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.

THE DIVISION OF ENFORCEMENT'S SUPPLEMENTAL STATEMENT OF FACTS

DIVISION OF ENFORCEMENT
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May 19, 2017

1016. **[REDACTED].**

1017. There is no evidence that Lathen sought or received any advice from Galbraith about his redemption letters, or disclosure to issuers.

1018. There is no evidence, other than Lathen's testimony, that he discussed the revisions he made to the McCord Participant Agreement, or any subsequent revisions, with Roper.

3260:13 **Q Okay. And did you -- did you see any**
3260:14 **problems with this participant account when you**
3260:15 **signed it?**
3260:16 A Not when I signed it, no.
3260:17 **Q Okay. Did there come a time where you did**
3260:18 **see a problem with this agreement?**
3260:19 A Yes. The language that you just had me
3260:20 read was something that had not been in my
3260:21 participant agreement before.
3260:22 **Q Which language in particular? Can we go**
3260:23 **back a page?**
3260:24 A Sure.
3260:25 MR. HUGEL: Paragraph 3, please.
3261:1 THE WITNESS: Where it says, "Not be
3261:2 permitted to pledge, borrower against, withdraw or
3261:3 exercise any right of ownership."
3261:4 That "exercise any right of ownership" was
3261:5 not something that was in sort of the pre-Gersten
3261:6 Savage review of my participant agreement.
3261:7 BY MR. HUGEL:
3261:8 **Q How did it get into this one?**
3261:9 A This was presumably added by Eric Roper in
3261:10 connection with his review of the participant
3261:11 agreement. And I would imagine that he was sort of
3261:12 trying to, you know, protect the fund.
3261:25 **Q And when you noticed that language, what**
3262:1 **did you do?**
3262:2 A I removed it.

3262:25 **This is an agreement with Mr. Grant.**
3263:1 **If we could go to paragraph 3 on that, at**
3263:2 **the bottom of the page, I believe.**
3263:3 **Okay. So this is the same paragraph 3**
3263:4 **that we looked at earlier. How has that changed?**
3263:5 A It says, "Participant agrees that he/she
3263:6 is not permitted to pledge, borrow against or

withdraw funds from the account."
So I believe the prior version had restriction on exercising the right of ownership, which we've removed.

Q Okay. And you perceived this as being a meaningful change to the agreement?

A Yes.

Q All right. And who made this change?

A I did.

Q All right. Did you consult with Mr. Roper about it?

A I likely did.

Q Okay. So what was the reasoning behind that change, the 10 percent minimum, 15 percent maximum?

And that's not talking about debt? That's talking about profits while both people are alive? Do I understand that correctly?

A Yes, that's right.

Q So what was the impetus for that?

A So I think there was concern that, you know, the -- I believe this was raised by one of my investors that, you know, what's to keep the participant from, you know, having, you know, a larger share of the profits or potentially, you know, accessing the account?

And I think we wanted to put some boundaries around that. And so that's why we said 5 percent of the profits and subject to a minimum of 10 and a maximum of 15.

Q Okay. And could we go to page 2, please, paragraph 4.

A Could I -- could I just make one other -- one other expansion on the earlier comment?

You had asked why we had gone to this 5 -- this 5 percent language. You know, I think we -- you know, we wanted it to be clear that the fact that we were prohibiting the participant from withdrawing funds from the account could not be construed by a third party looking at it as sort of having constructively deprived them of their beneficial interest in the account.

And so we felt the need to sort of explicitly state that -- their economics.

Q Okay. I would like to direct your attention to paragraph 4 here.

A Yes.

Q Is -- can you read that?

A Sure. It says, "In the event that Lathen and the designees should predecease the participant, participant or if applicable, participant's estate hereby agrees to cooperate with investors or their designated agent to liquidate the accounts.

"Once liquidated, any funds contributed by investors to the accounts would be returned to them. The remaining value in the accounts, if any, would then be divided 95 percent to investors and 5 percent to participants or their estate."

Q Is this the first version of the participant agreement in which the participant agrees to share profits with the fund if they outlive you -- if they outlive the other person?

A It could be. If not the first, it's certainly very close to first.

Q And is this the only version of the participant agreement you ever used that had such a provision?

A That had a -- a specific provision dealing with the participant outliving the joint owners?

Q No. Had the provision that the participant would share the profits of the accounts --

A Yes.

Q -- if they obtained it as a survivor?

A Yes.

Q Okay. And how long did you use this agreement?

A This was used until January of 2013.

Q Okay. And how many -- I'm sorry.

What was the reason for making this change?

A Well, if my stepfather and I died, that would be a rather bad event for the fund. Because the fund would effectively lose the entire investment in the account.

Q Uh-huh. So was it to protect the fund?

A Yes, it was.

Q Did you speak to Mr. Roper before --

A Yes.

3275:7 **Q Do you know if Mr. Roper wrote that**
3275:8 **language?**
3275:9 A I don't know if he wrote it or if I showed
3275:10 it to him. I don't recall.

1019. Respondents did not ask Roper about the revisions Lathen testified that he made to the Participant Agreement and as to which he claimed he had sought Roper's advice. Roper testified that he could not recall whether he had worked on any version of the Participant Agreement, or whether it had been some other firm.

2223:12 **Q And is there any distinction that you can**
2223:13 **tell between this participant agreement and the**
2223:14 **participant agreement that we just reviewed?**
2223:15 A They look like there have been redlined
2223:16 changes made.

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.

2224:6 JUDGE PATIL: Sustained.
2224:7 Mr. Roper, maybe you can help me.
2224:8 THE WITNESS: You and I, right?
2224:9 JUDGE PATIL: Earlier -- and counsel are
2224:10 welcome to object to my questioning as well.
2224:11 Earlier you stated that your firm had been
2224:12 retained, in part, to draft three principal
2224:13 documents; one was a PPM, one was an LPA, and one
2224:14 was a subscription agreement.
2224:15 THE WITNESS: That's correct.
2224:16 JUDGE PATIL: At that time, you seemed to
2224:17 indicate there may have been additional documents
2224:18 that your firm helped to draft. But when you first
2224:19 testified about it, you didn't recall them by name.
2224:20 THE WITNESS: That's correct.
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.

1020. Respondents asked Galbraith no questions about the impact of the IMA or PSA on his analysis of the validity of Respondents' joint tenancies, under NY Banking Law § 675 or otherwise. There is no evidence that Galbraith engaged in any such analysis.

1021. Lathen did not believe that NY Banking Law § 675 allowed entities to hold valid joint tenant accounts.

3573:13 **Q Are you saying that under Banking Law 675 of**
3573:14 **fund can be a joint tenant; is that what you said?**
3573:15 A I don't think I said that at all.

1022. Although Lathen told Galbraith that he made no withdrawals of funds from the Joint Accounts, that statement was false.

3594:4 **In the e-mail, he says, "I also noted that the**
3594:5 **borrower in the earlier agreements was simply to prevent**
3594:6 **the participant from withdrawing more than the moiety and**
3594:7 **also, that you did not make withdrawals either. So**
3594:8 **functionally, there was no difference in the rights of**
3594:9 **the joint tenants during their lives."**
3594:10 **Did you tell Kevin Galbraith that you did not**
3594:11 **make withdrawals from the joint tenant accounts?**
3594:12 A I think what I'm referring to here is to the
3594:13 extent -- and this is referring to the joint accounts
3594:14 that were governed by the IMA. In the instances where
3594:15 moneys were withdrawn from the account, it was -- you
3594:16 know, I had the investment management agreement where,
3594:17 you know, the profits from the account were flowing into
3594:18 the fund. And so I never personally was able to take a
3594:19 distribution from the account without, you know, regard
3594:20 to my obligation to remit the profits to the fund.
3594:21 So I think what I'm saying is, it's not like I
3594:22 can take money out of the account and put it in my own
3594:23 personal bank account. And so from that perspective,
3594:24 there was no difference between the participant and I.
3594:25 **Q But you did make withdrawals from the joint**
3595:1 **tenant accounts and deposited it into your brokerage**
3595:2 **account with David Jungbauer; is that right?**
3595:3 A Yes.

1023. Galbraith told Lathen that no case law directly supported the validity of his joint tenancies under either Banking Law § 675 or common law.

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.
2873:4 So at that point, I explained to him that
2873:5 we needed to read everything that we could get our
2873:6 hands on and do our best to understand, explain and
2873:7 analogize his facts to the facts of these other
2873:8 cases.

2889:21 **Q And how did you and Mr. Lathen think that**
2889:22 **that case law relating to side agreements was**
2889:23 **relevant to his investment strategy?**
2889:24 A Sure. Whether it was the mortgage on the
2889:25 underlying asset or the side agreement impacting the
2890:1 ultimate economics of the joint tenancy, as I
2890:2 explained, we were searching for cases that were
2890:3 analogous to Mr. Lathen's joint tenancies and to his
2890:4 investment strategy, because there was no case that
2890:5 was squarely on point.
2890:6 So we discussed how those cases applied by
2890:7 analogy to his facts. And we conclude -- and I
2890:8 advised and we concluded together that the case law
2890:9 holding that a side agreement or mortgage did not
2890:10 invalidate the joint tenancies was a good piece of
2890:11 support for our position.

1024. On January 11, 2011, Calaguio sent Lathen a draft of the IMA and stated that it is "still subject to Eric's review and may be modified accordingly." (Lathen Ex. 796.)

1025. In March of 2015, Peter Bankuti was still alive. (Div. Ex. 635 (2015, File EA00032300).)

Portfolio Summary							
6/30/2015						#NAME?	#NAME?
Partic.	Account	CUSIP	Qty	Basis	Part Deceased	Issuer	CPN
Brown	3502	32022RGP6	15,000	14,663	N	1ST FINANCIAL BANK USA	2.85
Brown	3502	32022RGK7	19,000	18,113	N	1ST FINANCIAL BANK USA	2.9
Gilks	3501	06051VZQ2	250,000	242,188	Y	BANK OF AMERICA NA	1.25
Johnson	3176	06051VTX4	250,000	229,375	Y	BANK OF AMERICA NA	4.024
Bankuti	3181	06051VTX4	250,000	239,875	N	BANK OF AMERICA NA	4.024

1026. Despite the fact that Lathen had told Galbraith that he did not make withdrawals from the joint tenant accounts during the lives of the Participants (a representation that Galbraith then passed along to US Bank and Prospect Capital), during March 2015, Lathen transferred over half of the accounts assets out of the account, depleting the value of the account from $1,961,203 in February 2015 to $592,235 at the end of March 2015. (PFOF ¶¶ 611; 998-99; Div. Ex. 129.)

WEDBUSH ACCOUNT NUMBER: 4521-3181 03-01-15 THRU 03-31-15 PAGE 2 OF 7

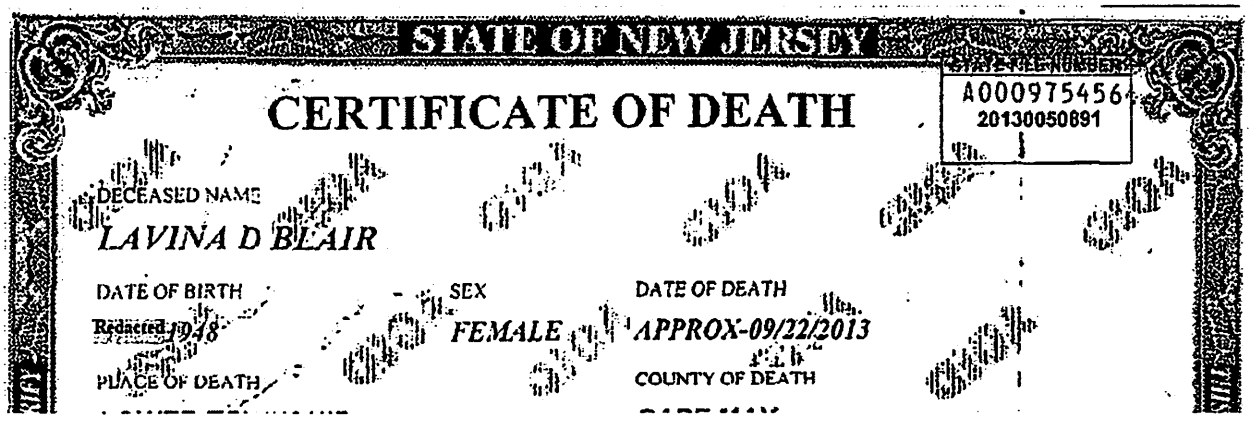
DONALD F LATHEN &
PETER BANKUTI JTWROS
WEDBUSH SECURITIES PRIME BRKR
C/O EDEN ARC CAPITAL MGMT

ACCOUNT SUMMARY

(Unpriced Securities Excluded)	PRIOR STATEMENT	03-31-15
CASH & CASH EQUIVALENTS (in US $)	3,735,440.84-	1,084,016.24-
BONDS: TAXABLE	654,206.26	622,109.61
CERTIFICATES OF DEPOSIT	5,042,446.61	1,054,142.50
ACCOUNT NET WORTH	1,961,203.03	592,235.87

INCOME/PRINCIPAL SUMMARY	CURRENT MONTH	YEAR TO DATE
TAXABLE INTEREST	64,000.04	113,268.98
TOTAL INCOME/PRINCIPAL	64,909.94	113,268.98
DEBIT INTEREST EXPENSE	3,441.38	31,078.44

1027. Lavina Blair died on or about September 22, 2013. (Div. Ex. 824 – p.8.)



STATE OF NEW JERSEY

CERTIFICATE OF DEATH

STATE FILE NUMBER
A000975456
20130050891

DECEASED NAME
LAVINA D BLAIR

DATE OF BIRTH
Redacted 1948

SEX
FEMALE

DATE OF DEATH
APPROX-09/22/2013

PLACE OF DEATH

COUNTY OF DEATH

1028. Despite the fact that Lathen had told Galbraith that he did not make withdrawals from the joint tenant accounts during the lives of the Participants, (a representation that Galbraith then passed along to US Bank and Prospect Capital), between May 1, 2013 and June 30, 2013, prior to Blair's death, Lathen reduced the value in the account from $1,042,558.17 to $238,095.81, including a transfer of $486,000 to an account in the name of Eden Arc Capital Partners on June 3, 2013. (PFOF ¶¶ 611; 998-99; Div. Ex. 124)

May 1, 2013 - May 31, 2013

ACCOUNT NUMBER [redacted]0008 AE: E001
HOUSEHOLD ACCOUNT S

DONALD F LATHEN &
DAVID E JUNGBAUER &
LAVINA D BLAIR JTWROS

Your Account Instructions
- Register in street name and hold
- Hold funds
- Margin agreement is on file

ACCOUNT SUMMARY

	OPENING BALANCE	CLOSING BALANCE
Margin account	$-2,233,827.44	$38,326.70
NET ACCOUNT BALANCE	-2,233,827.44	38,326.70
Securities	3,276,385.61	697,592.30
TOTAL PRICED PORTFOLIO	3,276,385.61	697,592.30
Total Portfolio Equity	**$1,042,558.17**	**$735,919.00**

June 1, 2013 - June 30, 2013

ACCOUNT NUMBER [redacted]0008 AE: E001
HOUSEHOLD ACCOUNT 4

**DONALD F LATHEN &
DAVID E JUNGBAUER &
LAVINA D BLAIR JTWROS**

Your Account Instructions
- Register in street name and hold
- Hold funds
- Margin agreement is on file

ACCOUNT SUMMARY

	OPENING BALANCE	CLOSING BALANCE
Margin account	$38,326.70	$-443,977.59
NET ACCOUNT BALANCE	38,326.70	-443,977.59
Securities	697,592.30	682,073.40
TOTAL PRICED PORTFOLIO	697,592.30	682,073.40
Total Portfolio Equity	**$735,919.00**	**$238,095.81**

June 1, 2013 - June 30, 2013

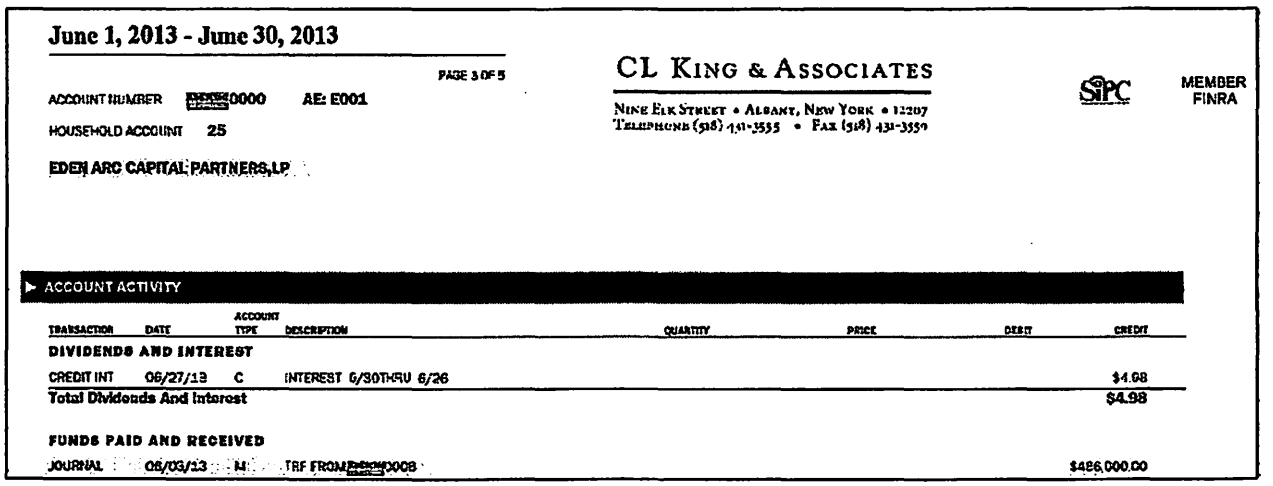
ACCOUNT NUMBER [redacted]0008 AE: E001
HOUSEHOLD ACCOUNT 4

DONALD F LATHEN &
DAVID E JUNGBAUER &
LAVINA D BLAIR JTWROS

CL KING & ASSOCIATES
NINE ELK STREET • ALBANY, NEW YORK • 12207
TELEPHONE (518) 432-3555 • FAX (518) 432-3550

ACCOUNT ACTIVITY

TRANSACTION	DATE	ACCOUNT TYPE	DESCRIPTION	QUANTITY	PRICE	DEBIT	CREDIT
DIVIDENDS AND INTEREST							
INTEREST	06/10/13	M	GATEWAY BANK OF FLORIDA DAYTONA BEACH FL CO FDIC MTHLY CLUB CPN 2.250% DUE 06/10/20 DTD 06/10/10 FC 06/10/13 061013 242,000				$462.45
INTEREST	06/17/13	M	GOLDMAN SACHS GROUP INC MEDIUM TERM NOTE B/E SUBORDINATED UNSECURED CPN 4.250% DUE 10/15/37 DTD 12/20/12 FC 01/15/13 061713 250,000				885.42
INTEREST	06/17/13	M	PROSPECT CAPITAL CORP INTERNOTES B/E SERI SUBORDINATED CPN 5.375% DUE 12/15/20 DTD 12/13/12 FC 06/15/13 061713 123,000				3,185.00
Total Dividends And Interest							**$4,532.87**
FUNDS PAID AND RECEIVED							
JOURNAL	06/03/13	M	TRF TO [redacted]2000			$486,000.00	
Total Funds Paid And Received						**$486,000.00**	



June 1, 2013 - June 30, 2013

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CL KING & ASSOCIATES

NINE ELK STREET • ALBANY, NEW YORK • 12207
TELEPHONE (518) 431-3535 • FAX (518) 431-3550

SIPC MEMBER FINRA

ACCOUNT NUMBER [redacted]0000 AE: E001

HOUSEHOLD ACCOUNT 25

EDEN ARC CAPITAL PARTNERS,LP

▶ ACCOUNT ACTIVITY

TRANSACTION	DATE	ACCOUNT TYPE	DESCRIPTION	QUANTITY	PRICE	DEBIT	CREDIT
DIVIDENDS AND INTEREST							
CREDIT INT	06/27/13	C	INTEREST 6/30THRU 6/26				$4.98
Total Dividends And Interest							**$4.98**
FUNDS PAID AND RECEIVED							
JOURNAL	06/03/13	M	TRF FROM[redacted]0008				$486,000.00

1029. Lathen attempted to redeem notes from, at least, Goldman Sachs, Prospect Capital, GECC, and Federal Farm Credit from accounts in the name of Blair. (Div. Ex. 374; see also Div. Exs. 373, 824 and PFOF¶¶149-50;156;174;184-85;190-01;352-53.)

1030. Galbraith and Lathen discussed that those cases in New York that evaluate the validity of a joint tenant account in light of side agreements look to the side agreements to determine what the intent of the parties is.

3055:22 **But they're looking to those side**
3055:23 **agreements to decide whether or not when the two**
3055:24 **parties formed the joint tenancy they had an intent**
3055:25 **to form the joint tenancy; isn't that fair?**
3056:1 A That is one of the things that they are
3056:2 looking at when they look at the side agreement,
3056:3 yes.
3056:4 **Q About that's something that you discussed**
3056:5 **with Mr. Lathen; isn't that right?**
3056:6 A Yes.

1031. The Discretionary Line Agreement stated that Lathen's death was an event of default. (Div. Ex. 190, Article 7, Section 7.01(g) ("If one or more of the following events ("Events of Default") shall have occurred. . (g) Borrower [defined as Lathen] dies or is adjudicated incompetent. . . then, immediately and automatically, . . . Lender may, by written notice to Borrower, terminate this Agreement, whereupon the unpaid principal amount of the Advances together with accrued interest thereon and all other Obligations shall become immediately due and payable and Lender [defined as Eden Arc Capital Partners] may exercise any and all rights it has under the Note, or at law or in equity...")

1032. Lathen's January 31, 2013 "Security and Account Control Agreement" states that, in the event of a default under the Discretionary Line Agreement, "Lender shall acquire and Borrower shall relinquish control of each securities account to secured party . . . in order to satisfy the accumulated loan balance therein or to take any other remedies it may have as a secured party with respect to such securities account under the applicable laws of the state where such securities account is located." (Div. Ex. 945 – p.11).

1032A. Galbraith was unsure whether he received or reviewed the Discretionary Line Agreement, and he did not review the Security and Account Control Agreement, even though these agreements impact survivorship rights in the JTWROS accounts.

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.

3576:6 **MS. WEINSTOCK: Let's take a look at Division**
3576:7 **1023 which I believe is in evidence.**
3576:8 **Q This document is dated December 3rd, 2015; is**
3576:9 **that right?**
3576:10 A Yes.
3576:11 **Q So that would be around the time that you told**
3576:12 **Kevin Galbraith that there was no security and account**
3576:13 **control agreement, right?**
3576:14 A Yes. That's true.
3576:15 **Q But approximately a year before --**
3576:16 A Well, I don't know. He's referencing in a note
3576:17 to GE, mentioning the UCC financing statements, I'm not
3576:18 sure when he would have asked me about the security
3576:19 agreement; you know, it could have been many months
3576:20 before this. I just don't know.
3576:21 **Q So many months before this e-mail, you told him**
3576:22 **there was no security and account control agreement,**
3576:23 **right?**
3576:24 A It could have been as far as many months
3576:25 before. Obviously, it would have been sometime before
3577:1 December 3rd.

1033. Grundstein testified that in 2009, Lathen told him that he was seeking to exploit what Lathen called a "loophole" in a security.

2428:8 **What's your understanding of what type of**
2428:9 **legal support Jay was seeking from you?**
2428:10 A Jay had what -- he and I discussed it,
2428:11 what I thought was just a brilliant idea. He had

2428:12 found a -- found a security that had a loophole in
2428:13 it that allowed him -- particularly given the bond
2428:14 environment at the time, the ability to make very
2428:15 large returns very quickly.
2428:16 And, you know, given -- given the manner
2428:17 in which he was going to be making money was not --
2428:18 it wasn't your ordinary type of investing.
2428:19 And he was looking to come to a law firm
2428:20 to make sure that what he was doing was legal and to
2428:21 make sure he was doing it in an appropriate manner.

1034. On October 10, 2014, Corey Chivers of Weil Gotshal & Manges LLP, wrote a letter to Galbraith which included the following passages about the validity of Lathen's joint tenancies:

> With respect to the question of joint tenancy, we have also reviewed the authorities you cited and we continue to believe that no bona fide joint tenancy was ever intended or achieve. While there is no dispute that "[g]enerally, the deposit of funds into a joint account constitutes prima facie evidence of an intent to create a joint tenancy . . . [t]he presumption created by Banking Law § 675 can be rebutted by providing direct proof *that no joint tenancy was intended* or substantial circumstantial proof that the joint account had been opened for convenience only." *In re Richichi*, 38 A.D.3d 558, 559 (2d Dep't 2007) (emphasis added) (citations and internal quotation marks omitted).
>
> When Mr. Lathen opened the brokerage account, he checked a box on that application stating: "Joint Tenants with Right of Survivorship. If one owner dies his/her interest passes to the surviving owners." This was simply not true. Just like the defendants in the SEC action, it appears to us that Mr. Lathen made a false representation on the brokerage account application when he checked that box.
>
> The terms of the participation agreement itself demonstrate that there was no intention to establish a joint tenancy. A joint tenancy requires that each joint tenant have an equal and identical interest in the entire *property*. *Goetz v. Slobey*, 76 A.D.3d 854, 956 (2d Dep't 2010) ("A joint tenancy is an estate held by two or more persons jointly, with *equal rights to share in its enjoyment during their lives,* and creating in each joint tenant a *right of survivorship*") (emphasis added) (internal citations and quotation marks omitted). In a true joint account, any joint tenant "has the right to withdraw one half of the funds during the lifetime of both tenants; in other words, at the time the account was opened, there must have been a present gift from the original donor to the cotenant of one half of the

account which each could withdraw unilaterally while both were alive." *In re Estate of Zecca*, 152 A.D.2d 830, 830-1 (3d Dep't 1989) (citations omitted). Here the participant did not possess any such rights. The participant agreement limited the participant's interest in the account to a nominal amount (which was clearly less than 50% of the value); prevented the participant from withdrawing the funds without Mr. Lathen's permission; and restricted the participant from pledging or encumbering the assets in the account.

Furthermore, the fact that Mr. Lathen maintained control over the account and limited the participant's ability to access the funds in the account is further evidence that there was no intent to establish a joint tenancy. *Ehrlich v. Wolf*, 2011 WL 197821 (N.Y. Sup. Ct. Jan. 11, 2011), one of the cases you rely upon, supports the position that no joint tenancy was intended because unlike the party in the *Ehrlich* case, Mr. Lathen "retained control of the account such that [he] did not intend that [the participant] have access without [his] permission." *Id. See also In re Yaros*, 90 A.D.3d 1063, 1064 (2d Dep't 2011) (evidence, such as an agreement requiring permission from the other party before withdrawing funds from the account, demonstrates that the party "did not intend to make a present gift of one-half of the account," which was sufficient to demonstrate, prima facie, that there was no intent to create a joint tenancy); *Wacikowski v. Wacikowski*, 93 A.D.2d 885 (2d Dep't 1983) (factors establishing that there was no intent to give the other party a "beneficial interest in [the] account during her lifetime" sufficient to rebut the presumption that the account was a joint tenancy included: "all the money in the account had been solely her own, that she always had exclusive possession of the account passbook and that her son has never made any deposits or withdrawals from the account").
(Div. Ex. 999 – pp. 5-6.)

1035. Galbraith understood, by Chivers's letter, that GECC disagreed with Galbraith's analysis of the caselaw on joint tenancies.

3070:20 **Q Okay. And then they go on to address**
3070:21 **certain of the case law; is that correct?**
3070:22 A Yeah. It looks like they cite Goetz and
3070:23 Zecca.
3070:24 **Q And Zecca is one of the cases you cited**
3070:25 **this morning; is that correct?**
3071:1 A I think I referenced it. I don't think I
3071:2 discussed it at any depth. But I know I referenced
3071:3 its name, uh-huh.
3071:4 **Q In your testimony this morning; is that**
3071:5 **correct?**

3071:6 A Yes.

3072:7 **Q And then they go on to cite some**
3072:8 **additional case law for you; is that correct?**
3072:9 A Yes. They cite Ehrlic and Yaros and
3072:10 Wacikowski, uh-huh.

3073:20 **Q Okay. So it's fair to say that GECC and**
3073:21 **their counsel disagreed with your analysis of the**
3073:22 **validity of Mr. Lathen's joint tenancies?**
3073:23 A Yes.

1036. On January 5, 2015, Chivers wrote a letter to Galbraith which included the following passages about the validity of Lathen's joint tenancies:

Joint Tenancy

If the participant was not a beneficial owner of the Notes, there is no right to payment upon her death and there is no need to inquire whether a joint tenancy was created. As set forth in our prior letter and below, there was not a bona fide joint tenancy, nor was one intended to be created. Rather, Mr. Lathen sought to create the fiction of a joint tenancy in an effort to obtain a recovery to which he had no contractual right.

Your letter claims that the Account Agreement "creates a statutory joint tenancy brokerage account under New York's Section 675 as a matter of law" and that the death of a person who was a joint tenant will be deemed the death of the beneficial owner of the Note. You assert that so long as the Account Agreement satisfies the requirements of Section 675 of New York banking law, the participant is deemed the beneficial owner under New York law. Beneficial ownership cannot be determined without reference to the Participant Agreement because it identifies who controls the Account and has the power to dispose of the securities in the Account. Although the Account Agreement recites the statutory language for a joint tenancy, as discussed below, the presumption is rebuttable where, as here, there is another agreement that clearly vests beneficial ownership with only one person, thereby manifesting that there was never to be a joint tenancy.

While your letter acknowledges that the "Participant Agreement and Account Agreement, operating together, may arguably fall short of a traditional common law joint tenancy," it asserts that since the accounts are not "convenience accounts," the presumption that the account is a joint tenancy cannot be rebutted. Any direct proof that

demonstrates the parties did not intend to form a joint tenancy will rebut the presumption. *See In re Yaros*, 90 A.D.3d 1063, 1064 (2d Dep't 2011) (The statutory presumption created by Banking Law § 675, however, can be rebutted "'by providing direct proof that no joint tenancy was intended *or* substantial circumstantial proof that the joint account had been opened for convenience only'") (citation omitted). The Participant Agreement reflects that there was no intent to form a joint tenancy. Courts in New York will not find that a joint tenancy exists where contemporaneous writings contradict that assertion. *See, e.g., Thomas v. Ives*, 14 A.D.2d 366, 369 (3d Dep't 1961) (applying the predecessor to Section 675 and holding that the "avowed purpose acknowledged by defendant . . . is completely foreign to any purpose of vesting a right of survivorship in the said defendant and the writing acknowledged by him completely negates any volition on the part of the deceased to create a joint tenancy in statutory form").

We are not aware of any authority which would allow an account holder to take advantage of the statutory presumption of a joint tenancy by falsely checking a box stating that an account is a joint account with rights of survivorship where the parties' contemporaneous written agreement contradicts that representation. Indeed, one of the *Staples* defendants advanced the same argument about the statutory presumption of a joint tenancy. This argument was categorically rejected by the SEC and was not credited by the court.

Your letter suggests that the Account satisfies the requirements of Section 675 because C.L. King, the brokerage firm where the Account is held, would be required to honor a request by the participant to withdraw funds from the account. This statement is contradicted elsewhere in your letter (page 4) where you acknowledge that the participant was not entitled "to access[] funds from the joint account without Mr. Lathen's permission." Even if C.L. King (which was not a party to the Participant Agreement) could honor such withdrawal request, the participant had no right to withdraw the funds under the Participant Agreement. Please let us know whether C.L. King was given a copy of the Participant Agreement or advised of its existence.

Your letter characterizes the Participant Agreement as a mere encumbrance, similar to a mortgage or a lien that a bank may hold on property, and cites *Smith v. Bank of Am., N.A.*, 103 A.D.3d 21 (2d Dep't 2012). There the court recognized that a joint tenancy can be severed where there is a "written instrument that evidences the intent to sever the joint tenancy" and noted that a mortgage, which

was merely a lien on the property, did not contain any language evidencing an intent to sever the joint tenancy. *Id.* at 23. Here, unlike in *Smith* where the mortgage was entered into after the creation of the joint tenancy, the contemporaneous Participant Agreement contains a clear manifestation that the parties did not intend to confer a gift of one half of the interest in the Account with a right of survivorship.[1]

***

Your letter states that Mr. Lathen has a proper Survivor's Claim for another account (Carlos G. Nonone) and that the Nonone Participant Agreement creates a "traditional joint tenancy" because it does not have a 95/5 profit split and the participant has full survivorship rights under both the account agreement and the participant agreement. The Nonone Participant Agreement does not create a joint tenancy. It requires that the entire account be pledged to secure a loan provided by Lathen to the account to cover the payment to the participant and to finance the purchase of the Notes. By encumbering the account with a loan that is repaid to Mr. Lathen prior to making any distributions to the participant, Mr. Lathen ensured that he was not providing a gift of half of the funds and an equal right of survivorship to the participant. Mr. Lathen retained the same rights to control and dispose of the Notes in the Nonone account as he did with the Blair Account, as well as the same power of attorney, and rights to pledge and grant a security interest in the account. Any contention that Mr. Lathen intended to make a gift of one half of the account to Mr. Nonone is further contradicted by the Participant Agreement, ¶4, which states: "It is not expected that Lathen will predecease participant and therefore it is unlikely that participant or participant's estate will receive any distributions from the Account(s) upon the death of Lathen." And this assertion of intent to make a gift is further contradicted by ¶2(f) which provides: "Participant parties further acknowledge that neither Participant nor Participant's estate will participant in profits in the Account(s)

[1] In the other cases cited in your letter, *In re Grancaric*, 91 A.D.3d 1104 (3d Dep't 2012) and *In re Estate of Ehrlich v. Wolf*, No. 113413/10, 2011 N.Y. Misc. LEXIS 630 (Sup. Ct. N.Y. County Jan 11, 2011), there was insufficient evidence to rebut the presumption of a joint tenancy. In *In re Grancaric* the court noted that "[a]bsolutely no evidence exist[ed]" to rebut the statutory presumption. 91 A.D.3d at 1106. Likewise, in *In re Estate of Ehrlich*, the court noted that the petitioner must establish at the time of the "opening of the account" that the account was "in truth something different from the tenancy defined by the presumption", and an agreement dated after the opening of the account was not sufficient to rebut the presumption. 2011 N.Y. Misc. LEXIS 630, at *5 (citations omitted). Here, the Participant Agreement, which was entered into prior to the opening of the account, is direct proof sufficient to rebut the statutory presumption.

following Participant's death." The Nonone participant agreement is dated February 28, 2014. Like Ms. Blair, Mr. Nonone died within eight months of signing the participant agreement. There was no expectation that Mr. Nonone or his estate would receive anything from the account upon his death as the account proceeds were required to be used to repay Lathen's loan. Accordingly, Mr. Lathen's assertion that Mr. Nonone had "full survivorship rights" under the Participation Agreement is nothing more than a legal fiction and is contrary to the express intent of the parties.

The agreements between Mr. Lathen and the two participants were designed to create sham joint tenancies in an effort to obtain windfall payments for Mr. Lathen upon the imminent deaths of participants. Neither Ms. Blair nor Mr. Nonone was a beneficial owner of a valid joint tenancy account with Mr. Lathen under New York law. In our view, GECC properly exercised its discretion to deny Mr. Lathen's request to redeem the Notes in those accounts. (Div. Ex. 838 – pp. 6-10.)

See also:

(Galbraith)

3080:7 **Q Okay. And on the next page, he addresses**
3080:8 **Smith V Bank of America, which is a case that you**
3080:9 **cited in your direct testimony; is that correct?**
3080:10 A Yes.

3081:6 **Q So fair to say that as written, they**
3081:7 **disagreed with your analysis of Smith?**
3081:8 A Mr. Chivers disagreed with my analysis of
3081:9 Smith, yes.
3081:10 **Q Okay. And can you read footnote 7 for us,**
3081:11 **please.**
3081:12 A "The other cases cited in your letter,
3081:13 Grancaric, Ehrlic, there was insufficient evidence
3081:14 to rebut the presumption of joint tenancies.
3081:15 "In Grancaric the court noted that
3081:16 absolutely no evidence existed to rebut the
3081:17 statutory presumption.
3081:18 "Likewise, in the estate of Ehrlic, the
3081:19 court noted that the petitioner must establish at
3081:20 the time of the opening of the account the account
3081:21 was something in truth something -- something in
3081:22 truth, something different from the tenancy defined
3081:23 by the presumption. And an agreement dated after
3081:24 the opening of the account was not sufficient to
3081:25 rebut the presumption.

3082:1 "Here the participant agreement which was
3082:2 entered into prior to opening of the account is
3082:3 direct proof sufficient to rebut the statutory
3082:4 presumption."
3082:5 So, yes, that was his take on some of the
3082:6 cases that we were discussing.
3082:7 **Q Earlier. Okay?**
3082:8 **MS. BERKE: And, Mr. Chan, can you scroll**
3082:9 **to page 10, please. And scroll down to the**
3082:10 **paragraph that begins, "The agreements."**
3082:11 **BY MS. BERKE:**
3082:12 **Q And then Mr. Chivers writes, "The**
3082:13 **agreements between Mr. Lathen and the two**
3082:14 **participants were designed to create a sham -- to**
3082:15 **create sham joint tenancies in an effort to obtain**
3082:16 **windfall payments for Mr. Lathen upon the imminent**
3082:17 **deaths of the participants.**
3082:18 **"Neither Ms. Blair nor Mr. Nonone was a**
3082:19 **beneficial owner of a valid joint tenancy account**
3082:20 **with Mr. Lathen under New York law. In our view,**
3082:21 **GECC properly exercised its discretion to deny Mr.**
3082:22 **Lathen's request to redeem the notes in those**
3082:23 **accounts."**
3082:24 A As he says, he's expressing our view -- or
3082:25 GECC's view, yes. That's what he wrote.
3083:1 **Q Again, that was a view that was passed**
3083:2 **along to your client, correct?**
3083:3 A Yes.

1037. Galbraith understood from Chivers's January 5, 2015 letter that GECC believed the Participant Agreement was material to their eligibility determination, a view which he passed along to Lathen.

(Galbraith)
3079:21 **Q They disagreed with your position. But**
3079:22 **they told you that having the participant agreement**
3079:23 **was important to their decision as to whether or not**
3079:24 **Mr. Lathen could redeem the option; isn't that**
3079:25 **right?**
3080:1 A He wrote that it couldn't be determined
3080:2 without reference to it; so, yes.

3083:1 **Q Again, that was a view that was passed**
3083:2 **along to your client, correct?**
3083:3 A Yes.

1038. Regarding joint tenancies, Joseph Muccia, counsel for US Bank, wrote, in relevant part, to Galbraith on September 19, 2014:

> In the second part of your letter (p. 6 *et seq*), you misstate the holdings of authorities upon which you rely, and overlook controlling principles, in contending that Eden Arc's agent was a "joint tenant."
>
> New York law defines a joint tenancy as "an estate held by two or more persons jointly with ***equal*** rights to ***share*** in its enjoyment during their lives ... with a right of survivorship." *Smith v. Bank of Am.*, 103 A.D.3d 21, 23 (2d Dep't 2012) (emphasis added); *accord, Cortelyou v. Dinger*, 62 Misc.2d 1007, 1010 (S. Ct. Richm. Co. 1970). There are several essential "unities" necessary for a joint tenancy to exist, including the unity of "interest – that each [joint tenant] have an interest ***identical*** with the interest of each of the co-tenants," and the unity of "possession – that they each be entitled to the common possession of the entire property." *Bankr. Exch., Inc. v. Langlands*, 2009 U.S. Dist. LEXIS §4005, 7 (W.D.N.Y. 2009) (emphasis added); *accord, Cortelyou, supra.*
>
> Each of these factors is missing in the relationship created by the Participant Agreement. Section 2(f) of that Agreement describes the full universe of benefits that the Participant can derive during his/her lifetime from the relationship with Eden Arc's agent, *i.e.* "[t]he Participant shall be entitled to 5% of the net profit in the Accounts . . . subject to a minimum of $10,000 and a maximum of $15,000," and specifies that the profits accruing to Eden Arc's agent likely will be "substantially in excess" of that which accrues to the Participant. And Section 3 of the Agreement makes clear that the Participant shall have ***no*** right of access to any of the ***principal*** in an account without the written consent of Eden Arc's agent. In sum, the Participant is provided a token payment, from a small fraction of the profit in an account, while Eden Arc's agent maintains complete control over all of the account's principal and a vast majority of its profit.
>
> Similarly, there is a lack of unity in rights of survivorship provided under the Participant Agreement. While Section 3 of the Agreement provides that "***all assets and proceeds*** from such Account(s) will pass directly" to Eden Arc's agent and his investors upon the Participant's death (emphasis added), Section 4 of the Agreement provides that, in the event Eden Arc's agent should pre-decease the Participant, the account(s) shall be liquidated and only 5% of certain of the proceeds shall pass to the Participant.

This is all overlooked in your letter. Rather, you focus exclusively on N.Y. Banking Law § 675, as if it overrides the foregoing principles, and you also misstate the holdings of cases construing § 675.

You assume, for example, that under § 675 a mere recitation of the term "joint tenant" in relation to an account, of itself, creates a presumption that an account in reality is a joint tenancy, without regard to the fundamental principles cited above. Section 675, however, applies by its terms only where:

> [S]uch deposit or shares and any additions thereto made, by either of such persons, after the making thereof, shall become the property of such persons as joint tenants and the same, together with all additions and accruals thereon, shall be held for the exclusive use of the persons so named, and may be paid or delivered to either during the lifetime of both or to the survivor after the death of one of them[.]

The statutory requirement is that the ***entirety*** of an account's principal, regardless of which party made the deposits (and inclusive of any accruals), shall be subject to the use of and payable to ***either*** party in their lifetime ***and*** delivered to the survivor (regardless of which party is the survivor) upon death of the other. If these criteria are not met, § 675's presumption of joint tenancy does not apply. That is clear from the words of the statute, and from the courts' construction of it, *e.g. In re Estate of Stalter*, 270 A.D.2d 594, 595 (3d Dep't 2000); *In re Estate of Camarda*, 63 A.D.2d 837, 838 (4th Dep't 1978). In contrast, as shown above, the Participant Agreement denied Participants of ***any*** access to an account's principal during their lives without written consent of Eden Arc's agent, entitled Participants to only a ***very limited portion*** of an account's profits and, rather than a right to survivorship upon the death of Eden Arc's agent, created an obligation to liquidate an account, from which Participants would receive only 5% of certain proceeds. The § 675 presumption therefore is not reached in this case. *See also Marrow v. Moskowitz*, 255 N.Y. 219 (1931); *In re Estate of Magacs*, 227 A.D.2d 760, 761 (3d Dep't 1996); *Rother v. Panessa*, 62 Misc.2d 896 (City Ct. 1970); *In re Palecek's Estate*, 9 Misc.2d 789 (Sur. Ct. Suffolk Co. 1958).

Moreover, even if a presumption of a joint tenancy could arise merely from use of the label "joint tenants," you incorrectly state (at p 8 of your letter) that New York state courts have narrowly limited the evidentiary bases for overcoming that presumption to "fraud, undue influence, lack of capacity or a determination by the

court based on the facts of the case, that the joint tenancy was instead of so-called 'convenience account.'" The case law you have cited does ***not*** limit the rebuttal of a statutory presumption of joint tenancy to those grounds. *Estate of Ehrlich v. Wolf*, No. 113413/10, 2011 N.Y. Misc. LEXIS 630 (Sup. Ct. N.Y. Co. Jan. 11, 2011), discusses only whether an account was a "convenience" account, and neither it, nor *Estate of Stalter*, *supra*, limit grounds for challenge to a joint tenancy in the way you contend.

In any event, your emphasis on these being the "only grounds" is inconsequential, as the last of your stated four bases to invalidate a presumption of joint tenancy, the maintenance of a "convenience account," is present here. You contend (at pp. 9-11 of your letter) that the accounts in question were not "convenience accounts", and therefore that there is no basis to invalidate a conclusion of joint tenancy, because Participants held ***some*** survivorship rights, albeit ones that were far from equal to those held by Eden Arc's agent. That, however, misstates the evidentiary requirements for showing a "convenience account." The decision in the *Corcoran* case to which you refer (letter p. 10) holds that a party challenging the statutory presumption also may defeat a finding of joint tenancy by "direct or circumstantial proof" that the joint account was established as a convenience and not with the intention of conferring a ***present*** beneficial interest on the other party to the account." (63 A.D.3d at 96) (emphasis added). This is precisely the case presented by the Participant Agreement – it did not confer to the Participant a present joint interest in the content of an account.

You assert (letter pp. 10-11) that "[t]he central feature of a convenience account is that the account holders simply do not intend survivorship rights to pertain to the account" and, therefore, that the Participant's survivorship benefit, however limited, of itself establishes the existence of joint tenancy. New York courts, however, do ***not*** look ***only*** for the existence of a survivorship benefit, but instead also look to whether both parties had a ***present*** beneficial interest in an account, to determine if joint tenancy is present. *Corcoran, supra.*

Finally, even accepting the flawed premise that an account's survivorship benefit to a Participant of itself demonstrates the Participant was a true joint tenant, it is a significant stretch to argue that a Participant's right to 5% of certain of an account's liquidation value upon the death of the Eden Arc agent was the requisite "survivorship benefit." A survivorship benefit consisting of anything less than the entire account is antithetical to the notion of joint tenancy.

The arguments and case law presented in your letter do nothing to disturb the conclusion of the Bank that the accounts at issue are not joint tenancies under New York Law.
(Div. Ex. 627 – pp. 3-6.)

See also:

(Galbraith)
3099:4 **Q "New York law defines a joint tenancy as,"**
3099:5 **quote, "An estate held by two or more persons**
3099:6 **jointly with equal rights to share in its enjoyment**
3099:7 **during their lives with a right of survivorship,"**
3099:8 **end quote.**
3099:9 **And they're citing Smith V Bank of**
3099:10 **America, correct?**
3099:11 A That's what they're citing, uh-huh.
3099:12 **Q And that's one of the cases that we**
3099:13 **discussed earlier, correct?**
3099:14 A Yes. That was the mortgage case.
3099:15 **Q And they go on to do an analysis of the**
3099:16 **law. They also cite Cortelyou V Dinger and they**
3099:17 **cite, Bankruptcy Exchange Inc. V Langlands, correct?**
3099:18 A Yes.

3100:17 **Q Okay. And if you flip to page 4 of the**
3100:18 **exhibit, down to the middle paragraph, it goes on:**
3100:19 **"The statutory requirement is that the**
3100:20 **entirety of an account's principal regardless of**
3100:21 **which party made the deposits, and inclusive of any**
3100:22 **accruals, shall be subject to the use of and payable**
3100:23 **to either party in their lifetime and delivered to**
3100:24 **the survivor regardless of which party is the**
3100:25 **survivor upon death of the other.**
3101:1 **"If these criteria are not met, Section**
3101:2 **675's presumption of joint tenancy does not apply.**
3101:3 **That is clear from the words of the statute and from**
3101:4 **the court's construction of it."**
3101:5 **And then they go on to cite the Stalter**
3101:6 **case, which I think is another case that you**
3101:7 **discussed on direct; is that correct.**
3101:8 A Did I discuss Stalter on direct, yes.

3101:16 A Yes. They cite Moskowitz, Magacs,
3101:17 Panessa, Palacek's estate, yes.

3102:18 **Q Okay. And that is, again, a position that**

3102:19 **you passed along to your client, correct?**
3102:20 A I forwarded this letter to my client.

Dated: May 19, 2017
New York, New York

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