identify if there were any issues associated with what Caramadre had done that would . . . be relevant to what Mr. Lathen was doing:

> 2608:25 **Q And what's your recollection about the**
> 2609:1 **scope of this -- we'll call it the amended**
> 2609:2 **engagement letter, because this was obviously --**
> 2609:3 **this was the second go-around.**
> 2609:4 **So what was your understanding about the**
> 2609:5 **scope of the amended engagement letter?**
> 2609:6 A Well, he had -- the primary focus of the
> 2609:7 engagement was to review the Caramadre indictment
> 2609:8 and to identify if there were any issues associated
> 2609:9 with what Caramadre had done that would have, in
> 2609:10 fact -- you know, be relevant to what Mr. Lathen was
> 2609:11 doing. And to make sure that he was not doing
> 2609:12 anything inappropriate.
> 2609:13 In the course of preliminary discussions,
> 2609:14 I raised some concerns, I think, about the structure
> 2609:15 of his arrangements. And so it was also to look at
> 2609:16 whether or not that structure needed or would be
> 2609:17 advisable to modify that structure to make sure that
> 2609:18 it was compliant.

(See also PFOF¶860.)

84. Part of the purpose of the Caramadre Memo was to ensure that Mr. Lathen's investment strategy was compliant with the law and to minimize any risk that issuers, regulators or the federal government would challenge his activities in light of the scrutiny and legal action faced by Mr. Caramadre. (Tr. 2004:13-23).

Division Response: Admitted that Flanders (not the principal author of the Caramadre Memo (PFOF¶813)) testified that the purpose of the Caramadre Memo was to cause Lathen to make adjustments in order to proceed with what he was doing so that he did not run afoul of the law and so that he would minimize the risk that issuers, regulators, or the federal government would challenge his activities.

2004:10 JUDGE PATIL: And what was your
2004:11 understanding, if any, about how that memorandum was
2004:12 going to help Lathen?
2004:13 THE WITNESS: It was designed to and
2004:14 hopefully -- was intended to have the effect of
2004:15 causing him to make whatever adjustments, if any,
2004:16 were needed, to avoid the kind of activities and
2004:17 charges that Caramadre was facing so that he could
2004:18 proceed with doing what he wanted to do without
2004:19 running afoul of the law or -- and minimizing the
2004:20 risk that -- that either issuers or regulators or
2004:21 the federal government would challenge his
2004:22 activities because of the kind of conduct that had
2004:23 gotten Mr. Caramadre into hot water.

The Final Caramadre Memo reflects a much more limited purpose, explicitly limiting the matters addressed in it to the "Program's vulnerability to the types of charges made in the indictment against Joseph Caramadre. This memorandum does not address any other matters." (Div. Ex. 668 – p. 1.) Farrell testified that it did not address the applicability of federal or state securities laws to Respondents' program. (PFOF¶¶886-88.)

85. According to Ms. Farrell, Mr. Lathen was concerned by Mr. Caramadre's indictment, and "he wanted to make sure that he was doing it right." (Tr. 2606:17-2607:8). The firm advised Mr. Lathen to avoid conduct that was the subject of Mr. Caramadre's indictment, as addressed in the Caramadre memo, but did not believe (or advise) that his strategy was in any way illegal.

Flanders: Tr. 1997:9-10; 17-1998:5

Q. After Mr. Caramadre was indicted, did you give Mr. Lathen any advice about -- in connection with his investment strategy that arose from Mr. Caramadre's indictment?
A. Yes, I did give him advice.
Q. Okay. What was the advice that you gave him?
A. To avoid the conduct, if he was engaging in any such conduct that had caused Mr. Caramadre to be indicted. And that principally had to do with the way he was dealing with participants -- or allegedly dealing with participants. But I didn't in any way advise to stop doing what he was doing, or suggest that what he was doing was in any way illegal or inappropriate.
Q. Why not?
A. Because I didn't believe it was so.

Farrell: Tr. 2769:14-20
Q. Ms. Brown just asked you some questions about telling Mr. Lathen whether things were legal or illegal during the course of your representation. If at any point during your representation that you had thought that something Mr. Lathen was doing was illegal, would you have told him that?
A. Yes.

Farrell: Tr. 2770:5-21
A. Would never tell a client they could do something illegal.
Q. That's not just that. I'm asking if during the course of the representation you actually came to believe that something a client was doing was unlawful –
. . .
A. I would have withdrawn from the representation.
Q. Not just -- that doesn't just apply with Mr. Lathen. But that is with any client you have, right?
A. That's firm policy.

Division Response: Admitted that Ms. Farrell so testified. Regarding the advice given by Hinckley Allen, there is no evidence that Farrell or Flanders knew what Lathen was submitting to issuers (except that he had not submitted his Participant Agreement to Goldman Sachs in connection with a 2013 redemption of a CD), and there is no evidence that Flanders knew that Lathen was continuing to redeem securities held in accounts governed by the IMA and pre-2013 Participant Agreement or, after 2013, the PSA. For her part, Farrell testified that she did not know that Lathen was continuing to redeem securities held in accounts governed by the IMA and pre-2013 Participant Agreement or, after 2013, the PSA, facts that might well have given her a reason to withdraw from the representation. (PFOF¶¶838;863;910;915;916.) For example, Farrell testified:

2717:13 **Q Okay. Fair enough. And he realized in**
2717:14 **the ordinary course he wasn't -- you realized in the**
2717:15 **ordinary course he wasn't providing the profit**
2717:16 **sharing agreement to issuers, right?**
2717:17 A I don't recall anything about that, to be
2717:18 honest.
2717:19 **Q Okay. You don't recall knowing what he**
2717:20 **was providing to issuers; is that right?**
2717:21 A Exactly.
2728:5 **Q Okay. Well, as you understood what he had**
2728:6 **submitted, it didn't provide complete information**
2728:7 **regarding the purpose and nature of the program,**
2728:8 **right?**
2728:9 A I don't know what he had provided.

In addition, the Final Caramadre Memo, written by Farrell and endorsed by Flanders (PFOF¶¶831;832), advised Lathen that his representations to all third parties should not

misrepresent the nature and intent of the program, and that he could best manage the risk of claims of misrepresentations by assuring that he provided complete information regarding the purpose and nature of his program to all parties involved. (PFOF¶¶889-91.)

86. The Caramadre Memo focused on the importance of disclosure to participants and brokers, which were the issues for Mr. Caramadre. It did not discuss disclosure obligations to issuers. (Lathen Ex. 668; Tr. 2628:2631:23).

Division Response: Admitted that the Final Caramadre Memo limited the matters addressed in it to the "Program's vulnerability to the types of charges made in the indictment against Joseph Caramadre [and] does not address any other matters." (Div. Ex. 668 – p. 1.) However, it included advice that Lathen's representations to all third parties should not misrepresent the nature and intent of the program, and that he could best manage the risk of claims of misrepresentations by assuring that he provided complete information regarding the purpose and nature of his program to all parties involved. (PFOF¶¶889-91.) In addition, Farrell testified that her advice that "representations to third parties must not misrepresent the nature or the intent of the Program" should apply to all third parties, and she never told Lathen that she was excluding anyone from her definition of "third parties." (PFOF¶890.)

2669:23 **Q But you did not exclude anyone in writing**
2669:24 **that sentence, did you?**
2669:25 A I didn't. I don't think I contemplated
2670:1 excluding anybody or including anyone else
2670:2 specifically. But we were trying to address the
2670:3 Caramadre complaint.
2670:4 **Q Understood. Now, you didn't tell Mr.**
2670:5 **Lathen that you were excluding anyone, right?**
2670:6 A No.
2670:7 **Q And Mr. Lathen never asked you whether he**
2670:8 **could misrepresent the nature or intent of the**
2670:9 **program to issuers, did he?**
2670:10 A He never suggested he would, no.
2670:11 **Q I'm sorry?**
2670:12 A No.

(See also: Div. Ex. 668 – p. 6.)

87. The aspect of the Caramadre Memo regarding "representations to third parties" emphasized the importance of not misrepresenting specific information about the participants, as well as the nature of the relationship between participants and Mr. Lathen and/or Endcare. The Caramadre Memo did not advise of any requirement to make additional disclosures to issuers because the lawyers who drafted it were not thinking about issuers when they drafted it. (Lathen Ex. 668; Tr. 2629:21-2630:2; Tr. 2671:12-20).

Division Response: Denied, as the cited testimony and Exhibit do not support this proposed Finding. The Caramadre Memo provided:

> *d. Representations to Third Parties*
> * * *
> Representations to third parties, including broker-dealers, must not misrepresent Participants' contact information, Participants' finances, Participants' investment history, or the nature of the relationship between Participants and you and/or EndCare. Further, such representations should not misrepresent the nature or intent of the Program.
> (PFOF¶889.)

It also stated:

> While there is no way to eliminate the claims that an individual did not fully understand what he or she was signing, documentation that clearly communicates the purpose and nature of the Program can mitigate the potential for credible claims of misrepresentation. The risk of such claims can best be managed by assuring that all parties involved (including Participants, broker dealers and investors) receive complete information regarding the purpose and nature of the Program and that you document their receipt of such written materials.
> (PFOF¶891.)

Similarly, Farrell testified:

> 2671:4 **"The risk of such claims can best be**
> 2671:5 **managed by assuring that all parties involved,**
> 2671:6 **including participants, broker-dealers and**
> 2671:7 **investors, receive complete information regarding**
> 2671:8 **the purpose and nature of this program, and that you**
> 2671:9 **document their receipt of such written materials."**
> 2671:10 **Do you see that?**
> 2671:11 A Uh-huh. Yes.
> 2671:12 **Q And that parenthetical, including**
> 2671:13 **"participants, broker-dealers and investors," by**
> 2671:14 **that you weren't meaning to exclude issuers, were**
> 2671:15 **you?**
> 2671:16 A I don't think I was thinking about
> 2671:17 issuers.
> 2671:18 **Q But that sentence wasn't meant to be**
> 2671:19 **exclusive, right?**
> 2671:20 A No.
> 2671:21 **Q You'd agree with me that the way you avoid**
> 2671:22 **claims of misrepresentation with anyone is to**
> 2671:23 **provide complete and accurate information --**
> 2671:24 A That is true.

2671:25 **Q -- correct?**
2672:1 **Let me finish, Ms. Farrell, so that the**
2672:2 **court reporter can get your answer. Thank you.**
2672:3 **And you never told Mr. Lathen that you**
2672:4 **were excluding a particular category from that list,**
2672:5 **were you?**
2672:6 A No.

In addition, Farrell testified that she never told Lathen that her use of "all parties," and non-specific "third parties" meant to exclude anyone or was limited to any group, including those in parentheticals:

2669:6**"Further, such representations should not**
2669:7 **misrepresent the nature or intent of the program."**
2669:8 A Uh-huh.
2669:9 **Q Do you see that?**
2669:10 A Uh-huh. Yep.
2669:11 **Q My question to you is: Did you mean to**
2669:12 **exclude anyone from your exhortation that**
2669:13 **representations to third parties should not**
2669:14 **misrepresent the nature or intent of the program?**
2669:15 A I think this was focused on the Caramadre
2669:16 indictment and the allegations. And the allegations
2669:17 there represented to -- related to the
2669:18 broker-dealers specifically.
2669:19 And so that's why it's specific. So the
2669:20 general concept of no misrepresentations would
2669:21 apply. That was the reason for making that general
2669:22 list.
2669:23 **Q But you did not exclude anyone in writing**
2669:24 **that sentence, did you?**
2669:25 A I didn't. I don't think I contemplated
2670:1 excluding anybody or including anyone else
2670:2 specifically. But we were trying to address the
2670:3 Caramadre complaint.
2670:4 **Q Understood. Now, you didn't tell Mr.**
2670:5 **Lathen that you were excluding anyone, right?**
2670:6 A No.
2670:7 **Q And Mr. Lathen never asked you whether he**
2670:8 **could misrepresent the nature or intent of the**
2670:9 **program to issuers, did he?**
2670:10 A He never suggested he would, no.
2670:11 Q **I'm sorry?**
2670:12 A No.
2670:13 **Q And, in fact, you didn't know until much**
2670:14 **later what information Mr. Lathen was actually**

2670:15 **providing to issuers, did you?**
2670:16 A No. I guess I assumed he was providing
2670:17 what the issuers requested.
2670:18 **Q And at that point, he hadn't given you his**
2670:19 **redemption packages to review, had he?**
2670:20 A No.

88. Ms. Farrell shared Mr. Flanders' view that there was no affirmative requirement for Mr. Lathen to make additional disclosures to issuers beyond what they asked for. (Tr. 2670:7-17; 2777:20-25).

Q. And Mr. Lathen never asked you whether he could misrepresent the nature or intent of the program to issuers, did he?
A. He never suggested he would, no.
Q. Q I'm sorry?
A. No.
Q. And, in fact, you didn't know until much later what information Mr. Lathen was actually providing to issuers, did you?
A. No. I guess I assumed he was providing what the issuers requested.
Court: What understanding did you have, if any, about what documents Mr. Lathen was legally obliged to provide to issuers other than the ones they requested?
A. I think he's obligated to provide what they ask for.

Division Response: The cited testimony does not support this proposed Finding. While Farrell testified that Lathen was obligated to provide what the issuers ask for, Respondents did not ask her to reconcile that view with her advice in the Final Caramadre Memo that his representations to all third parties should not misrepresent the nature and intent of the program, and that he could best manage the risk of claims of misrepresentations by assuring that he provided complete information regarding the purpose and nature of his program to all parties involved. (PFOF¶¶889-91.) Nor is there any evidence that Farrell saw what Lathen was representing to issuers – namely that he and the Participant were joint (beneficial) owners of the accounts, (PFOF¶¶409;863), or that she knew that he was redeeming securities from accounts governed by the IMA and pre-2013 Participant Agreements, accounts she had already told Lathen she considered invalid joint tenancies in which the Participants held no beneficial interest. (PFOF¶¶871-878.) Finally, there is no evidence that Farrell knew that Lathen was submitting redemption requests claiming valid joint tenancies and Participant beneficial interest after she shared her concerns regarding the PSA and its deleterious impact on both Lathen's and the Participant's beneficial interest in the accounts. (PFOF¶¶905-07;910.)

89. Hinckley Allen also rendered ongoing advice to the Respondents regarding their investment strategy and business model. Ms. Farrell handled the matter because she is a corporate transaction attorney and the firm's "go-to person" on securities. Mr. Flanders stated that Ms. Farrell was "very well-regarded" for that expertise. (Tr. 2021:7-2022:7).

Division Response: Admitted that Flanders so testified. However, the cited testimony does not support the portion of this proposed Finding that "Hinckley Allen also rendered ongoing advice to the Respondents regarding their investment strategy and business model." Indeed, if this proposed Finding is meant to address the time period post-September 2013, when Farrell told Lathen that he should revised his PSA, it is contradicted by the firm's billing records which reflects that Flanders billed only 2 hours for the entire year of 2014, and Farrell billed only 5 hours. (PFOF¶938.) In fact, Lathen appears to have largely sought other counsel once Farrell told him that the PSA destroyed both the Participants' and Lathen's interest in the accounts. (PFOF¶930.)

90. The scope of Hinckley Allen's representation included the obligation to make affirmative recommendations to Mr. Lathen about any legal issues the firm identified. Mr. Flanders explained that the purpose of the engagement was for the firm to advise Mr. Lathen about how to best "comply with whatever legal requirements [the firm] deemed applicable." (Tr. 2148:8-2149:6).

Division Response: Denied. Flanders did not testify that Hinckley Allen had an "obligation to make affirmative recommendations to Mr. Lathen about any legal issues the firm identified." He testified: "I think we were prepared to address whatever questions Mr. Lathen raised with us that we felt we were competent and able to address . . . includ[ing] affirmatively pointing out . . . issues that [we] identified on [our] own." (Tr. 2148:11-20.) Moreover, Farrell testified that there were a host of issues as to which the firm was not asked for and did not offer advice relative to Respondents' business, including his redemption requests to issuers:

2756:14 **Q All right. Okay. Now, what revisions did**
2756:15 **you make to Mr. Lathen's limited partnership**
2756:16 **agreement?**
2756:17 A We were not engaged to do anything on the
2756:18 limited partnership agreement.
2756:19 **Q Okay. What revisions did you make to his**
2756:20 **PPM?**
2756:21 A His --
2756:22 **Q Private placement memorandum.**
2756:23 A We did not make revisions to that.
2756:24 **Q Okay. Did you give him any advice at all**
2756:25 **regarding his duties and obligations under the**
2757:1 **Investment Company Act?**
2757:2 A No.
2757:3 **Q How about his duties and obligations under**
2757:4 **the Adviser's Act?**
2757:5 A No.
2757:6 **Q Did you review his ADV?**
2757:7 A No.
2757:8 **Q Review his compliance manual?**
2757:9 A No.
2757:10 **Q Advise him in any respect about the**

2757:11 **Custody Rule?**
2757:12 A No.
2757:13 **Q And you already testified that you gave no**
2757:14 **advice, didn't offer any advice on the tax**
2757:15 **implications of his business and strategy, right?**
2757:16 A No. Not any expressed on the treatment of
2757:17 payments, but probably modest advice about
2757:18 characteristics of investment income.
2757:19 **Q As we saw in the profit sharing agreement,**
2757:20 **right?**
2757:21 A Yes.

2757:22 **Q And we've already discussed that you were**
2757:23 **not aware of that aspect of Mr. Lathen's investment**
2757:24 **strategy that related to his redemption requests,**
2757:25 **right?**
2758:1 A Correct.
2758:2 **Q And Mr. Lathen never raised that as an**
2758:3 **issue prior to your review of the Goldman Sachs**
2758:4 **issues, right?**
2758:5 A I don't believe so.
(PFOF¶¶861-62.)

She also testified that she would take issue with any claim that the firm had assumed responsibility under the Amended Engagement Letter for pointing out to Lathen all of the issues with his business and investment strategy.

2759:11 **Q Okay. So if Mr. Lathen or anyone else**
2759:12 **claimed that you had assumed responsibility for**
2759:13 **pointing out to him all the issues with his business**
2759:14 **and investment strategy, you would take issue with**
2759:15 **that, wouldn't you?**
2759:16 A Yes, I mean, I think -- yeah.
(See also PFOF¶¶860-65.)

In addition, the hearing revealed numerous instances of Lathen's failure to make a full disclosure to Hinckley Allen of all relevant facts that might have enabled them to offer advice. For example, Flanders testified that he relied on Lathen for the representation he, Flanders, made to Goldman Sachs that Lathen and the Participant enjoyed the same benefits during their lifetimes. (Div. Ex. 754).

2090:14 **Q Okay. I'd ask you to take a look at page**
2090:15 **2 of Exhibit 754, which is the memo. And if you**
2090:16 **could read the third line, starting with, "I told**
2090:17 **him."**
2090:18 A "I told him," meaning the lawyer for the

2090:19 Goldman bank, "these joint accountholder with Mr.
2090:20 Lathen enjoy the same benefits as Mr. Lathen during
2090:21 his or her lifetime. And if the joint accountholder
2090:22 survived Mr. Lathen, then he/she would have whatever
2090:23 benefits Mr. Lathen had."
2090:24 **Q Okay. You can stop there.**
2090:25 **Now, that's information that Mr. Lathen**
2091:1 **provided to you -- correct? -- that he enjoyed the**
2091:2 **same benefits during his lifetime as the joint**
2091:3 **accountholder enjoyed? Is that information that Mr.**
2091:4 **Lathen provided to you?**
2091:5 A Either verbally or through the documents
2091:6 that he provided, yes.

But that representation was not accurate, as Farrell testified.

2729:17 **Q Okay. And Mr. Flanders had a subsequent**
2729:18 **call with Sidley Austin lawyers who were**
2729:19 **representing Goldman Sachs, correct?**
2729:20 A That's my understanding.
2729:21 **Q Were you not participating on that call?**
2729:22 A No.
2729:23 **Q Is there a reason why you weren't?**
2729:24 A I wasn't asked to.
2729:25 **Q Okay. And Mr. Flanders prepared a**
2730:1 **memorandum of that conversation; is that correct?**
2730:2 A That's correct.
2730:3 **Q And did you review that memorandum?**
2730:4 A No.
2730:5 **Q You never saw it?**
2730:6 A No. I didn't say I never saw it. You
2730:7 asked if I reviewed it.
2730:8 **Q You never saw it at or about the time of**
2730:9 **October 2013?**
2730:10 A I think I saw it when he prepared it, but
2730:11 I didn't -- review usually has the context of having
2730:12 reviewed it before it is finalized.

2732:18 **Q Okay. And if Mr. Lathen used his access**
2732:19 **to the account to move all the funds and securities**
2732:20 **out of the account, the participants would not have**
2732:21 **the same interest or benefits in the account that he**
2732:22 **did, would they?**
2732:23 A That is true.

Other facts not disclosed to Hinckley Allen included the PSA which Farrell did not see for months after Lathen executed it (PFOF¶¶904-08); the fact that Respondents continued to redeem securities held in accounts governed by the IMA, the pre-2013 Participant Agreements (PFOF¶910) and the un-revised PSA (PFOF¶915); the account control agreement he signed (PFOF¶928); and the fact that Respondents continued to move funds and securities among accounts (PFOF¶¶936-37). (See also PFOF¶¶850-56.)

91. During the course of the representation, Hinckley Allen reviewed and revised or prepared numerous documents for the Respondents. They revised the participant agreement, the enrollment form, the brochure, and the limited power of attorney. They also prepared a line of credit agreement. (Tr. 2622:14-2623:1; 2632:3-8; 2633:10-2635:10).

Division Response: Admitted, except that Farrell testified that Hinckley Allen "may have" revised the enrollment form. (Tr. 2622:21-22.)

2622:18 **Q Do you remember what documents you revised**
2622:19 **or prepared?**
2622:20 A We revised the participant agreement. I
2622:21 think we revised -- we may have revised the
2622:22 enrollment form. I'm not sure. We revised the
2622:23 brochure. We revised the limited power of attorney.

92. Hinckley Allen discussed with Mr. Lathen the terms of the relationship set forth between the parties, as set forth by the various agreements. Hinckley Allen's analysis and advice to Mr. Lathen was that the participant's ability or inability to access the joint accounts during Mr. Lathen's lifetime did not impact the business model because it did not change a person's economic interest in – and thus the validity of – the joint account. (Tr.2635:19-2636:3; 2636:13-2637:12).

Margaret Farrell, Esq., Tr. 2635:19 – 2636:3; 2636:13 - 2637:12
Q. Was there anything in the participant agreements at any point when you were working on them that discussed the participants' ability to access –
A. Yes.
Q. Okay. What was –
A. Well, they were told they were executing a limited power of attorney, and that their -- as a result, that the control of the account was largely in Mr. Lathen's hands. During the course or your representation, did you ever have any discussions with Mr. Lathen on the subject of a participant's ability to access the joint accounts?
A. I believe so.
Q. And what was that discussion, if you recall?
A. I think we discussed whether or not the granting of authority on the accounts in any way jeopardized the -- the joint accounts, so the previous joint account.

Q. And what effect, if any, did a participant's ability or inability to access joint accounts during Jay's lifetime have on the business model that you were setting up?
A. Our analysis was that it didn't. That -- being able to grant a power of authority to someone does not, basically, turn over authority, does not change one's economic interest in the account. The analogy I had was I can set up an account with the power of attorney of my father with Alzheimer's. I have control over the account. He is incompetent. He can't use it. But it is still a valid joint account.

Division Response: Hinckley Allen advised Lathen that the firm could not give him a legal opinion on the validity of his joint tenancies because the analysis was fact-specific, the law was unsettled, and it would expose the firm to a risk of third-party reliance that the firm was unwilling to undertake for the compensation that was to be paid for this matter. (PFOF¶¶827-29.) Farrell or Flanders communicated to Lathen that his structure was anything but bulletproof, even as revised in the fall of 2012. (PFOF¶830.) In addition, Farrell advised Lathen that his pre-2013 Participant Agreements did not give Participants the required interest in the account, that the IMA made the Fund the true joint owner on those accounts and that the PSA destroyed both Lathen's and the Participants' beneficial interest in the account. (PFOF¶¶871-878(IMA);905-907;909(PSA).)

93. Nor did Hinckley Allen advise Mr. Lathen that it was important to give the participants additional information about the brokerage accounts. (Tr. 2638:19 - 2639:5).

Division Response: Denied to the extent that this proposed Finding assumes that Hinckley Allen was aware that Lathen was not telling the Participants where the accounts were. In fact, Flanders testified that he was not aware of that fact (PFOF¶851), and Respondents did not inquire as to Farrell's understanding.

94. Hinckley Allen was also hired to identify and reduce any risks attendant in Eden Arc's business model. They had an obligation to, and did, identify and address / reduce any risks they identified. (Tr. 2621:22-2622:13).

Margaret Farrell, Esq., Tr. 2621:22 – 2622:13
Q. Okay. And during the course of your representation, did you view it as one of -- did you view it as part of your representation to seek to reduce those risks that you would –
A. Yes.
Q. And did you advise Mr. Lathen of the risks you identified?
A. Yes.
Q. Were there any risks that you identified that you did not tell Mr. Lathen about?
A. Not that I can recall. That would be -- that would be –
Q. All right.
A. That would be the right thing to do.
Q. I guess I can ask it another way. If you identified a risk, did you tell Mr. Lathen about it?
A. Yes.

Division Response: Denied, as the cited testimony does not support this proposed Finding. Farrell did not testify to the reasons for the firm's retention or the firm's obligations once retained. She testified:

2621:2 **Q And what risks did you believe were**
2621:3 **associated with the business model?**
2621:4 A Well, there were a number. I thought that
2621:5 the -- there was an obvious -- I had concerns about
2621:6 whether or not the way it was structured, they had
2621:7 created a valid joint tenancy.
2621:8 I had -- I indicated that I thought that,
2621:9 in any event, that issuers would not like it. And
2621:10 that as they became aware of more and more people
2621:11 doing this, that they would not pay, and it would
2621:12 require probably legal action at some point to -- to
2621:13 get them to pay.
2621:14 It was clear from the Caramadre case that
2621:15 regulators did not like the -- what was happening.
2621:16 It wasn't clear what parts they didn't like, but
2621:17 that they didn't.
2621:18 And that there was a lot of regulatory
2621:19 risk associated with proceeding, because if they
2621:20 didn't like it, that they could make his life
2621:21 miserable. There may have been others.
2621:22 **Q Okay. And during the course of your**
2621:23 **representation, did you view it as one of -- did you**
2621:24 **view it as part of your representation to seek to**
2621:25 **reduce those risks that you would --**
2622:1 A Yes.
2622:2 **Q And did you advise Mr. Lathen of the risks**
2622:3 **you identified?**
2622:4 A Yes.

She also testified that she would take issue with any claim that the firm had assumed responsibility under the Amended Engagement Letter for pointing out to Lathen all of the issues with his business and investment strategy.

2759:11 **Q Okay. So if Mr. Lathen or anyone else**
2759:12 **claimed that you had assumed responsibility for**
2759:13 **pointing out to him all the issues with his business**
2759:14 **and investment strategy, you would take issue with**
2759:15 **that, wouldn't you?**
2759:16 A Yes, I mean, I think -- yeah.

(See also DRRPFOF¶90, supra for the many facts withheld from Hinckley Allen by Respondents.)

95. During the course of the representation, Ms. Farrell undertook an evaluation of Mr. Lathen's business model and advised of the "risk" that the current structure would not be considered a valid joint tenancy. (Tr.2620:16-2621:21; 2622:2-2622:1.) This involved an evaluation of other potential structures, such as a trust. (Lathen Ex. 2069; Tr.2648:17-2649:12).

Division Response: Admitted, except the Division notes that the only evidence of Farrell's evaluation of a trust structure indicates she did so in October 2013, after she had pointed out to Lathen that his PSA was just as problematic as his IMA. (Lathen Ex. 2069 – p. Lathen16156; PFOF¶¶905-07).)

96. Ms. Farrell understood the initial structure of the business to involve Mr. Lathen opening joint accounts with participants as "nominee" for the Fund. Although she "could find no authority that you could not have a joint account with right of survivorship with an entity," Hinckley Allen recommended that Mr. Lathen change the structure, which involved having Mr. Lathen borrow funds from his investment partnership and establish the accounts in his individual name with the participant. (Tr. 2623:2-23).

Division Response: The cited testimony does not support this proposed Finding. Farrell testified that after polling her partners in the estate planning group, they concluded that having a joint account with a right of survivorship was "questionable" and that "holding as a nominee for an entity may not make a good joint account right of survivorship."

2623:10 Although I could find no authority that
2623:11 you could not have a joint account with right of
2623:12 survivorship with an entity, having pulled my
2623:13 partners in the estate planning group, we concluded
2623:14 that that was not -- that that was questionable.
2623:15 And that holding as a nominee for an
2623:16 entity may not make a good joint account right of
2623:17 survivorship.
2623:18 And so we looked at a possible way to
2623:19 create a valid joint account, and indicated that we
2623:20 thought that the best approach would be to borrow
2623:21 the funds from his investment partnership and
2623:22 establish these accounts in his individual name with
2623:23 a participant.

97. Hinckley Allen facilitated the new structure by drafting a line of credit agreement to allow Mr. Lathen to borrow from the Fund and to give the Fund a security interest in the assets, through UCC filings, that would entitle them to recover their loans out of the joint account assets before any general creditors. (Tr. 2622:24-2623:1; 2623:24-2624:17). Hinckley Allen did not, at any time, advise Mr. Lathen that he should stop doing business, including after they had recommended a structure change and were in the process of preparing new documents. (Tr. 2624:23 – 2625:15).

Division Response: The cited testimony does not support this proposed Finding. As to what Farrell told Lathen after she advised him that his IMA destroyed his joint tenancies was this:

> 2625:7 **Q And in discussing that with him, did you**
> 2625:8 **ever tell him that he shouldn't -- he should stop**
> 2625:9 **doing that until you had prepared new documents for**
> 2625:10 **him?**
> 2625:11 A I don't know if I said that expressly.

And on perfecting the Fund's security interest in the account, Farrell advised that he should execute an Account Control Agreement, advice that Lathen ignored. (PFOF¶¶925-27.) See:

> 2624:8 **Q And when you say a security interest, what**
> 2624:9 **do you mean by that?**
> 2624:10 A That's a concept of the UCC. That means
> 2624:11 they have a lien on those assets and are entitled to
> 2624:12 recover their loan out of those assets before any
> 2624:13 general creditors.
> 2624:14 **Q And would that lien be recorded somewhere?**
> 2624:15 A You can record it in a UCC filing.
> 2624:16 Generally the brokerage accounts, those are
> 2624:17 perfected through account control agreements.
> 2624:18 **Q What is your understanding of an account**
> 2624:19 **control agreement? What is that?**
> 2624:20 A It restricts the borrower's ability to
> 2624:21 move assets in and out of an account without the
> 2624:22 lender's approval.

98. During the course of the representation, Hinckley Allen made regular changes to the documents, as necessary, to "make sure that [they] had structured this in the best way possible to create a valid joint account." (Tr. 2650:5-18).

Division Response: Admitted that changes were made to documents during the course of the representation. The Division disagrees with the characterization of these changes as "regular" as Farrell did not testify to Hinckley Allen making "regular changes to the documents, as necessary." Instead, she testified: "There was a tinkering every time a question came up; every time a proceeding was brought against somebody who was using these bonds. So I'm not sure it was constant, but it was – . . . on and on, yes." (Tr. 2650:8-13.)

99. During the course of the representation, Hinckley Allen engaged in conversations with certain investors on Eden Arc's behalf to address the investors' legal questions. (Lathen Ex. 2067; Tr. 2642:12-2646:1).

Division Response: Denied, as the cited testimony and Exhibit do not support this proposed Finding. The cited testimony and Exhibit reflect that Farrell, and no one else from Hinckley Allen, had a conversation with only one investor.

100. At some point, Mr. Lathen inquired about the possibility of Hinckley Allen writing a formal legal opinion on the validity of the joint tenancies. The firm's decision not to write one was based on several factors, including that it was a "heavily fact-intensive question" that had no governing law directly on point, as opposed to a "pure legal question," and to avoid the added liability of having a formal opinion shared with other stakeholders. Hinckley Allen opted, instead, to provide Mr. Lathen with direct legal advice on the subject. (Tr. 2010:24-2012:1; Tr. 2613:5-2614:24).

Division Response: Admitted, except Lathen inquired more than once about the possibility of Hinckley Allen writing some sort of formal legal opinion, and even asked that it be discussed in the Caramadre Memo, requests Hinckley Allen denied. (PFOF¶¶868-69.) In addition, Lathen lied to at least one investor in claiming that Hinckley Allen's stated reasons for not giving him a formal opinion is that "it's not really what we do." (PFOF¶601.) And notwithstanding Lathen's understanding of the difference between a legal opinion and a memorandum, he told at least one investor that the Final Caramadre Memo was a "legal opinion." (PFOF¶659.)

101. In 2013 Hinckley Allen reached out to Goldman Sachs on Mr. Lathen's behalf regarding Goldman's legal obligation to honor Mr. Lathen's redemption requests. (Tr. 2023:11- 2024:14; Lathen Ex. 1059, Tr. 1921:7-17).

Division Response: Admitted that in 2013, Flanders of Hinckley Allen acted as litigation counsel in pursuing Lathen's claim for redemption of certain Goldman Sachs' CDs. (PFOF¶839.)

102. Mr. Flanders' letter to Goldman, which Mr. Flanders shared and discussed with Mr. Lathen, contained common law and statutory support that the firm identified as supporting the validity of the joint tenancies. (Tr. 2025:14-2026:5.) Mr. Lathen requested summaries of the cases, which Hinckley Allen provided. (Lathen Ex. 916-918; Tr. 2026:6-22).

Division Response: The cited testimony does not support this proposed Finding that the Flanders' letter (drafted by Lathen) contained "statutory support," (see Div. Ex. 572), nor that the letter contained common law supporting the validity of the joint tenancies. The letter's cases were cited for the proposition that "documents which statutorily create a joint tenancy with rights of survivorship are presumed to be valid" and that the challenging party "must provide 'clear and convincing' evidence that the JTWROS is not valid."

103. During Hinckley Allen's correspondence with Goldman, it learned of Goldman's position about their perceived issues with the joint tenancies, including that the participant agreements seemed to restrict accountholder benefits and the account holders were unlikely to outlive Lathen and receive benefits. (SEC Exhibit 754; Tr. 2029:5-2030:15).

Division Response: Admitted that Div. Ex. 754 reflects Flanders' recitation of his conversation with Goldman Sachs' attorney by phone.

104. Mr. Flanders "flat-out disagreed" with Goldman' arguments and relayed his position to Mr. Lathen. Specifically, Mr. Flanders did not believe that Mr. Lathen's investment strategy or side agreements between joint account holders had any bearing on the genuine nature of the joint account. (Tr. 2030:23-2032:20, 2032:24-2033:10).

Division Response: The cited testimony only supports a Finding that Flanders believed, and conveyed to Lathen, that Goldman Sachs was contractually obligated to honor his redemption request because Goldman did not "require that as part of whatever they asked for when the redemption request was made . . . and, obviously, they could have. And my understanding is that later they, in fact, have amended their offering documents to put a relationship requirement." (Tr. 2032:18-2033:2.) In addition, if he told Lathen that none of the side agreements Lathen had "had any bearing on the genuine nature of the joint account," he was giving Lathen advice that directly contradicted the advice Lathen was receiving from Farrell, who, both before, and at this time, was telling Lathen that his joint tenancies were destroyed by the IMA and his PSA. (PFOF¶¶871-878(IMA);905-907;909(PSA).) It was also contrary to the advice Flanders testified he subscribed to in the Final Caramadre Memo. (PFOF¶832.)

In addition, Flanders took these positions before ever having reviewed the CD Disclosure Statement at issue, and substantially reversed them after he saw it. (PFOF¶842.) When Flanders read it, he advised Lathen that it gave "some discretion to the issuer not to pay or to argue that the written verification it received in this case was not acceptable to Goldman..." (PFOF¶845.) Finally, Flanders was not advising Lathen on the federal securities laws; he was advising him on contract law. (See DRRPFOF¶67, supra.)

105. In October of 2010, Mr. Lathen retained the services of law firm Gersten Savage to help launch the fund and put in place all documents necessary to do so. (SEC Ex. 730; Tr. 2185: 13-16; 2186:1-4).

Division Response: The cited testimony and Exhibit do not support this proposed Finding. Gersten Savage was retained by Lathen to "assist [him] in the creation of a domestic limited partnership and to prepare the "private placement memorandum, limited partnership agreement, and subscription documents." (PFOF¶758; Div. Ex. 730 – p. 1.)

106. The counsel was rendered by Eric Roper, Esq., head of Gersten Savage's hedge fund practice, with the help of some associates. (Tr. 2641:20-23; 641:24-642:2; 2172:4-16).

Division Response: Admitted.

107. Mr. Roper graduated from University of North Carolina at Chapel Hill, studied English legal history at the London School of Economics, and received his law degree from Northwestern University School of Law. (Tr.

2160:4-23). Following law school he completed a clerkship with the Honorable Edwin A. Robson, a federal judge. (Tr. 2161:1).

Division Response: Admitted.

108. As head of the hedge fund practice at Gersten Savage, Mr. Roper had expertise in setting up limited partnerships, hedge funds, and offshore funds. In that capacity, Mr. Roper would meet with clients, determine what their strategies were, and "assist[] them in the appropriate documentation that they need in order to form their fund and commence their offering business." (Tr. 2164:5-20).

Division Response: Admitted.

109. Gersten Savage drafted the fund documents with full disclosure of the fund's investment strategy, as well as general prospectus language and requirements. This understanding was communicated through meetings, discussions, and the exchange of documents. Specifically, Mr. Lathen sent Mr. Roper an investor presentation, sample prospectuses, the participant agreement, and a memorandum from Katten Muchin's T&E Department. (Tr. 642:3-643:8; Lathen Ex. 782; Tr. 2168:16-2171:22; 2172:23-2173:16; Lathen Exs. 835-836; Tr. 2178:1-10; Lathen Ex. 1325; Tr. 3230:-3231:10; Lathen Ex. 982.; Tr. 3230:7-3232:17).

Division Response: This proposed Finding is argument and should be stricken pursuant to the Court's order. To the extent the Court is inclined to consider it, there is no evidence that Lathen disclosed all material facts to Gersten Savage, including no evidence that he disclosed his representations to issuers or that Katten Muchin had advised him not to execute his strategy through a Fund. (PFOF¶¶693;740.) In addition, Lathen sent an investor presentation to Roper on October 14, 2010, that falsely stated: "Prior to launching business, EndCare received advice from counsel that the strategy is legal." (PFOF¶763.)

110. Gersten Savage drafted Eden Arc's Private Placement Memoranda ("PPM"), Limited Partnership Agreement, and Subscription Agreement. (Tr. 2186:1-19; SEC Ex. 369; Tr.641:7-19; Lathen Ex. 783; Tr. 2191:11-20; Lathen Ex. 787; Tr. 2197:13-2198:1; Lathen Ex. 788-795; 801-810; Lathen Ex. 798).

Division Response: Admitted that Gersten Savage drafted Eden Arc's LPA and subscription agreement, and that Gersten Savage LLP assisted Lathen in drafting EACP's Private Placement Memorandum. However, Lathen himself drafted the following sections of the PPM: "Investment Objective," "The General Partner," and "Description of Investment Objectives and Strategy." (Lathen Exs. 786; 787 – pp. LATHEN03861, LATHEN03867, LATHEN03868.) (See PFOF¶770.)

111. Gersten Savage prepared a "term sheet" containing the core of the offering document. (SEC Ex. 651; Tr. 2175:8-2177:11).

Division Response: Admitted that Lathen engaged Gersten Savage to prepare a term sheet for EndCare Capital Partners, LP in August 2010, but no such term sheet was admitted into evidence so there is no documentary evidence that such term sheet was prepared, nor is there evidence of its contents. (Div. Ex. 651.)

112. Gersten Savage also drafted the Investment Management Agreement ("IMA"). (Lathen Ex. 796-797; Tr. 2207:19-2208:11). Gersten Savage added language to the IMA referencing Mr. Lathen as a "nominee" for the fund. (Lathen Ex. 799; Tr. 2211:21 – 2212:7, 20-23; Lathen Ex. 800; Tr. 2214:8-16). Mr. Roper had "no independent recollection" as to who added the nominee language though he acknowledges that it was the firm's work product. (Tr. 2214:17-2216:4; 2217:13-17).

Division Response: Admitted that Gersten Savage was involved in drafting EACP's IMA, but there is no evidence indicating which portions of the document were supplied by Gersten and which were supplied by Lathen. See:

2214:7 **Q And if you could identify for me what the**
2214:8 **differences are between the first paragraph in**
2214:9 **Lathen Exhibit 797 and the first paragraph in Lathen**
2214:10 **Exhibit 800, to the extent that you find there is a**
2214:11 **difference.**
2214:12 A The difference appears to be that there
2214:13 was language added on the second-to-last line
2214:14 referencing Jay Lathen as the nominee for the
2214:15 investment manager. And that does not appear in
2214:16 0797.
2214:17 **Q Okay. And do you know who added the**
2214:18 **language of Mr. Lathen acting as nominee for the**
2214:19 **investment manager?**
2214:20 A I have no independent recollection of
2214:21 that.

2217:13 **Q Whose work product do you believe that**
2217:14 **those two documents were?**
2217:15 A I believe that they're my firm's
2217:16 documents; but I don't have an independent
2217:17 recollection of that.

113. Mr. Lathen did not understand the nominee language to be significant other than it signified the Fund's financing and profit-sharing related to the joint accounts. He did not believe it to be significant to or inconsistent with his strategy of forming valid joint tenancies. (Tr. 3245:19-3246:15).

Division Response: Denied, as the cited testimony does not support this proposed Finding. The cited Lathen testimony says nothing about the fact that "Mr. Lathen did not understand the

nominee language to be significant" nor that it was not "significant to . . his strategy of forming valid joint tenancies."

114. Gersten Savage reviewed and edited the participant agreement. (Lathen Ex. 1325, 1326).

Division Response: Denied. Roper testified that he could not recall whether his firm or some other firm had edited the Participant Agreement. See:

2223:22 **Q Where -- do you know where those redline**
2223:23 **changes emanated from?**
2223:24 A I don't have an independent recollection
2223:25 of that. It could be from our firm, but I don't --
2224:1 I don't have an independent recollection.

2224:21 **JUDGE PATIL: So my question is to you:**
2224:22 **What role, with respect to the documents we're**
2224:23 **looking at called "Participant agreement," did your**
2224:24 **firm play with respect to its engagement with Mr.**
2224:25 **Lathen, if any?**
2225:1 THE WITNESS: And I think, Your Honor, my
2225:2 response was, to the best of my recollection, I
2225:3 cannot recall whether our firm did it or it was done
2225:4 elsewhere.

115. Gersten Savage also reviewed a Limited Power of Attorney form to be used with participants. (Lathen Ex. 846, 847; Tr. 2225:16-24).

Division Response: Denied, as the cited testimony and Exhibit do not support this proposed Finding. Although the cited testimony and Exhibit reflect Lathen's request to Roper for review of the Power of Attorney, there is no evidence that Roper in fact did so.

116. During the course of the representation, Gersten Savage also reviewed the company's website. (Lathen Ex. 844; Tr. 2227:22-2228:15).

Division Response: Denied, as the cited testimony and Exhibit do not support this proposed Finding. Although the cited testimony and Exhibit reflect Lathen's request to Roper for review of the website, there is no evidence that Roper in fact did so.

117. The lawyers at Gersten Savage were aware of, and articulated in the PPM, any potential risks inherent in the fund. This included the risk of regulatory objections to the fund, which Mr. Lathen understood pertained to the unusual "profiting from death" aspect of the fund. (Tr. 645:19-646:23).

Division Response: Denied, as the cited testimony does not support this proposed Finding. It merely quotes from the PPM and says nothing about whether or not the lawyers at Gersten Savage were aware of any particular risks inherent in the fund. In addition, the cited testimony

does not contain the quoted phrase "profiting from death." Nor is there any testimony or documentary evidence that Gersten Savage was or could be aware of, any potential risks inherent in Lathen's fund, let alone articulate all such infinitely possible risks.

118. The lawyers at Gersten Savage were aware of, and articulated in the PPM, the risk that issuers may not have contemplated the fund's investment strategy when they drafted their prospectuses, as well as the risk that issuers and trustees "may take a contrary view" of whether the strategy "represents a valid survivor's option redemption." (Tr. 647:19-648:3). They also were aware of, and identified the risk that the partnership could be exposed to an adverse judgment in favor of the issuers. (Tr. 649:2-7, 25-650:13).

Division Response: Admitted that Lathen testified to his own understanding that "Mr. Roper, or his associates, or whoever drafted this" "were aware that the risk [that the partnership could be exposed to an adverse judgment in favor of issuers] existed." (Tr. 650:14-16.) But the cited testimony does not support any Finding that the lawyers at Gersten Savage were aware of the risk that issuers may not have contemplated the fund's investment strategy when they drafted their prospectuses, or the risk that issuers and trustees "may take a contrary view" of whether the strategy "represents a valid survivor's option redemption."

119. Gersten Savage received advice from Jason Neroulias, as a consultant, who advised the firm on the Trust & Estates law applicable to the fund. (Lathen Ex. 786; 2196:7-2197:1; SEC Ex. 737).

Division Response: Denied, as the cited testimony and Exhibits do not support this proposed Finding. There is no documentary or testimonial evidence that Neroulias actually provided any advice to anyone on "Trust & Estates law applicable to the fund." Indeed, while Lathen Ex.786 is an email from Roper to Lathen, cc'd to Neroulias, noting the need for "his input on the estate part of the Risk Factor section," Div. Ex. 737, which pre-dates the first draft of the PPM, reflects that Neroulias told Roper that he is "happy to continue to help with this project" but that he "would like Jay to understand that for [Neroulias's] own professional liability purposes [Neroulias is] not providing him legal advice and not retained by him."

120. With full comprehension of Respondents' strategy and risk of future issuer-conflict, Gersten did not advise Respondents to provide additional disclosures to issuers and trustees. (Tr. 650:14-18; 651:12-18,20-25; 652:1-12).

Jay Lathen, Tr. 650:14-18; 651:12-18,20-25; 652:1-12
Q. All right. So Mr. Roper, or his associates or whoever drafted this, is it your understanding that they were aware that this risk existed?
A. Certainly.
Q. Did Mr. Roper ever tell you anything about providing additional disclosures to trustees?
A. No. Mr. Roper never said that I had to send anything more than what was required under the governing documents.
Q. Now, you indicated that Mr. Roper understood your strategy, right?

A. Yes, he did.
Q. And from here, it's clear that he understands that there is a risk that an issuer might pay, right?
A. Clearly.
Q. Okay. Would you have expected Mr. Roper if he believed that you had to give some extra disclosure to let you know that?
A. Yes, of course.
Q. Why would you expect him to tell you that?
A. Because I hired him to protect my interests and make sure I was pursuing the strategy in a lawful manner.

Division Response: This proposed Finding is argument and should be stricken. To the extent that the Court is inclined to consider it: (1) the cited testimony is Lathen's and Respondents elicited no such testimony from Roper, the only Gersten Savage witness called; (2) there is no evidence that Lathen disclosed all material facts to Gersten Savage, including no evidence he disclosed his representations to issuers or the facts underlying his joint tenancies; (3) there is no evidence that Roper advised Respondents on disclosure to issuers; and (4) Gersten Savage's work was focused on the Fund documents. (See PFOF¶¶751-53;762.) In addition, Lathen sent an investor presentation to Roper on October 14, 2010, that stated: "Prior to launching business, EndCare received advice from counsel that the strategy is legal." (PFOF¶763.)

121. Gersten Savage advised Mr. Lathen not to put fund profits towards charitable donations and not to put it into the PPM to the extent that it reflected Mr. Lathen's personal intentions to donate. (Tr. 915:2 -19).

Division Response: Admitted.

122. Gersten Savage drafted Eden Arc's initial Form ADV and assisted with some of the updates to it in conjunction with the fund's compliance consultant, Mission Critical. (Tr. 375:3-12; 591:25-592:2; 596:16-24; 2237:2-16, 2237:25-2238:13).

Division Response: Admitted that Gersten Savage assisted Lathen in preparing the initial Form ADV for EACM. Given that Respondents did not call Stephen DeRosa, whom Lathen claims helped him with the ADV, there is no evidence as to what portion of the ADV was drafted by Gersten Savage LLP or what specific advice Lathen requested, the disclosures he made in seeking that advice, or the advice that was actually rendered. (See PFOF¶¶479;481;484.) See also:

3504:6 **Q Well, you reviewed your Form ADVs before you**
3504:7 **filed them, right?**
3504:8 A Yes.
3504:9 **Q And you were the one that told Gersten Savage**
3504:10 **what your assets under management were, correct?**
3504:11 A I think they would certainly want to know what
3504:12 my assets under management were. And I think I would

3504:13 have told them, you know, the facts and circumstances;
3504:14 you know, we have this much money in a bank account.
3504:15 We've got this much money in the joint accounts. And
3504:16 here's the margin, you know, what should we say.

3506:16 **Q But you did review the ADVs before they were**
3506:17 **filed, right?**
3506:18 A Yeah. I think we've established that.
3506:19 **Q And you didn't raise any issues with them as to**
3506:20 **how it was filed, right?**
3506:21 A You know, I think I likely would have asked
3506:22 questions about certain things. As I recall, the process
3506:23 of these ADVs was -- preparing and filing these ADVs was
3506:24 an iterative one where they would take a first shot at
3506:25 it, I would review it, I would ask questions, we would
3507:1 make changes. So ultimately, it was a collaborative
3507:2 effort. But I was leaning heavily on them to interpret
3507:3 things such as Item 5F.

3561:1 **Q Let's take a look at Div. Ex. 2060,**
3561:2 **please.**
3561:3 **Is this an e-mail between you, Eric Roper,**
3561:4 **Stephen DeRosa and Michael Robinson?**
3561:5 A Yes, it is. Stephen DeRosa was the individual
3561:6 at Gersten Savage whose name I couldn't earlier recall
3561:7 that provided the advice in connection with the
3561:8 registration.
(PFOF ¶ 480.)

Denied as to the remainder of this proposed Finding as there is no evidence that Gersten Savage and Mission Critical collaborated on updates to the Form ADV.

375:3 **Q Now, sometime in late 2013, you hired a**
375:4 **compliance consultant; is that right?**
375:5 A Yes. I mean, we had compliance experts
375:6 helping us continuously from the moment we registered
375:7 as an investment advisor. Initially Gersten Savage
375:8 drafted our initial form ADV, and I think assisted us
375:9 in maybe some updates to that.
375:10 But eventually there was another firm that
375:11 specialized in fund compliance called Mission Critical
375:12 that was eventually retained on a continuous basis.

596:16 **Q What role, if any, did any legal counsel**
596:17 **have in the preparation of these documents?**
596:18 THE WITNESS: Well, the initial ADV was done

596:19 by Gersten Savage. So they prepared the initial
596:20 filing and the initial registration with the SEC.
596:21 And after that, when we were doing updates,
596:22 that's when we hired Mission Critical. It was just
596:23 more -- candidly, more cost effective than having
596:24 lawyers do it.

2237:2 **Q Okay. Did he -- did Mr. DeRosa ever**
2237:3 **provide any legal services to Mr. Lathen?**
2237:4 A I believe that Mr. DeRosa assisted the
2237:5 preparation of the Form ADV for the investment
2237:6 advisor registration.
2237:7 **Q And when you say "he assisted," did he**
2237:8 **assist someone?**
2237:9 A I use the word "assisted," because I am
2237:10 not sure whether at the time he was in the process
2237:11 of preparing the Form ADV, Mr. Lathen had engaged a
2237:12 third party SEC consulting firm called Mission
2237:13 Critical to -- so I'm not sure whether they were
2237:14 working together -- "they" being Mission Critical
2237:15 and Stephen -- at the time, which is why I use the
2237:16 word "assisted."

Between the time when Gersten Savage LLP ceased operations and EACM hired Mission Critical and Roper individually, two ADVs were filed. (PFOF ¶¶488;539;757-760.) In addition, the documentary evidence shows that Mission Critical had a limited role in reviewing what was filed; it did not "prepare" anything. Nor did Respondents call anyone from Mission Critical at the hearing to testify to what their participation in the filings was. Lathen himself called Gersten's and Mission Critical's involvement into question, claiming that it was "quite possible" that the Fund's administrator, Cassandra Joseph, also not called as a witness by Respondents, had assisted in filing the Form ADV. (See PFOF ¶¶539;541;542;548;552-55;767.) See also:

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.

123. Mr. 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. (Tr. 643:16-23).

Division Response: Admitted that Lathen so testified.

124. Kevin Galbraith, Esq. holds degrees from Connecticut College and Fordham Law School. (Tr. 2851:16-21).

Division Response: Admitted.

125. Mr. Galbraith specializes in securities law and has significant litigation experience working at prominent international law firms and in the investment and financial services practice areas. (Tr. 2851:25-2853:2; Tr. 2857:1-9).

Division Response: Denied, as the cited testimony does not support this proposed Finding. In fact, there was no testimony that Galbraith "specializes in securities law" or worked at "prominent international law firms."

126. Four years ago, Mr. Galbraith founded his own law firm, which specializes in representing individual investors in securities fraud cases against brokerage firms and other financial institutions, including issuers. Among other things, his firm also provides compliance advice to individuals and entities. (Tr. 2853:3-25).

Division Response: Denied, as the cited testimony does not support this proposed Finding that that Galbraith works on or "specializes in" "securities fraud cases." Admitted that Galbraith founded his own law firm.

127. Pursuant to the Respondents' privilege waiver, Mr. Galbraith turned over more than 600 privileged e-mails and more than 800 documents in total. *See* Protass Affirmation, Ex. 2, Respondents' Memorandum of Law in Opposition to the Division of Enforcement's Motion *In Limine* to Preclude Evidence or Testimony on Advice Received from Kevin Galbraith, dated January 18, 2017.

Division Response: Admitted that well after his and Respondents' production were due, and after advising the Division that he had no not-yet-produced documents responsive to the Subpoena, Galbraith produced more than 600 privileged emails. (PFOF¶¶673-674.) Indeed, Respondents and Galbraith continued to produce documents even after the hearing in this matter began. (PFOF¶678.)

128. The Division of Enforcement aggressively attempted to preclude Mr. Galbraith from testifying at the hearing by filing two motions asking for such relief. *See* The Division of Enforcement's Motion to Compel or Preclude Testimony dated, December 19, 2016; The Division of Enforcement's Motion *in Limine* to Preclude Evidence or Testimony on Advice Received from Kevin Galbraith, dated January 11, 2017.

Division Response: Denied. After Galbraith advised the Division that he had no responsive, not-yet-produced documents, but admitted that he had made no search of his own files for responsive documents, the Division moved to compel Respondents' compliance with the Court's orders requiring Respondents to produce all formerly privileged communications with the lawyers they consulted on the relevant topics. See Division Motion to Compel, December 19, 2016, at p. 1. In the alternative, the Division moved to preclude evidence and testimony of Respondents' reliance on any advice sought from or offered by Galbraith, as the Court had invited it to do in ruling that Respondents' failure to produce all documents relating to their defense would preclude them from asserting it. See Order, dated October 18, 2016. On January 11, 2017, the Division moved to preclude Galbraith's testimony because Galbraith and Respondents (1) failed to produce required documents, including by failing to make a diligent search of their files, delaying production of responsive documents, and making belated and overzealous decisions regarding privilege and responsiveness, and (2) Galbraith refused to be

interviewed by the Division—and Respondents failed to produce him for interview—in derogation of the Court's Order that the Division be able to explore fully the supposed advice sought and received by Respondents. See Oct. 18, 2016 Order.

129. Mr. Galbraith was originally retained to advise on FINRA's regulatory inquiries into Mr. Lathen's brokerage firms "to see what, if anything, [they] could do to help the regulator's understand [Mr. Lathen's] business." (Tr. 2865:19[5]-2856:10).

Division Response: Admitted.

130. Mr. Galbraith ultimately took on responsibility for handling issuer disputes and litigation, including the lawsuit filed by Prospect Capital in New York State Supreme Court. (Tr. 2856:11-19).

Division Response: Admitted.

131. At the outset of the representation, Mr. Lathen made full disclosure to Mr. Galbraith of all material facts concerning and relating to his investment strategy. (Tr. 2857:11-13; 2858:5-2859:14).

Division Response: This proposed Finding is argument and should be stricken pursuant to the Court's order. To the extent the Court is inclined to consider it, there is no evidence that Galbraith received the IMA, the PSA, or the 2013 Discretionary Line Agreement, or considered the effect of any of them on his analysis of Lathen's joint tenancies under NY Banking Law § 675. (See PFOF¶¶959-961;965-968;971-974.) Nor is there any evidence that Lathen advised Galbraith of Farrell's advice that the IMA and PSA had a serious and deleterious impact on the validity of his joint tenancies. (PFOF¶¶871-878(IMA);905-907;909(PSA);1011.) In addition, Lathen lied to Galbraith when he told him that he, Lathen, did not make withdrawals from joint tenant accounts during the lives of Participants. (See PFOF¶999.) See also:

3004:7 **Q And did he provide you with other fund**
3004:8 **documents, such as the investment management**
3004:9 **agreement?**
3004:10 A I think I got those at some point. I
3004:11 don't have a specific recollection of it.
3004:12 **Q Okay. And did he give you his profit**
3004:13 **sharing agreement?**
3004:14 A Same answer.

3004:21 **Q And did he ever give you his 2013**
3004:22 **discretionary line agreement?**
3004:23 A Probably. I don't remember studying it in
3004:24 any depth.

[5] The Division assumes that Respondents' citation is meant to be 2855:19-2856:10.

3006:11 **Q Okay. Now, in connection with the**
3006:12 **subpoena, you did not submit the investment**
3006:13 **management agreement to the Division. Is there a**
3006:14 **reason for that?**
3006:15 A Is there a reason that I did not provide
3006:16 the investment management agreement? I don't
3006:17 recall.

3006:22 **Q And is there a reason that you did not**
3006:23 **submit the 2013 discretionary line agreement in**
3006:24 **connection with the subpoena?**
3006:25 A Yeah. To the extent I received it -- and
3007:1 I think I received it. I'm not 100 percent sure.
3007:2 But to the extent I received it, I don't recall why
3007:3 I wouldn't produce it.

3008:1 **Q Now, the -- is it also fair to say that**
3008:2 **you did not provide the investment management**
3008:3 **agreement to any of the issuers or trusts with whom**
3008:4 **Mr. Lathen was having disputes?**
3008:5 A I would have to go back and review all my
3008:6 communications with those issuers. I don't recall
3008:7 specifically.
3008:8 I know we provided the participant
3008:9 agreement, death certificates, other documents and
3008:10 all the documents that were requested. I don't
3008:11 specifically remember if we provided those
3008:12 documents.
3008:13 **Q Now, if Mr. Lathen testified that he had**
3008:14 **never provided the investment management agreement**
3008:15 **to any issuer, you would have no reason to dispute**
3008:16 **that, would you?**
3008:17 A If he testified that -- to that? I
3008:18 wouldn't dispute that.
3008:19 **Q Okay. And you never shared the profit**
3008:20 **sharing agreement with any of the issuers or**
3008:21 **trustees with whom Mr. Lathen was having disputes**
3008:22 **either; is that correct?**
3008:23 A That's the same answer. I don't recall if
3008:24 it was ever requested. If it was, we would have
3008:25 produced it. If it wasn't, then I'm sure we did
3009:1 not.
3009:2 **Q Okay. And same thing; if Mr. Lathen**
3009:3 **testified that he'd never shared the profit sharing**
3009:4 **agreement with any of the issuers or trustees, you**

3009:5 **would have no reason to dispute that; is that**
3009:6 **correct?**
3009:7 A I would have no reason to dispute that.
3009:8 **Q Okay. And you never provided the 2013**
3009:9 **discretionary line agreement to issuers either;**
3009:10 **isn't that right?**
3009:11 A Same answer as before; I don't recall if
3009:12 it was ever requested. If it was not, then I
3009:13 imagine we didn't produce it.

132. Mr. Lathen provided Mr. Galbraith with governing documents including prospectuses, prospectus supplements, pricing supplements, trust indentures, and the participant agreement, and the fund documents (Tr. 2857:14-2858:4; Tr. 3011:18-24; Tr. 3004:7-24).

Division Response: Denied, as the cited testimony does not support this proposed Finding. Galbraith testified that Lathen provided him with "perhaps a trust indenture" and "the participant agreement or a sample participant agreement."

2857:18 **Q What documents did he give you?**
2857:19 A So he -- as I recall it, at the very
2857:20 outset of the engagement, he provided me with both
2857:21 governing documents; so prospectus, prospectus
2857:22 supplement, pricing supplement, perhaps a trust
2857:23 indenture that pertained to the notes and CDs that
2857:24 he would purchase using his strategy.
2857:25 And, second, he certainly provided me with
2858:1 the participant agreement or a sample participant
2858:2 agreement, through which he entered into side
2858:3 agreements, contractual agreements with his joint
2858:4 tenants.

As to "other fund documents," such as the IMA, Galbraith testified:

3004:7 **Q And did he provide you with other fund**
3004:8 **documents, such as the investment management**
3004:9 **agreement?**
3004:10 A I think I got those at some point. I
3004:11 don't have a specific recollection of it.
3004:12 **Q Okay. And did he give you his profit**
3004:13 **sharing agreement?**
3004:14 A Same answer.
3004:15 **Q Can you give me a ballpark of when "some**
3004:16 **point" might be? Was it a year ago? two years ago?**
3004:17 A I don't have a specific -- I'm sorry. I
3004:18 can't give you a ballpark. I think it was somewhere

3004:19 near the beginning of the representation, but I wish
3004:20 I could be more specific than that. I can't.
3004:21 **Q And did he ever give you his 2013**
3004:22 **discretionary line agreement?**
3004:23 A Probably. I don't remember studying it in
3004:24 any depth.
3004:25 **Q And did he give you the promissory note**
3005:1 **accompanying the 2013 discretionary line agreement?**
3005:2 A I don't recall.
3005:3 **Q Did he give you a security and account**
3005:4 **control agreement?**
3005:5 A I don't recall.

(See also PFOF¶¶961;966-68;972-73.)

133. Mr. Galbraith concluded, and advised Mr. Lathen, that his joint tenancies were valid under New York Banking Law § 675 and the relevant common law. (Tr.2872:7-17; 2885:16-22).

Q. Firstly, did you give him any advice as to the lawfulness of his investment strategy?
A. I did.
Q. And what was the advice? Or what was the discussion?
A. I mean, there have been so many discussions around it, but at -- at core, my advice has been that the joint tenancies that you have formed here are valid joint tenancies under Section 675. That's the briefest summary of it can give. I can give you more detail, if you want.
Q. Okay. And did you and Mr. Lathen in those discussions reach any conclusion as to the validity of the joint tenancies under common law?
A. Yes. I shared my opinion that whether his joint tenancies were examined under the common law or under 675, the conclusion was the same; that these were valid joint tenancies.

Division Response: This proposed Finding is argument and should be stricken pursuant to the Court's order. To the extent that the Court is inclined to consider it, Galbraith, who was not retained until July 2014, was acting as litigation counsel to Respondents (PFOF¶¶939-41;987), and formed his conclusions without the benefit of key documents governing Lathen's relationship to his Fund (including the IMA and PSA), and apparently without the benefit of knowing that Lathen's prior counsel believed that those documents destroyed his joint tenancies. (See DRRPFOF¶131.) Whatever Galbraith advised Lathen about the validity of his joint tenancies, Lathen's reliance on it was also unreasonable in light of the contradictory conclusions reached by lawyers for the issuers and trustees who responded to Galbraith's arguments about New York law, all of which Galbraith passed on to Lathen.
(PFOF¶¶164;166;168;242;244;246;984.) It was also unreasonable in light of Lathen and Galbraith's unsuccessful efforts to obtain opinions from any lawyer on the validity of Lathen's joint tenancies. (PFOF¶¶986;990.) And, according to Galbraith, his legal conclusions were

limited by the fact that no precedent was on "all fours" factually with Lathen's facts, a limitation he communicated to Lathen:

> 2872:20 **Q I'm sorry. If you please, so long as this**
> 2872:21 **is information that was communicated to Mr. Lathen.**
> 2872:22 A All of this was communicated to Mr.
> 2872:23 Lathen.
> 2872:24 So I told -- I told Jay that while there
> 2872:25 was a robust body of case law interpreting Section
> 2873:1 675, there was little to no case law factually on
> 2873:2 all fours with the investment strategy that he was
> 2873:3 executing.

Finally, Galbraith's testimony was unreliable given that his appearance at the hearing was in his capacity as co-defense counsel for Lathen with an admitted interest in producing a favorable result both in this proceeding and for the Prospect litigation on which Lathen retained Galbraith as litigation counsel. (PFOF¶¶949-952;956.) Indeed, his testimony was as biased as testimony from Respondents' own trial counsel would have been if one of them had assumed the stand to testify in his behalf.

134. Mr. Galbraith's counsel to Mr. Lathen was based on his extensive research on New York law governing joint tenancies with right of survivorship, including statutes, case law, scholarship and commentary surrounding the governing law. (Tr. 2863:6-21).

Division Response: Admitted that Galbraith so testified. (But see DRRPFOF¶133 for all of the reasons that Galbraith's conclusions and testimony are unreliable and Lathen's reliance on his advice unreasonable.) Further, Galbraith testified that his "extensive research" on New York law governing joint tenancies produced no decision with similar facts to Lathen's, and told Lathen that "there was little to no case law factually on all fours with the investment strategy that he was executing." (Tr. 2873:1-2.)

135. During the course of his representation, Mr. Galbraith had many conversations with Mr. Lathen about the legal regime impacting his business, including "careful, deep discussion of the statutory framework that pertains to his investment strategy, as well as the case law promulgated thereunder that would impact the validity of his joint tenancies and the investment strategy as a whole." (Tr. 2860:1-5; 2865:12-2867:2).

Division Response: Admitted, but Galbraith testified to no conversation with Lathen at all about the impact of the IMA or PSA on Lathen's joint tenancies under that legal regime, or the conclusions that Farrell had reached. (See DRRPFOF¶131.) In addition, as litigation counsel to Respondents, Galbraith's examination of the applicable legal regime was tied to, and colored by, his efforts to build the strongest argument he could in defending Respondents in the Prospect litigation. (PFOF¶944.) (See also DRRPFOF¶133 for all the reasons that Galbraith's conclusions and testimony are unreliable and Lathen's reliance on his advice unreasonable.)

136. Mr. Galbraith described Mr. Lathen as a "hands-on client" who, unlike many clients, read the statutes and case law with care. (Tr. 2862:21-25).

Division Response: Admitted.

137. Through his research, Mr. Galbraith advised as to what he described as the "agreed-upon analytical framework that courts use when determining validity of a joint tenancy" under the statute. (Tr. 2866: 8-17).

Division Response: To the extent that the Division understands this proposed Finding as stating that Galbraith testified that his research had led him to conclude that New York courts apply an "agreed-upon analytical framework. . . .," admitted. (But see DRRPFOF¶133 for all the reasons that Galbraith's conclusions and testimony are unreliable and Lathen's reliance on his advice unreasonable.)

138. Specifically, Mr. Galbraith advised that New York Banking Law § 675, which applies to both bank and brokerage accounts, creates a statutory presumption as to the validity of a joint tenancy upon a finding of *prima facie* evidence. (Tr. 2863:22 - 2864:12; 2865:12-2866:2; 2866:18-25). He also advised that brokerage firm signature card or account-opening documents – where account-openers document their intention to create a "JTWROS" account – is considered *prima* facie evidence. (Tr. 2867:3-2868:7).

Division Response: Admitted, except that the cited testimony does not support the Finding that "where account-openers document their intention to create a 'JTWROS' account."

139. Accordingly, Mr. Galbraith advised that the joint account opening documents filed by Mr. Lathen and the participants would be entitled to the statutory presumption of validity and that any person seeking to challenge the validity of the joint tenancy would bear a "heavy burden." (Tr. 2866:18-25).

Division Response: Denied, as the cited testimony does not support this proposed Finding. Galbraith's testimony cited here makes no reference to what he told Lathen about Lathen's accounts.

2866:18 **Q And can you tell us precisely what it is**
2866:19 **that you communicated to Mr. Lathen?**
2866:20 A Sure. The structure -- the analytical
2866:21 framework that the courts articulate in case after
2866:22 case is that once you have prima facie evidence of a
2866:23 joint tenancy, that is a statutory presumption.
2866:24 Any challenge -- any person or entity
2866:25 challenging that joint tenancy bears the burden.

140. Mr. Galbraith also researched the bases for overcoming *prima facie* evidence of joint tenancy and advised Mr. Lathen of his view that none of these four bases applied to his business. (Tr. 2868:8-2871:6; 2879:4-16; 2868:16-2869:24; 2869:25-2870:21; 2870:22-2871:6; 2876:15-2879:16).

Q. Okay. What did Mr. Lathen -- do you recall if Mr. Lathen expressed opinions concerning those four points?
A. He did. He asked a lot of questions about the cases that I had brought to his attention and analyzed. And I answered those questions. We discussed them in-depth. And he agreed with me entirely that none of the four bases for overturning the statutory presumption were present in his accounts.

Division Response: Admitted that Galbraith so testified. (But see DRRPFOF¶133 for all the reasons that Galbraith's conclusions and testimony are unreliable and Lathen's reliance on his advice unreasonable.)

141. Specifically, Mr. Galbraith concluded that there was no basis for a finding of "fraud" or "undue influence" with respect to the participants based on his review of the documents, discussions with Mr. Lathen, and his view that the disclosures to participants were "transparent and fulsome." Mr. Galbraith also noted the frequent involvement of relatives, friends, or advisors who often have a power of attorney over participant's affairs. (Tr. 2868:16-2869:24).

Division Response: Admitted that Galbraith so testified. (But see DRRPFOF¶133 for all the reasons that Galbraith's conclusions and testimony are unreliable and Lathen's reliance on his advice unreasonable. See PFOF¶165 (referring to GECC's view that Lathen's checking of the JRWROS box on the account applications constituted "a false representation.").)

142. Mr. Galbraith also concluded that "lack of capacity" was not an issue in light of the care that Mr. Lathen and Mr. Robinson took care not to enter into participant agreements with people who lacked capacity or, alternatively, whose representative did not hold a valid power of attorney form. (Tr. 2869:25-2870:21).

Division Response: Admitted that Galbraith so testified. (But see DRRPFOF¶133 for all the reasons that Galbraith's conclusions and testimony are unreliable and Lathen's reliance on his advice unreasonable.)

143. Mr. Galbraith also advised that the joint tenancies at issues were not "convenience accounts" based on his evaluation of the statutory definition and applicable case law. (Tr. 2870:22-2871:6; 2876:15-2879:16). Specifically, he advised that a convenience account is typically shared between an elderly or ill person with someone who could provide "assistance" with the account, for example, by writing checks or paying

bills. However, in those cases, there was a lack of evidence of a survivorship intention, i.e., that the assets would pass to the other account holder automatically upon the death of the other. (Tr. 2877:9-2878:12).

Kevin Galbraith, Esq., Tr. 2877:9-2878:12

Q. And if you could tell us what a convenience account is and why these -- what a convenience account is and why you and Mr. Lathen in discussions concluded these were not convenience accounts?
A. Sure. So a convenience account most typically is a joint checking account opened between some person who needs assistance and a second person; often times an elderly or ill person and a younger relative or friend, they open a joint checking account. There is no intention that the assets held in that account would pass to the other person named on the account upon the death of one or the other. Instead, they are typically opened for convenience purposes; hence, the name. For example, such that the second person can write checks on the account to help the elderly or ill person pay their bills, maybe while the elderly person is in the hospital. Or simply pay their grocery bills, their utilities, whatever it is. They are opened purely for convenience with no intention that the proceeds would pass to that other person upon the death of the first.
Q. Is no intention to pass -- is that another way of saying no survivorship intention?
A. Yes. There's no intention that there would be a survivorship feature.

Division Response: Admitted that Galbraith so testified. (But see DRRPFOF¶133 for all the reasons that Galbraith's conclusions and testimony are unreliable and Lathen's reliance on his advice unreasonable. See PFOF¶¶163-68;239-245 (detailing the opposite legal conclusions reached by GECC and US Bank, all passed on to Lathen), and PFOF¶¶142;145;146 (Goldman Sachs' opposite legal conclusions, conveyed to Lathen). See also Reply Brief at Section I(G)(2) (noting that Galbraith's cases reflect New York courts' focus on the intent of the parties to confer present interests in valid joint tenancies).)

144. Mr. Galbraith advised that Mr. Lathen's brokerage accounts with participants were not "convenience accounts" because there was explicit intent to establish a JTWROS, as evidenced in the brokerage account-opening documents and the participant agreement, which also referenced the survivorship intention. (Tr. 2878:13-2879:3).

Q. Okay. So how did a convenience account differ from the joint tenancy accounts that Mr. Lathen had -- how does the convenience account differ from the joint tenancy accounts that Mr. Lathen opened with participants?
A. So the accounts that Mr. Lathen opened with participants were explicitly joint tenancy accounts with a right of survivorship. It said so on the brokerage accounts. The participant agreement referenced the joint tenancy. There is a specific disclosure in the participant agreement stating that the assets held in the account shall not become part of the decedent's estate and, instead, will pass to Mr. Lathen in the event that he survives the joint tenant.

Division Response: Admitted that Galbraith so testified. (But see DRRPFOF¶133 for all the reasons that Galbraith's conclusions and testimony are unreliable and Lathen's reliance on his advice unreasonable. See PFOF¶165 (referring to GECC's view that Lathen's checking of the JTWROS box on the account applications constituted "a false representation.").)

145. Mr. Galbraith also explained that his analysis was based on his evaluation of the case law and that there were no cases "factually on all fours with the investment strategy that [Mr. Lathen] was executing." (Tr. 2872:24-2873:8.) However, Mr. Galbraith identified and advised Mr. Lathen as to many cases that supported the view that the joint tenancies at issue were valid. (Tr. 2879:23-2881:9).

Division Response: Admitted that Galbraith warned Lathen that there were no cases "factually on all fours with the investment strategy," but the cited testimony does not support the Finding that Galbraith "identified and advised Mr. Lathen as to many cases that supported the view that the joint tenancies at issue were valid."

146. Mr. Galbraith testified about his review of case law holding that mortgages, and other similar types of loans or encumbrances on property, do not invalidate the joint tenancy. (Tr. 2880:16-2881:1.) Mr. Galbraith also reviewed and advised Mr. Lathen about case law finding that side agreements involving joint accounts did not invalidate a joint tenancy. (Tr. 2888:7-2890:20).

Kevin Galbraith, Esq., Tr. 2888:7-2890:20
Q. And can you define what you meant by "side agreements"?
A. I think I was referencing our discussion of the case law. And in my case law research, I came across a number of cases where there were side agreements. And I'm trying to remember if it is Stalter or Corcoran or Zecca, there are a number of cases where there are -- at least one kind of side agreement or another. And that was the context.
Q. Okay. What types of side agreements did you and Mr. Lathen read about in the case law and discuss? And what I mean by "what type," what were the nature of those actual agreements?
A. Yeah. As I recall it, the nature of the agreements were such that they impacted the ultimate economics of the joint tenancies.
Q. Let me interrupt you, because you mentioned one type of agreement as a mortgage –
A. Uh-huh.
Q. -- mortgage as an example of a side agreement that you discussed with Mr. Lathen. Were there any other examples of side agreements that you discussed with Mr. Lathen?
A. Outside of the mortgage?
Q. Yes. Other than the mortgage.

A. Yes, yes. Other than the mortgage, there was at least one other side agreement case where one of the joint tenants had entered into a side agreement with a third party that would ultimately impact what would happen to the asset held in the joint tenancy. And the court looked at that and determined that that did not invalidate the joint tenancy. So I don't remember the specifics of what was in that side letter agreement. But as a general matter, that's my recollection.
Q. And how did you and Mr. Lathen think that that case law relating to side agreements was relevant to his investment strategy?
A. Sure. Whether it was the mortgage on the underlying asset or the side agreement impacting the ultimate economics of the joint tenancy, as I explained, we were searching for cases that were analogous to Mr. Lathen's joint tenancies and to his investment strategy, because there was no case that was squarely on point. So we discussed how those cases applied by analogy to his facts. And we conclude -- and I advised and we concluded together that the case law holding that a side agreement or mortgage did not invalidate the joint tenancies was a good piece of support for our position.
Q. And what was the equivalent of the mortgage that you discussed with Mr. Lathen with respect to his investment strategy?
A. So the mortgage or the side letter agreement, those are what I -- what I refer to as encumbrances. Those are contractual agreements outside of the statutory joint tenancy. In this -- in Mr. Lathen's case, the participant agreement is the side agreement.

Division Response: Admitted that Galbraith so testified. (But see DRRPFOF¶133 for all the reasons that Galbraith's conclusions and testimony are unreliable and Lathen's reliance on his advice unreasonable. See also Reply Brief at Section I(G).)

147. Mr. Galbraith advised that the statutes, including New York Banking Law Section 675, are controlling, and were put in place to codify the common law and give courts a framework for analyzing joint tenancies. (Tr. 2883:3-23).

Division Response: Admitted that Galbraith so testified. (But see DRRPFOF¶133 for all the reasons that Galbraith's conclusions and testimony are unreliable and Lathen's reliance on his advice unreasonable.)

148. Mr. Galbraith and Mr. Lathen discussed a case called "Grancaric" at length, and viewed it as analogous. They viewed it as support that "an arrangement whereby a third party who is otherwise a stranger to a joint tenancy deriving economic benefit from the joint tenancy would not destroy the validity of the joint tenancy." (Tr. 2947:21-2948:16).

Division Response: Denied, as the cited testimony does not support this proposed Finding that Lathen viewed Grancaric as analogous, only that Galbraith did. As to the rest of this proposed Finding, admitted that Galbraith so testified. (But see DRRPFOF¶133 for all the reasons that Galbraith's conclusions and testimony are unreliable and Lathen's reliance on his advice

unreasonable. See PFOF¶167 and Div. Ex. 838 – p.8, n.7 (GECC's disagreement with Galbraith's view of Grancaric.) See also Reply Brief at Section I(G)(2).)

149. Mr. Galbraith advised Mr. Lathen that any difficulty obtaining a formal opinion letter on the validity of the joint tenancies is that (1) law firm are hesitant to issue opinions that may be adverse to big financial institutions that could be clients, and (2) firms do not view the financial reward to be worth the risk of issuing such opinions, generally. (Tr. 2918:5-2919:4).

Division Response: Denied, as the cited testimony does not support this proposed Finding. Galbraith testified in the cited portions to Lathen's view of why law firms would not provide an opinion, not his own findings in that regard.

2918:5 **Q Okay. Did you come to learn the reasons**
2918:6 **that other law firms declined to issue a subpoena --**
2918:7 **I'm sorry -- an opinion letter, either for Mr.**
2918:8 **Lathen or otherwise?**
2918:9 A I did. So Jay and I discussed it a bit.
2918:10 And he shared with me, and I agreed with him based
2918:11 on my own 15 years of practice experience, that many
2918:12 or most law firms would prefer not to take an
2918:13 opinion -- or issue an opinion that might be viewed
2918:14 adversely by a big financial institution, because
2918:15 they either have them as clients or they would love
2918:16 to have them as clients.
2918:17 And the second -- the second rationale is
2918:18 really a risk/reward. So a law firm is paid a
2918:19 relatively small amount of money to issue an opinion
2918:20 letter. And they see it as essentially all
2918:21 downside.

Galbraith further testified that the only law firm he spoke to regarding the proposed opinion letter stated that they were representing the entity in an active FINRA investigation and they did not want to take any position that might agitate their regulator.

2917:18 **Q Do you know if Mr. Lathen was ever**
2917:19 **successful in obtaining an opinion letter?**
2917:20 A I don't think he ever obtained one.
2917:21 **Q Okay. Do you have -- do you know why he**
2917:22 **was -- why law firms were not willing to issue an**
2917:23 **opinion letter? Do you know?**
2917:24 A I only had a discussion with one law firm,
2917:25 so I know the stated reason. In that case, it was
2918:1 because the firm was representing an entity in an
2918:2 active FINRA decision -- or FINRA investigation, and
2918:3 it didn't want to take any position that might

2918:4 agitate their regulator.

Hinckley Allen had advised Lathen that the firm could not give him a legal opinion on the validity of his joint tenancies because the analysis was fact-specific, the law was unsettled, and it would expose the firm to a risk of third-party reliance that the firm was unwilling to undertake for the compensation that was to be paid for this matter. (PFOF¶¶827-29.)

150. Mr. Galbraith and Mr. Lathen collaborated in dealing with issuers who declined payment following the brokerage firm's submission of Mr. Lathen's redemption package. Most significantly, Mr. Galbraith handled the litigation with Prospect Capital. (Tr. 2887:18-2888:3).

Division Response: Admitted.

151. Mr. Galbraith and Mr. Lathen discussed prospectus language and the fact that both Jay and the participant had a "present beneficial interest" in the assets in the accounts. (Tr. 2894:23-2896:12; 2898:9-2899:6, 2897:1-2898:19)

Q. And during the course of your representation of Mr. Lathen, did you and he discuss this -- this particular Prospect pricing and prospectus supplement?
A. Yes.
Q. And did you and Mr. Lathen discuss other prospectuses issued by other issuers?
A. We did.
Q. Can you just give me a sense of what your discussions with Mr. Lathen were about with respect to these supplements, prospectuses and pricing supplement?
A. Yes. Our discussions were primarily focused on the prospectus supplement itself and the terms that were relevant to his business. So we looked carefully at the provisions governing the survivor's option. Specifically we discussed what -- what was required for a surviving joint owner to redeem one of these bonds at par. We discussed what the documents were that were required to be submitted by the brokerage firm to the indenture trustee in order to trigger that redemption. We discussed what an event of default was, and what the trustee's obligation was in the event of default. Those were the main topics.
Q. Okay. And why is it that you discussed the details of the Prospect prospectus? Jay held a significant amount of Prospect paper in joint tenancy and joint tenant accounts, and had put a fair amount of paper back to Prospect upon the death of his joint tenants. And then he had -- at some point, U.S. Bank -- some combination of U.S. Bank and Prospect, decided that they were going to put a hold on these redemptions and stopped honoring them. So at that point I got involved, and we studied the prospectus together pretty carefully and decided how firm our legal grounds were to contest those rejections.
A. I did. Jay and I discussed the meaning of this provision and this entire section. So it talks about the obligation of the issuer to repay -- or to pay at par on certain - under certain circumstances. It talks about the death of a beneficial owner of the

note. So in this case, we discussed the fact that there was -- had, in fact, been the death of a beneficial owner of the note; namely, Jay's participants.
Q. Let me just stop you right there before you go on. Did you and Mr. Lathen discuss the definition of the phrase "beneficial owner"?
A. You know, I don't recall our specific discussions on that. I know, as a general matter, we discussed that both Jay and the participant did have a present beneficial interest in the assets in the accounts. I don't know how in-depth we got on the term "beneficial owner."

Division Response: Admitted that Galbraith so testified. (But see DRRPFOF¶133 for all the reasons that Galbraith's conclusions and testimony are unreliable and Lathen's reliance on his advice unreasonable.) In particular, Galbraith testified that the legal advice Galbraith gave Lathen was in the context of trying to build the strongest argument he could for the Prospect litigation.

2979:18 **Q Okay. And weren't you trying to build the**
2979:19 **strongest argument as to the validity of the joint**
2979:20 **tenancies in the context of the Prospect litigation?**
2979:21 A Yes.
(PFOF¶944.)

152. During the course of his representation, Mr. Galbraith and Mr. Lathen discussed the terms of prospectuses, prospectus supplements, and pricing supplements, and what was required for a surviving joint owner to redeem under the survivor's option. Specifically, they discussed what documents were required to be submitted by the brokerage firm to the indenture trustee to trigger that redemption, and what the trustee's obligation was in the event of the issuer's default on payment. (Tr. 2895:6-23).

Division Response: Admitted that Galbraith so testified. (But see DRRPFOF¶133 for all the reasons that Galbraith's conclusions and testimony are unreliable and Lathen's reliance on his advice unreasonable.)

153. With respect to the dispute with Prospect Capital, Mr. Galbraith believed that U.S. bank, as the indenture trustee and "sole determination agent" should have made the determination and request for additional information. Mr. Galbraith believed U.S. Bank "acted improperly" in handling the matter by backing out of its "obligation as indenture trustee" and instructing Mr. Lathen and Prospect to deal with each other directly. (Tr. 2905:1-11; Tr. 2906:9-2907:1.)

Division Response: Denied, as the cited testimony does not support this proposed Finding with respect to its quoted reference to "sole determination agent" or "acted improperly."

154. With respect to the Prospect Capital litigation, Mr. Lathen and Eden Arc's position is that the joint tenancies were valid and the redemptions were

consistent with all the obligations set forth in the prospectus supplement. For those reasons, Mr. Lathen is entitled to redeem all of the Prospect paper that he was – and is still – holding, at par value. This position is consistent with Mr. Galbraith's research and advice to Mr. Lathen. (Tr. 2907:10-2098:8).

Division Response: Admitted that Galbraith so testified. (But see DRRPFOF¶133 for all the reasons that Galbraith's conclusions and testimony are unreliable and Lathen's reliance on his advice unreasonable.)

155. In September 2013, Mr. Lathen learned that the SEC was pursuing a civil case against the Staples in federal district court in South Carolina. (Tr. 704:4-18).

Division Response: Admitted.

156. After reviewing the complaint and conferring with both counsel for the Staples and own counsel at Hinckley Allen & Snyder, Mr. Lathen concluded that the facts in the Staples case were materially different from how he was operating his business. (Tr. 704:23-705:2-13; 873:11-17).

Division Response: Denied, as the cited testimony does not support this proposed Finding. It makes no reference to Lathen conferring with Hinckley Allen & Snyder regarding the Staples case. Despite Lathen's claims that he believed his business to be different from that of the Staples', particularly with respect to the differences between his Participant Agreement and the one used by the Staples, (PFOF¶450), he and Galbraith watched that case closely. (See, e.g., Div. Ex. 481 (series of emails with Lathen seeking updates from Staples attorney); PFOF¶957.) See also:

709:4 THE WITNESS: I either received it from Mr.
709:5 Staples' counsel, Mike Montgomery, who I had been
709:6 speaking to almost immediately after I became aware of
709:7 the case.
709:8 Or it may actually -- I think eventually it
709:9 was part of an attachment to one of the motions in
709:10 that case.

Lathen also acknowledged that a prospective investor, Benchmark, had "backed away" to see how the Staples case played out, indicating that Lathen was aware that at least one investor thought the Staples matter was important. (PFOF¶560.)

157. Specifically, Mr. Lathen understood that the complaint against the Staples alleged that the participant agreements had "fully stripped the participant of any ownership rights or survivorship in the account." (Tr. 705:14-706:25). In contrast, Mr. Lathen believed that "since [his] agreements preserved survivorship, that they were valid joint tenancies and would be very difficult to challenge on that basis." (Tr. 706:25-707:11).

Division Response: Admitted that Lathen so testified. Lathen also testified that if he had Participant Agreements like the ones at issue in Staples, an issuer would have grounds to refuse to redeem under the survivor's option, (PFOF¶450), acknowledging the materiality of those agreements to an eligibility determination.

3624:10 **Q And in your view, that was a step too far,**
3624:11 **right?**
3624:12 A I think that was my initial view at the time.
3624:13 And they certainly -- you know, my agreement had always
3624:14 attempted to preserve some level of survivorship, as well
3624:15 as, you know, economics in the account at the outset. So
3624:16 I feel like they had maybe gone a little bit too far.
3624:17 **Q And fair to say that if you had participant**
3624:18 **agreements like Staples, an issuer would have grounds to**
3624:19 **say no; is that fair to say?**
3624:20 A That would require me to understand. I don't
3624:21 know. I think as I testified yesterday, there were --
3624:22 there were issuers who had reviewed the Participant
3624:23 agreements of the Staples and had concluded that they
3624:24 would have paid. But it's fair to say I didn't find that
3624:25 out until after reading the Staples complaint. I think
3625:1 at the time, I probably thought they hadn't drafted
3625:2 their contracts as well as they should have.
3625:3 **Q Well, you testified during the Division's**
3625:4 **investigation that if you had had Participant Agreements**
3625:5 **like the Staples case, an issuer would have grounds to**
3625:6 **say no; that's what you testified, right?**
3625:7 A I may have said that because that would be
3625:8 consistent with whatever view I just espoused which is I
3625:9 felt like their contracts had sort of fully stripped the
3625:10 Participant.
3626:13 **Q -- that you had stated in testimony if you had**
3626:14 **Participant Agreements like Staples, an issuer would have**
3626:15 **grounds to say no?**
3626:16 A Yeah. I think that the response says, yeah, I
3626:17 think probably. But that wasn't the facts with us.

158. Mr. Lathen came into possession of an FBI memorandum regarding the Staples investigation, which concluded that no securities law violations had occurred. Mr. Lathen believes the memorandum was either given to him directly by Staples' counsel, Michael Montgomery or was attached to motions in that case. (Lathen Ex. 1556-1557; Tr. 707:21-708:3; 709:3-710:12).

Division Response: Admitted.

159. The FBI memorandum recommended that the case be closed based on various government agencies' conclusions that there was nothing illegal about the strategy, including no violation of securities laws or regulations. (Lathen Ex. 1557).

Division Response: Admitted that the cited Exhibit reflects the FBI's recommendation as stated. However, at the hearing, the Division objected to the Exhibit on grounds—first identified in its Motion in Limine—as unreliable hearsay within hearsay, and the Court stated that it might "reconsider [the Division's] objection" "at some point" "including in the post-trial process." (See Tr. 711:17-712:13.) The Division continues to object to this Exhibit and asks the Court to exclude it.

160. Specifically, the Securities Division of the South Carolina Attorney General's Office "conducted a thorough investigation" and concluded that no state securities regulations were violated. They also found, "through correspondence with several bond issuers, that Staples merely took advantage of a little known loophole in the rules governing the purchase and redemption of bonds with a survivor's option." (Lathen Ex. 1557).

Division Response: Admitted that the FBI memo states that Securities Division of the South Carolina Attorney General's Office "thoroughly examined [Staples'] operation," and found, "through correspondence with several bond issuers, that Staples merely took advantage of a little known loophole." (See DRRPFOF¶159, supra.)

161. The memorandum also highlighted discussions with the U.S. Attorney's Office, which found nothing illegal about the strategy, and an SEC trial attorney in Atlanta, who "was not able to pinpoint a regulatory or criminal violation." (Lathen Ex. 1557).

Division Response: Admitted that the FBI memo states that the U.S. Attorney's Office, stated that the conduct "didn't appear to be illegal." (See DRRPFOF¶159, supra.)

162. Mr. Lathen sent Mr. Flanders at Hinckley Allen information regarding the Staples case, including a copy of an SEC press release and FBI memo. Mr. Flanders recalls discussing the situation and the factual distinctions. (Lathen Ex. 2022; Tr. 2019:20-2021:6; Lathen Ex. 1556, 1557; Tr. 2022:8-24).

Division Response: Denied, as the cited testimony and Exhibits do not support this proposed Finding. While Flanders testified that he believed he had a conference call with Lathen about Staples, he could not recall the "Staples situation and factual distinctions."

2020:5 **Q And if you could take a look at that, and**
2020:6 **just tell me if that refreshes your recollection**
2020:7 **about subsequent communications with Mr. Lathen?**
2020:8 A Yes. This appears to be dated September

2020:9 21, 2013. It's an email from Mr. Lathen to me
2020:10 attaching a press release about an SEC charge
2020:11 against a father and son in South Carolina with
2020:12 operating a fraudulent investment program designed
2020:13 to illegally profit from the deaths of terminally
2020:14 ill individuals.
2020:15 And this is the so-called Staples matter.
2020:16 **Q Are you familiar with that matter?**
2020:17 A I was at the time. I confess that I do
2020:18 not recollect as I sit here precisely what the
2020:19 circumstances were.
2020:20 **Q Okay. And in the email, Mr. Lathen**
2020:21 **indicates he wants to have a conference call with**
2020:22 **you.**
2020:23 **Do you know if that ever took place?**
2020:24 A I believe it did.
2020:25 **Q Do you recall what was discussed on that**
2021:1 **call?**
2021:2 A I believe we discussed the Staples
2021:3 situation and factual distinctions that I do not
2021:4 recall between what Lathen was doing and what the
2021:5 SEC was charging the Staples -- were about in their
2021:6 investment program.

163. The Staples case was resolved in a settlement, which included a dismissal of the 10b-5 and 17(a)(1) charges, with prejudice, and neither admitting nor denying a violation of Section 17(a)(2) and 17(a)(3). (Tr. 871:10-14; Lathen Ex. 2000-2001).

Division Response: Admitted.

164. Mr. Grundstein explained that Mr. Lathen was seeking counsel to ensure what he was doing was legal and it was being done in an appropriate manner. (Tr. 2428:19-21).

Division Response: Admitted that Grundstein so testified.

165. Mr. Grundstein has also known Mr. Lathen for 30-years and is a member of the financial industry. He testified to Mr. Lathen's "very high standing character," and vouched for Mr. Lathen's honesty and trustworthiness. (Tr. 2426:20-2427:2).

Division Response: Admitted to the extent that Grundstein was testifying to his view of Lathen's character as a friend (PFOF¶¶688-89), not as an industry participant. There is no evidence that Grundstein had any interactions with Lathen in business, apart from Lathen's seven-month engagement of Grundstein's firm in 2009. See also:

2426:24 **Q And what would -- how would you describe**
2426:25 **Mr. Lathen?**
2427:1 A Just very high standing character, very
2427:2 honest, very trustworthy friend.

166. Based on their observations during their representation of Mr. Lathen, both Mr. Flanders and Ms. Farrell formed the opinion that Mr. Lathen was genuinely seeking to operate within the bounds of the law and create a valid joint account.

Robert Flanders, Esq., Tr. 2027:17-2028:2
Q. All right. You just testified that you believed that Mr. Lathen wanted to honor the law. Why do you say that?
A. Because that was the whole tenor of his approach to us. He was very interested in doing this the right way and not getting in trouble with regulators and not having to face the same sort of scrutiny and much less criminal problems that Caramadre had had in common. So his whole focus was, "What do I have to do to get this right?"

Margaret Farrell, Esq., Tr. 2651:1-9
Q. From your interactions with Mr. Lathen, did you form an understanding about how he was trying to operate his business?
A. He was trying to operate it within the bounds of the law. He was trying -- he was trying to create a joint -- a valid joint account.
Q. Okay. And did you believe that he came to you to assist in that purpose?
A. Yes.

Division Response: Admitted that Flanders and Farrell so testified. (But see DRRPFOF¶¶89-90 for the many material matters Lathen failed to disclose to both Flanders and Farrell that might have colored their views had they been aware of them at the time.)

167. Over the course of his representation, Mr. Galbraith formed the "very clear belief" that "[Mr. Lathen] believes with certainty that these are valid joint tenancies" and that "[h]e believed and believes wholeheartedly that his investment strategy is entirely lawful." (Tr. 2874:25- 2875:16).

Tr. 2874:25-2875:16
Q. Do you have any insight as to Mr. Lathen's beliefs as to the lawfulness of his investment strategy?
A. Yes. As a result of our conversations, I have very clear belief on that topic, which is that Jay believes with certainty that these are valid joint tenancies.
Q. I asked about the lawfulness of his investment strategy. You answered the validity of his joint tenancies.
A. Sorry.
Q. Are they one and the same?

A. They are -- they are essentially one and the same. But my answer is the same. He believed and believes wholeheartedly that his investment strategy is entirely lawful.

Division Response: Admitted that Galbraith so testified. (But see DRRPFOF¶133 for all the reasons that Galbraith's conclusions and testimony are unreliable and Lathen's reliance on his advice unreasonable.)

168. After working closely with Mr. Lathen for several years, Mr. Galbraith, formed the opinion that Mr. Lathen was not only honest and forthright, but was committed to complying with the law. (Tr. 2875:21-2876:4)

Q. Okay. Have you -- you know, over the several years that you've known him, have you formed any opinion as to Mr. Lathen's character?
A. I have.
Q. Okay. And what opinions have you formed?
A. Well, through our interactions, I've seen from day one, but certainly with more depth as our -- as our relationship and the scope of our engagement increased, I've seen that he's entirely forthright. He is transparent with me. He is meticulous about understanding all the legal issues around his investment strategy. Those are -- those are the key takeaways.

Division Response: Denied, as the cited testimony does not support this proposed Finding that Galbraith concluded that Lathen was "committed to complying with the law." (See also DRRPFOF¶131 for the many material matters Lathen failed to disclose to Galbraith that might have impacted his conclusion that "he is transparent with me," had he been aware of them at the time; DRRPFOF¶133 for all the reasons that Galbraith's conclusions and testimony are unreliable and Lathen's reliance on his advice unreasonable.)

169. CIT Bank ("CIT") processed Mr. Lathen's redemption request and paid after receiving the Participant Agreement. (Tr. 2909:2-11; 2911:5-20; Lathen Ex. 1433)

Division Response: This proposed Finding is irrelevant because the dispute with CIT Bank centered on CDs (PFOF¶412), which are not the subject of this proceeding. In addition, the survivor's option provisions in bond prospectuses are different from those in CD disclosure statements. Plain-vanilla CDs have a spare discussion of the survivor's option. (PFOF¶¶39;41;420;847; Div. Ex. 681 – p. 4.) For these reasons, CD testimony and exhibits are of limited relevance to this proceeding.

To the extent that the Court is inclined to consider this proposed Finding, admitted that CIT paid Lathen's CD redemption request after demanding and obtaining Lathen's Participant Agreement, but did so only after Lathen and Galbraith threatened to sue it (PFOF¶¶253-55;1004-10) and without knowledge of either the IMA or PSA, leaving it ignorant of the truth of Lathen's purported "ownership." (PFOF¶¶412-13.) And as Galbraith testified, he could not assess

whether CIT's motivation in paying the redemption was its agreement with Lathen's position or its desire to avoid a law suit. (PFOF¶1006.)

170. Una Khang, an attorney at CIT, gave a statement to the Division which stated, in pertinent part, that "CIT felt that under the language of their documentation they did not see anything that permitted them to withhold he funds." (Lathen Ex. 1970).

Division Response: This proposed Finding should be stricken as improper and contrary to the Court's ruling. The cited exhibit was admitted but "not to prove the truth of the assertions in their documents." (Tr. at 3703:22-23; See Division's Letter to Judge Patil, March 2, 2017.) Respondents could have, but did not, call any issuer witness to testify.

171. After accepting Mr. Lathen's redemption requests, CIT advised Mr. Lathen's counsel, Kevin Galbraith, Esq., that it intended to change the language in its offering documents to limit survivor's option ("SO") redemptions to individuals who are blood relatives of or have resided under the same roof as the deceased beneficial owner of the SO bond. (Tr. 2909:20-2915:5; Lathen Ex. 1433).

Division Response: This proposed Finding is irrelevant because the dispute with CIT Bank centered on CDs (PFOF¶412), which are not the subject of this proceeding. In addition, the survivor's option provisions in bond prospectuses are different from those in CD disclosure statements. Plain-vanilla CDs have a spare discussion of the survivor's option. (PFOF¶¶39;41;420;847; Div. Ex. 681 – p. 4.) For these reasons, CD testimony and exhibits are of limited relevance to this proceeding.

To the extent that the Court is inclined to consider this finding, admitted that Galbraith so testified. The cited Exhibit states "CIT will be changing its offering documents on future issuances in order to make clear that an arrangement like yours will not be eligible for early redemption." (Lathen Ex. 1433 – p. Lathen11258.) See also:

3120:9 **Q Okay. And I think you mentioned earlier**
3120:10 **that you also threatened to sue CIT on behalf of Mr.**
3120:11 **Lathen if they would not promptly and fully pay the**
3120:12 **redemptions; is that correct?**
3120:13 A I think so. As part of my conversations
3120:14 with -- whether it was BMO Harris or CIT, and as I
3120:15 described earlier, my explanation of their
3120:16 documents, our arrangements, our participant
3120:17 agreements and the governing law under 675, they had
3120:18 many in-depth conversations with those counsel.
3120:19 As part of those conversations, I may well
3120:20 have told CIT that we would sue to enforce our
3120:21 rights if necessary.
3120:22 At the end of those discussions, whether

3120:23 they decided that they were going to lose the
3120:24 litigation or they didn't want to litigate, I have
3120:25 no idea.
3121:1 But I know that they paid.

172. Barclay's Bank initially refused to but ultimately agreed to redeem the survivor's option CDs that Mr. Lathen presented for redemption after requesting to review his Participant Agreements. (SFOF¶97; Tr. 1676:4-16). Barclay's subsequently changed its survivor's option language to foreclose Mr. Lathen's investment strategy. (Tr. 1676:4-16).

Division Response: Denied, as the cited testimony and SFOF do not support this proposed Finding that Barclay's Bank requested to review, or did review, Lathen's Participant Agreements, or that Barclay's Bank changed its survivor's option language to foreclose Mr. Lathen's investment strategy, subsequently or otherwise.

1676:4 **Q And did some issuers object to the**
1676:5 **redemptions?**
1676:6 A There were some who did.
1676:7 **Q And who were those?**
1676:8 A Some that come to mind were Goldman Sachs,
1676:9 I believe it was -- an entity -- Goldman Sachs Bank.
1676:10 There was also a Goldman Sachs entity, which was not
1676:11 a bank, which issued notes instead of CDs.
1676:12 At some point Barclays Bank objected, and
1676:13 upon review, they changed their mind.
1676:14 We had -- I'm trying to think who else.
1676:15 Firm CIT raised some objections, but ultimately
1676:16 decided upon review to pay.

(See also SFOF¶97 ("Barclay's Bank initially refused to but ultimately agreed to redeem the survivor's option CDs that Mr. Lathen presented for redemption.").)

In addition, the survivor's option provisions in bond prospectuses are different from those in CD disclosure statements. Plain-vanilla CDs have a spare discussion of the survivor's option. (PFOF¶¶39;41;420;847; Div. Ex. 681 – p. 4.) For these reasons, CD testimony and exhibits are of limited relevance to this proceeding.

Finally, like CIT, Barclays Bank agreed to pay Lathen's redemptions, but did so only after Lathen and Galbraith threatened to sue it (PFOF¶¶253-55;1004-10) and without knowledge of either the IMA or PSA, leaving it ignorant of the truth of Lathen's purported "ownership." (PFOF¶¶412-13.)

173. BMO Harris redeemed Mr. Lathen's survivor's option CDs after receiving and reviewing the Participant Agreement and after having been apprised of Mr. Lathen's investment strategy. (Tr. 2915:7-2916:25).

Division Response: Denied, as the cited testimony does not support this proposed Finding that BMO Harris received and reviewed the Participant Agreement, nor that BMO Harris was apprised of Mr. Lathen's investment strategy.

Moreover, this proposed Finding is irrelevant in that the dispute with BMO Harris centered on CDs (PFOF¶412), which are not the subject of this proceeding. In addition, the survivor's option provisions in bond prospectuses are different from those in CD disclosure statements. Plain-vanilla CDs have a spare discussion of the survivor's option. (PFOF¶¶39;41;420;847; Div. Ex. 861 – p. 4.) For these reasons, CD testimony and exhibits are of limited relevance to this proceeding.

Further, like CIT and Barclays Bank, BMO Harris agreed to pay Lathen's redemptions, but did so only after Lathen and Galbraith threatened to sue it (PFOF¶¶253-55;1004-10) and without knowledge of either the IMA or PSA, leaving it ignorant of the truth of Lathen's purported "ownership." (PFOF¶¶412-13.) See also:

3113:14 **Q Okay. And I think on direct, Mr. Protass**
3113:15 **spoke with you about BMO Harris; is that correct?**
3113:16 A Yes.
3113:17 **Q And they were an issuer of CDs; is that**
3113:18 **correct?**
3113:19 A As I recall.
3113:20 **Q Okay. And you also threatened to sue BMO**
3113:21 **Harris?**
3113:22 A Probably.
3113:23 **Q In fact, you told them in October of 2016**
3113:24 **that you intended to file suit and file complaints**
3113:25 **with the Consumer Protection Bureau and the Office**
3114:1 **of the Comptroller of the Currency; isn't that**
3114:2 **correct?**
3114:3 A That doesn't sound right. October of
3114:4 2016, they had paid out long since.
3114:5 **Q Okay.**
3114:6 A I think as I describe earlier, we had an
3114:7 extensive back and forth. And I was able to
3114:8 persuade them that our view of the law was correct,
3114:9 so they decided to pay.
3114:10 **Q Okay. You're right.**
3114:11 **That was October of 2015 that you**
3114:12 **threatened to sue them; is that correct?**
3114:13 A That sounds more likely.
3114:14 **Q Okay. And that was, again, at the request**
3114:15 **of Mr. Lathen, isn't that right?**
3114:16 A All my discussions with all of the issuers
3114:17 were done at the instruction of Jay.

174. BMO informed Mr. Lathen's counsel, Kevin Galbraith, Esq., that it intended to change the language in its offering documents for survivor's option CDs to include an additional provision or qualifier requiring that any individual seeking to exercise the survivor's option either be a blood relation of or have resided under the same roof as the deceased beneficial owner of such bond. (Tr. 2915:7-25).

Division Response: Admitted that Galbraith so testified. (But see DRRPFOF¶173, supra, regarding the limited relevance of testimony and exhibits related to CDs.)

175. Wells Fargo and Bank of America honored requests for the redemption of survivor's option bonds after learning about the existence of the Participant agreement and the financing agreement between Eden Arc Capital Partners, LP and the account holders (Lathen and the Participant). (Tr. 3669:11-13; Div. Ex. 417).

Division Response: Denied, as the cited testimony and Exhibits do not support this proposed Finding.

> 3669:11 tell us this is what he was talking about with respect to
> 3669:12 a new ruling or not. I assume that's where you're going
> 3669:13 with this.

The cited Exhibit is a redemption letter concerning instruments at BOKF NA.

Further, there is no evidence of payments by Wells Fargo or Bank of America on Lathen's redemption requests pursuant to the form of redemption letter exemplified by Div. Ex. 417. And as Begelman testified, the language Lathen added gave the recipient no information about the terms of any of the agreements referenced in it. (PFOF¶415.)

176. Beginning in December 2015, Mr. Lathen began disclosing in his redemption request letters that he had entered into a separate written agreement with the participant relating to the joint account and that the Fund had provided the financing for the Accounts. (Tr. 3407:2-20).

Division Response: Admitted. However, that additional "disclosure" gave the issuer no information about the terms of those agreements, nor their impact on Lathen's or the Participant's beneficial interest in the account or on the validity of the joint tenancies. (PFOF¶415.)

177. At least 30 issuers honored Mr. Lathen's redemption requests following the enhanced disclosures put in place in December 2015. (Tr. 3407: 21 – 24).

Division Response: Denied, as the cited testimony does not support this proposed Finding. There is no evidence that any issuer paid after receiving Lathen's December 2015 redemption requests. See:

> 3407:21 **Roughly how many issuers received that**
> 3407:22 **document?**
> 3407:23 A It was more than -- I think it was between
> 3407:24 30 and 35 issuers, in that range.

178. JPMorgan Clearing Corporation submitted millions of dollars of redemption requests to issuers after attorneys in its Compliance Department received the participant agreements signed by the two joint account holders, the private placement memorandum for Mr. Lathen's fund, and the investment management agreement. In submitting those requests, they did not provide the issuers with the additional documents that Mr. Lathen had provided. (Lathen Ex. 2044; Tr. 321:10-25).

Division Response: Denied, as the cited testimony and Exhibit do not support the portion of this proposed Finding that JPMCC submitted millions of dollars of redemption requests to issuers. The cited Exhibit is a request from JPMCC's AML Department requesting various documents and information from Lathen, and Lathen's response to JPMCC. See:

> 321:10 **Were you asked that question, and did you**
> 321:11 **give that answer?**
> 321:12 A If I may -- if I may clarify. JPMC was the
> 321:13 clearing firm. Securevest was my broker. When -- in
> 321:14 or around February of 2012, JPMC asked Securevest
> 321:15 questions about my business and asked me to provide
> 321:16 additional information.
> 321:17 I provided that information to Securevest.
> 321:18 Included in that was a copy of the participant
> 321:19 agreement. So I didn't technically provide it to JPM,
> 321:20 but I provided it to Securevest who was asking the
> 321:21 question that JPM asked.
> 321:22 So what we now know is that JPM -- as a
> 321:23 result of this investigation, we've seen JPM's files,
> 321:24 and we know, in fact, that Securevest did pass along
> 321:25 the participant agreement to them.

179. Bank of New York, the trustee for the bulk of the bonds redeemed by Mr. Lathen, and the determination agent for GM and Bank of America, continued to receive and honor redemption requests from Mr. Lathen after the SEC notified them of its investigation and subpoenaed it for records related to his actions. (Lathen Exs. 2077; 2070, 2070-a).

Division Response: Denied, as the cited Exhibits do not support the portion of this proposed Finding that Bank of New York continued to receive and honor redemption requests from Mr. Lathen after the SEC notified it of its investigation and subpoenaed it for records related to its actions, nor do they support the Finding that Bank of New York acted as trustee for the "bulk of the bonds redeemed by Lathen, or that it acted as "determination agent for GM and Bank of America." Lathen Exhibit 2077, a letter from Bank of New York to the Division, is dated January 30, 2015. Lathen Exhibit 2070 does not show any redemptions for GM and Bank of America subsequent to January 30, 2015. Moreover, Lathen Ex. 2070-a was not admitted into evidence, and therefore cannot serve as the basis of a proposed Finding. See:

> 3760:7 MR. HUGEL: And with respect to the
> 3760:8 spreadsheet, we offer in evidence the marked up version
> 3760:9 which we could call 2070A.
> 3760:10 JUDGE PATIL: Denied. You're welcome to make
> 3760:11 those arguments in your brief. But it's not what I would
> 3760:12 consider evidence.

180. Several bond issuers changed the language in their governing documents by adding additional requirements that would foreclose Mr. Lathen's investment strategy. Mr. Lathen believed this to be an acknowledgment by issuers that their pre-existing governing documents did not foreclose his strategy. (Tr. 564:1-23).

> Q. Mr. Lathen, you knew back as early as 2012 that your strategy had a limited shelf life; is that correct?
> A. I think it's fair to say I assumed at some point investors would begin to change the language in their prospectus, which is indeed what has happened in several instances. I think investors realized that they were contractually obligated to pay under the language that they had in place, and they were looking to close that loophole with different language.
> Q. And you've been saying investors, but you mean issuers; is that correct?
> A. Did I say investors? . . . Okay. I meant -- I meant -- that maybe was why my counsel was standing up. I meant issuers. Issuers would obviously change their governing documentation around the survivor's option provision. And, in fact, they have done so.
> Q. Goldman Sachs did that; is that right?
> A. Yes, Goldman. Barclays, Citi.

Division Response: Denied, as the cited testimony does not support this proposed Finding in light of contradictory testimony and Exhibits. With respect to Lathen's testimony regarding CIT, it is contradicted by the documentary evidence. (See Div. Exs. 501, 930, 931; PFOF¶412 (referring to Lathen's dispute with CIT Bank over CDs).) With respect to Goldman Sachs, Lathen's testimony is similarly contradicted by the testimony of Begelman from Goldman Sachs. Begelman testified that Goldman Sachs amended the language in its CD Disclosure Statement, not its bond prospectuses, to make the language more clear, and testified that the CD amendment did not change the import of the survivor's option terms. (PFOF¶¶139-140.) The reference to

"Citi" appears to be a transcript error. It was CIT Bank that changed the language in its CD disclosure statements. (See, DRRPFOF¶171, supra.)

181. In response to what it learned about Mr. 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."
(SFOF¶98; Tr. 1245:4-1248:20; Lathen Ex. 1937, p. 19).

Division Response: Admitted.

182. Specifically, As a result of its dispute with Mr. Lathen, Goldman Sachs Bank USA changed the language in its offering documents for survivor's option CDs to require a specific familial or legal relationship between joint account owners in order to exercise the survivor's option. (Tr. 1921:24-1925:22; Lathen Ex. 2016, p. 11.). Specifically, the language reads as follow:

"A joint owner of a joint account with a beneficial owner who has died or been adjudicated incompetent will be entitled to redeem a CD, only if such joint owner was a member of the same household with the deceased or incompetent beneficial owner at the time of such beneficial owner's death or declaration of legal incompetency, or if such joint owner is related to the deceased or incompetent beneficial owner, including by blood, marriage or adoption. Any other joint accountholder shall have no right to the estate feature. A joint owner so entitled to redeem a CD shall hold all of the rights to take actions with respect to such CD that are granted to an authorized representative under the disclosure statement with respect to the estate feature."

Division Response: Denied, as there is no evidence as to causality (i.e., "As a result of its dispute with Mr. Lathen"). The Division admits that at a time after it received Lathen's redemptions, Goldman Sachs Bank USA changed its language for its CDs, but not its survivor's option bonds, the subject of this action. (See PFOF¶140.)

183. Roger Begelman, Co-Chief Compliance Officer for Goldman Sachs Bank, USA, testified that after their dealings with Mr. Lathen took place, Goldman was "amending the language in the survivor's option to make it clearer." (Tr. 816:2-8; 1921:24-1922:18). However, Mr. Begelman agreed that making the language "clearer" actually involved specifying new requirements that were not explicitly contained in the old language:

Roger Begelman, Goldman Sachs, Tr. 1925:6-21

Q. These weren't clarifying some prior requirement that hinted at these; this was just new requirements that were put in that someone had to comply with to be able to exercise the survivor's option?
A. I could take issue with that statement, but I understand what you're saying. I mean, I don't -- I don't think these are necessarily new. We were attempting to amend the language so that the notion of a joint tenancy with right of survivorship was as possibly clear as we could make it.
Q. This is far beyond requiring a joint tenancy. It says you have to be living in the same household or be related?
A. That is a fair comment. I would agree with that.

Division Response: Admitted to the extent that Begelman was testifying to the CD disclosure statement, (PFOF¶139), which is of limited relevance in this proceeding. (See, DRRPFOF¶173, supra.)

184. Attorneys at Springleaf Financial Services, an issuer of survivor's option bonds, stated that although the (Staples) survivor's option investment strategy ("Estate Assistance Program") was not contemplated by Springleaf, they would have redeemed the bonds notwithstanding the existence of side agreements because the strategy was based on a "legal loophole in the terms of the bond offering materials that was permissible under the terms of the bonds." (Lathen Ex. 1966).

Division Response: This proposed Finding should be stricken as improper and contrary to the Court's ruling. The cited exhibit was admitted but "not to prove the truth of the assertions in their documents." (Tr. at 3703:22-23; Division's Letter to Judge Patil, March 2, 2017 ("[T]he documents were part of the investigative file, they were provided to Respondents in August 2016 . . .therefore, their impact on Respondents' mental state is irrelevant. . . Respondents' arguments [] about those Exhibits related to the materiality of Respondents' false statements [] necessarily requires the statements in the Exhibits to be true, [so] we request that the Court disregard those arguments.") Respondents could have, but did not, call any Issuer witness to testify. To the extent that the Court is inclined to consider this proposed Finding, it should consider the totality of the information. The Court also admitted Division Exhibit 2072 with the same restriction, which states, in pertinent part:

1. The "Survivor's Option" affords the survivor(s) of a deceased owner of the beneficial interest in each Note the option to request principal repayment prior to the scheduled maturity. With respect to each issuance of the Notes, the option was not exercisable until 12 months after issuance. See Exhibit B for a description of the procedures for exercising the "Survivor's Option."

10. With respect to potential harm to the Company, the Company has limited liquidity to fund its operations and debt obligations, including the redemption of the Notes each year with respect to the exercise of the "Survivor's Option." Any undue increase in the Company's debt payment requirements diverts limited available funds from the Company's operations and financing activities.

    With respect to the harm to legitimate holders, if, in any year, the principal amount of Notes that are tendered for redemption pursuant to the exercise of the "Survivor's Option" exceeds the cash available for redemption due to a Company imposed annual put limitation, legitimate holders of the Notes who exercise their "Survivor's Option" after the annual put limitation has been imposed and filled in any year will not receive payment on their Notes in the year originally tendered, but will be deemed to have tendered their Notes in the following year in the order in which such Notes were originally tendered, subject to any annual put limitation that may be imposed in such subsequent year."

11. I have no recollection of being notified during the process of redeeming Notes pursuant to the "Survivor's Option" that certain Notes were purchased jointly with terminally ill individuals who signed separate contracts relinquishing legal ownership in the Notes.

12. It is my understanding that the "Survivor's Option can be exercised only when the deceased held a beneficial interest in the Notes. Therefore, the Company may, in its sole discretion, elect to reject any exercise of the "Survivor's Option" if the tendered Notes were held by a deceased who was not the beneficial owner of the Notes.

185. With respect to the Staples case, which also involved a survivor's option investment strategy, an in-house attorney for Ally Financial told Division staff that even with full disclosure regarding side agreements with the terminally ill individuals, Ally Financial still would have redeemed the bonds in light of the potential cost and litigation risk of not redeeming them. (Lathen Ex. 1966).

Division Response: This proposed Finding should be stricken as improper and contrary to the Court's ruling. The cited exhibit was admitted but "not to prove the truth of the assertions in their documents." (Tr. at 3703:22-23; Division's Letter to Judge Patil, March 2, 2017 ("[T]he documents were part of the investigative file, they were provided to Respondents in August 2016 . . .therefore, their impact on Respondents' mental state is irrelevant. . . Respondents' arguments [] about those Exhibits related to the materiality of Respondents' false statements [] necessarily requires the statements in the Exhibits to be true, [so] we request that the Court disregard those arguments.") Moreover, Respondents could have, but did not, call any issuer witness to testify. To the extent that the Court is inclined to consider this proposed Finding, it should consider the totality of the information. The Court also admitted Division Exhibit 2073 with the same restriction, which states, in pertinent part:

4. **Brief history of AFI's issuance of "SmartNotes", including a description of what they are, and the primary date ranges they were issued.**

The original SmartNotes program, which AFI established in 1996, permitted the issuance of unsecured debt securities with maturities ranging from 9 months to 30 years. The specific terms related to each note (e.g., term, interest rate, redemption provisions, availability of a survivor's option, etc.) would be determined at the time of issuance. While notes issued under the SmartNotes program were registered with the U.S. Securities and Exchange Commission ("SEC") and could therefore be sold to investors without restriction, the program was primarily focused on retail investors. AFI discontinued the original SmartNotes program in July 2007. In August 2012, AFI launched a retail note program that is similar to the original SmartNotes program.

5. **General discussion of the "survivor's option," including the general intention of this option and how it is legitimately exercised.**

A "survivor's option" permits the holder of a note with this feature to require AFI to repay the full principal amount (par) of the note upon the death of the beneficial owner of such

Div. Ex.

note. The intent of this feature was to provide flexibility to persons managing estate assets in the event of the death of the beneficial holder of a note by providing heirs the opportunity to require the issuer to redeem the notes at par.

A third party (the "Administrator") processes investor requests to exercise survivor's options. Generally, assuming a beneficial owner met any applicable holding periods, a representative of the beneficial owner's estate must produce certain items to exercise the survivor's option. The primary items include proof of death of the beneficial owner, evidence proving the deceased was the beneficial owner of the note, instructions from the beneficiary or estate representative requesting exercise of the survivor's option, evidence that the person providing the instructions is permitted to act on behalf of the estate, and evidence that the estate currently holds the applicable notes. The Administrator processes all requests, and would contact AFI only if interpretive questions arise with respect to the required deliverables. If in the Administrator's judgment all required items have been delivered, the request would be processed without any involvement of or action by AFI.

12. Potential or actual harm caused if persons open a joint brokerage account with terminally ill individuals, purchase discounted SmartNotes, and then exercise the applicable survivor's option shortly thereafter.

The harm to AFI is the negative liquidity impact resulting from having to redeem an amount of SmartNotes in excess of what would have normally been anticipated or projected. Further, elevated administrative fees would be incurred as a result of the excessive redemptions.

In addition, other holders of SmartNotes that wish to exercise a survivor's option could be harmed in the event they were precluded from exercising a survivor's option as a result of the Annual Limit being exceeded and enforced by AFI.

13. Terminally ill purchasers of SmartNotes.

To my knowledge, during the 2009-2011 time period, no individual at AFI was aware that terminally ill individuals that purchased SmartNotes jointly with third parties relinquished their legal ownership rights in the purchased SmartNotes by separate contract, or otherwise.

14. AFI's redemption process.

A "survivor's option" permits the holder of a note with this feature to require AFI to repay the full principal amount (par) of the note upon the death of the beneficial owner of such note. Generally, the death of a person who, during his or her lifetime, was entitled to substantially all of the beneficial rights and interests of ownership of a note, would be deemed the death of the beneficial owner for purposes of a survivor's option, if such beneficial interest can be established.

If AFI had knowledge of a contractual relationship whereby the deceased person had, prior to his or her death, contractually relinquished all beneficial rights and interests of ownership in a note, AFI may have taken the position that the party seeking to exercise the survivor's option was not the beneficial owner of the note for such purposes and the exercise of the applicable survivor's option was not valid.

186. International Lease Finance Corporation ("ILFC")'s position was that survivor's option investment strategies like Mr. Lathen's could either result in a gain or immaterial harm based on the time-value of money. (Lathen Ex. 1971).

Division Response: This proposed Finding should be stricken as improper and contrary to the Court's ruling. The cited exhibit was admitted but "not to prove the truth of the assertions in their documents." (Tr. at 3703:22-23; Division's Letter to Judge Patil, March 2, 2017 ("[T]he documents were part of the investigative file, they were provided to Respondents in August 2016 . . .therefore, their impact on Respondents' mental state is irrelevant. . . Respondents' arguments [] about those Exhibits related to the materiality of Respondents' false statements [] necessarily requires the statements in the Exhibits to be true, [so] we request that the Court disregard those arguments.") Moreover, Respondents could have, but did not, call any Issuer witness to testify. To the extent that the Court is inclined to consider this proposed Finding, it should consider the totality of the exhibit which says nothing about a "gain." See:

9. If a person were to open a joint brokerage account with a terminally ill individual, buy an ILFC note containing a Survivor's Option at a discount to par, and exercise the Survivor's Option upon the death of the terminally ill individual shortly afterwards, ILFC could suffer actual but probably immaterial harm. For example, if ILFC had intended to purchase the note in the open market, the price at which ILFC could have purchased the note in the open market would be lower than the price at which ILFC would actually repay the note in connection with the exercise of the Survivor's Option. In that case, the harm to ILFC would be the difference between the discounted market price and par. If ILFC had not intended to purchase the note in the open market, ILFC would repay at par the note tendered pursuant to the Survivor's Option sooner than ILFC would have repaid the note at the originally scheduled maturity date. In that case, the harm to ILFC

would be the time value of money, based on ILFC's then-current cost of funds, for the period between the early repayment date and the originally scheduled maturity date. In either of these cases, in light of the volume and size of ILFC's financing activities, the harm to ILFC would likely be immaterial.
(Lathen Ex. 1971 – pp. Lathen15316-17.)

187. Bank of New York told the SEC in connection with the Staples proceeding that the beneficial owner of the bond is evidenced by the titled owners of the brokerage account. (Lathen Exhibit 1972):

"The notes are issued in book-entry form, each a global note, and are held through the Depositary Trust Company, DTC, as depositary. Purchases of the notes under the DTC system must be made by or through DTC participants, such as broker-dealers or clearing firms, which receive a credit for the notes on DTC's electronic recordkeeping system. The beneficial interest of each actual purchaser of each note is recorded on the participants' records."

Division Response: This proposed Finding should be stricken as improper and contrary to the Court's ruling. The cited exhibit was admitted but "not to prove the truth of the assertions in their documents." (Tr. at 3703:22-23; Division's Letter to Judge Patil, March 2, 2017.) ("[T]he documents were part of the investigative file, they were provided to Respondents in August 2016 . . .therefore, their impact on Respondents' mental state is irrelevant. . . Respondents' arguments [] about those Exhibits related to the materiality of Respondents' false statements [] necessarily requires the statements in the Exhibits to be true, [so] we request that the Court disregard those arguments.") Moreover, Respondents could have, but did not, call any Trustee witness to testify. In any event, to the extent the Court is inclined to consider this Proposed Finding, the cited Exhibit does not support the Finding that "the beneficial owner of the bond is evidenced by the titled owners of the brokerage account."

188. The issuers who testified for the Division at trial are not representative of issuers generally with whom Mr. Lathen dealt. They accounted for a mere $76,000 in profits, less than 5% of the profits made by Eden Arc Capital Management from bond redemptions, and less than one percent of the total profits made by the fund. (LE 2070, 2070-a).

Division Response: Admitted that Lathen was able to successfully defraud many issuers and that he reaped substantial profits from them as a result of his scheme, but the calculations cited above are not supported by the Exhibits cited. To the extent that the issuers who testified at trial were able to ferret out Respondents' scheme, and so curtailed the profits Respondents were able to siphon from them, it was not for lack of trying on the part of Respondents. (See, e.g., Tr. 1189:6-10 (Robustelli of GECC testifying about Div. Ex. 553: "There might have been some [redemptions] that passed through before we knew about this arrangement – these arrangements.").) Respondents could have, but did not, call any Issuer witness to testify. In

addition, to the extent this proposed Finding relies on Lathen Exhibit 2070-a, that Exhibit is not in evidence, and cannot support a proposed Finding. See:

> 3760:7 MR. HUGEL: And with respect to the
> 3760:8 spreadsheet, we offer in evidence the marked up version
> 3760:9 which we could call 2070A.
> 3760:10 JUDGE PATIL: Denied. You're welcome to make
> 3760:11 those arguments in your brief. But it's not what I would
> 3760:12 consider evidence.

189. Each of the five largest bond issuers –American General Finance, Bank of America, CIT, General Motors, and MBIA – individually accounted for more of Mr. Lathen's profits than the Division's issuer witnesses, combined. (LE 2070, 2070-a).

Division Response: Admitted that Lathen was able to successfully defraud the listed issuers and that he reaped substantial profits from them as a result of his scheme. To the extent that the issuers who testified at trial were able to ferret out Respondents' scheme, and so curtailed the profits Respondents were able to siphon from them, it was not for lack of trying on the part of Respondents. (See, e.g., Tr. 1189:6-10 (Robustelli of GECC testifying about Div. Ex. 553: "There might have been some [redemptions] that passed through before we knew about this arrangement – these arrangements.").) Respondents could have, but did not, call any Issuer witness to testify. In addition, to the extent this proposed Finding relies on Lathen Exhibit 2070-a, that Exhibit is not in evidence, and cannot support a proposed Finding. See:

> 3760:7 MR. HUGEL: And with respect to the
> 3760:8 spreadsheet, we offer in evidence the marked up version
> 3760:9 which we could call 2070A.
> 3760:10 JUDGE PATIL: Denied. You're welcome to make
> 3760:11 those arguments in your brief. But it's not what I would
> 3760:12 consider evidence.

190. U.S. Bank is the validity determination agent for Prospect Capital. (Tr. 960:5-17)

Ian Bell, Operations Manager, U.S. Bank, Tr. 960:5-17|
Q. Prospect is the determining agent for -- I'm sorry, U.S. Bank is the determining agent for Prospect bonds, correct?
A. Correct.
Q. Okay. And that means that U.S. Bank's role is to evaluate the redemption requests that are submitted for Prospect bonds and determine whether Prospect is supposed to pay them or is not supposed to pay them, correct?
A. Correct.
Q. And Prospect is bound by the determinations that U.S. Bank makes, correct?
A. Correct.

Division Response: Admitted that Bell testified that US Bank is the determining agent for Prospect bonds. But there was no testimony that US Bank is the "validity determination agent." That phrase was created by Lathen, and is not a term used in the governing documents of survivor's option instruments. See:

3641:23 **Q Mr. Lathen, where does the term "validity**
3641:24 **determination agent" come from?**
3641:25 A It comes from the -- I don't know if the term
3642:1 is exactly used in the prospectus. But that's a term
3642:2 that's used in the industry overall.
3642:3 **Q But it doesn't say that term in any of the**
3642:4 **prospectuses; is that right?**
3642:5 A It says any -- usually, the term that you see
3642:6 in the prospectus language is all questions regarding the
3642:7 eligibility for exercise or the validity of claims
3642:8 associated with an exercise, shall be determined by Party
3642:9 X in their sole discretion. So that's -- most
3642:10 prospectuses have that language. And then that tells you
3642:11 who is the validity determination agent for that
3642:12 instrument.

3642:18 **Q But it's not in any of the first bond**
3642:19 **prospectuses; is that right?**
3642:20 A I don't know if the term "validity
3642:21 determination agent" is used in the bond prospectus.

191. Mr. Lathen's counsel, Kevin Galbraith, advised him that U.S. Bank was shirking its responsibility, as the determination agent, for making a decision with respect to Prospect Bonds. (Tr. 2900:20-2901:13; 2905:1-6; 2906:9-15).

Division Response: Admitted. (But see DRRPFOF¶133 for all the reasons that Galbraith's conclusions and testimony are unreliable and Lathen's reliance on his advice unreasonable.)

192. The testimony at trial made it abundantly clear that U.S. Bank employees who deal with this aspect of the business neither made a determination as to the validity of Mr. Lathen's redemption request nor had any idea why it was denied. *See infra.*

Ian Bell, Operations Manager, U.S. Bank, Tr. 975:10-22
Q. Were you involved at all in the decision-making process at U.S. Bank concerning whether or not to approve Mr. Lathen's redemption request?
A. I was not.
Q. So you don't know the reason that U.S. Bank approved or did not approve of the redemption request Mr. Lathen submitted, correct?

A. We escalated to our relationship manager.
Q. Okay. But do you know whether they did approve or did not approve the redemption request?
A. I wouldn't be able to speak to specific ones, no.

Beverly Freeney, Relationship Manager, U.S. Bank, Tr. 1069:15- 1070:19
Q. Okay. Now, it is fair to say that you're familiar with survivor option notes?
A. Yes.
Q. With respect to early withdrawals pursuant to the survivor option, what role do you have personally have in any of the redemption process?
A. I don't have really any role with regards to the survivor options.
Q. Okay. And which area of the bank, if any, is responsible for that function?
A. That would be my operations department.
Q. Does Ian Bell work for the operations department?
A. That is correct.
Q. Thank you. And just generally, what, if you know, does the operations department do with respect to redemptions of survivor options notes?
A. That's not my expertise, so I wouldn't really know exactly what he does.
Q. Okay. Can you tell me, as far as you know, who makes the decision to pay any particular redemption on a survivor's option –
MR. HUGEL: Objection, Your Honor. She says she has no expertise in this area.
BY MS. BROWN: Q Well, do you know?
JUDGE PATIL: Overruled. Only if you know.
A. Yes. It's really up to the issuer to --

Tom Tabor, VP, Corporate Trust Department, U.S. Bank, Tr. 1101:14-18
Q. And are there eligibility requirements for exercising survivor option notes for clients you're familiar with?
A. I know that there are normally requirements, but I wouldn't know specifics.

Division Response: Denied. The Division offered substantial evidence that US Bank employees, in consultation with their in-house and outside counsel, made a determination (after lengthy interactions with Lathen and his counsel, Galbraith) that Lathen's redemption requests were ineligible, a conclusion that was confirmed by their clients, as evidenced by the testimony from Federal Farm Credit's Finnegan, whom US Bank had alerted to the issue. (PFOF¶¶224;227;228;230;238;240;241;243;245;172;173;178-80.) Indeed, a processor working for US Bank's Bell appears to have been the person responsible for identifying Lathen's scheme. See, e.g., PFOF¶215 and:

952:4 **Q And what time frame are we talking about?**
952:5 A Mid to late 2013, early 2014.
952:6 **Q And how did this come to your attention?**
952:7 A A processor that reported to me had
952:8 presented an issue that she had thought needed to be
952:9 escalated specific to Mr. Lathen's elections.

952:10 The dollar amounts were extremely high for
952:11 the product, as well as he had come under several
952:12 deceased holders that had seemingly no relationship
952:13 to one another.
952:14 **Q And who was that processor?**
952:15 A Stephanie Lanier.

193. The SEC itself use the term "beneficial owner" on its website when distinguishing between the street owner of a security and the owner as recorded on a brokers records. *See* https://www.sec.gov/investor/pubs/holdsec.htm. (judicial notice).

Division Response: Denied, as the cited website does not support this proposed Finding. The cited page of the SEC's website states that even if your security is held in street name, your status as beneficial owner, if true, is unaffected.

Street Name Registration

You may have your security registered in street name and held in your account at your broker-dealer. Many brokerage firms will automatically put your securities into street name unless you give them specific instructions to the contrary. Under street name registration, your firm will keep records showing you as the real or "beneficial" owner, but you will not be listed directly on the issuer's books. Instead, your brokerage firm (or some other nominee) will appear as the owner on the issuer's books.

194. Nor were operations people who processed the redemption requests looking for any information about side agreements or indicia of ownership rights. Instead, account statements were being used to identify the "beneficial owner" of the instrument, as demonstrated by title on the account and sometimes a set period where the individual held the instrument in their account.

Ian Bell, U.S. Bank, Tr. 978:14-25
Q. Is it fair to say that U.S. Bank does not -- in processing a redemption request, is it fair to say that U.S. Bank does not ask about the source of the money that a holder used to purchase the survivor's option bond that is being sought to be redeemed?
A. My team does not typically, no.
Q. Is it also fair to say that U.S. Bank, in processing a redemption request, again, does not inquire as to what the money will be used for if the bond is redeemed?
A. We do not.

Ian Bell, U.S. Bank (Tr. 980:1-981:6)
Q Mr. Bell, you testified a few moments ago concerning the documents that are submitted in connection with a redemption request, and that included the death

certificate, an account statement, current statement, account statement from six months ago, to the extent there's a six-month holding period. Do you recall that testimony?
A. Yes.
Q. Yes. And those documents are submitted by brokerage firms, yes?
A. Correct.
Q. They are not submitted by the actual holder of the bond?
A. Correct.
...
Q. . . . What is the purpose for which account statements are submitted in connection with a redemption request?
A. Validation that the beneficiary or the deceased had held the position for long enough.
Q. Okay. So that means that you used the account statements to determine who the beneficiary is and how long they held the bond that is being sought to be redeemed, yes?
A. Correct.

Ian Bell, U.S. Bank (Tr. 981:25-982:3)
Q. You used the account statement that is submitted to determine who the beneficial owner of the bond is, correct?
A. Correct.

Division Response: Admitted that operations people who processed the redemption requests were not looking for any information about side agreements or indicia of ownership rights because they did not expect there to be any. When the side agreements, which impacted beneficial ownership, were exposed, many issuers refused to redeem. (See generally, PFOF¶¶126-247.) Also, admitted that account statements identify the account holders on the accounts, but denied that account statements evidence the beneficial owners of the accounts.

195. Throughout the time that Mr. Lathen was having disputes with issuers, he was being assured by his legal counsel that his legal position was correct.

Kevin Galbraith, Esq., (Tr. 3125:17-3126:2)
Q. Were you persuaded by any of those [issuer] letters that you received that they were right and that you were wrong?
A. Absolutely not. . . I meant to say in response to your earlier question about this prospectus, this is an example of the type of revision that was made by issuers like CIT, BMO Harris. Clearly here GE. This is the type of change that an issuer makes when they realize that their offering documents permit Mr. Lathen's strategy. They realize it. Then they issue – they dispute it with him and take the positions they take. And then they issue new offering documents that actually prevent his strategy.

Robert Flanders, Esq.
Now, did you agree with the analysis by Goldman's attorney that's reflected here?

A. No.
Q. Why not?
A. Because I did not think that the investment strategy had any bearing on whether the account was a genuine joint account. The fact that it may have been unlikely that the joint accountholder might benefit beyond the $10,000 that the joint accountholder had received to be a participant did not seem to me to be a factor that would nullify the joint account relationship. Particularly in the sense in the unlikely event that the joint accountholder survived Mr. Lathen, Mr. Lathen got hit by a bus or a car and he died, the joint accountholder, in my understanding, was entitled under the arrangement to all of the benefits that Mr. Lathen and/or his company would obtain.

And so -- and I also was of the view that there was no requirement of parity between the benefits of the -- that one of the joint accountholder would have with another. My understanding was that it would be typical in these situations for joint accountholders to have an agreement among themselves as to what the purpose of the joint account was, what -- who would make -- what use of it, under what circumstances, and perhaps even agree to restrictions as to access to the account.

But none of that, in my view, was relevant or material to whether it was a true joint account. Particularly, you have to distinguish in my view between the relationship of the institution holding the account and third parties. Here, either one of them, as far as the -- as Goldman was concerned, were -- you know, had whatever rights they had to the joint account, it was presumptively valid.

And the fact that they had made certain agreements among themselves as to access to the account or use of the funds or the investment program, all of that seemed to me to be immaterial to whether it was, in fact, a joint account. Because Goldman was -- didn't require that as part of whatever they asked for when the redemption request was made –

And, obviously, they could have. And my understanding is that later they, in fact, have amended their offering documents to put a relationship requirement.

So I just -- I just flat-out disagreed with his argument that the investment program here was determinative of whether this was a true joint account. And that was the reason why I disagreed with him.
Q. And did you ever relate your opinion on this matter to Mr. Lathen?
A. Yes.

Division Response: This proposed Finding is argument and should be stricken pursuant to the Court's order. To the extent the Court is inclined to consider it, see DRRPFOF¶¶63, 67, 69 and 70 for all the reasons that Flanders' conclusions are unreliable and Lathen's reliance on his advice unreasonable and DRRPFOF¶133 for all the reasons that Galbraith's conclusions and testimony are unreliable and Lathen's reliance on his advice unreasonable.

196. All of the survivor's option bonds or CDs that Mr. Lathen redeemed were so-called "book-entry" instruments. (Tr. 1227:7-15, 1581:14-16, 1635:9-20, 1887:19-22, 3393:8-21).

Division Response: Admitted that the GECC, Prospect, Federal Farm Credit (a.k.a. Funding Corp.), Bank of America and International Lease Finance Corporation bonds that Respondents redeemed were book-entry instruments. The citation at 1635:9-20 does not support the Finding that Duke Energy's survivor's option instruments were "book-entry." The citation at 3393:8-21 refers to Lathen Ex. 1972, which in turn refers to the book entry status of certain Bank of America and International Lease Finance Corporation notes. There is no evidence regarding whether any other redemptions made by Lathen were of "book-entry" instruments.

197. Indentures governing the bonds clearly stated that account registration at the brokerage firm (e.g. title owners at the brokerage firm) were proof of ownership for all purposes under the Indenture. (See RPFOF¶¶196-201.)

Division Response: This proposed Finding is argument and should be stricken pursuant to the Court's order. To the extent the Court is inclined to consider it, it is contradicted by the consistent issuer testimony and evidence that the "beneficial owner" was not synonymous with the titled owner on the account. (PFOF¶¶106;109;111-12, see also PFOF¶¶86-108). In fact, the issuers would have had no need for a representation by Lathen (or anyone else) if they simply needed evidence of who the account holder was; if the account holder is perforce the beneficial owner, the account statements would have provided the necessary evidence. Respondents concede that all issuers required Respondents' redemption letter. Respondents do not offer any explanation for Lathen's contemporaneous acknowledgment that the deceased had to have a beneficial interest in the accounts to be eligible under the survivor's option. (PFOF¶¶420;847;878-79;909;930.) See also, e.g., PFOF¶106(d):

> **CFC:** The survivor's option is a provision in a note pursuant to which we agree to repay that note, if requested by the authorized representative of the ***beneficial owner*** of that note, following the death of the ***beneficial owner*** of the note, so long as the note was owned by that ***beneficial owner*** or the estate of that beneficial owner at least six months prior to the request. (Div. Ex. 928 – p. 21.)
>
> **CFC (cont'd):** For purposes of the Survivor's Option, a person shall be deemed to have had a '***beneficial ownership interest***' in this Note if such person or such person's estate had the right, immediately prior to such person's death, to receive the proceeds from the disposition of this Note, as well as the right to receive payment of the principal of this Note. (See Div. Ex. 972 – Exhibit 4.5, p. 176.)
>
> 1320:15 **Q So is this NRU's definition of beneficial**
> 1320:16 **ownership interest in connection with the CFC**
> 1320:17 **InterNotes?**

1320:18 A Yes.

See also (Robustelli):
1240:25 **Q -- DTC is, therefore, the only entity that**
1241:1 **has the right to redeem the notes?**
1241:2 A Our contracts provide for the beneficial
1241:3 owners to be able to redeem the notes with the
1241:4 survivor's option. I'm not quite sure I
1241:5 understand --

1254:8 **Q Mr. Hugel just asked you some questions**
1254:9 **about the beneficial interest in a portion of the**
1254:10 **process that you and I did not go over in direct,**
1254:11 **and I'm going direct your attention to it again.**
1254:12 **We're on page 20 of Division Exhibit 545,**
1254:13 **which you will find at tab 2 of your binder.**
1254:14 A Okay.
1254:15 **Q And that's the material that he read to**
1254:16 **you from -- is under a title called "registration**
1254:17 **and settlement"; is that right?**
1254:18 A Yes.
1254:19 **Q And the material that appears there under**
1254:20 **all relates to, as the title suggests, "registration**
1254:21 **and settlement"?**
1254:22 A Correct.
1254:23 **Q Now, in your experience, can a broker die?**
1254:24 A Excuse me?
1254:25 **Q Can a broker die --**
1255:1 A Yes.
1255:2 **Q -- a broker-dealer?**
1255:3 A Can a broker-dealer die?
1255:4 **Q Uh-huh.**
1255:5 A No.
1255:6 **Q So if we turn to the survivor's option**
1255:7 **section, which begins two pages before that on page**
1255:8 **18, and under the first paragraph where it describes**
1255:9 **the survivor option -- the survivor's option, is the**
1255:10 **beneficial owner referred to there the**
1255:11 **broker-dealer?**
1255:12 A No.
1255:13 **Q So what is the relationship between the**
1255:14 **term "beneficial interest" and "beneficial owner"**
1255:15 **under registration and settlement and the term**
1255:16 **"beneficial owner" under the survivor's option**
1255:17 **section of the prospectus supplement?**

1255:18 A I mean, this section relating to DTC
1255:19 really relates to the mechanical method by which
1255:20 interests can be transferred.
1255:21 I don't think anyone would suggest --
1255:22 although, DTC is the -- is the legal owner of the
1255:23 notes strictly for the ease of transferring book
1255:24 entry securities.
1255:25 There's no substantive -- I don't think
1256:1 anyone suggests that DTC has an ownership --
1256:2 beneficial ownership interest itself in the notes.
1256:3 **Q So can you describe what the difference**
1256:4 **between the use of beneficial interest under**
1256:5 **registration and settlement is, if any, and the use**
1256:6 **of that term under survivor's option?**
1256:7 A Well, I'm not sure -- when you look at the
1256:8 DTC section, all it says in the second paragraph, it
1256:9 says "Beneficial interests in a global note will be
1256:10 shown on and transfers are effected through records
1256:11 maintained by DTC or its participants.
1256:12 "In order to own a beneficial interest in
1256:13 a note, it must be an institution that has an
1256:14 account with DTC or have a direct or indirect
1256:15 account with such an institution.
1256:16 "The beneficial owners, retail investors
1256:17 who own are beneficial owners through having either
1256:18 a direct or indirect account with an institution
1256:19 that has -- that is a participant in DTC."
1256:20 **Q So are you suggesting -- are you telling**
1256:21 **us that the beneficial owner that is referred to on**
1256:22 **page S-19 is, in fact, the retail investor?**
1256:23 A Yes. When you look at the second sentence
1256:24 of the second paragraph, "In order to own a
1256:25 beneficial interest in a note, you must be an
1257:1 institution that has an account or have a direct or
1257:2 indirect account with such an institution," that
1257:3 language is directed to whomever owns the beneficial
1257:4 interest, that being the retail investor, this -- in
1257:5 the case, InterNotes.

198. For example, Goldman's Indenture states that "ownership of Securities shall be proven by the Security Register." (Div. Ex. 564, p.16). It also states that "Prior to due presentment of a Security for registration of transfer, the Company, the Trustee and any agent of the Company or the Trustee may treat the Person in whose name such Security is registered as the owner of such Security for the purpose of receiving payment of principal of and any

premium and (subject to Section 3.07) any interest on such Security and for all other purposes whatsoever, whether or not such Security be overdue, and neither the Company, the Trustee nor any agent of the Company or the Trustee shall be affected by notice to the contrary." (Div. Ex. 564, p. 37).

Division Response: See DRRPFOF¶197, supra.

199. The Goldman shelf prospectus states that ownership of beneficial interests in its notes are reflected in the books and records of DTC and its "participants" (e.g. the brokerage firms). The brokerage firm's customers who are named on the accounts are "beneficial owners." *See infra.*

Div. Ex. 561, p.17 (emphasis added)
"Those who own beneficial interests in a global debt security will do so *through participants* in the depositary's securities clearing system, and the rights of these indirect owners will be governed solely by the applicable procedures of the depositary and its participants. We describe book-entry securities below under "Legal Ownership and Book-Entry Issuance."

Div. Ex. 561, p.21 (emphasis added)
"Any indirect owners who own beneficial interests in the global debt security and wish to exercise a repayment right must give proper and timely instructions to their banks or brokers *through which they hold their interests*, requesting that they notify the depositary to exercise the repayment right on their behalf. Different firms have different deadlines for accepting instructions from their customers, and you should take care to act promptly enough to ensure that your request is given effect by the depositary before the applicable deadline for exercise."

Div. Ex. 561, p. 97 (emphasis added)
"For securities held in street name, we or the Issuer Trusts will recognize only the intermediary banks, brokers and other financial institutions in whose names the securities are registered as the holders of those securities and we or the Issuer Trusts will make all payments on those securities, including deliveries of any property other than cash, to them. These institutions pass along the payments they receive to *their customers who are the beneficial owners*, but only because they agree to do so in their customer agreements or because they are legally required to do so."

Division Response: See DRRPFOF¶197, supra.

200. Similarly, Goldman's Pricing Supplement which contains the survivor's option language, contains similar language. *See infra.*

Div. Ex. 565, p. 6 (emphasis added)

We will issue each tranche of notes as a master global note registered in the name of DTC, or its nominee. The sale of the notes will settle in immediately available funds through DTC. You will not be permitted to withdraw the notes from DTC except in the limited situations described in the accompanying prospectus under "Legal Ownership and Book-Entry Issuance — What Is a Global Security? — Holder's Option to Obtain a Non-Global Security; Special Situations When a Global Security Will Be Terminated". Investors may hold interests in a master global note *through organizations that participate, directly or indirectly, in the DTC system.*

Div. Ex. 565, p.9 (emphasis added)
To obtain redemption pursuant to exercise of the Survivor's Option for a note, the deceased beneficial owner's authorized representative must provide the following items to the *participant in DTC through which the beneficial interest in the note is held by the deceased beneficial owner.*

Division Response: See DRRPFOF¶197, supra.

201. The governing documents for Citigroup paper contained substantially similar language regarding the definition of beneficial ownership. *See infra.*

Div. Ex. 513, p.21
"In order to ensure that DTC's nominee will timely exercise a right to repayment relating to a particular note, the beneficial owner of that note must instruct the broker or other direct or indirect participant through which it holds an interest in the note to notify DTC of its desire to exercise a right to repayment."

Div. Ex. 513, p.24
"To obtain repayment upon exercise of the survivor's option for a note, the representative must provide to the broker or other entity through which the deceased beneficial owner holds an interest in the note."

Div. Ex. 513, p.54
"Thus, each beneficial owner of a book-entry security will hold that security indirectly through a hierarchy of intermediaries, with DTC at the "top" and the beneficial owner's own securities intermediary at the "bottom."

Div. Ex. 513, p.54-55
"Citigroup Global Markets Holdings will not have any responsibility or liability for any aspect of the records relating to, or payments made on account of, beneficial ownership interests in the book-entry securities or for maintaining, supervising or reviewing any records relating to the beneficial ownership."

Division Response: See DRRPFOF¶197, supra.

202. Documentation for all other bond issuers is substantially similar to the language in the Goldman and Citigroup governing documents in that beneficial ownership is determined by the books and records of the brokerage firm and more specifically the customers who signed the brokerage account agreement and who are listed as account owners at the brokerage firm.

Division Response: See DRRPFOF¶197, supra.

203. All of the bond and CD redemptions occurred in accounts that Mr. Lathen maintained with brokerage firms who were DTC participants as defined under the governing documents.

Division Response: Denied, as Respondents cite no evidence for this proposed Finding.

204. Each bond prospectus defines the death of a beneficial owner in a joint tenancy as a triggering event which gives rise to the right of the surviving joint owner to exercise the redemption right in full. *See* Division PFOF¶¶106-107.

Division Response: Admitted that the bond prospectuses offered the survivor's option early redemption feature on the death of a beneficial owner of the note. (PFOF¶106.) Under each prospectus, other than Funding Corp.'s, to trigger the survivor's option for notes held in joint tenancy, the decedent had to have been both a beneficial owner as well as a joint tenant on the account in which the notes were held. (PFOF¶¶106-107.) In addition, the prospectuses required that any bonds redeemed by beneficial owners holding them in joint tenancies, had to hold them in valid joint tenancies.

205. With respect to all such accounts, the Participant was a beneficial owner of the account at death and was a beneficial owner of the bonds in the account at death as defined under Issuers' governing documents and as fully documented in the brokerage firm's books and records.

Division Response: This proposed Finding is argument and should be stricken pursuant to the Court's order. To the extent that the Court is inclined to consider it, it is denied as there is no support cited for this proposed Finding. In any event, it is wrong. (See DRRPFOF¶197, supra.) In addition, as noted in DRRPFOF¶204, any bond held in a joint tenancy had to be held in a valid joint tenancy to make the co-tenant eligible to redeem.

206. The procedures for putting paper back to the issuers also recognized the primacy of the brokerage firm's books and records as relates to a definitive determination of beneficial ownership. The documentation which proved beneficial ownership of the bond under the governing documents and issuer/trustee procedures for validating claims was the brokerage account statement which listed the account owners. In addition, brokerage firm

representatives were required to execute an election form attesting to the fact that the decedent was a beneficial owner of the bond at death.

Division Response: This proposed Finding is argument and should be stricken pursuant to the Court's order. To the extent that the Court is inclined to consider it, it is denied as there is no support cited for this proposed Finding. In any event, it is wrong. (See DRRPFOF¶197, supra; see also Letter from Judith Weinstock, dated May 8, 2017, attaching the "Form of Notice of Election to Exercise Survivor's Option," in which Lathen represented that the Participant was the "deceased beneficial owner," a representation that was unnecessary if the issuers "recognized the primacy of the brokerage firm's books and records as relates to a definitive determination of beneficial ownership.")

207. Issuer governing documents do not require that the authorized representative (e.g. Mr. Lathen as surviving joint owner) have an "economic stake" in the account at the decedent's death or otherwise. The only ownership requirement at death under the governing documents is with respect to the decedent. Indeed, the governing documents are completely agnostic with respect to distribution of proceeds following the death of the beneficial owner. (N/A).

Division Response: This proposed Finding is argument and should be stricken pursuant to the Court's order. Further, there is no support cited for this proposed Finding and therefore the Court should disregard it. In any event, once Lathen represented himself as a surviving joint owner on the account, he had a duty to speak accurately and fully. In addition, because the Fund was the true beneficial owner of the accounts, neither Lathen nor the Participant held any interest, and the joint tenancies were invalid, as Lathen knew. (PFOF¶¶905-909.) (See Reply Brief at Section I(G).)

208. No issuer governing documents required that side agreements or financing agreements be disclosed or indicated that they were important to a determination of eligibility to redeem under the survivor's option provision. (N/A).

Division Response: There is no support cited for this proposed Finding and therefore the Court should disregard it. To the extent the Court is inclined to consider it, admitted that the governing documents did not explicitly require the submission of any side agreements, but deny that their importance to the eligibility determination was unknown to Lathen or anyone else. (See Reply Brief at Section I(D).)

209. No issuer governing documents required that there be any familial relationship between the decedent and the surviving joint tenant in order to be eligible to redeem under the survivor's option provision. (N/A).

Division Response: There is no support cited for this proposed Finding and therefore the Court should disregard it. To the extent the Court is inclined to consider it, admitted, with the exception of the testimony noted in DRRPFOF¶182, supra.

210. No issuer governing documents prohibited the exercise of the survivor's option in instances where the decedent had delegated power of attorney with respect to their ownership in the account. (N/A).

Division Response: This proposed Finding is argument and should be stricken pursuant to the Court's order. Further, there is no support cited for this proposed Finding and therefore the Court should disregard it. To the extent that the Court is inclined to consider it, the Division notes that once a representation is made as to the redeeming party's eligibility, the redeeming party is required, under the securities laws, to fully and accurately disclose all material facts necessary to make such representation not materially misleading. (See Reply Brief at Section I(C).) Therefore, if such powers of attorney materially bore on the beneficial ownership of the decedent, the redeeming party, like Lathen here, must disclose it.

211. No issuer governing documents prohibited someone who was in poor health or advanced in age from owning their bonds or for their survivor or heirs to exercise the survivor's option provision upon their death. (N/A).

Division Response: This proposed Finding is argument and should be stricken pursuant to the Court's order. Further, there is no support cited for this proposed Finding and therefore the Court should disregard it.

212. No issuer governing document contained any requirement that a decedent possess any particular quantum or percentage of economic interest in the account at their death. (N/A).

Division Response: This proposed Finding is argument and should be stricken pursuant to the Court's order. Further, there is no support cited for this proposed Finding and therefore the Court should disregard it. To the extent the Court is inclined to consider it, it is wrong. Beneficial ownership was required to redeem the survivor's option notes, and Lathen's side agreements and Fund agreements stripped the Participants of any such interest. (PFOF¶¶106-15;871-72;874-78;905-09.)

213. No issuer governing document prohibited a bond holder from encumbering their interest or relinquishing their interest in the account holding the bond. (N/A).

Division Response: This proposed Finding is argument and should be stricken pursuant to the Court's order. Further, there is no support cited for this proposed Finding and therefore the Court should disregard it. To the extent the Court is inclined to consider it, it is wrong. While the governing documents did not prevent a bondholder from encumbering his interest, beneficial ownership was required to redeem the survivor's option notes. (PFOF¶¶106-15.)

214. The brokerage firms undertook significant due diligence on Mr. Lathen and Eden Arc before beginning a relationship. (Tr. 2525:12-16).

Division Response: Denied, as the cited testimony does not support this proposed Finding:

2525:12 **Q Okay. And fair to say that at the time**
2525:13 **he's sending you this, this is September 2011, he**
2525:14 **hadn't started doing any business with Securevest.**
2525:15 **Was this during the onboarding process?**
2525:16 A Yes.

In addition, other testimony by Cellitti supports an opposite Finding: that SecureVest did not view it as its job to review Lathen's strategy. (See PFOF¶393.) Respondents offered no testimony from any broker other than Cellitti as to broker's due diligence, but Flanders testified that Lathen had admitted that a number of brokers had told him to take his business elsewhere once they understood what he was doing. (See PFOF¶848. See also PFOF¶¶394-96;655.)

215. Michael Robinson, who handled the processing of redemption requests for Mr. Lathen, testified as to his close working relationship with brokers and their full awareness of the investment strategy. (Tr. 1787:7-1788:1; 1789:10-1790:7).

Q. And in your experience, were brokers fully aware of the investment [strategy]?
A. Yes. You know, I was involved in -- certainly not with C.L. King, but with First Southwest and Wedbush, when those relationships were being established. And, you know, there was quite full disclosure and communication between, you know -- Mr. Lathen and those firms when they were, you know, looking at doing business with us.

Q. Okay. And did [Andrea Burriesci of CL King] have an understanding -- did you believe that she had an understanding of the strategy when you started [working at Eden Arc]?
A. Yes.
Q. Why do you believe that?
A. Because I talked to her constantly, met her a few times. And she clearly understood what we were doing.

Division Response: Admitted that Robinson testified that he believed C.L.King, and First Southwest and Wedbush had an understanding of some aspects of Eden Arc's strategy, but there is no evidence that Lathen shared the PSA with any broker, nor is there any evidence that he shared the IMA with GFG, CL King, FSW, or Wedbush, and there is no evidence that he shared the IMA with SecureVest and JPMC before March 2012, when JPMC asked for it. (Lathen Exs. 2040; 2042) In addition, Lathen sent at least two of the brokers an investor presentation that contained the following representation: "Prior to launching its business, Eden arc received advice from counsel that the strategy is legal." (PFOF¶¶393-94;655.) Cellitti testified that both SecureVest and JPMC relied on such representation. (PFOF¶¶393-94.)

216. Auggie Celliti, CEO of Securevest Financial ("Securevest"), one of Mr. Lathen's brokers, testified that he fully understood Mr. Lathen's investment strategy. (Tr. 2521:7-13; 2524:13-2525:11).

Auggie Celliti, Securevest (Tr. 2521:7-13)
Q. Okay. And do you recall what Mr. Lathen's investment strategy was?
A. Yes.
Q. Okay. What do you recall about it?
A. That he was an investor in death put option corporate bonds. That he was running a strategy that had something to do with that.
Q. Okay. And what do you mean by "death put option corporate bonds"?
A. It's a -- it's a bond that has a – that can be redeemed upon the death of a holder at par.

Division Response: Admitted that Cellitti testified that he had an understanding that Lathen was buying "death put option corporate bonds" and that he read Lathen's investor presentation (Lathen Ex. 2028) at the time, but Cellitti also testified that it was not SecureVest's job to review Lathen's strategy, and he relied on Lathen's representation that he had received advice from counsel that Lathen's strategy was legal. (PFOF¶¶393-95.) In addition, in a March 2012 letter to SecureVest, Lathen falsely claimed to share profits with Participants. (PFOF¶583.)

217. Mr. Lathen provided Securevest with many documents to further explain his strategy, including an investor presentation, the PPM, and the participant agreement. (Lathen Ex. 2028; Tr. 2522:1-2523:4; Lathen Ex. 2032; Tr. 2636:16-24[6]).

Division Response: The cited testimony supports only that part of this proposed Finding that Cellitti received Lathen's investor presentation and his PPM. Lathen provided those documents after JPMorgan advised that it was terminating its clearing arrangement for Lathen's accounts, and in response to JPMorgan's request, not SecureVest's own request. (PFOF¶387.) There is no reference to Cellitti receiving any Participant Agreement in the cited testimony or Exhibits.

218. Brokerage firms like Securevest do extensive due diligence in an "on-boarding process" before beginning a business relationship with a client. They were satisfied with all of the information Mr. Lathen provided and agreed to do business with him. (Tr. 2525:12-16).

Division Response: Denied, as the cited testimony does not support this proposed Finding:

2525:12 **Q Okay. And fair to say that at the time**
2525:13 **he's sending you this, this is September 2011, he**
2525:14 **hadn't started doing any business with Securevest.**

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[6] The Division assumes that the citation to "Tr. 2636:16-24" is meant to be to "Tr. 2536:16-24."

2525:15 **Was this during the onboarding process?**
2525:16 A Yes.

In addition, other Cellitti testimony supports an opposite Finding: that SecureVest did not view it as its job to review Lathen's strategy. (See PFOF¶395.) Respondents offered no testimony from any broker other than Cellitti as to any broker's due diligence, but Flanders testified that Lathen had admitted to him that a number of brokers had told Lathen to take his business elsewhere once they understood what he was doing. (See PFOF¶848. See also PFOF¶¶394-96;655.)

219. During the course of Securevest's relationship with Mr. Lathen, Mr. Lathen and Securevest shared information and documents pertaining to Mr. Lathen's business with compliance professionals and lawyers within and Securevest and at its clearing agent, JPMorgan. (Tr. 3286:10 – 3287:22; Lathen Exs. 2031, 2036, 2041-444[7], 2062).

Division Response: Admitted that after JP Morgan had indicated its decision to terminate its clearing relationship with respect to Lathen's SecureVest accounts, Lathen and SecureVest shared the information and documents pertaining to Lathen's business reflected in the cited Exhibits with JPMorgan and SecureVest compliance personnel. (PFOF¶387.)

220. Mr. Lathen also answered questions regarding Caramadre, which he answered and included an attachment of the Indictment, encouraging all parties to review it. (Lathen Ex. 2035; Tr. 2551:9-2553:2; Lathen Ex. 2062).

Division Response: Admitted that after JP Morgan had indicated its decision to terminate its clearing relationship with respect to Lathen's SecureVest accounts (PFOF¶387), Lathen responded to JPMorgan's question about Caramadre by attaching the Indictment and suggesting all parties to review it.

221. Mr. Lathen was committed to giving investors fulsome disclosure of the strategy, both in the fund's offering documents, as well as through filings and ongoing communications. (Tr. 645:2-647:3).

Division Response: Denied, as the cited testimony does not support this proposed Finding, particularly with reference to Lathen's desire to provide fulsome disclosure to investors "through filings and ongoing communications," as the cited testimony reflects only his testimony on disclosures in his PPM. In any event, Lathen did not in fact provide investors with fulsome disclosure about all aspects of his strategy; for example, there is no evidence that Lathen told any investor that both Farrell and Hood, his tax lawyer, had advised him that the Fund's income from the accounts (and therefore their distributions) would be taxed as ordinary income, not capital gains. And there is no evidence that Lathen told his auditors after 2013 (when Lathen executed the PSA) that fact or gave them the PSA so that they could consider the issue.

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[7] The Division assumes the reference is meant to be to Lathen Exs. 2014-44.

(PFOF¶¶290;791;808;810;815;816;912.) In addition, in the Fund's DDQ, Lathen falsely omitted mention of the Fund's clearing broker, JPMC, who had terminated its relationship with Lathen. (PFOF¶584.) In that same document, Lathen claimed that his capital account represented "a significant portion of his liquid net worth," even though he never invested any money into the Fund. (PFOF¶¶585-86.) Lathen also told Fund investors that "strict governance procedures and funds flow protocols" would be placed on the JTWROS accounts, when none were in place. (PFOF¶¶589-91.) In addition, Lathen was not forthcoming with individual investors, such as Rosenbach, his first investor. (PFOF¶588.) And he falsely told Fund investor Michael Cooney that Hinckley Allen had refused to issue a legal opinion because "it's not really what we do," that he did not think "a memo from a Providence firm was even worth it" so he "didn't press it any further." (PFOF¶601.)

222. The fund's Private Placement Memorandum lays out risk factors, including the risk of future issuer conflicts over the contractual regime. (Div. 369, p. 26)

"It is unclear whether any of the issuers of the SO investments ever contemplated the partnership's investment strategy when they drafted their prospectuses. While the general partner believes that its strategy conforms with the prospectus guidelines and represents a valid survivor's option redemption, there is a possibility that issuers and trustees may take a contrary view."

Division Response: Admitted.

223. The Division produced no evidence of any investor complaints about Mr. Lathen's disclosures to investors. [N/A]

Division Response: Admitted.

224. Indeed, the Division themselves have not claimed or asserted that Mr. Lathen's disclosures to investors were insufficient or inadequate. *See* Memorandum of Law in Support of the Division of Enforcement's Motion *in Limine* to Preclude Certain Evidence & Testimony, p 2-3 ("This case is about whether Respondents made material misstatements or omissions to bond issuers and whether Respondents violated the Custody Rule; there is no allegation of investor fraud."); Tr. 577:12-13 ("MS. WEINSTOCK: Because Mr. Lathen is not charged with anything related to fund investors.).

Division Response: Admitted that the OIP does not claim that Lathen's disclosures to investors were insufficient or inadequate. (But see DRRPFOF¶221, supra, and PFOF¶¶562;582;584-86;588;589;591-92;594;601;612-13.)

225. During the course of the representation, Mr. Galbraith and Mr. Lathen reached out to, and met with, attorneys at FINRA to explain Mr. Lathen's business and investment strategy to the regulators. Mr. Galbraith explained

that "[Mr. Lathen] wanted to be helpful to FINRA so that they could understand what his business actually was, so there was no misperception of misunderstanding on their part." (Tr. 2921:4-2925:13; 3044:4-3045:16, 3049:8-12).

Division Response: Admitted that Galbraith testified to the reasons he believed Lathen had for reaching out to FINRA, but Lathen, himself, testified that the reason he reached out to FINRA was his concern that if he did not convince FINRA that his business was lawful, they would shut down every relationship he had with brokers going forward, as they had already done with respect to C.L. King and First Southwest. (PFOF¶¶444-45.)

3486:8 **Q And it's not until late August of 2014 that you**
3486:9 **and Kevin Galbraith reach out to FINRA; is that right?**
3486:10 A That's correct.
3486:11 **Q And that's because two brokers had shut down**
3486:12 **your business, and you wanted to convince FINRA not to**
3486:13 **shut them down; is that right?**
3486:14 A That is correct. I believe Kevin testified the
3486:15 other day that it was related to C.L. King. But it was,
3486:16 in fact -- First Southwest, that sort of was the impetus
3486:17 because now we had -- it was pretty clear that C.L. King
3486:18 was just going to -- that FINRA was going to just follow
3486:19 us wherever we went. So it would be preferable to
3486:20 educate them, understand their concerns, try to address
3486:21 those concerns. And that's why we set up the call with
3486:22 FINRA.

Lathen also understood that FINRA was not his regulator. (PFOF¶448.)

226. In 2012, Eden Arc Capital Management pre-emptively registered as an Investment Advisor with the SEC, inviting further regulatory scrutiny into their business before it was required. (Tr. 648:12-18).

Division Response: Denied, as the cited testimony does not support this proposed Finding. While Lathen testified that registering with the SEC "would make it more likely that you would be on the regulator's radar screen," Respondents offered no testimony that Lathen sought to "invite" such scrutiny.

In addition, Lathen testified that one of the reasons he registered as an Investment Adviser was because he thought that being SEC-registered would make an investment in the Fund more attractive to investors. (PFOF¶60.) In any event, once EACM had $25 million assets under management—which Lathen declared it anticipated having within 120 days of registration in EACM's initial Form ADV— it was required to register with the SEC. (Div. Ex. 1 at Section 2.A.(9).) Mid-sized advisers—i.e. those with assets under management between $25 million and $100 million—"must register with the commission: (1) if the adviser is not required to be

registered as an investment adviser with the securities commissioner (or any agency or office performing like functions) of the state in which it maintains its principal office and place of business; or (ii) if registered with that state, the adviser would not be subject to examination as an investment adviser by that securities commissioner." 76 FR 42950-01, at *42952, 2011 WL 2783991, Release No. IA-3221, (Final Rule).

EACM's principal (and only) place of business is New York. New York is a state whose advisers are not subject to examination by state authorities and, therefore, advisers in New York with over $25 million under management are required to register with the Commission. Id. at 42961 ("[A]dvisers with their principal office and place of business in Minnesota, New York and Wyoming with assets under management between $25 million and $100 million must register with the Commission."); see also Division of Investment Management: Frequently Asked Questions Regarding Mid-Sized Advisers, available at https://www.sec.gov/divisions/investment/midsizedadviserinfo.htm ("After July 21, 2911, a mid-sized adviser must register with the Securities and Exchange Commission if it . . . is not subject to examination as an adviser by the state where it maintains its principal office and place of business. . . . A mid-sized adviser with its principal office and place of business in either of those states"—New York or Wyoming—"is not 'subject to examination' by the state securities authority and would have to register with the SEC.") (See also PFOF¶506.) Therefore, EACM would have been required to register with the Commission once it hit $25 million under management, and it appears that EACM was using early registration with the Commission as a marketing tool to solicit investments and achieve its goal of reaching $25 million in assets under management. (See PFOF¶60.)

227. Mr. Lathen filed a complaint against Goldman Sachs Bank USA with the New York State Department of Financial Services. (Tr. 331:5-14, 690:5-21; Div. Exs. 236 and 577).

Division Response: Admitted that Lathen, posing as an individual investor, made a complaint against Goldman Sachs Bank USA to the NY State Department of Finance, a regulator that supervises institutions like insurance companies, banks, credit unions, check cashers and investment companies not subject to the Investment Company Act of 1940, who are New York State-chartered or licensed. It does not have jurisdiction over Respondents. (PFOF¶¶435;439.) Lathen never contacted the SEC, his regulator, to complain about Goldman Sachs. (PFOF¶440.)

228. Mr. Lathen also filed a complaint against Goldman Sachs Bank USA with the Consumer Financial Protection Bureau. (Tr. 329:16-330:18, 690:5-21; Div. Ex. 574.)

Division Response: Admitted that Lathen, posing as an aggrieved consumer, made a complaint against Goldman Sachs Bank USA to the Consumer Financial Protection Bureau, a regulator that supervises a range of companies to assess their compliance with federal consumer financial laws, including banks, thrifts and credit unions with assets over $10 billion, mortgage originators and servicers, payday lenders and private student lenders of all sizes, larger participants in consumer reporting, consumer debt collection, student loan servicing, international money transfer and

automobile financing, but not investment advisers, like EACM. (PFOF¶¶141;434;438.) Lathen never contacted the SEC, his regulator, to complaint about Goldman Sachs. (PFOF¶440.)

229. When Dennisse Alamo, the daughter of a now-deceased a participant, reached out to Mr. Lathen about being contacted by the SEC, Mr. Lathen encouraged her to speak openly with them, stating: "I do not know what the SEC may be looking into but my guess is that they are looking at my business model because it is unusual. You should speak with him and be fully open and truthful about our arrangement. I have nothing to hide nor should you." (Lathen Ex. 869.)

Division Response: Admitted that Lathen told Alamo to speak openly with the SEC, understanding that she did not know what Lathen told issuers. (PFOF¶308.) In addition, Alamo's mother was a pre-Fund Participant. (PFOF¶300.)

230. When contacted by the SEC's examination staff in connection with EACM's first cycle exam in the Fall of 2014, Mr. Lathen was forthcoming about his investment strategy with exam staff and provided all information requested by the exam staff in connection with the exam.

Division Response: Even though no testimony or exhibit is cited to support this Finding, the Division admits that Lathen provided some information requested by the SEC exam staff, including, apparently, an account control agreement that he now contends was never operative (PFOF¶¶596-99), but Lathen was hardly transparent or forthcoming with the exam staff. He tried to hide the fact that he had not put in place a compliance manual on time (PFOF¶576), and failed to abide by representations he made to exam staff about future conduct. (PFOF¶¶567-69;574.)

231. In the Fall of 2010, Mr. Lathen began investing with other sophisticated investors. Specifically, he opened accounts with Gary Rosenbach, a former head fund manager. Robert Millius, one his former colleagues at Lehman Brothers and a Managing Direct at Barclays, also invested. (Tr. 3226:8-3227:17).

Division Response: Denied, as the cited testimony does not support this proposed Finding to the extent the Finding discusses Millius, his employment, or his level of sophistication. In addition, Lathen testified that Rosenbach was a former hedge fund manager, not head fund manager. See:

3226:18 **Q Who is Gary Rosenbach?**
3226:19 A He's a former hedge fund manager, now
3226:20 lives in Vail, Colorado, just managing his own
3226:21 investments.

232. Mr. Lathen solicited a few dozen investors for the fund, and ultimately about 15 invested approximately $5.85 million. Investors included Accumulus fund (fund of funds), Mr. Faris Nabor of Deutsche Bank, Robert Milius of Barclays, and Mr. Vytas Petrulius (a friend of Mr. Lathen's and a real estate and transactional attorney). (Tr. 3252:6-3255:4).

Division Response: Admitted that the cited testimony supports the portion of this proposed Finding that approximately 15 investors invested in the fund before it opened, and the initial closing was $5.85 million.

3252:23 **Q How many investors ended up investing in**
3252:24 **the fund before it opened?**
3252:25 A I think we had on the order of 15.
3253:1 **Q And how much money did they invest in**
3253:2 **total?**
3253:3 A The initial closing was, I think, 5.85
3253:4 million, so a shade under 6 million.

233. Mr. Lathen also relied on a variety of business, legal, and financial professionals to run his business. He was honest and forthright with these professionals. (Tr. 1756:23-1761:24).

Division Response: Admitted that Robinson testified to business, legal and financial professionals with whom Lathen interacted during Robinson's tenure, and that it was his view that Lathen was honest and forthright with these professionals. (But see: PFOF¶¶551;579-585;602;612;613;652;654;690;698-703;712-15;752-53;820-822;824;837;862-63;871-77;904-10;915;959-71;998-1000;1011;1017;1020-22.)

In addition, Robinson's own honesty and forthrightness was called into question by evidence that he lied to issuers in connection with redemption requests, portraying the joint tenants as investment advisory clients of Eden Arc, making him a poor judge of Lathen's honesty and forthrightness. (PFOF¶¶605-08.)

234. Mr. Lathen fully disclosed his strategy to his compliance consultants Mission Critical Services. Mission Critical Services Corp. prepared all Form ADVs for Eden Arc Capital Management, LLC other than its initial Form ADV. (Tr. 596:18-24, 3323:5-8).

Division Response: The cited testimony does not support this proposed Finding, except with respect to Lathen's claim that Mission Critical Services Corp. prepared all but the initial, Forms ADV. However, Lathen also testified that perhaps Cassandra Joseph had filed some of the Forms ADV prior to Lathen's retention of Mission Critical. (PFOF¶¶52-53.) Respondents called neither Cassandra Joseph nor any representative of Mission Critical and there is no evidence of his disclosure of his strategy to either Ms. Joseph or Mission Critical.

235. Mr. Lathen fully disclosed his strategy to his auditors at Citrin Cooperman and later EisnerAmper. (Lathen Ex. 788; Tr. 3235:14 – 3236:7; Div Ex. 814; Tr. 3606:5-3607:9; 1760:21-1761:21).

Division Response: Denied, as the cited testimony and exhibits do not support this proposed Finding with respect to EisnerAmper, except that Lathen testified that drafts of his PPM had been sent to Citrin Cooperman. There is no evidence that Lathen provided EisnerAmper with his PSA. Lathen called no one from Citrin Cooperman or EisnerAmper to testify. (PFOF¶557.)

236. Mr. Lathen fully disclosed his strategy to his independent administrator, Integrated Investment Solutions. (Lathen Ex. 788; Tr. 3235:14 – 3236:7; 1756:23 – 1757:11; 1760:21-1761:21).

Division Response: Denied, as the cited testimony and Exhibits do not support this proposed Finding, except that it appears that drafts of the PPM were sent to his independent administrator, Integrated Investment Solutions.

237. The Division elicited no testimony from any auditor, accountant, attorney, broker, compliance expert, investor, potential investor or other securities industry professional that Mr. Lathen's investment strategy was unlawful or violated any federal securities law or rule. (N/A)

Division Response: There is no evidence that Lathen sought, or that any professional offered him, advice on securities laws, so there could be no testimony from any professional to adduce on that topic. In addition, numerous attorney witnesses testified as to concerns they had about potential legal issues that they communicated to Lathen regarding the implementation of Lathen's investment strategy. (See, e.g., PFOF¶¶651;652;690;719;824;827-830;835-836;868-869;871-73;886-88;905-09;911;934.) In addition, Lathen did not provide full disclosure to his attorneys. (See, e.g., PFOF¶¶713;715;720;737;850-856;863;904;910;915-916;926;928;96;966-967;972.) And Mission Critical pointed out Lathen's violations of the Custody Rule, but Lathen did nothing to correct the violation. (PFOF¶545.)

Benchmark, an investor, asked Lathen whether "[i]s it legal for nominees of a corporation or partnership to enter a JTWROS agreement?" (Div. Ex. 107 – p. 5.) See also:

3616:25 **Q And, in fact, there was a potential investor**
3617:1 **called Benchmark that did express concerns about the**
3617:2 **legality of the strategy; is that right?**
3617:3 A I don't specifically recall what you're
3617:4 referencing. They did ultimately want to invest in the
3617:5 fund until the Staples matter hit.
3617:6 **Q Well, they had a conference call with Peggy**
3617:7 **Farrell of Hinckley Allen?**
3617:8 A Yes. I believe there was a call.
3617:9 **Q And that was because they had some concerns**
3617:10 **about the legality of the strategy, correct?**

3617:11 A I don't think it's a fair inference, just
3617:12 because someone is having a conference call with someone,
3617:13 that they have concerns about the legality of the
3617:14 strategy.
3617:15 **Q Well, how often did prospective investors ask**
3617:16 **to speak to one of your attorneys?**
3617:17 A It happened fairly frequently. Any investor
3617:18 doing diligence on a situation is going to want to
3617:19 understand the legal issues involved.
3617:20 **Q And after they spoke to bench -- after they**
3617:21 **spoke to Peggy Farrell, they did not invest, correct?**
3617:22 A After speaking to Peggy Farrell, they were
3617:23 ready to invest and, ultimately, were going to invest
3617:24 until a few weeks later, the Staples case came out in
3617:25 which case, they backed away to see how that played out.

Numerous lawyers, including Begelman and Robustelli testified that they told Lathen at the time that his conduct was fraudulent, and Prospect's lawyers sued him for, among other things, fraud. (PFOF¶¶130;135;200;256;257.) Another lawyer, the Division's expert, Martin Lybecker testified that Respondents were in violation of the Custody Rule. (PFOF¶¶461-477.) Lathen also sought to deflect scrutiny of many of the professionals he consulted or with whom he did business by sharing his investor presentation with the assurance that "[p]rior to launching business, Eden Arc received advice from counsel that the strategy is legal." (PFOF¶¶393-94;655-657;763.)

238. A commitment to adequate participant disclosure has been a focus of the legal counsel Mr. Lathen received from the outset. (Tr. 3180:22-24; 3188:8-20).

Division Response: Admitted that Lathen sought legal counsel with respect to disclosure to Participants. However, as it was revealed at trial, Lathen lied to prospective Participants in his brochures about his program's altruistic purposes, telling them that EndCare pledged to make charitable contributions that EndCare never made. (PFOF¶883.) In addition, Respondents severed Lathen's joint tenancy with Davis, but there is no evidence that he told her what Katten had told him: that she had a present 1/3 interest to the securities in the account. (PFOF¶¶322;323;327;704.)

239. Dennisse Alamo, the daughter of a deceased Participant who was acting as her mother's Power of Attorney, testified regarding her very positive experience with Mr. Lathen. (Tr. 2439:15-2350:3)[8]

Division Response: Admitted, except that the cited transcript portion supports only that Alamo deemed her interactions with Lathen as "positive," not "very positive."

[8] The Division assumes Respondents' citation is to 2349:15, not 2439:15.

240. The Division has not claimed or asserted that Mr. Lathen's disclosures to Participants were insufficient or inadequate. (N/A)

Division Response: Admitted that the OIP does not claim that Lathen's disclosures to Participants were insufficient or inadequate. (But see PFOF¶¶322-23;327;582;704;881-884.)

241. The Division has not claimed or asserted that the Limited Powers of Attorney executed by Participants (or their lawful representatives) were improper or unlawful. (N/A)

Division Response: Admitted that the OIP does not claim that the "Limited" Powers of Attorney executed by Participants (or their representatives) were improper or unlawful. But the Division notes that several issuer witnesses testified that the Powers of Attorney giving Lathen complete control over the accounts contributed to their conclusions that the Participants had no beneficial ownership interest in them and that no valid joint tenancy had been created. (PFOF¶¶97;125;130;132;162;165;178-180.) In addition, Farrell testified that Lathen had told her that the brokers required joint signatures on any account instructions, so by having the Participants execute the Powers of Attorney, Lathen, but not they, could unilaterally control the accounts. (PFOF¶902.)

242. The Division has not claimed or asserted that the Participant Agreements into which Mr. Lathen and Participants (or their lawful representatives) entered were independently improper or unlawful. (N/A)

Division Response: Admitted that the OIP does not claim that the Participant Agreements executed by Participants (or their representatives) were improper or unlawful. But the Division notes that several issuer witnesses testified that the Participant Agreements were important to their eligibility decisions and some refused to redeem upon receipt of the Participant Agreements; Prospect claimed the failure to disclose the side agreements was fraudulent. (PFOF¶¶116-138;150;160-63;164;172;178-81;200;228;230;241.) In addition, after Farrell reviewed Lathen's IMA and sample Participant Agreement, among other documents, she told Lathen of her concerns about the validity of his joint tenancies under those agreements. (PFOF¶871.)

243. Michael Robinson served as Vice President of Marketing and Administration at Eden Arc, and worked closely with Mr. Lathen (in a one-room office), for several years. (Tr. 1748:16-20; 1752:22-1753:19).

Division Response: Admitted that Robinson served as Vice President of Marketing and Administration at Eden Arc, and worked closely with Mr. Lathen (in a one-room office). The cited testimony does not support the rest of this proposed Finding, namely the length of time for which this arrangement took place.

244. He is a graduate of Harvard College, and holds a master's degree in economics from Princeton and a master's degree in finance from MIT. (Tr. 1743:13-16). He worked in finance for many years, including at Citibank, Bank of Montreal, and Societe General. (Tr. 1743:1-1744:11)

Division Response: Admitted.

245. Mr. Robinson testified to his belief in the truth of the language in the redemption request letters and the validity of Mr. Lathen's strategy. He testified that he believed Mr. Lathen held the same beliefs. (1803:17-1805:20).

Division Response: Admitted that Robinson testified that he believed that the language used in the redemption letters was true. As to his understanding of Lathen's belief in the truth of the letter's representations, Robinson testified only that, since the language in the redemption letters attesting to the Participant's joint and beneficial ownership was written by Lathen and the letters were signed by him, "it could be said that he believed that what he was saying was correct." See:

1804:13 **Q What did Mr. Lathen believe about the**
1804:14 **truth or falsity of this language?**
1804:15 A The only thing I can say is, basically
1804:16 it's his words. So I think he -- you know, this is
1804:17 his words and his signature. So I think it could be
1804:18 said that he believed that what he was saying was
1804:19 correct.

The cited testimony does not support the portion of this proposed Finding that either Robinson or Lathen believed the strategy to be valid.

246. After working closely with Mr. Lathen for several years, and knowing him as a person, Mr. Robinson formed a positive opinion of Mr. Lathen's character that is inconsistent with the Division's allegations of fraud. (Tr. 1827:6-8; 14, 17-1829:13).

Q. JUDGE PATIL: Mr. Robinson, what frauds do you know of that Mr. Lathen committed? (1827)
A. THE WITNESS: None.

Q. MS. CORCORAN: Can you put some color behind that, in your own words, why? . . .
A. Yeah. . . my close working relationship with Jay over almost four years, sitting in this little room together. You know, we didn't just talk about business. But we talked about our kids, our families. You know, he dealt with contractors and, you know, buying and selling cars and all this sorts of things that you do in

daily life. And it was just no sense I had that he was ever engaged in — what you might call sharp practices, you know, was trying to cheat somebody, trying to hide something, trying to get a little more insurance money for a fender-bender than he was entitled to. He just didn't do that stuff. I just came to feel like he was playing straight.

Division Response: Admitted that Robinson testified to having such a view. (But see DRRPFOF¶233.)

247. Throughout his career, Mr. Lathen has no history of disciplinary action being taken against him nor has he ever been the subject of an investigation into possible misconduct. (Tr. 2156:8-10).

Division Response: Denied, as the cited testimony does not support this proposed Finding.

248. Mr. Grundstein, who has known Mr. Lathen for thirty years and is a member of the financial industry, testified to Mr. Lathen's "very high standing character," and his view of Mr. Lathen's honesty and trustworthiness. (Tr. 2426:20-2427:2.)

Division Response: Admitted to the extent that Grundstein was testifying to his view of Lathen's character as a friend (PFOF¶¶688-89), not industry participant. There is no evidence that Grundstein had any interactions with Lathen in business, apart from Lathen's seven-month engagement of Grundstein's firm in 2009.

249. Mr. Dean has known Mr. Lathen for more than 30 years since their time in college together at Rice University. SFOF¶69. They worked together for years at two different companies, Key Energy and Penn Virginia. *See infra.*

Division Response: Admitted that Lathen and Dean have known each other since college and that they both worked for Key Energy and Penn Virginia at various times in their careers and in various capacities. But at Key Energy, both Lathen and Dean were relatively junior in their respective positions, and overlapped for only four years. (PFOF¶¶18;19.) When Lathen left Lehman, Key Energy's business did not follow him to Citibank. (PFOF¶20.) At Penn Virginia, Dean and Lathen only overlapped for a year, 2006, during which time, Dean was not involved in any of the M&A activity that Lathen was working on as an investment banker for the company. (PFOF¶¶21;23;24.) When Lathen left Lehman, Penn Virginia's business did not follow him to Citibank. (PFOF¶25.) See also:

2795:15 **Q Uh-huh.**
2795:16 A I worked at First Albany until 2004, at
2795:17 which time I left.
2795:18 And at that point, I was working in
2795:19 Denver. I left to go to work for a company called
2795:20 Infinity Oil & Gas. I worked there until 2006.

2795:21 And I joined Penn Virginia Corporation and
2795:22 its subsidiaries in October of 2006. And worked
2795:23 there until February of last year.
2795:24 And the company has declared bankruptcy, I
2795:25 think it was April or May, 2016, I was laid off. And
2796:1 I am currently between jobs.

2828:9 **Q And when you went to Penn Virginia, you**
2828:10 **said you were the head of investor relations, and**
2828:11 **you moved into corporate development. While you**
2828:12 **were the head of investor relations, what role did**
2828:13 **you take in any of the M&A activity engaged in by**
2828:14 **Penn Virginia?**
2828:15 A We had -- it was not my area -- as
2828:16 investor relations early on, that wasn't my area of
2828:17 responsibility.
2828:18 You know, the COO -- and he had financial
2828:19 folks that would be involved in modeling and, you
2828:20 know, hammering out the transaction details.
2828:21 When I was promoted to head of corporate
2828:22 development, I continued to do investor relations,
2828:23 but I also added the M&A part of the job to that.
2828:24 And primarily what I was involved in was
2828:25 looking at various acquisition opportunities. But
2829:1 probably more -- more successful was divesting. We
2829:2 sold a lot of assets to pay down our debt and, you
2829:3 know, continue to keep our liquidity and leverage
2829:4 under control.
2829:5 Obviously not enough at the end of day.
2829:6 But, you know, we -- but, again, that's what I did
2829:7 toward the end of my career there was to -- you
2829:8 know, to be involved in the a lot of divestitures.
2829:9 **Q And how long were you in corporate**
2829:10 **development, the EVP of corporate development?**
2829:11 A I think it was 2011. So it would have
2829:12 been like five years.

250. Mr. Dean was vice president of strategic planning and analysis at Key Energy, and worked there from 1996-2000. SFOF¶70. During that time, Mr. Lathen was an investment banker at Lehman Brothers and part of the team working for Key Energy. (Tr. 2798:7-2799:1)

Division Response: Admitted, noting that during that period, Lathen was a "mid-level, relatively young guy" on the Lehman Brothers/Key Energy team. (PFOF¶19.)

251. Mr. Dean was head of investor relations and corporate development at Penn Virginia. (Tr. 2802:6-9). Mr. Lathen worked closely with the CEO and CFO of Penn Virginia, as well as the General Counsel, advising them on investment banking matters. (Tr. 2803:21-24).

Division Response: Admitted, but Dean had little interaction with Lathen while they overlapped for one year at Penn Virginia, since, as head of investor relations, Dean's area was not M&A activity – the area on which Mr. Lathen was consulting Penn Virginia. (PFOF¶21.)

252. Mr. Dean testified that Mr. Lathen was a person of very high character (Tr. 2816:18-2819:10)

Division Response: Admitted that Dean so testified. But Dean had limited interactions on a professional level with Lathen, and very few interactions with him on any level since, apparently, 2006. (See DRRPFOF¶251, supra.)

2815:17 **Q So how often do you see each other these**
2815:18 **days?**
2815:19 A I haven't seen Jay in -- I believe it's
2815:20 five years. Our children were pretty young. Might
2815:21 have been more. Might have been six.
2815:9 But, you know, primarily we will talk --
2815:10 talk via email. And I think I had a conversation
2815:11 with him a year ago. His daughter, I think, was
2815:12 considering going to Penn and, you know, we live in
2815:13 Philly.

253. He stated that Mr. Lathen was very trustworthy on both a personal and professional level. (Tr. 2819:7-9).

Division Response: Admitted that Dean testified that he trusted Lathen personally and professionally.

254. Mr. Dean testified that Mr. Lathen's reputation amongst his peers at Lehman Brothers was excellent (Tr. 2809:17-2810:8).

Division Response: Admitted that Dean testified that he thought Lathen's reputation among his peers at Lehman Brothers was excellent.

255. Mr. Dean stated that Mr. Lathen's reputation amongst his colleagues at Penn Virginia was excellent. (Tr. 2803:25-2804:2)

Division Response: Admitted that Dean so testified. He went on to testify that Penn Virginia continued to use Lehman Brothers after Lathen left, so "it wasn't like Jay . . . was the only reason we were involved there." See:

2803:25 **Q Okay. What was Mr. Lathen's reputation**
2804:1 **among your colleagues at Penn Virginia?**
2804:2 A It was excellent. I think the work that
2804:3 he and Lehman had provided led to them getting
2804:4 rewarded with, you know, repeat business down the
2804:5 road, all the way until -- even after Lehman went
2804:6 belly-up, they, you know, continued to be, you know,
2804:7 our bankers at Penn Virginia through Barclays, where
2804:8 a lot of them landed.
2804:9 When Jay left Lehman in 2007 and went to
2804:10 Citigroup, you know, I think that there was a
2804:11 continuation without him at Lehman.
2804:12 So it wasn't like Jay, you know -- he was
2804:13 the only reason we were involved there. But he did
2804:14 a -- you know, he did a fine job.

256. Mr. Dean also testified that Mr. Lathen was part of team of "consummate professionals" at Lehman, and that he had a perfect record in upholding his fiduciary duties to his clients, including the responsibility of protecting confidential client information. (Tr. 2800:4-8).

Q. Okay. How did Mr. Lathen handle the responsibility of protecting confidential client information?
A. I would say Jay, along with any of the bankers that we dealt with at Lehman were – you know, there's nothing short of a perfect record that's acceptable. So there was never any doubt in our minds.
Q. In terms of his business dealings, would you describe him as having a propensity for having honesty or dishonesty on the spectrum?
A. Complete honesty.

Division Response: Admitted that Dean testified that that was his opinion given his limited interactions with Lathen on a professional level. (See DRRPFOF¶¶250-51, supra.)

257. Mr. Lathen conceived of this investment strategy when members of his own family were struggling with exorbitant healthcare and end-of-life costs. (Tr. 3177:1-3178:12)

Division Response: Admitted that Lathen so testified.

258. Though profit was an obvious motivating factor, in the end, the reality is that Endcare provided a real service to real people in need.

Dennisse Alamo, Participant's Daughter / Power of Attorney, Tr. 2355: 10-16
Q. And why did you recommend EndCare to your friends?

A. Well, I had a good experience. I thought it was helpful; and I think that, you know, the people that I had recommended it to were people that I knew might not have had the financial resources to appropriately handle end-of-life matters.

Joy Davis, Participant, Terminal Cancer, 6-month diagnosis, Tr. 1526:21-1527:4
Q. I understand that. Did you have a specific financial need for the money? Or was it going to go towards medical expenses or something specific? Or --
A. No. I used the money to -- to straighten out my kids. I wanted to make sure that, you know, my kids were, you know, were straight, you know, before I died. So I used the money to help them out.

Division Response: Admitted that Alamo testified that "she had a good experience," and thought EndCare was "helpful," and that she recommended it to people she knew who "might not have had the financial resources to appropriately handle end-of-life matters." The cited testimony from Davis does not support this proposed finding. Additionally, neither EndCare, nor Lathen, paid Davis the 1/3 of the joint account to which she was entitled as a joint tenant when he closed the account after learning that she was cured. (PFOF¶¶325;327;704.)

259. Mr. Lathen went to great lengths to ensure that his Participants were comfortable with the program and, ultimately, treated them with kindness, care, and concern for their well-being.

Dennisse Alamo, Tr. 2349:15-2350:3
Q. Generally, Ms. Alamo, how would you describe your interactions with Mr. Lathen?
A. Positive. Helpful. Supportive.
Q. Did you ever feel pressured by Mr. Lathen to participate in the program?
A. No.
Q. How did you feel about the adequacy of Mr. Lathen's disclosures to you about the program?
A. I think they were – that he was honest, that he was transparent. He answered, you know, any questions that I had to my satisfaction.

Dennisse Alamo, Tr. 2346:16-347:11
Q. Would you mind reading it?
A. Sure. "Jay it was a wonderful surprise to receive your note. Your generous contribution on Mom's behalf means so much and was very touching. We are thrilled that she will be acknowledged on the Calvary tree of life among so many strong and courageous individuals. "Thank you from the bottom of my heart. I hope that you and your family will enjoy the assortment of treats" -- oh, yes, I do remember this -- "I prepared with you in mind. "Each item was made with much love and care as a sign of my deep appreciation .. Warmest regards."
Q. Do you recall why you felt compelled to send this note?
A. Yeah. I think that at a time when – you know, going through something like this is hard enough. I felt very appreciative and wanted to acknowledge, you

know, not just the business aspect, but you know, the contribution that he had made on my mother's behalf at the hospital.

Division Response: Denied, as the cited testimony does not support this proposed Finding. Admitted that Alamo testified that her interactions with Lathen were "helpful" and "supportive." No other similar testimony from any of Lathen's EndCare clients or their representatives was offered, and Respondents did not ask Davis whether she held similar views.

260. The Fund underwent an annual audit in compliance with the Custody Rule for the entire time period during which EACM was a registered investment adviser (e.g. for fiscal years ended December 31, 2012, 2013 and 2014). With respect to each such fiscal year, the audited financial statements for the Fund were issued within 120 days of the end of the fiscal year. Eden Arc withdrew its registration as an investment adviser with the SEC in February 2016, prior to the deadline to issue audited financial statements for the fiscal year ended December 31, 2015. Once it withdrew its registration, it was no longer subject to the SEC's Custody Rule or the annual audit requirement with respect to the fiscal year ended December 31, 2015. *See* Tr. 539:5-16; 648:12-18.

Division Response: This proposed Finding is argument and therefore should be stricken pursuant to the Court's order. Further, it is denied because it is wrong for at least three reasons.

First, whether the Fund underwent an annual audit is of no moment to Respondents' compliance with the Custody Rule. The Division's Custody Rule claims here – brought under Advisers Act Section 206(4)-2 and Rule 206(4)-2(a)(1) – concern whether EACM maintained client assets in the name of the client, here, the Fund. The provision of the Custody Rule that deals with annual audits—Rule 206(4)-2(b)(4) (the "Audit Exception")—does not excuse an Adviser's failure to maintain client assets in the clients' names. See 17 C.F.R. § 275.206(4)-2(b)(4) (providing that an Adviser does not have to comply with certain other provisions of the Custody Rule if in compliance with the Audit Exemption – but still requiring compliance with paragraph (a)(1)).

Second, even if the Audit Exemption provision of the Custody Rule was somehow relevant, Respondents have failed to state that they met their obligations under that provision. The Audit Exemption provides, in relevant part, that an Adviser "shall be deemed to have complied with Paragraph (a)(4) of this section with respect to the account of a limited partnership . . . that is subject to audit . . . at least annually and distributes its audited financial statements prepared in accordance with generally accepted accounting principles to all limited partners within 120 days of the end of its fiscal year." Rule 206(4)-2(b)(4). There is no evidence in the record as to whether or not EACM distributed its audited financial statements to limited partners—nor does this proposed Finding allege as much. Thus, that audited financial statements "issued" fails to even allege facts that would prove EACM's compliance with the Audit Exception provision of the Custody Rule.

Third, Respondents incorrectly imply that once the Adviser withdrew its registration, it did not violate the Custody Rule for the fiscal year 2015. Respondents are wrong. EACM, aided and

abetted by Lathen, violated the Custody Rule for the fiscal year 2015 in two ways: (a) it failed to keep client assets in the name of the client, in violation of Rule 206(4)-2(a)(1); and (b) it failed to either obtain a surprise examination or circulate audited financial statements to investors for the fiscal year 2015. As noted above, the Audit Exception provides that an Adviser "shall be deemed to have complied with Paragraph (a)(4)" if it circulates audited financial statements to investors within 120 days of the end of their fiscal year. Paragraph (a)(4) requires that an Adviser have client funds and securities verified annually on a surprise basis by an independent public accountant. Taken together, in short, the Custody Rule requires that advisers *either* circulate their audited financial statements to investors annually, or be subject to a surprise examination. EACM did neither for the fiscal year 2015. That Respondents withdrew EACM's registration in 2016 does not absolve them of their Custody Rule obligations for 2015. Therefore they violated both Rule 206(4)-2(a)(1) and Rule 206(4)-2(a)(4) for that year.

261. For joint accounts opened under Participant Agreements executed prior to January 2013, the Fund's economic benefits derived from its rights under the Investment Management Agreement ("IMA"). For joint accounts opened under Participant Agreements executed after January 2013, the Fund's economic benefits derived from its rights under the original Discretionary Line Agreement ("ODLA"), subsequent Discretionary Line Agreement (SDLA) and Profit Sharing Agreement ("PSA"). *See* Div. Ex. 191 / Div. Ex. 190 and Div. Ex. 72 / Div. Exs. 183, 184 and 185.

Division Response: Denied, as this proposed Finding mischaracterizes the evidence. Under the IMA, Lathen and Jungbauer were nominees for EACM and were acting on behalf of EACM and EACP. (PFOF¶355.) The nominees agreed that they would hold the survivor's option instruments "as nominee for and on behalf of the partnership only," and that they had "no legal or beneficial interest in the SO Investments." (PFOF¶357.) In addition, Lathen acknowledged acting as a nominee owner for the Fund. (PFOF¶358.)

The Discretionary Line Agreements stated that the lender "would provide a discretionary line of credit in order to finance the purchase of certain securities to be owned by Borrower as a joint tenant with rights of survivorship pursuant to agreements between Borrower(s) and certain identified Participants." (PFOF¶¶369;376.) The Promissory Note provided that Lathen promised to pay EACP "for all amounts outstanding." (Div. Ex. 193.) The Profit Sharing Agreement, in place at the same time as the Discretionary Line Agreements and the Promissory Note, provided that Lathen would transfer all profits and losses he derived from the joint accounts to the Fund. (PFOF¶374.)

In any event, despite the various non-arms' length agreements that purported to create certain arrangements, the evidence at the hearing showed that the securities in the JTWROS accounts belonged to the Fund and had to be held in the Fund's name. (See Division of Enforcement's Post-Hearing Brief, dated April 7, 2017 at pp. 20-23.)

262. The Fund's Investments consisted of the following components: (a) "Advances" made to joint accounts under the IMA for Participants Agreements preceding January 2013; (b) "Loans" to Lathen or Lathen/Participants jointly under the

~~ODLA or SDLAs respectively for Participant Agreements after January 2013~~; (c) "Profit sharing rights" under the PSA (for Participant Agreements after January 2013). *See* Div. Ex. 191 / Div. Ex. 190 and Div. Ex. 72 / Div. Exs. 183, 184 and 185.

Division Response: Denied. None of the quoted terms are defined terms in any of the agreements cited by Respondents. The IMA makes no reference to "Advances." It says that the Nominees "shall be authorized to act in behalf of the Investment Manager [EACM] and/or the Partnership [EACP] and shall be further authorized to purchase SO Investments," that they have "no legal or beneficial interest in the SO Investments", and that "[a]ll other attributes of the beneficial ownership of the SO Investments shall be and remain in Partnership." (Div. Ex. 191 p. – 2.) Similarly, "Loans" is not a defined term in the Discretionary Line Agreements. Nor is there any mention of "Profit sharing rights" or any "sharing" of profits in the PSA. To the contrary: the PSA provides that Lathen will "assign all profits and losses he derives from the Accounts and the Participant Agreements to EACP." (Div. Ex. 72 p. – 2.) (See also, supra DRRPFOF¶261.)

263. The joint accounts were always maintained with a qualified custodian and were titled in the names of Mr. Lathen, the Participant, and Mr. Jungbauer (only with respect for Participant Agreements executed prior to January 2013).

Division Response: Admitted that the accounts were titled in the names of Lathen, the Participant, and/or Jungbauer, but there is no evidence the custodians were qualified.

264. The Instrument evidencing the Fund's ownership of the Advances is the IMA itself. *See* Div. Ex. 191.

Division Response: Denied. The Fund did not own "Advances." The IMA makes no reference to "Advances." It says that the Nominees "shall be authorized to act in behalf of the Investment Manager [EACM] and/or the Partnership and shall be further authorized to purchase SO Investments," that they have "no legal or beneficial interest in the SO Investments," and that "[a]ll other attributes of the beneficial ownership of the SO Investments shall be and remain in Partnership." (Div. Ex. 191 – p. 2.) Consequently, the Fund beneficially owned the securities in the JTWROS accounts through its nominees, Lathen and Jungbauer. (See also Division of Enforcement's Post-Hearing Brief, April 7, 2017 at pp. 20-23.)

265. The Instrument evidencing the profit sharing rights is the PSA. *See* Div. Ex. 72.

Division Response: Denied. The PSA, instead of sharing profits between parties, assigns all profits to one party, specifically providing that Lathen will "assign all profits and losses he derives from the Accounts and the Participant Agreements to EACP." (Div. Ex. 72 – p. 2.) The provisions of the PSA and the DLA, in place at the same time, among other evidence, show that the Fund owned the securities in the JTWROS accounts. See also Division of Enforcement's Post-Hearing Brief ("DPHB"), dated April 7, 2017 at pp. 20-23.

266. The Instrument evidencing the ODLA dated January 24, 2013 is the agreement itself and the Promissory Note ("PN"). *See* Div. Ex. 190, 193).

Division Response: Admitted that Respondents executed a Discretionary Line Agreement dated January 4, 2013 and a Promissory Note.

267. The Instruments evidencing the SDLAs are the SDLAs themselves. See Div. Ex. 183-185.

Division Response: Denied. While Respondents executed additional Discretionary Line Agreements beginning in February 2015, (PFOF¶376), they, too, were evidenced by the Promissory Note.

268. Under the initial contractual regime enacted at Fund inception, the Fund owned Advances to Messrs. Lathen and Jungbauer under the IMA which were to be expressly used to fund the joint accounts. *See* Div. Ex. 191 – p.2 at ¶¶ 4, 41, 8.

Division Response: Denied, as this proposed Finding mischaracterizes the IMA. The IMA makes no reference to "Advances," nor does it say anywhere that the purported Advances or anything else were to be expressly used to fund the joint accounts. (Div. Ex. 191.) The IMA says that the Nominees "shall be authorized to act in behalf of the Investment Manager [EACM] and/or the Partnership [EACP] and shall be further authorized to purchase SO Investments," that they have "no legal or beneficial interest in the SO Investments", and that "[a]ll other attributes of the beneficial ownership of the SO Investments shall be and remain in Partnership." (Div. Ex. 191 p. – 2.) The nominees agreed that they would hold the survivor's option instruments "as nominee for and on behalf of the partnership only." Thus, Lathen and Jungbauer were nominees for EACM and EACP and were acting on behalf of EACM and EACP. (PFOF¶355.) In addition, Lathen acknowledged acting as a nominee owner for the Fund. (PFOF¶358.) Consequently, the Fund beneficially owned the securities in the JTWROS accounts through its nominees, Lathen and Jungbauer. (See also DPHB at pp. 20-23.)

269. Under the modified contractual regime adopted in January 2013, From January 2013 to January 2015, the Fund owned Loans made to Mr. Lathen under the Original DLA. After January 2015, the Fund owned Loans made to Mr. Lathen and Participant as joint borrowers. In addition to these Loans, the Fund owned profit sharing rights related to Mr. Lathen's share of the joint accounts under the PSA. *See* Div. Ex. 183-185.

Division Response: Denied, as this proposed Finding mischaracterizes the evidence. The Profit Sharing Agreement, in place at the same time as the Discretionary Line Agreements, provided that Lathen would transfer all profits and losses he derived from the joint accounts to the Fund. (PFOF¶374.) The Discretionary Line Agreements stated that the lender "would provide a discretionary line of credit in order to finance the purchase of certain securities to be owned by Borrower(s) as a joint tenant with rights of survivorship pursuant to agreements between Borrower and certain identified Participants." (PFOF¶¶369;376.) In addition, the

introduction of the PSA and the DLAs did nothing to change the reality that the Fund owned the securities in the JTWROS accounts. The economics of the transactions, the flow of the funds, the representations to investors in the Forms ADV, the treatment of assets in the Adviser's financials, and Lathen and the Fund's tax treatment, all did not change. (See DPHB at pp. 20-23.) In addition, the IMA continued to govern accounts of Participants signed up prior to January 24, 2013. (PFOF¶¶350-51;381.)

Dated: May 19, 2017
New York, New York

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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.

Certificate of Service

I hereby certify that I served the Division of Enforcement's (1) Post-Hearing Reply Brief, (2) Responses to Respondents' Proposed Findings of Fact, (3) Supplemental Findings of Fact, and (4) Responses to Respondents' Proposed Findings of Fact in Support of Their Inability to Pay Defense, on May 19, 2017, on the below parties by the means indicated:

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