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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.

THE DIVISION OF ENFORCEMENT'S STATEMENT OF FACTS

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April 7, 2017

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PROPOSED FINDINGS OF FACTS ("PFOF")

I. Facts Regarding Respondents' and the Fund's Background

Respondents' Background

1. At the time of the Administrative Proceeding, Donald F. ("Jay") Lathen, Jr., ("Lathen") was 49 years old. (SFOF ¶ 1.)[1]

2. Lathen graduated college in 1989 and got his MBA with distinction in 1993. At one point he held a Series 7 and a Series 24 and 63. A Series 24 is for a supervisor. (SFOF ¶ 2.)

3. Lathen was a managing director in the investment banking department at Citigroup from July 2007 until September 2008. While at Citigroup, he was a managing director and co-head of Citigroup's energy mergers and acquisition business in the U.S. Prior to joining Citigroup, Lathen was a managing director at Lehman Brothers where he spent 11 years with its industry-leading global natural resources investment banking group. Over the course of his 15-year investment banking career, Lathen advised on over $100 billion worth of completed transactions. (SFOF ¶ 3.)

4. In 2009, after he was laid off by Citigroup, Lathen discovered survivor's option bonds.

> 3172:4 **Q Okay. Let's talk about survivor option**
> 3172:5 **bonds.**
> 3172:6 **When did you first hear of them?**
> 3172:7 A I discovered the provision sort of by
> 3172:8 happenstance. If this was in early 2009, maybe
> 3172:9 February-March, somewhere in that time period, and I
> 3172:10 had owned some General Motors and GMAC bonds dating
> 3172:11 back to 2004 when I had put them in my personal
> 3172:12 portfolio.
> 3172:13 And in early 2009, the Obama
> 3172:14 administration was sort of doing their Detroit
> 3172:15 rescue. And General Motors was basically going to be
> 3172:16 taken in for a pre-packaged bankruptcy.
> 3172:17 So as a GM and GMAC bondholder, and also
> 3172:18 having some time on my hands, I decided to take a
> 3172:19 look at the restructuring documents associated with
> 3172:20 the GM transaction.
> 3172:21 And in the course of reading prospectuses
> 3172:22 for the instruments that I own, both the GM bonds
> 3172:23 and the GMAC bonds, the GMAC bonds in particular

[1] SFOF paragraphs refer to the March 31, 2017 Order on Stipulations. PFOF refers to proposed findings of fact set forth in this document.

3172:24 were GMAC smart notes, which when I read the
3172:25 prospectus, I came across the survivor's option
3173:1 provision. And that was my first awareness that a
3173:2 survivor's option even existed.

5. Prior to launching Eden Arc Capital Partners LP ("EACP" or the "Fund") (and for some time thereafter), Lathen purchased survivor's option bonds with terminally- ill individuals using his own money, Gary Rosenbach's money, and Robert Milius's money. (Div. Exs. 496; 2052.)

3493:2 **Q You had mentioned a high net worth investor**
3493:3 **named Gary Rosenbach, correct?**
3493:4 A Yes.
3493:5 **Q And you had a relationship -- a business**
3493:6 **relationship with Mr. Rosenbach starting sometime in**
3493:7 **2009 -- is that right -- or was it 2010?**
3493:8 A It was 2010. I believe I was introduced to him
3493:9 in the summer of 2010 by a former Lehman colleague that
3493:10 knew him. And we had breakfast in New York. And that
3493:11 was the beginning of the relationship.
3493:12 **Q And you were engaging in this strategy with Mr.**
3493:13 **Rosenbach not through a fund; is that right?**
3493:14 A That's correct.

3227:20 **Q So did there come a time when you decided**
3227:21 **to set up an investment fund based on this strategy?**
3227:22 A Yes. I began exploring raising the fund
3227:23 for the strategy around the same -- about the same
3227:24 time that I started opening up accounts with Gary.
3227:25 And, in fact, when I met with Gary, I had
3228:1 indicated to him that I was, you know, considering
3228:2 raising the fund. And, you know, I think my initial
3228:3 thought was that we would just wait until the fund
3228:4 was ready, and he would invest in the fund.
3228:5 But, you know, he had an interest in
3228:6 getting involved even earlier. And so that's what
3228:7 precipitated having the joint accounts with him, you
3228:8 know, before we actually ended up launching the
3228:9 fund.
3228:10 So while I was operating the strategy with
3228:11 Gary, I was also talking to Gersten Savage and on
3228:12 the path to raise a fund.

6. Some time ago, Lathen formed a limited liability company ("LLC") called Emprise Energy. He and a partner invested in some working interests for oil and gas properties.

918:1 **Q Now, some time ago, Mr. Lathen, you formed**
918:2 **an LLC; is that correct?**
918:3 A Yes.
918:4 **Q It was called Emprise Energy; is that**
918:5 **right?**
918:6 A Yes.
918:7 MR. HUGEL: I'm sorry. What was that
918:8 name?
918:9 MS. WEINSTOCK: Emprise Energy.
918:10 BY MS. WEINSTOCK:
918:11 **Q Is that right?**
918:12 A Yes.
918:13 **Q And you and a partner invested in some**
918:14 **working interests for oil and gas properties; is**
918:15 **that correct?**
918:16 A Yes.

7. Lathen is the Chief Executive Officer, Chief Compliance Officer, Chief Financial Officer, Chief Investment Officer, managing member, and founder of Eden Arc Capital Management, LLC ("EACM" or "the Adviser"). (SFOF ¶ 4.)

8. EACM is an investment adviser, registered with the Commission between October 2012 and February 2016, which was founded and controlled by Lathen. EACM acted as the investment manager to Eden Arc Capital Partners, LP ("EACP" or "the Fund"). (SFOF ¶ 5.)

9. EACP is a hedge fund established by Lathen in approximately May 2011. (SFOF ¶ 6.)

10. Eden Arc Capital Advisors, LLC ("EACA"), is the general partner of EACP. Lathen is the managing member of EACA. (SFOF ¶¶ 7, 8.)

11. Lathen understood that he had to comply with EACM's Code of Ethics, dated February 2013, which by its terms Lathen was charged with administering and enforcing. (Div. Ex. 174 – p. 3.) That code required him to avoid engaging in fraudulent and manipulative practices, to act with honesty, integrity, and professionalism, and to adhere to federal and state securities laws, rules, and regulations. Such rules are industry standard. (Div. Ex. 174 – pp. 3-4.) See also:

415:2 **Okay. So you had to comply with the code of**
415:3 **ethics, right?**
415:4 A Yes.
415:5 **Q So you had to avoid in engaging in**
415:6 **fraudulent and manipulative practices with respect to**
415:7 **your clients; is that correct?**
415:8 A Yes.

415:9 **Q You had to act with honesty, integrity and**
415:10 **professionalism; is that correct?**
415:11 A Yes.
415:12 **Q And you had to adhere to federal and state**
415:13 **securities laws, rules and regulations; is that**
415:14 **correct?**
415:15 A Yes.
415:16 **Q And is it fair to say that that was an**
415:17 **industry -- that's an industry standard?**
415:18 A That is my understanding.

12. Lathen knew that as an investment adviser, it is important to be accurate.

496:18 **Q And as an investment advisor, you know that**
496:19 **it's important to be accurate; is that right?**
496:20 A Yes.

13. Lathen described himself as having a "type A" personality.

3450:15 **Q Well, you describe yourself as a type A**
3450:16 **personality; is that right?**
3450:17 A That's fair to say.

14. Jim Dean was in the same residential college as Jay Lathen while at Rice University, and has been friends with him since 1986. (SFOF ¶ 69.)

15. Dean was vice president of strategic planning and analysis at Key Energy, and worked there from 1996-2000. (SFOF ¶ 70.)

16. Key Energy used Lehman Brothers for its investment banking until Lehman collapsed in 2008. (SFOF ¶ 71.)

17. Lathen worked on Lehman Brothers' Key Energy team until he left Lehman in 2007 for Citigroup. (SFOF ¶ 72.)

18. Dean was the primary point person besides the CFO, CEO and COO on all financial and M&A-related activities while at Key Energy. (SFOF ¶ 73.)

19. While Dean was at Key Energy, Lathen was a mid-level, relatively young guy on the Lehman Brothers/Key Energy team.

2799:2 **Q Can you say again what kind of work he did**
2799:3 **for you?**
2799:4 A Well, Jay, as an energy banker, he would
2799:5 provide ideas. They would generate ideas on how to
2799:6 lower cost of capital, provide funding, you know,
2799:7 make acquisitions or divestitures.
2799:8 And so Jay would be -- you know, at that

2799:9 time was more of a mid-level banker, maybe a vice
2799:10 president or a heavy associate. And he would put
2799:11 together the presentation books and present them,
2799:12 and often, depending on, you know, what the
2799:13 situation was.
2799:14 But, you know, again, he had -- he was not
2799:15 the top one on the rung. He was, you know, a
2799:16 mid-level, relatively young guy at the time.

20. Key Energy's business did not follow Lathen to Citigroup when he left Lehman Brothers in 2007.

2827:18 **Q Okay. Now, Key Energy's business didn't**
2827:19 **follow Mr. Lathen to Citigroup, did it?**
2827:20 A I don't believe so. I was not at Key
2827:21 Energy beyond 2000 myself. But I can't say that it
2827:22 wasn't. But, you know, again, it's -- you know,
2827:23 Citigroup's pretty large. They already had a
2827:24 preexisting relationship. And, you know, having him
2827:25 on board wouldn't have hurt.
2828:1 But, at that time, he was an M&A
2828:2 specialist, so he would not have been doing
2828:3 financings as much as he would be doing -- you know,
2828:4 Why don't you go after this company? You know, Why
2828:5 don't you sell to this other company? Why don't you
2828:6 put a defense in place?
2828:7 And I can't tell you that Key Energy used
2828:8 Citigroup or Jay for any of that.

21. Dean was director of investor relations when he started at Penn Virginia, and continued in that role until he became EVP of Corporate Development in 2011.

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.

22. Penn Virginia used Lehman Brothers for its investment banking until Lehman collapsed in 2008. (SFOF ¶ 74.)

23. While he was head of investor relations at Penn Virginia, and throughout Lathen's work for the company as an M&A specialist at Lehman Brothers, M&A was not Dean's area.

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?**
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2829:3 know, continue to keep our liquidity and leverage
2829:4 under control.
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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.

24. Lathen worked on Lehman Brothers' Penn Virginia team until he left Lehman in 2007 for Citigroup. (SFOF ¶ 75.)

25. Penn Virginia did not follow Lathen when he left Lehman for Citigroup.

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.

2829:13 **Q And after Mr. Lathen left Lehman Brothers,**
2829:14 **did Penn Virginia follow him to Citigroup?**
2829:15 A I don't believe we did anything with them.
2829:16 At that time, I think we were more aligned
2829:17 with -- well, Lehman went under. We weren't aligned
2829:18 with anybody. At that stage, everybody was in
2829:19 turmoil in 2008.
2829:20 But Barclays, when they -- a lot of the
2829:21 folks, the same individuals, not Jay, arrived at --
2829:22 was -- tended to be at Barclays. And we continued
2829:23 to do business with Barclays, but not Citi.
2829:24 **Q Okay. So you -- so Penn Virginia followed**

2829:25 **Mr. Lathen's colleagues to Barclays --**
2830:1 A Correct –

26. After Lehman collapsed, Penn Virginia transferred its business to Barclays, where most of the Lehman Brothers bankers had landed.

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
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2804:14 a -- you know, he did a fine job.

2829:24 **Q Okay. So you -- so Penn Virginia followed**
2829:25 **Mr. Lathen's colleagues to Barclays --**
2830:1 A Correct --
2830:2 **Q -- and not --**
2830:3 A -- right.
2830:4 **Q -- to Citigroup?**
2830:5 A And he did -- I do recall -- I can't
2830:6 remember what the -- the exact pitch was, but he did
2830:7 call on us while at Citigroup. But, again, that was
2830:8 more of an M&A capacity.
2830:9 So, you know, we were less -- less a
2830:10 consumer of M&A advice as we were underwriting the
2830:11 issuance of securities. Raising money, if you will.

27. Dean has not worked with Lathen in a professional setting in 10 years, since Lathen left Lehman Brothers in 2007.

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,
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2829:20 But Barclays, when they -- a lot of the
2829:21 folks, the same individuals, not Jay, arrived at --
2829:22 was -- tended to be at Barclays. And we continued
2829:23 to do business with Barclays, but not Citi.
2829:24 **Q Okay. So you -- so Penn Virginia followed**
2829:25 **Mr. Lathen's colleagues to Barclays --**
2830:1 A Correct –

28. In Dean's view, Lathen was a thorough person who asked a lot of questions. (SFOF ¶ 76.)

29. In Dean's view, if Lathen did not know something or had a question he would ask because Lathen is "one of the smartest-guys-in-the-room type of guys."

2832:17 **Q If he didn't know something or had a**
2832:18 **question, he'd ask, right?**
2832:19 A Jay is -- you know, I don't know if this
2832:20 is a statement of -- I think it explains it.
2832:21 He's one of the smartest-guys-in-the-room
2832:22 type of guys. So, yeah, he will -- often will show
2832:23 off, like, how smart he is on your business.
2832:24 And, again, he is -- you know, I was
2832:25 impressed by that. Because, you know, again, I'm
2833:1 banking one company day in and day out. He's got
2833:2 multiple clients. And he'll come in, and he'll get
2833:3 right to the crux of the matter, you know.
2833:4 They'll ask a lot of questions, and then
2833:5 if you don't answer it quite well, you know, he'll,
2833:6 like, pursue it. So he would be able to, you know,
2833:7 come up with things, like, whether it's a -- you
2833:8 know, like an accounting issue or, you know, some
2833:9 sort of a -- if there's an issue of the day out

2833:10 there, there's some issue in the trend that you're
2833:11 producing oil and gas from, he'll ask you how your
2833:12 wells were; what happened to that well.
2833:13 And, you know, it got -- we -- I
2833:14 understood why he was doing it. I think a lot of
2833:15 our executives didn't like it very much.
2833:16 But, you know, I think it's part of -- you
2833:17 know, it's part of their duty, you know, I think
2833:18 is -- as investment bankers to make sure they're
2833:19 bringing out all risks and bringing them to the
2833:20 light of day.

30. In Dean's view, Lathen was not afraid to ask questions about things he did not know himself. (SFOF ¶ 77.)

31. Dean never saw any of Lathen's redemption requests, never saw Lathen's emails with issuers, did not know what Lathen was telling investors about the Participants rights or interests in the joint accounts, never saw any of Lathen's Participant Agreements, his Investment Management Agreement ("IMA"), his line of credit agreement or his Profit Sharing Agreement.

2849:8 **Q Okay. And so you never saw any of the**
2849:9 **sort of underlying documents, for example, the**
2849:10 **documents that Mr. Lathen was submitting to the**
2849:11 **issuers?**
2849:12 A Correct. I never -- beyond that investor
2849:13 presentation, I never had interest and never
2849:14 received anything else.
2849:15 **Q All right. And you never saw his emails**
2849:16 **with issuers in which he responds to their requests**
2849:17 **for information, for example, right?**
2849:18 A Right, not at all.
2849:19 **Q And you don't know what he was telling**
2849:20 **investors about the terminally ill patients' rights**
2849:21 **to and interests in the joint accounts that he was**
2849:22 **setting up with them, right?**
2849:23 A Right. I had no knowledge of that.
2849:24 **Q And you don't know what any of his**
2849:25 **agreements look like?**
2850:1 A I don't.
2850:2 **Q You never saw his participant agreement?**
2850:3 A No.
2850:4 **Q You never saw his investment management**
2850:5 **agreement with the fund?**
2850:6 A No.
2850:7 **Q Never saw his line of credit agreement?**
2850:8 A No.

2850:9 **Q Never saw his profit sharing agreement,**
2850:10 **right?**
2850:11 A No.

The Fund's Background and Operations

32. EACP's investment strategy was to buy bonds and Certificates of Deposit ("CDs") that contained a survivor's option. When the instruments were jointly owned, this option allowed the investments to be redeemed early, upon the death of a joint beneficial owner, at par value, by the surviving joint beneficial owner. EACP's investment strategy involved purchasing survivor's option instruments on the secondary market at a discount and then putting them back to issuers at par pursuant to the survivor's option provision. (Div. Ex. 369 – p. 16).

72:14 **Q And, in any event, the fact that these bonds**
72:15 **trade on a secondary market at a discount presented an**
72:16 **opportunity to you to buy them cheaply; is that right?**
72:17 A That's -- that's certainly fair to say.

33. EACP's March 2011 Private Placement Memorandum ("PPM") states:

> The key element of the Partnership's investment strategy is to acquire SO Investments in joint accounts ("Joint Accounts") with Participants... The Joint Accounts will be structured as joint tenancies with rights of survivorship ("JTWROS") between the Participant and one or more nominee owners ("Nominees") acting on behalf of the Partnership. Mr. Lathen has agreed to serve as Nominee for the Partnership on the Joint Accounts for no consideration . . . . The Partnership will enter into written nominee agreements with all Nominees who serve on the Partnership's behalf with respect to the Joint Accounts.
> (Div. Ex. 369 – pp. 16-17.)

34. Survivor's option investments are typically marketed to retail investors. (SFOF ¶ 9.)

35. Respondents understood that survivor's option investments are typically marketed to retail investors. (Div. Ex. 369 – p. 16).

36. The survivor's option bonds were medium and long-term bonds, with a life of anywhere from two to three years up to thirty years. (SFOF ¶ 10.)

37. In order to execute the strategy, Respondents needed two people to jointly own the bonds, and one of them had to be likely to die in the near future. This enabled Respondents to redeem the bonds at par (100 cents on the dollar) from the issuer in an abbreviated time frame.

72:18 **Q And getting together with the terminally ill**

72:19 **individuals that were about to die presented an ability**
72:20 **for you to redeem them at par from the issuer in an**
72:21 **abbreviated time frame; is that right?**
72:22 A Yes.
72:23 **Q And is that essentially how The Fund made**
72:24 **money?**
72:25 A That is -- that is true; the bulk of the
73:1 profits were from redemption.
73:2 **Q And, to be clear, when we're talking about**
73:3 **par, what do you mean by that?**
73:4 A It means 100 cents on the dollar.
73:5 **Q So you could either wait until maturity to**
73:6 **get the 100 cents on the dollar, or you could exercise**
73:7 **this survivor's option to get the 100 cents on the**
73:8 **dollar; is that right?**
73:9 A Those are two of the ways to sell.

38. Initially the Fund was 100 percent invested in survivor's option bonds. Later, survivor's option CDs were added to the portfolio. As of the time of the hearing, the Fund was predominately invested in survivor's option CDs.

159:6 **Q Now, initially the Eden Arc Capital Partners**
159:7 **was 100 percent invested in survivor option bonds; is**
159:8 **that right?**
159:9 A Yes.
159:10 **Q And then later down the road, the funds**
159:11 **started vesting -- investing in survivor option CDs as**
159:12 **well; is that right?**
159:13 A Yes. In the joint account, CDs were
159:14 purchased as well as bonds.
159:15 **Q And at this point today, is it approximately**
159:16 **20 percent bonds and 80 percent CDs? Is that right?**
159:17 A I think it is a much larger percentage --
159:18 well, I don't -- I don't know the precise figure at
159:19 this moment.
159:20 **Q Well, fair to say initially it was solely**
159:21 **bonds, right?**
159:22 A Initially it was solely bonds. And by the
159:23 end, it was predominantly CDs.

39. Lathen was familiar with the survivor's option provisions in bond prospectuses and CD disclosure statements.

927:11 **Okay. Now, you're familiar, as you**
927:12 **stated, with bond prospectuses and CD disclosure**
927:13 **statements; is that correct?**
927:14 A Yes.

927:15 **Q In particular, ones that deal with**
927:16 **survivor's option; is that right?**
927:17 A Yes.
927:18 **Q And the disclosure statements for CDs are**
927:19 **different from the bond prospectuses; is that**
927:20 **correct?**
927:21 A Yes. They are different documents.

1675:24 **Q Now, did you read the bond prospectus in**
1675:25 **this?**
1676:1 A I did not.
1676:2 **Q Did Mr. Lathen?**
1676:3 A Yes, he did.

40. Lathen became familiar with survivor's option bonds in 2009. Lathen researched survivor's option bonds and read many bond prospectuses.

3172:4 **Q Okay. Let's talk about survivor option**
3172:5 **bonds.**
3172:6 **When did you first hear of them?**
3172:7 A I discovered the provision sort of by
3172:8 happenstance. If this was in early 2009, maybe
3172:9 February-March, somewhere in that time period, and I
3172:10 had owned some General Motors and GMAC bonds dating
3172:11 back to 2004 when I had put them in my personal
3172:12 portfolio....
3173:18 **Q And so what did you do after you**
3173:19 **discovered this provision?**
3173:20 A Well, I was very curious. I mean, it sort
3173:21 of looks like an apparent arbitrage, so I wanted to
3173:22 explore it further.
3173:23 So I began reading lots of other
3173:24 prospectuses in the market -- well, first thing I
3173:25 did literally is I Googled "survivor's option
3174:1 bonds," and a whole wealth of information came up.
3174:2 And GMAC, I believe at that time, was the
3174:3 largest issuer of survivor's option bonds. But
3174:4 there were several other issuers. There were
3174:5 50-some-odd issuers who had issued this paper.
3174:6 And when I looked to see where the bonds
3174:7 of some of those issuers were trading that had the
3174:8 survivor's option feature, I discovered that a
3174:9 substantial number of companies had paper trading at
3174:10 substantial discounts to par.
3174:11 So it seemed to be a sizable market. I
3174:12 learned that it was on the order of 75 to $100
3174:13 billion market; lots of different issuers, lots of

3174:14 discount paper all having the survivor's option.

41. The survivor's option provisions in bond prospectuses are longer than those in CD disclosure statements. Plain vanilla CDs have a spare discussion of the survivor's option.

927:22 **Q Okay. And is it fair to say that the bond**
927:23 **prospectuses have more information related to the**
927:24 **redemption provision in survivor's options; is that**
927:25 **correct?**

928:10 MR. HUGEL: More information than --
928:11 MS. WEINSTOCK: Than the CD disclosure
928:12 statements.
928:13 JUDGE PATIL: So overruled.
928:14 THE WITNESS: I think that it is fair to
928:15 say that on a pure word-count basis, the description
928:16 of the survivor's option feature in your typical
928:17 corporate bond document is larger, i.e., a higher
928:18 word count than the description that's typically
928:19 provided in your ordinary disclosure statement with
928:20 respect to a CD.
928:21 BY MS. WEINSTOCK:
928:22 **Q And is it fair to say that your typical**
928:23 **survivor's option provision in a bond prospectus**
928:24 **runs many pages; is that fair to say?**
928:25 A I think it's typically two to three pages,
929:1 in that range.

929:17 **Q And, Mr. Lathen, is it fair to say that**
929:18 **your typical survivor's option provision in a bond**
929:19 **prospectus runs many pages? Is that fair to say?**
929:20 A Yes. I think that is fair to say.
929:21 **Q Okay. Whereas --**
929:25 **Q The disclosure statements for a very**
930:1 **sizable part of the CD market are very boilerplate;**
930:2 **is that fair to say?**
930:3 A Yes. I mean, for plain vanilla CDs, it's
930:4 a very spare section of the disclosure statement.
930:5 For other types of CDs that are more
930:6 exotic, so-called structured CDs, it is a more
930:7 lengthy provision, though, not as lengthy as one
930:8 would find in your typical bond prospectus.
930:9 **Q And just so the record is clear, the**
930:10 **provision you're referring to is the survivor's**
930:11 **option provision; is that correct?**

930:12 A Yes. And in the -- in the CD world, that
930:13 provision is typically referred to as a withdrawal
930:14 on death -- withdrawal upon death, because a
930:15 certificate of deposit is a deposit with a financial
930:16 institution.
930:17 So when you're exercising the survivor's
930:18 option, what you're really saying is, I want my
930:19 deposit back now. I want to withdraw my deposit.
930:20 So it's typically referred to as a
930:21 withdrawal upon death.
930:22 **Q And for the plain vanilla CDs, is it fair**
930:23 **to say that they literally use all of the same**
930:24 **disclosure statement which has a rather spare**
930:25 **discussion of the survivor's option? Is that fair**
931:1 **to say?**
931:2 A Yes.

42. Lathen made himself a joint account holder on the Joint Tenancy With Right of Survivorship ("JTWROS") accounts he created to hold the bonds because he understood that an entity cannot be a joint tenant. (Div. Exs. 465 – p. 2; 107 – p. 5.)

43. In order to execute the strategy, Lathen located terminally-ill individuals ("Participants") through hospices and social workers. Respondents sought Participants that had six months or less to live.

55:5 **Q In terms of the terminally ill individuals,**
55:6 **the ideal time frame in which you were looking for was**
55:7 **that they would -- that they would die in six months or**
55:8 **less; is that right?**
55:9 A We typically would look for people who had an
55:10 expectancy -- life expectancy of six months or less,
55:11 yes.
55:12 **Q And you found these individuals through**
55:13 **hospices and social workers, correct?**
55:14 A Yes.
55:15 **Q And also Craigslist; is that right?**
55:16 A In one instance, Craigslist.
55:17 **Q And you got letters from their doctors to**
55:18 **confirm that they were terminal, right?**
55:19 A Yes, we did.
55:20 **Q And if they were not terminal, you would not**
55:21 **sign them up, correct?**
55:22 A That's correct.

44. Participants were "somewhere between modest means and nearly destitute." Many "were extremely poor."

1680:24 **Q Now, what was the approximate financial**
1680:25 **condition of the participants that you were dealing**
1681:1 **with?**
1681:2 A I guess I would characterize them as
1681:3 somewhere between modest means and nearly destitute.
1681:4 **Q And some of them were extremely poor?**
1681:5 A Based on the information that I had
1681:6 available to me, I would say yes, many of them were
1681:7 extremely poor.

45. EndCare was a marketing vehicle Lathen used to solicit Participants. (SFOF ¶ 11.)

46. Lathen was the president and CEO of EndCare. (Div. Ex. 369 – p. 16.)

47. Although EACA was technically an investor in the Fund by virtue of being the General Partner, neither Lathen nor EACA has ever invested any money into the Fund.

50:14 **Q Now, you've never personally invested any**
50:15 **money into Eden Arc Capital Partners; is that right?**
50:16 A That is true.
50:17 **Q Now --**
50:18 A May I clarify that?
50:19 **Q Go ahead. That's fine. Go ahead.**
50:20 A Okay. When The Fund was started, I made no
50:21 investment in The Fund. And at various times, I have
50:22 had a capital balance in The Fund.
50:23 So I did technically have an investment in
50:24 The Fund when there was a capital account balance. I
50:25 just wanted to be accurate on my response.
51:1 **Q And what do you mean by "capital account**
51:2 **balance"?**
51:3 A The value of my interest in The Fund. So
51:4 basically the way the accounting works, they value all
51:5 of the assets, and then they determine what each
51:6 partner's share of the assets is.
51:7 **Q You're referring to your share as general**
51:8 **partner; is that right?**
51:9 A Yes, that's right.
51:10 **Q And to be clear, general partner is Eden Arc**
51:11 **Capital Advisors; is that right?**
51:12 A Yes, that's right.
51:13 **Q And when you talk about capital account**
51:14 **balance, you've never actually invested any money into**
51:15 **The Fund; is that right?**
51:16 A That's true.

51:17 **Q Nor has the general partner; is that right?**
51:18 A That's true.
51:19 **Q So when you talk about capital account**
51:20 **balance, what is it exactly that you mean?**
51:21 A Well, as the general partner, I'm entitled to
51:22 a share of profits from The Fund. And as profits are
51:23 earned in The Fund, that gets credited to my capital
51:24 account.
51:25 **Q So when you say capital accounts and at**
52:1 **certain times you had money in your capital account,**
52:2 **you're talking about the moment in time before you take**
52:3 **out your performance fees; is that right?**
52:4 A That's right. Before I remove my performance
52:5 fee from The Fund.
52:6 **Q And when I say "your performance fees," we're**
52:7 **talking about Eden Arc Capital Partners -- Capital**
52:8 **Advisors, correct?**
52:9 A That's right.

48. EACM had only one employee, Michael Robinson, who was Vice President of Marketing and Administration.

120:22 **Q And you mentioned that you had an employee at**
120:23 **one point; is that right?**
120:24 A Yes, I did.
120:25 **Q And his name was Michael Robinson?**
121:1 A Yes, that's correct.
121:2 **Q And was he your only employee?**
121:3 A Yes, he was.
121:4 **Q And he was the vice president of marketing;**
121:5 **is that right?**
121:6 A Yes.
121:7 **Q Now, there was --**
121:8 A I think, actually "vice president of
121:9 marketing and administration" may have been his exact
121:10 title.

49. Robinson was represented by Clayman & Rosenberg during both the investigation and the hearing.

1668:4 **Q And that was when you testified during the**
1668:5 **investigation in this matter --**
1668:6 A Uh-huh.
1668:7 **Q -- is that right?**
1668:8 A Yes.
1668:9 **Q Was that on June 19 of 2015?**
1668:10 A I can't swear to the date, but I will

1668:11 assume that's correct.
1668:12 **Q Other than that meeting, you and I have**
1668:13 **never spoken, correct?**
1668:14 A Correct.
1668:15 **Q And you haven't spoken with anyone else**
1668:16 **from the SEC aside from me; is that right?**
1668:17 A That's correct.
1668:18 **Q You were represented by Clayman &**
1668:19 **Rosenberg in this case; is that right?**
1668:20 A Yes, it is.

50. Prior to testifying at the hearing, Robinson met with Harlan Protass and Christina Corcoran on two occasions. Ms. Corcoran went over some of the questions with Robinson that she asked him at trial. Robinson reviewed his answers with Ms. Corcoran.

1668:21 **Q And prior to testifying today, you met**
1668:22 **with the lawyers at Clayman & Rosenberg; is that**
1668:23 **right?**
1668:24 A I have.
1668:25 **Q Which lawyers?**
1669:1 A I met with Harlan Protass. And I've met
1669:2 with -- his associate, who is Christine --
1669:3 **Q Christina Corcoran?**
1669:4 A Yes. Corcoran. I'm sorry. Bad with
1669:5 names.
1669:6 **Q When did you meet with them?**
1669:7 A I met with Christine yesterday. And I met
1669:8 with Harlan about two weeks ago.
1669:9 **Q And those meetings were in person?**
1669:10 A Yes.

1669:18 **Q And when you met with Ms. Corcoran, did**
1669:19 **she go over with you the questions that she would**
1669:20 **ask you?**
1669:21 A Some questions.
1669:22 **Q And did you review your answers with her?**
1669:23 A Yeah. During the course of that
1669:24 conversation.

51. Other than those two meetings, Robinson met with attorneys at Clayman & Rosenberg two or three other times.

1669:11 **Q And other than those two meetings, did**
1669:12 **you, over the last of the course of the last few**
1669:13 **years, meet with those attorneys?**
1669:14 A I have.

1669:15 **Q Approximately how many times?**
1669:16 A I would say maybe two or three other
1669:17 times.

52. Robinson's salary at EACM was [redacted] per year.

1670:3 **Q And what was your salary at Eden Arc**
1670:4 **Capital Management?**
1670:5 A Exactly [redacted] per year.

53. Robinson worked for EACM from July 5, 2012 to February 29, 2016.

1667:19 **Q You worked for Eden Arc Capital**
1667:20 **Management?**
1667:21 A That is correct.
1667:22 **Q What was the time frame?**
1667:23 A From July 5, 2012, to February 29, 2016.

54. During the investigation, Robinson testified that Lathen dealt with forms filed with the SEC.

1673:9 **Q You said that you recall testifying during**
1673:10 **the investigation in this case, Mr. Robinson?**
1673:11 A Yes.
1673:12 **Q And during that investigation, you were**
1673:13 **asked who dealt with forms filed with the SEC, and**
1673:14 **you stated -- you stated Mr. Lathen; is that**
1673:15 **correct?**
1673:16 A Yes.

55. Under EACP's Limited Partnership Agreement, the Fund will indemnify Lathen against any and all claims, damages, losses, penalties, expenses, judgments or liabilities of any nature, including legal fees, expenses and costs associated with preparing a defense for an investigation or proceeding, but excluding any such claims that are determined to be the result of willful misconduct or gross negligence. (Div. Ex. 311 – p. 25; 312 – p. 28.)

2275:20 THE WITNESS: I do control that as a
2275:21 general partner, but my financial interest in that
2275:22 is $1,000. So, I guess -- and my understanding is
2275:23 that Eden Arc Capital Partners is not a party to the
2275:24 proceeding.
2275:25 At the same time, that partnership has --
2276:1 I do have through the limited partnership agreement
2276:2 an indemnity from the limited partnership in the
2276:3 event that certain type of liability is established.
2276:4 In other words, if there is a liability

2276:5 that arose that was not the result of my willful
2276:6 misconduct, the partnership would potentially have
2276:7 to indemnify me for that loss and, therefore, the
2276:8 financial wherewithal of the partnership would be
2276:9 relevant.
2276:10 So I guess I look for some guidance from
2276:11 you or from the Division as to whether the financial
2276:12 statements of Eden Arc Capital Partners, the
2276:13 partnership are what you would like me to provide.

56. At no time was Lathen or EACM an investment adviser to the terminally-ill individuals.

53:16 **Q Okay. And at no time were you or Eden Arc**
53:17 **Capital Management an investment advisor to terminally**
53:18 **ill individuals; is that right?**
53:19 A Yes, that's correct.

3544:23 **Q And you didn't want to be an investment advisor**
3544:24 **to the terminally ill individuals; is that right?**
3544:25 A Correct.
3545:1 **Q And, in fact, you disclaimed that in the**
3545:2 **participant agreement; is that right?**
3545:3 A That's correct.

See also:
Neither Lathen nor any Investor is providing financial advice in connection with this Agreement and is solely acting with Participant in accordance with the terms and conditions of this Agreement and of the Account(s) and not in any fiduciary or other such capacity to the Participant.
(Div. Ex. 346 – p. 2.)

"The participant agreement states that I am not an investment adviser to the participant. No compensation is being paid by the participant to me or to any of the Eden Arc entities. The SEC exempts from definition of "client" any party who receives investment advisory services for free…"
(Div. Ex. 465 – p. 2.)

57. At some point, the Fund had 21 investors.

3496: 15 **Q Now, at some point, you had 22 investors,**
3496:16 **including the general partner; is that right?**
3496:17 A It sounds about right.

58. The Fund's overall profits have been between $7.5 million and $9.5 million.

3496:18 **Q And since inception, the fund has earned over**

3496:19 **$9.5 million in profits; is that right?**
3496:20 A I believe that was your calculation in the OIP.
3496:21 I don't know that I would agree with that figure
3496:22 precisely.
3496:23 **Q Well, what is the figure?**
3496:24 A I don't know the precise figure.
3496:25 **Q Is it around $9.5 million?**
3497:1 A It's lower than that.
3497:2 **Q How much lower?**
3496:3 A Maybe a million or two. I'm not sure.
3497:4 **Q So you don't know what the fund's profits are?**
3497:5 A The fund's profits are based on -- I think the
3497:6 way you calculated it is based on whatever the carrying
3497:7 value of the instruments were. Since that time, there's
3497:8 been, you know, losses in the account.
3497:9 **Q So at one point, were the fund's profits $9.5**
3497:10 **million?**
3497:11 A It's possible.
3497:12 **Q And that would have been maybe around the end**
3497:13 **of 2015; is that right?**
3497:14 A That could be right.

59. Since inception, the Fund has purchased approximately $150 to $160 million of survivor's option instruments, and has redeemed approximately $130 million of survivor's option instruments.

3498:12 **Q But you think that the fund since inception has**
3498:13 **purchased approximately $130 million in survivor option**
3498:14 **instruments?**
3498:15 A It's probably higher than that because there
3498:16 have been instances where we've purchased instruments.
3498:17 And either the issuer has called them under the call
3498:18 option, or we've monetized those in the secondary market.
3498:19 So the 130 million figure I gave you is the amount that
3498:20 we put back under the survivor's option feature.
3498:21 So there would be additional bonds that were
3498:22 disposed of in other ways, whether through the issuer
3498:23 call or sale in the secondary markets. So the purchases
3498:24 of survivor option instruments is somewhere north of 130
3498:25 million.
3499:1 **Q What's the approximate number?**
3499:2 A I couldn't give you a precise figure. But it's
3499:3 probably, you know, 140 million, maybe.
3499:6 A Let me just modify my prior response because
3499:7 there are positions currently held that haven't been
3499:8 monetized which would need to be added to the 130, $140
3499:9 million number. So it might be 150, 160 million,

3499:10 somewhere in that ballpark.

60. In 2012, EACM registered as an investment adviser with the SEC. One of the reasons Lathen registered the Adviser was because he thought being SEC-registered would make an investment in the Fund more attractive to investors.

905:22 **Q And is it fair to say that you also**
905:23 **thought having a registered investment advisor would**
905:24 **help in the capital raising for the fund?**
905:25 A It certainly can be beneficial in that
906:1 regard as well.
906:2 **Q Is that one of the reasons that you**
906:3 **registered EACM as an advisor?**
906:4 A Yes, that is fair to say.

3561:20 **Q One of the reasons that you wanted to register**
3561:21 **as an investment advisor is because you thought that it**
3561:22 **would be attractive to investors; is that right?**
3561:23 A I did think that it could potentially help with
3561:24 investors, certainly.
3561:25 **Q And that's one of the reasons that you**
3561:1 **registered at the time that you did; is that right?**
3561:2 A I think that's fair to say.

61. EACM collected management fees from the Fund, calculated as a percentage of the assets under management. EACA collected incentive or performance fees from the Fund, which was based on the Fund profits.

120:4 **Q And, to be clear, what is a management fee --**
120:5 **or what was it in this context?**
120:6 A Management fee is a percentage of the assets
120:7 under management paid from the fund to the investment
120:8 advisor, who in this case was Eden Arc Capital
120:9 Management.
120:10 **Q And what about the performance fee?**
120:11 A The performance fee is based on a share of
120:12 the profits from the strategy. And that fee is earned
120:13 by Eden Arc Capital Advisors, which is the general
120:14 partner of the fund.

62. Management fees were charged to limited partners at different rates, ranging from 0% to 2% of assets under management. Incentive fees also varied from limited partner to limited partner and ranged from 0% to 30% of the Fund's profits.

155:10 **Q Now, you had testified earlier that initially**
155:11 **the fee structure for your fund was 2 and 20 percent;**

155:12 **is that right?**
155:13 A No. It was initially a half a percent and 30
155:14 percent. I believe that's what I testified to earlier.
155:15 The 2 and 20 was the changed fee structure that was put
155:16 in place around July of 2013.
155:17 **Q And, to be clear, the smaller number, the .5**
155:18 **percent or the 2 percent is -- that's the management**
155:19 **fee, and the 20 or 30 percent is the incentive fee; is**
155:20 **that right?**
155:21 A Yes, that's correct.
155:22 **Q And that varied from investor to investor**
155:23 **depending on when they signed up; is that right?**
155:24 A Yes. All investors that initially signed up
155:25 were at a half a percent and 30 percent. And then when
156:1 I went to a new fee structure to attract new investors
156:2 in the middle of 2013, we went to 2 percent and 20
156:3 percent.
156:4 And I notified all of my existing investors
156:5 and asked them whether or not they wished to stay on
156:6 the agreement that they had when they initially
156:7 invested, which was a half a percent and 30, or whether
156:8 they wanted to have the same fee structure that was
156:9 being offered to new investors.
156:10 And some of them decided to stay with their
156:11 old arrangement, and some of them elected to go to the
156:12 2 percent and 20 percent structure.
156:13 **Q And you had a couple of investors that were**
156:14 **1.6 percent and 16 percent; is that correct?**
156:15 A Yes, that is correct.
156:16 **Q And who were they?**
156:17 A These were principals of Blue Sand
156:18 Securities. Blue Sand Securities is what is known in
156:19 the industry as a third-party marketer; that is, they
156:20 help funds raise capital from investors.
156:21 And in doing so, they're compensated based
156:22 upon a percentage of the fees that I would earn on
156:23 those new investors; both management fees as well as
156:24 incentive fees.
156:25 So the 1.6 percent and the 16 percent is a 20
157:1 percent discount, if you will, off of the standard fee
157:2 structure of 2 and 20, effectively allowing them the
157:3 benefit of the compensation they would be entitled to
157:4 as if they themselves were investors that had been
157:5 introduced.
157:6 **Q And that reduced -- those reduced rates were**
157:7 **essentially in exchange for their marketing for your**

157:8 **fund; is that correct?**
157:9 A That was -- part of their arrangement was
157:10 being able to invest a certain amount -- a certain
157:11 amount of capital was actually able to be invested with
157:12 no compensation, so called zero and zero. And then
157:13 they were able to make additional investments on top of
157:14 that at 1.6 and 16.
157:15 And had they found investors for the fund,
157:16 they would have received compensation based on my fees
157:17 earned from those investors that they brought to the
157:18 fund.
157:19 But they never brought any investors to the
157:20 fund so they never earned that other potential
157:21 component of compensation.

II. Issuers, Survivor's Option Notes, and Beneficial Ownership

Issuers and Survivor's Option Notes, Generally

63. Respondents did not call a single trustee or issuer witnesses to testify at the hearing, though they listed five on their initial witness list, dated December 12, 2016.

64. **Citigroup Global Markets Holdings, Inc. ("Citigroup" or "CGMHI")**

a. Citigroup is a holding company primarily engaged in investment banking, proprietary trading, retail brokerage and asset management activities through its U.S. and foreign broker-dealer subsidiaries. (Div. Ex. 513 – p. 34.)

b. CGMHI offered Retail Medium Term Notes containing a survivor's option. (SFOF ¶ 20.)

c. Barbara Mullaney is Managing Director and Global Head of Citi Private Client Solutions Group. (SFOF ¶ 22.)

d. Mullaney has over 25 years of experience in financial services. She has nearly two decades of experience in various leadership roles at Citi in EMEA and the Americas, including leading the firm. (Div. Ex. 2005.)

65. **Duke Energy ("Duke")**

a. Duke is a utility holding company that has electric power utilities in six states.

1616:20 **Q What is Duke Energy?**
1616:21 A Duke Energy is a utility holding company
1616:22 that today has utility -- electric power utilities

1616:23 in six states in the Northeast, the Mid-Atlantic and
1616:24 in Florida.

b. Stephen De May is a Senior Vice President, Tax and the Treasurer of Duke. (SFOF ¶ 55.)

c. As treasurer, he is responsible for financing and capital markets activities, liability management, liquidity and cash management, long term investments and managing Duke's relationship with major credit rating agencies. As head of tax, he is responsible for federal, state, local and international tax compliance, audits, research, structuring and tax planning, property tax, income tax accounting, tax information systems and Sarbanes-Oxley compliance with respect to tax matters. (Div. Ex. 2018.)

d. De May has been employed by Duke for 27 years.

1617:23 **Q And before you were treasurer and senior**
1617:24 **vice president of tax, did you hold any other**
1617:25 **positions for Duke Energy?**
1618:1 A I've been in primarily financial-related
1618:2 roles at Duke Energy in those 27 years with a
1618:3 two-year exception in 2004 and 2005, I did a
1618:4 developmental stint as head of public policy for the
1618:5 company.

e. Duke offered one product line, its InterNotes, which contained a survivor's option.

1618:9 **Q Okay. Does Duke offer -- how many**
1618:10 **products does Duke offer that have survivor's option**
1618:11 **provisions?**
1618:12 A None at the present time.
1618:13 **Q How many did they in the past?**
1618:14 A It was a single program.
1618:15 **Q Okay. And can you tell us, what is a**
1618:16 **survivor's option?**
1618:17 A It is an option that was unique to this
1618:18 program called InterNotes. This program was
1618:19 directed to retail investors, individual investors.
1618:20 And the survivor option basically allowed
1618:21 survivors of an investor to put the bonds back to
1618:22 the company, put the notes back to the company at
1618:23 par upon the death of the investor.

66. **Goldman Sachs**

a. The Goldman Sachs Group Inc. is a leading global financial services firm providing investment banking, securities and investment management services to a substantial and diversified client base that includes corporations, financial institutions, governments and high-net-worth individuals. (Div. Ex. 561 – p. 9.)

b. The Goldman Sachs Group Inc. offered medium-term notes containing survivor's options pursuant to its Prospectus Supplement, dated September 19, 2011, and identified which of those notes contained the feature in relevant pricing supplements. (Div. Exs. 563 – p. 8; 562 – pp. 6-9; 565 – pp. 6-10; 568 – pp. 6-9.) See also:

762:18 **Q And can you tell us whether you recognize**
762:19 **Division Exhibit 563?**
762:20 A I do.
762:21 **Q And what do you recognize it as?**
762:22 A This is a prospectus supplement or a
762:23 bring-down from a shelf offering for medium-term
762:24 notes.

763:15 **Q So, Mr. Begelman, why don't you -- at the**
763:16 **Judge's suggestion, to save you trouble, why don't you**
763:17 **go to S-7, and see if that helps you determine whether**
763:18 **this document contains the survivor's option terms.**
763:19 A Page 7, ma'am?
763:20 **Q S-7 of 563. So it's --**
763:21 JUDGE PATIL: Sorry. Where is he looking
763:22 for this page number? At the very bottom center?
763:23 THE WITNESS: I got it. I got it.
763:24 BY MS. BROWN:
763:25 **Q Do you see under the heading "Information in**
764:1 **the pricing supplement" --**
764:2 A Yes.
764:3 **Q -- and the last bullet?**
764:4 A Yes. It does indeed have the survivor's
764:5 option bullet describing it.

c. Until April 2016, Roger Begelman was Co-Chief Compliance Officer for Goldman Sachs Bank USA ("GS Bank"), a subsidiary of Goldman Sachs Group, Inc. (SFOF ¶ 26)

67. **General Electric Capital Corporation ("GECC")**

a. GECC offers diverse financing and services in five operating segments: Commercial Lending and Leasing, Consumer, Real Estate, Energy Financial Services and GE Capital Aviation Services. (Div. Ex. 542 – p. 8.)

b. GECC offered InterNotes, or notes that contained survivor's options pursuant to its Prospectus Supplement, dated December 1, 2011. (Div. Ex. 545 – p. 5.)

c. Fred Robustelli is an associate general counsel for all funding transactions at General Electric Co. ("GE"). In that function, he and his team handle all of the debt securities issuances for GE and GECC, the financial services operation of GE. (SFOF ¶ 37.)

68. **Federal Farm Credit Banks Funding Corp.("Funding Corp.")**

a. Funding Corp. is an agent of the Federal Farm Credit System Banks, a federally chartered network of borrower-owned lending institutions comprised of cooperatives and related service organizations who provide credit and related services nationwide to American farmers, ranchers, producers or harvesters of aquatic products, their cooperatives, and certain farm-related businesses, among other financing activities. (Div. Ex. 530 – p. 7.)

b. Funding Corp. offers retail notes that included a survivor's option feature pursuant to its Offering Circular Supplement, dated October 18, 2010. (Div. Ex. 530 – p. 6, et seq.)

c. Allison Finnegan is a Managing Director and the General Counsel for Funding Corp., a government sponsored enterprise that raises money for the Farm Credit system banks, who on-lend it to their affiliated associations to make loans that support agriculture in rural America. (SFOF ¶ 60.)

d. Finnegan's core responsibilities are to support two functions of the Funding Corp in a legal capacity: to prepare financial disclosure and to issue Farm Credit discount notes and bonds. (SFOF ¶ 61.)

69. **National Rural Utilities Cooperative Finance Corporation ("CFC")**

a. CFC is a cooperative of rural electric companies. Its primary function is to make loans to those companies. It raises money through raises in the public and private markets and then lends capital to its owners. (SFOF ¶ 44.)

b. Matthew Wade is a securities supervisor at CFC. (SFOF ¶ 45.)

c. CFC issued InterNotes containing a survivor's option. (SFOF ¶ 46.)

70. **Prospect Capital Corp. ("Prospect")**

a. Joseph Ferraro is General Counsel of Prospect. (SFOF ¶ 49.)

b. Ferraro has been General Counsel at Prospect for 8 years.

1470:3 And then in October of 2008, became
1470:4 employed by Prospect as their general counsel.

c. As General Counsel, Ferraro has general oversight of legal matter, both corporate and litigation.

1470:19 **Q And what are your responsibilities as**
1470:20 **general counsel?**
1470:21 A General oversight of the legal function at
1470:22 Prospect. That means everything from regulatory
1470:23 filings, corporate matters, overseeing lending to
1470:24 managing the individuals in our litigation
1470:25 department, also cover litigation matters.

d. Prospect issues InterNotes that contain a survivor's option. (SFOF ¶ 50.)

71. **InCapital LLC ("InCapital")**

a. InCapital is a "broker dealer based out of Chicago that focused primarily on fixed income distribution." (SFOF ¶ 39.)

b. InCapital "advise[s] [clients] on what debt to issue, what maturities, what coupon rates to issue and then just help with their ongoing questions in terms of market intelligence, feedback, alert from broker-dealers, how well their bonds are being received."

1264:2 **Q And exactly what types of services do you**
1264:3 **provide for your clients?**
1264:4 A So we help advise them on what debt to
1264:5 issue, what maturities, what coupon rates to issue
1264:6 and then just help with their ongoing questions in
1264:7 terms of market intelligence, feedback, alert from
1264:8 broker-dealers, how well their bonds are being
1264:9 received.

c. Brian Walker is a managing director in the Debt Capital Markets group at InCapital. (SFOF ¶ 40.)

d. Walker is one of the founders of InCapital.

1263:10 **Q And what's your job title at InCapital?**
1263:11 A At InCapital, I'm a managing director in
1263:12 the debt capitals markets group.
1263:13 **Q And how long have you been in that**
1263:14 **position?**
1263:15 A Since I joined the firm in 2000.
1263:16 **Q How long has InCapital been around?**

1263:17 A Since 2000.
1263:18 **Q So you're one of the originators of**
1263:19 **InCapital or one of the original members?**
1263:20 A That's correct.

e. InCapital acted as an underwriter for a number of survivor's option bonds and notes at issue in this litigation. (E.g., Div. Ex. 975, 928, 598, 600, 611, 617.)

f. For client's offering debt, InCapital reviews draft prospectuses and prospectus supplements before they are filed with the SEC. Walker has reviewed over a hundred prospectuses and supplements in his capacity as managing director. This review would include a review of the survivor's option language in those documents. In certain instances, InCapital prepares the pricing supplements for their clients' review and filing.

1264:10 **Q Do you play any roles with offering**
1264:11 **materials with debt?**
1264:12 A We do. For issuers that want some of our
1264:13 services, we'll actually prepare the pricing
1264:14 supplement for them that they then review and file
1264:15 with the SEC with each of their offerings.
1264:16 **Q What about in connection with**
1264:17 **prospectuses? Will you provide any advice with**
1264:18 **regard to that?**
1264:19 A So, right, because we're an underwriter,
1264:20 and we would be listed on the cover of the
1264:21 prospectus that they issue the debt from, so we
1264:22 would comment as we go through the process with the
1264:23 attorneys as they draft that for filing with the
1264:24 SEC.
1264:25 **Q I said "prospectuses," but would that**
1265:1 **apply to prospectus supplements as well?**
1265:2 A It would.

1268:22 **Q And does your review include a review of**
1268:23 **the survivor's option language?**
1268:24 A In the prospectus or prospectus supplement
1268:25 it would.

1269:2 **So ballpark, how many prospectus**
1269:3 **supplements have you reviewed over the course of**
1269:4 **your time at InCapital?**
1269:5 A So there's been 50 issuers, and they
1269:6 usually re-file every year. So, you know, quite a
1269:7 few. Over a hundred.

g. All but two of InCapital's 50 corporate clients offer debt with survivor's options. (SFOF ¶¶ 41, 42.)

h. InCapital's client base makes up approximately 100 percent of the market for survivor's option bonds. (SFOF ¶ 43.)

72. Citigroup's Retail Medium Term Notes are targeted to retail investors.

716:9 **Q And are those notes targeted at a particular**
716:10 **market segment?**
716:11 A Retail investors.
716:12 **Q Okay. Were they ever marketed to**
716:13 **institutional investors?**
716:14 A No.

73. CFC's InterNotes are marketed to retail investors.

1310:16 A Survivor's option is an option for the
1310:17 holder of the bond. If the owner of the bond passes
1310:18 away, the bond can be put back to CFC at par. And
1310:19 the proceeds from that will be given to the
1310:20 beneficiary.
1310:21 **Q Are the bonds that you referenced, are**
1310:22 **they targeted at a particular market segment?**
1310:23 A Just retail investors.

74. Duke's InterNotes were marketed to retail investors.

1618:15 **Q Okay. And can you tell us, what is a**
1618:16 **survivor's option?**
1618:17 A It is an option that was unique to this
1618:18 program called InterNotes. This program was
1618:19 directed to retail investors, individual investors.
1618:20 And the survivor option basically allowed
1618:21 survivors of an investor to put the bonds back to
1618:22 the company, put the notes back to the company at
1618:23 par upon the death of the investor.

1620:9 **Q Is the survivor's option intended to**
1620:10 **benefit corporate investors?**
1620:11 A Not at all. We offered it only as an
1620:12 accommodation to what we -- we were advised by our
1620:13 financial advisors that a survivor option was an
1620:14 important accommodation for -- in the security and
1620:15 an attribute in the security that would attract
1620:16 retail investors who would otherwise be concerned
1620:17 about, you know, having an illiquid bond if they

1620:18 were to die prior to the maturity of the debt.

75. Goldman Sachs Group Inc.'s targeted market for its notes was the retail investor.

760:6 **Q And was there a particular market segment to**
760:7 **which the survivor's option notes were directed?**
760:8 A Well, I mean, obviously this is something --
760:9 the notes ended up in the hands of individuals or what
760:10 you would call the retail market.
760:11 You should know that Group sold them on a
760:12 non-retail basis to other broker-dealers who then
760:13 on -- sold them to third-parties and to individuals.
760:14 **Q Fair to say, though, that the intent was to**
760:15 **put them in the hands of retail individual investors?**
760:16 A It is fair.

76. GECC's notes containing survivor's option provisions were targeted to retail investors.

1165:24 **Q And what market segment, if any, are those**
1165:25 **securities directed to?**
1166:1 A Those are targeted to retail investors.

77. The notes issued by Funding Corp. that contained a survivor's option were intended for retail investors.

1838:11 **And was the survivor's option notes**
1838:12 **offered by Funding Corporation marketed to**
1838:13 **institutional investors?**
1838:14 A The bonds were intended for retail
1838:15 investors.

78. Prospect's InterNotes are targeted to retail investors.

1471:1 **Q Are you familiar with Prospect Capital**
1471:2 **notes that offer survivor's options?**
1471:3 A Yes.
1471:4 **Q Okay. And are those notes targeted at a**
1471:5 **particular market segment?**
1471:6 A Yes. They are -- we call them retail
1471:7 notes.
1471:8 **Q That's because they're targeted to retail**
1471:9 **investors?**
1471:10 A Correct.

79. De May (Duke) testified that the expenses associated with retail products—for example brokerage fees paid in connection with distribution—make the products more expensive to issuers.

1618:24 **Q And you said it was directed at retail**
1618:25 **investors. Why was that?**
1619:1 A Duke Energy, being a utility holding
1619:2 company, is a very large issuer, a very frequent
1619:3 issuer, and a very large issuer of debt securities.
1619:4 And -- you know, billions of dollars today
1619:5 on the balance sheet. We have about $50 billion of
1619:6 debt.
1619:7 And in an effort to diversify our funding
1619:8 sources, we branched out beyond the traditional
1619:9 institutional investor base, and we looked to the
1619:10 retail sector.
1619:11 We also do that for our stock. We find
1619:12 that retail investors more so than any are
1619:13 buy-and-hold investors. We like investors who buy
1619:14 our securities and hold them.
1619:15 But selling retail securities or
1619:16 securities to retail investors is slightly more
1619:17 expensive than doing so in the institutional market.
1619:18 But we did this to diversify our investor base.
1619:19 **Q How is it more expensive?**
1619:20 A Just because of the selling commissions
1619:21 and the underwriter discounts that we have to pay in
1619:22 order to get the securities distributed to
1619:23 individual investors.

80. Survivor's option products were marketed to retail investors, in part, because entities cannot die.

[Walker]
1266:6 **Q Are the notes that -- are notes that**
1266:7 **contain survivor options directed at any particular**
1266:8 **market?**
1266:9 A They're marketing exclusively to retail or
1266:10 individual investors.
1266:11 **Q Why is that?**
1266:12 A Because the survivor option function can
1266:13 only be exercised in the event of death. So, you
1266:14 know, a pension fund, insurance company, somebody
1266:15 that's a nonindividual never really dies, so it
1266:16 doesn't apply to them. So it has to be an
1266:17 individual.

81. The survivor's option offers individuals flexibility in their finances at the time of the death of the beneficial owner.

[Mullaney]
715:19 **Q Are you familiar with CGMHI notes that offer**
715:20 **survivor's options?**
715:21 A Yes, I am.
715:22 **Q Okay. And what does a survivor's option**
715:23 **offer an investor?**
715:24 A It offers an investor a security in that if
715:25 he passes away, the benefits of that security can pass
716:1 on to his family or his estate in the form that they
716:2 can put that security back to Citi and get a certain
716:3 amount defined in the -- in the terms of the trade.
716:4 **Q So rather than holding it to maturity at the**
716:5 **time of death?**
716:6 A Rather than holding it to death or trying to
716:7 sell it back in a secondary market at an unknown
716:8 price.

[Ferraro]
1471:21 **Q Well, what is a survivor's option?**
1471:22 A A survivor's option, what that means is if
1471:23 I was to purchase one of these retail notes and I
1471:24 was to pass away, my beneficiaries would be entitled
1471:25 to what is called put the notes back in the company.
1472:1 So, in essence, if a purchaser of a note
1472:2 were to die, their heirs have a right then to get
1472:3 liquidity on that note, get the money back
1472:4 essentially earlier than they would if the note had
1472:5 been held to maturity.
1472:6 **Q Is that among the reasons why it is**
1472:7 **targeted to retail investors?**
1472:8 A Yes. It's one of the reasons that retail
1472:9 investors do find that attractive to know that
1472:10 should they unfortunately pass, their heirs will not
1472:11 be stuck in a security that they may not want to be.

[Finnegan]
1838:16 **Q And why is that?**
1838:17 A It is a product that is attractive, I
1838:18 would say, to retail investors, in that it enables
1838:19 the investor to engage in some sort of estate
1838:20 planning and that, you know, they could provide for
1838:21 their spouse, for example, in the event of their
1838:22 death. Their spouse could sort of automatically put
1838:23 the bond back and receive the proceeds while

1838:24 avoiding probate.

82. Issuers rely on trustees or paying agents to help implement their survivor's option programs.

a. The Paying Agent for Citigroup's Retail Medium-Term Notes issued at CUSIP 17307XFV8 was Citibank, N.A. (SFOF ¶ 25.)

b. US Bank was the trustee for the CFC's InterNotes. (Div. Ex. 928 – p. 5.)

c. Duke's trustee for its InterNotes program was Bank of New York Mellon. (Div. Ex. 521 – p. 8.)

d. Bank of New York Mellon acted as Trustee for each of the Goldman Sachs Group, Inc. notes that Lathen either redeemed or sought to redeem during the relevant period. (Div. Exs. 562 – p. 3; 565 – p. 3; 568 – p. 3.)

e. Bank of New York Mellon acted as trustee for each of the GECC CUSIPs Lathen redeemed or sought to redeem during the relevant period. (Div. Ex. 545 – p. 5.) See also:

1175:16 **Q Okay. Going back to the pricing page of**
1175:17 **the prospectus supplement, Exhibit 545, and that is**
1175:18 **page 5 of the exhibit, can you tell from this**
1175:19 **document who the trustee is for these bonds?**
1175:20 A It's Bank of New York Mellon.

f. The Processing Agent for Funding Corp's Survivor's Option notes was US Bank. (SFOF ¶ 64.)

g. US Bank is Prospect's trustee for its InterNotes program. (SFOF ¶ 53.)

83. Many of the issuers who testified had exclusive authority to determine eligibility under the survivor's option provision in their offering materials.

a. Citigroup had the authority to determine eligibility under the survivor's option. (See Div. Ex. 513 – p. 23-24.) See also:

722:9 **Q So who has the ultimate authority under**
722:10 **these documents to decide whether or not to pay out on**
722:11 **a survivor's option?**
722:12 A Citigroup.

b. Duke has the final say in determining whether to pay out on the survivor's option.

1627:24 **Q So who has the final say in determining**
1627:25 **whether to pay out on the survivor's option?**
1627:1 A The company.
1627:2 **Q Is that consistent with your understanding**
1627:3 **of how this works in practice?**
1627:4 A Yes.

c. Funding Corp.'s offering circular provided:

Subject to the Annual Aggregate Survivor's Option Limitation and the Individual Survivor's Option Limitation, all questions as to the eligibility or validity of any exercise of the Survivor's Option will be determined by us, either directly or through the Processing Agent. (Div. Ex. 530 – p. 62.)

See also:
1845:12 **Q Okay. So directing your attention to page**
1845:13 **62. Can you read the first full paragraph,**
1845:14 **beginning "Subject to."**
1845:15 A "Subject to the annual aggregate
1845:16 survivor's option limitation and the individual
1845:17 survivor's option limitation, all questions as to
1845:18 the eligibility or validity of any exercise of the
1845:19 survivor's option will be determined by us, either
1845:20 directly or through the processing agent."
1845:21 **Q And who is the "us" in that sentence?**
1845:22 A The Funding Corporation.

d. GECC's prospectus gave it the discretion to determine eligibility in GECC:

All other 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 final and binding on all parties. (Div. Ex. 545 – p. 20.)

See also:
1180:10 **Q And reading the second sentence beginning**
1180:11 **"All other questions, please."**
1180:12 A "All other questions regarding the
1180:13 eligibility or validity of any exercise of the
1180:14 survivor's option will be determined by us, in our
1180:15 sole discretion, which determination will be final
1180:16 and binding on all parties."
1180:17 **Q And what does that mean?**
1180:18 A That to the extent that there are any
1180:19 questions relating to the exercise of the option,

1180:20 that GE Capital gets to make that determination at
1180:21 its own discretion.

e. Goldman Sachs Group's prospectus similarly provided that the discretion to determine eligibility was Goldman's: "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 final and binding on all parties." (Div. Exs. 562 – p. 8; 565 – p. 9; 568 – p. 8.)

84. Even in those instances where discretion to determine eligibility resided with the trustee, the issuers would continue to monitor redemptions and point out irregularities or potential frauds. For example, Ferraro (Prospect) testified that the issuer continues to play a role in the redemption process of its notes. He further pointed out that nothing in the governing documents prevents Prospect from bringing information bearing on eligibility to its trustee.

1472:12 **Q Do you know anything about how the**
1472:13 **redemption process works under the survivor's**
1472:14 **option?**
1472:15 A Typically, in order for a holder of the
1472:16 note, really the estate of the note or beneficiary
1472:17 of the note to redeem the option, they will fill out
1472:18 some paperwork. And attached to that paperwork, a
1472:19 copy of a death certificate, typically, and submit
1472:20 that to the trustee, U.S. Bank.
1472:21 U.S. Bank will then review the package.
1472:22 And at some point in their review, I get sent,
1472:23 typically on a weekly basis, a -- however many
1472:24 redemption requests there may be for that week.
1472:25 And it gives me an opportunity to review
1473:1 the same information and either approve or deny.

1481:9 **Q And under the provisions that we've just**
1481:10 **been reviewing, who has discretion to decide whether**
1481:11 **the evidence presented is sufficient?**
1481:12 A The trustee.
1481:13 **Q Does that mean that the issuer plays no**
1481:14 **role in the determination?**
1481:15 A No.
1481:16 **Q Okay. So what role does the issuer play?**
1481:17 A We have an opportunity to look at the
1481:18 information that the trustee is basing its
1481:19 determination on. And as I mentioned before,
1481:20 through an Internet portal interface, give our final
1481:21 approval, if you will, of the issuance.
1481:22 **Q Okay. If you saw something that, for lack**
1481:23 **of a better word, looked fishy, what would you do?**

1481:24 A I would first -- if I were the one
1481:25 noticing something seemed amiss, I would speak to my
1482:1 internal corporate and litigation attorneys just to
1482:2 see what their take on it was.
1482:3 If they agreed with me that something was
1482:4 a little fishy, I would reach out to U.S. Bank, the
1482:5 trustee, and get their take on it as well.
1482:6 Probably also ask our outside securities
1482:7 counsel just to get their take.
1482:8 **Q And does anything prevent you from going**
1482:9 **back to the trustee and pointing out what you view**
1482:10 **to be information that --**
1482:11 A No.
1482:12 **Q -- bears on eligibility?**
1482:13 A No.

85. Ferraro (Prospect) testified that Prospect must act in the best interests of its shareholders and it would not be bound under the governing documents to pay out on a fraud.

1542:12 **Q And you just testified that if Prospect --**
1542:13 **I mean, if U.S. Bank approves of a redemption, that**
1542:14 **that redemption approval is not final and binding on**
1542:15 **Prospect?**
1542:16 A What I'm saying is either U.S. Bank could
1542:17 change their mind or there could be circumstances
1542:18 under which we would still not be comfortable
1542:19 approving the payment of those redemptions.
1542:20 **Q But didn't you agree pursuant to the terms**
1542:21 **of this prospectus that it will be determined by the**
1542:22 **trustee in its sole discretion, and that**
1542:23 **determination by the trustee would be final and**
1542:24 **binding on Prospect?**
1542:25 A Yes.
1543:1 **Q Okay. And to the extent that Prospect**
1543:2 **rejects a survivor's option redemption request that**
1543:3 **U.S. Bank has approved, it would be acting**
1543:4 **inconsistently with the language in its own**
1543:5 **prospectus supplement?**
1543:6 A I would disagree.
1543:7 **Q And why is it that you would disagree?**
1543:8 A Because it is still within our
1543:9 determination, first of all, to tell U.S. Bank
1543:10 whether we actually approve of their approval or
1543:11 not.
1543:12 And, secondly, just because a document
1543:13 like this says that the trustee at its sole

1543:14 discretion has final determination, that doesn't, in
1543:15 my estimation at least, act as a total bar from our
1543:16 company acting in what it thinks is the best
1543:17 interest of the shareholders, if it thinks that by
1543:18 following that sole discretion standard is somehow
1543:19 perpetrating a fraud.

86. In calling for appropriate evidence that the deceased was a beneficial owner at the time of death, and any additional evidence required to satisfy conditions of the exercise of the survivor's option, the prospectuses called for whatever information is required to present a complete picture of beneficial ownership.

[Walker]
1278:6 **Q Okay. Would it be fair to say that the**
1278:7 **prospectus calls for whatever information is**
1278:8 **required to present a complete picture of beneficial**
1278:9 **ownership?**
1278:10 A I would agree.

Lathen Redeemed or Attempted to Redeem Notes and Other Products from Each Issuer Who Testified

87. In 2012, Lathen redeemed notes issued by Citigroup, bearing the CUSIP 17307XFV8. (Lathen Ex. 2070.)

88. Those notes were issued pursuant to a Pricing Supplement dated September 28, 2004, a Prospectus Supplement dated September 22, 2003 and Prospectus dated June 30, 2003. (Div. Exs. 512 – p. 2; 513 – pp. 1-60.)

89. The Citigroup notes that Lathen attempted to redeem were from an account in the name of Lathen and Oliver Grant. (Div. Ex. 635; Lathen Ex. 2070; Div. Ex. 917 – pp. 24, 42, 58.)

90. Lathen and Grant entered into a Participant Agreement dated 5/7/2011. (Div. Ex. 331.)

91. Lathen redeemed Duke InterNotes bearing the CUSIP 26442KAA4. (LE 2070; Div. Ex. 383.)

92. The Duke InterNotes bearing CUSIP 26442KAA4 were issued pursuant to a Pricing Supplement dated November 21, 2012, a Prospectus Supplement dated November 13, 2012, and a Prospectus dated September 29, 2010. (Div. Exs. 519; 521 – pp. 1-55.)

93. Goldman rejected Lathen's submissions of redemptions for Goldman Sachs Holding Notes bearing the CUSIPs 38143CAH4, 38143CAL5, 38143CAR2, and 38143CBA8. (Div. Ex. 828 – p. 49.)

94. The terms under which a Goldman Sachs Group, Inc. note could be redeemed under the survivor's option provision were identical for each of the CUSIPS Lathen redeemed sought to redeem during the relevant period (the "GS Survivor's Option Terms"). (Div. Exs. 562 – pp. 6-9, 14; 565 – pp. 6-10, 13; 568 – pp. 6-9, 12; Lathen Ex. 2070.) See also:

774:15 **Q Thank you. Now just flipping through**
774:16 **Division Exhibit 568 and specifically with reference**
774:17 **to the survivor option terms, which are found at pages**
774:18 **6 and 7 of that exhibit, do you see any material**
774:19 **differences from what you just read?**
774:20 A I do not, not material, no.

775:22 **Q Thank you. And if you would just flip**
775:23 **through this, and please take all the time you care**
775:24 **to, and look at Division Exhibit 565, pages 6 and 7,**
775:25 **and tell me if you see any material differences from**
776:1 **the survivor's option terms you looked at in**
776:2 **connection with Division Exhibit 562.**
776:3 A No.

95. GECC rejected Lathen's submissions of redemptions for GECC notes bearing the CUSIPs 36966TGR7, 36966THD7, and 36966THE5. (Div. Ex. 557 – p. 6.)

96. The terms under which a GECC note could be redeemed under the survivor's option provision were identical for each of the CUSIPs Lathen redeemed or sought to redeem during the relevant period (the "GECC Survivor's Option Terms"), and were provided in the prospectus supplement, dated December 1, 2011. (Div. Ex. 545; see also Div. Exs. 544, 546, 547, 548, 550s.) See also:

1168:17 **Q Can you tell me if you recognize Division**
1168:18 **Exhibit 545?**
1168:19 A Yes. This is the prospectus supplement
1168:20 relating to our InterNotes issuances.

1170:21 **So we're looking at Division Exhibit 544,**
1170:22 **Division Exhibit 546, Division Exhibit 547, Division**
1170:23 **Exhibit 548 and Division Exhibit 550.**
1170:24 **Do you see those?**
1170:25 A Yeah.
1171:1 **Q Okay. Can you tell me what each of those**
1171:2 **Division exhibits is as a general matter?**
1171:3 A These are pricing supplements for
1171:4 individual InterNotes issuances.
1171:5 **Q Okay. And what does the pricing**
1171:6 **supplement that you see here tell an investor about**
1171:7 **whether the survivor's option feature is part of the**

1171:8 **notes that's being offered?**
1171:9 A Yeah, it notes on the box on the first
1171:10 page on whether the survivor option is included.

1174:6 **Q Now, with respect to each of these**
1174:7 **Exhibits 542, 544, 546, 547, 548 and 550, can you**
1174:8 **tell what pricing supplement -- what prospectus**
1174:9 **supplement each of these pricing supplements relates**
1174:10 **to?**
1174:11 A It would relate to the prospectus
1174:12 supplement that we just took a look at earlier,
1174:13 Exhibit 2, I believe, it is.

97. After reviewing all of the Participant Agreements provided by US Bank and consulting with outside counsel, Finnegan made the decision to reject Lathen's redemptions of Funding Corp. notes bearing CUSIPs 3133FXEH6, 3133FXEA1, 3133FXDT1, 3133FXEH6, and 3133FXDK0 as ineligible because no valid joint tenancy had been created by the Participant Agreement.

1862:21 **Q Okay. Now, after seeing the participant**
1862:22 **agreement that we just looked at with respect to Ms.**
1862:23 **Blair, did you form any conclusion; and if so, what,**
1862:24 **with respect to -- about the veracity of Mr.**
1862:25 **Lathen's representation that Ms. Blair was a joint**
1863:1 **and beneficial owner on that account?**
1863:2 A At this stage in my review of the
1863:3 documents, I was unsure.
1863:4 **Q What importance to a determination of**
1863:5 **eligibility, if any, under the survivor's option did**
1863:6 **the participant agreements that you read have?**
1863:7 A The participant agreement was unusual in
1863:8 that there was mention of Eden Arc, a company, which
1863:9 was not -- was not the intent of the retail bond
1863:10 program. The retail bond program is intended for
1863:11 individuals. It's intended for individuals.
1863:12 And so to see the name of a company in the
1863:13 participant agreement was unusual and concerning for
1863:14 me.
1863:15 **Q And why do you say "concerning"?**
1863:16 A It wasn't clear to me that a company could
1863:17 be a joint tenant.
1863:18 **Q And did you eventually get clarity on that**
1863:19 **question?**
1863:20 A I did consult with counsel.
1863:21 **Q And did you determine at that time to**
1863:22 **reject the redemption? Don't tell me what counsel**
1863:23 **told you.**

1863:24 A Yes, I did.

1867:19 **Q Okay. Now, after reviewing this**
1867:20 **participant agreement and power of attorney with Mr.**
1867:21 **Kerr, how did you view Mr. Lathen's redemption**
1867:22 **request?**
1867:23 A We, again, determined not to pay on the
1867:24 survivor option.
1867:25 **Q And did review of any of the participant**
1868:1 **agreements in Division Exhibit 527 -- and take a**
1868:2 **minute to look at them if you like -- alter your**
1868:3 **conclusion about the eligibility of Mr. Lathen's**
1868:4 **redemption requests?**
1868:5 A No, they did not.

(See also: Div. Exs. 527; 527A; 528.)

98. The terms under which a Funding Corp. note could be redeemed under the survivor's option provision were identical for each of the CUSIPs Lathen sought to redeem during the relevant period (the "Funding Corp. Survivor's Option Terms"), and were provided in the Offering Circular supplement, dated October 18, 2010. (SFOF ¶ 62.)

99. Funding Corp. notified investors if a particular CUSIP offered a survivor's option in the Term Sheets for each CUSIP, and each Funding Corp. note that Lathen sought to redeem contained a survivor's option. (SFOF ¶ 63.)

100. The terms of the survivor's option are the same across all of the Prospect InterNotes.

1482:14 **Q Let me ask you -- do you know if the terms**
1482:15 **of the survivor's option are the same in all of the**
1482:16 **Prospect notes that offer survivor's options?**
1482:17 A Yes.
1482:18 **Q They are the same?**
1482:19 They are the same.

101. Lathen redeemed certain Prospect InterNotes bearing the CUSIPs 74348YBD2, 74348YBH3, 74348YBR1, 74348YBN0, and 74348YBP5. (SFOF ¶ 51.)

a. CUSIP 74348YBD2 was issued pursuant to the pricing and prospectus supplement at Div. Ex. 598.

b. CUSIP 74348YBH3 was issued pursuant to the pricing and prospectus supplement at Div. Ex. 600.

c. CUSIPS74348YBN0 and 74348YBP5 were issued pursuant to the pricing and prospectus supplement at Div. Ex. 611.

d. CUSIP 74348YBR1 was issued pursuant to the pricing and prospectus supplement at Div. Ex. 617.

102. Lathen attempted to but was unable to redeem certain other Prospect InterNotes. (SFOF ¶ 52.)

103. InCapital underwrote Bank of America InterNotes issued pursuant to a Prospectus dated October 29, 2004 ("BoA Prospectus"). (Div. Ex. 975.) See also:

1269:16 **Q That is Division Exhibit 975. Do you**
1269:17 **recognize this document?**
1269:18 **Go ahead. Take your time.**
1269:19 **(The witness examined the document.)**
1269:20 THE WITNESS: Yeah, I do. I do recognize
1269:21 that.
1269:22 BY MS. BERKE:
1269:23 **Q What is it?**
1269:24 A So this is the prospectus that Bank of
1269:25 America filed for its retail InterNotes program.
1270:1 **Q Is Bank of America an InCapital client?**
1270:2 A They are.

104. InCapital reviewed the BoA Prospectus before it was issued.

1270:6 **Q Did you review this document before it was**
1270:7 **issued?**
1270:8 A I did.

105. In 2012, Lathen redeemed Bank of America Corp. InterNotes issued pursuant to the BoA Prospectus, bearing the CUSIP 06050XA52. (Lathen Ex. 2070.)

Beneficial Ownership Was Required to Redeem the Survivor's Option Notes

106. Each prospectus or offering circular required the death of a beneficial owner of the note to trigger the early redemption right under the survivor's option (emphasis added):

a. **Citigroup:** The pricing supplement relating to any note will indicate if the holder of that note will have the survivor's option, which is an option to elect repayment of the note prior to its stated maturity in the event of the death of ***the beneficial owner*** of the note. (Div. Ex. 513 – p. 22.)

b. **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.

c. **Duke:** 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. 521 – p. 20.)

d. **Goldman Sachs Group:** Following the death of the ***beneficial owner*** of a note, so long as that note was owned by that ***beneficial owner*** or the estate of that ***beneficial owner*** for at least six months prior to the request, if requested by the authorized representative of the ***beneficial owner*** of that note (subject to the limitations described below), we agree to redeem any notes prior to the stated maturity . . . (Div. Exs. 562 – p. 6; 565 – p. 6; 568 – p. 6.)

e. **GECC:** 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. 545 – p. 18.)

f. **Funding Corp.:** Pursuant to the exercise of the Survivor's Option (as defined below) if applicable, we will repay any Retain Bond (or a portion thereof) properly requested for repayment by or on behalf of the person that has authority to act on behalf of the deceased owner of the beneficial interest in such Retail Bond under the laws of the appropriate jurisdiction, including, without limitation, the Survivor Representative, as

defined below, at a price equal to 100% of the principal amount of the beneficial interest of the deceased owner in such Retail Bond accrued and unpaid interest to the date of such repayment (or at a price equal to the accreted face amount for original issue discount securities on the repayment date. . . . If the applicable Term Sheet for a particular Retail Bond so states, the Survivor Representative, as defined below, of that Retail Bond will have the right to require us to repay such Retail Bond prior to its Maturity Date upon the death of its ***beneficial owner*** under the procedures and restrictions described herein. Thereafter, we will repay any Retail Bond (or portion thereof) properly requested to be repaid by or on behalf of the person with authority to act on behalf of the deceased ***owner of the beneficial interest*** in such Retail Bond under the laws of the appropriate jurisdiction (including, without limitation, the personal representative, executor, surviving joint tenant or surviving tenant by the entirety of such deceased beneficial owner) (the "Survivor Representative") at a price equal to 100% of the principal amount of such ***beneficial interest*** plus accrued and unpaid interest to the date of such repayment, subject to certain limitations as described below. We call this right the "Survivor's Option." (Div. Ex. 530 – p.60.)

g. **Prospect:** 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. 600 – p. 23.)

h. **Bank of America:** "The 'Survivor's Option' is a provision in a note in 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 acquired by the ***beneficial owner*** at least six months prior to the request . . . 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. (Div. Ex. 975 – p. 44.)

107. 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 (emphasis added):

a. **Citigroup:** The death of a person holding ***a beneficial ownership interest*** in a note as a joint tenant with right of survivorship or tenant by the entirety with another person, or as a tenant in common with the deceased holder's spouse, will be deemed the death of a ***beneficial owner*** of that note, and the entire principal amount of the note so held, plus accrued

interest to the date of repayment, will be subject to repayment upon exercise of the survivor's option." (Div. Ex. 513 – p. 22.)

b. **CFC:** The death of a person holding a ***beneficial ownership interest*** in a note as a joint tenant or tenant by the entirety with another person or as a tenant in common with the deceased holder's spouse will be deemed the death of a ***beneficial owner*** of that note, and the entire principal amount of the note so held will be subject to repayment by us upon request. (Div. Ex. 928 – p. 21.)

c. **Duke:** The death of a person holding a ***beneficial ownership interest*** in a Note as a joint tenant or tenant by the entirety with another person, or as a tenant in common with the deceased owner's spouse, will be deemed the death of a ***beneficial owner*** of that Note, and the entire principal amount of the Note so held will be subject to repayment by us upon request. (Div. Ex. 521 – p. 21.)

d. **Goldman Sachs Group:** The following will be deemed the death of a ***beneficial owner*** of a note, and the entire principal amount of the note so held will be subject to redemption by us upon request (with the limitations described below): . . . death of a person holding a ***beneficial ownership interest*** in a note as a joint tenant . . . with another person . . . (Div. Ex. 562 – pp. 6-7; 565 – pp. 6-7; 568 – pp. 6-7.)

e. **GECC:** The death of a person holding a ***beneficial ownership interest*** in a note as a joint tenant . . .with another person . . . will be deemed the death of a ***beneficial owner*** of that note, and the entire principal amount of the note so held will be subject to repayment by us upon request. (Div. Ex. 545 – p. 19.)

f. **Prospect:** The death of a person holding a ***beneficial ownership interest*** in a note as a joint tenant or tenant by the entirety with another person, or as a tenant in common with the deceased holder's spouse, will be deemed the death of a ***beneficial owner*** of that note, and the entire principal amount of the note so held will be subject to repayment by us upon request. (Div. Ex. 600 – p. 23.)

g. **Bank of America:** The death of a person holding a ***beneficial ownership interest*** in a note as a joint tenant or tenant by the entirety with another person, or as a tenant in common with the deceased holder's spouse, will be deemed the death of a ***beneficial owner*** of that note, and the entire principal amount of the note held in this manner will be subject to repayment by up upon exercise of the Survivor's Option. (Div. Ex. 975 – p. 44.)

108. Each prospectus emphasized the materiality of the beneficial ownership requirement by requiring redeemers to submit evidence of, among other things, the decedent's beneficial ownership (emphasis added):

a. **Citigroup:** Subject to the foregoing, in order for a survivor's option to be validly exercised, the paying agent must receive . . . appropriate evidence satisfactory to Citigroup Global Markets Holdings and the paying agent that (1) the representative has authority to act on behalf of the ***deceased beneficial owner***; (2) the death of such ***beneficial owner*** has occurred; and (3) the deceased was the ***beneficial owner*** of such note at the time of death. (Div. Ex. 513 – p. 23.)

b. **CFC:** To obtain repayment pursuant to the exercise of the Survivor's Option for a note, the deceased ***beneficial owner's*** authorized representative must provide the following items to the broker or other entity through which the ***beneficial interest*** in the note is held by the ***deceased beneficial owner***: . . . appropriate evidence satisfactory to us and the trustee (a) that the deceased was the ***beneficial owner*** of the note at the time of death and his or her interest in the note was owned by the deceased ***beneficial owner*** or his or her estate at least six months prior to the request for repayment . . . . Any additional information that we or the trustee reasonably require to evidence satisfaction of any conditions to the exercise of the Survivor's Option or to document ***beneficial ownership*** or authority to make the election and to cause the repayment of the note. (Div. Ex. 928 – pp. 22-23.)

c. **Duke:** To obtain repayment 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 broker or other entity through which the beneficial interest in the Note is held by the deceased ***beneficial owner***: ... appropriate evidence satisfactory to us and the Trustee (i) that the deceased was the ***beneficial owner*** or his or her estate at least six months prior to the request for repayment... (Div. Ex. 521 – p. 22.)

d. **Goldman Sachs Group:** 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***:

- a written request for redemption signed by the authorized representative of the deceased ***beneficial owner*** . . .

- appropriate evidence satisfactory to us and the Trustee: (a) that the deceased was the ***beneficial owner*** of the note at the time of death and his or her interest in the note was owned by the deceased ***beneficial owner*** of the note at the time of death and his or her

interest in the note was owned by the deceased ***beneficial owner*** or his or estate for at least six months prior to the request for redemption; [and]

- any additional information we or the Trustee reasonably require to evidence satisfaction of any conditions to the exercise of the Survivor's Option or to document ***beneficial ownership*** or authority to make the election and to cause the redemption of the note. . . (Div. Exs. 562 – p. 8; 565 – p. 9; 568 – p. 8.)

e. **GECC:** To obtain repayment 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 broker or other entity through which the beneficial interest in the note is held by the deceased ***beneficial owner***:

- a written instruction to such broker . . . of the authorized representative's desire to obtain repayment pursuant to exercise of the Survivor's Option;

- appropriate evidence satisfactory to the trustee and us (a) that the deceased was the ***beneficial owner*** of the note at the time of death and his or her interest in the note was owned by the deceased ***beneficial owner*** or his or her estate at least six months prior to the request for repayment, (b) that the death of the ***beneficial owner*** has occurred, (c) of the date of death of the beneficial owner, and (d) that the representative has authority to act on behalf of the ***beneficial owner***; [and]

- any additional information the trustee or we reasonably require to evidence satisfaction of any conditions to the exercise of the Survivor's Option or to document ***beneficial ownership*** or authority to make the election and to cause the repayment of the note. (Div. Ex. 545 – pp.19-20.)

f. **Funding Corp.:** Subject to the foregoing, in order to validly exercise a Survivor's Option, the Survivor Representative must make a request for repayment through an appropriate financial institution ("Financial Institution"). The request must include the following:

- a written request for repayment signed by the Survivor Representative. . .

- appropriate evidence that (1) the Survivor Representative has authority to act on behalf of the deceased ***beneficial owner***; (2) the death of such ***beneficial owner*** has occurred; (3) the deceased was the ***beneficial owner*** of the Retail Bond at the time of death; and (4) the Retail Bond had been held for the applicable Hold Period. . . (Div. Ex. 530 – p.62.)

g. **Prospect:** To obtain repayment 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 broker or other entity through which the beneficial interest in the note is held by the deceased ***beneficial owner*** . . . appropriate evidence satisfactory to the trustee (a) that the deceased was the ***beneficial owner*** of the note at the time of death and his or her interest in the note was owned by the deceased ***beneficial owner*** or his or her estate at least six months prior to the request for repayment . . . (Div. Ex. 600 – p. 24.)

h. **Bank of America:** To obtain repayment of a note pursuant to exercise of the Survivor's Option, the deceased ***beneficial owner's*** authorized representative must provide the following items to the broker or other entity through which the beneficial interest in the note is held by the deceased ***beneficial owner***: appropriate evidence satisfactory to the trustee that: (a) the deceased was the ***beneficial owner*** of the note at the time of death and his or her interest in the note was acquired by the deceased ***beneficial owner*** at least six months prior to the request for repayment... (Div. Ex. 975 – p. 46.)

109. That a decedent holding the note in joint tenancy also had to be a beneficial owner of the note was confirmed by the issuers' representatives.

a. Citigroup's offering materials (Div. Ex. 513 at 22) required beneficial ownership interests by the decedent even where the notes were held in joint tenancy.

719:17 **Q And can you read -- can you read the first**
719:18 **sentence in that paragraph for us.**
719:19 A Sure.
719:20 "The death of a person holding a beneficial
719:21 ownership interest in a note as a joint tenant with
719:22 the right of survivorship or tenant by the entirety
719:23 with another person or as a tenant in common with the
719:24 deceased holder's spouse will be deemed the death of a
719:25 beneficial owner of that note.
720:1 "And the entire principal amount of that
720:2 note so held, plus accrued interest to the date of
720:3 repayment, will be subject to repayment upon exercise
720:4 of the survivor's option."
720:5 **Q Thank you.**
720:6 **So under that provision, in order to**
720:7 **exercise the survivor's option, would it be sufficient**
720:8 **for the decedent to hold the note in a joint tenant**
720:9 **account? Or does the decedent still have to have** a
720:10 **joint beneficial ownership interest?**
720:11 A So you're asking if the person has to have

720:12 it in his own account? Or is it enough to have
720:13 beneficial interest in it?
720:14 **Q I'm asking: Does this requirement -- does**
720:15 **the person who died have to have a beneficial**
720:16 **ownership interest pursuant to the provision we just**
720:17 **read?**
720:18 A In my understanding, yes.

b. To qualify for redemption under the GS Survivor's Option Terms, a deceased who held the Goldman Sachs Group, Inc. note in joint tenancy must also have been a beneficial owner of the note.

769:11 **Q All right. So that language that you just**
769:12 **read, "The following will be deemed. The death of a**
769:13 **beneficial owner of a note and the entire principal**
769:14 **amount of the note so held will be subject to**
769:15 **redemption by us upon request with the limitations**
769:16 **described below," the first bullet point -- continue**
769:17 **over to the next page. What does that say?**
769:18 A Under "Death of a person holding a
769:19 beneficial ownership interest in a note as a joint
769:20 tenant or tenant by the entirety with another person,
769:21 a tenant in common with the deceased holder's spouse
769:22 or a tenant in common with a person other than such
769:23 deceased person's spouse."

770:9 **So if the person holds the note in joint**
770:10 **tenancy, do they qualify as a beneficial owner under**
770:11 **the language that you just read, even if they don't**
770:12 **have any beneficial ownership in the note?**
770:13 A Based on this bullet, no.

c. To qualify for redemption under the GECC Survivor's Option Terms, a person holding the note in joint tenancy also had to be a beneficial owner of the note.

1178:4 **Q Under that language, what qualified a**
1178:5 **joint tenant on a note to redeem? The fact that the**
1178:6 **deceased held the note in joint tenancy, or the fact**
1178:7 **that the deceased was a beneficial owner or both?**
1178:8 A Need both. It would be a joint tenant and
1178:9 a beneficial owner.

d. Ferraro (Prospect) testified that, to redeem a note held in joint tenancy, both joint tenants have to be beneficial owners of the note.

1477:21 **Q Okay. Just focusing on the first**

1477:22 **sentence, if two people hold a note in joint**
1477:23 **tenancy, what would qualify them for redemption?**
1477:24 **In other words, do they have to be a joint**
1477:25 **tenant? Do they have to have a beneficial ownership**
1478:1 **interest? Or do they have to have some other**
1478:2 **interest?**
1478:3 A They both have to have a beneficial owner
1478:4 interest in the note.

e. Bank of America's notes required beneficial ownership of the notes to redeem under the survivor's option in all circumstances.

1274:4 **Q Well, I want to read the language again.**
1274:5 **"The death of a person holding a beneficial**
1274:6 **ownership interest in a note as a joint tenant or a**
1274:7 **tenant in entirety with another person will be**
1274:8 **deemed the death the beneficial owner of the note."**
1274:9 **Is beneficial ownership still a concept in**
1274:10 **this provision?**
1274:11 A It is. The concept of beneficial owner
1274:12 applies in all of the circumstances.

110. Lathen affirmed in an affidavit filed in litigation with Prospect in New York State Court that a Participant must have true beneficial interest in the securities in the joint account at the time of their death.

231:2 **Q You recall filling out an affidavit in a**
231:3 **matter called Prospect Capital, correct?**
231:4 A Yes.
231:5 **Q And in that affidavit, you stated,**
231:6 **"Importantly, the Participant must have a true**
231:7 **beneficial interest in the securities in the joint**
231:8 **account at the time of their death."**
231:9 **You said that in your affidavit; is that**
231:10 **right?**
231:11 A I may have -- I may have said that in my
231:12 affidavit. And I'm just pointing out to you that the
231:13 term "true beneficial interest" does not appear in the
231:14 governing documents.
231:15 **Q Okay. But did you say that in your affidavit**
231:16 **or not?**
231:17 A Yes, I did.

111. A submission of a joint tenant account statement could be – but is not necessarily – adequate evidence of beneficial ownership. It would not be adequate evidence in the event that there were side agreements to the account that bore on beneficial ownership.

[Ferraro]
1479:10 **Q Okay. And if you know, is the**
1479:11 **presentation of a JTWROS account statement**
1479:12 **satisfactory evidence to establish beneficial**
1479:13 **ownership under that provision?**
1479:14 A In and of itself, no, not necessarily.
1479:15 **Q Why not?**
1479:16 A Because a -- just because a joint tenancy
1479:17 account exists, that is not itself the same thing as
1479:18 there being beneficial ownership in the note that
1479:19 account holds.
1479:20 **Q Could there be other things that would**
1479:21 **evidence beneficial ownership?**
1479:22 A Yes.
1479:23 **Q Okay. Do you have anything in mind?**
1479:24 A You could have trust documents. You could
1479:25 have side letters. Really, any kind of other
1480:1 contractual arrangement that demonstrates who the
1480:2 beneficial owner or owners of that note is.

112. The person on an account statement is not necessarily the beneficial owner of notes held in that account, because securities can be held in a street name, other than the beneficial owners.

[De May (Duke), on cross-examination] (emphasis added)
1632:15 **Q Let's say that I have a brokerage account,**
1632:16 **and I got some Duke InterNotes in it. And I've got**
1632:17 **an agreement with my brother that says, If I die, I**
1632:18 **want you to have the contents of this account.**
1632:19 **Would you want to know about that**
1632:20 **agreement?**
1632:21 A I would only want to know about a side
1632:22 agreement if it changed or attempted to change the
1632:23 beneficial ownership status.
1632:24 **Q And if -- you would agree that in my**
1632:25 **example if I had an agreement with my brother that**
1633:1 **said, If I die I want you to have what's in my**
1633:2 **account, that doesn't change the beneficial**
1633:3 **ownership status of the Duke bonds, right?**
1633:4 A That sounds like a -- something that you
1633:5 are -- a bequest.
1633:6 **Q A bequest. All right. But you would**
1633:7 **agree that whether it's in my will or I've written**
1633:8 **out the contract with him or some kind of informal**
1633:9 **agreement with him, that when I die, I want you to**
1633:10 **have the contents of my brokerage account, that's**
1633:11 **not something you would want to know for redeeming**

1633:12 **my bonds, right?**
1633:13 A That's right. Because I don't think it
1633:14 changed the fact that -- I don't know the
1633:15 circumstances of your hypothetical.
1633:16 But it sounds like it doesn't change the
1633:17 fact that you're the beneficial owner of the bond
1633:18 while you're alive.
1633:19 **Q Because my name's on the account still,**
1633:20 **right?**
1633:21 A No. Because you are bearing all the
1633:22 rights and privileges --
1633:23 **Q Okay.**
1633:24 A -- and risks of ownership, because
1633:25 securities can be held in street name, not
1634:1 necessarily your own.

113. A beneficial owner bears economic rights and risks of holding the note.

a. Robustelli (GECC) testified that:

1177:6 **Q And what does beneficial owner mean?**
1177:7 A Beneficial owner means a person who holds
1177:8 the economic interest in the note and has the rights
1177:9 to pledge, sell or partake in any of the profits of
1177:10 that note.

b. Robustelli (GECC) told Lathen's counsel that "[u]nder guiding New York state and federal law principles, indicia of beneficial ownership of securities typically includes the right to sell the securities and to be entitled to the economic benefits of (and bear the risk of economic loss deriving from) the sale of such securities." (Div. Ex. 1016 – p. 2.)

c. GECC's counsel told Lathen's counsel that "beneficial ownership entails certain basic rights, such as the right to vote or dispose of securities. It also entails under New York statutory provisions holding an economic interest in the securities and bearing the risk of loss." (Div. Ex. 999 – p. 4.)

d. GECC's counsel also told Lathen's counsel that "The SEC has defined a "beneficial owner" of a security as a person who 'directly or indirectly, ***through any contract, arrangement, understanding, relationship or otherwise*** has or shares: (i) Voting power which includes the power to vote, or to direct the voting of, such security; and/or (ii) Investment power which includes the power to dispose, or to direct the disposition of such security." (Div. Ex. 838 – pp. 3-4 (citing Rule 13d-3 of the Securities Exchange Act of 1934) (emphasis in original).)

e. De May (Duke) testified that a person holding a "beneficial ownership interest in the Duke InterNotes is "that person who enjoys all of the rights and privileges and risks of owning the security."

1623:9 **Q Do you know what a beneficial ownership**
1623:10 **interest is?**
1623:11 A I can tell you what I believed it to be
1623:12 both then and now.
1623:13 **Q Sure.**
1623:14 A It's that person who enjoys all of the
1623:15 rights and privileges and risks of owning the
1623:16 security. I say "risks," because if Duke Energy
1623:17 were to go bankrupt and there were no -- there was
1623:18 no wherewithal to repay any of the notes, it would
1623:19 be that person who would be at loss.
1623:20 But looking at the more positive side of
1623:21 the relationship, it is the person who would benefit
1623:22 from all of the rights of the security.

f. Begelman (Goldman Sachs) testified in examining one of Lathen's Participant Agreements that the absence of risk of loss added to Goldman Sachs' conclusion that the deceased had no beneficial interest.

1939:13 **Q And what, if anything, did that paragraph**
1939:14 **tell you about the participant's obligations with**
1939:15 **respect to the account?**
1939:16 A Basically, our view was that the
1939:17 participant had actually little or no obligations
1939:18 with this account at all.
1939:19 **Q Okay. And what, if anything, did that**
1939:20 **tell you about the participant's risks of ownership**
1939:21 **of the account?**
1939:22 A We didn't believe he had any risk of
1939:23 ownership.

g. CFC's offering materials stated: 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.)

h. Bank of America's offering materials, which contained language which was standard in the industry, stated: "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." (Div. Ex. 975 – p. 44.)

See also:
[Walker, after reading the passage directly above]
1272:1 **Q Okay. Is this language consistent with**
1272:2 **your understanding of what a beneficial owner is?**
1272:3 A It is. That language is fairly consistent
1272:4 across all the programs.
1272:5 **Q So fair to say this is a definition that**
1272:6 **you've seen in other offering materials --**
1272:7 A It is --
1272:8 **Q -- or something similar to this?**
1272:9 A -- correct.
1272:10 **Q Have you ever seen a prospectus that**
1272:11 **contained a definition of beneficial ownership that**
1272:12 **was materially different from this?**
1272:13 A I have not.

114. When De May (Duke) was asked whether the language about DTC as holder in Duke's Prospectus altered his understanding about who the beneficial owner was under the survivor's option provision, he testified:

1645:11 **Q So what it said is -- it says, "The**
1645:12 **ownership interest of each actual purchaser of each**
1645:13 **debt security" -- and it defines the actual**
1645:14 **purchaser of each debt security as the 'beneficial**
1645:15 **owner,' right?**
1645:16 A That's what it says.
1645:17 **Q Okay.**
1645:18 A I will note that that "Beneficial Owner,"
1645:19 is not what was referred to in the prospectus
1645:20 supplement.

1657:12 **Q And did any provision that Mr. Hugel just**
1657:13 **directed your attention to during the**
1657:14 **cross-examination change your understanding of what**
1657:15 **a beneficial owner in the note was for the purposes**
1657:16 **of the survivor's option provision?**
1657:17 A No. And I'm not sure how important intent
1657:18 was. But the company's intent -- and we designed
1657:19 this prospectus supplement in the survivor's option
1657:20 to provide a benefit to individuals who enjoyed
1657:21 beneficial ownership rights and risks and privileges
1657:22 and who paid for the notes, who could sell the
1657:23 notes, who would file tax forms related to the sale
1657:24 or disposition of the notes or the interest income
1657:25 from those notes.
1658:1 This, to us -- and I was there when we put

1658:2 this provision in place. This, to us, is what we
1658:3 meant by beneficial ownership.

115. At least one potential investor recognized that the prospectuses required that the decedent be a beneficial owner of the note and expressed their concern to Lathen that neither the Participant nor Lathen held a beneficial ownership in the notes. (Div. Ex. 107 – p. 4.)

Impact of Side Agreements on Beneficial Ownership

116. It would have been important to Citigroup's lawyers—who would have investigated questions about beneficial ownership—to have any side agreements bearing on beneficial ownership rights.

722:13 **Q Okay. And if there was a question about**
722:14 **whether someone had a beneficial ownership interest in**
722:15 **connection with these documents, how would that be**
722:16 **handled?**
722:17 A We would refer that to our legal counsel.

723:12 **Q And would you want your legal counsel to**
723:13 **have available to them any side agreements that**
723:14 **impacted on beneficial ownership rights?**
723:15 A Yes.
723:16 **Q And is that something that you think would**
723:17 **be important to your lawyers' determination on whether**
723:18 **or not Citi had to redeem under this prospectus?**
723:19 A Yes.

117. Walker (InCapital) testified that if there was a side agreement between account holders to a JTWROS account that bore on ownership rights, such an agreement should be submitted and considered by a trustee in making an eligibility determination. Such information would potentially have a material impact on such a determination.

1278: 11 **Q So if there was a side agreement between**
1278: 12 **accountholders to JTWROS that bore upon ownership**
1278: 13 **rights, what importance, if any, would this have**
1278: 14 **under these documents to an eligibility**
1278: 15 **determination?**
1278: 16 A In my opinion, I think any document that
1278: 17 has any bearing on the ownership of the account
1278: 18 would have material impact or should be considered
1278: 19 in a decision by the trustee.

118. De May (Duke) testified that a side agreement bearing on ownership rights to the account would have been important to a determination of eligibility under the survivor's option.

1628:5 **Q Okay. If there was a side agreement**
1628:6 **between accountholders to a JTWROS account that bore**
1628:7 **on ownership rights, what import, if any, would that**
1628:8 **have to a determination of eligibility pursuant to**
1628:9 **the survivor's option?**
1628:10 A Well, if the purpose of such an
1628:11 arrangement was to provide a benefit to someone who
1628:12 was not the beneficial owner, then we would object
1628:13 to that.
1628:14 **Q Is that information that you -- that would**
1628:15 **be important in the eligibility determination?**
1628:16 A Yes, very much. I think -- I think the
1628:17 terms of the -- of the survivor option are pretty
1628:18 clear; that they were intended to benefit a
1628:19 beneficial owner and no one else.

119. De May testified that a side agreement indicating that a joint tenant was acting as agent for an entity would have been important to an issuer.

1629:5 **Q I'm asking you to envision a different**
1629:6 **side agreement; one between one party to a joint**
1629:7 **tenant account saying that that individual was**
1629:8 **acting as an agent for an entity.**
1629:9 **Would that be important to a determination**
1629:10 **of eligibility?**
1629:11 A Again, I think if it changed the -- if it
1629:12 changed the intended outcome such that a beneficial
1629:13 owner -- and this is during the period of time that
1629:14 the security is owned, there's a beneficial owner.
1629:15 I'm sure it can take different forms.
1629:16 But only a person can die. And so we talk
1629:17 many times in this prospectus supplement about, you
1629:18 know, a beneficial owner dying. And that is --
1629:19 triggers the right of the survivor option.
1629:20 And so I think any arrangement that you
1629:21 can describe that would change that fundamental
1629:22 ownership structure that we envisioned when we put
1629:23 the survivor option in place, then that would be of
1629:24 import to us.

120. Begelman (Goldman Sachs) testified that if he had seen other agreements with Eden Arc relating to Lathen's ownership rights in the joint accounts, those

agreements also would have been material to Goldman Sachs' eligibility determination.

801:7 **Q Is it fair to say, Mr. Begelman, that your**
801:8 **analysis here was limited to just your review of the**
801:9 **agreements that Mr. Lathen had with his participants,**
801:10 **the deceased?**
801:11 MR. HUGEL: Objection. There are many other
801:12 documents that he testified about.
801:13 JUDGE PATIL: Overruled.
801:14 THE WITNESS: Yes.
801:15 BY MS. BROWN:
801:16 **Q You may answer.**
801:17 A That's fair.
801:18 **Q Thank you. And if other agreements Mr.**
801:19 **Lathen had with the fund -- his fund bore on his**
801:20 **ownership rights in the joint account, how relevant,**
801:21 **if at all, would they have been to your determination**
801:22 **of his eligibility in the redemption context?**

802:2 THE WITNESS: It would have been relevant.
802:3 We would have rejected it probably sooner or
802:4 immediately rather than asking for additional
802:5 documentation.

121. Robustelli (GECC) testified that any agreement that Lathen had with the Fund by which he disavowed ownership interest in the note would have likewise been material because it would have indicated that perhaps the fund was the beneficial owner of the note rather than Lathen or the Participant.

1196:11 **Q What importance -- let me start again.**
1196:12 **So if you had been aware that aside from**
1196:13 **the participant agreement with Mr. Fogas, Mr. Lathen**
1196:14 **had had an agreement with his fund by which he**
1196:15 **disavowed ownership interest in the note, what**
1196:16 **importance, if any, would that agreement have had to**
1196:17 **your eligibility determinations?**
1196:18 A Well, it would have indicated that perhaps
1196:19 the fund was the beneficial owner instead either Mr.
1196:20 Lathen or the participant.
1196:21 And what was being represented to us was
1196:22 that Donald Lathen and his participants were joint
1196:23 accountholders with beneficial owner interests.

122. Ferraro (Prospect) testified that a side agreement to a joint tenant account bearing on beneficial ownership rights would have been important to see to determine eligibility under the survivor's option.

1480:3 **Q Okay. So if there were side agreements**
1480:4 **bearing on the beneficial ownership rights of the**
1480:5 **parties to a JTWROS account, what import would that**
1480:6 **have on a determination of eligibility?**
1480:7 A Well, it would -- it would be significant.
1480:8 It would be something that if I had questions, I
1480:9 would like to see.

123. Ferraro (Prospect) testified that a side agreement indicating that an account holder was acting as an agent for a third party would have been equally important to see.

1480:10 **Q Okay. And if there was a side agreement**
1480:11 **to a JTWROS account stating that one accountholder**
1480:12 **was acting as an agent or a nominee for a third**
1480:13 **party, what import would that have to a**
1480:14 **determination of eligibility?**
1480:15 A Well, that would be important, because
1480:16 that would get at exactly what rights are held by
1480:17 whom.

124. Robustelli (GECC) testified that, because the Participant Agreement outlined who the beneficial owner of the GECC notes was, it was critical to GECC's determination of the eligibility of Lathen's redemption request.

1195:4 **Q Okay. And what importance, if any, was**
1195:5 **the participant agreement to GECC's determination of**
1195:6 **eligibility of the redemption request?**
1195:7 A Ultimately, the participant agreement
1195:8 described who were the beneficial owners of the
1195:9 note, who had the rights related to the note.
1195:10 **Q And can you tell me of what importance, if**
1195:11 **any, that was to your determination of eligibility?**
1195:12 A Well, critical to our determination was
1195:13 trying to figure out who the beneficial owner was,
1195:14 and so the participant agreement outlined that.

1196:11 **Q What importance -- let me start again.**
1196:12 **So if you had been aware that aside from**
1196:13 **the participant agreement with Mr. Fogas, Mr. Lathen**
1196:14 **had had an agreement with his fund by which he**
1196:15 **disavowed ownership interest in the note, what**
1196:16 **importance, if any, would that agreement have had to**
1196:17 **your eligibility determinations?**
1196:18 A Well, it would have indicated that perhaps
1196:19 the fund was the beneficial owner instead either Mr.
1196:20 Lathen or the participant.

1196:21 And what was being represented to us was
1196:22 that Donald Lathen and his participants were joint
1196:23 accountholders with beneficial owner interests.

125. Finnegan (Funding Corp.) testified that after reviewing all of the Participant Agreements provided by US Bank and consulting with outside counsel, she made the decision to reject Lathen's redemptions of Funding Corp. notes as ineligible because no valid joint tenancy had been created by the Participant Agreement.

1862:21 **Q Okay. Now, after seeing the participant**
1862:22 **agreement that we just looked at with respect to Ms.**
1862:23 **Blair, did you form any conclusion; and if so, what,**
1862:24 **with respect to -- about the veracity of Mr.**
1862:25 **Lathen's representation that Ms. Blair was a joint**
1863:1 **and beneficial owner on that account?**
1863:2 A At this stage in my review of the
1863:3 documents, I was unsure.
1863:4 **Q What importance to a determination of**
1863:5 **eligibility, if any, under the survivor's option did**
1863:6 **the participant agreements that you read have?**
1863:7 A The participant agreement was unusual in
1863:8 that there was mention of Eden Arc, a company, which
1863:9 was not -- was not the intent of the retail bond
1863:10 program. The retail bond program is intended for
1863:11 individuals. It's intended for individuals.
1863:12 And so to see the name of a company in the
1863:13 participant agreement was unusual and concerning for
1863:14 me.
1863:15 **Q And why do you say "concerning"?**
1863:16 A It wasn't clear to me that a company could
1863:17 be a joint tenant.
1863:18 **Q And did you eventually get clarity on that**
1863:19 **question?**
1863:20 A I did consult with counsel.
1863:21 **Q And did you determine at that time to**
1863:22 **reject the redemption? Don't tell me what counsel**
1863:23 **told you.**
1863:24 A Yes, I did.

1867:19 **Q Okay. Now, after reviewing this**
1867:20 **participant agreement and power of attorney with Mr.**
1867:21 **Kerr, how did you view Mr. Lathen's redemption**
1867:22 **request?**
1867:23 A We, again, determined not to pay on the
1867:24 survivor option.
1867:25 **Q And did review of any of the participant**

1868:1 **agreements in Division Exhibit 527 -- and take a**
1868:2 **minute to look at them if you like -- alter your**
1868:3 **conclusion about the eligibility of Mr. Lathen's**
1868:4 **redemption requests?**
1868:5 A No, they did not.

Many Issuers Who Found Out About Lathen's Scheme Did Not Pay

Goldman Sachs

126. GS Bank's treasury department learned of Lathen's redemption requests of three GS Bank CDs in the summer of 2013, and Begelman requested additional information from Lathen's broker in an email, dated August 15, 2013. In that email, Begelman asked for information respecting the accounts of Lathen and Jackson; Lathen and Servider and Lathen and Kilgus:

> To enable GS Bank to determine whether Mr. Lathen may elect to exercise a survivor's option, we need the following information:
>
> - Account opening documents for each of the accounts
> - Any monthly account statement reflecting the acquisition of the Callable CD in each of the accounts
> - Any agreements between Mr. Lathen (or any of his affiliated entities) with the other identified owner of each of the accounts
> - Documents reflecting the acquisition of each of the Callable CDs, including (i) whether the Callable CD was purchased in a primary sale or in the secondary market or through CL King and (ii) any communications between Mr. Lathen and the other identified owner regarding the purchase
> - The source of funding for each of the accounts
> - Any withdrawals from the account(s) by decedent(s)
> - Copies of any federal gift tax returns, redacted as may be appropriate, showing that Mr. Lathen made a completed gift to the other account holder(s) upon creation of each of the accounts, or, in lieu of such copies, an affidavit by Mr. Lathen indicating how he treated the creation of each account for federal gift tax purposes
> - With respect to the Lathen/Kilgus account, an explanation for the 5/31 journal entry and the identity of the account holder on the transferor account . . .
> - Any consideration paid by Mr. Lathen (or affiliated entities) to the other owner of each of the accounts in connection with the establishment of the relevant account, and if so how much and why
> - Will the "joint account" holder's estate receive any of the proceeds from the redemption including any difference between the purchase price and the redemption amount
>
> (Div. Ex. 570 – pp. 1-2.)

See also:

776:19 **Q And how did you become familiar with that**
776:20 **name?**
776:21 A I became familiar with that name when people
776:22 from the bank's treasury department came to me to
776:23 inform me that there were a number of redemption
776:24 requests which included an individual named Mr. Lathen.
776:25 **Q And were those with respect to bonds or CDs?**
777:1 A Both.
777:2 **Q Okay. And what did this person who came to**
777:3 **you tell you about the redemptions?**
777:4 A That there seemed to be a lot of them. More
777:5 than one, more than two, as I recall.
777:6 And that it seemed unusual that we would
777:7 have one individual on so many redemption requests.
777:8 As a consequence, we set up -- you call it a
777:9 surveillance or review so that if anymore came in, we
777:10 would be notified.
777:11 And we did some research on who the
777:12 requestor was and the nature of the requests, and then
777:13 we asked for additional information.

778:24 **Q And I'm going to direct your attention to**
778:25 **your email, but tell me if you can identify the entire**
779:1 **exhibit.**
779:2 A I can. This is my email to C.L. King for
779:3 Ms. Burriesci, Andrea Burriesci, asking for a slew of
779:4 different documents so that we could have a better
779:5 understanding of the nature of the relationship
779:6 between Mr. Lathen and the other party on the -- on
779:7 the note or on the CD.

779:16 **Q All right. So did you have an understanding**
779:17 **when you were addressing this who Ms. Burriesci was?**
779:18 **I mean, I think you said she was his representative?**
779:19 A Yeah. So C.L. King was the actual entity on
779:20 Mr. Lathen's behalf that asked for the redemption. I
779:21 think they -- I believe it's a broker-dealer.
779:22 **Q Okay. And your email is dated August 15,**
779:23 **2013.**
779:24 **How soon after you became aware of Mr.**
779:25 **Lathen's redemption requests did you send out this**
780:1 **email? Just in relative terms.**
780:2 A I believe it was within two weeks.
780:3 **Q Now, if you could read what you wrote to Ms.**
780:4 **Burriesci in making your requests. And I'm at the**

780:5 **fifth line down. Starts with "Specifically."**
780:6 **Do you see that, "Specifically based on the**
780:7 **documentation"?**
780:8 A Yes.
780:9 **Q So could you read from that down to the**
780:10 **first bullet point?**
780:11 A Okay. "Specifically based on the
780:12 documentation provided to us, Mr. Lathen, on behalf of
780:13 Eden Arc Capital Management, LLC, purports to exercise
780:14 through C.L. King a survivor's option as a joint owner
780:15 of each of these accounts. Such options in all
780:16 circumstances may only be exercised by an owner of the
780:17 relevant callable CD.
780:18 "To enable GS bank to determine whether Mr.
780:19 Lathen may elect to exercise a survivor's option, we
780:20 need the following information."
780:21 **Q Okay. And then you provide her with a list**
780:22 **of items that you wanted to see?**
780:23 A That's correct.

127. Lathen responded through his broker, by letter dated August 21, 2013, and attached account opening documents, monthly account statements, relevant Participant Agreements, and trade confirms; identified a " loan from Eden Arc Capital Partners, a private investment partnership" as the "funding for the accounts"; he represented that no withdrawals had been made from any of the accounts by the decedents; explained that each decedent had been paid $10,000 pursuant to the terms of the Participant Agreements; and noted that the decedents would receive none of the proceeds from the redemptions since the accounts were "JTWROS and, by law, the decedent's interest in the account is not part of their estate." (Div. Ex. 570 – pp. 3-4.) See also:

782:7 **Q All right. So if you look at Division**
782:8 **Exhibit 570, same thing. On page 3, what is that, 3**
782:9 **and 4?**
782:10 A This is their -- they attach documents of
782:11 our request.
782:12 **Q Okay.**
782:13 A So this is their -- basically their
782:14 response.
782:15 **Q Is this Eden Arc's response to you?**
782:16 A Eden Arc, as you can see, sent it to Andrea
782:17 Burriesci at C.L. King. And that was on -- sent to
782:18 us.

128. On review of the account opening documents, Begelman determined that Lathen had signed them on behalf of the Participants as agent for them.

784:21 **Q And did you happen to review these**
784:22 **attachments that she's providing at the time you got**
784:23 **the email?**
784:24 A Yes, ma'am.
784:25 **Q All right. And looking at, for example,**
785:1 **569, pages -- sorry. 4 through 6, what are those?**
785:2 A So this is basically a brokerage account
785:3 application with Mr. Lathen, along with, in this case,
785:4 an Emily Servider.
785:5 **Q Okay. Stop right there, please.**
785:6 A Yes.
785:7 **Q Can you tell who signed the account opening**
785:8 **document on behalf of Ms. Servider?**
785:9 A Yes.
785:10 **Q Who?**
785:11 A Mr. Lathen. And it says "as agent."
785:12 **Q Thank you. All right. Let's flip to the**
785:13 **next account document, page -- the signature appears**
785:14 **on page 10, but it runs from page 9 to 10.**
785:15 A Okay.
785:16 **Q And what do you understand that to be?**
785:17 A Again, this is a brokerage account
785:18 application to holders Mr. Lathen and a Frederick
785:19 Jackson.
785:20 **Q And can you tell by looking at page 10 who**
785:21 **signed the account opening document, Mr. Jackson or**
785:22 **someone on his behalf?**
785:23 A Yes. It was, once again, Mr. Lathen as
785:24 agent.
785:25 **Q All right. And how about page 13? And,**
786:1 **again, you can look at the whole thing. It's 11**
786:2 **through 13. What is that?**
786:3 A That's also an account application. Again,
786:4 Mr. Lathen and a Carol Kilgus.
786:5 **Q And can you tell who signs for Ms. Kilgus?**
786:6 A Once again, it appears to be Mr. Lathen as
786:7 agent.

(See also: Div. Ex. 569 – pp. 4-6; 9-10; 11-13.)

129. Begelman determined that the Participant Agreements, and the Powers of Attorney were signed by each Participant prior to Lathen's opening of their respective joint accounts because the Participant Agreement and the Power of Attorney authorized Lathen to sign the Participant's name to any account-related documents.

1942:17 **Q Okay. Now, can you tell when Mr. Jackson**

1942:18 **signed this participant agreement?**
1942:19 I direct your attention to page 22.
1942:20 A He did. It appears he did, yes.
1942:21 **Q And can you tell what date? If you go up,**
1942:22 **yeah.**
1942:23 A February 4, 2013.
1942:24 **Q Okay. And if you look at 818, which is**
1942:25 **your next page, can you tell when Mr. Jackson signed**
1943:1 **the power of attorney?**
1943:2 A February 4, 2013.
1943:3 **Q Okay. Now look at pages 9 and 10 of 569,**
1943:4 **which is the tab you're in.**
1943:5 **And I think you told us on direct that**
1943:6 **that was an account opening document, as you**
1943:7 **understood it --**
1943:8 A Yes.
1943:9 **Q -- for Mr. Jackson?**
1943:10 **Okay. And if you look at page 10, which**
1943:11 **is where he signs it, I think you testified, again,**
1943:12 **on direct that it didn't look like Mr. Jackson**
1943:13 **signed it; Mr. Lathen signed it.**
1943:14 **But what's the date?**
1943:15 A February 4, 2013.
1943:16 **Q Okay. So what does looking at those two**
1943:17 **documents, or really three -- the participant**
1943:18 **agreement and the power of attorney and this account**
1943:19 **form that Mr. Lathen is signing on Mr. Jackson's**
1943:20 **behalf -- tell you, if anything, about the sequence**
1943:21 **of when these documents were signed?**
1943:22 **They're all signed on the same date. So**
1943:23 **I'm asking you if you can deduce what the sequence**
1943:24 **was.**
1943:25 A You would deduce that the account
1944:1 agreement application was done last -- or at least
1944:2 you would hope it would have been done last.
1944:3 **Q Why is that?**
1944:4 A Because without the authority, Mr. Lathen
1944:5 wouldn't have been able to sign as agent on behalf
1944:6 of Mr. Jackson.

(See also: Div. Exs. 569 – pp. 9-10; 17-22; 818 – p. 1.)

130. After reviewing the account opening documents, Participant Agreements and powers of attorney relating to the joint tenant accounts with Servider, Jackson and Kilgus in which Lathen had purchased or transferred certain GS Bank CDs, GS Bank, acting in reliance on its in-house and outside counsel, determined to

reject the redemptions because the deceased was not the true beneficial owner as represented by Lathen's redemption request.

787:20 **Q So tell us, if you would, please, what**
787:21 **Division Exhibit 569, pages 17 through 22, and**
787:22 **Division Exhibit 818, what did that whole package tell**
787:23 **you about the relationship between Mr. Lathen and Mr.**
787:24 **Jackson, if anything?**
787:25 A Okay. My quote -- or our conclusion
788:1 actually, yes, was that this was really Mr. Lathen's,
788:2 and Mr. Jackson was basically just for the fee of
788:3 $10,000 handing over basically his name and address.
788:4 We came to a conclusion that this was really
788:5 just Mr. Lathen's either CD or note. In this
788:6 instance, CD.
788:7 **Q Thank you. And what, if anything, of the**
788:8 **documents you received from C.L. King was important to**
788:9 **the decision that you just related that Goldman Sachs**
788:10 **came to that Mr. Lathen was the true owner on the**
788:11 **account?**
788:12 A I think all of them that you presented here,
788:13 both the agreement and then the -- the account opening
788:14 that shows the Co., the agreement itself, which to us
788:15 seemed to be pretty much determinative, as well as,
788:16 you know, the limited power of attorney, it pretty
788:17 much as a collective gave us this impression that this
788:18 was really Mr. Lathen.
788:19 **Q Okay. And why were they important, the**
788:20 **determination -- were they -- were they important to**
788:21 **the determination of eligibility, if at all?**
788:22 A Yeah, I mean, yes, they were --
788:23 **Q How --**
788:24 A -- and because of it, we declined to redeem.
788:25 **Q Why were they important?**
789:1 A Well, to us, we felt they were -- there were
789:2 actually a number of different arguments. But
789:3 fundamentally we felt that Mr. Lathen was the owner of
789:4 the CD. And that the party that had since deceased
789:5 was really never a real owner.
789:6 And as a consequence, you know, we declined
789:7 to redeem.

790:12 **Q And how, if you know, did Goldman Sachs**
790:13 **convey its decision to reject the redemption request**
790:14 **made by Mr. Lathen?**
790:15 A I think we did so both directly to C.L. King
790:16 but also through a letter from Sidley Austin.

(See also: Div. Ex. 571 – p. 2.)

131. The account opening documents, Participant Agreements and powers of attorney were determinative to GS Bank's determination that Lathen, and not the participant, was the true owner of the notes, rendering him ineligible to redeem them.

788:7 **Q Thank you. And what, if anything, of the**
788:8 **documents you received from C.L. King was important to**
788:9 **the decision that you just related that Goldman Sachs**
788:10 **came to that Mr. Lathen was the true owner on the**
788:11 **account?**
788:12 A I think all of them that you presented here,
788:13 both the agreement and then the -- the account opening
788:14 that shows the Co., the agreement itself, which to us
788:15 seemed to be pretty much determinative, as well as,
788:16 you know, the limited power of attorney, it pretty
788:17 much as a collective gave us this impression that this
788:18 was really Mr. Lathen.
788:19 **Q Okay. And why were they important, the**
788:20 **determination -- were they -- were they important to**
788:21 **the determination of eligibility, if at all?**
788:22 A Yeah, I mean, yes, they were --
788:23 **Q How --**
788:24 A -- and because of it, we declined to redeem.
788:25 **Q Why were they important?**
789:1 A Well, to us, we felt they were -- there were
789:2 actually a number of different arguments. But
789:3 fundamentally we felt that Mr. Lathen was the owner of
789:4 the CD. And that the party that had since deceased
789:5 was really never a real owner.
789:6 And as a consequence, you know, we declined
789:7 to redeem.

132. Of importance to GS Bank's determination that Lathen—and not Jackson, for example—was the true owner of the CDs was the Power of Attorney Jackson signed that gave Lathen full and complete control, with any and all powers, over the securities account.

1938:10 **Q Okay. Now, what, if anything, did this**
1938:11 **power of attorney tell you about what Mr. Jackson**
1938:12 **was giving Mr. Lathen the authority to do?**
1938:13 A This limited power of attorney gave -- Mr.
1938:14 Jackson was allowing Mr. Lathen to open accounts,
1938:15 trade in accounts, basically have full and complete
1938:16 control over the nature of the securities account or

1938:17 bank account.
1938:18 And had pretty much any and all powers
1938:19 right down to, you know, pledging and the like.

(See also: Div. Ex. 818.)

133. Of importance to GS Bank's determination that Lathen, and not Jackson, for example, was the true owner of the CDs were the following provisions of the Participant Agreement signed by Jackson:

> 2.
>
> * * *
>
> d. Participant agrees to cooperate with Lathen to facilitate modifications to the account(s) as necessary, except that Participant understands and agrees that Lathen and the Partnership are solely responsible for funding the Account(s), including the purchase of any securities transferred into the Account(s), or subsequently purchased in or from the Accounts(s) [sic], or satisfying any loans or liabilities arising with respect to the Account(s).
>
> * * *
>
> f. In consideration of entering into this Agreement, Lathen shall pay Participant $10,000 as soon as practicable following the Effective date. Participant shall receive no additional payments with respect to the Account(s) unless the Account(s) are terminated and the funds in the Account(s) are disbursed prior to Participant's death. Participant, and Participant's attorney-in-fact, . . . expressly acknowledge that Lathen does not intend to terminate the Account(s) during Participant's lifetime and, therefore, it is unlikely that Participant or Participant's estate will receive any additional amounts under this Agreement or with respect to the Account(s). . . .
>
> g. The Account(s) will be pledged to secure a loan (the "Investment Loan") provided to Lathen by the Partnership to cover the payment to Participant and to finance the purchase of the Investments in the Account(s). The Investment Loan must be repaid prior to any other distributions.
> (Div. Ex. 569 – pp. 17-18.)

134. Informing his decision that the true owner of the notes in the account was Lathen, Begelman determined that under that Participant Agreement, Jackson had no obligations or risks of ownership with respect to the joint account; that only Lathen had the power to terminate the account; and that while Lathen was the borrower from Eden Arc of the funds used to purchase the securities, the entire account, including Jackson's purported share of it, was pledged to secure the loan Eden Arc made.

1938:24 **Q Okay. Let's look at (2)(d). So under**
1938:25 **(2)(d), the second line says, "Participant**
1939:1 **understands and agrees that Lathen and the**
1939:2 **partnership are solely responsible for funding the**
1939:3 **accounts, including funding the purchase of any**
1939:4 **securities transferred into the accounts or**
1939:5 **subsequently purchased in or from the accounts or**
1939:6 **satisfying any loans or liabilities arising with**
1939:7 **respect to such accounts."**
1939:8 **Do you see that?**
1939:9 A Yes, ma'am.
1939:10 **Q And did you read that at the time that you**
1939:11 **received it?**
1939:12 A Yes.
1939:13 **Q And what, if anything, did that paragraph**
1939:14 **tell you about the participant's obligations with**
1939:15 **respect to the account?**
1939:16 A Basically, our view was that the
1939:17 participant had actually little or no obligations
1939:18 with this account at all.
1939:19 **Q Okay. And what, if anything, did that**
1939:20 **tell you about the participant's risks of ownership**
1939:21 **of the account?**
1939:22 A We didn't believe he had any risk of
1939:23 ownership.

1939:24 **Q Let's move down to 2(f), as in Frank. So**
1939:25 **at the bottom of the page it starts -- it says, "In**
1940:1 **consideration of entering into this agreement,**
1940:2 **Lathen shall pay participant $10,000 as soon as**
1940:3 **practicable following the effective date.**
1940:4 **"Participant shall receive no additional**
1940:5 **payments with respect to the accounts unless the**
1940:6 **accounts are terminated and the funds in the**
1940:7 **accounts are disbursed prior to the participant's**
1940:8 **death.**
1940:9 **"Participant and participant's**
1940:10 **attorney-in-fact, if applicable," and then there's a**
1940:11 **parenthetical, "expressly acknowledge that Lathen**
1940:12 **does not intend to terminate the accounts during**
1940:13 **participant's lifetime and, therefore, it is**
1940:14 **unlikely that participant or participant's estate**
1940:15 **will receive any additional amounts under this**
1940:16 **agreement or with respect to the accounts."**
1940:17 **And did you read that at the time that you**
1940:18 **received Mr. Jackson's participant agreement?**

A We did -- I did.
Q All right. And what, if anything, did that passage tell you about the participant's interest in the account during his lifetime?
A I believe I had testified earlier that we had looked at this participation agreement, not only this paragraph, but in total. And with the limited power of attorney, fundamentally, Mr. Jackson was getting $10,000, and that was it.
The -- Mr. Lathen was having full and complete ownership of the account, the securities, the CDs and everything that went with it.
The only thing by agreement that Mr. Jackson was going to get was an upfront -- or a payment.
Q Okay. And under that provision I just read, who, if anyone, did you understand had the ability to terminate the account during either participant's lifetime?
A Just Mr. Lathen.

Q Okay. Let's look at (g) which is on page 18. Yeah.
"The accounts will be pledged to secure a loan, the investment loan, provided to Lathen by the partnership to cover the payment to participant and to finance the purchase of the investments in the accounts.
"The investment loan must be repaid prior to any other distribution from the accounts."
Did you read that at the time?
A Yes.
Q And under that provision, who was the borrower of the investment loan?
A Mr. Lathen was, basically, borrowing the funds in order to purchase the securities.
Q Well, it says the accounts will be pledged to secure a loan provided to Mr. Lathen, right?
Okay. So not to Mr. Jackson?
A No.
Q And what was pledged to secure that loan?
A This account.
Q Both Mr. Lathen and Mr. Jackson's portion of that account, correct?
A Correct. But, again, saying that Mr. Jackson pledged the account, we always -- we never

1942:14 felt that Mr. Jackson had any real interest.

135. On September 25, 2013, GS Bank's outside counsel, with Begelman's approval, wrote to Lathen's broker at CL King, copying Lathen, and notified him of GS Bank's determination to reject his redemption requests:

> GS Bank appreciates Mr. Lathen providing the information requested to enable it to evaluate his redemption request. Based on a review of the information, GS Bank has concluded that the provisions of the callable CDs do not allow for redemption by Mr. Lathen. None of the accounts are *bona fide* joint tenant accounts, but rather were established exclusively to permit Mr. Lathen to acquire securities with survivor's options. Accordingly, GS Bank is under no obligation to honor the redemption requests, as Mr. Lathen's status as a joint tenant with rights of survivorship is not legally recognizable. GS Bank thus is declining each redemption request. (Div. Ex. 571 – p. 2.)

> See also:
> 790:25 **Q Okay. Now, Sidley Austin, you just**
> 791:1 **testified, was the outside counsel that Goldman hired,**
> 791:2 **so it's representing Goldman in writing to C.L. King;**
> 791:3 **is that right?**
> 791:4 A Yes, ma'am.
>
> 791:22 And is that language that you agreed with?
> 791:23 A Yes, ma'am.

136. After rejecting Lathen's redemptions of CD's in 2013, Goldman Sachs Holding Inc. determined to reject further redemptions of bonds made by Lathen, and informed the trustee that, should any further redemptions be made by Lathen, that they should not be immediately honored, but that they should be forwarded to Goldman Sachs for review.

> 809:25 **Q And after your meeting with – I think you**
> 810:1 **said – general counsel of the bank and outside**
> 810:2 **counsel, did you have any conversations with your**
> 810:3 **trustee?**
> 810:4 A Well, we informed the trustee through our
> 810:5 treasury department that should we receive further
> 810:6 requests for redemptions from Mr. Lathen, that they
> 810:7 should not be immediately honored, and that they would
> 810:8 need to come through us to review them on a
> 810:9 case-by-case basis.
> 810:10 **Q And who acted as the bank's and Goldman**
> 810:11 **Sachs Group's trustee with respect to the survivor's**
> 810:12 **option notes?**
> 810:13 A I'm sorry. But I don't remember who it was.

810:14 **Q Was it Bank of New York?**
810:15 A It was. Thank you. Sorry.

137. In responding to Begelman's request for information regarding his redemption requests, Lathen did not provide Goldman Sachs with his Discretionary Line Agreement or Profit Sharing Agreement because Goldman Sachs had only asked for the agreements between him and the participant. (Div. Ex. 681 – pp. 3-4.)

138. If Goldman Sachs had known that Lathen had agreements with his Fund that bore on his ownership rights in the joint accounts he set up with participants, those agreements would have been material to its determination of his eligibility to redeem any notes and Goldman Sachs likely would have rejected those requests sooner.

801:7 **Q Is it fair to say, Mr. Begelman, that your**
801:8 **analysis here was limited to just your review of the**
801:9 **agreements that Mr. Lathen had with his participants,**
801:10 **the deceased?**
801:11 MR. HUGEL: Objection. There are many other
801:12 documents that he testified about.
801:13 JUDGE PATIL: Overruled.
801:14 THE WITNESS: Yes.
801:15 BY MS. BROWN:
801:16 **Q You may answer.**
801:17 A That's fair.
801:18 **Q Thank you. And if other agreements Mr.**
801:19 **Lathen had with the fund -- his fund bore on his**
801:20 **ownership rights in the joint account, how relevant,**
801:21 **if at all, would they have been to your determination**
801:22 **of his eligibility in the redemption context?**

802:2 THE WITNESS: It would have been relevant.
802:3 We would have rejected it probably sooner or
802:4 immediately rather than asking for additional
802:5 documentation.

139. After it rejected Lathen's redemptions of certain GS Bank Notes, GS Bank amended its Disclosure Statement for later CD issuances to include additional pre-requisites to redemption, including that the deceased be a beneficial owner of the CD, to be more clear. The Amendments did not change the import of the survivor's option terms. (Lathen Ex. 2016 – p. LATHEN15870.) See also:

795:5 **Q Does the survivor's option terms look the**
795:6 **same in today's offering of CDs -- or did they at the**
795:7 **time you left?**
795:8 A They amended the language of the survivor's
795:9 option to be more clear.

795:10 **Q Okay. Did the import of the survivor's**
795:11 **option change?**
795:12 A I don't believe so, no.

1926:25 **So I think Mr. Hugel asked you about the**
1927:1 **changes that added the same household and**
1927:2 **relationship with the deceased?**
1927:3 **But he didn't focus on an additional**
1927:4 **addition which was the addition of beneficial owner.**
1927:5 **Was that, in fact, an addition to the CD**
1927:6 **language?**
1927:7 A I believe so, yes.
1927:8 **Q Yes?**
1927:9 A Yes. I believe so.

1927:10 **Q And I think you testified earlier that**
1927:11 **your understanding of this CD requirements already**
1927:12 **included a concept of beneficial ownership; is that**
1927:13 **right?**
1927:14 A I did. I was a bit loose with the
1927:15 language.
1927:16 **Q Okay. But -- so what was the purpose of**
1927:17 **this addition, the beneficial owner addition?**
1927:18 A Again, this language and the amendments to
1927:19 this language was an attempt to make it precisely
1927:20 clear who could and who could not, you know, be able
1927:21 to seek a redemption.
1927:22 And the nature of what that redemption was
1927:23 about had more to do with an individual who was
1927:24 trying to complete probate of an estate and not --
1927:25 you know, for financial gain.

140. Goldman Sachs Group, Inc. made no amendments to its GS Survivor's Option Terms following its rejection of Lathen's redemption of certain Goldman Sachs Group Inc. notes. (Div. Ex. 2017.) See also:

1928:3 **I think you stated on direct that you**
1928:4 **thought there were possibly changes also to the**
1928:5 **language of the notes after -- before you retired**
1928:6 **and after Mr. Lathen made his redemption requests.**
1928:7 **Do you recall that testimony?**
1928:8 A Yes.
1928:9 **Q Okay. I'm going to show you --**
1928:10 A Thank you.
1928:11 **Q Now, I'm showing you what's been marked as**
1928:12 **Division Exhibit 2017 for identification.**
1928:13 (Division Exhibit No. 2017 was marked

1928:14 for identification.)
1928:15 BY MS. BROWN:
1928:16 **Q And it's simply to attempt to refresh your**
1928:17 **recollection.**
1928:18 **My first question is: Does this refresh**
1928:19 **your recollection that there were, in fact, notes**
1928:20 **issued after Mr. Lathen made his requests that were**
1928:21 **rejected and sometime prior to your retirement?**
1928:22 A Yes.

1931:15 **Q So the first paragraph under both headings**
1931:16 **starts, "Following the death" --**
1931:17 A Right --
1931:18 **Q -- "of the beneficial owner" --**
1931:19 A -- right.
1931:20 **Q -- correct?**
1931:21 **Okay. Do you see any change in that**
1931:22 **paragraph?**
1931:23 A Yes.
1931:24 **Q And what is that change?**
1931:25 A No, I'm sorry. I do not.

1932:9 **Q All right. "To be valid. The survivor's**
1932:10 **option must be exercised by or on behalf of the**
1932:11 **person who has."**
1932:12 **Do you see that?**
1932:13 A Yes.
1932:14 **Q And did those two bullets look the same?**
1932:15 A Yes.
1932:16 **Q Okay. And then the next paragraph begins,**
1932:17 **"The following will be deemed the death of a**
1932:18 **beneficial note -- owner of a note, and the entire**
1932:19 **principal amount of the note so held will be subject**
1932:20 **to a redemption by us upon request with the**
1932:21 **limitations described below."**
1932:22 **That's the same in both?**
1932:23 A Yes.
1932:24 **Q Okay. And then the first bullet of either**
1932:25 **one says, "Death of a person holding a beneficial**
1933:1 **ownership interest in a note as a joint tenant or a**
1933:2 **tenant by the entirety with another person, a tenant**
1933:3 **in common with the deceased holder's spouse or a**
1933:4 **tenant in common with a person other than such**
1933:5 **deceased person's spouse," those are the same?**
1933:6 A Yes.

1933:22 **Q And on the page 10 of the thing you're**
1933:23 **holding in your hand, the second full -- first --**
1933:24 **the second full paragraph begins, "To obtain**
1933:25 **redemption pursuant to the exercise of the**
1934:1 **survivor's option."**
1934:2 **Do you see that?**
1934:3 A Yes.
1934:4 **Q And then on the screen, do you see that**
1934:5 **same paragraph?**
1934:6 A I do.
1934:7 **Q Okay. And then you see the bullets?**
1934:8 A Yes.
1934:9 **Q Okay. And the second one on both says**
1934:10 **"Appropriate evidence satisfactory to us and the**
1934:11 **trustee."**
1934:12 A Yes.
1934:13 **Q And (A) is that "the deceased was the**
1934:14 **beneficial owner of the note at the time of death,**
1934:15 **and his or her interests in the note was owned by**
1934:16 **the deceased beneficial owner or his or her estate,**
1934:17 **or at least six months prior to the request for**
1934:18 **redemption."**
1934:19 **Do you see that?**
1934:20 A Yes.
1934:21 **Q Any differences?**
1934:22 A No.
1934:23 **Q Okay. Does that refresh your**
1934:24 **recollection -- granted that I did not read the**
1934:25 **entire provision to you.**
1935:1 **But does that refresh your recollection as**
1935:2 **to changes made in the notes?**
1935:3 A Yeah -- yes.
1935:4 **Q And --**
1935:5 A It seems like I was incorrect.

141. In Lathen's complaint to the CFPB about GS Bank's rejection of his redemption requests, he misleadingly portrayed himself as a consumer in need of assistance dealing with a predatory financial institution, concealing that he was the Chief Investment Officer and Chief Compliance Officer of EACM, and that he operated EndCare. He wrote:

> I purchased several Goldman Sachs Bank USA CDs in 3 different joint brokerage accounts in early 2013. . . . These CDs are currently worth an estimated 90 cents on the dollar so I am faced with the prospect of a sizable loss if I am forced to see these CDs on the open market instead of receiving 100 cents on the dollar from Goldman. . . I believe Goldman is acting in bad faith and is perhaps wagering that I will not have the patience of money to

sue them and force them to honor their own contract. I believe they hope I can be intimidated to "go away." This is mercenary behavior by Goldman Sachs, though apparently not out of character for them if recent press accounts of Goldman are to be believed. I believe they will continue to use these unfair "hardball" tactics until such time as a regulator asks them to desist from such conduct. Therefore, I respectfully request your assistance in this matter. I have spent upwards of $20,000 on legal fees to this point and face the prospect of further legal fees and delays if I have to take them to court to enforce my clear contractual rights. Please help!

* * *

I am submitting on behalf [√] Myself

(Div. Ex. 574 – pp. 1-2.)

142. By submission dated February 21, 2014 (copied to Lathen), Begelman, with the assistance of outside counsel, pointed out these misleading omissions to the CFPB, as well as the omissions Lathen had made in his redemption requests concerning the true nature of the relationship between him and his Participants. Begelman explained that once GS Bank reviewed the information Lathen ultimately provided, it concluded that the deceased had not been the true owner on the accounts, and that Lathen did not have the right to redeem the CDs:

> In April and June of 2003, CL King . . . submitted requests to GS Bank to redeem Callable CDs that were in three separate brokerage accounts maintained at CL King. . . . Accompanying each request was a letter from Mr. Lathen to CL King and a month-end statement for each account. The separate requests involved certain common elements: (i) Mr. Lathen purported to be the joint owner of a brokerage account; (ii) Mr. Lathen represented that the other account owner had "recently passed away;" (iii) the account statement was addressed to Mr. Lathen and the other account holder c/o Eden Arc Capital Management LLC ("Eden Arc LLC"); (iv) the portfolio solely was comprised of medium term notes or callable CDs – instruments that typically contain a provision allowing them to be redeemed only upon the death of the owner – issued by a number of financial institutions; and (v) the instruments were purchased at a discount to the notional amount and thus, if redeemable at par, would result in immediate profit. . . .
>
> . . . An initial review of publicly available information revealed a number of additional facts. First, Eden Arc LLC. . . is an investment advisor registered with the SEC that was founded by Mr. Lathen who also serves as Eden Arc LLC's chief investment officer and chief compliance officer . . . Mr. Lathen has significant financial experience. . . . .Second, an entity known as EndCare, which was founded in March 2009, is located at the same address as Eden Arc, and "provides financial assistance to individuals

near the end of life," typically $10,000. . . . We note that, although all documentation related to the redemption requests were addressed to Mr. Lathen's business address, Mr. Lathen used his home address in his complaint.

. . . GS Bank issues disclosure documents describing the terms of the Callable CDs. Those documents, only the first page of which were submitted by Mr. Lathen, do not create any absolute right of redemption in the event of death. . . . [A]s the language reflects, the redemption right only belongs to "*the owner of a CD.*". . . To determine the "owner," consideration must be given to the distinction between a "joint account" where a cognizable ownership interest upon death of one owner exists and a "convenience" account, where no viable ownership interest exists. Typically, in a joint account, each tenant receives a vested interest in one-half of the account upon its creation and has the right to withdraw funds from the account (*see, e.g., In re Estate of Stalter*, 270 A.D.2d 594 (2000)), whereas in a "convenience" account, one owner typically supplies all the proceeds for the account and places it in joint name with another for various reasons of convenience (*see, e.g., Matter of Yaros*, 90 A.D.3d 1063 (2011); *Matter of Corcoran*, 63 A.D.3d 93 (2009)). A convenience account is thus not a legal joint account.

In light of the disclosures and the law, on August 15, 2013, GS Bank requested additional information to enable it to determine whether the Callable CDs were redeemable by Mr. Lathen. . . . The information that Mr. Lathen provided showed that each of the accounts was established under identical documentation, including a Participant Agreement, which provides that "the brokerage accounts described below is part of a business ("Business") conceived and executed by Lathen with financing provided by Eden Arc Capital Partners, LP (the "Partnership"), a limited partnership organized by Lathen to fund the Business." . . . Each of the putative joint account holders died shortly after the account was opened.

. . . Considered in their totality, these facts compelled the conclusion that GS Bank had no obligation to redeem under the provisions of the disclosure documents or New York law. GS Bank also respectfully submits that the important interests that this Agency was created to protect are not in any way implicated by the complaint filed by Mr. Lathen. As reflected in the Participant Agreements that Mr. Lathen executed (and undoubtedly drafted), Mr. Lathen is engaged in an investment scheme – a "highly unusual absolute return fixed income strategy" -- whereby he attempts to profit by creating the appearance of a "joint account" with the identities of terminally ill patients who have absolutely no economic interest in the accounts at issue. He is thus not a "consumer," but rather an individual, who through a registered investment advisor he formed and manages, is engaged in a sophisticated investment strategy, the success of which

involves representing to banks (including GS Bank) that he is a true owner of an account, contrary to fact.
(Div. Ex. 575 – pp. 2-4.)

See also:
797:7 **Q Can you tell me if you recognize Division**
797:8 **Exhibit 575?**
797:9 A Yes. This is our response to the CFPB.

797:19 **Q All right. And who wrote this?**
797:20 A I did, along with outside counsel and
797:21 in-house counsel.

143. GS Bank heard nothing further from the CFPB after it made its response to Lathen's complaint.

802:10 Q Okay. And whatever happened to the CFPB
802:11 process with Mr. Lathen, as far as you know?
802:12 A As far as I know, we supplied the responses
802:13 as required. And it was -- we were never requested to
802:14 redeem or take any further action on the matter.

144. When his efforts to enlist the CFPB to pressure GS Bank into paying the redemptions of his CDs were unsuccessful, Lathen next filed an almost identical complaint with the New York State Department of Finance ("DFS") on February 4, 2014. (Div. Ex. 577.)

145. GS Bank submitted its response, authored by Begelman and outside counsel and copying Lathen, on May 13, 2014. (Div. Ex. 578.) See also:

805:8 **Q All right. Let's look at 578, which is your**
805:9 **next tab.**
805:10 A This was our response, which is very, very
805:11 similar to the response we did to the CFPB.
805:12 **Q Thank you.**
805:13 MS. BROWN: So the Division offers Division
805:14 Exhibit 578 into evidence.
805:15 JUDGE PATIL: Admitted.
805:16 (Division Exhibit No. 578 was received
805:17 in evidence.)
805:18 MS. BROWN: Thank you.
805:19 BY MS. BROWN:
805:20 **Q And who wrote this letter?**
805:21 A As with the prior one, I did, along with
805:22 outside counsel and in-house counsel.

146. To a reply submitted to DFS by Lathen, GS Bank submitted a further response, also authored by Begelman and outside counsel, copied to Lathen, and dated May 30, 2014, in which it reiterated that GS Bank's considered analysis of New York law and the reality of Lathen's arrangements with the decedents supported its conclusion that Lathen's redemption requests were ineligible. (Div. Ex. 580.)

147. With respect to Lathen's claim that GS Bank's rejection of his redemptions should require GS Bank to make enhanced disclosure of its right to reject retail investors' redemptions freedom in its sole discretion and on a whim, GS Bank responded:

> Fourth, Mr. Lathen now purports to be concerned about "retail investors" who might be purchasing CDs subject to revised disclosure language, and hypothesizes that GS Bank may not honor redemption requests that may be made in the future upon a joint owner's death. Please note that GS Bank has in the past and continues to regularly honor redemption requests that are made by a valid "joint account" owner. Indeed, the only dispute GS Bank has had about redemption request involves Mr. Lathen. Thus, the "enhanced disclosure language" that Mr. Lathen asks the DFS to require GS Bank to include in its disclosure documents in not accurate and not warranted by actual circumstances.
>
> * * *
>
> . . . GS Bank made a reasoned decision that Mr. Lathen's redemption requests were not valid as it was not consistent with the disclosure language and in any event, were foreclosed by existing law.
> (Div. Ex. 580 – p. 3.)

See also:

807:4 **Q And did you author Division Exhibit 580?**
807:5 A Again, I did as well, as with outside
807:6 counsel and in-house counsel.

807:11 **Q So you -- it starts "Fourth." If you could**
807:12 **read that paragraph until I give you the sign to stop,**
807:13 **please.**
807:14 A Okay.
807:15 "Fourth, Mr. Lathen now purports to be
807:16 concerned about retail investors who might be
807:17 purchasing CDs subject to the revised disclosure
807:18 language, and hypothesizes that GS Bank may not honor
807:19 redemption requests that may be made in the future
807:20 upon joint owner's death
807:21 "Please note that GS Bank has in the past
807:22 and continues to regularly honor redemption requests
807:23 that are made by a valid joint account owner.
807:24 "Indeed, the only dispute GS Bank has had

807:25 about redemption requests involves Mr. Lathen."
808:1 **Q Stop, please. Thank you.**
808:2 **And, to your knowledge, was that statement**
808:3 **about GS Bank having disputes with redeemers, for lack**
808:4 **of a better term, was that true throughout your tenure**
808:5 **at Goldman Sachs Bank?**
808:6 A Yes, ma'am.
808:7 **Q Do you know of any different experience by**
808:8 **Goldman Sachs Group in terms of the bonds with respect**
808:9 **to redeemers?**
808:10 A I do not.

148. After GS Bank made its May 30, 2014 submission, DFS took no action on Lathen's complaint against GS Bank.

808:11 **Q And so I think you've already told us this,**
808:12 **but what, to your understanding, happened to Mr.**
808:13 **Lathen's Department of Financial Services complaint?**
808:14 A Again, we responded, and then did not
808:15 receive any further instructions or hear anything from
808:16 the Department of Financial Services to redeem or to
808:17 take any further action.

149. After GS Bank rejected Lathen's CD redemptions, GS Group Inc. told its trustee, Bank of New York, to alert it to further redemptions by Lathen and subsequently rejected four note redemptions Lathen presented for Logan, Pratola, Blair, and Jackson.

809:25 **Q And after your meeting with – I think you**
810:1 **said – general counsel of the bank and outside**
810:2 **counsel, did you have any conversations with your**
810:3 **trustee?**
810:4 A Well, we informed the trustee through our
810:5 treasury department that should we receive further
810:6 requests for redemptions from Mr. Lathen, that they
810:7 should not be immediately honored, and that they would
810:8 need to come through us to review them on a
810:9 case-by-case basis.
810:10 **Q And who acted as the bank's and Goldman**
810:11 **Sachs Group's trustee with respect to the survivor's**
810:12 **option notes?**
810:13 A I'm sorry. But I don't remember who it was.
810:14 **Q Was it Bank of New York?**
810:15 A It was. Thank you. Sorry.

(See also: Div. Ex. 828 – p. 49.)

GECC

150. In March 2014, Bank of New York, acting as Trustee for GECC, told CL King that Lathen's redemptions of GECC notes held in accounts held with Blair, Logan and Pratola were rejected.

> Jay,
> FYI the following General Electric bonds were rejected by BNY Mellon. The rejection notices only said "withdrawal as per the Issuer's discretion."

Account	Name	Quantity	CUSIP
[redacted]-0008	Blair	250,000	36966TGR7
[redacted]-0024	Logan	280,000	36966THD7
[redacted]-0025	Pratola	250,000	36966THE5

(Div. Ex. 557 – p. 6.)

151. The Participant Agreement signed by Blair on February 28, 2012, provided in relevant part:

> . . . By signing this Agreement, Participant expressly acknowledges that this Agreement and the documentation for opening the brokerage accounts described below ("Account(s)") is part of a business ("Business") conceived and executed by Lathen with financing either provided by Lathen or being arranged from various third party investors ("Investors") and in differing formats, including Eden Arc Capital Partners, a limited partnership organized by Lathen, to fund the Business.
>
> * * *
>
> 2.
>
> * * *
>
> d. you hereby authorize Lathen to make transfers of cash and securities into and out of the Account(s) without your prior consent, including to and from other accounts that Lathen and the Investors control.
>
> * * *
>
> f. The Participant shall be entitled to 5% of the net profits in the Accounts during the term of the joint tenancy, subject to a minimum of $10,000 and a maximum of $15,000. Participant shall receive a $10,000 payment as soon as practicable following the Effective Date. . .
> 3. Participant agrees that he/she will not be permitted to pledge, borrow against, or withdraw funds from the Account(s) without the express written permission of Lathen, which permission may be withheld in Lathen's sole discretion. . . .
> 4. In the event that Lathen and the Designees should pre-decease the Participant, Participant, . . . hereby agree to cooperate with Investors or their designated agent to liquidate the Account(s). Once liquidated, any funds contributed by Investors to the Accounts would be returned to them. The

remaining value in the Account(s), if any, would then be divided 95% to Investors and 5% to Participant or their estate.
(Div. Ex. 319 – pp. 1, 2.)

152. The Participant Agreement signed by Logan on December 1, 2012, was identical to Blair's in relevant part. (Div. Ex. 342 – pp.1, 2.)

153. The Participant Agreement signed by Pratola on December 4, 2012, was identical to Blair's in relevant part. (Div. Ex. 355 – pp. 1, 2.)

154. Lathen knew that the form of the Participant Agreement signed by Blair, Logan and Pratola gave each no beneficial ownership interest in the account and would not create a valid joint tenancy because Farrell told him that in the summer or fall of 2012. (PFOF ¶¶ 871, 878, infra.)

155. By the terms of the Profit Sharing Agreement, the Blair, Logan and Pratola accounts were governed by Lathen's IMA. (Div. Ex. 72 – p. 1.)

156. Lathen also knew that the joint tenancies created under the IMA – such as the Blair, Logan and Pratola accounts – were invalid because Farrell had told him in the summer of 2012 that his IMA made the Fund the real party in interest on the accounts, and an entity could not hold a valid joint tenancy. (PFOF ¶¶ 871, 878, infra.)

157. For two months, Lathen resisted GECC's requests for information about his joint accounts, first made by Robustelli in a telephone conversation with Lathen on April 28, 2014. Lathen insisted that additional information should not be required.

> . . . Please let me know if I am missing something but I believe these requests are valid and should be approved based on the plain language of your prospectus. I believe the documents that have already been provided to you and BONY are sufficient to establish the validity of these redemption requests.
> (Div. Ex. 556 – pp. 3-4.)

> . . .I respectfully request that you honor these redemption requests. I do not believe any additional information should be required.
> (Div. Ex. 556 – p. 2.)

See also:

1202:24 **Does that refresh your recollection about**
1202:25 **whether he provided the information with his May 1**
1203:1 **email?**
1203:2 A Yes, that does refresh my recollection; he
1203:3 did not provide it in that May 1 email.

158. On May 28, 2014, Lathen finally produced only a Participant Agreement, power of attorney, and account opening documents with respect to one of his joint account holders.

1205:9 **Did you, in fact, have a call on May 28?**
1205:10 A Yes.
1205:11 **Q And tell us about that conversation.**
1205:12 A That was, once again, I reiterated that we
1205:13 needed additional documentation.
1205:14 **Q And what, if anything, did he say to you?**
1205:15 A That's when he agreed to provide the
1205:16 participant agreement.
1205:17 **Q All right. So on Wednesday, May 28 at**
1205:18 **6:20 p.m., Mr. Lathen writes to you, "Fred, as**
1205:19 **discussed, attached is the documentation for one of**
1205:20 **the accounts."**
1205:21 **Now, if you would turn to page 9. Is this**
1205:22 **one of the documents Mr. Lathen provided in that**
1205:23 **email?**
1205:24 A Yes.

(See also: Div. Ex. 566 – p. 1.)

159. Lathen told Robustelli that the participants "had the right by law to sell those securities [in the joint accounts] and would have had an economic interest in the proceeds of a sale," (Div. Ex. 557 – p. 2), but omitted to say that:

- The brokers enforced a double signature requirement for any action on the account;

- Lathen had an executed power of attorney from each participant that gave him full powers over the purchase and sale (and pledge and transfer) of all securities in the account; and

- Each of the participant agreements governing accounts holding the GECC notes Lathen was seeking to redeem (a) prohibited the participants from pledging, borrowing against or withdrawing funds from the accounts without Lathen's express permission; and (b) limited the Participant's right to any profits in the Accounts during the term of the joint tenancy to 5%, and to 5% in the event Lathen predeceased him or her.

(Div. Exs. 319 – pp. 1, 2, 4; 342 – pp. 1, 2, 4; 355 – pp.1, 2, 4.)

See also:
1202:9 **Q So the first -- the second full paragraph**
1202:10 **says, "As a joint owner on the account, they would**
1202:11 **have had the right by law to sell those securities**

1202:12 **and would have had an economic interest in the**
1202:13 **proceeds of a sale."**
1202:14 Do you understand to whom he's referring
1202:15 by "they"?
1202:16 A I believe that meant the participants.
1202:17 **Q Knowing what you know now sitting here**
1202:18 **today, do you believe that to be a truthful**
1202:19 **statement?**
1202:20 A No.

2676:6 **Q Thank you. So does that refresh your**
2676:7 **recollection that Mr. Lathen told you that both**
2676:8 **holders on the account had to sign in order --**
2676:9 A That they typically had to sign, yes.
2676:10 **Q Okay. And he had made it easier on**
2676:11 **himself by having them execute powers of attorney so**
2676:12 **that he could do -- that the broker-dealer would**
2676:13 **have to accept his instruction without their**
2676:14 **signature, correct?**
2676:15 A The broker-dealer could, yes.
2676:16 **Q So that meant because there was a double**
2676:17 **signature requirement, for lack of a better word,**
2676:18 **that the participants were not able to give**
2676:19 **instructions to the broker-dealers on the accounts;**
2676:20 **is that right?**
2676:21 A Correct.

160. Because the Participant Agreement outlined who the beneficial owner of the GECC notes was, it was critical to GECC's determination of the eligibility of Lathen's redemption request.

1195:4 **Q Okay. And what importance, if any, was**
1195:5 **the participant agreement to GECC's determination of**
1195:6 **eligibility of the redemption request?**
1195:7 A Ultimately, the participant agreement
1195:8 described who were the beneficial owners of the
1195:9 note, who had the rights related to the note.
1195:10 **Q And can you tell me of what importance, if**
1195:11 **any, that was to your determination of eligibility?**
1195:12 A Well, critical to our determination was
1195:13 trying to figure out who the beneficial owner was,
1195:14 and so the participant agreement outlined that.

161. Also important to GECC's determination of eligibility under the GECC Survivor's Option Terms would have been any agreement that Lathen had with his fund by which he disavowed ownership interest in the note because it would

have indicated that perhaps the fund was the beneficial owner of the note rather than Lathen or the Participant.

1196:11 **Q What importance -- let me start again.**
1196:12 **So if you had been aware that aside from**
1196:13 **the participant agreement with Mr. Fogas, Mr. Lathen**
1196:14 **had had an agreement with his fund by which he**
1196:15 **disavowed ownership interest in the note, what**
1196:16 **importance, if any, would that agreement have had to**
1196:17 **your eligibility determinations?**
1196:18 A Well, it would have indicated that perhaps
1196:19 the fund was the beneficial owner instead ofeither Mr.
1196:20 Lathen or the participant.
1196:21 And what was being represented to us was
1196:22 that Donald Lathen and his participants were joint
1196:23 accountholders with beneficial owner interests.

162. After reviewing the Participant Agreement, power of attorney and account opening documents that Lathen sent him on May 28, 2014, Robustelli concluded that the documents were explicit in stripping the deceased of any beneficial ownership in the joint account that held GECC notes that Lathen was attempting to redeem under the GECC Survivor's Option Terms.

1205:25 **Q And did you review it at or about the time**
1206:1 **you got the email?**
1206:2 A Yes.
1206:3 **Q And what was your reaction?**
1206:4 A I was surprised that it was so explicitly
1206:5 restricted, the beneficial ownership interest of the
1206:6 participant was quite clear.

(See also: Div. Ex. 557 – pp. 9-16.)

163. Robustelli communicated those conclusions to Lathen's lawyer in an email dated September 30, 2014, which he wrote in consultation with GECC's outside counsel, Corey Chivers at Weil Gotshal and Manges:

> We have reviewed the materials provided, including brokerage account information and a sample participant agreement, and have determined that the deceased person was not a beneficial owner of the notes and, therefore, the Survivor's Option cannot be exercised. Under guiding New York state and federal law principles, indicia of beneficial ownership of securities typically includes the right to sell the securities and to be entitled to the economic benefits of (and bear the risk of economic loss deriving from) the sale of such securities. The sample participant agreement provided makes clear that the purported joint owner enjoyed none of the rights or economic interests and bore none of the risks attendant to beneficial ownership.

Furthermore, the absence of rights of the deceased person in the securities (as evidenced by the participant agreement), including the absence of rights upon survivorship, defeats the suggestion that the brokerage account created a valid joint tenancy. The deceased person was entitled to essentially a de minimis amount of money for lending her name to the brokerage account. The information provided presents evidence of a scheme designed to create the appearance that the deceased person was a joint tenant or beneficial owner of the securities in the brokerage account (when, in reality, the deceased person was not the beneficial owner of the securities), which was executed solely for the purpose of enabling the true beneficial owner to attempt to exercise rights under the Survivor's Option.
(Div. Ex. 558 – p. 2.)

See also:
1212:21 **Q And did you write this email by yourself?**
1212:22 A I did that with counsel, with Corey
1212:23 Chivers at Weil Gotshal.

164. Lathen's lawyer, Galbraith, forwarded that email to Lathen.

3061:20 **Q Okay. And you forwarded this email to**
3061:21 **your client, Mr. Lathen, correct?**
3061:22 A Yes.

165. In subsequent communications Lathen's counsel, Chivers, acting on behalf of and in consultation with Robustelli, conveyed GECC's position on Lathen's redemption requests after analyzing the documents Lathen had provided. In a letter, dated October 10, 2014, Chivers wrote:

> For Mr. Lathen to validly request redemption under the Suvivor's [sic] Option, he must demonstrate among other things that the case involves the "death of a person holding a beneficial ownership interest in the note as a joint tenant." This requires two separate and independent conclusions: first, that the deceased person held a beneficial ownership interest in the note, and second that the deceased person held that interest as a joint tenant.
>
> * * *
>
> Based on our review of the materials, attached hereto, the arrangements appear in fact to be carefully designed to strip the deceased person of all rights that are indicia of beneficial ownership. It appeared that effectively the deceased person had simply been paid $10,000 fee to lend her name to an investment account solely for the purpose of attempting a scheme to exercise the Survivor's Option.
>
> Although the term "beneficial owner" is not defined in the disclosure itself, it is a well-known concept under federal securities laws. We also looked by way of analogy to New York state statutory uses of the term in relation to ownership of securities. In each case, at a minimum, beneficial ownership

entails certain basic rights, such as the right to vote or dispose of securities. It also entails under New York statutory provisions holding an economic interest in the securities and bearing the risk of loss.

Under the arrangements we reviewed, we saw none of these indicia that would be sufficient to suggest a bona fide beneficial ownership interest by the deceased person in the Notes.

The sample participant agreement your client provided to us demonstrates that the participant did not have any ownership interest in the joint accounts used to purchase the notes. Specifically, the participant agreement—entered into the day before the brokerage account was opened—relinquished the participant's economic interest in the account. The participant was not permitted to "pledge, borrow against, or withdraw funds from the Account(s)" and waived the rights of the participant's estate to "participate in the profits in the Account(s) following the death of the participant. It provided Mr. Lathen with all the power to control the account, including granting Mr. Lathen a "limited power of attorney" to establish and set up the account and to "make transfers of case and securities into and out of the "Accounts" without the participant's "prior consent." Mr. Lathen and his investors were "solely responsible for funding the account."

* * *

In our view, therefore, regardless of the effect or validity of the alleged joint tenancy, because the arrangements stripped the deceased person from any beneficial interest in the Notes, we do not believe that Mr. Lathen is entitled to exercise the Survivor's Option.

* * *

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 achieved. . .

When Mr. Lathen opened the brokerage account, he checked a box on the application stating "Joint Tenants with Right of Survivorship. If the owner dies his/her interest passes to the surviving owners." This was simply not true. . . . it appears to us that Mr. Lathen made a false representation on the brokerage account application when he checked that box."
(Div. Ex. 559 – pp. 1-3.)

See also:
1215:23 **Q All right. So directing your attention to**
1215:24 **Division Exhibit 559 for identification, which is at**
1215:25 **tab 10 of your binder.**
1216:1 **Can you tell me what this is?**
1216:2 A This is a written response from -- written
1216:3 by Weil Gotshal with me to Mr. Galbraith.

1216:17 And did you have an occasion to read the
1216:18 letter at or about the time it's dated?
1216:19 A Yes.
1216:20 **Q Anything in here with which you disagree?**
1216:21 A No.

166. Galbraith forwarded that letter to Lathen.

3073:23 **Q And, again, you forwarded that letter**
3073:24 **along with its analysis to your client, correct?**
3073:25 A I forwarded the letter to my client.

167. After Galbraith responded to Chivers' letter of October 10, 2014, and provided newer versions of the Participant Agreement, Chivers wrote again, on behalf of and in consultation with Robustelli, to convey GECC's position. In a letter, dated January 5, 2015, Chivers told Galbraith that GECC believed that Lathen had engaged in deception and an attempt to defraud GECC in submitting his redemption request without disclosing the true nature of the relationship between him and the Participants:

> In this case, it has become clear that GE Capital has been the recipient of an attempted fraud by Mr. Lathen. The suggestion that Mr. Lathen should have been able to simply provide the Account Agreement (to give the appearance of beneficial ownership) and withhold the Participant Agreement (which revealed the true legal and economic substance of the arrangements between Mr. Lathen and the deceased person) only serves to draw attention to the deceptive nature of Mr. Lathen's scheme and correspondingly the importance of GE Capital's right to request additional information.
>
> * * *
>
> . . . Just like in the *Staples* case, the arrangements between Mr. Lathen and the deceased person compel the following conclusions:
>
> - that in order to attempt to exercise the Survivor Option, Mr. Lathen structured the arrangements to give the appearance through the Account Agreement that the deceased person was a beneficial owner;
> - that the parties entered into other contractual relationships (which they intended to be binding) designed to insure that the deceased person received no economic benefit other than the promised $10,000 or similar fee for lending their name to the arrangements;
> - that the parties never intended for the deceased person to have any bona fide beneficial ownership interest in the Notes themselves; and
> - that the scheme was designed and employed by Mr. Lathen to attempt improperly to exercise the Survivor Option.
>
> Having reviewed your arguments, our conclusions continue to be that Mr. Lathen is not entitled to exercise the Survivor's Option for GE Capital Internotes for two principal reasons: (1) the deceased participant (Lavina D.

Blair) was not the beneficial owner of the Notes; and (2) the account in which Mr. Lathen held the notes was not a joint tenancy.

* * *

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.

* * *

The agreements between Mr. Lathen and the two participants were designed to create sham join tenancies in an effort to obtain windfall payments for Mr. Lathan upon the imminent deaths of the participants. Neither Ms. Blair nor Mr. Nonone was a beneficial owner of a valid joint tenancy account with Mr. Lathen under New York law.
(Div. Ex. 838 – pp. 2-3, 9-10.)

See also:
1217:13 **Q All right. So turn to tab 11, which is**
1217:14 **Division Exhibit 838 for identification.**
1217:15 Do you recognize Division 838?
1217:16 A Yes.
1217:17 **Q What is it?**
1217:18 A This is another response that Weil Gotshal
1217:19 had written with my input.

1218:8 **Q And this letter is dated January 5, 2015.**
1218:9 **And did you have an opportunity to review it at or**
1218:10 **about the date?**
1218:11 A Yes.
1218:12 **Q Okay. And was there anything in this**
1218:13 **letter with which you disagreed?**
1218:14 A No.

168. Galbraith sent Chiver's January 5, 2015 letter to Lathen.

3082:25 **Q Again, that was a view that was passed**
3083:1 **along to your client, correct?**
3083:2 A Yes.

169. Lathen never sent the IMA or Profit Sharing Agreement to GECC, either in making his redemption request, or in response to GECC's request for information about Lathen's arrangements.

1260:15 **Q Mr. Robustelli, when Mr. Lathen**
1260:16 **transmitted the participant agreement and the power**
1260:17 **of attorney, did he provide any other information**
1260:18 **about agreements that he had with any other parties**
1260:19 **to you?**
1260:20 A No.

170. Lathen understood that the Profit Sharing Agreement, which provided that all profits in the accounts over and above the loan amounts would be transferred to the Fund, destroyed both his and the Participant's beneficial ownership in the accounts because Farrell had told him that in September and October 2013. (PFOF ¶¶ 905-909, 911, 913, infra.)

171. That Lathen had disavowed his own ownership interest in the accounts in favor of the Fund through the IMA, or pledged all of the profit in the accounts to the Fund through the Profit Sharing Agreement, would have been material information to GECC with respect to its eligibility determination because GECC would have understood that the Fund was the beneficial owner of the accounts instead of Lathen or the Participant.

1196:11 **Q What importance -- let me start again.**
1196:12 **So if you had been aware that aside from**
1196:13 **the participant agreement with Mr. Fogas, Mr. Lathen**
1196:14 **had had an agreement with his fund by which he**
1196:15 **disavowed ownership interest in the note, what**
1196:16 **importance, if any, would that agreement have had to**
1196:17 **your eligibility determinations?**
1196:18 A Well, it would have indicated that perhaps
1196:19 the fund was the beneficial owner instead either Mr.
1196:20 Lathen or the participant.
1196:21 And what was being represented to us was
1196:22 that Donald Lathen and his participants were joint
1196:23 accountholders with beneficial owner interests.

Funding Corp.

172. Funding Corp. learned of Lathen's attempts (through EACM) to redeem Funding Corp. notes from a letter from Beverly Freeney of US Bank. In that letter, Freeney advised Funding Corp. that US Bank had reviewed a Participant Agreement between Lathen and three individuals with whom he alleged to jointly own Funding Corp. Survivor's Option notes – Blair (CUSIP 3133FXEH6); Fogas (CUSIP 3133FXEH6) and Logan (CUSIP 3133 FXDK0) – and "concluded that under the terms of such Participant Agreement, Eden Arc is

not qualified to obtain the payments for which Eden Arc has applied at this time." (Div. Ex. 526 – p. 1.) See also:

1849:17 **Q Now, are you familiar with a man named**
1849:18 **Donald Lathen?**
1849:19 A Yes.
1849:20 **Q And how did you first become aware of him?**
1849:21 A Through U.S. Bank.
1849:22 **Q And how did that happen?**
1849:23 A The Funding Corp. received a letter from
1849:24 U.S. Bank informing us that they had made a
1849:25 determination not to make payment based on an
1850:1 application put forward to them by the financial
1850:2 institution representing Eden Arc.

173. Finnegan asked US Bank for the documentation upon which they made their determination so that she could review it herself, and US Bank sent her documents that it had received in order to validate Lathen's redemptions of Funding Corp notes, which included the redemption packages for Blair, Fogas and Logan, but also redemption packages for Kerr (CUSIP 3133FXEA1) and Osika (CUSIP 3133FXDT1). (Div. Exs. 528; 527; 527A.) See also:

1852:20 **Q And what happened next? Did you notify**
1852:21 **Ms. Freeney that you were fine with their decision**
1852:22 **not to pay? Or was there more interaction with U.S.**
1852:23 **Bank about their redemption?**
1852:24 A Yeah. There was more interaction. I
1852:25 asked for the documentation upon which they made
1853:1 their determination so I could review it myself.

1854:22 **Now she writes, "The documents we received**
1854:23 **from Eden Arc for each of the applications can be**
1854:24 **downloaded by following this link. For your**
1854:25 **convenience, we've also prepared a summary of what's**
1855:1 **included below."**
1855:2 **So what did you understand her list to be**
1855:3 **on pages 1, 2 and 3 of Division Exhibit 528?**
1855:4 A I understood this to be the information
1855:5 that was forwarded to U.S. Bank by the financial
1855:6 institution that had first considered the
1855:7 information required for the survivor option.

1855:25 **So can you identify for us what Division**
1856:1 **527 and 527-A are?**
1856:2 A These are the written requests from Donald
1856:3 Lathen to -- I assume their financial institution --
1856:4 his financial institution to receive -- or to make

1856:5 redemption of the survivor option.

1857:24 **So what is it that you understood, if**
1857:25 **anything, about when U.S. Bank had received these**
1858:1 **documents that she provided to you through the**
1858:2 **website?**
1858:3 A My understanding was that U.S. Bank
1858:4 received the information in order to validate the
1858:5 fact that Donald Lathen was indeed the survivor
1858:6 representative and, therefore, entitled to exercise
1858:7 the survivor put.

174. The Participant Agreements and other information relating to Lathen's redemption requests of Funding Corp. notes related to accounts held with five Participants: Blair, Fogas, Logan, Kerr and Osika. (Div. Exs. 528; 527.)

175. The Blair, Fogas and Logan Participant Agreements (and their corresponding Powers of Attorney) were identical in form, and each was signed in 2012. (Div. Ex. 527 – pp. 1-12; see also PFOF ¶¶ 151-152, supra.)

176. The Kerr and Osika Participant Agreements (and their corresponding Powers of Attorney) were identical in form, and each was signed in 2013. (Div. Ex. 527 – pp. 20-38.)

177. The Kerr and Osika Participant Agreement provided in relevant part:

> . . . By signing this Agreement, Participant expressly acknowledges that this Agreement and the documentation for opening the brokerage accounts described below is part of a business ("Business") conceived and executed by Lathen with financing provided by Eden Arc Capital Partners, LP (the "Partnership"), a limited partnership organized by Lathen to fund the Business.
>
> * * *
>
> 2.
>
> * * *
>
> d. . . . Participant understands and agrees that Lathen and the Partnership are solely responsible for funding the Account(s), including funding the purchase of any securities transferred into the Account(s), or subsequently purchased in or from the Accounts, or satisfying any loans or liabilities arising with respect to the Account(s).
>
> * * *
>
> f. In consideration of entering into this Agreement, Lathen shall pay Participant $10,000 as soon as practicable following the Effective Date. Participant shall receive no additional payments with respect to the Account(s) unless the Account(s) are terminated and the funds in the Account(s) are disbursed prior to Participant's death. Participant and Participant's attorney-in-fact, . . . expressly acknowledge that Lathen does

not intend to terminate the Account(s) during Participant's lifetime and, therefore, it is unlikely that Participant or Participant's estate will receive any additional amounts under this Agreement or with respect to the Account(s).. . .

g. The Account(s) will be pledged to secure a loan (the "Investment Loan") provided to Lathen by the Partnership to cover the payment to Participant and to finance the purchase of the Investments in the Account(s). the Investment Loan must be repaid prior to any other distribution from the Account(s).

h. Lathen may purchase Investments in the Account(s) on margin (i.e., with funds lent by the brokerage firm). While such investment practice could expose Account holders, including Participant, to liability for so-called "margin calls," if the value of the securities in the Account(s) declines, Lathen hereby assumes sole responsibility to fund any such liabilities.

* * *

4. . . . In the event that Lathen pre-deceases the Participant, the Investment Loan shall become immediately due and payable. The Partnership will have authority to liquidate the Account(s) to satisfy the outstanding balance due under the Investment Loan. Once the Investment Loan is satisfied with respect to such liquidated Account(s), any remaining proceeds shall be paid to Participant, or, if applicable, to Participant's estate. (Div. Ex. 527 – pp. 20-21.)

178. In reviewing the Blair form of Participant Agreement that US Bank supplied, Finnegan determined that Lathen, and not the Participant, had the sole control of and interest in the joint accounts.

1860:7 **Q And what, if anything, did the power of**
1860:8 **attorney tell you about Ms. Blair's authority to**
1860:9 **control the account?**
1860:10 A The power of attorney seemed to grant
1860:11 Donald Lathen the ability to control the account.

1860:12 **Q Okay. Let's flip back to page 1. Now**
1860:13 **looking at (2)(d). "You hereby authorize Lathen to**
1860:14 **make transfers of cash and securities into and out**
1860:15 **of the accounts without your prior consent,**
1860:16 **including to and from other accounts that Lathen and**
1860:17 **investors control."**
1860:18 **What did you understand Mr. Lathen's**
1860:19 **authority was with respect to the account?**
1860:20 A Based on my reading of the agreement in
1860:21 that provision, it appeared to me that Donald Lathen
1860:22 had complete control over the account.
1860:23 **Q Then at the bottom of (2)(d), it says,**
1860:24 **"Participants shall have absolutely no**

1860:25 **responsibility for funding the accounts, and the**
1861:1 **participant affirms that no such consideration had**
1861:2 **been provided to or by the participant for such**
1861:3 **purpose."**
1861:4 **What did you understand that to mean?**
1861:5 A I'm sorry. I didn't see where you were
1861:6 reading.
1861:7 **Q Sure. I was at the last line of (2)(d).**
1861:8 A Okay. I read it to be that Donald Lathen
1861:9 would be funding the accounts through which the
1861:10 purchases of the investments would be made.

1861:11 **Q All right. And if I could ask you to flip**
1861:12 **to page 2, paragraph 3. It says, "Participant**
1861:13 **agrees that he/she will not be permitted to pledge,**
1861:14 **borrow against or withdraw funds from the accounts**
1861:15 **without the express written permission of Lathen,**
1861:16 **which permission may be withheld in Lathen's sole**
1861:17 **discretion."**
1861:18 **What did you understand that paragraph to**
1861:19 **mean?**
1861:20 A It appeared to me, again, that Donald
1861:21 Lathen exercised complete control over the account.

(See also: Div. Ex. 527 – pp. 1-4.)

179. Finnegan's conclusion was the same in reviewing the Kerr form of the Participant Agreement.

1864:14 **Q And can you tell us the parties on that**
1864:15 **participant agreement, please.**
1864:16 A Donald Lathen and Andrew Kerr.
1864:17 **Q Is this one of the participant agreements**
1864:18 **that you saw when you visited the website and**
1864:19 **downloaded the material?**
1864:20 A Yes, it is.
1864:21 **Q And what conclusions did you reach, if**
1864:22 **any, after reading Mr. Kerr's participant agreement?**
1864:23 A It looked very similar to the agreement
1864:24 that he entered into with Ms. Blair.
1864:25 **Q Okay. So directing your attention to**
1865:1 **paragraph (2)(c), it says, "Participant agrees to**
1865:2 **execute a limited power of attorney."**
1865:3 **Did you have an occasion to look at Mr.**
1865:4 **Kerr's power of attorney?**
1865:5 A Yes.
1865:6 **Q And is that at page 26?**

A It is, yes.
Q All right. And what did you deduce from having read the limited power of attorney about Mr. Kerr's ability or authority to control activity in the account?
A Similar to the account with Ms. Blair, it appeared as though the power of attorney granted Donald Lathen complete control.
Q Okay. Taking you back to 527, page 20. Under (2)(d), just reading that to yourself, does that look similar to the participant agreement with Ms. Blair in terms of the funding responsibilities for the account?
A Yes.
Q And what about (2)(f)? And (2)(f) says, "In consideration of entering into this agreement, Lathen shall pay participant $10,000 as soon as practicable following the effective date. Participant shall receive no additional payments with respect to the accounts unless the accounts are terminated and the funds in the accounts are disbursed prior to participant's death."
What did you understand the participant to -- what interest did the participant have in the account?
A The economic interest of the participant in the account seemed to be very limited.
Q Okay. And the next sentence reads, "Participant and participant's attorney in fact, if applicable," and then there's a definitional phrase, "expressly acknowledged that Lathen does not intend to terminate the accounts during participant's lifetime and, therefore, it is unlikely that participant or participant's estate will receive any additional amounts under this agreement or with respect to the accounts."
So in reading that paragraph -- or sentence, I should say, what interest did you conclude after reading that, if any, that the participant had in the profits on the account?
A My understanding is that there would be no entitlement to any profits.
Q Okay. And what, if anything, did that sentence I just read tell you about who, as between Mr. Lathen and Mr. Kerr, had the ability to terminate the account?

1867:3 A Donald Lathen exclusively.
1867:4 **Q Okay. Let's drop down to (2)(h). And I'm**
1867:5 **on page 21. "Lathen may purchase investments in the**
1867:6 **accounts on margin, i.e., with funds lent by the**
1867:7 **brokerage firm.**
1867:8 **"While such investment practice could**
1867:9 **expose accountholders, including participant, to**
1867:10 **liability for so-called margin calls, if the value**
1867:11 **of the securities in the account declines, Lathen**
1867:12 **hereby assumes sole responsibility to fund any such**
1867:13 **liabilities."**
1867:14 **So what, if anything, did that provision**
1867:15 **tell you about the risks of ownership in the**
1867:16 **account?**
1867:17 A That risks of ownership were exclusively
1867:18 Donald Lathen's.

180. After reviewing all of the Participant Agreements provided by US Bank and consulting with outside counsel, Finnegan made the decision to reject Lathen's redemptions of Funding Corp. notes as ineligible because no valid joint tenancy had been created by the Participant Agreement.

1862:21 **Q Okay. Now, after seeing the participant**
1862:22 **agreement that we just looked at with respect to Ms.**
1862:23 **Blair, did you form any conclusion; and if so, what,**
1862:24 **with respect to -- about the veracity of Mr.**
1862:25 **Lathen's representation that Ms. Blair was a joint**
1863:1 **and beneficial owner on that account?**
1863:2 A At this stage in my review of the
1863:3 documents, I was unsure.
1863:4 **Q What importance to a determination of**
1863:5 **eligibility, if any, under the survivor's option did**
1863:6 **the participant agreements that you read have?**
1863:7 A The participant agreement was unusual in
1863:8 that there was mention of Eden Arc, a company, which
1863:9 was not -- was not the intent of the retail bond
1863:10 program. The retail bond program is intended for
1863:11 individuals. It's intended for individuals.
1863:12 And so to see the name of a company in the
1863:13 participant agreement was unusual and concerning for
1863:14 me.
1863:15 **Q And why do you say "concerning"?**
1863:16 A It wasn't clear to me that a company could
1863:17 be a joint tenant.
1863:18 **Q And did you eventually get clarity on that**
1863:19 **question?**
1863:20 A I did consult with counsel.

1863:21 **Q And did you determine at that time to**
1863:22 **reject the redemption? Don't tell me what counsel**
1863:23 **told you.**
1863:24 A Yes, I did.

1867:19 **Q Okay. Now, after reviewing this**
1867:20 **participant agreement and power of attorney with Mr.**
1867:21 **Kerr, how did you view Mr. Lathen's redemption**
1867:22 **request?**
1867:23 A We, again, determined not to pay on the
1867:24 survivor option.
1867:25 **Q And did review of any of the participant**
1868:1 **agreements in Division Exhibit 527 -- and take a**
1868:2 **minute to look at them if you like -- alter your**
1868:3 **conclusion about the eligibility of Mr. Lathen's**
1868:4 **redemption requests?**
1868:5 A No, they did not.

(See also: Div. Exs. 527; 527A.)

181. Even though the Kerr form of Participant Agreement assigned all of the net proceeds in the account (after repayment of the $10,000 paid to the Participant and the loan from the Fund) to the Participant if Lathen pre-deceased him or her, Finnegan's conclusion that no valid joint tenancy had been created led her to conclude that Participants would likely not obtain those benefits.

1879:16 **Q And after reading the agreement, you**
1879:17 **understood that in the -- should Mr. Lathen**
1879:18 **predecease Mr. Kerr, that Mr. Kerr would get all of**
1879:19 **the assets that were in this joint account?**
1879:20 A That was not clear to me.
1879:21 **Q All right. Why was that not clear?**
1879:22 A It wasn't clear to me that the participant
1879:23 agreement established a valid joint tenancy.

1881:1 **Q Is there something in this agreement that**
1881:2 **indicates that if Mr. Lathen predeceased Mr. Kerr,**
1881:3 **that Mr. Kerr would not get whatever was in the**
1881:4 **account?**
1881:5 A Again, if -- Mr. Lathen was not the only
1881:6 party mentioned in this participant agreement other
1881:7 than Andrew Kerr. So it wasn't clear to me that
1881:8 this participant agreement established a
1881:9 relationship which would entitle Donald Lathen to
1881:10 the proceeds of the account.
1881:11 **Q Oh, no. I'm sorry. Maybe I misspoke.**
1881:12 A Okay.

1881:13 **Q My question was the opposite of that.**
1881:14 A Okay.
1881:15 **Q It was Mr. Kerr. If Mr. Lathen were hit**
1881:16 **by a bus or had a heart attack --**
1881:17 A Right.
1881:18 **Q -- after the agreement was signed, Mr.**
1881:19 **Kerr would get what was -- he would become the sole**
1881:20 **owner of this brokerage account by operation of law,**
1881:21 **right?**
1881:22 A I couldn't have made that conclusion from
1881:23 this agreement.
1881:24 **Q Well, you had the brokerage account saying**
1881:25 **it was a joint account with right of survivorship,**
1882:1 **right?**
1882:2 A Correct.
1882:3 **Q You understand what right of survivorship**
1882:4 **is, right?**
1882:5 A I do, I do.
1882:6 **Q That means in a joint tenancy, if one**
1882:7 **person survives and the other dies, the survivor has**
1882:8 **sole -- becomes the sole tenant in the account,**
1882:9 **right?**
1882:10 A Correct.
1882:11 **Q And was there anything in this participant**
1882:12 **agreement that indicated to you that should Mr.**
1882:13 **Lathen predecease Mr. Kerr, that Mr. Kerr would not**
1882:14 **become the sole owner of that account?**
1882:15 A So in Section 2(f)?
1882:16 **Q 2(f), okay.**
1882:17 A This section of the agreement seemed to me
1882:18 to set up a limited economic interest --
1882:19 **Q Okay.**
1882:20 A -- on the part of Mr. Kerr.
1882:21 **Q Was there something in particular in**
1882:22 **Section 2(f) that you're referring to?**
1882:23 A In consideration -- so he's paid 10,000 --
1882:24 **Q Correct.**
1882:25 A -- for setting up the account, and shall
1883:1 receive no additional payments with respect to the
1883:2 account.
1883:3 **Q Unless --**
1883:4 A The accounts are terminated and the funds
1883:5 in the account are disbursed. And then Lathen
1883:6 indicates that he does not intend to terminate --
1883:7 **Q It says he won't get anything "unless the**
1883:8 **account is terminated, funds disbursed prior to the**

1883:9 **participant's death."**
1883:10 A Right.
1883:11 If you go halfway down the paragraph, it
1883:12 says "Lathen does not intend to terminate the
1883:13 account during participant's lifetime; and,
1883:14 therefore, it is unlikely that participant or
1883:15 participant's estate will receive any additional
1883:16 amounts under this agreement or with respect to the
1883:17 accounts."
1883:18 **Q Correct. I understand Mr. Lathen doesn't**
1883:19 **expect to terminate the account. And I'm sure he**
1883:20 **doesn't expect to die before Mr. Kerr.**
1883:21 **But nevertheless, if that happened, if he**
1883:22 **did die before Mr. Kerr, Mr. Kerr gets the account,**
1883:23 **right?**
1883:24 A That was the question in my mind, whether
1883:25 or not Donald Lathen was entitled to the proceeds of
1884:1 the account, and whether or not he had set up a
1884:2 valid joint tenancy.
1884:3 **Q So you just said Donald Lathen. Did you**
1884:4 **mean Mr. Kerr?**
1884:5 A Both.

182. At the time she reviewed Lathen's redemption requests, Finnegan did not know that Lathen had disavowed his ownership interest in any notes bought with money supplied by the Fund in his IMA, but such information would have been material to her determination of his eligibility to redeem because it was not clear to her that a company could be a joint tenant in a valid joint tenancy.

1862:21 **Q Okay. Now, after seeing the participant**
1862:22 **agreement that we just looked at with respect to Ms.**
1862:23 **Blair, did you form any conclusion; and if so, what,**
1862:24 **with respect to -- about the veracity of Mr.**
1862:25 **Lathen's representation that Ms. Blair was a joint**
1863:1 **and beneficial owner on that account?**
1863:2 A At this stage in my review of the
1863:3 documents, I was unsure.
1863:4 **Q What importance to a determination of**
1863:5 **eligibility, if any, under the survivor's option did**
1863:6 **the participant agreements that you read have?**
1863:7 A The participant agreement was unusual in
1863:8 that there was mention of Eden Arc, a company, which
1863:9 was not -- was not the intent of the retail bond
1863:10 program. The retail bond program is intended for
1863:11 individuals. It's intended for individuals.
1863:12 And so to see the name of a company in the
1863:13 participant agreement was unusual and concerning for

1863:14 me.
1863:15 **Q And why do you say "concerning"?**
1863:16 A It wasn't clear to me that a company could
1863:17 be a joint tenant.
1863:18 **Q And did you eventually get clarity on that**
1863:19 **question?**
1863:20 A I did consult with counsel.
1863:21 **Q And did you determine at that time to**
1863:22 **reject the redemption? Don't tell me what counsel**
1863:23 **told you.**
1863:24 A Yes, I did.
1863:25 **Q Now, if you had understood that pursuant**
1864:1 **to Mr. Lathen's investment agreement with his fund,**
1864:2 **that he himself had disavowed any ownership in the**
1864:3 **securities, of what importance, if at all, would**
1864:4 **that information have had to an eligibility**
1864:5 **determination?**
1864:6 A Not having had that information at the
1864:7 time, it's difficult for me to say.

183. By the terms of his Profit Sharing Agreement, the Blair, Fogas and Logan accounts were governed by Lathen's IMA, and the Kerr and Osika accounts were governed by the Profit Sharing Agreement. (Div. Ex. 72 – p.1.)

184. Lathen knew that the form of the Participant Agreement signed by Blair, Fogas and Logan gave each no beneficial ownership interest in the account and would not create a valid joint tenancy because Farrell told him that in the summer or fall of 2012. (PFOF ¶¶ 871, 878, infra.)

185. Lathen also knew that the joint tenancies created under the IMA – such as the Blair, Fogas and Logan accounts – were invalid because Farrell had told him in the summer of 2012 that his IMA made the Fund the real party in interest on the accounts, and an entity could not hold a valid joint tenancy. (PFOF ¶¶ 871, 878, infra.)

186. Lathen submitted his redemption requests of the Funding Corp. notes held in the Kerr and Osika accounts on June 30, 2015. (Div. Ex. 527A – pp. 3-4.) See also:

1855:21 **I draw your attention to the last four**
1855:22 **pages of the exhibit, which are marked 527-A. I**
1855:23 **just want to make sure you have all of them in front**
1855:24 **of you.**
1855:25 **So can you identify for us what Division**
1856:1 **527 and 527-A are?**
1856:2 A These are the written requests from Donald
1856:3 Lathen to -- I assume their financial institution --
1856:4 his financial institution to receive -- or to make

1856:5 redemption of the survivor option.

187. Lathen knew that his Profit Sharing Agreement destroyed the validity of his joint tenancies with Kerr and Osika because Farrell told him that in September 2013. (PFOF ¶¶ 905-909, 911, 913, infra.)

Prospect Capital

188. Prospect began to ask questions about Lathen's redemptions in January of 2014. (See Div. Ex. 592.)

189. An attorney at Prospect named Eric Colandrea flagged Lathen's requests for Ferraro. Colandrea noted that Lathen's name was being submitted in connection with a number of various redemption requests.

1485:19 **Q Are you familiar with a person named**
1485:20 **Donald Lathen?**
1485:21 A Yes.
1485:22 **Q Okay. And how did you become aware of**
1485:23 **him?**
1485:24 A I first became aware of Mr. Lathen when an
1485:25 attorney in my corporate group who formerly worked
1486:1 with me and had been in charge of reviewing the
1486:2 information U.S. Bank sent us with respect to
1486:3 redemptions of survivor options came to me a little
1486:4 perplexed by what he was seeing.
1486:5 And what he was seeing were multiple
1486:6 redemption requests that had Mr. Lathen's name on
1486:7 them as a named beneficiary.

190. At the time, Lathen had submitted a number of redemption requests, including for accounts held in the name of Korn, Blair, Jackson, Fogas, Bell, and Servider. (Div. Ex. 592)

191. The Participant Agreements of Korn (4/20/2012) (Div. Ex. 338), Blair (2/28/2012) (Div. Ex. 319), Fogas (11/23/2012) (Div. Ex. 327), and Bell (8/13/2010) (Div. Ex. 318) were entered into prior to January 2013 and, by the terms of the Profit Sharing Agreement (Div. Ex. 72), those accounts were governed by the Investment Management Agreement (Div. Ex. 191).

192. The terms of the Jackson (2/4/2013) (Div. Ex. 332), and Servider (2/28/13) (Div. Ex. 357) agreements were entered into shortly after the January 2013, and those accounts were governed by the Profit Sharing Agreement.

193. Colandrea reached out to US Bank to discuss the matter.

1486:8 **Q What happened next? He brought that to**
1486:9 **your attention, you say?**

1486:10 A Yes. He brought that to my attention. We
1486:11 discussed that it looked a little strange. And it
1486:12 was probably best for -- his name was Eric
1486:13 Colandrea -- Mr. Colandrea to reach out to U.S. Bank
1486:14 to let them know.
1486:15 **Q Do you know if that happened?**
1486:16 A Yes.

194. US Bank then requested additional information from CL King, Lathen's broker for the Prospect redemptions. (Div. Ex. 592 – p.7.)

195. Rather than providing the additional information, Burriesci of CL King responded with questions such as "why this is necessary"? (Div. Ex. 592 – p.7.)

196. Less than one week after the request for information, on January 29, 2014, Burriesci forwarded Colandrea a letter that Lathen wrote to US Bank regarding the request for additional information. (Div. Ex. 592 – p. 1.)

197. The letter refused the request for information, stating in part:

> Based on my review of the prospectus, I believe this additional information request by Prospect is both unnecessary and inappropriate. ...
>
> The securities in question have been validly submitted to US Bank (in some cases multiple times due to processing glitches) and the documentation provided in support of each request fully conformed with all of the requirements laid out in the prospectus.
>
> With respect to each Prospect bond in the account, CL King has already provided U.S. Bank with death certificates and account statements which clearly establish beneficial ownership at the time of death as well as satisfaction of the 6 month holding period.
>
> (Div. Ex. 592 – p. 10.)

198. The January 29, 2014 letter did not discuss nor attach any of Lathen's agreements. (Div. Ex. 592)

199. Lathen did not provide Prospect <u>any</u> agreements until Prospect finally forced his hand through lawsuit. Even then, Lathen only provided any agreement under the cloak of confidentiality – he required that Prospect first enter into a non-disclosure agreement.

3032:20 **Is it your recollection that when Prospect**
3032:21 **Capital first sued, you provided them with certain**
3032:22 **documents; is that right?**
3032:23 A Yes.

3032:24 **Q Under the cover of a nondisclosure**
3032:25 **agreement, correct?**
3033:1 A Yes.

200. On June 30, 2014 Prospect sued Lathen for "fraudulent conduct designed to profit from the deaths of terminally ill individuals". See Prospect Capital v. Lathen, Index No. 156375/2014. The allegations, as stated in their amended complaint, include:

> On information and belief, Donald Lathen, Jr., his wife Kathleen Lathen and Eden Arc operate EndCare, a scheme in the guise of a financial assistance program that turns the death of the poor into a profit-making enterprise by purchasing and redeeming corporate bonds, including bonds issued by Prospect, that contain a "survivor's option", also known as a "death put".
>
> As a condition to participating in the EndCare program, the participants were required to execute side agreements which (i) required the participant to relinquish ownership rights to 95% of the assets in the account, (ii) prohibited the participant from withdrawing funds from the account without Lathen's express written permission and (iii) provided that the participant would receive, at most, only 5% of the value of the account if Lathen pre-deceased the participant. Any brokerage account that Defendant opened with a program participant was subject to these conditions.
>
> On information and belief, Defendants Donald Lathen, Jr. and Jungbauer opened "joint" brokerage accounts with brokerage firms. After these fraudulent "joint" accounts were opened, Defendant(s) Donald Lathen, Jr. and/or Eden Arc and/or Jungbauer used funds that Eden Arc and its investors deposited into the brokerage accounts to purchase discounted corporate bonds containing a survivor's option, which allows the bonds to be redeemed for the full principal amount prior to maturity if, among other things, the beneficial owner of the bond dies.
>
> After a participant died, Defendant(s) Donald Lathen, Jr. and/or Eden Arc and/or Jungbauer instructed the brokerage firm to redeem the survivor's option in the phony joint accounts, with the intent that the brokerage firm would falsely represent to the bond issuer that the bonds were held in a joint account.
>
> Defendant(s) Donald Lathen, Jr. and/or Eden Arc and/or Jungbauer failed to inform the bond issuers that the deceased participants had entered into side agreements with the Defendants (i) whereby the deceased participants relinquished ownership of 95% of the value of the bonds, (ii) that prohibited the participant from withdrawing funds for the accounts without Lathen's express written permission and (iii) that provided that the participant would

receive at most, only 5% of the value of the account if Lathen pre-deceased the participant.

The defendants misrepresentations and omissions were material and injured Prospect in an amount to be determined at a trial by jury.
(Div. Ex. 594 – p. 1.)

201. Later, in Prospect Capital v. Lathen, Lathen's counsel tried unsuccessfully to seal the portions of the docket that contained the Participant Agreement. (Div. Ex. 641 at 80-81 (4/30/2015, 5/12/15, 5/21/15, 6/11/15, 6/15/15, 6/16/15 entries) and 90 (9/24/15 entry).)

US Bank

202. US Bank was trustee or paying agent for CFC, Funding Corp., and Prospect (PFOF ¶¶ 82(b), (f), (g), supra.)

203. US Bank acted as trustee for Caterpillar Financial Services Corp. (Div. Ex. 629 – p.1) and Citibank, additional issuers of survivor's option notes that Lathen sought to redeem. See also:

1085:14 **Q Can you tell me who Ms. Zmugg is?**
1085:15 A She is one of our representatives at
1085:16 our -- Caterpillar.
1085:17 **Q And Caterpillar is an issuer of survivor**
1085:18 **option notes?**
1085:19 A That's correct.
1085:20 **Q Now, there is a date stamp on this letter**
1085:21 **of June 9, 2015. Is that the time about which you**
1085:22 **sent this letter?**
1085:23 A Yes.
1085:24 **Q And why were you sending this letter?**
1085:25 A As per instruction from legal counsel.

1086:12 **Q And did you send a similar letter to this**
1086:13 **one to other issuer clients?**
1086:14 A Yes.
1086:15 **Q And which ones?**
1086:16 A Citibank, Federal Farm, National Rural

204. Ian Bell is Operations Manager in the payment and transfer division services of the Corporate Trust area at US Bank; he has served in that capacity since late 2012. (SFOF ¶ 27.)

205. Bell supervises the team that processes redemptions of US Bank clients' survivor's option notes. (SFOF ¶ 28.)

206. US Bank processes redemptions as Trustee for clients issuing various debt securities under those issuances' indentures. (SFOF ¶ 29.)

207. In the typical redemption process for Survivor's Option notes, Bell's area receives presentments and packages from brokers who coordinate the paperwork for holders who are electing to put or sell back their bond position under the terms of the survivor's option contingency in the indenture. (SFOF ¶ 30.)

208. Bell's area receives, reviews and tracks the presentments. (SFOF ¶ 31.)

209. Freeney has been a Vice President and relationship manager in the administration department of the corporate trust department at US Bank for over 14 years. (SFOF ¶ 32.)

210. On January 29, 2014, Freeney received a letter from Lathen by email. (SFOF ¶ 33.)

211. Lathen's January 29, 2014 letter was attached to his January 29, 2014 email to Freeney. (SFOF ¶ 34.)

212. In her role, Freeney has, among other types of clients, issuers of corporate debt for whom US Bank acts as Trustee.

1068:8 **And does the administration department --**
1068:9 **what kinds of clients does the administration**
1068:10 **department serve?**
1068:11 A We have all different type of clients. We
1068:12 have corporate, we have municipal. We have escrows.
1068:13 We have all types of clients.
1068:14 **Q Okay. Are issuers of corporate debt part**
1068:15 **of that group?**
1068:16 A That's correct.
1068:17 **Q Okay. And when we talk about U.S. Bank's**
1068:18 **clients, what is U.S. Bank's role in connection with**
1068:19 **an issuer's offering of debt securities?**
1068:20 A It depends on what they have hired us to
1068:21 be. It could be trustee, register or paying agent.
1068:22 It could be an escrow agent. It could be just a
1068:23 paying agent. It depends on what they hired us
1068:24 to -- to act in our capacity.

213. Issuers make the decision to pay redemptions under the survivor's option provision of their notes.

1070:9 **Q Okay. Can you tell me, as far as you**
1070:10 **know, who makes the decision to pay any particular**
1070:11 **redemption on a survivor's option –**

1070:18 THE WITNESS: Yes. It's really up to the
1070:19 issuer to –

214. If Bell receives a question from one of his processors about a presentment's eligibility for redemption, he instructs his processor to escalate the issue to the relationship manager assigned to the particular issuance.

947:11 **Q Okay. And what if it's an issue other**
947:12 **than the missing document? What if it's a question**
947:13 **about eligibility?**
947:14 A The processors under me could escalate to
947:15 me as their manager.
947:16 **Q And what would you do with it?**
947:17 A Depending on the situation, I would
947:18 typically instruct my processor to go to the
947:19 relationship manager of that particular issue.
947:20 **Q Okay. And the relationship manager, how**
947:21 **do you know which one to go to?**
947:22 A Each issue is assigned a relationship
947:23 manager. And we have system access that would allow
947:24 us to look up who that particular relationship
947:25 manager on that particular issue would be.

215. In mid to late 2013 or early 2014, one of Bell's processors, Stephanie Lanier, alerted him to the fact that Lathen had submitted several redemptions for large dollar amounts listing different decedents, none of whom had any seeming relationship to Lathen.

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.

216. Bell instructed Lanier to escalate the issue to Freeney, who was the relationship manager for Prospect, the issuer of the notes that Lathen was attempting to redeem.

952:20 **Q So what, if anything, did you tell Ms.**
952:21 **Lanier to do with that information?**

952:22 A I told her to escalate to the relationship
952:23 manager.
952:24 **Q And who was the relationship manager you**
952:25 **advised her to escalate to?**
953:1 A Beverly Freeney.
953:2 **Q And why did you select Ms. Freeney?**
953:3 A Ms. Freeney was assigned to the issue that
953:4 the presentments had come under.
953:5 **Q And what issue was that?**
953:6 A Prospect Capital.

217. After the issue was escalated, Bell's group was instructed to ask Lathen for further documentation relating to the joint tenancies involved in his redemptions.

953:23 **Q Okay. So tell me about those requirements**
953:24 **for further documentation.**
953:25 **Did someone make a request of him? What**
954:1 **happened?**
954:2 A We had escalated to Beverly, and we were
954:3 instructed to get further documentation from Mr.
954:4 Lathen.
954:5 **Q And do you have any understanding just**
954:6 **generally what that documentation was?**
954:7 A It had to do with further documenting
954:8 joint tenancy.

218. Lathen responded to those requests for additional information with a letter addressed to Freeney (which she then forwarded to Bell), dated January 29, 2014. In it, Lathen refused to provide additional information on the grounds that US Bank had no right to request it under the Prospect prospectus:

> Re: Recent Request by Eric Colandrea (Prospect Capital) (see attached email chain)
>
> Andrea Burriesci from CL King recent contacted me by email regarding the attached request from Eric Colandrea.
>
> Based on my review of the prospectus, I believe this additional information request by Prospect is both unnecessary and inappropriate. Under the prospectus, US Bank, not the issuer, is responsible for determining the validity of an exercise of the survivor's option provision. Prospect, the issuer, maintains discretion only with respect to application of the individual and/or aggregate put limits.

* * *

With respect to each Prospect bond in the accounts, CL King has already provided US Bank with death certificates and account statements which clearly establish beneficial ownership at the time of death as well as satisfaction of the 6 month holding period.

* * *

If US Bank has a legitimate reason it can articulate for requesting the additional information with respect to these claims, I will comply. However, US Bank needs to clearly state the reasons why such additional information is necessary (other than "Prospect wants it"). Remember, US Bank has already received information as required under the prospectus and it has approved all of these claims. The facts clearly show that Prospect is the party behind the new information requests. If US Bank allows Prospect to second-guess its processes and decisions, it not only violates the prospectus but potentially introduces further delays into the process. Therefore please be advised that I intent to hold US Bank responsible for any payment delays that result from its need to review additional information and "re-approve" any of these claims

* * *

Please contact me at your earliest convenience to discuss this matter further.
(Div. Ex. 623 – pp.1-3.)

See also:
953:12 **Q And can you tell us when, if ever, the**
953:13 **next time you heard of Mr. Lathen was?**
953:14 A Yes. I believe it was when Beverly had
953:15 forwarded me a letter that Mr. Lathen had written to
953:16 her.
953:17 **Q Okay. And do you know what the context of**
953:18 **that letter was and why Ms. Freeney was forwarding**
953:19 **it to you?**
953:20 A If I recall, the letter was a complaint by
953:21 Mr. Lathen specific to our requirements for further
953:22 documentation.

219. After Bell received Lathen's January 29, 2014 letter, they spoke by phone. In that conversation, Lathen did not offer to provide additional information to Bell in response to the request Lanier had made to his broker, CL King, for additional information, and did not advise Bell that he had side agreements with the decedents.

957:24 **Q And what, if anything, did you say to him?**

957:25 A I was certainly sympathetic to his
958:1 situation, and told him that I would escalate the
958:2 situation to the appropriate party.
958:3 **Q Okay. And in that conversation, did Mr.**
958:4 **Lathen offer you any of the information that had**
958:5 **been requested of him?**
958:6 A Not that I recall, no.
958:7 **Q And did he ever offer you any more**
958:8 **information than the election package that he had**
958:9 **submitted?**
958:10 A Not to my recollection.
958:11 **Q Okay. Did he ever describe any side**
958:12 **agreements that he might have had --**
958:13 A No.
958:14 **Q -- with the deceased?**
958:15 A No.

220. After that call, and as he told Lathen he would, Bell escalated the issue to Tom Tabor, Beverly Freeney's manager.

958:21 **So what happened after that call?**
958:22 A Correct. I escalated to Tom Tabor, who is
958:23 Beverly Freeney's manager.

221. On January 23, 2014, Stephanie Lanier, a processor in Ian Bell's Operations Group, wrote to Burresci about six redemption requests submitted on behalf of Lathen joint accounts in connection with their Prospect Capital notes. She wrote:

> Hi Andrea,
>
> Prospect Capital has requested the following documentation for each of the six accounts you have submitted Survivor Options for: . . .
> (Div. Ex. 622 – p. 6.)

222. In response to Burriesci's request for "where these requests are coming from," Colandrea of Prospect responded on January 24, 2014:

> Andrea,
>
> We need this for record keeping purposes. . . .
>
> Specifically, we want to see copies of both the complete account/client information from and trade confirmation. . . .
> (Div. Ex. 622 – p. 5.)

223. Burriesci obtained information from Colandrea respecting the specific accounts and securities to which his request was directed, and forwarded it to Lathen on January 27, 2014:

> **From:** Andrea Burriesci [mailto:abb@clking.com]
> **Sent:** Monday, January 27, 2014 4:37 PM
> **To:** Jay Lathen; Michael Robinson
> **Subject:** FW: Prospect Survivor Options
>
> **From:** Eric Colandrea [mailto:ecolandrea@prospectstreet.com]
> **Sent:** Monday, January 27, 2014 4:09 PM
> **To:** Andrea Burriesci; 'cts.survivor.options@usbank.com'
> **Subject:** RE: Prospect Survivor Options
>
> These accounts and securities:

(Div. Ex. 622 – pp.2-3.)

224. Freeney brought Lathen's January 29, 2014 letter to the attention of her manager, Tabor.

> Beverly,
>
> Please see attached response to the inquiry below.. . .
>
> The attached correspondence is time-sensitive and I would appreciate a prompt response. If you are not the correct person to handle this matter, please forward the letter to the correct person at US Bank and advise me of that person's contact information so that I may follow up.

(Div. Ex. 622 – pp. 2-4.)

225. Freeney forwarded Lathen's January 29, 2014 letter to Bell. (Div. Ex. 622 – p.1.) See also:

1081:5 **Q You write to Mr. Lathen on January 29 in**
1081:6 **response, I guess, to his email, which is on page 2.**
1081:7 A Uh-huh.
1081:8 **Q And you write, "The manager for our**
1081:9 **survivor options area is Ian Bell." And you give**
1081:10 **him his phone number and his email address.**
1081:11 **Why did you do that?**
1081:12 A I was told I could do that by my manager,
1081:13 yes.
1081:14 **Q Okay. And then Mr. Lathen writes to you,**
1081:15 **"Did you forward the letter to him?" And right**
1081:16 **above that you write, "Yes."**

1081:17 **And is that consistent with your**
1081:18 **recollection?**
1081:19 A Yes.

226. After Lathen informed US Bank that he would not provide additional information to it or Prospect, as requested, on January 29, 2014, Lathen continued to demand payment on his redemption while still refusing to provide the requested information regarding his joint tenancies.

Thomas/Beverly:

Please advise regarding the above-referenced matter. Prospect is seriously delinquent in paying these claims. As trustee for the issuer, US Bank should demand that Prospect honor their obligations under the prospectus. If Prospect refuses, US Bank should declare an event of default under the indenture governing these securities.

I do not understand why this is taking so long to resolve. Perhaps US Bank needs to be more forceful in resolving this situation. It has been three months since I wrote the attached letter and I am very frustrated by the lack of progress on this matter.
(Div. Ex. 624 – p.1.)

See also:
1083:5 **Q Sure. Had Mr. Lathen -- what information,**
1083:6 **if any, had Mr. Lathen provided between January 29**
1083:7 **and this April 29 email?**
1083:8 A I do not recall any.

227. After US Bank retained Thompson Hine as counsel in the Lathen dispute, Thompson Hine instructed Freeney to alert other issuer clients to redemption requests Lathen had made of their notes pursuant to their notes' survivor's options.

1084:1 **Q And after U.S. Bank hired outside counsel,**
1084:2 **did there come a time when you learned that Mr.**
1084:3 **Lathen had certain side agreements with deceased**
1084:4 **for which he was submitting survivor option**
1084:5 **redemptions?**
1084:6 A Yes.

1084:15 **Q Did there come a time that you contacted**
1084:16 **other clients of yours, issuers of yours, whose**
1084:17 **bonds Mr. Lathen was attempting to redeem?**
1084:18 A As per instruction from my legal counsel,
1084:19 yes.
1084:20 **Q Why don't we look at tab 8 which is**

1084:21 **Division Exhibit 629 for identification.**
1084:22 A Uh-huh.
1084:23 **Q Do you recognize this document --**
1084:24 A Yes.
1084:25 **Q -- Ms. Freeney?**
1085:1 **What is it?**
1085:2 A It is one of the letters that was drafted
1085:3 by my legal counsel.
1085:4 **Q Okay. And is it a letter to an issuer**
1085:5 **client?**
1085:6 A Yes.

228. On or about June 9, 2015, Freeney sent a letter to Caterpillar Financial Services Corporation, one of her issuer clients. In that letter, prepared by counsel, she wrote:

> We are writing to advise you that an entity by the name of Eden Arc Capital Management, LLC ("Eden Arc") has informed us it has applied for payment under the survivor's option of two (2) of the PowerNotes [SM] with the total face value of $75,000.00, based upon the death of parties with whom Eden Arc claims to have jointly owned the PowerNotes [SM]. We are told that the CUSIPS (with the surname of the decedent and the face value of the PowerNotes [SM]) are 14912HQB9 (Goldstein, $25,000.00), and 14912HQC7 (Osika, $50,000.00), and documentation pertinent to the applications, provided to us by counsel for Eden Arc, is enclosed. Counsel for Eden Arc has requested that such applications be acted upon at the earliest practicable date.
>
> Eden Arc has advised the Bank that its position as applicant under the survivor's option of such PowerNotes [SM] is based upon a "Participant Agreement" it had entered into with the titled owners of the PowerNotes [SM] (copies of the form of Participant Agreement applicable to the subject PowerNotes [SM] is enclosed). The Bank has had the opportunity to review the Participant Agreement form and has concluded that, under the terms of such Participant, Agreement, Eden Arc is not qualified to obtain the payment for which Eden Arc has applied at this time. Eden Arc has advised the Bank that it disagrees with that conclusion and that it believes that it is qualified to obtain payment under the survivor's option of the notes.
>
> Please let us know if you would like the Bank to advise Eden Arc's counsel whether its PowerNotes [SM] will be paid at this time. . . .
> (Div. Ex. 629 – p.1.)

See also:

1085:14 **Q Can you tell me who Ms. Zmugg is?**
1085:15 A She is one of our representatives at
1085:16 our -- Caterpillar.
1085:17 **Q And Caterpillar is an issuer of survivor**
1085:18 **option notes?**
1085:19 A That's correct.
1085:20 **Q Now, there is a date stamp on this letter**
1085:21 **of June 9, 2015. Is that the time about which you**
1085:22 **sent this letter?**
1085:23 A Yes.
1085:24 **Q And why were you sending this letter?**
1085:25 A As per instruction from legal counsel.

229. Freeney sent a letter like the one she sent to Caterpillar Financial Services Corporation to Citibank, Federal Farm Credit, and National Rural, other issuers of survivor's option notes as to which Lathen had submitted redemption requests.

1086:12 **Q And did you send a similar letter to this**
1086:13 **one to other issuer clients?**
1086:14 A Yes.
1086:15 **Q And which ones?**
1086:16 A Citibank, Federal Farm, National Rural.

230. Internal and outside counsel for US Bank reviewed the Participant Agreements Lathen ultimately furnished for the redemptions he was attempting to make through US Bank and made the determination, expressed in the letters Freeney sent, that he was not qualified to redeem the notes.

1092:8 **Do you know who at the bank reviewed the**
1092:9 **participant agreement?**
1092:10 A It was our legal counsel who actually
1092:11 reviewed.
1092:12 **Q So it wasn't someone at the bank, it was**
1092:13 **the law firm that you mentioned earlier?**
1092:14 A Yes. Yep.
1092:15 **Q What was the name of that law firm?**
1092:16 A It was our internal legal counsel and our
1092:17 external legal counsel.

See also: Div. Ex. 629 – p.1.

231. Tom Tabor is Vice President in the corporate trust department of US Bank, where he has been managing the corporate trust area for four years. (SFOF ¶ 35.)

232. Tabor supervises Freeney in her role as relationship manager, a role that requires her to act as the client-facing person for the bank for the life of any bond issue for which the bank acts as Trustee. (SFOF ¶ 36.)

233. If, during the redemption process, there is a question about what a term in a governing document means, normally US Bank's internal counsel would be asked to review the term.

1102:11 **What if there's a question about what a**
1102:12 **term in a governing document means?**
1102:13 A If there is a question about a term in the
1102:14 governing document, normally U.S. Bank's internal
1102:15 counsel would be asked to review the term.

234. Tabor has no power as Vice President in the corporate trust department of US Bank to declare an issuer in default.

1106:1 **Q Do you have the power in your job**
1106:2 **responsibilities to declare an issuer in default?**
1106:3 A No.

235. Tabor has never told a purchaser of a note issued by a US Bank client that he would put the issuer in default.

1105:22 **Q Any recollection of ever having told a**
1105:23 **client – a purchaser of a note issued by a bank**
1105:24 **client that you would put the issuer in default?**
1105:25 A No, I don't recall ever having done that.

236. Tabor was aware that there was an issue with one of Lathen's requests to put or tender notes of Prospect, a client of US Bank for which US Bank acted as Trustee.

1100:9 **Q So prior to understanding why you were**
1100:10 **here today, did you come to – become aware of Mr.**
1100:11 **Lathen?**
1100:12 A Yes, I do recall.
1100:13 **Q In what context?**
1100:14 A I recall that there was an issue with one
1100:15 of his requests to put bonds, to tender bonds.
1100:16 **Q And who was the issuer, if you can recall?**
1100:17 A Prospect.
1100:18 **Q Is Prospect Capital a client of U.S. Bank?**
1100:19 A Yes.
1100:20 And what role does U.S. Bank serve in
1100:21 connection with Prospect Capital notes -- or at
1100:22 least the notes Mr. Lathen was trying to redeem?

1100:23 A I believe we were the trustee on those
1100:24 notes.

237. Tabor receives approximately 200-300 emails each day.

1104:3 **Q Can you give us an estimate of how many**
1104:4 **emails you receive on a given day?**
1104:5 A 2- to 300.

238. US Bank hired Joe Muccia of Thompson Hine with respect to Lathen's redemption issues.

1106:4 **Q - Did there come a time when the bank hired**
1106:5 **outside counsel with respect to Mr. Lathen's**
1106:6 **redemption issues?**
1106:7 A Yes.

1106:20 **Q And who was the bank's outside counsel?**
1106:21 A Thompson Hine.
1106:22 **Q And did -- was there a particular lawyer?**
1106:23 A Joe Muccia.

239. After finally receiving certain Participant Agreements from Lathen, and reviewing them, Muccia, on behalf of US Bank, wrote to Kevin Galbraith, who represented Lathen, on August 14, 2014, conveying the Trustee's determination that there was no valid joint tenancy in the Notes between the decedents and Lathen:

> This firm is counsel to the Trustee with respect to the matters addressed herein. On behalf of the Trustee we advise you that, based upon the Trustee's analysis of information and material most recently submitted on behalf of your client Eden Arc and related parties (the "Holders") in conjunction with the other evidence and information available to the Trustee in connection with the attempted exercise of the Survivor's Option by the Holders, there does not appear to the Trustee satisfactory evidence or information indicating the existence of a joint tenancy in the Notes between the decedents and the Holders. The Trustee is unaware of any additional evidence or information which might affect the determination of eligibility or validity of the Holders' attempted exercise of the Survivor's Option. Accordingly, the Trustee at this time has determined that the Holders are not eligible for exercise of the Survivor's Option. (Div. Ex. 625 – p.1.)

240. On September 4, 2014, Muccia, representing US Bank, wrote to Galbraith, representing Lathen, reiterating the Trustee's position, pointing out the

materiality of the Participant Agreements to the eligibility determination, and noting that no further materials had been provided relating to the joint tenancy.

> We have reviewed your email and letter dated September 2 with respect to your client's Prospect Capital Corporation Survivor's Option submissions. We reject the first portion of your letter and its unfounded attacks on U.S. Bank regarding a period of time when it had not been provided with the Participation Agreements associated with such Survivor's Option submissions. Among other things, and as you perforce acknowledge in the last part of your letter, those Participation Agreements materially bear upon the eligibility of such submissions.
>
> * * *
>
> We note, finally, that you have not submitted, although you were invited to do so, any additional material of an evidentiary nature concerning the existence of a joint tenancy. Rather, you have submitted only legal argument concerning the alleged meaning of evidentiary material previously submitted.
> (Div. Ex. 626 – p.1.)

241. On September 19, 2014, Muccia, representing US Bank, wrote to Galbraith, representing Lathen, and set out in detail the provisions of the Participant Agreements that supported the Trustee's view that Lathen's notes were not held in a valid joint tenancy, and providing the Trustee's analysis of the case law:

> * * *
>
> In short, your letter and the conclusions it asserts are inaccurate as regards various facts and the applicable law.
>
> 1. In the first part of your letter (pp.2-6), you assert that U.S. Bank National Association (the "Bank") breached a duty allegedly owed to an agent of Eden Arc with respect to determinations made relative to applications on behalf of that agent for payment of Survivor's Options. The analysis is flawed in several respects.
>
> * * *
>
> -- Second, Eden Arc's agent (who, of course, was the party that possessed the evidence on this issue) was obligated to provide satisfactory evidence that he was authorized to act on behalf of a deceased "joint tenant," and yet failed until recently to provide evidence material to that issue, in the form of the Participant Agreement.

-- Third, most fundamentally, the Bank as Trustee did not owe the duty you have alleged to a person who was not a joint tenant of a deceased note holder. Your argument incorrectly assumes that a person who in reality had no right to proceeds of a note (*i.e.*, who was not a joint tenant) should nevertheless be paid the proceeds of a note, simply because a determination of the adequacy of the form of an application was made at a time when evidence material to the determination (the Participant Agreement) had not been provided. This puts form (indeed, an incomplete form) over substance.

* * *

2. 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."

* * *

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.

* * *

The statutory requirement [of N.Y. Banking Law § 675] 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 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. This 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 200) . . . In contrast, as shown above, the Participant Agreement denied Participants ***any*** access to an account's principal during their lives without written consent of Eden Arc's agent, entitled Participants only to 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. . . .

* * *

. . . 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. 2-6.)

242. Galbraith forwarded Muccia's letter to Lathen.

3102:17 **Q Okay. And that is, again, a position that**
3102:18 **you passed along to your client, correct?**
3102:19 A I forwarded this letter to my client.

243. Between December 4, 2014 and March 18, 2015, Muccia, representing US Bank, and Galbraith, representing Lathen, exchanged several emails setting out their respective positions; in particular, on December 29, 2014, Muccia conveyed the Trustee's disagreement with Galbraith's interpretation of New York Banking Law Section 675(a):

I have reviewed your below email and we have given thought to your question. In short, we have concluded that the language in the last clause of Banking Law Section 675(a) to which you refer does not speak to the circumstances with which we are faced, and we are not persuaded by your argument concerning the import of that language.

The language you have emphasized in the last clause of Section 675(a) speaks to when a bank is released for delivery of cash, securities or other property from an account to one joint tenant. It assume the existence of a joint tenancy, which is not the case in the circumstances of the Participant Agreement, for all of the reasons about which we have previously communicated, by phone and in writing.

The version of the Participant Agreement to which your [sic] refer (exemplified by the Frederick Jackson agreement) provides, ***not*** that either or both of Lathen and Jackson can sign to affect [sic] distributions from the accounts to either, ***but rather***, and to the contrary (in paragraph 2f), that, after payment of an initial $10,000 to the Participant, the Participant "shall receive no

additional payment with respect to the Account." So that the Participant had no right to proceeds from the Account during his/her lifetime. The Agreement to which you refer further provides that neither the Participant nor his/her estate will have any interest in any of the proceeds of the Account if the Participant pre-deceases Lathen, which the Agreement acknowledges (in an enormous understatement) was "expected." And it provides in paragraphs 2g and 4 that, in the "not expected" event that Lathen pre-deceases the Participant, the proceeds of the Account will first be applied to reimburse Eden Arc the total cost of all of the Investments in the Account ***and*** for the $10,000 payment made to the Participant when the Account was opened.

It is apparent in these circumstances why its author required the Participant to agree (in paragraph 15 of the Participant Agreement) not to disclose any of these terms of the Participant Agreement to anyone. But having learned of them, the Bank has concluded that a joint tenancy did not exist. That conclusion is not affected by the concluding clause of Section 675(a). (Div. Ex. 628 – pp. 12, 13.)

See also: Div. Ex. 158.

244. Galbraith forwarded Muccia's December 29, 2014 email to Lathen.

3110:19 **Q And you presented his view to your client;**
3110:20 **is that correct?**
3110:21 A I forwarded his email.

245. On September 10, 2015, after asking for and receiving Lathen's Discretionary Line Agreement, Muccia, representing US Bank, wrote to Galbraith, representing Lathen, detailing the Trustee's unchanged conclusions with respect to the newer form of the Participant Agreement and the Discretionary Line Agreement, and noting the Trustee's concerns that still more material agreements could exist that had yet to be provided to US Bank:

This is in response to your letter dated August 13, 2015, regarding the proposed redemption of certain Caterpillar instruments by Donald Lathen. I note that we first received on September 2, (after making a special request for them) three documents which, based on your letter, are directly relevant to the matter discussed in your letter yet were not included in the August 13 submission: (1) the "Account Application", (2) the "Account Agreement"; and (3) the "Discretionary Line Agreement," pursuant to which the line of credit referenced in your letter was established.

While the additional documents provided on September 2 indicate that there are yet further relevant documents bearing on the application which have not been provided to us, including unspecified loan documents, we have reached a conclusion based on what has been provided to date that Mr. Lathen and Mr. Gilks *did not* hold interests that constitute a joint tenancy under New York law and that the application for present payment of the Caterpillar instruments made by Mr. Lathen will not be granted. Put another way, with reference to the language of your letter, Mr. Lathen and Mr. Gilks did not "h[o]ld entirely identical interests" in the Account.

The following are among the factors which contributed to our conclusion:

* * *

(iv) Under Paragraph 2(d), all monies used to fund the Account must be borrowed from Eden Arc which provides a unique benefit to Mr. Lathen from the proceeds of the Account not provided to or shared in by Mr. Gilks.

(vi) Based on Paragraph 2(f) of the Participant Agreement, Mr. Gilks or his designee was to receive a $10,000 distribution from the Account on the Effective Date, with such distribution reflecting "an advance [on Mr. Gilks'] expected profit" in the Account. It is unclear why one of two *supposed* joint tenants in the account (purporting to have identical interests in such Account with the other join [sic] tenant) would be receiving "an advance" on funds which should, by definition, already be theirs (it is similarly unclear why there Is no provision for such a distribution to Mr. Lathen).

(vii) Based on Paragraph 4 of the Participant Agreement, Eden Arc can declare the Investment Loan immediately due upon the death of Mr. Gilks. A substantial creditor is thus granted different rights to the contents of such Account depending on which of the two joint tenants predeceased the other. (The use of this provision in the Participant Agreement also is odd for the reason Eden Arc is not a party to it.)

(ix) Under Paragraph 10, only Mr. Gilks (and not Mr. Lathen) provides an indemnity.

(x) The terms of Paragraphs 13(b), 18 and 23 are one way provisions effecting [sic] only one of the two supposed joint tenants.

Additional factors that support our conclusion, arising from the Account Application, the Account Agreement and the Discretionary Line Agreement include:

(xi) Both the Account Agreement and the Account Application, although signed both by Mr. Lathen and Mr. Gilks, provide only one mailing address for any reports, etc., "c/o Eden Arc Capital Management, One Penn Plaza, Suite 3671, New York NY 10119".

(xiii) There exists a very close relationship between Mr. Lathen and the Lender which funded the Investments that did not exist between Lender and Mr. Gilks. The Discretionary Line Agreement with Lender does not even identify Mr. Gilks by name and appears to be a form dictated by Mr. Lathen and Eden arc which they caused "Participants" to sign. The relationship between the Lender and Mr. Lathen is particularly problematic in light of the Lender's right, under the Discretionary Line Agreement, to render all funds immediately due and payable in a variety of circumstances."

(xiv) The Discretionary Line Agreement provides in Section 2.05(b)(ii) that the $10,000 which is part of the Funded Amount to Mr. Gilks must be repaid upon, among other things, the death of either Mr. Lathen or Mr. Gilks.

(xv) Under the Discretionary Line Agreement, Eden Arc (and in turn to some extent Mr. Lathen) benefits from an interest rate that is substantial as well as "fees, charges" and other unspecified items, and a return on Investments in the account, which diminish Mr. Gilks' interest in the Account.

While we suspect there is more, the foregoing is adequate to the conclusion stated above.
(Div. Ex. 2056 – pp. 1- 3.)

(See also: Div. Ex. 157.)

246. Galbraith forwarded Muccia's September 10, 2015 Letter to Lathen.

3018:22 **Q And you forwarded this letter to your**
3018:23 **client; is that correct?**
3018:24 A Yes.

247. There is no evidence that Lathen or his counsel ever provided the IMA or Profit Sharing Agreement to US Bank, or any of its issuer clients, even though, by the time Lathen and Galbraith were pushing US Bank to authorize his redemptions, Farrell had advised Lathen to revise his Profit Sharing Agreement because it likely destroyed the beneficial interests of both Lathen and the Participants. (PFOF ¶¶ 413, 905-909, 911, 913, infra.)

Prior to Lathen, Many Issuers Had Never Refused a Redemption Request

248. Begelman (Goldman Sachs) testified that prior to Lathen's redemption requests, neither Goldman Sachs Group, Inc. nor GS Bank had ever disputed a redemption request under either the notes' or CDs survivor's option terms. (Div. Ex. 580 – p. 3.) See also:

807:11 **Q So you – it starts "Fourth." If you could**
807:12 **read that paragraph until I give you the sign to stop,**
807:13 **please.**
807:14 A Okay.
807:15 "Fourth, Mr. Lathen now purports to be
807:16 concerned about retail investors who might be
807:17 purchasing CDs subject to the revised disclosure
807:18 language, and hypothesizes that GS Bank may not honor
807:19 redemption requests that may be made in the future
807:20 upon joint owner's death
807:21 "Please note that GS Bank has in the past
807:22 and continues to regularly honor redemption requests
807:23 that are made by a valid joint account owner.
807:24 "Indeed, the only dispute GS Bank has had
807:25 about redemption requests involves Mr. Lathen."
808:1 **Q Stop, please. Thank you.**
808:2 **And, to your knowledge, was that statement**
808:3 **about GS Bank having disputes with redeemers, for lack**
808:4 **of a better term, was that true throughout your tenure**
808:5 **at Goldman Sachs Bank?**
808:6 A Yes, ma'am.
808:7 **Q Do you know of any different experience by**
808:8 **Goldman Sachs Group in terms of the bonds with respect**
808:9 **to redeemers?**
808:10 A I do not.

249. Ferrero (Prospect) testified that Prospect had never before recommended that a redemption request be refused.

1489:15 **And then once this came to your attention,**
1489:16 **did Prospect refuse to redeem future requests?**
1489:17 A Our recommendation was not to.
1489:18 **Q Had that ever happened before that**

1489:19 **Prospect refused to redeem on a request?**
1489:20 A No.

250. Robustelli (GECC) testified that they had never encountered the need to ask for additional information relating to a redemption request aside from Lathen's redemptions.

1180:22 **Q Thank you. Can you tell us, please, under**
1180:23 **what circumstances, if any, GECC has asked for**
1180:24 **additional information beyond that sought by the**
1180:25 **trustee to establish eligibility of any particular**
1181:1 **redemption request?**
1181:2 A I mean, this has happened with respect to
1181:3 Mr. Lathen. I don't recall any other specific
1181:4 situations when we've asked for additional
1181:5 information.

251. Finnegan (Funding Corp.) testified that, apart from the redemption sought by Lathen, Funding Corp. has never asked for additional information to determine the eligibility of a redemption.

1848:13 **Q Under what circumstances, to your**
1848:14 **knowledge, has Funding Corporation asked for**
1848:15 **additional information beyond that submitted to the**
1848:16 **processing agent to establish eligibility?**
1848:17 A Outside of this particular circumstance,
1848:18 to my understanding, Funding Corporation has not
1848:19 asked for additional information to establish that
1848:20 eligibility.

252. Wade of CFC testified about only one other instance where a redemption raised red flags by the trustee.

1313:14 **Q So what would happen if the trustee had a**
1313:15 **question about a particular redemption?**
1313:16 A They would raise that issue to us.
1313:17 **Q To you in particular?**
1313:18 A Directly to me or my team.
1313:19 **Q And then what would you do with that**
1313:20 **question, if anything?**
1313:21 A If we ever receive something like that
1313:22 from US Bank that's not an administrative
1313:23 paperwork-type issue, it gets escalated to my
1313:24 manager and then to our legal team.
1313:25 **Q Has that ever happened?**
1314:1 A Only one time.
1314:2 **Q Can you tell us about that one time?**

1314:3 A I don't remember all the specifics, but
1314:4 essentially US Bank was trying to verify that the
1314:5 redemption was held for six months. That's one of
1314:6 the requirements for the death put.
1314:7 And the documentation that they had, they
1314:8 couldn't come to the conclusion on whether or not it
1314:9 was for a full six months, so they asked us if we
1314:10 could take a look at it.
1314:11 **Q Did you take a look at it?**
1314:12 A We did. And we raised it to our legal
1314:13 team.
1314:14 **Q You raised it to your legal team?**
1314:15 A Yes, we did.

Issuers Who Paid Did So Under Threat of Litigation, Among Other Things

253. Galbraith and Robinson (on Lathen's behalf) threatened to sue BMO Harris.

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.

3114:18 **Q Okay. And all the threats to sue the**
3114:19 **issuers came from Mr. Lathen as well; is that**
3114:20 **correct?**
3114:21 A Yeah. We had agreed upon a strategy, yes.

3115:17 **Q And you weren't the first person to sue**
3115:18 **BMO Harris on behalf of Eden Arc; isn't that**
3115:19 **correct?**
3115:20 A I'm not sure.
3115:21 **Q Okay.**
3115:22 MS. BERKE: Can you pull up Division
3115:23 Exhibit 785, please.
3115:24 BY MS. BERKE:
3115:25 **Q And this is an email from Michael Robinson**
3116:1 **to Laurence Kaplan dated September 22, 2015; is that**
3116:2 **correct?**
3116:3 A Okay. Yep. I see that. Uh-huh.
3116:4 **Q And if you scroll down to the bottom of**
3116:5 **page, do you recognize the Bates prefix on the page?**
3116:6 A I do.
3116:7 **Q So this is a document that came from your**
3116:8 **files?**
3116:9 A Yeah. I think so.
3116:10 **Q Okay. So even though you're not copied on**
3116:11 **the face of the document, you believe you had this**
3116:12 **document; is that correct?**
3116:13 A Yeah, I must have, if it came in my
3116:14 production, yes.
3116:15 **Q Okay. And the first paragraph reads,**
3116:16 **"Laurence. Your message is clear. If we need to**
3116:17 **get our attorney involved, we will do so.**
3116:18 **"However, if we do involve our attorney,**
3116:19 **we will be looking not only to force you to honor**
3116:20 **these early withdrawal requests or to compensate for**
3116:21 **losses incurred in a secondary market disposition,**
3116:22 **but also to recoup any legal costs we incur with**
3116:23 **respect to enforcing our rights under these**
3116:24 **agreements. (Sic.)**

3117:2 **"In decision, any legal action against you**
3117:3 **would be accompanied by a formal complaint to your**
3117:4 **regulator. I think the OCC and/or relevant state**
3117:5 **regulator as applicable would be very interested to**
3117:6 **learn of your conduct and your rather novel**
3117:7 **interpretations of your own governing documents."**
3117:8 **Is that what Mr. Robinson wrote to Mr.**

3117:9 **Kaplan?**
3117:10 A Yeah. You read that correctly, uh-huh.

254. Galbraith, on Lathen's behalf, threatened to sue CIT.

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.
3121:2 **Q Okay. Well, you threatened to sue them;**
3121:3 **is that correct?**
3121:4 A That's what I just said, uh-huh.

255. Lathen threatened Barclays. As he memorialized in an email to counsel for the Staples: "[H]ad some problems with Barclays. They asked to see our participant agreements which we provided. After a few threatening phone calls over the last few weeks, they finally paid." (Div. Ex. 481 – p. 14.)

Issuers Characterized Lathen's Actions as Fraudulent

256. GECC told Lathen's counsel that they viewed Lathen's redemptions as a fraudulent scheme:

> . . . Just like in the *Staples* case, the arrangements between Mr. Lathen and the deceased person compel the following conclusions:
>
> • that in order to attempt to exercise the Survivor Option, Mr. Lathen structured the arrangements to give the appearance through the Account Agreement that the deceased person was a beneficial owner;
> • that the parties entered into other contractual relationships (which they intended to be binding) designed to insure that the deceased person received no economic benefit other than the promised $10,000 or similar fee for lending their name to the arrangements;

- that the parties never intended for the deceased person to have any bona fide beneficial ownership interest in the Notes themselves; and
- that the scheme was designed and employed by Mr. Lathen to attempt improperly to exercise the Survivor Option.

(Div. Ex. 838 – pp. 2-3.)

257. Goldman Sachs came to the same conclusion, and expressed it in its response to Lathen's CFPB Complaint.

> As reflected in the Participant Agreements that Mr. Lathen executed (and undoubtedly drafted), Mr. Lathen is engaged in an investment scheme – a "highly unusual absolute return fixed income strategy" -- whereby he attempts to profit by creating the appearance of a "joint account" with the identities of terminally ill patients who have absolutely no economic interest in the accounts at issue. He is thus not a "consumer," but rather an individual, who through a registered investment advisor he formed and manages, is engaged in a sophisticated investment strategy, the success of which involves representing to banks (including GS Bank) that he is a true owner of an account, contrary to fact.
> (Div. Ex. 575 – pp. 4-5.)

258. Prospect sued Lathen for fraud among other things. (PFOF ¶ 200, supra.)

III. Respondents' Fraud

Lathen, Jungbauer, and Participants Lacked Beneficial Ownership of the Bonds

259. Respondents could not give Participants a true beneficial ownership interest in the bonds because the Fund's assets needed to be protected.

> 3634:21 **Q And in order to protect fund investors, you**
> 3634:22 **could not let the Participant have a true beneficial**
> 3634:23 **ownership in the property; is that right?**
> 3634:24 A I think it's more accurate to say that it was
> 3634:25 advisable to protect the fund from actions by the
> 3635:1 participant that could hurt the fund.
> 3635:2 **Q And you didn't want the Participants to**
> 3635:3 **misappropriate fund assets, correct?**
> 3635:4 A I think that was a natural goal, sure. Anytime
> 3635:5 you have someone that's advancing money against an asset,
> 3635:6 whether it's a loan that's secured or in some other
> 3635:7 context, where they're expecting something back for that
> 3635:8 investment, one has to protect. What's the basis for
> 3635:9 their investment?
> 3635:10 **Q You didn't want Participants to misappropriate**
> 3635:11 **fund assets; is that correct?**
> 3635:12 A I didn't want the Participant to violate the

3635:13 terms of the Participant Agreement.
3635:14 **Q But did you say in your investigative testimony**
3635:15 **that you didn't want the Participant to misappropriate**
3635:16 **fund assets? Did you say that?**
3635:17 A I may have said that.

260. Lathen would have considered it a "misappropriation" if Participants tried to access the assets in the JTWROS accounts.

3635:2 **Q And you didn't want the Participants to**
3635:3 **misappropriate fund assets, correct?**
3635:4 A I think that was a natural goal, sure. Anytime
3635:5 you have someone that's advancing money against an asset,
3635:6 whether it's a loan that's secured or in some other
3635:7 context, where they're expecting something back for that
3635:8 investment, one has to protect. What's the basis for
3635:9 their investment?

261. Lathen had authority to access all of the JTWROS accounts. (SFOF ¶ 16.)

262. The March 2011 PPM stated that "strict governance protections and funds flow protocols will be placed on all Joint Accounts to protect the accounts from unauthorized trading or funds transfers." (Div. Ex. 369 – p. 17.)

263. Investors were told about the strict governance protections and funds flow protocols because Lathen wanted to assure investors that both he and the terminally-ill individuals would not "misappropriate" funds or securities from the JTWROS accounts.

82:25 **Q Okay. So when you say here, "unauthorized**
83:1 **trading or funds transfers," you're referring to the**
83:2 **Participants, correct?**
83:3 A I was referring to the Participants as well
83:4 as myself. And because the joint tenancies are between
83:5 me and the Participant, and there's -- an investor
83:6 would rightly be concerned, Well, what if you, Jay,
83:7 take off with the money?
83:8 So I wanted to make sure that that -- that
83:9 that was addressed as well.
83:10 **Q And, ultimately, that was not addressed,**
83:11 **correct?**
83:12 A Well, it wasn't addressed through the
83:13 Participant Agreement or the brokerage accounts. But
83:14 we did have an independent administrator of The Fund
83:15 who was doing monthly reconciliations on all of the
83:16 accounts.
83:17 So had there been any improper

83:18 misappropriation, it would have been noticed by the
83:19 Fund administrator.
83:20 **Q And by "misappropriation," you're referring**
83:21 **to yourself and the Participants; the idea was that you**
83:22 **and the Participants would not be able to**
83:23 **misappropriate funds from these accounts, correct?**
83:24 A Yes.

264. There were 50 to 60 Participants over the life of the Fund. Each Participant was required to sign a Participant Agreement and a Limited Power of Attorney before the JTWROS account was opened.

104:11 **Q And the fund had approximately 60**
104:12 **participants; is that right?**
104:13 A I haven't done an actual count. That seems a
104:14 bit high to me. I think it's maybe 60 in total,
104:15 including accounts before the fund. But it's certainly
104:16 in the 50 to 60 range.

265. Aside from the margin loans provided by the broker-dealers, the Fund provided all funding for the survivor's option instruments purchased into the Joint Accounts. (Div. Exs. 72 – p. 1; 324 – p. 1; 365 – p. 27.) See also:

304:23 **Q Aside from margin that was borrowed from the**
304:24 **brokerage firms, the fund provided all the financing**
304:25 **for the joint tenant accounts; whether in the form of**
305:1 **a loan or an advance?**
305:2 A That is correct.

266. In or around early 2013, Lathen added a provision to the Participant Agreement that the Participants bore no risk for margin calls. (Div. Ex. 332 – p. 2.)

267. EACP and EACM's Due Diligence Questionnaire provided: "The Participants who open the accounts in partnership with Eden Arc receive compensation, and do not bear any expenses or liabilities, including any costs associated with the purchase of securities in their accounts." (Div. Ex. 238 – p. 11).

268. A JTWROS brokerage account was created for each Participant, opened after the Participant signed the Participant Agreement. (Div. Exs. 124-129; 314-364.)

269. Each JTWROS account was held in the name of Donald Lathen and the Participant (and David Jungbauer for accounts opened prior to January 24, 2013). (Div. Exs. 124-129.)

270. The Fund was not named on any JTWROS account. (Div. Exs. 124-129.)

271. At one point, the broker-dealer for the JTWROS accounts was First Southwest Company ("FSW"). For each JTWROS account, there were separate account margin agreements, each of which was signed by Lathen. Each of the FSW JTWROS margin agreements contained the following language:

> You further represent that no one except you has an interest in your account or accounts with [FSW].
> (Div. Ex. 125 – Margin Agreements, para. 15.)

272. In exchange for the Participant opening a brokerage account with Lathen, the Fund paid him or her $10,000.

> 61:11 **Q Now, in exchange for the participant's**
> 61:12 **opening brokerage accounts with you, you paid them --**
> 61:13 **or Eden Arc Capital Partners paid them $10,000; is that**
> 61:14 **right?**
> 61:15 A Yes.
> 61:16 **Q And the $10,000 was paid as soon as the**
> 61:17 **brokerage account was opened; is that right?**
> 61:18 A It was paid once the account was opened and
> 61:19 some instruments had been purchased into the account --
> 61:20 or transferred into the account.

273. Robinson told Participants "You're getting $10,000 and full stop. And the conversation kind of ends."

> 1683:23 **Q "ANSWER: I have stated that. I think I**
> 1683:24 **have stated they're getting $10,000. I don't think**
> 1683:25 **I've gone on and said, 'And you're not getting**
> 1684:1 **anything else.' I think I've said, 'You're getting**
> 1684:2 **$10,000,' and full stop. And the conversation kind**
> 1684:3 **of ends.**
> 1684:4 **"I mean, we don't have, like, a tertiary**
> 1684:5 **or secondary conversation about, 'And you're not**
> 1684:6 **getting this, you're not getting that.' I mean,**
> 1684:7 **'That's what you're getting. Done.'"**
> 1684:8 **Is that what you said in your**
> 1684:9 **investigative testimony?**
> 1684:10 A Probably. I'm just reading this. Yeah.
> 1684:11 **Q You did say that?**
> 1684:12 A Yes.
> 1684:13 **Q And that's accurate?**
> 1684:14 A Yes, it is.

274. The $10,000 was a one-time payment: "Financial assistance comes in the form of a one-time cash payment made within 15 business days of enrollment." (Div. Ex. 435 – p. 3)

275. On July 2, 2013, Robinson told Debra Newman of the Gloucester County Division of Social Services, in response to a subpoena requesting account information for Joy Davis in order to determine her eligibility for social services: "From time-to-time, we provide financial assistance to indigent terminally-ill individuals, usually in the form of a one-time $10,000 payment...Under the terms of our financial assistance program, the $10,000 payment is a one-time event. Ms. Davis will not receive any additional payment from us now or in the future." (Div. Ex. 505 – p. 2.)

276. The $10,000 payment to pay the Participant came from the Fund's bank account at HSBC, until around 2015, when the money was sent directly from the brokerage account to the Participant or their designee.

61:24 **Q Where did the $10,000 payment come from?**
61:25 A Oh, okay. Early on, it came from The Fund.
62:1 So it would be written from a fund bank account.
62:2 And I think towards the end, we were actually
62:3 sending money directly from the brokerage account to
62:4 the participant or their designee.
62:5 **Q Approximately when did you make that change?**
62:6 **You said toward the end. Approximately --**
62:7 A Probably around 2015.

1690:19 **Now, participants got paid by Eden Arc**
1690:20 **Capital Partners from the HSBC account; is that**
1690:21 **right?**
1690:22 A Yes. I believe that's right.

277. No Participant ever received more than $10,000.

198:21 **Q Okay. So aside from the $10,000 that the**
198:22 **participant got in exchange for opening the brokerage**
198:23 **account with you, no Participant ever received more**
198:24 **than $10,000; is that right?**
198:25 A That is true; that is correct.

278. Over the course of the Fund, the Fund used five different introducing broker-dealers: Grace Financial Group ("GFG"), SecureVest, CL King & Associates ("CL King"), FSW, and Wedbush Securities ("Wedbush"). The relationships with the broker-dealers were mainly seriatim as opposed to concurrent. (Div. Exs. 124-126, 128-129.)

279. GFG's clearing broker was Penson Financial Services ("Penson"), and SecureVest's clearing broker was JPMorgan Clearing Corp. ("JPMorgan"). CL King, FSW, and Wedbush were self-clearing. (Div. Exs. 124-129.)

280. Lathen signed the account opening documents for the JTWROS accounts. (SFOF ¶ 58.)

281. Lathen signed the account opening documents for the JTWROS accounts on his own behalf and on behalf of the Participants.

1690:23 **Q And with respect to the account opening**
1690:24 **documents, did Mr. Lathen sign for himself?**
1690:25 A Yeah. He would sign for himself, and --
1691:1 yes.
1691:2 **Q And did he also sign for the participant?**
1691:3 A Under a limited power of attorney, he
1691:4 signed for the participant. I think that was --
1691:5 that was typically the case.

282. No Participant ever asked Robinson about the "mechanics of a brokerage account." Robinson believed that "most of these individuals have never had a brokerage account and don't think about things like that."

1689:21 **"So -- so the answer -- I'm sorry that's a**
1689:22 **long-winded, roundabout answer to the question. But**
1689:23 **I have not had any conversations that I recall,**
1689:24 **because no one has ever asked, you know, about sort**
1689:25 **of mechanics of a brokerage account.**
1690:1 **"I suspect, if I may speculate again, that**
1690:2 **most of these individuals have never had a brokerage**
1690:3 **account and don't think about things like that."**

283. Participants generally did not receive account statements. On the rare occasions when Participants did receive account statements, Robinson called the broker-dealers and told them not to send account statements to the Participants.

1703:5 **Q Okay. And did they receive statements**
1703:6 **from the broker-dealers?**
1703:7 A Typically not.
1703:8 **Q Okay. And on the account opening**
1703:9 **statements -- on the account opening documents, was**
1703:10 **there a box that asked you where you wanted**
1703:11 **statements sent?**
1703:12 A There was.
1703:13 **Q And did you indicate Eden Arc?**
1703:14 A Yes. Generally, I did.
1703:15 **Q Okay.**
1703:16 A We did.
1703:17 **Q And were there a couple of times that**
1703:18 **brokerage account statements went to Participants or**
1703:19 **their agents?**

1703:20 A Yes.
1703:21 **Q And on those occasions, did you call the**
1703:22 **broker-dealer and say, "Just send them to Eden Arc's**
1703:23 **offices"?**
1703:24 A Yes.

284. Lathen asked CL King if account correspondence could come just to him, not the other joint owners. (Div. Ex. 71 – p. 1.)

285. The brokerage firms required signatures of both joint owners to withdraw funds from the accounts.

86:4 **Q You initially said that you didn't need the**
86:5 **governance protections and fund flow protocols on the**
86:6 **joint accounts, because the Participant Agreement**
86:7 **stopped the Participants from withdrawing funds without**
86:8 **your consent, right?**
86:9 A That was one of the -- one of the protections
86:10 that I felt, you know, obviated the need for a formal
86:11 arrangement at the brokerage firm.
86:12 The other thing I think I mentioned was the
86:13 fact that the brokerage firm requires signatures of
86:14 both joint owners.
86:15 **Q Signatures of both joint owners for what?**
86:16 A In connection with withdrawing funds from the
86:17 accounts.
86:18 **Q And did each broker that you used have that**
86:19 **protection?**
86:20 A I believe they did.

286. Lathen told a prospective investor that Participants were not informed of any details of the JTWROS account, including, for example, the name of the brokerage firm, and the account number: "Moreover, as a practical matter, the Participants are not informed about any details of the JTWROS account (e.g., the name of the brokerage firm, the account number, etc.)." (Div. Ex. 237a – p. 3.)

287. Lathen told a prospective investor that he had full discretion to move assets from one JTWROS account to another when the prospective investor asked about the possibility of a Participant attempting to obtain more than the $10,000 upfront payment:

> Allocations across various JTWROS accounts should pose no conflict since all are for the benefit of the Fund it seems....?.... BUT where there is risk of claim beyond $10k by joint tenant can you allocate out of the account without their consent to ameliorate the risk of successful claim?

Jay Lathen has full discretion to move assets from one JTWROS account to another at any time.
(Div. Ex. 237a – p. 10.)

288. The partners in the Fund paid all taxes on the income and gains in the JTWROS accounts. (Div. Exs. 288 – pp. 566-587; 289 – pp. 34-96; 290 – pp. 137-238; 294 – pp. 32-263.) See also:

303:20 **Q Okay. So the limited partners paid the tax**
303:21 **liability; is that accurate?**
303:22 A The limited partners and the general partner
303:23 paid the tax liability based on their share of the
303:24 income of the fund.
303:25 **Q Okay. And the Participant did not, correct?**
304:1 A That's true. The Participant received a
304:2 1099 for the $10,000 payment that they received. To
304:3 impose additional taxable income on them for moneys
304:4 not received would not make any sense.

289. Participants did not receive a 1099 for any coupon interest or any other income or profits in the JTWROS account.

301:2 **Q They were not sent a 1099 from the brokerage**
301:3 **firm; is that correct?**
301:4 A That is correct.
301:5 **Q And you mentioned coupon payments during the**
301:6 **life of the Participant yesterday; is that correct?**
301:7 A Yes.
301:8 **Q And the Participants were not issued any**
301:9 **1099 for the coupon payments during their life; is**
301:10 **that correct?**
301:11 A If I may -- if I may clarify a point that I
301:12 think is important for answering this question.
301:13 **Q Go ahead.**
301:14 A Brokerage firms, when there is a joint
301:15 account, there's only one Social Security number that
301:16 they will have on record for that account for purposes
301:17 of tax reporting.
301:18 So, basically, they say, you know, Where
301:19 should we tell the IRS to send the 1099? And in all
301:20 instances, my Social Security number was the tax ID of
301:21 record on the brokerage account for purposes of 1099
301:22 reporting to the IRS.
301:23 So we received all the 1099s. In no
301:24 instance would another joint accountholder, on any
301:25 joint account that I'm aware of in the country,
302:1 receive a 1099. Only one joint owner receives a 1099

302:2 on a joint account.
302:3 **Q All right. And, in this case, you were the**
302:4 **joint accountholder that received the 1099 for the**
302:5 **accounts, correct?**
302:6 A Yes, that is correct.
302:7 **Q And there was no tax liability to the**
302:8 **Participants aside from the $10,000 payment; is that**
302:9 **correct?**
302:10 A That is correct.
302:11 **Q And with respect to 1099s that you got from**
302:12 **the brokerage firm, you and the fund took care of the**
302:13 **taxes that were owed; is that correct?**
302:14 A The fund is not a taxpayer. The way the
302:15 income flowed is that it flowed to my tax return, and
302:16 then pursuant to the profit sharing arrangement,
302:17 flowed back to the fund.
302:18 And then the fund, which is a pass-through
302:19 entity, then issued K-1s to all of the investors in
302:20 the fund for their share of the underlying income of
302:21 the fund.
302:22 And it's those investors, the end investors
302:23 that actually end up paying the taxes owed.

290. Throughout the life of the Fund, the partners in the Fund paid taxes on the gains in the Fund, in the form of ordinary income for the coupon interest and capital gains on the profits associated with the exercise of the survivor's option.

462:9 **Q And in terms of the gains in the joint**
462:10 **tenant accounts, the fund -- and I know you mentioned**
462:11 **it's not the fund; it's the partners.**
462:12 **But the partners, the fund, whatever you**
462:13 **want to call it, they paid capital gains taxes on**
462:14 **that, correct?**
462:15 A Capital gains were one type of income that
462:16 the fund had.
462:17 **Q And what was the other type of income?**
462:18 A Interest income.
462:19 **Q Okay. And -- but it was all classified as**
462:20 **capital gains; is that correct?**
462:21 A That's not correct.
462:22 **Q Which part was classified as capital gains?**
462:23 A The capital gains part.
462:24 **Q And to be clear, what do you mean by that?**
462:25 **You're talking about –**
463:1 A So, I'm sorry. I don't mean to be cute
463:2 about it.
463:3 When you purchase and sale -- sell an

463:4 instrument, that gives rise to capital gain based on
463:5 the difference between the purchase price and the sale
463:6 price.
463:7 So, for instance, when we purchased a bond
463:8 instrument into the joint account for, let's say, 95,
463:9 when it was subsequently put back to the issuer at
463:10 100, that would result in a $5 capital gain.
463:11 If that capital gain in that holding period
463:12 was less than one year, that capital gain would be
463:13 so-called short-term capital gain. If the holder
463:14 period exceeded a year, it would be long-term capital
463:15 gain.
463:16 Now, there's other income that's coming from
463:17 that security. Of course, it's paying -- and in most
463:18 cases it's paying a coupon payment.
463:19 So when the issuer makes its interest
463:20 payment, that's considered interest income, and that's
463:21 a different type of income than capital gain.
463:22 **Q Okay.**
463:23 A So there was a combination. The fund's
463:24 income was a combination of interest income,
463:25 short-term capital gains and long-term capital gains.

3609:22 **Q Well, fair to say that through the entire life**
3609:23 **of the fund, you treated the gains as capital gains,**
3609:24 **right?**
3609:25 A Yes. Well, the character of the income, as
3510:1 earned in the joint accounts, did not change character
3510:2 when it was passed through to the fund, initially through
3510:3 the investment management agreement and subsequently
3510:4 through the profit sharing agreement.
3510:5 **Q So your testimony is the loan structure did not**
3510:6 **change the capital gains treatment; is that your**
3510:7 **testimony?**
3510:8 A By the loan structure, you're referring to the
3510:9 structure we put in place with Hinckley Allen?
3510:10 **Q In 2013?**
3510:11 A In January of 2013?
3510:12 **Q Right.**
3510:13 A Yes, that's correct.

291. Neither the Fund nor Lathen nor the Participants paid gift tax on amounts paid to the Participants.

459:24 **Q And there was no gift tax liability to the**
459:25 **participant; is that correct?**
460:1 A Yes, that's correct. The $10,000 was

compensation to them.
Q But in terms of -- in terms of any other moneys, there was no gift tax liability, because there were no other moneys aside from the $10,000; is that right?

THE WITNESS: My understanding is that unless additional moneys were received by them, it wouldn't be considered a gift.
And even if there were additional moneys received by them, it would be compensation; not a gift. I didn't consider it a gift.
BY MS. WEINSTOCK:
Q Okay. So in terms of putting aside the $10,000 payment for a moment, in terms of any other money from the joint tenant accounts, there was no gift tax consequence to the participant; is that right?
A I believe that gift tax consequence is to the -- is to the grantor, not the recipient, as I understand the law.
So the gift tax would have been owed by me if there was a gift tax.
Q And you didn't pay any gift tax, correct?
A No, I didn't.
Q And the reason we're talking about gift tax is because Eden Arc Capital Partners is funding a joint account in the name of you and a terminally ill individual, correct? So one might ask: Is that a gift of something to the terminally ill individual; is that right?
A Someone may ask that, I suppose.
Q Okay. And that's something that you had thought about; is that right?
A Yes.
Q And determined that there was no present gift to the terminally ill individual, so there was no gift tax consequence; is that right?
A Well, my understanding of the gift tax rule -- and I did receive some legal advice on this -- is that when -- it has to do with the brokerage account or a bank account.
The IRS considers it only to be a gift when it's, quote, completed, which means that the joint owner on the account receives an actual distribution from the account without further recourse.

462:1 So merely having someone be a joint
462:2 accountholder on a joint account does not trigger a
462:3 gift tax liability; it's only triggered insofar as
462:4 that individual actually receives funds from the
462:5 account, in which case it is completed.
462:6 **Q Okay. So just to be very clear, the fund**
462:7 **did not pay any gift taxes; is that right?**
462:8 A Yes, that's correct.

292. The Fund financials showed the net asset value of the Fund as being 100% of the value of the assets in the JTWROS accounts. (Div. Exs. 194 – p. 4; 195 – p. 5; 196 – p. 4; 228 – p. 4; 101 – p. 4.) See also:

3592:23 **Q Well, you certainly included in the net asset**
3592:24 **value of fund, 100 percent of the value of the assets in**
3592:25 **the joint tenant's account; is that right?**
3593:1 A We valued the joint accounts under the
3593:2 assumption that I would outlive the Participants.
3593:3 Contractually speaking, if I were to predecease the
3593:4 Participants, then the Participants would have to pay
3593:5 back the Discretionary Line Agreement, plus interest, and
3593:6 the residual value would go to the Participant in which
3593:7 case, we would have to adjust the valuation of the joint
3593:8 account or more accurately, the loan to the joint account
3593:9 on the books of the fund in the event that I predecease
3593:10 the Participant.
3593:11 **Q But fair to say that for the life of the fund,**
3593:12 **the fund financial showed the fund owning 100 percent of**
3593:13 **the value of the assets in the joint tenant account; is**
3593:14 **that right?**
3593:15 A The joint tenancy accounts were valued under
3593:16 the expectation that I would outlive the Participant and
3593:17 that I would honor the Profit Sharing Agreement with the
3593:18 partnership, such that the partnership would receive the
3593:19 full economic value of the account.

293. Bank, brokerage charges including margin interest, and clearing charges relating to the JTWROS were recorded in the Fund financials as an expense to the Fund. (Div. Exs. 104 – p. 4; 306 – p. 63; 305 – p. 67.) See also:

489:20 **Q Now, under "Expense," the bank and broker**
489:21 **charges and the clearance charges are an expense to**
489:22 **the fund; is that correct?**
489:23 A They are recorded here as an expense to the
489:24 fund.
489:25 **Q And the clearance charges, that relates to**
490:1 **the joint tenant brokerage accounts; is that right?**

490:2 A Yes, the clearance charges relate to the
490:3 joint brokerage accounts.

469:19 MS. WEINSTOCK: Okay. Let's take a look,
469:20 Mr. Chan, at the 2014 taxes, No. 306, and page 14,
469:21 please.
469:22 BY MS. WEINSTOCK:
469:23 **Q And, Mr. Lathen, you have the same**
469:24 **accounting method here as well, correct?**
469:25 A Yes, that's correct.
470:1 **Q Gains received as nominee are subtracted**
470:2 **out; is that right?**
470:3 A Yes, that's correct.
470:4 MS. WEINSTOCK: Now, Mr. Chan, if you could
470:5 go to page 40, please. I'm sorry. Mr. Chan, can we
470:6 go to page 63, please.
470:7 BY MS. WEINSTOCK:
470:8 **Q Now, there's an entry on this page, "Margin**
470:9 **interest various 1099's." And it says "$638,258."**
470:10 **And then under that is "Received as nominee," and it's**
470:11 **negative $638,258.**
470:12 **Is that the margin interest charged by the**
470:13 **brokerage firm?**
470:14 A Yes, it is, in the joint accounts.
470:15 **Q And the title of this page is "Investment**
470:16 **income expenses"?**
470:17 A Yes.
470:18 **Q And this is because the margin interest was**
470:19 **charged as an expense to the fund; is that correct?**
470:20 A Yes.

470:21 MS. WEINSTOCK: And, Mr. Chan, if you could
470:22 pull up 305, please. And page 9 in 305 is the 2013
470:23 taxes.
470:24 BY MS. WEINSTOCK:
470:25 **Q And, again, here we see that gains received**
471:1 **as nominee are subtracted out; is that correct?**
471:2 A Yes.
471:3 MS. WEINSTOCK: Okay. And, Mr. Chan, page
471:4 40, please.
471:5 BY MS. WEINSTOCK:
471:6 **Q And here is the interest income received as**
471:7 **nominee that's also backed out; is that correct?**
471:8 A Yes.
471:9 MS. WEINSTOCK: And, Mr. Chan, page 67,
471:10 please.

471:11 BY MS. WEINSTOCK:
471:12 **Q And, Mr. Lathen, this is entitled**
471:13 **"Investment income expenses;" is that correct?**
471:14 A Yes, it is.
471:15 **Q And this is, again, the margin interest that**
471:16 **is on the return. But then it's backed out and**
471:17 **charged to the fund; is that correct?**
471:18 A That is correct.

294. Lathen had an account in his name, or in his and Jungbauer's names, into which he purchased survivor's option instruments, which he then transferred into other JTWROS accounts.

435:4 **Q You testified yesterday that on occasion you**
435:5 **would buy account -- you would buy bonds into an**
435:6 **account in your name and then transfer it into**
435:7 **participant accounts; is that right?**
435:8 A I did -- I did say that. And I think I may
435:9 have qualified it by saying it may have been in my
435:10 account or it may have been in an account with me and
435:11 David Jungbauer, and I didn't have full recall.
435:12 I don't actually recall whether -- if I did
435:13 buy bonds in my own account, my own individual
435:14 account, then it would have been for the purpose of
435:15 either adding an additional owner, i.e., a participant
435:16 onto the account, or transferring it into a joint
435:17 account with the participant.
435:18 **Q And you think that you did that either in an**
435:19 **account in your name only or in an account in your**
435:20 **name with David Jungbauer; is that right?**
435:21 A Yes, I think that's possible.

295. For the life of the Fund, Lathen transferred investor funds from the Fund's account into the JTWROS accounts.

105:9 **Q And from 2011 to the present, the flow of**
105:10 **funds was investor money went into Eden Arc Capital**
105:11 **Partners, and then that money was transferred into**
105:12 **these individual joint tenancy with right of**
105:13 **survivorship accounts, correct?**
105:14 A Yes.
105:15 **Q And then after the terminally ill individual**
105:16 **died and the instruments were redeemed, that money was**
105:17 **then transferred back to the Eden Arc Capital Partners**
105:18 **account; is that right?**
105:19 A Yes.
105:20 **Q And that didn't change under the loan**

105:21 **structure that you created, correct?**
105:22 A Correct.

296. Lathen cross-traded the JTWROS accounts at will, as well as transferred positions among JTWROS accounts. (Div. Exs. 935, 937, 938, 939, 940, 941, 942.)

432:13 **Q Now, you cross-traded these joint tenant**
432:14 **accounts at will; is that correct?**
432:15 A Yes.

435:22 **Q And aside from buying bonds in an account in**
435:23 **your name or your and David Jungbauer's name and then**
435:24 **transferring them to the Participants, you also**
435:25 **transferred bonds and CDs among Participant accounts;**
436:1 **is that right?**
436:2 A Yes.

441:18 **Q So is it fair to say crossing trades**
441:19 **between and among joint tenant accounts was fairly**
441:20 **routine?**
441:21 A I think that's -- it did occur with some
441:22 frequency, yes.

See also:
Please see attached cross trades for today. These should all be TYPE 2.
Thanks, Jay.
(Div. Ex. 941.)

297. As described by Robinson, sometimes when Lathen found out a Participant's death was imminent, Lathen would transfer assets into that account, as he did with Carol Kilgus. (Div. Exs. 27, 29.)

1714:17 **Q And you said sometimes when you found out**
1714:18 **that a Participant was -- death was imminent, Mr.**
1714:19 **Lathen would transfer assets into that account; is**
1714:20 **that right?**
1714:21 A Yes. Sometimes, yes.

298. Carol Kilgus's Participant payment was made after she died.

62:19 **Q And do you remember a participant named Carol**
62:20 **Kilgus?**
62:21 A Yes, I do.
62:22 **Q And that was an account that was opened the**
62:23 **day before she died; is that right?**
62:24 A Yes.

62:25 **Q And when was the payment made in that case?**
63:1 A Sometime -- I'm not sure exactly, but it
63:2 would have been a couple days, maybe three days or so.
63:3 **Q So you think it was made after she died?**
63:4 A Yes, I think that's fair to say.

299. The debit balance in Kilgus's account was moved after she died. (Div. Ex. 27.) See also:

1723:6 **Q Okay. So was the margin balance moved**
1723:7 **from Ms. Kilgus's account after she died?**
1723:8 A We weren't moving margin balances. We
1723:9 were moving margin balances from the account. We
1723:10 were moving them to the account.
1723:11 Let me just read this again.
1723:12 (The witness examined the document.)
1723:13 THE WITNESS: Oh, debit balances, yeah.
1723:14 That's -- up -- yes. That is probably -- and deal
1723:15 with calls.
1723:16 Sometimes you have -- you may have a call
1723:17 on an account if the -- you know, the asset
1723:18 balance -- market value of the assets and the -- you
1723:19 know, the margin requirements are out of balance.
1723:20 So I had to check on that -- that day. So
1723:21 if there were any movements, they would have been
1723:22 done on May 31.
1723:23 BY MS. WEINSTOCK:
1723:24 **Q Okay. After Ms. Kilgus's death?**
1723:25 A Uh-huh.

300. Denisse Alamo's mother, Doris Cubilette, was enrolled in EndCare in 2009, during which time Alamo was Cubilette's attorney in fact. (SFOF ¶ 65.)

301. Alamo received $10,000 pursuant to Cubilette's agreement with EndCare. (Lathen Ex. 2053 – p. LATHEN15959.) See also:

2356:22 **Q And pursuant to that agreement, you ended**
2356:23 **up receiving $10,000; is that right?**
2356:24 A Correct.
2356:25 **Q No more than that, right?**
2357:1 A No.

302. Alamo did know what assets or level of assets were held in the brokerage accounts.

2357:19 **Q What assets were in those accounts?**
2357:20 A Specific, I wouldn't -- I wouldn't know. I

2357: 21 didn't actually inquire about it.

2358:11 **Q Do you know what level of assets those**
2358:12 **accounts held?**
2358:13 A I do not.

303. Alamo did not have online access to the brokerage accounts.

2357:22 **Q Did you ever have online access to any of**
2357:23 **those accounts?**
2357:24 A I didn't ask for it, but I -- you know, I
2357:25 don't know, I guess, is the question. I never
2358:1 inquired about it.

304. Alamo did not receive monthly statements for the brokerage accounts.

2358:2 **Q Did you ever receive monthly statements**
2358:3 **for any of those accounts?**
2358:4 A No, I did not.

305. Alamo did not put any money into the brokerage accounts.

2358:5 **Q Did you ever put any money into any of**
2358:6 **those accounts?**
2358:7 A No.

306. Alamo did not make any transfers in the brokerage accounts.

2358:8 **Q Did you ever make any transfers between**
2358:9 **any of those accounts?**
2358:10 A I did not.

307. Alamo did not receive a percentage of the profits or interest payments from the brokerage accounts.

2358:21 **Q You never received a percentage of the**
2358:22 **profits that Mr. Lathen got; is that correct?**
2358:23 A Correct.
2358:24 **Q While your mother was living, did you**
2358:25 **receive any type of interest payments during – from**
2359:1 **those accounts?**
2359:2 A I did not.

308. Alamo did not know what Lathen told issuers.

2359:20 **Q But you didn't have an understanding of**
2359:21 **what Mr. Lathen told issuers of bonds?**

2359:22 A No.
2359:23 **Q So you would not have told the SEC**
2359:24 **anything about that –**
2359:25 A No.

309. Joy Davis entered into an agreement with EndCare in June 2011 when she was terminally ill. (Div. Ex. 325 – p. 3.) See also:

1507:1 **Q And you mentioned -- you mentioned that**
1507:2 **you had cancer. And what was your prognosis? Or**
1507:3 **how long did the doctors think you were going to**
1507:4 **live?**
1507:5 A Six months.

310. Davis's Participant Agreement, dated June 23, 2011, provided that Lathen was authorized to "make transfers of cash and securities into and out of the Account(s) without [Davis's] prior consent." (Div. Ex. 325 – p. 1, para. 2(d).)

311. Pursuant to the terms of the Participant Agreement, Davis was "not [] permitted to pledge, borrow against, or withdraw funds from the Account(s) without the express written permission of Lathen, which permission may be withheld in Lathen's sole discretion." (Div. Ex. 325 – p. 2, para. 3.)

312. Davis and Lathen entered into a power of attorney agreement that provided that Lathen could "open, manage, handle, and direct brokerage accounts titled in [Davis's] name . . .;" "buy, sell, . . . and deal in stocks, bonds, . . . and other securities . . .;" and "transfer funds into and out of such accounts." (Div. Ex. 325 – p. 4.)

313. Davis received $10,000 from Lathen.

1507:9 **Q You mentioned that Mr. Lathen ended up**
1507:10 **paying you $10,000; is that right?**
1507:11 A Yes.

314. Davis has no investment experience, and has not owned stocks or bonds or had a brokerage account.

1505:20 **Q What type of investment experience do you**
1505:21 **have?**
1505:22 A None.
1505:23 **Q Have you owned stocks before?**
1505:24 A No.
1505:25 **Q Have you owned bonds before?**
1506:1 A No.
1506:2 **Q Have you ever had a brokerage account?**
1506:3 A No.

315. Davis does not know if Lathen made transfers in or out of brokerage accounts.

1509:17 **Q Do you know if Mr. Lathen ever made any**
1509:18 **transfers in and out of the account, any accounts?**
1509:19 A No. I don't know.

316. Davis does not know what GFG, SecureVest, or CL King are.

1512:15 **Q Do you know what Grace Financial Group is?**
1512:16 A No.

1514:7 **Q Have you ever heard of a company called**
1514:8 **Securevest?**
1514:9 A No.

1516:9 **Q Do you know who C.L. King is?**
1516:10 A No.

317. Davis did not receive online access to brokerage accounts at GFG, SecureVest, or CL King.

1512:20 **Q Did you ever receive online access to any**
1512:21 **accounts held at Grace Financial Group?**
1512:22 A No.

1514:13 **Q Did you ever receive access to any online**
1514:14 **accounts at Securevest?**
1514:15 A No

1516:14 **Q Did you ever put -- did you ever receive**
1516:15 **online access to any accounts at C.L. King?**
1516:16 A No.

318. Davis did not receive monthly statements from GFG, SecureVest, or CL King.

1512:23 **Q Did you ever receive any monthly account**
1512:24 **statements from any accounts at Grace Financial**
1512:25 **Group?**
1513:1 A No.

1514:16 **Q Did you ever receive monthly statements**
1514:17 **from any accounts held at Securevest?**
1514:18 A No.

1516:17 **Q Did you ever receive any monthly**
1516:18 **statements from C.L. King?**

1516:19 A No.

319. Davis never put money into accounts at JPMorgan, SecureVest, or CL King.

1514:4 **Q Did you ever put any money into any**
1514:5 **accounts at JPMorgan?**
1514:6 A No.

1514:10 **Q Did you ever put any money into accounts**
1514:11 **at Securevest?**
1514:12 A No.

1516:11 **Q Did you ever open any accounts at C.L.**
1516:12 **King?**
1516:13 A No.

320. Davis understood that the $10,000 payment was similar to the "Make a Wish" Foundation and that Respondents were going to give her $10,000 for her to do what she wanted to do.

1507:12 **Q And what were the circumstances that**
1507:13 **resulted in that payment?**
1507:14 A Well, like I said, it was more or less
1507:15 like a Make a Wish thing. Because I was on hospice,
1507:16 that I was going to die. That they were going to
1507:17 give me $10,000 for me to do what I wanted to do.
1507:18 And they were to take out a bond on me.
1507:19 And then after my demise, they would cash
1507:20 the bond. That's how they would get their money
1507:21 back plus a little extra.

321. Lathen signed paperwork to open an account held by him, Jungbauer, and Davis at JPMorgan on December 8, 2011. (Div. Ex. 271 – pp. 1, 3.)

322. In January 2013, after Lathen learned that Davis was cancer-free, Lathen transferred approximately $1.37 million in securities from his joint account with Davis and Jungbauer at CL King (xxxx-0005) to an account held only by himself and Jungbauer at CL King (xxxx-0002). (Div. Ex. 124, Davis statements – pp. 121-128 (SEC-CLK-E-0008063-70); Jungbauer statements – pp. 190- 208 (SEC-CLK-E-0000850-868).)

323. In January 2013, after Lathen learned Davis was cancer-free, he sought to have her removed from the joint account at CL King. (Div. Ex. 510 – pp. 1, 2.)

324. On July 2, 2013, Michael Robinson told Debra Newman, an employee of the Gloucester County Division of Social Services, that the $10,000 payment to

Davis was a "one-time event. Davis will not receive any additional payments from us now or in the future." (Div. Ex. 505 – p. 2.)

325. When Davis was cured of cancer, Respondents transferred all of the money out of her account and closed it, severing the joint tenancy.

112:2 **Q And she was cured of that cancer; is that**
112:3 **right?**
112:4 A I believe she did tell us that she was cured,
112:5 yes.
112:6 **Q And after she told you she was cured of**
112:7 **cancer, you transferred all of the money out of her**
112:8 **account and closed it, right?**
112:9 A Yes, I believe that's correct.
112:10 **Q So there was no chance -- you made sure there**
112:11 **was no chance that she could outlive you; is that**
112:12 **right?**

112:15 THE WITNESS: The Participant Agreement that
112:16 we had executed with Joy Davis was similar to other
112:17 arrangements throughout; was my right under the
112:18 Participant Agreement to move funds out of or into the
112:19 account.
112:20 That's also a right that joint tenants have
112:21 by law.

3556:6 **Q And by the way, didn't you sever the joint**
3556:7 **tenancy of Joy Davis?**
3556:8 A Yes, we did.

326. Lathen wanted to make sure Davis did not outlive him.

113:2 **Q Okay. So my question to you, Mr. Lathen, is:**
113:3 **You wanted to make sure that Joy Davis did not outlive**
113:4 **you; is that correct?**
113:5 A Yes.
113:6 **Q And because of that, you transferred the**
113:7 **money out of her account when you found out that she**
113:8 **was cured, correct?**
113:9 A We did exercise the rights that we had under
113:10 the Participant Agreement to move funds out of that
113:11 account, correct.

327. At no time did Lathen pay out to Davis her share of the account proceeds when he severed the joint tenancy.

1510:3 **Q You mentioned before you only received**

1510:4 **$10,000?**
1510:5 A Yes.

1517:3 **Q Once you got better, what, if anything,**
1517:4 **happened to your agreement with Mr. Lathen?**
1517:5 A Nothing happened. I mean, I never heard
1517:6 from him again until now.

328. Participant Peter Bankuti lived longer than the expected six months.

1697:18 **Q Are you familiar with a participant named**
1697:19 **Peter Bankuti?**
1697:20 A Yes, I am.
1697:21 **Q And did he live longer than the six months**
1697:22 **that was expected?**
1697:23 A He did.
1697:24 **Q How long did he live?**
1697:25 A I believe he's still living today. That
1698:1 would be two years or something like that.

329. Lathen removed assets from Bankuti's account and moved them to another JTWROS account.

1698:2 **Q Okay. And with respect to Mr. Bankuti,**
1698:3 **Mr. Lathen -- did Mr. Lathen remove assets from the**
1698:4 **Bankuti account and deploy them elsewhere?**
1698:5 A I'm not sure.
1698:6 **Q Okay.**
1698:7 MS. WEINSTOCK: Let's pull up, Mr. Chan,
1698:8 page 103 of Mr. Robinson's investigative testimony.

1699:4 **Q Okay. And does that refresh your**
1699:5 **recollection that in the case of Mr. Bankuti, Mr.**
1699:6 **Lathen exercised his rights to remove the assets**
1699:7 **from the account and deploy them elsewhere?**
1699:8 A Yes. Apparently, yes. Some assets. I
1699:9 don't think all assets.
1699:10 **Q So is it accurate that Mr. Lathen in the**
1699:11 **case of Mr. Bankuti exercised his rights to remove**
1699:12 **assets from the account and deploy them elsewhere?**
1699:13 A I believe that is true.

330. Each Participant Agreement restricted Participant's rights and gave plenary powers to Lathen. (PSOF [__], infra.)

331. Each Participant Agreement was signed by Lathen and the Participant or the Participant's agent. (Div. Exs. 314-364.)

332. Each Participant Agreement bound Participants to confidentiality, making them promise that they would not disclose the terms of the Participant Agreement or the associated paperwork to any other person without the prior written consent of Lathen. (Div. Exs. 314-364.)

333. An example of the Fund's first version of the Participant Agreement is Division Exhibit 346, the James McCord Participant Agreement. That agreement states:

> Participant agrees that he/she is not be [sic] permitted to pledge, borrow against, withdraw or exercise any right of ownership with respect to the Investments or other assets in the Account(s) without the express written permission of Lathen, which permission may be withheld in Lathen's sole discretion.
> (Div. Ex. 346 – para. 3.)

334. An example of the Fund's second version of the Participant Agreement is Division Exhibit 325, the Joy Davis Participant Agreement. That agreement states:

> Participant agrees that he/she will not be permitted to pledge, borrow against, or withdraw funds from the Account(s) without the express written permission of Lathen, which permission may be withheld in Lathen's sole discretion.
> (Div. Ex. 325 – para. 3.)
>
> Participants shall be entitled to 5% of the net profits in the Accounts during the term of the joint tenancy, subject to a minimum of $10,000 and a maximum of $15,000.
> (Div. Ex. 325 – para. 2(f).)

335. An example of the Fund's third version of the Participant Agreement is the Marion Korn Participant Agreement. That Agreement added a provision that:

> In the event that Lathen and the Designees should pre-decease the Participant, Participant, or if applicable, Participant's estate hereby agree to cooperate with Investors or their designated agent to liquidate the Account(s). Once liquidated, any funds contributed by Investors to the Accounts would be returned to them. The remaining value in the Account(s), if any, would then be divided 95% to Investors and 5% to Participant or their estate.
> (Div. Ex. 338 – p. 2.)

336. No Participant ever received profits in the Accounts, because the profits were primarily dependent upon the death of the Participant.

> 250:22 **Q And so that's why no Participant ever got**
> 250:23 **more than $10,000; because the profits in the account**

250:24 **during the life of the joint tenancy didn't reach that**
250:25 **amount; is that right?**
251:1 A That's right.
252:2 **Q And because the strategy, the profits are**
252:3 **being realized upon the death of one of the joint**
252:4 **tenants; is that right?**
252:5 A Not all of the profits. I mean, these bonds
252:6 do, of course, pay -- make a coupon payment. So there
252:7 is interest income flowing into the account.
252:8 **Q Okay.**
252:9 A So --
252:10 **Q But the bulk of the profit is realized**
252:11 **through the exercise of the survivor's option; is that**
252:12 **correct?**
252:13 A That's absolutely true, yes.

337. An example of the Fund's fourth version of the Participant Agreement is Division Exhibit 330, the Nanette Goldstein Participant Agreement. That agreement no longer contained the language regarding the 95/5 split of remaining value in the account in the event of pre-decease. That agreement states:

> In consideration of entering into this Agreement, Lathen shall pay Participant $10,000 as soon as practicable following the Effective Date. Participant shall receive no additional payments with respect to the Account(s) unless the Account(s) are terminated and the funds in the Account(s) are disbursed prior to Participant's death...Lathen does not intend to terminate the Account(s) during Participant's lifetime and, therefore, it is unlikely that Participant or Participant's estate will receive any additional amounts under this Agreement or with respect to the Account(s).
> (Div. Ex. 330 – pp. 1-2.)

338. An example of the Fund's fifth version of the Participant Agreement is Division Exhibit 323, the Marcellus Brown Participant Agreement. The first such agreement was signed in February 2015, and it corresponded with the change to the Discretionary Line Agreement. That Participant Agreement states:

> Upon the Effective Date, the Participant (or its designee) will receive a $10,000 distribution from the Account(s)...there is no assurance that the Investments will be profitable or that the account owners will receive additional distributions from the Account(s) beyond the initial distribution to the Participant referenced above.
> (Div. Ex. 323 – p. 2.)

339. The Participant Agreements prohibited Participants from moving funds out of the JTWROS accounts without Lathen's permission.

112:23 **Q So in your case, joint tenants could move**
112:24 **funds out of the accounts; is that what you're saying?**
112:25 A They -- the Participant Agreement would have
113:1 prohibited them from doing that without my permission.

340. The Power of Attorney Lathen had each Participant execute appointed Lathen as "the true and lawful attorney" to:

> 1. open, manage, handle, and direct brokerage accounts titled in the undersigned's name either individually or jointly;
> 2. to buy, sell, exchange...trade...and in any and every other way it sees fit to handle, dispose of, acquire, and deal in stocks, bonds,...other securities...with or through a brokerage firm...or custodian...;
> 3. to execute agreements relating thereto in their name or otherwise on their behalf;...
> 5. to sign their name to any and all written instruments...;
> 6. to transfer funds into and out of such accounts.
> (Div. Ex. 325 – p. 4.)

341. Lathen drafted and made changes to Participant documents to hide the Participants' lack of beneficial ownership from issuers, if issuers ever received the Participant Agreement.

> The issuer and trustees see the registration on the account as a JTWROS. They do not see the Participant Agreement so they are not privy to where the capital was sourced and how the economics of the account have been shared between the Participant and the fund. That being said, I have crafted the Participant Agreement in a manner which is intended to defeat the straw man argument in the event the issuer ever does see the Participant Agreement and tries to challenge the putback.
> (Div. Ex. 488 – p. 2.)

342. Lathen removed language from the original Participant Agreement that stated that the Participant could not "exercise any right of ownership with respect to the investments or other assets from the account."

3259:12 **Q Okay. And now the side agreement with Mr.**
3259:13 **McCord, what is he promising in connection with**
3259:14 **those rights under the side agreement?**
3259:15 A It says, "Participant agrees that he/she
3259:16 is not be permitted to pledge, borrow against,
3259:17 withdraw or exercise any right of ownership with
3259:18 respect to the investments or other assets in the
3259:19 accounts without the express written permission of
3259:20 Lathen, which permission may be withheld in Lathen's
3259:21 sole discretion.
3259:22 "It is specifically understood by

3259:23 participant that upon participant's death, the
3259:24 accounts and all assets and proceeds from such
3259:25 accounts will pass directly to Lathen and the
3260:1 investors and that such will not be part of
3260:2 participant's estate."
3260:3 **Q Okay. And what would happen under this**
3260:4 **agreement if you died before Mr. McCord?**
3260:5 A He would get the account.
3260:6 **Q Okay. Free and clear?**
3260:7 A I guess more accurately, it would require
3260: 8 the death of both myself and David Jungbauer, my
3260:9 stepfather.
3260:10 **Q I --**
3260:11 A Yes. But assuming that he outlived me and
3260:12 my stepfather, he would get the account.
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.

3261:25 **Q And when you noticed that language, what**
3262:1 **did you do?**
3262:2 A I removed it.

343. After removing the language in PFOF ¶ 342, supra, from subsequent agreements, Lathen still made redemptions under the older agreements that contained the language. (See, e.g., Div. Ex. 409.)

344. Lathen also made changes to the Participant Agreements to protect the Fund investors.

3269:11 **Q All right. Now, under that language that**

3269:12 **you just read, is that new for this version?**
3269:13 A Yes, it is.
3269:14 **Q Okay. So what was the reasoning behind**
3269:15 **that change, the 10 percent minimum, 15 percent**
3269:16 **maximum?**
3269:17 **And that's not talking about debt? That's**
3269:18 **talking about profits while both people are alive?**
3269:19 **Do I understand that correctly?**
3269:20 A Yes, that's right.
3269:21 **Q So what was the impetus for that?**
3269:22 A So I think there was concern that, you
3269:23 know, the -- I believe this was raised by one of my
3269:24 investors that, you know, what's to keep the
3269:25 Participant from, you know, having, you know, a
3270:1 larger share of the profits or potentially, you
3270:2 know, accessing the account?
3270:3 And I think we wanted to put some
3270:4 boundaries around that. And so that's why we said 5
3270:5 percent of the profits and subject to a minimum of
3270:6 10 and a maximum of 15.

345. Although Lathen changed the Participant Agreement multiple times, he never gave the Participants a true beneficial ownership interest in the JTWROS accounts in order to protect the Fund.

3591:21 **Q Is it fair to say that the final version in**
3591:22 **February 2015 did not have this language that "Lathen and**
3591:23 **the Participants shall each own a 50 percent interest in**
3591:24 **the account;" is it fair to say that language didn't make**
3591:25 **its way in there?**
3592:1 A That is inconsistent with my recollection. I
3592:2 don't believe that we had the 50 percent language in the
3592:3 final version.
3592:4 **Q And that's because that language would**
3592:5 **jeopardize the fund's position; is that right?**
3592:6 A I don't know that it was that, so much as not
3592:7 wanting the Participant to potentially think that they're
3592:8 going to get more from the account in the event, you
3592:9 know, that -- we didn't want a situation where a
3592:10 Participant would come and say, "I want to withdraw funds
3592:11 from the account." And we say, "Well, that's not
3592:12 possible because of the -- you know, discretionary line
3592:13 agreement prohibits that" and them say, "Well, you know,
3592:14 it says I've got a 50 percent interest in the account
3592:15 here. I want a withdrawal." We don't want to have
3592:16 arguments with our Participants.
3592:17 **Q And you needed to protect the fund, correct?**

3592:18 A I think that's fair to say.

346. As Lathen assured investors and potential investors, Respondents restricted Participants and Participants' survivors from obtaining the assets in the JTWROS, and did not inform them of the details of the JTWROS accounts.

> As a matter of law, the Participants' survivors have extremely limited rights vis-à-vis the assets in their particular JTWROS account. Moreover, as a practical matter, the Participants are not informed about any details of the JTWROS account (e.g., the name of the brokerage firm, the account number, etc.)...The Participation Agreement prohibits the Participants from pledging their interest in the JTWROS accounts.
> (Div. Ex. 237 and 237a – p. 3.)

> How do you keep the family from having a claim to the asset during the life of the joint owner? Answer . . . Most of the time the Participant doesn't even know where the account will be opened. Finally, the brokerage firm requires all account holders' signatures to move funds out of the account so even if they found out where the account was carried and called the brokerage firm to attempt a withdrawal, they wouldn't be successful.
> (Div. Ex. 488 – p. 1.)

347. The draft of Respondents' letter to SEC exam staff stated: "Pursuant to Rule 206(4)-2(a)(1)(ii) and the written agreements with the Fund, I am acting as an agent for the Fund client when holding the client's funds and securities in the JTWROS accounts." The letter also states: "EACM intends to put in place an account control agreement with the brokerage firm that dictates that no funds may leave the JTWROS accounts without the permission of the Fund." (Div. Ex. 177f – p. 3.)

348. The language on page 3 cited in PFOF ¶ 347, supra, of Exhibit 177f did not appear in the final letter that was sent to SEC exam staff. (Div. Ex. 309.)

349. Robinson told Participants and their agents that the nature of the arrangement between Respondents and Participants was a "business transaction."

> 1685:6 **Q Now, did you tell participants and their**
> 1685:7 **agent that it's a business transaction?**
> 1685:8 A I'm sorry. That what is a business
> 1685:9 transaction?
> 1685:10 **Q The $10,000, that it was a business**
> 1685:11 **transaction.**
> 1685:12 A Essentially, yes.

350. Div. Ex. 963 (1) lists Participants who signed agreements prior to January 24, 2013 whose joint accounts held assets past January 24, 2013; and (2) any redemptions made in those accounts. (Div. Ex. 963 – pp. 1-3.) See also:

985:12 **Q And what were you asked to be a summary**
985:13 **witness about?**
985:14 A I was asked to provide summary witness
985:15 testimony on two general topics. The first one was
985:16 related to -- or provide summary witness testimony
985:17 on the topic of management and performance fees in
985:18 this case.
985:19 And the second topic of my summary
985:20 testimony is to provide a list of participant
985:21 accounts that signed participant agreements prior to
985:22 January 24, 2013, and provide additional information
985:23 with respect to their holdings, value of their
985:24 holdings and role of securities.

1012:15 **Q Ms. Brown is handing the witness an iPad**
1012:16 **showing Div. Ex. 963 marked for**
1012:17 **identification.**
1012:18 **Mr. Jindra, do you recognize this exhibit?**
1012:19 A Yes, I do.
1012:20 **Q What is it?**
1012:21 A It's a summary exhibit showing the list of
1012:22 participant accounts, their balances, and list of
1012:23 securities for which redemption letters were
1012:24 identified. And also provides information regarding
1012:25 whether the redemption took place or not.

351. Twenty four Participants who signed Participant Agreements before January 24, 2013 had assets in their account after that date, including some that went into 2015 and one that went into 2016. (Div. Ex. 963 – pp. 1-3.) See also:

3563:11 **Q And that was in place until sometime in January**
3563:12 **2013, right?**
3563:13 A The Investment Management Agreement continued
3563:14 to govern all of the accounts that were created before --
3563:15 that were governed by Participant Agreements created
3563:16 before that date.
3563:17 **Q So there were accounts governed by the**
3563:18 **Investment Management Agreement that went into 2013, 2014**
3563:19 **and beyond; is that right?**
3563:20 A Yes. I don't remember exactly when the last of
3563:21 those accounts was liquidated. But it did certainly --
3563:22 it went into 2013 and '14 as you said.
3563:23 **Q You continued to redeem under those accounts,**
3563:24 **right?**
3563:25 A Yes. That's true.

3564:9 **Q Fair to say there were at least 20 accounts**

3564:10 **that were under the investment management structure after**
3564:11 **you received that advice from Ms. Farrell?**
3564:12 A Yes.

352. Division Exhibit 963 has highlighted in pink, for Participants that signed Participant Agreements before January 24, 2013, those redemptions that occurred after December 20, 2012. (Div. Ex. 963 – pp. 1-3.) See also:

1015:22 **Q And I notice that the rows in this exhibit**
1015:23 **are coded in two different colors, sort of a pinkish**
1015:24 **and a gray; is that right?**
1015:25 A That's correct.
1016:1 **Q And what do those colors represent?**
1016:2 A It represents -- it refers to the date of
1016:3 the redemption letter, so it -- if the redemption
1016:4 letter was dated prior to December 20, 2012, it
1016:5 would be -- the color would be gray.
1016:6 And if it's after that date, it would be
1016:7 pinkish or red shaded.

353. For Participants that signed Participant Agreements before January 24, 2013, sixty nine redemption requests were submitted after December 20, 2012; thirty seven of those bonds were redeemed. (Div. Ex. 963 – pp. 1-3.) Additional redemption requests were submitted for Participants enlisted after January 24, 2013. (See, e.g., Div. Ex. 58; 90; 372; 383-387; 389-408.)

Fund Governing Documents Stripped Lathen of Beneficial Ownership of the Bonds

354. On May 2, 2011, EACM, EACP, Lathen, and Jungbauer executed an Investment Management Agreement ("IMA"). Lathen signed on behalf of EACP, EACM, Jungbauer, and himself.

1146:4 MS. WEINSTOCK: And, Mr. Chan, if you can
1146:5 pull up 191, please.
1146:6 BY MS. WEINSTOCK:
1146:7 **Q Mr. Jungbauer, why don't I give you a copy**
1146:8 **so you can scan through it.**
1146:9 **Can you tell us if you've ever seen this**
1146:10 **document before?**
1146:11 **(The witness examined the document.)**
1146:12 THE WITNESS: No, I haven't seen this
1146:13 document.
1146:14 BY MS. WEINSTOCK:
1146:15 **Q And if you could take a look at the last**
1146:16 **page, please.**
1146:17 A Yes.
1146:18 **Q Again, do you see your name listed there?**

1146:19 A Correct.
1146:20 **Q And is that your signature above your**
1146:21 **name?**
1146:22 A No.
1146:23 **Q And, again, do you think Mr. Lathen signed**
1146:24 **this on your behalf?**
1146:25 A Correct.

355. Under the IMA, Lathen and Jungbauer were Nominees for EACM and were acting on behalf of EACM and EACP. (Div. Ex. 191 – pp. 1-2.)

356. Lathen also had Jungbauer sign a Special Power of Attorney enabling Lathen to, among other things:

> 1. Open, maintain, modify or close bank accounts…brokerage accounts…This power shall include the authority to conduct any business with any banking or financial institution with respect to any of my accounts, including, but not limited to, making deposits and withdrawals…
> 2. Perform any act necessary to deposit, negotiate, sell, or transfer and note, bond, security…
> (Div. Ex. 19 – p. 1.)

357. Under the IMA, 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." (Div. Ex. 191 – p. 2).

358. Other contemporaneous documents authored or executed by Lathen during the IMA-time period were consistent with his role as nominee for the Fund:

> "Gains rec'd as nominee" (Div. Ex. 307 – pp. 14-15; Div. Ex. 304 – pp. 9-10; Div. Ex. 305 – pp. 9-10; Div. Ex. 306 – pp. 14-15.)
>
> "I act as a nominee owner for the Fund." (Div. Ex. 34 – p. 1.)
>
> "Is it legal for nominees of a corporation or partnership to enter a JTWROS agreement? Specifically, can a nominee that is fully funded by a partnership enter into a JTWROS agreement with another individual to obtain death bonds? An entity cannot be a tenant on a JTWROS. There is no statutory prohibition against nominee ownership of a JTWROS, whether as nominee for a [sic] an individual owner or an entity owner…" (Div. Ex. 107 – p. 5.)
>
> See also:
> 183:7 **Q Now, the word "nominee," you said that that's**
> 183:8 **an accurate statement – correct? – that you and Dave**
> 183:9 **Jungbauer were acting as nominees for and on behalf of**
> 183:10 **the partnership?**
> 183:11 A I mean, it does -- it does say "nominee."

183:12 **Q Is that an accurate characterization of you**
183:13 **and David Jungbauer's relationship with the fund?**
183:14 MR. HUGEL: Objection. Calls for a legal
183:15 conclusion.
183:16 THE WITNESS: Yeah, I'm not -- I mean,
183:17 it's --
183:18 JUDGE PATIL: Overruled.
183:19 THE WITNESS: I mean, I will say I thought of
183:20 myself as an agent. A nominee -- sure, okay, I'm a
183:21 nominee.

184:18 A "The partnership's investment strategy is to
184:19 purchase survivor's option corporate bonds in joint
184:20 accounts with individuals who are terminally ill. On
184:21 these joint accounts, which are instructed as joint
184:22 tenancies with rights of survivorship, I act as a
184:23 nominee owner for the fund.
184:24 "The fund provides the capital for the
184:25 accounts, and there is a profit sharing arrangement
185:1 with the Participants on the accounts.
185:2 "A portion of the expected profits in the
185:3 account are paid up front to the Participant to help
185:4 ease the financial burdens of end-of-life care. The
185:5 typical up-front payment is $10,000."
185:6 **Q Now, you wrote this letter yourself,**
185:7 **correct?**
185:8 A Yes, I did.
185:9 **Q And you referred yourself -- to yourself as a**
185:10 **nominee owner for the fund; is that correct?**
185:11 A Yes, yes, I did.
185:12 **Q And that is because you were a nominee for**
185:13 **the fund, correct?**
185:14 A I was a nominee for the fund.

359. Lathen used Jungbauer as an additional nominee on the JTWROS accounts under the IMA to ensure that the terminally-ill individuals did not outlive either him or his stepfather and that the accounts would remain in control of the Fund.

78:25 **Q And why did you involve your stepfather as a**
79:1 **nominee owner?**
79:2 A One of the concerns with the joint tenancy is
79:3 if I were to predecease the Participant, the account
79:4 would pass by operation of law to the surviving joint
79:5 owner.
79:6 And if the -- if that surviving joint owner
79:7 was the Participant, then the account would go to the
79:8 Participant. By having a three-person joint tenancy in

79:9 the event of my demise, the account would pass to the
79:10 Participant and Mr. Jungbauer.
3260:3 **Q Okay. And what would happen under this**
3260:4 **agreement if you died before Mr. McCord?**
3260:5 A He would get the account.
3260:6 **Q Okay. Free and clear?**
3260:7 A I guess more accurately, it would require
3260:8 the death of both myself and David Jungbauer, my
3260:9 stepfather.
3260:10 **Q I --**
3260:11 A Yes. But assuming that he outlived me and
3260:12 my stepfather, he would get the account.

360. Jungbauer believed that he never had a financial interest in the accounts, that it was not his money, and the profits in the accounts were going to the Fund.

1160:23 **Q Now, Mr. Jungbauer, you said that because**
1160:24 **of the ethics involved, you wouldn't exercise those**
1160:25 **rights. What did you mean by that?**
1161:1 A It's not my money.
1161:2 **Q Okay. And what was your understanding**
1161:3 **of where the profits in the accounts were going**
1161:4 **to?**
1161:5 A They would stay within the fund.
1161:6 **Q Okay. And you didn't -- you didn't pay**
1161:7 **any taxes in connection with these accounts, did**
1161:8 **you?**
1161:9 A No. I never -- never had any financial
1161:10 interest in the accounts.

361. Jungbauer never paid any taxes on the assets in the JTWROS accounts, nor did he receive a 1099 from the brokerage firm or the Fund.

1161:6 **Q Okay. And you didn't -- you didn't pay**
1161:7 **any taxes in connection with these accounts, did**
1161:8 **you?**
1161:9 A No. I never -- never had any financial
1161:10 interest in the accounts.
1161:11 **Q Okay. And you didn't -- so you didn't**
1161:12 **receive 1099s --**
1161:13 A I never received any -- I received no 1099
1161:14 or whatever forms.

362. Jungbauer did not receive or sign any paperwork for the JTWROS accounts, nor did he ever access any of the money or securities in any of the accounts, nor did he make any investment decisions on the accounts. Jungbauer never made transfers in the accounts, nor did he buy any securities in those accounts, nor did

he get profits from the accounts, nor did he contribute any funds to those accounts.

1139:1 **Q Did you ever receive any paperwork on the**
1139:2 **accounts?**
1139:3 A No, I did not.
1139:4 **Q Did you ever access any of the money or**
1139:5 **securities in any of these accounts?**
1139:6 A No, I did not.
1139:7 **Q And did you sign any paperwork for the**
1139:8 **accounts?**
1139:9 A Not to the best of my knowledge, no.
1139:10 **Q And did you sign any paperwork related**
1139:11 **to -- withdrawn.**
1139:12 **And did you make any investment decision**
1139:13 **on these accounts?**
1139:14 A No, I did not.
1147:4 **Q Did you ever speak to any of the broker**
1147:5 **dealers that held the accounts?**
1147:6 A No.
1147:7 **Q Did you ever speak to any of the bond**
1147:8 **issuers?**
1147:9 A No.
1147:10 **Q And do you have any understanding of what**
1147:11 **Jay's conversations were with the bonds issuers?**
1147:12 A No.
1147:13 **Q And did you make any transfers in the**
1147:14 **accounts that Mr. Lathen opened in your name?**
1147:15 A Not to the best of my knowledge, no.
1147:16 **Q And did you buy any securities in those**
1147:17 **accounts?**
1147:18 A No.
1147:19 **Q And did you get any profits from those**
1147:20 **accounts?**
1147:21 A No.
1147:22 **Q And did you contribute any funds to those**
1147:23 **accounts?**
1147:24 A No.

363. Jungbauer never spoke to any of the broker-dealers that held the accounts, nor to any of the bond issuers.

1147:4 **Q Did you ever speak to any of the broker**
1147:5 **dealers that held the accounts?**
1147:6 A No.
1147:7 **Q Did you ever speak to any of the bond**
1147:8 **issuers?**

1147:9 A No.

364. It was Jungbauer's understanding that if anything happened to Lathen, the money would go back to Eden Arc.

1141:12 **Q And it was your understanding -- was it**
1141:13 **your understanding that if something happened to Jay**
1141:14 **and Kathleen, the money would go back do the**
1141:15 **company?**
1141:16 A That's correct.

365. On January 24, 2013, Respondents replaced the IMA with a Discretionary Line Agreement between the Fund and Lathen (Div. Ex. 190), a promissory note between Lathen and the Fund (Div. Ex. 193), and a Profit Sharing Agreement between the Fund, Lathen, and EACM (Div. Ex. 72).

366. UCC liens in favor of the Fund were placed on each JTWROS account created after January 2013. (SFOF ¶ 12.)

367. The Discretionary Line Agreement purported to change the relationship between the parties to that of a lender (the Fund) and a borrower (Lathen). (Div. Ex. 190 – p. 2.)

368. Lathen signed the Discretionary Line Agreement on behalf of himself as Borrower and the Fund as Lender. (Div. Ex. 190 – p. 15.)

369. The Discretionary Line Agreement 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 and certain identified Participants." It also provided that the Investments would be pledged to secure the Advances. (Div. Ex. 190 – pp. 2, 5-6.)

370. The stated interest rate for the advances was the prime rate plus three percent. (Div. Ex. 190 – pp. 2, 6.)

371. The Discretionary Line Agreement prevented the Participant from withdrawing his or her moiety from the JTWROS account.

3592:4 **Q And that's because that language would**
3592:5 **jeopardize the fund's position; is that right?**
3592:6 A I don't know that it was that, so much as not
3592:7 wanting the participant to potentially think that they're
3592:8 going to get more from the account in the event, you
3592:9 know, that -- we didn't want a situation where a
3592:10 participant would come and say, "I want to withdraw funds
3592:11 from the account." And we say, "Well, that's not
3592:12 possible because of the -- you know, discretionary line

3592:13 agreement prohibits that" and them say, "Well, you know,
3592:14 it says I've got a 50 percent interest in the account
3592:15 here. I want a withdrawal." We don't want to have
3592:16 arguments with our Participants.

372. Lathen drafted the Profit Sharing Agreement himself.

506:15 **Q Now, with respect to the profit sharing**
506:16 **agreement, you drafted that agreement, correct?**
506:17 A Yes.

373. Lathen signed the Profit Sharing Agreement on behalf of himself, the Fund, and EACM. (Div. Ex. 72 – p. 72.)

374. The Profit Sharing Agreement provided that Lathen would transfer all profits and losses he derived from the joint accounts to the Fund. (Div. Ex. 72 – p. 2.)

375. The Profit Sharing Agreement also provided for continued capital gains treatment of the profits in the JTWROS accounts.

> Furthermore, the parties agree that this Agreement shall be treated as a partnership for tax purposes. As such, the character of the income from the Accounts for federal income tax purposes shall pass through to EACP, which will then allocate such income (or loss) to its partners pursuant to the terms of the LPA.
> (Div. Ex. 72 – p. 2.)

376. In February 2015, Respondents further modified the Discretionary Line Agreement by including the Participants as borrowers, on a non-recourse basis. (Admitted Fact in Answer; Div. Exs. 183-188.)

377. After February 2015, Lathen used his Power of Attorney to execute a Discretionary Line Agreement for each Participant as a co-borrower. Lathen signed the Agreements on behalf of himself and the Participants. (See e.g., Div. Exs. 183 – p. 15; 184 – p. 15.)

206:15 **Q Now, in February of 2015, did you execute a**
206:16 **new Discretionary Line Agreement?**
206:17 A Yes.
206:18 **Q Now, the Discretionary Line Agreement that we**
206:19 **were just talking about, you were the only borrower on**
206:20 **that one; is that right?**
206:21 A That's correct.
206:22 **Q And the new Discretionary Line Agreements**
206:23 **added the Participants as borrowers; is that right?**
206:24 A That's correct. It was -- the Participant
206:25 and I jointly borrowed under the new version of the --

207:1 **Q And at that point you signed an individual**
207:2 **one with each Participant; is that right?**
207:3 A Yes.
207:4 **Q And that was sometime in February 2015, going**
207:5 **forward, right?**
207:6 A Yes.

378. The change to separate Discretionary Line Agreements for each Participant was made to protect the Fund investors.

3336:1 A Yes. There was a final change, which was
3336:2 made in February of 2015, where both the Participant
3336:3 and I were borrowers on the line of credit.
3336:4 **Q What was the reason for that change?**
3336:5 A Well, when I hired Kevin to represent me
3336:6 in the Prospect litigation, we came across this Bank
3336:7 of America, the Smith vs. Bank of America case.
3336:8 In that situation, there was a joint
3336:9 tenancy formed. And then one of the joint tenants
3336:10 borrowed money under -- using that asset as a -- as
3336:11 security.
3336:12 And then when that person died, the bank,
3336:13 which was Bank of America, went to Smith, who was
3336:14 the surviving owner, and said, We'd like to be paid
3336:15 back.
3336:16 And the Court said, Smith wasn't a
3336:17 borrower under this. It was the person who died who
3336:18 was a borrower under this. Sorry. Smith is not
3336:19 obligated to pay you back.
3336:20 So we realized the vulnerability in our
3336:21 structure, and we fixed it.

379. The 2015 version of the Discretionary Line Agreement provided that the Participants could not receive distributions of cash and/or securities from the JTWROS accounts unless the account value exceeded 110 percent of what was owed to the Fund.

"Section 5.05. *Use of Proceeds, Distributions from Securities Accounts.* The proceeds of the Advances made under this Agreement will be used by Borrowers solely in accordance with Section 2.01. Lender specifically consents to the distribution to the Participant of the Participant Payment in accordance with the Participant Agreement. With the exception of the Participant Payment, Borrowers will not be permitted to receive distributions of cash and/or securities from the Securities Accounts unless the value of Collateral in the Securities Accounts exceeds 110% of the Obligations after giving effect to the distributions."
(See, e.g., Div. Ex. 186 – p. 11.)

See also:
313:6 MR. HUGEL: Gilks?
313:7 MS. WEINSTOCK: Gilks.
313:8 BY MS. WEINSTOCK:
313:9 **Q If you could read Section 5.05, please.**
313:10 A Could you tell me the date of this
313:11 agreement?
313:12 **Q Sure.**
313:13 MS. WEINSTOCK: Mr. Chan, that is on p.
313:14 15. It should be on p. 15. Let's check the first
313:15 page.
313:16 THE WITNESS: I see. Thank you. April 9,
313:17 2015.
313:18 BY MS. WEINSTOCK:
313:19 **Q And, for the record, the date is?**
313:20 A April 9, 2015.
313:21 **Q Okay. If we could turn back to p. 11 and**
313:22 **read Section 5.05, please.**
313:23 A Sure.
313:24 "Use of proceeds, distributions from
313:25 securities accounts. The proceeds of the advances
314:1 made under this agreement will be used by borrowers
314:2 solely in accordance with Section 2.01.
314:3 "Lender specifically consents to the
314:4 distribution to the Participant of the Participant
314:5 payment in accordance with the Participant Agreement.
314:6 With the exception of the Participant payers" -- I'm
314:7 sorry.
314:8 "With the exception of the Participant
314:9 payment, borrowers will not be permitted to receive
314:10 distributions of cash and/or securities from the
314:11 securities accounts unless the value of the collateral
314:12 in the securities accounts exceeds 110 percent of the
314:13 obligations after giving effect to the distributions."

380. The payments under the Discretionary Line Agreements were non-recourse to Lathen or the Participant, so there was no personal liability either for Lathen or the Participant on the loan. (Div. Exs. 190 – p. 14 (Section 8.07); 186 – p. 13 (Section 8.07).) See also:

206:4 **Q And what that means is that the loan is a**
206:5 **non-recourse loan, correct?**
206:6 A Yes.
206:7 **Q So there was no risk to the Participant; is**
206:8 **that correct?**
206:9 A Yes.
206:10 **Q If the value in the account declined and the**

206:11 **loan couldn't be paid back, there was no personal**
206:12 **liability either for you or the Participant on that**
206:13 **loan; is that correct?**
206:14 A That is correct.

381. Under the Profit Sharing Agreement, the IMA continued to govern accounts created before January 24, 2013.

> The parties hereby wish to amend the contractual arrangement between Lathen and EACP as it relates to the conduct of the business after the date herein. Specifically, new brokerage accounts formed with new Participants after the date herein, will be governed by this Agreement rather than the previously executed IMA. For the avoidance of doubt, accounts opened with Participants prior to the date herein will continue to be governed by the IMA.
> (Div. Ex. 72 – p. 1.)

See also:
419:12 **Q Now, this is the Participant Agreement with**
419:13 **Adolph Pratola; is that right, Mr. Lathen?**
419:14 A Yes.
419:15 MS. WEINSTOCK: And, Mr. Chan, if you could
419:16 find the date of the signature, please. Thank you.
419:17 One more page up.
419:18 BY MS. WEINSTOCK:
419:19 **Q This is dated December 4 of 2012; is that**
419:20 **right?**
419:21 A Yes.
419:22 MS. WEINSTOCK: And now, Mr. Chan, if you
419:23 could please bring up Exhibit 552.
419:24 BY MS. WEINSTOCK:
419:25 **Q This is a redemption letter for Mr. Pratola**
420:1 **for January 30 of 2014; is that right?**
420:2 A Yes.
420:3 **Q And Mr. Pratola's account would be governed**
420:4 **by the Investment Management Agreement, because he**
420:5 **signed up in late 2012; is that right?**
420:6 A Yes, that's correct.

382. Even after the Discretionary Line Agreement was introduced, Lathen continued to act as and call himself a nominee for the Fund, in, for example, his own tax returns:

> "Gains rec'd as nominee" (Div. Exs. 305 – pp. 9-10; 306 – pp. 13-14.)

See also:
199:24 **Q Okay. You keep saying the word "allocated**

199:25 **out."**
200:1 **You reported it on your tax return, and then**
200:2 **you subtracted the exact same amount on your tax**
200:3 **return; is that right?**
200:4 A That is true.

383. When the Discretionary Line Agreement was implemented on January 24, 2013, the flow of funds between the Fund and the joint accounts and the economics of the Fund were unchanged.

102:5 **Q In terms of the economics, that didn't**
102:6 **change; is that right? I'm not talking about**
102:7 **hypothetical economics. I'm talking about actual flow**
102:8 **of funds.**
102:9 A Yes. In the event I outlive the
102:10 Participants, the economics are essentially unchanged
102:11 from the prior version.
102:12 **Q And that's the normal course where you would**
102:13 **outlive the Participant, correct?**
102:14 A That's correct.

305:5 **Q And it's an advance in the pre-January 24,**
305:6 **2013, time frame and a loan after that; is that right?**
305:7 A That's fair to say, yes.
305:8 **Q Okay. But in all cases, the money flow did**
305:9 **not change; is that correct?**
305:10 A That's correct.

See also: "The Manager generally sweeps cash from its brokerage accounts to its omnibus account at HSBC." (Div. Ex. 238 – p. 13.)

Role of Brokers in Respondents' Scheme

384. The broker-dealers used by the Fund were paid quite a bit of money, in the form of payments on the margin loans, and brokerage commissions or markups and markdowns.

420:8 **Now, in terms of your broker-dealers, the**
420:9 **fund paid the broker-dealers quite a bit of money; is**
420:10 **that correct?**
420:11 A The brokers were paid quite a bit of money.
420:12 I believe most of that would have been paid through
420:13 the joint accounts themselves.
420:14 **Q And was that in the form of payments on the**
420:15 **margin loans?**
420:16 A Yes. That would be one of the components of
420:17 compensation.

420:18 **Q And were there also brokerage commissions?**
420:19 A Yes.
420:20 **Q And how were those paid?**
420:21 A I don't know in every instance. I believe
420:22 in most instances they were paid by the joint accounts
420:23 themselves, either in the form of a commission or a
420:24 markup or a markdown on the instrument that was
420:25 traded.
421:1 There may be instances where the commissions
421:2 were tracked separately, and we were billed for
421:3 commissions for all of the accounts and paid the
421:4 commissions through another mechanism than having them
421:5 drawn from the joint accounts.

385. At one point, the clearing broker for the JTWROS accounts was JPMorgan. Each of the JPMorgan JTWROS account opening documents contained the following language (Div. Ex. 128):

> "In consideration of JP Morgan carrying the Account for the account holders, the account holders jointly and severally agree that each of them shall have authority on behalf of the Account to buy, sell and otherwise deal in, through JP Morgan as brokers, stocks, bonds, listed options (including uncovered listed option writing), and any and all forms of securities, commodities and other property on margin or otherwise (including short sales); to receive on behalf of this Account demands, notices, confirmations, reports, statements of account, and communications of every kind; to receive on behalf of the Account money, securities and property of every kind in the name of any of the account holders or otherwise, and to dispose of same; to make on behalf of the account agreements relating to any of the foregoing matters, and to terminate or modify the same or waive any of the provisions thereof; and generally to deal with JP Morgan on behalf of the Account as fully and completely as if each alone were interested in said Account, all without notice to the other or others interested in said Account, including, but not limited to, the authority to liquidate and/or withdraw all or any portion of the property in the Account, and to dispose of the same."

386. Augie Cellitti has been CEO of SecureVest, a full-service broker-dealer, from 2007 through the present.

2518:21 **Q Where do you presently work?**
2518:22 A Securevest Financial Group.
2518:23 **Q What do you do there?**
2518:24 A I'm the CEO.
2518:25 **Q And what kind of business is Securevest**
2519:1 **Financial Group?**
2519:2 A We're a full service broker-dealer.
2519:3 **Q How long have you been the CEO of**

2519:4 **Securevest?**
2519:5 A Since 2007.

387. JPMorgan indicated to SecureVest that it did not wish to hold Lathen's accounts in or around March 2012.

2530:2 **Q Did there come a time when JPMorgan**
2530:3 **indicated to Securevest that it did not wish to hold**
2530:4 **Mr. Lathen's accounts any longer?**
2530:5 A Yes.
2530:6 **Q And do you recall when that happened?**
2530:7 A I think it was sometime around March of
2530:8 2012 possibly.

388. SecureVest and JPMorgan had no role in determining the eligibility of Lathen's requests for redemptions of survivor's option instruments.

2578:21 **Q And Securevest has no role in determining**
2578:22 **the eligibility of that redemption; is that right?**
2578:23 A No.
2578:24 **Q And neither does the clearing firm?**
2578:25 A No.

389. SecureVest was a pass-through for Lathen's documents and worked as an agent in the redemption process.

2579:1 **Q You were basically just a pass-through of**
2579:2 **the document; is that right?**
2579:3 A Yes.
2579:4 **Q And you were sort of working as an agent**
2579:5 **for Mr. Lathen in the redemption process?**
2579:6 A Acting as an agent?
2579:7 **Q Correct.**
2579:8 A I guess you can say that.

390. SecureVest never advised Lathen on the substance of his redemption submissions.

2579:9 **Q And you never advised Mr. Lathen on the**
2579:10 **substance of his redemption submissions, right?**
2579:11 A On the substance? No.

391. At the outset of the relationship, SecureVest stood to profit from Lathen's business.

2580:7 **Q Well, at the outset of the relationship,**
2580:8 **before it was terminated, Securevest stood to profit**

2580:9 **from the relationship; it had the potential, right?**
2580:10 A Yes.

392. SecureVest understood the money in Lathen's accounts came from a fund.

2581:5 **Q So you understood that the money in the**
2581:6 **Securevest account came from a fund, right?**
2581:7 A Yes.

393. Lathen represented to SecureVest that he had received advice from counsel that his strategy was legal. (Lathen Ex. 2028 – p. LATHEN15740.)

394. SecureVest and JPMorgan relied on Lathen's representation in Lathen Exhibit 2028 that "[p]rior to launching its business, Eden Arc received advice from counsel that the strategy is legal."

2581:8 **Q I'm going to draw your attention to page**
2581:9 **16 of this presentation. So on the third main**
2581:10 **bullet down, it says, "Prior to launching its**
2581:11 **business, Eden Arc received advice from counsel that**
2581:12 **the strategy is legal."**
2581:13 **Do you see that?**
2581:14 A Yes.
2581:15 **Q You relied on that representation by Mr.**
2581:16 **Lathen, right?**
2581:17 A Most likely, yes.
2581:18 **Q And when you passed this along to JPM, is**
2581:19 **it fair to say that they relied on that**
2581:20 **representation by Mr. Lathen?**
2581:21 A Yes.

395. It was not SecureVest's job to review Lathen's strategy.

2582:5 **Q Terminally ill individuals. You didn't**
2582:6 **see any agreements between Mr. Lathen and them?**
2582:7 A It wasn't really -- Securevest's job
2582:8 wasn't to review a strategy. We were strictly a
2582:9 transaction firm. And we provided custodial
2582:10 services through our -- through our clearing agent.
2582:11 So it wasn't really something that I
2582:12 wasn't looking at specifically.

396. SecureVest relied on the representations made by Lathen and did not verify any details about his disclosure arrangement with Participants.

2587:15 **Q You never verified any details about his**
2587:16 **disclosure arrangement with participants, right?**

2587:17 A No.
2587:18 **Q Fair to say that with respect to the**
2587:19 **representations Mr. Lathen made to you, you relied**
2587:20 **on them?**
2587:21 A Yes.

397. JPMorgan requested information from Lathen on proof of ownership of death put bonds and the source of funding for accounts on March 1, 2012. (Lathen Ex. 2031 – p. LATHEN15790.)

398. Lathen provided SecureVest with the Sermeno and Palmer Participant Agreements and the IMA on March 12, 2012. (Lathen Ex. 2042 – p. LATHEN15862.)

399. Between March 1, 2012 and March 12, 2012, Lathen sent SecureVest multiple emails related to his accounts. (Lathen Exs. 2032 – p. LATHEN15791; 2035 – p. 1; 2036 – p. LATHEN15848; 2042 – p. LATHEN15862.)

Respondents' Redemptions: Fraud Upon Issuers

400. Respondents used the means and instrumentalities of interstate commerce in submitting their redemption requests, including emailing the brokers, trustees and issuers with respect to the submissions. (E.g., Div. Exs. 556; 557; 622; 623.)

401. When a Participant died, Lathen and Robinson prepared the material required to substantiate the survivor's option election. That material included the redemption letter and a copy of the Participant's death certificate.

919:14 **Q Well, did you prepare a package of**
919:15 **materials required to substantiate the survivor's**
919:16 **option election?**
919:17 A I'm not sure I would call it a package. In
919:18 most cases it was two pages.
919:19 **Q And that would include the redemption**
919:20 **letter; is that right?**
919:21 A Yes.
919:22 **Q And a copy of the death certificate; is**
919:23 **that right?**
919:24 A Yes.

402. Included in the redemption packages sent to issuers were copies of the relevant account's account statements showing that the note sought to be redeemed was held in the account. All of the account statements were titled with Lathen's and the Participant's name, and most were "c/o Eden Arc Capital Management" and then cite to the bulk exhibits. (Div. Exs. 124-129.) See also:

924:3 BY MS. WEINSTOCK:

924:4 **Q You were asked the following question and**
924:5 **gave the following answer:**
924:6 **"QUESTION: What happens when the**
924:7 **participants die, specifically to the securities and**
924:8 **to the accounts?**
924:9 **"ANSWER: We, Michael and I, usually**
924:10 **Michael, procures a copy of the death certificate, a**
924:11 **certified copy of the death certificate, from one of**
924:12 **the family members of the participant.**
924:13 **"We then prepare the package of materials**
924:14 **that are required under the relevant deal**
924:15 **documentation to substantiate the survivor's option**
924:16 **election which includes, as we discussed yesterday,**
924:17 **a letter of authorization from me as the surviving**
924:18 **joint owner on the account, a copy of the death**
924:19 **certificate, account statements showing that the**
924:20 **registration of the account and the securities in**
924:21 **the account.**
924:22 **" And if there's a holding requirement,**
924:23 **perhaps multiple account statements to demonstrate**
924:24 **that the holding requirement has been met.**
924:25 **"And then that is sent to -- usually**
925:1 **overnighted to the brokerage firm."**
925:2 **You were asked that question, and you gave**
925:3 **that answer; is that correct?**
925:4 A Yes.
925:5 MR. HUGEL: Judge, can she read the
925:6 complete answer?
925:7 JUDGE PATIL: Yes. Go ahead.
925:8 BY MS. WEINSTOCK:
925:9 **Q And the rest of the answer is:**
925:10 **"ANSWER: And then the brokerage firm then**
925:11 **forwards that information along with perhaps some**
925:12 **other information to either DTC in the case of CDs**
925:13 **or the trustee in the case of the bonds.**
925:14 **"So however the -- whoever the party is**
925:15 **that is supposed to receive the documentation and**
925:16 **review the documentation and that various issuer or**
925:17 **issuers, that brokerage firm sends that information**
925:18 **on."**
925:19 **Is that part of your answer as well Mr.**
925:20 **Lathen?**
925:21 A Yep. Yes, yes, it is. I'm sorry.

403. Lathen understood that these documents went to issuer or trustee.

925:22 **Q So you were aware that the package that**

925:23 **you were sending in went to either the issuer or the**
925:24 **trustee; is that correct?**
925:25 A Yes.

185:22 **Q Now, before we get to that, I just want to**
185:23 **show you Div. Ex. 61.**
185:24 **Are those redemption letters that you sent in**
185:25 **to bond owners?**
186:1 A They appear to be letters addressed by me to
186:2 my brokerage firms.
186:3 **Q And they were written in order to redeem**
186:4 **bonds from the issuers pursuant to survivor's options,**
186:5 **correct?**
186:6 A Yes. The governing documents for the bond
186:7 issues state that the -- all documentation relating to
186:8 the redemption is sort of prepared by the brokerage
186:9 firm and then submitted to the issuer.
186:10 And the thing that the account owners have to
186:11 do is they have to provide basically a request letter
186:12 saying, We want to exercise the feature.
186:13 And you're supposed to address that to your
186:14 brokerage firm. And then you include a copy of the
186:15 death certificate. And that's what goes to the
186:16 brokerage firms.
186:17 And then they compile a bunch of additional
186:18 information and send it -- send it to the issuer or the
186:19 trustee, depending upon what the documents say.

404. Robinson was also aware that these documents were forwarded to the issuer or trustee.

1675:3 **Q And did you help prepare redemption**
1675:4 **packets for issuers?**
1675:5 A Yes.
1675:6 **Q And were those packets sent to**
1675:7 **broker-dealers?**
1675:8 A They were.
1675:9 **Q And were those packets then forwarded to**
1675:10 **the issuer or trustee?**
1675:11 A Well, I sent them to the brokers -- to the
1675:12 people at the brokerage firms who dealt with
1675:13 redemptions. And then they sent them to whatever
1675:14 parties needed to have them; which might be trustee,
1675:15 might be DTC, might be the issuer itself. I was
1675:16 never really involved with that directly.
1675:17 **Q Okay. But were you aware that those**
1675:18 **packets were then forwarded to the issuer trustee?**

1675:19 A Yes. Generally.

405. Lathen drafted the original redemption letter template and read and signed each one that was submitted.

186:20**And with respect to Div. Ex. 61,**
186:21 **those letters were written by you; is that correct?**
186:22 A Yeah, they were.

228:9 **Q Now, you say that Michael drafted these**
228:10 **letters, but you drafted the original one, correct?**
228:11 A Yes.
228:12 **Q And you read these over before signing them;**
228:13 **is that right?**
228:14 A Yes.
228:15 **Q And you signed each of them, correct?**
228:16 A Yes

1691:9 **Q And was there a redemption letter that was**
1691:10 **sent to the broker-dealers?**
1691:11 A There was, yes.
1691:12 **Q And was that also called a letter of**
1691:13 **authorization?**
1691:14 A Yes, I believe so.
1691:15 **Q And did Mr. Lathen draft that letter?**
1691:16 A Yeah, generally. I mean, yes -- I would
1691:17 say he primarily did. Over time, wording might have
1691:18 been modified from time to time.
1691:19 And, you know -- I sometimes corrected
1691:20 typos and things like that. But he was the
1691:21 principal author of the letters.
1691:22 **Q And was that the case over the course of**
1691:23 **the time that you worked there, that he was the**
1691:24 **principal author of the letter?**
1691:25 A Yes.
1692:1 **Q And did he sign those letter?**
1692:2 A He did.

406. Lathen was the principal author of the redemption letters and signed those letters. (SFOF ¶ 59.)

407. Some redemption letters were on Donald Lathen's letterhead (E.g., Div. Exs. 90 – p. 2; 372-374; 378-388; 395; 397-408; 552; 823) and some were on EACM's letterhead. (E.g., Div. Exs. 61-pp.1-3, 5-7, 9, 11-12; 375-p.1; 376-pp.1-2; 377-p.1, 391-p.1; 394-p.1; 396-p.1; 409-pp.1-3; 827-p.13; 829-p.1; 835-p.5; 922-p.4; 923-p.4; 924-p.4; 987-p.5; 992-pp.1-3; Lathen Exs. 1941-pp. 14691; 1948-p.15036; 2072-pp.16166-75; 2071-pp.16160-65.) Until sometime in 2014, the

redemption letters stated: "[Participant], a joint owner on the above-referenced account, recently passed away. As the surviving joint owners on the account, we would like to exercise the survivor's option with respect to the following notes in the account." (See, e.g., Div. Ex. 374 – p. 1.)

408. Lathen believed that it was implied that in the original redemption letter, the Participant was a beneficial owner, and he intended that implication.

229:7 **Q And is it fair to say that in a joint**
229:8 **ownership arrangement, it's implied that the person is**
229:9 **a beneficial owner?**
229:10 A Yes, I would say that's certainly true.
229:11 **Q And in the first letter, it's implied that**
229:12 **the person is a beneficial owner. The one that just**
229:13 **says "joint owner," that letter, it's implied that the**
229:14 **person is a beneficial owner, correct?**
229:15 A I suspect.
229:16 **Q Well, yes or no?**
229:17 A Yes, I think that's a reasonable inference.
229:18 **Q Okay. Fair to say in the letter that just**
229:19 **says "joint owner," it is implied that the person is a**
229:20 **beneficial owner, correct?**
229:21 A Correct.

409. Sometime in 2014, Lathen changed the language of the redemption letters from referring to Participants as "joint owners" of the accounts to "joint and beneficial owners." (SFOF ¶ 13.)

410. In December 2015, Lathen made further changes to the redemption letter. Division Exhibit 417 is an example of the change. New language that was added stated: "Please be advised that Eden Arc Capital Partners, a Delaware limited partnership, provided financing for the above-referenced account. In addition, Mr. Brown and I entered into a written agreement governing the account." (Div. Ex. 417.) See also:

237:4 **Now, Mr. Lathen, if you can take a look at**
237:5 **417 for identification.**
237:6 **Sometime in late 2015, you changed the**
237:7 **redemption letter; is that correct?**
237:8 A Yes, I did.
237:9 **Q And is Division Exhibit 417 an example of one**
237:10 **of those?**
237:11 A Yes, it is.
237:12 **Q Okay. And, again, that's -- that change was**
237:13 **made in December 2015; is that right?**
237:14 A Yes. The date of this letter is December 21,
237:15 2015.

237:16 **Q And that's the approximate time frame in**
237:17 **which you changed all the letters; is that right?**
237:18 A Yes, it is.

411. The vast majority of redemptions that Lathen submitted using the letter in Division Exhibit 417 were with respect to CDs.

931:3 MS. WEINSTOCK: And, Mr. Chan, if we could
931:4 pull up the exhibit that we were looking at
931:5 yesterday with Respondents' counsel, No. 417.
931:6 Mr. Chan, do you have the spreadsheet?
931:7 BY MS. WEINSTOCK:
931:8 **Q Mr. Lathen, this is the spreadsheet that**
931:9 **we were looking at yesterday; is that right?**
931:10 A Yes.
931:11 **Q And this is -- this has a list of CUSIPs**
931:12 **that you were seeking to redeem; is that right?**
931:13 A Yes.
931:14 **Q And these were CDs; is that correct?**
931:15 A Most of them were CDs. I think there are
931:16 some bonds in there also.
931:17 **Q Okay. But fair to say, the vast majority**
931:18 **of them were CDs?**
931:19 A That is fair to say.
931:20 **Q Okay. And in -- late 2015, your portfolio**
931:21 **was mostly CDs at that point?**
931:22 A That is correct.

412. Three issuers that originally refused to pay on Respondents' survivor's option redemptions later decided to pay (Barclay's Bank, CIT, and BMO Harris). Barclay's Bank and BMO Harris were both CD issuers; CIT was both a bond and CD issuer. Robinson's letters to CIT Bank and BMO Harris were regarding their CDs. (Lathen Ex. 2070; Div. Exs. 501 – p. 1; 931 – p. 1.) See also:

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.
1676:17 Prospect Capital was another issuer that
1676:18 raised some objections.
1676:19 **Q And did BMO Harris raise some objections**
1676:20 **as well?**
1676:21 A They did. And they both paid some, and
1676:22 then they objected to some. And I think they
1676:23 ultimately paid them all, if I'm not mistaken.

413. Lathen did not include the Participant Agreement, the IMA or Profit Sharing Agreement, or the Power of Attorney with his redemption letters.

238:23 **And with this redemption packet, you didn't**
238:24 **include the Participant Agreement, correct?**
238:25 A No, I didn't.
239:1 **Q Or the Profit Sharing Agreement, correct?**
239:2 A No, I did not.
239:3 **Q Or the power of attorney, correct?**
239:4 A That is correct. Well, the power of
239:5 attorney -- I'm not sure if that would have been
239:6 included or not. Probably not, because the person was
239:7 deceased already, so it wouldn't matter.
239:8 **Q So typically you would not include the power**
239:9 **of attorney in redemption packets; is that correct?**
239:10 A The power of attorney between myself and the
239:11 Participant?
239:12 **Q Yes.**
239:13 A Yeah, as I understand it, when a grantor of a
239:14 power of attorney passes away, that -- that power of
239:15 attorney is extinguished.
239:16 **Q Okay. So you never provided the power of**
239:17 **attorney to the issuers; is that correct?**
239:18 A No.

1690:3 **Q Now, the participant agreement was**
1690:4 **generally not provided to issuers; is that correct?**
1690:5 A That is correct.
1690:6 **Q And except on occasion when someone asked**
1690:7 **for it; is that right?**
1690:8 A I believe that is correct.
1690:9 **Q Okay. And that was Prospect Capital; is**
1690:10 **that right?**
1690:11 A In that case, they did ask for it, and
1690:12 they received it. I'm not sure about afterwards.

181:7 **Q And you did not share the investment**
181:8 **management agreement with the issuers or the trustees**

181:9 **of the survivor option instrument; is that correct?**
181:10 A No -- no issuer or trustee --
181:11 **Q I'm not asking if an issuer asked for it.**
181:12 **Did you share it with them?**
181:13 A I do not recall ever sharing this with them.

414. In the ordinary course, Respondents did not provide the Discretionary Line Agreement to the issuers.

312:17 **Q In the normal course, you did not provide**
312:18 **the Discretionary Line Agreement to issuers; is that**
312:19 **correct?**
312:20 A That is correct.

415. In the view of Begelman of Goldman Sachs, Respondents' 2015 redemption letters reveal nothing about the terms of the referenced agreements other than that some level of financing was provided by the Fund.

811:19 **Q And I ask you to take a look at that, Mr.**
811:20 **Begelman. Have you seen this form of document before?**
811:21 **Don't worry about what it actually says for**
811:22 **right now. But have you seen this form of document**
811:23 **before?**
811:24 A Yes.
811:25 **Q And can you tell us just generally what you**
812:1 **understand it to be?**
812:2 A This is basically the written notice in
812:3 order to indicate that they're seeking a redemption
812:4 request.

812:23 **Q So does -- what, if anything, does this**
812:24 **disclosure tell you about the actual terms of those**
812:25 **agreements?**
813:1 A Other than their saying that they gave some
813:2 level of financing, nothing.

(See also: Div. Ex. 417.)

Respondents Acted with Scienter

416. The March 2011 PPM states, under "Risks Associated with the Partnership's Investment Strategy":

Limited Track Record. Unproven Investment Strategy

The Partnership's investment strategy is unique, unusual, and unproven. Upon the commencement of the Partnership, the General Partner was not

aware of any other fund that is pursuing the same investment strategy as the Partnership. There can be no assurance that the investment strategy of the Partnership will be realized in whole or in part, or that any gains will be made by the partnership as a result of its investment strategy... In addition, objections to the Partnership's strategy and its implementation, whether or not presently anticipated, could arise by various third persons or parties, federal, state, or local regulatory or similar bodies or otherwise, which could frustrate or defeat the Partnership's investment strategy.
(Div. Ex. 369 – p. 25.)

417. The July 2013 PPM states, under "Risks Related to the Partnership's Investment Strategy":

> Limited Track Record/Unproven Investment Strategy
>
> The Partnership's investment strategy is unique and unusual. The Partnership has been pursuing the investment strategy since May 2011 and, prior to that, Mr. Lathen and outside investors pursued the investment strategy since July 2009. The Managing Member of the General Partner is not aware of any other fund that is pursuing the same investment strategy as the Partnership. Given this limited track record, the unique nature of the strategy, and the lack of other funds pursuing the same strategy, there can be no assurance that the investment strategy of the Partnership will be realized in whole or in part, or that any gains will be made by the Partnership as a result of its investment strategy... In addition, objections to the Partnership's strategy and implementation, whether or not presently anticipated, could arise from various third persons or parties, federal, state, or local regulatory or similar bodies or otherwise, which could frustrate or defeat the Partnership's investment strategy.
> (Div. Ex. 365 – p. 26.)

418. Lathen knew that the "unequal economics" between the Fund, Lathen, and the Participants, under the Profit Sharing Agreement was "a fundamental risk to the strategy." (Div. Ex. 107 – pp. 2, 4.)

419. Lathen knew that the SEC or a prosecutor might investigate his strategy, and as a result, he might have to "cease and desist." (Div. Ex. 482 – p. 3.)

420. Lathen knew that in order to exercise the survivor's option, the decedent had to be a beneficial owner at the time of his or her death.

> Holding Requirement
> ▪ Decedent must have been a beneficial owner of the bond at the time of death
> (Div. Exs. 2042 – p. 22; 2064 – p.20; 461 – p.20.)
>
> <u>See also</u>:

[Lathen discussing the differences between the CD survivor's option and the bonds':] There is no reference to a joint tenancy unlike the language you typically see in a bond prospectus and also the disclosure statement says "owner" rather than the usual "beneficial owner" which prevails in the bond docs.
(Div. Ex. 681 – p. 4.)

See also:
496:24 **Q Let's turn to the next p.. Under "Holding**
496:25 **requirement," it says, "Decedent must have been a**
497:1 **beneficial owner of the bond at the time of death."**
497:2 **Is that an accurate statement, Mr. Lathen?**
497:3 A Yes, it is.

3518:3 MS. WEINSTOCK: Mr. Chan, if you could pull up
3518:4 Div. Ex. 461, please, and if you could go to p.
3518:5 20.
3518:6 **Q This is your investor presentation from 2011;**
3518:7 **is that right?**
3518:8 A I didn't see the cover page. This was an
3518:9 e-mail dated to that time.
3518:10 MS. WEINSTOCK: Mr. Chan, can you go back to
3518:11 the first page, please.
3518:12 A March 2011. Okay. Thank you.
3518:13 **Q I'm sorry. I didn't hear your response.**
3518:14 A Yes. I was confirming that this was a March
3518:15 2011 investor presentation.
3518:16 **Q And on p. 20 under holding requirement, you**
3518:17 **say, "Decedent must have been a beneficial owner of the**
3518:18 **bond at the time of death;" is that right?**
3518:19 A Yes.

3521:7 **Q But you acknowledge that at least as it relates**
3521:8 **to the bonds, that deceased must have been the beneficial**
3521:9 **owner at the time of death, right?**
3521:10 A Sure.
3521:11 **Q That's what it said in your presentation,**
3521:12 **right?**
3521:13 A Yeah. I'm merely pointing out that the term
3521:14 "beneficial owner" can have different meanings.

231:2 **Q You recall filling out an affidavit in a**
231:3 **matter called Prospect Capital, correct?**
231:4 A Yes.
231:5 **Q And in that affidavit, you stated,**
231:6 **"Importantly, the Participant must have a true**

231:7 **beneficial interest in the securities in the joint**
231:8 **account at the time of their death."**
231:9 **You said that in your affidavit; is that**
231:10 **right?**
231:11 A I may have -- I may have said that in my
231:12 affidavit. And I'm just pointing out to you that the
231:13 term "true beneficial interest" does not appear in the
231:14 governing documents.
231:15 **Q Okay. But did you say that in your affidavit**
231:16 **or not?**
231:17 A Yes, I did.
231:18 **Q Okay. So that's an accurate statement; "The**
231:19 **Participant must have a true beneficial interest in the**
231:20 **securities in the joint account at the time of their**
231:21 **death"? That's an accurate statement, correct?**
231:22 A I said that in the affidavit.
231:23 **Q Okay.**
231:24 A Whether it's an accurate statement or not is
231:25 a legal conclusion.

(See also: Div. Ex. 107.)

421. Lathen understood that the Participant Agreements were relevant to the determination of beneficial ownership.

3539:23 **Q But you acknowledged that the Participant**
3539:24 **agreements were relevant to a determination of beneficial**
3539:25 **ownership; is that right?**
3540:1 A Yes.

422. Lathen knew that if he provided his Participant Agreements and other documents to issuers, that would "diffuse the fraud claim." (Div. Ex. 705 – p. 1.)

423. Lathen knew that issuers might not be aware of his strategy and that they might object to that strategy. (Div. Exs. 369 – p. 26; 365 – p. 28.)

424. Lathen took no affirmative steps to inform issuers of his strategy even though he knew they might take a "contrary view" as to the validity of his redemption requests. (Div. Exs. 369 – p. 26; 365 – p. 28.) See also:

91:9 **Q Okay. If we could go down to p. 26,**
91:10 **please. If you could read under "Posture of issuers,**
91:11 **trustees and brokerage firms toward the investment**
91:12 **strategy."**
91:13 A "The prospectus for a particular SO
91:14 investment contains the guidelines, procedures and
91:15 limitations which apply to the exercise of the

91:16 survivor's option feature for a particular issuer and
91:17 issue.
91:18 "It is unclear whether any of the issuers of
91:19 the SO investments ever contemplated the partnership's
91:20 investment strategy when they drafted their
91:21 prospectuses.
91:22 "While the general partner believes that its
91:23 strategy conforms with the prospectus guidelines and
91:24 represents a valid survivor's option redemption, there
91:25 is a possibility that issuers and trustees may take a
92:1 contrary view.
92:2 "If so, the partnership could incur legal
92:3 expenses to force issuers and trustees to redeem the SO
92:4 investments. This would have the effect of extending
92:5 the timing of redemptions and lowering the
92:6 partnership's returns.
92:7 "The partnership could also be exposed to an
92:8 adverse judgement in favor of the issuers which might
92:9 preclude or severely limit the ability of the
92:10 partnership to successfully redeem its SO investments
92:11 on an ongoing basis. This would have an adverse impact
92:12 on the partnership."
92:13 "In addition to legal actions which issuers
92:14 might undertake, it is also possible that issuers may
92:15 elect to modify the prospectus language related to the
92:16 survivor's option provision with respect to new issues
92:17 going forward.
92:18 "Such a step would have the effect of
92:19 reducing the supply of SO investments, which the
92:20 partnership could purchase, could limit the time period
92:21 over which the investment strategy could be effectively
92:22 implemented and/or could limit the partnership's
92:23 opportunity for continuing purchases.
92:24 "It is possible that brokerage firms with
92:25 whom the partnership does business may not wish to be
93:1 associated with the partnership's investment strategy
93:2 due to perceived adverse publicity risks.
93:3 "This could have the effect of limiting the
93:4 number of brokerage firms available to the partnership
93:5 and may create disruptions to the partnership's
93:6 investment strategy to the extent the partnership has
93:7 difficulty finding alternative brokerage firms willing
93:8 to carry the joint accounts."
93:9 **Q Now, you say above, "While the general**
93:10 **partner believes that its strategy conforms with the**
93:11 **prospectus guidelines and represents a valid survivor's**

93:12 **option redemption, there is a possibility that issuers**
93:13 **and trustees may take a contrary view."**
93:14 **You knew back in March of 2011 that issuers**
93:15 **might not think that your strategy conformed with their**
93:16 **prospectus guidelines, right?**
93:17 A Yes.
93:18 **Q And you took no affirmative steps to inform**
93:19 **the issuers of your strategy, correct?**
93:20 A I provided all of the information that was
93:21 requested in their own governing documents. And if
93:22 they requested more, I also provided it.
93:23 **Q My question is: You took no affirmative**
93:24 **steps to inform issuers of your strategy, correct?**
93:25 A I did not volunteer them information that
94:1 they did not ask for.

425. In November 2012, Lathen told a prospective investor in an email that: "...the strategy should work for some period of time until it doesn't, in which case the trade will have played out." (Div. Ex. 468 – p. 4.)

426. In November 2012, Lathen told a prospective investor that he was aware that ultimately he might have to "fold up shop and return money to investors." (Div. Ex. 468 – p. 4.)

427. Lathen deliberately withheld the Participant Agreement, and other material facts about his, the Fund's and the Participants' interests in the bonds, from the issuers and trustees.

> Does the bond issuer have ability to refuse payment since 'straw-man' was created?
>
> The issuer and trustees see the registration on the account at JTWROS. They do not see the Participant Agreement so they are not privy to where the capital was sourced and how the economics of the account have been shared between the Participant and the fund.
> (Div. Ex. 488 – p. 2.)
>
> See also:
> Not getting any signals that there will be problems with the issuers/trustees. So for now, no news is good news. Longer term, that is obviously a question mark. To get perfect clarity on that would require me to be open-kimono with them in advance which is not a good path for obvious reasons.
> (Div. Ex. 817 – p. 1.)

428. Lathen did not want issuers to find out about his strategy.

My only choice unfortunately is to sue Goldman to force them to honor the redemption provision. This is not a palatable solution, however, as the publicity around the case could alert other issuers to my strategy and cause them to tighten the loopholes in their docs and/or decline to make payments to me. (Div. Ex. 481 – p. 1.)

429. There is no evidence that Lathen ever sued any of the issuers. Lathen did not sue Goldman Sachs because he sought to avoid publicity around his strategy.

340:9 **Q Now, you had conversations with a lawyer by**
340:10 **the name of Michael Montgomery; is that correct?**
340:11 A Yes.
340:12 **Q And Michael Montgomery represented Staples;**
340:13 **is that right?**
340:14 A That's correct.
340:15 **Q Okay. If you could take a look at Division**
340:16 **481 for identification. This was an email exchange**
340:17 **between you and Mr. Montgomery, correct?**
340:18 A Yes, it is.

340:25 **Q And the date of this, Mr. Lathen, is**
341:1 **June 17, 2014?**
341:2 A Yes, that's right.
341:3 **Q And in this email that you wrote to him on**
341:4 **June 17 of 2014, you're talking about the dispute that**
341:5 **you were having with Goldman; is that correct?**
341:6 A Yes, that's right.
341:7 **Q And if you could read to us that email on**
341:8 **p. 1, please.**
341:9 A Sure.
341:10 "My complaint with the NY Department of
341:11 Financial Services against Goldman went nowhere. DFS
341:12 considered it a business dispute, not a consumer
341:13 dispute, and so they were not inclined to get
341:14 involved.
341:15 "My only choice, unfortunately, is to sue
341:16 Goldman to force them to honor the redemption
341:17 provision. This is not a palatable solution; however,
341:18 as the publicity around the case could alert other
341:19 issuers to my strategy and cause them to tighten up
341:20 the loopholes in their docs and/or decline to make
341:21 payments to me.
341:22 "I have concluded that the small gains in
341:23 suing Goldman are outweighed by these collateral
341:24 risks.
341:25 "So I am standing down for now. As a result
342:1 of the Goldman situation, I have made some tweaks to

342:2 my structure to make it more resilient against future
342:3 challenges by issuers."
342:4 **Q So you acknowledge that as a result of the**
342:5 **Goldman situation, you made some tweaks to your**
342:6 **structure to make it more resilient against future**
342:7 **challenges by issuers, correct?**
342:8 A That's what I said.
342:9 **Q And you also acknowledge that you did not**
342:10 **want publicity around your case, because it could**
342:11 **alert other issuers to your strategy and cause them to**
342:12 **tighten up the loopholes in their documents and/or**
342:13 **decline to make payments to you; is that correct?**
342:14 A Yes, that's right.

430. Lathen wrote that "death certificates and account statements [] clearly establish beneficial ownership at the time of death" (Div. Ex. 592 – p. 10) despite the fact that he was seeking to redeem from 4 accounts governed by the Investment Management Agreement and he had already been told by Farrell that, under the Investment Management Agreement, Participants had no beneficial ownership interest in the account. (PFOF ¶¶ 871, 878, infra.)

431. Lathen wrote that "death certificates and account statements [] clearly establish beneficial ownership at the time of death" (Div. Ex. 592 – p. 10) despite the fact that he was seeking to redeem from 2 accounts governed by the Profit Sharing Agreement, and Lathen had already been told by Farrell that his Profit Sharing Agreement destroyed the validity of his joint tenancies. (PFOF ¶¶ 905-909, 911, 913, infra.)

432. Lathen never affirmatively reached out to or complained to the SEC. Lathen sought to avoid scrutiny by the SEC.

> I think an interesting angle around all of this could be to agitate with the SEC and/or underwriters to force issuers who don't pay me to disclose the risk in their current and future deals that they have refused to pay these claims in the past and may refuse to do so in the future. Of course, that could also backfire if it leads to language changes or further SEC scrutiny of my model. I could certainly threaten to do that with each issuer who denies me but following through on it is another kettle of fish.
> (Div. Ex. 800 – p. 4.)

See also:
3628:11 **Q You never reported GECC to the SEC; is that**
3628:12 **right?**
3628:13 A No.
3628:14 **Q Nor any other bond issuers, correct?**
3628:15 A Correct.

335:20 **Q Now, you say in the email that "an**
335:21 **interesting angle around this could be to agitate with**
335:22 **the SEC;" is that right?**
335:23 A Yes.
335:24 **Q But you never did agitate with the SEC; is**
335:25 **that right?**
336:1 A That is true.

339:22 **Now, Mr. Lathen, is it fair to say that you**
339:23 **were trying to avoid scrutiny by the SEC?**
339:24 A I think scrutiny is certainly a major
339:25 headache, and I would rather avoid it, if possible. I
340:1 don't think anybody would really enjoy scrutiny from
340:2 the SEC.
340:3 **Q And that is what you meant by "stealth,"**
340:4 **correct?**
340:5 A I mean, it could have been part of it. I
340:6 mean, I think it was principally related to issuers.
340:7 But, sure, regulators could also be part of the
340:8 equation.

433. Lathen sought to use "stealth and tact" in his disputes with issuers.

There are plenty of other things to buy. Thus the reason to use stealth and tact in any disputes I have.
(Div. Ex. 800 – p. 1.)

See also:
339:6 **Q And to be clear, when you use the word**
339:7 **"stealth," you meant you didn't want to do anything**
339:8 **publicly, because other issuers can find out what you**
339:9 **were doing; is that right?**
339:10 A Among other things.

434. In 2014, Lathen complained to the Consumer Fraud Protection Bureau ("CFPB") about Goldman Sachs' refusal to redeem CDs pursuant to the survivor's option. He used his home address on the submission, stated that he was submitting on behalf of "himself," and did not describe the Fund in the submission. Lathen also did not attach the Participant Agreement to his complaint. (Div. Ex. 574 – pp. 1-2.)

330:20 **Q And to be clear, this is that CFPB**
330:21 **complaint, 574, correct?**
330:22 A Yes.
330:23 **Q Now, if you take a look at page 2. And look**
330:24 **at the attachments. The participant agreement is not**
330:25 **something that was attached there; is that correct?**

331:1 A No, it's not.

435. In 2014, Lathen complained to DFS. He used his home address and did not fill in the field that asked for "Business Name." (Div. Ex. 577 – p. 2.)

436. DFS declined to take action on Lathen's complaint.

332:7 **Q And the New York DFS said that they were not**
332:8 **going to resolve this; is that correct?**
332:9 A Yes, that is correct.

437. Lathen never heard back from the CFPB.

332:4 **Now, you never heard back from the Consumer**
332:5 **Financial Protection Bureau; is that correct?**
332:6 A I believe that's correct.

438. The CFPB 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. See https://www.consumerfinance.gov/policy-compliance/guidance/supervision-examinations/institutions/

439. DFS regulates financial services institutions including 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. See http://www.dfs.ny.gov/about/whowesupervise.htm#investment

440. Lathen complained to no agency that had jurisdiction over Respondents.

441. The July 2013 PPM states that brokerage firms have declined to do business with the Fund due to perceived adverse publicity risks. JPMC declined to do business with the Fund for that reason.

Posture of Issuers, Trustees and Brokerage Firms toward the Investment Strategy
...
Some brokerage firms have declined to do business with the Partnership due to perceived adverse publicity risks. To the extent the Partnership has difficulty finding brokerage firms willing to carry the Joint Accounts on reasonable terms, the Partnership's operations and returns could be adversely affected.
(Div. Ex. 365 – p. 28.)

See also:
115:7 **Q Okay. You mean the third paragraph in the**
115:8 **March 2013 -- I'm sorry, July 2013 PPM is -- talks**
115:9 **about how brokerage firms have declined to do business**
115:10 **with the Participant due to perceived adverse publicity**
115:11 **risks; is that right?**
115:12 A Yes, that's correct.
115:13 **Q And that's something that you added because**
115:14 **that, in fact, happened; is that right?**
115:15 A Yes, that is correct.
115:16 **Q Okay. And --**
115:17 MR. HUGEL: Judge, I think Ms. Weinstock
115:18 misspoke. I think she said declined to do business
115:19 with the Participant. I think she meant the
115:20 partnership.
115:21 MS. WEINSTOCK: Oh, I did. Thank you for
115:22 that.
115:23 JUDGE PATIL: Sustained.
115:24 BY MS. WEINSTOCK:
115:25 **Q Mr. Lathen, so that, in fact, happened;**
116:1 **brokerage firms declined to do business with the**
116:2 **partnership due to perceived adverse publicity risks;**
116:3 **is that right?**
116:4 A That is correct. There was a brokerage firm
116:5 that had declined.
116:6 **Q And which firm was that?**
116:7 A It was actually a clearing firm. Our
116:8 brokerage firm was Securevest, and they had a clearing
116:9 arrangement with JPMorgan.

116:17 **Q Now, when you say "due to perceived adverse**
116:18 **publicity risks," that was your understanding of why**
116:19 **JPMC terminated your business; is that right?**
116:20 A That was my understanding, yes.

442. Lathen was aware that FINRA was investigating CL King in relationship to his business. Lathen was also aware that FINRA was examining FSW in connection with his business.

329:3 **Q You were aware that FINRA was investigating**
329:4 **C.L. King related to your business, correct?**
329:5 A Yes.
329:6 **Q You were aware that FINRA was examining**
329:7 **First Southwest in connection with your business,**
329:8 **correct?**
329:9 A Yes.

443. In or around late 2013, CL King terminated Respondents' business. In 2014, FSW terminated Respondents' business. (Div. Exs. 124, 1012, 1031.) See also:

116:10 **Q And there were other brokerage firms that**
116:11 **also terminated your business subsequent to this PPM;**
116:12 **is that right?**
116:13 A Yes, that is correct.
116:14 **Q And that was C.L. King and First Southwest;**
116:15 **is that right?**
116:16 A That is correct.

444. Lathen understood that the termination of his business was due to FINRA's investigations.

> The Dallas District Office is conducting an inquiry with respect to the activities of all Eden Arc and Donald F. (Jay) Lathen ("Lathen") related accounts held at First Southwest Company...
> (Div. Ex. 1012 – p. 3.)

> We are obviously sensitive to letting FINRA know this information given the troubles they have caused us with CLK and First Southwest.
> (Div. Ex. 1008 – p. 1.)

> See also:
> 3627:16 **Q And you knew that FINRA had investigated C.L.**
> 3627:17 **King as it related to your strategy; is that right?**
> 3627:18 A My strategy and others as I understand.
> 3627:19 **Q And First Southwest as well?**
> 3627:20 A FINRA had been investigating our strategy at
> 3627:21 First Southwest. I'm not sure if they were investigating
> 3627:22 other strategies.

445. Lathen and his attorney, Kevin Galbraith, reached out to FINRA in August of 2014 because they were concerned that FINRA would investigate any broker that carried Lathen's business, which would effectively end the Fund.

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.

446. In August of 2014, Lathen and Galbraith had a lengthy conversation with FINRA in which they tried to convince FINRA of the legitimacy of Lathen's strategy. FINRA was not persuaded.

3403:19 **Q So did either you or Mr. Galbraith explain**
3403:20 **what your business was to FINRA?**
3403:21 A Yes. We had a conference with them and
3403:22 discussed it in some depth.
3403:23 **Q Did you have an understanding of what**
3403:24 **FINRA is?**
3403:25 A Yes.
3488:6 **Q The conversation that you and Mr. Galbraith had**
3488:7 **with FINRA, that lasted about an hour and a half; is that**
3488:8 **right?**
3488:9 A Yes.

3489:7**Q So they were not persuaded in that initial**
3489:8 **call, and they refused to engage further; is that**
3489:9 **correct?**
3489:10 A I don't know whether that's a fair
3489:11 characterization. From my perspective, we did not feel
3489:12 that the conversation was complete. We wished to have
3489:13 further conversation. They did not want to have further
3489:14 conversations. You can draw whatever inference you want
3489:15 from that. I'm not able to draw an inference from that.
3489:16 **Q And you're saying there was no further call**
3489:17 **after that?**
3489:18 A That's correct.

447. In 2015, Lathen did not want FINRA to know who his new broker was. In response to a question from CL King's attorney, Christopher Robertson, asking if Lathen currently had a broker-dealer custodian and who it was, Lathen responded, "Yes we do. What is the reason for the question? We are obviously sensitive to letting FINRA know this information given the troubles they have caused us with CLK and First Southwest." (Div. Ex. 1008 – p. 1.) See also:

3492:5 **Q What's your understanding of what their**
3492:6 **concerns were?**
3492:7 A I believe their concerns were, as I understand
3492:8 it, they believe that the brokerage firms, again, those
3492:9 were the entities that they regulate, they believed since
3492:10 the brokerage firms are the parties that are responsible

3492:11 for submitting the redemption requests to the issuers,
3492:12 they believe that the brokerage firms had an affirmative
3492:13 obligation to tell the issuers about the nature of my
3492:14 joint tenancies and the extent of my contractual regime.
3492:15 **Q And you were aware that FINRA had that issue;**
3492:16 **is that right?**
3492:17 A Yes. That's based on my conversations with
3492:18 C.L. King. That's what I understand to be certainly one
3492:19 of their issues. I'm not sure if there are other issues.
3492:20 **Q On February 4th of 2015, you were aware of**
3492:21 **that, correct? You were aware of FINRA's issues with**
3492:22 **your strategy on February 4th of 2015, right?**
3492:23 A I think that's fair to say.
3492:24 **Q And that's why you didn't want FINRA to know**
3492:25 **who your new custodian was; is that right?**
3493:1 A Yes.

448. Lathen was aware that FINRA does not have jurisdiction over investment advisers.

932:1 **Q And FINRA does not have jurisdiction over**
932:2 **investment advisors; is that correct?**
932:3 A That's my understanding.
932:4 **Q Just broker-dealers; is that right?**
932:5 A That's my understanding.

449. In September 2013, Lathen became aware that the SEC had brought a case entitled SEC v. Staples, a case involving the purchase of survivor's option instruments with terminally-ill individuals in which the defendants were charged with fraud in relation to their misrepresentation of the fact that the deceased participant had been the "owner" of the survivor's option bonds in their redemption request letters. (Lathen Ex. 2000 – p. LATHEN15532.) See also:

328:4 **Q Now, in 2013, the SEC brought a case**
328:5 **entitled "SEC vs. Staples," is that correct?**
328:6 A Yes.
328:7 **Q And you became familiar with that case in**
328:8 **September of 2013; is that correct?**
328:9 A Yes.
328:10 **Q And you reviewed the Staples complaint?**
328:11 A Yes, I did.
328:12 **Q And that case was also a case involving**
328:13 **survivor option bonds; is that right?**
328:14 A Yes, it was.
328:15 **Q And it was also a case where an individual**
328:16 **was teaming up with terminally ill individuals in**
328:17 **order to take advantage of survivor option bonds; is**

328:18 **that correct?**
328:19 A Yes.

450. Lathen thought that if he had Participant Agreements like the ones at issue in SEC v. Staples, an issuer would have grounds to refuse to redeem under the survivor's option.

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.

451. In the fall of 2013, Lathen became aware that Goldman Sachs was refusing to pay on his survivor's option redemptions.

3627:2 **Q And you became aware of the fact that Goldman**
3627:3 **didn't think that your joint tenancies were valid in the**
3627:4 **fall of 2013; is that right?**
3627:5 A Yes.

3627:6 **Q And they thought there was an issue with**
3627:7 **beneficial ownership, correct?**
3627:8 A I think the specific issue they had is they
3627:9 thought that they were not bona fide joint tenancies.

324:24 **Now, you had mentioned that there were**
324:25 **issues with GECC and Goldman Sachs in terms of them**
325:1 **not wanting to pay your redemptions; is that correct?**
325:2 A That is correct.

452. Lathen similarly became aware of Prospect's questioning of his survivor's option redemption requests in early 2014.

328:20 **Q And you mentioned that you were sued by**
328:21 **Prospect in June of 2014; is that right?**
328:22 A Yes.

270:13 **Q But you're not being asked those questions.**
270:14 **All I'm asking is what Prospect's position**
270:15 **was. That's all I'm asking you.**
270:16 A Prospect's position in January 2014 was they
270:17 did not want to pay.

453. Prospect took the position that Respondents' redemptions were ineligible because neither Lathen nor the Participants had beneficial ownership.

269:3 **Q I'm not asking you for context.**
269:4 **I'm asking you if Prospect was taking the**
269:5 **position at any point that they didn't want to pay**
269:6 **because they didn't think that you or the Participants**
269:7 **had beneficial ownership.**
269:8 **Did they take the position at some point?**
269:9 A They eventually took that position
269:10 approximately eight months after they refused to pay.
269:11 But it wasn't their decision to even make.

270:13 **Q But you're not being asked those questions.**
270:14 **All I'm asking is what Prospect's position**
270:15 **was. That's all I'm asking you.**
270:16 A Prospect's position in January 2014 was they
270:17 did not want to pay.

3627:10 **Q And Prospect had a similar problem; is that**
3627:11 **right?**
3627:12 A Yes.

454. From March to August of 2014, Lathen became aware that issuers GECC, Citigroup, and Caterpillar Corporation were questioning his strategy.

3627:23 **Q And you also became aware in August of 2014**
3627:24 **that GECC, Citigroup and Caterpillar were questioning**
3627:25 **your strategy; is that right?**
3628:1 A Who did you mention? GECC?
3628:2 **Q GECC, Citigroup and Caterpillar.**
3628:3 A Citigroup and Caterpillar were issuers where
3628:4 U.S. Bank acted as the trustee and validity determination
3628:5 agent. You said Citigroup and Caterpillar. I sort of was
3628:6 thinking U.S. Bank making that because that's their role
3628:7 as the validity determination agent.
3628:8 **Q And you became aware of GECC having an issue as**
3628:9 **well?**
3628:10 A Certainly, yes.

297:14 **Q Now, you've -- Prospect was not the only**
297:15 **issuer that raised dispute with you; is that correct?**
297:16 A That is correct.
297:17 **Q Goldman Sachs raised an issue in 2013; is**
297:18 **that right?**
297:19 A Yes. Late in 2013.
297:**Q And GECC as well --**
297:21 A Yes.
297:22 **Q -- is that correct?**
297:23 A That is correct.
297:24 **Q And that was also in 2013?**
297:25 A I believe that was in 2014.
298:1 **Q Was that in early 2014?**
298:2 A I believe it was around March of 2014, yes.

325:3 **Q And there were also issue -- there was also**
325:4 **an issue with Caterpillar; is that right?**
325:5 A There was an issue with U.S. Bank who was
325:6 the validity determination agent for Caterpillar. We
325:7 did not speak directly to Caterpillar.
325:8 **Q But U.S. Bank represented Caterpillar, so to**
325:9 **speak, in this dispute?**
325:10 A Yes. They were the trustee under the
325:11 Caterpillar loans.

455. Lathen read Weil Gotshal's October 10, 2014 letter to Galbraith regarding Respondents GECC redemptions at or about the time the letter was written. (Div. Ex. 559.) See also:

326:19 **Q Mr. Lathen, if you can just read it over and**

326:20 **let us know whether you read that at or around the**
326:21 **time it was written.**
326:22 MS. WEINSTOCK: For the record, this is
326:23 Division Exhibit 559.
326:24 THE WITNESS: Yes, I do recall reading this.

456. Weil Gotshal's October 10, 2014 letter notified Respondents that GECC was rejecting the Respondents' redemption request because the deceased person had had no beneficial ownership interest in the note and no valid joint tenancy had been created. Additionally, the letter accused Lathen of making a false representation on the brokerage account application, and attempting to carry out a fraudulent scheme. (Div. Ex. 559.)

457. Weil Gotshal's October 10, 2014 letter also referenced the fact that the SEC had charged securities fraud in a similar case, SEC v. Staples. (Div. Ex. 559.)

458. The SEC notified Lathen of an SEC exam in the fall of 2014. (SFOF ¶ 14.)

459. Lathen was personally subpoenaed by the SEC related to the SEC's investigation in February of 2015. (SFOF ¶ 15.)

460. Lathen received a Wells notice from the SEC in December 2015, after which he continued to submit redemption requests.

3629:1 **Q And all of this time, you continued to do what**
3629:2 **you were doing; is that right?**
3629:3 A Yes.
3629:4 **Q And you also got a Wells notice; is that right?**
3629:5 A Yes, I did.
3629:6 **Q And you still continued to redeem -- is that**
3629:7 **right -- through the survivor option; is that right?**
3629:8 A Are you saying --
3629:9 **Q You continued to submit redemption --**
3629:10 A After the Wells notice?
3629:11 **Q Correct.**

IV. EACM, Aided and Abetted by CCO Lathen, Violated the Custody Rule

461. Lybecker was admitted as an expert witness with respect to the applicability of the Custody Rule and the Investment Advisers Act to the facts in this matter. (Div. Ex. 171.)

1358:15 **Q Can you just briefly summarize your**
1358:16 **opinion -- what was the scope of your retention?**
1358:17 **What were you asked to provide an opinion on?**
1358:18 A I was asked to be an expert witness with
1358:19 respect to the applicability of the Custody Rule and

1358:20 the Investment Advisers Act to the facts in this
1358:21 matter.
1358:22 MS. MOILANEN: And first, Your Honor, I'd
1358:23 like to offer Mr. Lybecker as an expert in this
1358:24 matter.
1358:25 And I would like to offer Div. Ex.
1359:1 171 into evidence.
1359:2 MR. PROTASS: No objection, Your Honor.
1359:3 JUDGE PATIL: So accepted as an expert.
1359:4 And Division Exhibit 171 is admitted.

462. Lybecker concluded that the Fund was the client of Lathen and Lathen's advisory firm, EACM, and the Fund's assets should have been custodied in an account in the Fund's name. (Div. Ex. 171 – p. 7.) See also:

1359:8 **Q And, Mr. Lybecker, can you please briefly**
1359:9 **state your conclusion regarding the question you**
1359:10 **were asked -- you were retained to look at.**
1359:11 A My conclusion is that the fund was the
1359:12 client of Mr. Lathen and his advisory firm.
1359:13 And that the fund's assets should have
1359:14 been kept in a proper custody account. Proper
1359:15 custody account would have had the fund's name in
1359:16 the caption of the custody account.

463. The Custody Rule does not refer to joint tenancies.

1456:10 **Q Does the Custody Rule refer to joint**
1456:11 **tenancy relationships?**
1456:12 A Not that I recall.

464. The Custody Rule imposes duties on investment advisers, including holding property on behalf of a fund in the name of the fund.

1462:11 **Q Okay. Why would it make a difference if**
1462:12 **one of the parties was an investment advisor?**
1462:13 A Because the Custody Rule imposes duties on
1462:14 an investment advisor.
1462:15 As a result of the Madoff case, when the
1462:16 SEC revisited the Custody Rule, the intention was to
1462:17 force brokerage accounts, all sorts of property held
1462:18 on behalf of the fund, to reflect the fund's name in
1462:19 the title of the account, or the client's name in
1462:20 the title of the account.
1462:21 The understanding at the time was that the
1462:22 Madoff fraud could not have happened if the
1462:23 customers -- if his advisory clients had been

1462:24 required to see the custody accounts and get audited
1462:25 financial statements that would have shown that
1463:1 there was nothing in their accounts.

465. The Fund was EACM's client for the purposes of the Advisers Act. (Div. Ex. 171 – p. 12.)

466. All of the assets held in the JTWROS accounts were funds or securities of the Fund. (Div. Ex. 171 – p. 12.)

467. All of the assets held in the JTWROS accounts should have been held in a proper custody account. (Div. Ex. 171 – p. 12.)

468. The Fund should have been listed as the client on the JTWROS accounts. (Div. Ex. 171 – p. 12.)

469. EACM's disclosures in its Forms ADV are consistent with the position that the Fund was EACM's client. (Div. Ex. 171 – p. 7.)

470. An investment adviser has custody of client funds and securities where it, or a related person, holds, directly or indirectly, client funds or securities, or has any authority to obtain possession of them. (Div. Ex. 171 – p. 7.)

471. Lathen had the authority to transfer the funds and securities of the Fund into the JTWROS account that was in the name of Lathen and of a Participant. (Div. Ex. 171 – p. 7.)

472. EACM had custody of the Fund's funds and securities. (Div. Ex. 171 – p. 8.)

473. The assets in the JTWROS accounts represented the Fund's funds and securities. (Div. Ex. 171 – p. 9.)

474. After January 24, 2013, Lathen continued as if nothing substantive had changed as a result of executing the Profit Sharing and Discretionary Line Agreements. (Div. Ex. 171 – p. 9.)

475. If the promissory note underlying the Discretionary Line Agreement was an asset of the Fund, it was subject to the Custody Rule. (Div. Ex. 171 – p. 10.)

476. As Lybecker concluded, Lathen "had the authority to transfer the funds and securities of the Fund into the JTWROS account that was in the name of Mr. Lathen and of a Participant. Each act taken by Mr. Lathen was a step taken pursuant to his actual and apparent authority as the principal and managing member of EACM and/or as a "nominee" on behalf of the Fund pursuant to the Investment Management Agreement. It cannot be reasonably argued that Mr. Lathen did not have the authority to obtain possession of the funds and securities held in the JTWROS account(s). Therefore, EACM had custody of the Fund's funds and securities." (Div. Ex. 171 – pp. 7-8.)

477. Lybecker, having reviewed the Forms ADV, financial statements, tax returns and various agreements in place for accounts opened prior to 2013, concluded that "the assets held in the JTWROS accounts were the funds and securities of the Fund (not Mr. Lathen and not the Participants) and pursuant to the Custody Rule should have been held in a proper custody account in the name of the Fund. (Div. Ex. 171 – p. 9.)

478. In the Form ADVs filed by EACM, Item 7 states that EACM is an investment adviser to just one private fund – Eden Arc Capital Partners, LP, *e.g.* the Fund. In all but one filing (February 2013), the current gross asset value of that private fund listed in each Form ADV is equal to the reported Regulatory Assets Under Management listed in Item 5 of the ADV. As of March 2014, EACM reported that it was providing portfolio management for the pooled investment vehicle in Item 5, and it reported providing investment advice to only one individual advisory account. (Div. Ex. 171 – p. 7.)

479. Lathen testified that he prepared some of his Forms ADV in collaboration with lawyers at Gersten Savage LLP and Mission Critical, a compliance consultant.

3505:14 **Q So you explained to them your business, right?**
3505:15 A Yes.
3505:16 **Q You told them the amount of money in the**
3505:17 **brokerage accounts, right?**
3505:18 A Yes.
3505:19 **Q And you jointly decided to put down the value**
3505:20 **of the assets in the joint tenant accounts under**
3505:21 **regulatory assets under management; is that correct?**
3505:22 A That is fair to say.

480. Lathen reviewed his Forms ADV before they went out, and asked questions about them. He also made sure they were accurate.

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.

3510:9 **Q And to the extent that it was Cassandra Joseph**
3510:10 **from Integrated Investment Solutions, you would have**
3510:11 **reviewed whatever she filled out before it was submitted?**
3510:12 A That's fair to say, yeah.
3510:13 **Q And you would have made sure everything in**
3510:14 **there was accurate?**
3510:15 A Absolutely.

481. Lathen reviewed the Form ADV brochures before they were filed.

506:18 **Q And with respect to the ADV brochures, you**
506:19 **reviewed them before they were filed, correct?**
506:20 A Yes.

482. Lathen acknowledged that he was deemed to have custody of the assets in the JTWROS accounts, including the margin balances.

3507:4 **Q And you also listed the value of what was in**
3507:5 **the joint tenant accounts as what was in custody --**
3507:6 **right -- what you had custody of -- is that right -- or**
3507:7 **what the advisor had custody of, right?**
3507:8 A Certainly. I mean, of course, as a general
3507:9 partner of a fund, I'm deemed to have custody of
3507:10 everything.
3507:11 **Q And you included the margin balances in both of**
3507:12 **those numbers, right?**
3507:13 A Yes, I did.

483. Lathen claimed that he found the Forms ADV to be incredibly complicated and difficult to understand, but that his goal was to make sure "they [Gersten Savage and Mission Critical] understood my business, they understood the relevant facts of my business, and that we could correctly fill out the ADV."

3504:23 **Q And is that recollection from this e-mail or is**
3504:24 **that from something else?**
3504:25 A It dates back to the initial decision to hire

3505:1 Gersten Savage to prepare the Form ADV. I found that
3505:2 form to be incredibly complicated and difficult to
3505:3 understand. And I think I'm a reasonably intelligent
3505:4 person. And that's why I hired Gersten Savage because --
3505:5 you know, I realized I was over my head. So this
3505:6 regulatory assets under management that we're looking at
3505:7 here, I think, is a pretty good indication of how
3505:8 complicated it can be.
3505:9 So what I want to try to make clear is with
3505:10 respect to both Gersten and Mission Critical, my goal was
3505:11 to make sure they understood my business, they understood
3505:12 the relevant facts of my business and that we could
3505:13 correctly fill out the ADV.

484. Respondents did not call Stephen DeRosa, who Lathen claimed to have helped with the Forms ADV, as a witness at the trial, nor did they call anyone from Mission Critical.

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.

485. The promissory note between Lathen and the Fund gave the person holding it the right to demand payment.

3516:23 **Q It's a negotiable instrument, right?**
3516:24 **Promissory note is a negotiable instrument?**

3517:3 A I mean if you mean negotiable like it could be
3517:4 transferred to someone else, you know, I don't know the
3517:5 answer to that question. Practically speaking, I'm not
3517:6 sure who would want to buy the promissory note.
3517:7 **Q Well, it gave the person holding it the right**
3517:8 **to demand payment; is that correct?**
3517:9 A Yes.

486. Respondents did not custody the promissory note with the Fund's broker-dealers.

3517:10 **Q And you did not custody the promissory note**
3517:11 **with your broker-dealers, correct?**
3517:12 A I didn't. I'm not sure it could be custodied, to
3517:13 be honest.

3517:22 **Q You didn't give the promissory note to your**
3517:23 **broker-dealers, correct?**
3517:24 A No, I didn't.

487. Lathen acknowledged that if a loan was certificated, there may be a requirement that the loan be held at a qualified custodian.

3690:7 We're basically saying the joint accounts are collateral
3690:8 and don't have to be -- it would be sort of along the
3690:9 lines of if a lender had made a loan, let's say it was a
3690:10 registered investment advisor and they made a loan to a
3690:11 building and that building served as collateral for the
3690:12 loan, then there may potentially be -- if the loan was
3690:13 certificated, there may be a requirement that the loan
3690:14 be held at a qualified custodian. But certainly, the
3690:15 building would not need to be held at a qualified custodian.

488. Lathen filed or caused to be filed a Form ADV or an amendment thereto for EACM on or around the following dates:

- September 14, 2012 (Div. Exs. 1, 10);
- September 27, 2012 (Div. Ex. 2);
- February 26, 2013 (Div. Ex. 3);
- April 1, 2013 (Div. Ex. 4);
- March 31, 2014 (Div. Ex. 5);
- May 16, 2014 (Div. Ex. 6);
- March 31, 2015 (Div. Ex. 7, 11, 12);
- December 30, 2015 (Div. Ex. 13); and
- January 4, 2016 (Div. Ex. 8).

489. Lathen reviewed and signed each Form ADV and Form ADV amendment on behalf of EACM. (Div. Exs. 1-8, 10-13.)

490. Lathen certified under penalty of perjury that the information and statements made in each Form ADV and each Form ADV amendment, including exhibits and other information submitted, were true and correct. (Div. Exs. 1-8, 10-13.)

491. On or around February 23, 2016, Lathen filed or caused to be filed a Form ADV-W on behalf of EACM. (Div. Ex. 14.)

492. Lathen filed or caused to be filed EACM's Form ADV Part 2 Brochures for September 2012 (Div. Ex. 2a), March 2013 (Div. Ex. 4a), March 2014 (Div. Ex. 5a), March 2015 (Div. Ex. 7a), and December 30, 2015 (Div. Ex. 8a).

493. Lathen reviewed and certified under penalty of perjury that the information and statements made in the submitted Form ADV Part 2 Brochures (Div. Exs. 2a, 4a, 5a, 7a, and 8a) were true and correct. (Div. Ex. 2, 4, 5, 7 and 8.)

494. In Item 9(A)(1) of every Form ADV or Form ADV amendment filed between September 14, 2012 and January 4, 2016, EACM reported that it had custody of its advisory clients' (i) cash or bank accounts, and (ii) securities.

495. In its Form ADV filed on or around September 24, 2012, EACM reported:

- In Item 9(A)(2) that it had custody of $12 million on behalf of 2 clients; (Div. Ex. 1 – p. 35)
- In Section 7.B.(1) that EACP used the following custodians: C.L. King & Associates, Inc., HSBC Bank, J.P. Morgan Clearing Corp., and Penson Financial Services, Inc. (Div. Ex. 1 – pp. 28-31.)

496. In its amendment to the Form ADV filed on or around September 27, 2012, EACM reported:

- In Item 9(A)(2) that it had custody of $12 million on behalf of 2 clients; (Div. Ex. 2 – p. 35)
- In Section 7.B.(1) that EACP uses the following custodians: C.L. King & Associates, Inc., HSBC Bank, J.P. Morgan Clearing Corp., and Penson Financial Services, Inc. (Div. Ex. 2 – pp. 28-31.)

497. In its amendment to the Form ADV filed on or around February 26, 2013, EACM reported:

- In Item 9(A)(2) that it had custody of $12 million on behalf of 2 clients; (Div. Ex. 3 – p. 35)
- In Section 7.B.(1) that EACP uses the following custodians: C.L. King & Associates, Inc., HSBC Bank, J.P. Morgan Clearing Corp., and Penson Financial Services, Inc. (Div. Ex. 3 – pp. 28-31.)

498. In its amendment to the Form ADV filed on or around April 1, 2013, EACM reported:

- In Item 9(A)(2) that it had custody of $13 million on behalf of 2 clients; (Div. Ex. 4 – p. 35)
- In Section 7.B.(1) that EACP uses the following custodians: C.L. King & Associates, Inc., HSBC Bank, J.P. Morgan Clearing Corp., and Penson Financial Services, Inc. (Div. Ex. 4 – pp. 29-31.)

499. In its amendment to the Form ADV filed on or around March 31, 2014, EACM reported:

- In Item 9(A)(2) that it had custody of $44 million on behalf of 1 client; (Div. Ex. 5 – p. 37)
- In Item 7.B.(1) that EACP uses the following custodians: C.L. King & Associates, Inc., First Southwest Company, and HSBC Bank. (Div. Ex. 5 – pp. 29-32.)
- In Item 7.B.(1) that EACP had a current gross asset value of $44 million. (Div. Ex. 5 – p. 25.)
- In Item 5 that it had regulatory assets under management of $44 million on behalf of 1 account. (Div. Ex. 5 – p. 14.)

500. In its amendment to the Form ADV filed on or around May 16, 2014, EACM reported:

- In Item 9(A)(2) that it had custody of $44 million on behalf of 1 client; (Div. Ex. 6 – p. 33)
- In Item 7.B.(1) that EACP uses the following custodians: C.L. King & Associates, Inc., First Southwest Company, and HSBC Bank. (Div. Ex. 6 – pp. 27-28.)
- In Item 7.B.(1) that EACP had a current gross asset value of $44 million. (Div. Ex. 6 – p. 23.)
- In Item 5 that it had regulatory assets under management of $44 million on behalf of 1 account. (Div. Ex. 6 – p. 14.)

501. In its amendment to the Form ADV filed on or around March 31, 2015, EACM reported:

- In Item 9(A)(2) that it had custody of $31,713,632 million on behalf of 1 client; (Div. Ex. 7 – p. 35)
- In Item 7.B.(1) that EACP uses the following custodians: C.L. King & Associates, Inc., First Southwest Company, LLC, HSBC Bank and Wedbush Securities Inc. (Div. Ex.7 – pp. 28-30.)
- In Item 7.B.(1) that it had a current gross asset value of $31,713,632 million on behalf of 1 account. (Div. Ex. 7 – p. 24.)

- In Item 5 that it had regulatory assets under management of $31,713,632 million on behalf of 1 account. (Div. Ex. 7 – p. 15.)

502. In its amendment to the Form ADV filed on or around December 30, 2015, EACM reported:

- In Item 9(A)(2) that it had custody of $31,713,632 million on behalf of 1 client; (Div. Ex. 13 – p. 34)

- In Item 7.B.(1) that EACP uses the following custodians: C.L. King & Associates, Inc., First Southwest Company, LLC, HSBC Bank and Wedbush Securities Inc. (Div. Ex. 13 – pp. 27-29.)

- In Item 7.B.(1) that it had a current gross asset value of $31,713,632 million on behalf of 1 account. (Div. Ex. 13 – p. 23.)

- In Item 5 that it had regulatory assets under management of $31,713,632 million on behalf of 1 account. (Div. Ex. 13 – p. 14.)

503. In its amendment to the Form ADV filed on or around January 4, 2016, EACM reported:

- In Item 9(A)(2) that it had custody of $31,713,632 million on behalf of 1 client; (Div. Ex. 8 – p. 35)

- In Item 7.B.(1) that EACP uses the following custodians: C.L. King & Associates, Inc., First Southwest Company, LLC, HSBC Bank and Wedbush Securities Inc. (Div. Ex. 8 – pp. 28-30.)

- In Item 9(A)(2) that it had a current gross asset value of $31,713,632 million on behalf of 1 account. (Div. Ex. 8 – pp. 24.)

- In Item 5 that it had regulatory assets under management of $31,713,632 million on behalf of 1 account. (Div. Ex. 8 – pp. 15.)

504. The two clients listed in Item 9(A)(2) in the September 24, 2012, September 27, 2012, February 26, 2013 and April 1, 2013 Form ADV and Form ADV amendments were EACP and Gary Rosenbach.

345:25 **Q And what does that No. 2 relate to?**
346:1 A The two clients of the investment manager at
346:2 that time were Gary Rosenbach and Eden Arc Capital
346:3 Partners.
346:4 **Q And at that time, was Gary Rosenbach also a**
346:5 **fund investor?**
346:6 A Yes, he was.

346:7 **Q So you were executing this strategy**
346:8 **separately with Mr. Rosenbach, but then he was also a**
346:9 **limited partner in Eden Arc Capital Partners; is that**
346:10 **right?**
346:11 A Yes. We had some legacy joint accounts that
346:12 were still being wound down. We weren't making any
346:13 new investments once the fund started, because we
346:14 didn't want to conflict.

505. The one client listed in Item 9(A)(2) in the March 31, 2014, May 16, 2014, March 31, 2015, December 30, 2015 and January 4, 2016 Amendments to EACM's Form ADV represents EACP. (Div. Exs. 5-8, 13.) See also:

353:5 **Q And total number of accounts is now one; is**
353:6 **that correct?**
353:7 A Yes.
353:8 **Q And that's because you were no longer**
353:9 **advising Mr. Rosenbach separately; is that right?**
353:10 A That's correct.

506. On Forms ADV and Form ADV amendments filed between February 6, 2013 and January 4, 2016, EACM reported in Item 2 that it was a mid-sized advisory firm that has regulatory assets under management of $25 million or more but not less than $100 million and either (a) not required to be registered as an adviser with the state securities authority of the state where it maintains its principal office and place of business, or (b) not subject to examination by the state securities authority of the state where it maintains its principal office and place of business. (Div. Exs. 3 – p. 6; 4 – p. 6; 5 – p. 6; 6 – p. 6; 7 – p. 7; 8 – p. 7; 13 – p. 6.)

507. The regulatory assets under management that EACM reported in its Forms ADV and Form ADV amendments included the gross value of the securities that are in the joint accounts, an amount which included securities purchased on margin.

348:9 **Q Now, the number that you have for regulatory**
348:10 **assets under management, that includes the margin in**
348:11 **the broker-dealer accounts; is that right?**
348:12 A It includes the gross value of the
348:13 securities that are in the joint accounts. Because
348:14 under -- and I was being advised by lawyers on this
348:15 form. But there is a sort of interesting instruction
348:16 on how you're supposed to calculate regulatory assets
348:17 under management.
348:18 And you're supposed to include any accounts
348:19 that the investment advisor has individually. So the
348:20 joint accounts, while they weren't owned by the fund,

348:21 they were included in the definition of "Regulatory
348:22 assets under management" because of the way the
348:23 instructions say to calculate it.

355:1 **Q So at that point you were including the**
355:2 **margin balances; is that right?**
355:3 A It appears so.

358:5 **Q And the $44 million represents the amount of**
358:6 **money and leverage in the joint tenant accounts; is**
358:7 **that right?**
358:8 A Yes.

508. Each Form ADV and Form ADV amendment identified Lathen as Managing Member and Chief Compliance Officer of EACM. (Div. Exs. 1-8, 10-13.)

509. EACM's Form ADV Part 2 Brochure dated September 2012 provides the following regarding custody: "Clients receive monthly statements from the broker dealer, bank or other qualified custodian that holds and maintains client's investment assets. In addition, to insure compliance with Rule 206(4)-2 under the Advisers Act, audited financial statements of the Fund are delivered to clients by the Fund's auditors within 120 days of the fiscal year end. The Fund is audited annually by an independent certified public accounting firm which is registered with, and subject to regular inspection by, the Public Companies Accounting Oversight Board. Financial statements of the Fund are prepared in accordance with U.S. Generally Accepted Accounting Principles ("GAAP"). The reports are in written form and clients should carefully review these statements." (Div. Ex. 2a – p. 11.)

510. EACM's Form ADV Part 2 Brochure dated March 2013 provides the following regarding custody: "Clients receive monthly statements from the broker dealer, bank or other qualified custodian that holds and maintains client's investment assets. In addition, to insure compliance with Rule 206(4)-2 under the Advisers Act, audited financial statements of the Fund are delivered to clients by the Fund's auditors within 120 days of the fiscal year end. The Fund is audited annually by an independent certified public accounting firm which is registered with, and subject to regular inspection by, the Public Companies Accounting Oversight Board. Financial statements of the Fund are prepared in accordance with U.S. Generally Accepted Accounting Principles ("GAAP"). The reports are in written form and clients should carefully review these statements." (Div. Ex. 4a – p. 11.)

511. EACM's Form ADV Part 2 Brochure dated March 2014 provides the following regarding custody: "The Adviser is deemed to have custody of client assets since it or related parties serve as the General Partner or in a similar capacity to the funds and as such has the authority to obtain possession of such funds'

securities or other assets. Physical custody of the clients' assets is provided by the custodians of the funds and client accounts. Clients receive monthly statements from the broker dealer, bank or other qualified custodian that holds and maintains client's investment assets. In addition, to insure compliance with Rule 206(4)-2 under the Advisers Act, audited financial statements of the Fund are delivered to clients by the Fund's auditors within 120 days of the fiscal year end. The Fund is audited annually by an independent certified public accounting firm which is registered with, and subject to regular inspection by, the Public Companies Account Oversight Board. Financial Statements of the Fund are prepared in accordance with U.S. Generally Accepted Accounting Principles ("GAAP"). The reports are in written form and clients should carefully review these statements. We urge all of our clients to carefully review and compare such custodial statements to any account statements that they may receive from us." (Div. Ex. 5a – p. 10.)

512. EACM's Form ADV Part 2 Brochure dated March 2015 provides the following regarding custody: "The Adviser is deemed to have custody of client assets since it or related parties serve as the General Partner or in a similar capacity to the funds and as such has the authority to obtain possession of such funds' securities or other assets. Physical custody of the clients' assets is provided by the custodians of the funds and client accounts. Clients receive monthly statements from the broker dealer, bank or other qualified custodian that holds and maintains client's investment assets. In addition, to insure compliance with Rule 206(4)-2 under the Advisers Act, audited financial statements of the Fund are delivered to clients by the Fund's auditors within 120 days of the fiscal year end. The Fund is audited annually by an independent certified public accounting firm which is registered with, and subject to regular inspection by, the Public Companies Account Oversight Board. Financial Statements of the Fund are prepared in accordance with U.S. Generally Accepted Accounting Principles ("GAAP"). The reports are in written form and clients should carefully review these statements. We urge all of our clients to carefully review and compare such custodial statements to any account statements that they may receive from us." (Div. Ex. 7a – p. 10.)

513. EACM's Form ADV Part 2 Brochure dated December 30, 2015 provides the following regarding custody: "The Adviser is deemed to have custody of client assets since it or related parties serve as the General Partner or in a similar capacity to the funds and as such has the authority to obtain possession of such funds' securities or other assets. Physical custody of the clients' assets is provided by the custodians of the funds and client accounts. Clients receive monthly statements from the broker dealer, bank or other qualified custodian that holds and maintains client's investment assets. In addition, to insure compliance with Rule 206(4)-2 under the Advisers Act, audited financial statements of the Fund are delivered to clients by the Fund's auditors within 120 days of the fiscal year end. The Fund is audited annually by an independent certified public accounting firm which is registered with, and subject to regular inspection by,

the Public Companies Account Oversight Board. Financial Statements of the Fund are prepared in accordance with U.S. Generally Accepted Accounting Principles ("GAAP"). The reports are in written form and clients should carefully review these statements. We urge all of our clients to carefully review and compare such custodial statements to any account statements that they may receive from us." (Div. Ex. 8a – p. 10.)

514. On April 24, 2015, Lathen represented to his auditor:

- There are no material holdings of securities or investments not readily marketable owned by the Fund . . .
- At December 31, 2014, the Fund had investments in securities in aggregate amount of $27,811,577 . . .
- The following list includes all bank/brokerage accounts . . . maintained by the Fund during the period being audited . . . CL King & Associates . . . First Southwest Company . . . Wedbush Securities . . . These [trading] records, once approved, were submitted to our external fund administrator for posting in the books and records of the Fund.

(Div. Ex. 106 – p. 5 para. 16, 17a; p. 6 para. 23.)

515. EACM's March 2013 Compliance Policies and Procedures, signed by Lathen on April 1, 2013, stated:

- Eden Arc Capital Management, LLC ("Eden Arc" or the "Adviser") was formed in August 2010. Eden Arc currently provides investment advisory services to a single fund, Eden Arc Capital Partners (the "Fund"), a Delaware limited partnership which commenced investment activities in May 2011.
- The CCO [Donald Lathen] is responsible for the operation of the policies and procedures contained in this Compliance Manual. The CCO has responsibility for all compliance matters . . . including . . . design and implementation of compliance systems, policies and procedures. . . . Training and compliance awareness by [EACM] and its Access Persons, including as to applicable regulatory requirements and associated Eden Arc policies and procedures. . . . carrying out interim and annual compliance reviews and tests of [EACM]. . . .
- The Adviser has custody of Fund assets and the Fund is audited annually as required under Rule 206(4)-2.
- Eden Arc will not take or maintain physical custody of any Fund assets, and will conduct all business operations in such a way that all Fund cash and investments will be preserved in the safekeeping of independent 'qualified custodians.'

- Eden Arc will maintain Fund assets with a qualified custodian in a separate account for each client under that Fund's name, or in accounts that contain only Fund assets, under the Fund's name or Eden Arc's name as agent or trustee for the Fund. The CFO [Lathen] is responsible for causing Fund assets to be held with qualified custodians . . . .

- Rule 206(4)-2 under the Act defines 'custody' as holding, directly or indirectly, funds or securities of the Fund (or any individual investor), or having any authority to obtain possession of them. Custody includes . . . [a]ny arrangement (including a general power of attorney) under which an adviser is authorized or permitted to withdraw funds or securities of the Fund maintained with a custodian upon its instruction to the custodian . . . Under subparagraph (d)(2)(iii) of Rule 206(4)-2 under the Act, the general partner of a limited partnership . . . is deemed to have 'custody' under the Act of the property of the limited partnership or limited liability company. (Div. Ex. 177a – pp. 3, 5, 11, 12, 13.)

516. Lathen signed a "Form of Acknowledgement of Provisions of Compliance Manual," which stated that "The undersigned individual acknowledges that he/she understands the policies and procedures contained in this Compliance Manual; and [t]hat he/she agrees to abide by these policies and procedures, including any future amendments." (Div. Ex. 177a – p. 39.)

517. EACM's March 2013 Compliance Policies and Procedures stated Lathen will have general oversight "over the compliance activities of [EACM], including the implementation of [EACM's] Compliance Policies and Procedures." (Div. Ex. 177a – p. 4.)

518. The EACM's March 2013 Compliance Policies and Procedures stated: "Under the Act, Eden Arc, as a registered investment adviser, has a fiduciary duty to its client, the Fund. The Act requires Eden Arc to implement a set of internal controls and policies and procedures and supervise the activities of persons who act on its behalf to prevent violations of federal and state securities laws. Eden Arc's duty to supervise applies to all Access Persons. The SEC expects advisers, and their supervisors, to respond vigorously when wrongdoing or possible indications of wrongdoing are identified." (Div. Ex. 177a – p. 4.)

519. EACP's 2011 and 2012 Audited Financial Statements stated: "[EACP] establishes joint accounts with terminally-ill individuals ("Participants") and individuals acting as representatives of [EACP] ("Nominee"). The Partnership provides funds to the joint accounts under a Nominee agreement to make investments in securities which contain a 'survivor's option' or similar feature." (Div. Exs. 194 – p. 8, 195 – p. 9.)

520. EACP's 2011, 2012, and 2014 Audited Financial Statements stated: "Fair value is defined as the price that [EACP] would receive under the Nominee agreements upon selling an investment held in the joint accounts in an orderly

transaction to an independent buyer in the principal or most advantageous market for the investment." (Div. Exs. 194 – p. 8, 195 – p. 9, 197 – p. 8.)

521. EACP's 2013 Audited Financial Statements stated: "Fair value is defined as the price that would be received upon selling an investment held in the joint accounts in an orderly transaction to an independent buyer in the principal or most advantageous market for the investment." (Div. Ex. 196 – p. 8.)

522. EACP's 2011 and 2012 Audited Financial Statements listed as "Due from Nominee Accounts at Fair Value" bonds and CDs held in joint accounts under the names of Mr. Lathen and Participants. (Div. Exs. 194 – p. 10, 195 – p. 12.)

523. EACP's 2013 and 2014 Audited Financial Statements stated:

- The managing member ("Managing Member") of [EACP's] general partner establishes joint accounts (the "Joint Accounts") with terminally ill individuals ("Participants"). [EACP] provides funding to the Joint Accounts under agreement (the "Agreements") it has executed with the Managing Member and, on certain of the Joint Accounts, agreements it has executed with the Managing Member and an additional joint owner ("Nominee") acting on behalf of [EACP].

- Under the Agreements it has executed with the Managing Member and Nominee, [EACP] is entitled to receive all of the profits and/or losses from the Joint Accounts.

- The trading activity within the Joint Accounts is the responsibility of [EACA].

(Div. Exs. 196 – p. 8, 197 – p. 8.)

524. EACP's 2013 and 2014 Audited Financial Statements listed as "Due from Joint Accounts at Fair Value" bonds and CDs held in joint accounts under the names of Lathen and Participants. (Div. Exs. 196 – p. 11-12, 197 – p. 11-12.)

525. Lathen drafted a Due Diligence Questionnaire for investors regarding EACP and EACM in or about July 1, 2013 ("July 2013 DDQ"). (Div. Ex. 238.)

526. The July 2013 DDQ stated:

- The Fund invests in corporate bonds and brokered certificates of deposits...The Fund invests in securities which contain a survivor's option...The Fund invests in these securities through a series of joint brokerage accounts established with terminally ill individuals...

- The Investment Manager utilizes a two-pronged approach to valuing the Fund's investments. For security positions which reside in accounts where the joint owner is currently deceased, the Investment Manager generally

values those positions at the higher of par or market value. For security positions which reside in accounts where the joint owner is alive, the Investment Manager values those positions at market value...

- Assets are held in a series of [JTWROS] . . . accounts (the "Joint Accounts") established between Mr. Lathen and terminally ill individuals . . . Mr. Lathen has entered into certain arrangements with the Fund to borrow money from the Fund to invest into the Joint Accounts and to assign the profits and losses from the Joint Accounts to the Fund.

- The Principal's capital account balance in the Fund represents a significant portion of his liquid net worth.

- Eden Arc's strategy is to purchase fixed income instruments that contain a 'survivor's option' . . . . Eden Arc purchases these instruments in JTWROS accounts with terminally ill individuals ("Participants"). The Participants who open the accounts in partnership with Eden Arc receive compensation, and do not bear any expenses or liabilities, including any costs associated with the purchase of securities in their accounts.

- The Fund is invested in several joint accounts at any given time.

- The Fund invests in relatively liquid instruments . . .
(Div. Ex. 238 – pp. 7, 9, 11, 13.)

527. The July 2013 DDQ listed CL King as EACP's prime broker since November 2011. (Div. Ex. 238 – p. 7.)

528. In the July 2013 DDQ, in response to a question about whether the prime broker, custodian, or auditor changed within the past three years, Lathen's response did not mention SecureVest or JPMorgan. (Div. Ex. 238 – p. 8.)

529. On February 13, 2015, Lathen responded to a January 15, 2015 letter from examination staff of the U.S. Securities and Exchange Commission ("Exam Staff Letter"). (SFOF ¶ 19.)

530. Lathen advised the exam staff that EACM was undergoing an annual compliance review and he would forward a summary of the results when it was completed. (Div. Ex. 309 – p. 2.)

531. Lathen did not discuss EACM's custody arrangement under the IMA. (Div. Ex. 309 – p. 3.)

532. Lathen advised the exam staff that EACM was going to conduct a review of its Compliance Manual, and once it was updated, he would forward a revised copy. (Div. Ex. 309 – p. 3.)

533. Lathen stated to exam staff: "[T]he Fund does not directly own these [JTWROS] accounts or the securities in them." (Div. Ex. 309 – p. 3.)

534. Lathen advised the exam staff that "regardless of whether the Custody Rule is deemed applicable to the JTWROS Accounts, EACM is substantively complying with it in any event." (Div. Ex. 309 – p. 3.)

535. Lathen advised the exam staff that EACM would implement control procedures related to valuation and would forward the procedures once completed. (Div. Ex. 309 – p. 5.)

536. Lathen advised the exam staff that EACM would follow the provisions of the LPA with regard to the calculation and payment of management fees. (Div. Ex. 309 – p. 6.)

537. When asked by SEC exam staff for the "[n]ames of securities held in all client portfolios, aggregate position, totals for all instruments as of September 30, 2014," Lathen listed all of the bonds and CDs held in the JTWROS accounts. (Div. Ex. 477 – pp. 4, 6-22.)

377:21 **Q I'm sorry. Sometime in late 2014, the SEC**
377:22 **conducted an examination of Eden Arc Capital**
377:23 **Management; is that correct?**
377:24 A Yes, that's right.
377:25 **Q And there were some questions that were**
378:1 **posed to you by exam staff; is that right?**
378:2 A Yes.
378:3 **Q And if you could take a look at 477 for**
378:4 **identification, and if you could tell us whether these**
378:5 **were the questions posed to you and your answers.**
378:6 A Yes.

378:13 **Q And if you could take a look at No. 23,**
378:14 **please -- question 23. And what's the question under**
378:15 **"Portfolio management"?**
378:16 A "Names of securities held in all client
378:17 portfolios, aggregate position, totals for all
378:18 instruments as of September 30, 2014.
378:19 "This record should include the security
378:20 name, name of each client holding an interest, the
378:21 amount owned by each client, the aggregate number of
378:22 shares of principal and/or notional amount held, and
378:23 total market value of the position. The preferred
378:24 format for this information is in Excel."
378:25 **Q And your answer is "See attached," correct?**
379:1 A Yes.
379:2 **Q And if we scroll down, we can see what you**

379:3 **attached for No. 23; is that right? Is that what you**
379:4 **attached for No. 23?**
379:5 A Yes.

538. Lathen did not sign a draft engagement letter with Mission Critical, dated November 20, 2012, that contained an "Exhibit A" listing a suite of services offered by Mission Critical. (Div. Ex. 2000 – pp. 5-6.)

539. Lathen signed an engagement letter with Mission Critical on October 2, 2013 which provided that "Mission Critical is not a law firm and is not providing legal advice or opinions" and that Lathen would pay for services on an hourly and as needed basis at $250/hour. (Div. Ex. 455 – pp. 1, 4.) See also:

3500:21 **Q And you hired Mission Critical in October of**
3500:22 **2013; is that right?**
3500:23 A Sounds about right.

540. Lathen understood that Mission Critical was not offering legal advice. (Div. Ex. 455 – p.1.)

3499:11 **Q Mission Critical told you they were not**
3499:12 **offering legal advice; is that right?**
3499:13 A That's correct.
3499:14 MS. WEINSTOCK: Can you pull up Division
3499:15 Exhibit 455, please.
3499:16 **Q It said that in there, retainer letter; is that**
3499:17 **right? If you can take a look at 3C on the bottom, it**
3499:18 **says, "Client further understands and agrees that Mission**
3499:19 **Critical is not a law firm and is not providing legal**
3499:20 **advice or opinions;" is that correct, Mr. Lathen?**
3499:21 A Yes.

541. Mission Critical's engagement letter specified that they were working "under the direction of" EACM, and that EACM "shall be responsible for establishing and maintaining an adequate and effective internal control system, compliance program, record keeping, management, decision-making and other management and compliance functions." (Div. Ex. 455 – p. 1.)

542. Mission Critical identified the fact that Respondents' attorney had retired as a compliance risk. (Div. Ex. 438 – p. 31.) See also:

3499:22 MS. WEINSTOCK: Mr. Chan, if you could pull up
3499:23 Div. Ex. 438, please. If you could take us to
3499:24 p. 31, please.
3499:25 **Q If you look at the -- this is the risk analysis**
3500:1 **that Mission Critical prepared; is that correct? The**
3500:2 **risk assessment and GAAP analysis?**

3500:3 A Yes.
3500:4 **Q And the middle point says under GAAP analysis**
3500:5 **and/or comments, "Eden Arc's attorney has retired. And**
3500:6 **at this point, the firm has not identified a**
3500:7 **replacement." Is that what it says there?**
3500:8 A Yes.
3500:9 **Q And it identifies the compliance risk as Eden**
3500:10 **Arc fails to retain appropriate third-parties to assist**
3500:11 **with required tasks such as compliance, consultants and**
3500:12 **attorneys. That's the risk that's identified there; is**
3500:13 **that right?**
3500:14 A That's what it says.
3500:15 **Q And the attorney that had retired was Eric**
3500:16 **Roper; is that correct?**
3500:17 A That's right.
3500:18 **Q Eric Roper's firm went out of business in the**
3500:19 **fall of 2012; is that right?**
3500:20 A Sounds about right.

543. On March 12, 2014, Mission Critical sent Lathen the definition of regulatory assets under management. (Div. Ex. 491.)

544. On October 3, 2014, Mission Critical emailed Lathen the text of the Custody Rule. (Div. Ex. 434 – p. 1-7.)

545. On January 11, 2015, Mission Critical sent Lathen a Draft Risk Assessment and Gap Analysis which noted that it was a "High" risk that the "current account arrangements are not in compliance with [EACM's] procedure because they are in the JT accounts in Jay's and participates [sic] names without the fund's name" and that "Eden Arc did not conduct any annually [sic] reviews as required by 206(4)-7 since its initial SEC registration on 10/31/12." (Div. Ex. 438 – pp. 13, 33.) The Custody Rule violations continued even after identified by both SEC Exam Staff and Respondents' own compliance consultant. (Div. Exs. 124-129.)

546. On February 11, 2015, Mission Critical sent Lathen excerpts of an SEC rule related to policies and procedures relating to custody. (Div. Ex. 441 – p. 1.)

547. On April 13, 2015, Mission Critical sent Lathen a compliance review memo stating "Eden Arc is deemed to have custody of the funds and securities of the Fund since a related party serves as the general partner for the Fund. This custody is reflected in Eden Arc's ADV 1A Item 9 and in the Fund's offering documents." (Div. Ex. 446 – p. 3.)

548. Mission Critical provided services to EACM for the following hours as set forth in the chart below:

Month	Hours Provided	Exhibits
October 2013	2.5	(Div. Ex. 422 – p. 3.)
November 2013	None	n/a
December 2013	2.5	(Div. Ex. 423 – p. 2.)
January 2014	2	(Div. Exs. 424 – p. 2, 425 – p. 3, 427 – p. 4.)
February 2014	2.5	(Div. Exs. 425 – p. 4, 427 – p. 5.)
March 2014	6.25	(Div. Exs. 427 – p. 3, 428 – p. 3.)
April 2014	2	(Div. Ex. 428 – p. 4.)
May 2014	3	(Div. Exs. 429 – p. 2, 430 – p. 4, 431 – p. 4.)
June 2014	2	(Div. Exs. 430 – p. 3, 431 – p. 3.)
July 2014	None	n/a
August 2014	2	(Div. Exs. 432 – p. 2, 433 – p. 3, 436 – p. 5.)
September 2014	2.5	(Div. Exs. 433 – p. 4, 436 – p. 4.)
October 2014	18	(Div. Ex. 436 – p. 6.)
November 2014	22.5	(Div. Exs. 437 – p. 3, 439 – p. 4.)
December 2014	13.5	(Div. Ex. 439 – p. 3.)
January 2015	12.5	(Div. Exs. 440 – p. 2, 443 – p. 3.)
February 2015	16	(Div. Ex. 443 – p. 4.)
March 2015	13	(Div. Exs. 447 – p. 2, 448 – p. 4, 449 – p. 5.)

Month	Hours Provided	Exhibits
April 2015	25.5	(Div. Exs. 448 – p. 3, 449 – p. 3.)
May 2015	0.68	(Div. Ex. 449 – p. 4.)
June 2015	None	n/a
July 2015	None	n/a
August 2015	None	n/a
September 2015	6.5	(Div. Exs. 450 – p. 2, 453 – p. 3.)
October 2015	0.75	(Div. Exs. 452 – p. 2, 453 – p. 5.)
November 2015	4.25	(Div. Ex. 453 – p. 4.)
December 2015	6	(Div. Exs. 453a – p. 2, 454 – p. 4.)
January 2016	2.25	(Div. Ex. 454 – p. 3.)
February 2016	2	(Div. Ex. 454 – p. 5.)

V. Respondents Should Be Subject to a Bar and Penalties

Lathen's Testimony Was At Times Evasive And Incredible

549. Lathen resisted testifying to the reason Prospect was refusing to pay his redemption requests.

267:25 **Q Well, when they discovered -- when they**
267:1 **finally were provided with the participant agreement,**
267:2 **they said they didn't want to pay, because they didn't**
267:3 **think there was ownership on behalf of the**
267:4 **participants; is that right?**
267:5 A Well, Prospect was not the party to determine
267:6 validity under the governing documents.
267:7 **Q I'm not asking that. I'm just asking if**
267:8 **Prospect was refusing to pay for that reason.**
267:9 A Prospect refused to pay in January of 2014
267:10 when they didn't have the participant agreement. So
267:11 I'm not sure how they could have concluded that the

267:12 owner didn't have an interest in the account at that
267:13 time when they refused to pay.
267:14 **Q Initially, they didn't have the participant**
267:15 **agreement, correct?**
267:16 A That's correct. They initially --
267:17 **Q And they wanted it, correct?**
267:18 A They did not ask for the participant
267:19 agreement.
267:20 **Q They were refusing to pay; is that right?**
267:21 A They were refusing to pay.
267:22 And we offered to U.S. Bank to give them
267:23 whatever information they wanted. U.S. Bank had
267:24 already approved the claims.
267:25 **Q Mr. Lathen --**
268:1 A Well, you're looking for context. I'm trying
268:2 to give you context.
268:3 **Q I'm not asking you for context.**
268:4 **I'm asking you if Prospect was taking the**
268:5 **position at any point that they didn't want to pay**
268:6 **because they didn't think that you or the participants**
268:7 **had beneficial ownership.**
268:8 **Did they take the position at some point?**
268:9 A They eventually took that position
268:10 approximately eight months after they refused to pay.
268:11 But it wasn't their decision to even make.

550. Lathen testified that the "strict governance protections and funds flow protocols" described in the PPM were not necessary because such restrictions were in the Participant Agreements. He claimed that the strict governance protections and funds flow protocols he referred to in the PPM were the Participant Agreements.

79:22 **Q Now, you say here in the second paragraph,**
79:23 **"In addition, strict governance protections and funds**
79:24 **flow protocols will be placed on all joint accounts to**
79:25 **protect the accounts from unauthorized trading or funds**
80:1 **transfers."**
80:2 **Is that something that you did?**
80:3 A We did -- we did have -- in our arrangements
80:4 with the Participants, there were restrictions on
80:5 whether they could withdraw funds from the account
80:6 without my permission. And I think that's what that is
80:7 referring to.

551. Lathen testified that he told Peggy Farrell he was still submitting redemptions under the IMA, but then acknowledged he could not remember the conversation specifically.

3567:20 **Q And despite that advice, you continued to**
3567:21 **redeem under the IMA; is that right?**
3567:22 A As I said, I believe we still had valid joint
3567:23 tenancies under the IMA. And we continued to make
3567:24 redemptions with respect to the joint tenancies that were
3567:25 governed by the IMA. And Ms. Farrell was aware of that
3568:1 and did not say stop.
3568:2 **Q When did you tell her that you were still**
3568:3 **redeeming under the IMA?**
3568:4 A It would have likely been shortly after this
3568:5 conversation. I don't recall exactly.
3568:6 **Q When you say "it likely would have been," do**
3568:7 **you know what it was?**
3568:8 A No, I don't know.
3568:9 **Q You're saying it was an oral conversation or**
3568:10 **this was in writing?**
3568:11 A It was likely an oral conversation.
3568:12 **Q So there's no documentation of that, right?**
3568:13 A No.
3568:14 **Q Your testimony is you called her and said,**
3568:15 **"Just want you to know, I'm still redeeming under the**
3568:16 **IMA;" is that your testimony?**
3568:17 A I don't recall it being exactly in those terms.
3568:18 But I likely told her that we, you know, continued to
3568:19 have a number of joint accounts that were governed by the
3568:20 IMA.
3568:21 **Q And when you say you likely told her that,**
3568:22 **you're not sure of that; is that right?**
3568:23 A I'm not sure of that. But I think I likely
3568:24 would have because she mentioned that -- her assumption
3568:25 was it probably didn't have any. So I would have wanted
3569:1 to correct that assumption. And ultimately, we did not
3569:2 remove the IMA language from the profit sharing agreement
3569:3 because those accounts did continue to be governed by the
3569:4 IMA.

552. Lathen testified that Mission Critical or Gersten Savage assisted with EACM's Form ADV dated February 26, 2013 (Div. Ex. 3), even though Gersten Savage went out of business in the fall of 2012 and Respondents did not hire Mission Critical until October 2013.

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.

553. When confronted with the fact that neither Gersten Savage nor Mission Critical was retained when Lathen filed his Forms ADV in February and April of 2013 Lathen then claimed he did not know how to use the Form ADV system, and claimed it was "quite possible" the fund's administrator, Cassandra Joseph, assisted in filing the Form ADV.

3509:10 **Q Let's take a look at Division Exhibit 4.**
3509:11 **This is another ADV that you filed without the**
3509:12 **assistance of an attorney; is that right?**
3509:13 A You know, I will say this. I didn't even

3509:14 really know how to use the Form ADV system to go in and
3509:15 actually submit this thing. So whether it was Gersten
3509:16 or -- there was a time period on compliance matters that
3509:17 we engaged the services of someone that worked for our
3509:18 administrator, a woman by the name of Cassandra Joseph
3509:19 around the time that we put our compliance manual in
3509:20 place, which I recall was sometime in early 2013, that we
3509:21 put the compliance manual in place.
3509:22 And so it's quite possible that she also
3509:23 assisted in filing the Form ADV. The reason that I feel
3509:24 fairly sure I didn't file this myself is I didn't even --
3509:25 I couldn't even remember what my log-in information was
3510:1 on this Web site. And I wouldn't have been able to do
3510:2 this on my own. So I feel pretty certain that someone
3510:3 filed this on my behalf.

554. Respondents did not call Cassondra Joseph as a witness at the hearing.

555. Despite initially claiming that he did not "even really know how to use the Form ADV System to go in and actually submit" the Form ADV, and that he "couldn't even remember what [his] log-in information was," Lathen later remembered putting his "cursor on the little button."

3529:2 JUDGE PATIL: I just don't know what the red
3529:3 box and the lack of checks mean. That's what I'm saying.
3529:4 Does the red box mean that it is checked yes or does the
3529:5 red box mean that it's not checked? Because the witness
3529:6 might have the same problem I have.
3529:7 MS. WEINSTOCK: I understand.
3529:8 THE WITNESS: I'm thoroughly confused. I'm
3529:9 very confused we would have submitted anything that looks
3529:10 like this. My recollection is when we submitted
3529:11 something, we actually -- you know, you actually put your
3529:12 cursor on the little button. And it fills the dot. And
3529:13 I also don't remember seeing, you know, redlines under
3529:14 things that we filed. But maybe when it gets filed in
3529:15 your system, it ends up looking differently than it
3529:16 looked when we printed it out before we filed it.

556. When confronted with the fact that he had not sought Bruce Hood's advice regarding continuing to treat the income from the JTWROS accounts as capital gains under the loan arrangement, Lathen suddenly claimed he may have received tax advice from Citrin Cooperman, the Fund's auditor, but he could not remember the advice specifically, and had nothing in writing from them. (See Div. Ex. 238 p. – 4 (identifying the Fund's auditor as Citrin Cooperman).)

3611:19 **Q Now, prior to this e-mail, you had not gone**
3611:20 **back to Bruce Hood to ask him about the loan structure;**
3611:21 **is that correct?**
3611:22 A I don't recall what conversations I may have
3611:23 had with him in -- contemporaneous with the January 2013
3611:24 structure that Hinckley came up with. So it's possible I
3611:25 didn't speak to him about tax advice in connection with
3612:1 that structure.
3612:2 **Q Fair to say you did not get new tax advice**
3612:3 **after you had changed to the discretionary line agreement**
3612:4 **in January of 2013; is that right?**
3612:5 A Yeah. I don't know if that's quite true. I do
3612:6 recall having conversations with Citrin Cooperman, I
3612:7 believe, around sort of late 2012 when we were
3612:8 contemplating the change in the structure. And I believe
3612:9 I may have received some tax advice relating to the new
3612:10 structure. I don't have perfect clarity. But I don't
3612:11 believe we spoke to Bruce Hood about it. That much, I
3612:12 will concede.

3616:10 **Q But you don't remember the advice from Citrin**
3616:11 **Cooperman specifically, right?**
3616:12 A I don't specifically remember.
3616:13 **Q And you didn't get anything in writing from**
3616:14 **Citrin Cooperman?**
3616:15 A No, not that I recall.

See also Div. Ex. 107 – p. 11 (prospective investor Benchmark email dated August 22, 2013, noting that the tax memo on file was written while Eden Arc was using the nominee relationship, that the attorney relied on the nominee relationship for establishing "ownership" to the Fund, and asking if new guidance had been sought out.)

557. Respondents did not call anyone from Citrin Cooperman as a witness at the hearing.

558. In an email to Lathen, one of the questions prospective investor Benchmark asked was "[i]s it legal for nominees of a corporation or partnership to enter a JTWROS agreement?" (Div. Ex. 107 – p. 5.)

559. In connection with Benchmark's inquiry, Lathen set up a call with Benchmark and Hinckley Allen.

3621:11 **Q You could stop there.**
3621:12 **In connection with these inquiries, you set up**
3621:13 **a call with benchmark and Hinckley, Allen Snyder; is that**
3621:14 **right?**

3621:15 A Yes.

560. Lathen testified that no prospective investor ever expressed concern about the legality of his strategy, but also acknowledged that (1) Benchmark had a conference call with Hinckley Allen, and (2) that Benchmark "backed away" to see how the Staples case played out.

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.

561. Even though Lathen acknowledged being deeply in debt, he attempted to claim that a withdrawal from EACP in the amount of $45,000 on February 28, 2015, was his capital account balance from the prior quarter and that he waited two months to withdraw it.

3660:8 **Q Let's take a look at March 2015. Let's take a**
3660:9 **look at the third page. And there's a wire in for Eden**
3660:10 **Arc Capital Partners from Eden Arc Capital Partners in**
3660:11 **the amount of $45,000. Is that your management fee?**
3660:12 A I don't know.
3660:13 **Q Well, it came from Eden Arc Capital Partners;**
3660:14 **is that right?**
3660:15 A Right. But there's -- I received compensation

from Eden Arc Capital Partners in the form of my share of profits, as well as the management fee. So I'm not sure which one this is.
Q So this could be your management fee or your incentive fee, correct?
A It could be, that's right. I think in a prior version that we looked at yesterday, it actually indicated management fee. That was written on the wire here. It doesn't seem to be indicated.
Q But either way, you're taking your fee before the quarter is over; is that right?
A You know, I don't recall what my capital account balance was at the time. But if I had a capital account balance in the fund as of February 28th, then I wouldn't be taking it early. I would be taking it, you know, because it was there.
Q When did the quarter end?
A The quarter ends on March 31st. But what I'm trying to explain is that the -- with respect to a withdrawal from my capital account at the fund -- and, again, I'm not saying that the $45,000 came from my capital account because I can't tell from looking at this. But to the extent it came from the capital account in the fund and to the extent the balance in the capital account, there was a capital account balance, then I was just taking it from the capital account.
Q So you're saying this could have been from a different quarter; is that what you're saying?
A No. I'm saying it could have been from my capital account. The withdrawals from the capital account can be done at any time. They don't have to be done at the beginning of a quarter.
JUDGE PATIL: Is this account still open?
THE WITNESS: This Bank of America account, no, it's no longer opened.
Q You had testified that your management fees and your incentive fees were not enough for you to live on; is that right?
A Yes. I have testified to that.
Q And, therefore, you could not maintain a capital account balance; is that right?
A No. I think actually what I said -- if you're referring to the e-mail exchange with Gary Rosenbach -- I had said that my management fee was not enough to live on. I don't believe I said that my management and incentive fee was not enough to live on.

3662:12 **Q So is it your testimony that you believe**
3662:13 **your -- you let your capital account balance build up,**
3662:14 **and you took it on March 12th of 2015, and you were not**
3662:15 **taking it early; is that your testimony?**
3662:16 A I'm saying it's possible that the $45,000
3662:17 relates to a withdrawal from my capital account. And I
3662:18 don't recall whether it's related to the capital account
3662:19 or the management fee.
3662:20 **Q By March of 2015, you were deeply in debt; is**
3662:21 **that right?**
3662:22 A I don't know what you mean by deeply in debt.
3662:23 I had less debt than I have today. But, yes, I had debt.
3662:24 **Q Over a million dollars of debt, right?**
3662:25 A Yes.
3663:1 **Q And as a matter of course, you did not let your**
3663:2 **capital account balance build up -- correct -- because**
3663:3 **you needed the money, right?**
3663:4 A Yes. I think that's fair to say. What could
3663:5 be going on here is I think I indicated in my testimony
3663:6 yesterday that there were times that it took me a while
3663:7 to do the NAV for the fund. And it's possible that this
3663:8 45,000 is -- now that I've done the NAV for the fund, I'm
3663:9 taking a distribution from the capital account.
3663:10 **Q Which quarter are you talking about?**
3663:11 A Well, I'm not sure what NAV we had completed in
3663:12 March 12th of 2015. It could have been the December 31st
3663:13 NAV that was being calculated. And I'm now taking a
3663:14 withdrawal.
3663:15 **Q So you think that you waited two months to take**
3663:16 **your withdrawal; is that your testimony?**
3663:17 A It's possible.

562. **[REDACTED]**

563. Lathen altered his testimony at the hearing to suit his arguments. While both he and Galbraith initially testified that they had a fulsome call with FINRA in order to explain Respondents' business, Lathen later testified that he did not have the opportunity to fully explain.

[Galbraith]2922:13 **Q Okay. And did you actually speak with**
2922:14 **FINRA, or did Mr. Lathen speak with FINRA?**
2922:15 A We both did. It was by phone, but it was
2922:16 a conference call with multiple individuals from
2922:17 FINRA's Enforcement Department who were conducting
2922:18 the investigation, including a relatively senior
2922:19 regional enforcement person.
2922:20 And it was a pretty in-depth conversation.

2922:21 I don't remember exactly how long it went on, but
2922:22 certainly, you know, an hour or more.
2922:23 And in connection with that, there was a
2922:24 fulsome discussion of his business, the Participant
2922:25 agreements, et cetera, et cetera.
2923:1 We also provided some documents, including
2923:2 the Participant Agreement, to FINRA as a follow-on
2923:3 to that meeting.

[Lathen]3403:19 **Q So did either you or Mr. Galbraith explain**
3403:20 **what your business was to FINRA?**
3403:21 A Yes. We had a conference with them and
3403:22 discussed it in some depth.
3403:23 **Q Did you have an understanding of what**
3403:24 **FINRA is?**
3403:25 A Yes.
3488:6 **Q The conversation that you and Mr. Galbraith had**
3488:7 **with FINRA, that lasted about an hour and a half; is that**
3488:8 **right?**
3488:9 A Yes.

3486:23 **Q Then you were not able to convince FINRA of**
3486:24 **your position; is that correct?**
3486:25 A We were not even given an opportunity, really,
3487:1 to have substantive dialogue on that. They basically
3487:2 refused to engage and said that they regulate
3487:3 broker-dealers. They don't regulate us. They know
3487:4 everything they need to know, thank you very much.

Respondents Had Numerous Compliance Failures

564. **[REDACTED]**

565. Lathen violated the terms of his own LPA, and took management fees before NAV was calculated, because he needed the money.

The Staff's review revealed that EACM is not following the provisions of EACP's LPA with respect to its management fees. Specifically, the LPA states the following...with respect to management fees...

The Staff noted that the 2nd quarter 2014 management fee was paid on March 11, 2014, instead of April 1, 2014 and the 3rd quarter 2014 management fee was paid on May 29, 2014, instead of July 1, 2014. Furthermore, EACM collects the management fee before the NAV is finalized for the month...

It is the Staff's opinion that EACM is not in compliance with the provisions of the LPA with respect to management fees paid to EACM by EACP... (Div. Ex. 309 – pp. 5-6.)

566. Lathen acknowledged having taken his management fees before he was supposed to on two occasions. He said that it was "possible" he had done this on another occasion as well.

409:10 **Q So there were two instances where you took**
409:11 **your management fees before you were supposed to; is**
409:12 **that correct?**
409:13 A Yes, that's correct.
409:14 **Q And where it says "NAV," that refers to net**
409:15 **asset value; is that right?**
409:16 A Yes.
409:17 **Q And in addition to these two instances, you**
409:18 **also took management fees early in December of 2014 as**
409:19 **well, correct?**
409:20 A I may have. I don't know for certain, but
409:21 it's possible.

567. In a letter to SEC exam staff, EACM assured exam staff that it would "undertake[] to follow the provisions of the LPA with regard to the calculation and payment of management fees." (Div. Ex. 309 – p. 6).

568. **[REDACTED]**

569. **[REDACTED]**

570. **[REDACTED]**

571. **[REDACTED]**

572. **[REDACTED]**

573. SEC exam staff identified multiple compliance failures in their January 15, 2015 letter to Respondents, including a failure to conduct an annual compliance review, not having a compliance manual in place at the time of registration, and failure to maintain certain required reports. In addition, the exam staff told Lathen "EACM may not be able to avail itself of the audited financial statement exemption because Rule 206(4)-2(a)(1) requires client assets to be maintained in accounts under the client's name or the Adviser's name as agent to trustee. In addition to having custody of client assets through the powers described in EACP's offering materials, EACM's investment strategy entails EACP lending funds to you personally for you to invest in a joint account over which you have discretion, thereby giving you custody of client assets. Furthermore, it appears that EACM failed to implement adequate policies and procedures, as described

in Release 2968, regarding your individual access to custody of EACP's assets." (Div. Ex. 309.)

574. Although Lathen told SEC exam staff that he would update EACM's income statement and policies and procedures, and forward copies to exam staff, he failed to do so. (Div. Ex. 309 – p. 7.)

411:10 **Q And can you read your answer, please.**
411:11 A "To correct this matter, EACM will update
411:12 its income statement to reflect the expenses as
411:13 individual categories. EACM will undertake to
411:14 maintain cash receipts and cash disbursement journals,
411:15 a general ledger, trial balance, balance sheet and
411:16 income statements going forward.
411:17 "EACM will provide them to staff once the
411:18 documents include current data in approximately 60
411:19 days.
411:20 "In addition, EACM will update its policies
411:21 and procedures to provide for the EACM of such
411:22 records. We anticipate that the updates will be
411:23 concluded within the next 60 days. Once completed,
411:24 EACM will forward a copy to the staff."
411:25 **Q You never forwarded SEC exam staff the**
412:1 **copies that you said you would here; is that correct?**
412:2 A Yes, I don't believe we did.

575. Respondents did not put in place a compliance manual until April 2013. This compliance manual should have been in place at the time of registration.

393:20 **Q Now, where it says the compliance manual was**
393:21 **put in place in April of 2014, was it actually April**
393:22 **of 2013?**
393:23 A Yeah. I think that -- I think it should say
393:24 April 2013.
393:25 **Q And then -- but you think the October 2014**
394:1 **date is correct?**
394:2 A Yes. If 18 months is added to April 2013,
394:3 that would get you to October 2014.
394:4 **Q So you were aware that your compliance**
394:5 **manual was supposed to be put in place at the time of**
394:6 **registration, correct?**
394:7 A I think I -- I'm not sure when the
394:8 compliance manual was supposed to be in place. If it
394:9 was supposed to be in place at the time of
394:10 registration, it obviously wasn't in place, and so we
394:11 didn't comply with it.
394:12 So I'm -- I'm not sure -- I mean, when I

394:13 became aware of the fact that there was an obligation
394:14 to have it in place from the very beginning.

576. Lathen did not want SEC exam staff to know the compliance manual was not in place at the time of registration.

> The other point is whether we have a compliance review requirement for 2013. I understand the 18 month rule but the key question is the time period that must be covered by the review. The compliance manual was put in place in April 2014 which suggests that we had to do the review by October 2014. I'm not sure I want to call the April 2014 date to their attention if it causes them to say "aha, you should have had it in place at the time of registration." But if it doesn't hurt us then maybe we do mention it... (Div. Ex. 458 – p. 1.)

> See also:
> 394:15 **Q But either way, you didn't want exam staff**
> 394:16 **to know that you didn't have it in place at the time**
> 394:17 **of registration, correct?**
> 394:18 A That's fair to say.

577. Respondents did not timely complete their annual compliance review. (Div. Exs. 458 – p. 1; 945 – p. 2.)

Lathen and Robinson Made Additional Misrepresentations to Market Participants

578. When TD Ameritrade refused to add a terminally-ill individual to a Donald Lathen/Kathleen Lathen brokerage account, Lathen falsely claimed that TD Ameritrade's decision would "bring great emotional trauma" to the spouse of the deceased, even though the spouse stood to gain nothing more from the redemption. (Div. Ex. 496 – p. 3.) See also:

> 3478:7 **Q And you believe that TD Ameritrade's decision**
> 3478:8 **to not open the account would have brought great**
> 3478:9 **emotional trauma to Ms. Sczech Zaboroski; is that your**
> 3478:10 **testimony?**
> 3478:11 A That's what it says in the letter.
> 3478:12 **Q Is that true?**
> 3478:13 A Well, I think she probably would have felt, you
> 3478:14 know, upset on some level if, you know, she had caused me
> 3478:15 to lose $5,000. And I also think, you know, to the
> 3478:16 extent there was any doubt as to whether I was going to
> 3478:17 pay the money and I hadn't paid the money yet, is my
> 3478:18 recollection, then that might have brought her additional
> 3478:19 trauma.
>
> 3479:14 **Q So either way –**

3479:15 A It's sort of a moot point.
3479:16 **Q Right.**
3479:17 **Either way, their decision would not have**
3479:18 **brought great emotional trauma to Ms. Sczech Zaboroski,**
3479:19 **right?**
3479:20 A In terms of the financial aspect, no.

579. In 2010, in an effort to convince JPMorgan to keep his brokerage accounts open, Lathen, through his attorney David Robbins, promised to never open an account with JPMorgan again.

> "I added that if you had any idea that JPM was against such transactions, you never would have opened accounts there. I said that once these transactions are done, you will agree never to open an account with JPM again."
> (Div. Ex. 728 – p. 2.)

See also:
3448:21 **Q So you needed JPMC to keep certain**
3448:22 **accounts open, because the participants had died; is**
3448:23 **that right?**
3448:24 A Oh, now I see what you mean by "keep
3448:25 open."
3449:1 Yes, yes, we needed to keep the accounts
3449:2 open so that we could redeem the instruments.
3449:3 **Q And David promised to JPMC that you would**
3449:4 **agree never to open an account with JPM again if**
3449:5 **they processed these redemptions; is that right?**
3449:6 A He appears to have made that promise.
3449:7 **Q And he sent you this email, right?**
3449:8 A He did send me the email.

580. Despite his promise never to open an account with JPMorgan again, Lathen knowingly opening subsequent clearing accounts with JPMorgan.

3450:21 **Q And despite the promise that you would**
3450:22 **never open up an account again with JPM, you ended**
3450:23 **up doing that, right?**
3450:24 A I did end up opening an account with
3450:25 Securevest, and their clearing firm was JPMorgan.
3451: **Q And you were aware that their clearing**
3451:2 **firm was JPMorgan, right?**
3451:3 A Yes, I was.

581. In an email to Penson, the clearing broker for GFG, Lathen falsely claimed that "forced liquidations in these accounts would be very damaging to me **and the other joint owners** on these accounts" and that "there is a possibility that

Penson could be exposed to a FINRA arbitration proceeding brought by terminally ill accountholders or their estates," a claim that was false since Lathen's Participant Agreements stripped the Participants of any interest in the accounts during their lifetimes and none of them even knew where the brokerage accounts were housed. (Div. Ex. 489 – p. 2 (emphasis added).)

582. Lathen falsely claimed to investors and Participants, into 2014, that EndCare and Eden Arc donated fifteen percent of profits to charitable organizations. (Div. Exs. 95a, 95c, 95d, 95h, 95i; 461 – p. 19; 594 – p.17; 657 – p. 3; Lathen Ex. 1879 – p. LATHEN14280; Lathen Ex. 1974 – p. LATHEN15347.) See also:

496:13 **Q Okay. If you could take a look at p. 19,**
496:14 **please. And it says here, "Eden Arc donates 15**
496:15 **percent of profits to charitable organizations."**
496:16 **That was not accurate, was it?**
496:17 A No.
496:18 **Q And as an investment advisor, you know that**
496:19 **it's important to be accurate; is that right?**
496:20 A Yes.
496:21 **Q And this was disseminated to a number of**
496:22 **potential investors; is that correct?**
496:23 A Yes, it was.

504:14 **Q So you do believe that 95-A, C, D, H and I**
504:15 **were disseminated; is that correct?**
504:16 A Yes.

504:23 BY MS. WEINSTOCK:
504:24 **Q And, Mr. Lathen, each of these exhibits says**
504:25 **that EndCare has pledged to donate 15 percent of its**
505:1 **profits to charities in the markets that it serves,**
505:2 **correct? It says that there; is that right?**
505:3 A Yes.
505:4 **Q And that never happened; is that right?**
505:5 A That's correct.

505:14 MS. WEINSTOCK: Mr. Chan, if you could put
505:5 15 95-A up again, please.
505:16 BY MS. WEINSTOCK:
505:17 **Q And, Mr. Lathen, where it says, "Participant**
505:18 **and their families will have an opportunity to**
505:19 **nominate charities for inclusion in EndCare's annual**
505:20 **giving programs," that is something that didn't happen**
505:21 **either; is that right?**
505:22 A There were some instances where that
505:23 happened, but it typically didn't happen in every
505:24 case.

583. In his March 1, 2012 letter to SecureVest, Lathen falsely claimed to share profits with Participants: "The Fund provides the capital for the accounts and there is a profit sharing arrangement with the Participants on the accounts. A portion of the expected profits in the account are paid up front to the Participant..." (Div. Ex. 34 – p. 1.)

584. In the July 2013 DDQ, in answer to a question seeking changes in the Fund's custodian within the past three years, Lathen falsely omitted mention of the Fund's clearing broker, JPMorgan, that had terminated its relationship with Lathen. (Div. Ex. 238 – p. 8.) See also:

3480:3 MS. WEINSTOCK: Mr. Chan, if you could pull up
3480:4 Div. Ex. 238, please.
3480:5 **Q Let's take a look at p. 7, please.**
3480:6 **Under prime broker, Mr. Lathen, what does it**
3480:7 **say there?**
3480:8 A "C.L. King."
3480:9 **Q What does it say under duration of your**
3480:10 **professional relationship?**
3480:11 A "Since November 2011."
3480:12 **Q And that was not accurate, correct?**
3480:13 A I don't know that -- I mean I certainly was
3480:14 having conversations with Jeff Maier by November 2011.
3480:15 So I mean whether or not we actually started opening
3480:16 accounts with C.L. King at that time, I don't have a
3480:17 perfect recollection. But I believe I was having
3480:18 conversations with him.
3480:19 **Q Your relationship with JPMC didn't end until**
3480:20 **sometime in February or March of 2012; is that right?**
3480:21 A That's true. But there was a period of time
3480:22 where we actually had overlapping where we were up and
3480:23 running with two prime brokers at the same time: C.L.
3480:24 King and SecureVest. And that was sort of done so that
3480:25 if there was a disruption with either prime broker, we
3481:1 would have the ability to sort of have a place to go.
3481:2 Having two is better than having one as we learned with
3481:3 the Penson situation. And we wanted to have the
3481:4 flexibility to be able to, you know, move accounts if
3481:5 needed to.
3481:6 **Q Let's take a look at p. 8, please.**
3481:7 **Under custodians, you list C.L. King &**
3481:8 **Associates; is that right?**
3481:9 A Yes.
3481:10 MS. WEINSTOCK: Let's scroll down, please, Mr.
3481:11 Chan.
3481:12 **Q Under general where it says, "Has the**

administrator prime broker, custodian or auditors been changed within the past three years? If so, why?" can you please read to us what it says?
A Sure, yes.
"When the fund initially launched in May 2011, it primed and custodied its assets at Penson Financial Services. In the fall of 2011, Penson began experiencing financial difficulties and notified the investment manager that it would no longer be able to provide financing for the fund's investment strategy. At that point, the investment manager began looking for a new prime broker and custodian for the fund's assets and eventually selected C.L. King as its new prime broker beginning in early 2012."
Q You don't mention SecureVest or JPMC here; is that right?
A No.
Q And that's because you didn't want any of your investors calling SecureVest or JPMC; is that right?
A That's not true. It was clear that at the time this was drafted, C.L. King was the prime broker of the company of the business. And so it's asking, you know, whether there's been a change. And I indicated that there had been a change. I was basically providing a transition between, you know, the initial prime broker that the fund had and who it currently has.
Q Well, it asks you if the prime broker, custodian or auditor has changed within the past three years.
And you don't mention JPMC or SecureVest; is that right?
A No. It's not mentioned.
Q The impression here is that you go from Penson to C.L. King; is that right?
A That certainly is the impression.
Q And you knew that it was important for this form to be accurate; is that right?
A Sure. I would want it to be accurate.
Q And it would be accurate to list JPMC and SecureVest in this section; is that right?
A That would have been a more fulsome disclosure, sure.
Q And you didn't want your investors calling SecureVest and JPMC; is that right?
A That's not true. I could care less, to be honest. And in many conversations that I had with

3483:9 investors, I did mention J.P. Morgan and SecureVest. It
3483:10 wasn't something that I was trying to hide. It was just
3483:11 an oversight in describing, you know, the history.
3483:12 **Q Well, you were very careful about describing**
3483:13 **the reason that you were no longer with Penson, right?**
3483:14 A Yes.
3483:15 **Q But you didn't do the same for JPMC, right?**
3483:16 A Well, I mean JPMC is not mentioned. So had I
3483:17 mentioned it, I, you know, would have likely provided the
3483:18 reason also.
3483:19 **Q You would have had to say that JPMC didn't like**
3483:20 **your strategy, right?**
3483:21 A Yes. I would have said that.
3483:22 **Q And you didn't want to say that, right?**
3483:23 A It was not a deliberate attempt to hide the
3483:24 fact that we had a relationship with SecureVest and J.P.
3483:25 Morgan. And, in fact, in conversations that I have with
3484:1 investors and even in my PPM, I've always been clear as a
3484:2 risk factor that brokerage firms may not -- we may have
3484:3 difficulty finding brokerage firms to carry the accounts.
3484:4 And in conversations that I have with
3484:5 investors, particularly sophisticated investors, these
3484:6 are questions that get answered. And often, I'm very
3484:7 forthright about it. It's a risk of the strategy. I've
3484:8 never tried to sort of play that down.

585. In the July 2013 DDQ, Lathen claimed that "[t]he Principal's capital account balance in the Fund represents a significant portion of his liquid net worth." (Div. Ex. 238 – p. 9.)

586. Lathen claimed to Fund investor Gary Rosenbach to have invested approximately $100,000 in the Fund at one point, even though he never invested any money into the Fund.

> See my capital statement attached. My fund investment at December 1 was approximately $30k. At December 31st it was around $1,000 due to a negative incentive fee for the month of December. I have never had more than $100k or so in the fund because I don't have any spare liquidity and the management fee is not enough for me to live on. As a result, I need to withdraw my performance fees on a regular basis and so I have not been able to maintain a more meaningful investment in the fund on a consistent basis…I am in the process of refinancing our second home in Sag Harbor to free up funds to make a more significant investment in the fund. We also have the house on the market for sale in the even the refi is unsuccessful. If either of these transactions occur then I intend to make a substantial and durable investment in the fund.
> (Div. Ex. 45.)

See also:
50:14 **Q Now, you've never personally invested any**
50:15 **money into Eden Arc Capital Partners; is that right?**
50:16 A That is true.

346:4 **Q And at that time, was Gary Rosenbach also a**
346:5 **fund investor?**
346:6 A Yes, he was.

587. Although Lathen refinanced his house in Sag Harbor, he never made an investment into the fund.

554:7 **Q And you did, in fact, refinance your second**
554:8 **home in Sag Harbor, correct?**
554:9 A Yes, I did.
554:10 **Q And you did not then make an investment in**
554:11 **the fund; is that correct?**
554:12 A Yes. The amount of refinancing really was
554:13 just paying for the existing debt on the property and
554:14 being required to pay off additional debt by the new
554:15 lender to the property.
554:16 So there was not any material proceeds to be
554:17 coming from that refinancing.
554:18 **Q And to be clear, where you say here, "To**
554:19 **make a more significant investment in the fund," you**
554:20 **never actually injected any money into the fund; is**
554:21 **that correct?**
554:22 A That is true.

588. Lathen did not tell Gary Rosenbach that Lathen was sharing profits with Robert Milius, a friend of Lathen's, because Lathen did not want to "spook" Rosenbach, and he did not think it was important for Rosenbach to know. (Div. Ex. 2052.)

3494:12 **Q And you didn't tell Mr. Rosenbach that you were**
3494:13 **cutting in Robert Milius; is that right?**
3494:14 A No. I don't think I told him.
3494:15 **Q In fact, you said to Mr. Milius, "My investor**
3494:16 **in Vail doesn't even know about your investment in the**
3494:17 **accounts. He has a short attention span. And I made the**
3494:18 **decision not to tell him because I didn't want to make it**
3494:19 **seem more complicated and spook him. You had seemed**
3494:20 **eager to invest. And I didn't want him to potentially**
3494:21 **veto your involvement." Is that what you told Mr.**
3494:22 **Milius?**
3494:23 A That sounds about right.
3494:24 MS. WEINSTOCK: Mr. Chan, can you pull up

3494:25 Div. Ex. 2052, please.
3495:1 **Q Is this November 17th, 2011 e-mail in which you**
3495:2 **say what I just said to Mr. Milius?**
3495:3 A Yes.
3495:4 MS. WEINSTOCK: The Division offers Division
3495:5 Exhibit 2052 into evidence.
3495:6 JUDGE PATIL: Admitted.
3495:7 (Div. Ex. No. 2052 was received in
3495:8 evidence.)
3495:9 **Q You didn't tell Gary Rosenbach about Robert**
3495:10 **Milius's share because that wasn't in your interest to do**
3495:11 **so, right?**
3495:12 A Yeah. I didn't feel that it was an important
3495:13 fact for him to know. The point of that, his attention
3495:14 span is a correct one. I'd rather not burden him with
3495:15 something that I felt was rather trivial.
3495:16 **Q You say you don't want to spook him, right?**
3495:17 A That is what I said. I'm not sure why I
3495:18 thought it would spook him.

589. In the March 2011 PPM, Lathen told investors that "strict governance protections and funds flow protocols" would be placed on the JTWROS accounts, (Div. Ex. 369 – p. 17), when none were in place.

590. Lathen represented that there would be "strict governance protections and funds flow protocols" because Lathen wanted to assure investors that both he and the terminally-ill individuals would not "misappropriate" funds or securities from the JTWROS accounts.

82:25 **Q Okay. So when you say here, "unauthorized**
83:1 **trading or funds transfers," you're referring to the**
83:2 **Participants, correct?**
83:3 A I was referring to the Participants as well
83:4 as myself. And because the joint tenancies are between
83:5 me and the Participant, and there's -- an investor
83:6 would rightly be concerned, Well, what if you, Jay,
83:7 take off with the money?
83:8 So I wanted to make sure that that -- that
83:9 that was addressed as well.
83:10 **Q And, ultimately, that was not addressed,**
83:11 **correct?**
83:12 A Well, it wasn't addressed through the
83:13 Participant Agreement or the brokerage accounts. But
83:14 we did have an independent administrator of The Fund
83:15 who was doing monthly reconciliations on all of the
83:16 accounts.
83:17 So had there been any improper

83:18 misappropriation, it would have been noticed by The
83:19 Fund administrator.
83:20 **Q And by "misappropriation," you're referring**
83:21 **to yourself and the Participants; the idea was that you**
83:22 **and the Participants would not be able to**
83:23 **misappropriate funds from these accounts, correct?**
83:24 A Yes.

3634:21 **Q And in order to protect fund investors, you**
3634:22 **could not let the Participant have a true beneficial**
3634:23 **ownership in the property; is that right?**
3634:24 A I think it's more accurate to say that it was
3634:25 advisable to protect the fund from actions by the
3635:1 Participant that could hurt the fund.
3635:2 **Q And you didn't want the Participants to**
3635:3 **misappropriate fund assets, correct?**
3635:4 A I think that was a natural goal, sure. Anytime
3635:5 you have someone that's advancing money against an asset,
3635:6 whether it's a loan that's secured or in some other
3635:7 context, where they're expecting something back for that
3635:8 investment, one has to protect the basis for
3635:9 their investment.
3635:10 **Q You didn't want Participants to misappropriate**
3635:11 **fund assets; is that correct?**
3635:12 A I didn't want the Participant to violate the
3635:13 terms of the Participant Agreement.
3635:14 **Q But did you say in your investigative testimony**
3635:15 **that you didn't want the Participant to misappropriate**
3635:16 **fund assets? Did you say that?**
3635:17 A I may have said that.

591. In the July 2013 Amended PPM, Lathen told investors that "Account Control Agreements are executed with the brokerage firm holding the account in order to prevent unauthorized trading or funds transfers." (Div. Ex. 365 – p. 19).

592. No "strict governance protections and funds flow protocols" were placed on the JTWROS accounts. No Account Control Agreements was placed on the JTWROS accounts.

80:8 **Q That wasn't a protocol to be placed on the**
80:9 **joint account, though, was it? That was an agreement**
80:10 **between you and a participant?**
80:11 A Yes, that's true. And we did speak to
80:12 brokerage firms regarding creating what is known as an
80:13 account control agreement, which would basically
80:14 instruct the brokerage firm to only allow transfers
80:15 from the account by certain parties.

80:16 **Q You discussed that with brokerage firms?**
80:17 A We discussed it with brokerage firms, but we
80:18 never -- we never put it in place.

881:11 **Q Now, so you ultimately never got any**
881:12 **brokers to implement the account control agreement?**
881:13 A That's correct.

593. Lathen testified that the "strict governance protections and funds flow protocols" were not necessary because such restrictions were in the Participant Agreements. He claimed that the strict governance protections and funds flow protocols he referred to in the PPM were the Participant Agreements.

79:22 **Q Now, you say here in the second paragraph,**
79:23 **"In addition, strict governance protections and funds**
79:24 **flow protocols will be placed on all joint accounts to**
79:25 **protect the accounts from unauthorized trading or funds**
80:1 **transfers."**
80:2 **Is that something that you did?**
80:3 A We did -- we did have -- in our arrangements
80:4 with the Participants, there were restrictions on
80:5 whether they could withdraw funds from the account
80:6 without my permission. And I think that's what that is
80:7 referring to.

594. In addition to his false representations in his PPMs that account control agreements were in place, Lathen made the same claim to a prospective investor: "The fund is a secured creditor. The account control agreement protects the account from either the joint tenants or their creditors accessing funds from the account." (Div. Ex. 107 – p. 6.)

595. The Discretionary Line Agreement referred to a Security Agreement which it defined as "an investment account control agreement delivered by Borrower to Lender in connection with each Advance pursuant to which Lender is granted a security interest in the Securities Account into which the proceeds of such Advance are invested." (Div. Ex. 190 – p. 5.)

596. When SEC exam staff requested the Security Agreement, Lathen provided SEC exam staff with a document entitled "Security and Account Control Agreement," dated January 31, 2013. (Div. Ex. 945 – pp. 2, 10.)

597. The Security and Account Control Agreement defines the Secured Party as EACP and the Debtor as Lathen. It states:

> On this 31st day of January, 2013, Donald F. Lathen ("Debtor"), for valuable consideration, receipt of which is hereby acknowledged, grants to

Eden Arc Capital Partners, LP ("Secured Party") a security interest in the following property of Debtor (the "Collateral"):

Description of Collateral
Joint brokerage accounts created from time to time between Debtor and third parties ("Participants"). Such accounts will be funded by advances as contemplated under the Discretionary Line of Credit Agreement ("LOC Agreement") dated January 24, 2013 between Debtor and Secured Party.

Each Joint account described above...will be pledged to secure advances under the LOC Agreement with respect to such Securities Account...

1. Warranties and Covenants of Debtor. Debtor warrants and covenants that:
(a) No other creditor has a security interest in the Collateral except the brokerage firm carrying the joint account and only to the extent that the Debtor has incurred margin indebtedness in the account provided by the brokerage firm.
(Div. Ex. 945 – pp. 10-11.)

598. Lathen testified that he believed the Security and Account Control Agreement was provided to SEC exam staff.

382:18 **Q Do you have that one in front of you?**
382:19 A I do, yes. This appears to be the -- I
382:20 believe when I testified yesterday, you had been
382:21 referencing a security agreement in the line of credit
382:22 agreement, and you had asked me whether or not we had
382:23 such a security agreement.
382:24 And I believe I stated that I couldn't
382:25 recall, and also said that we had some UCC-1 filings.
383:1 This may be the security agreement.
383:2 **Q And did you send this to exam staff?**
383:3 A Yes -- well, I -- I assume so. I don't --
383:4 it looked like it was above the -- in a prior email,
383:5 it looked like it was something that was asked for by
383:6 the exam staff. So I would assume that we provided
383:7 it.

599. Lathen never sent the Security and Account Control Agreement to anyone except to his compliance consultant, for forwarding to SEC exam staff, when SEC exam staff requested it.

379:10 **Q And if you could take a look at Exhibit 945,**
379:11 **and tell us if this is communication between you and**
379:12 **Mission Critical about how to respond to the exam**

379:13 **staff.**
379:14 A Yes.

382:11 **Q Now, if we could scroll down to page 10,**
382:12 **please. What is this document?**
382:13 A It appears to be a security and account
382:14 control agreement.

386:13 **Q You never sent this document to a broker; is**
386:14 **that right?**
386:15 A I don't recall sending this document to a
386:16 broker.
386:17 **Q In fact, you never sent this document to**
386:18 **anyone; is that right?**
386:19 A That may well be, yeah.
386:20 **Q And the first time you sent it to anyone was**
386:21 **when you sent it to the compliance consultant; is that**
386:22 **right?**
386:23 A That's possible.
3578:1 **Q You never sent the security and account control**
3578:2 **agreement to any lawyer; is that right?**
3578:3 A I don't recall whether or not I did.
3578:4 **Q You never sent it to any broker-dealer; is that**
3578:5 **right?**
3578:6 A Likely not. It wouldn't have been something
3578:7 that most people would have asked for.
3578:8 **Q You never produced it to any auditor; is that**
3578:9 **right?**
3578:10 A I don't recall.
3578:11 **Q The only time you shared it was when SEC exam**
3578:12 **staff asked for it; is that right?**
3578:13 A Yes.
3578:14 **Q And you didn't send it to any broker-dealer; is**
3578:15 **that right?**
3578:16 A Again, I don't -- probably not. I don't want
3578:17 to say I never sent it and then you show me an e-mail
3578:18 where I sent it. So that's why I'm hedging a little bit.
3578:19 **Q Fair comment.**
3578:20 A I will say, if someone asked for it, I would
3578:21 look for it.
3578:22 **Q But you don't have any recollection of sending**
3578:23 **it to anyone except Daren Kane; is that right?**
3578:24 A That's fair to say.

600. Lathen told Galbraith he had never executed a Security and Account Control Agreement. Galbraith then told GECC's outside counsel that information. (Div. Ex. 1023.) See also:

> 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.

601. Lathen falsely told Michael Cooney, a Fund investor and the Fund's third-party marketer, that Hinckley Allen had refused to issue a legal opinion because "it's not really what we do." He also told Cooney that he did not think "a memo from a Providence firm was even worth it" so he "didn't press any further." (Div. Ex. 969 – p. 2.)

602. Although Lathen denied that he was acting as an investment adviser to the terminally-ill individuals, he signed an Advisor Services Agreement with FSW in which he represented that he was an investment adviser to the clients "with respect to accounts maintained by the clients at" FSW. (Div. Ex. 1004.)

603. None of the accounts at FSW were titled in the Fund's name. (Div. Ex. 125.)

604. Respondents threatened to sue and/or report issuers to various regulators when the issuers questioned their redemptions. In letters to the issuers, Respondents claimed that they were acting as advisor to retail investors. Lathen read these letters over before they were sent.

> "Here it is. Good to go. Bcc me on the email. Thanks, Jay."
> (Div. Ex. 930; see also Div. Ex. 931.)

See also:
1677:24 **Q Now, with respect to these objections that**
1677:25 **some of the issuers raised, did you draft and send**
1678:1 **letters to some of these issuers?**
1678:2 A I did.
1678:3 **Q And did Mr. Lathen read them over before**
1678:4 **you sent them?**
1678:5 A I'm sure he did.

605. In the email to CIT Bank that Lathen approved and asked to be blank carbon copied on, Robinson claimed "our clients [referring to the Participants] have redeemed your CDs in the past without having to meet this condition." (Div. Exs. 930; 931 – p. 1.)

606. In a letter to JPMorgan, Respondents claimed to "manage brokerage accounts for people who invest in, among other things, fixed-income securities…that contain the 'Survivor's Option' feature" and that as "as an RIA [Registered Investment Adviser] which gives advice to investors about which securities to purchase, this situation damages OUR reputation." (Div. Ex. 932 – pp. 1-2.)

607. In an email to BMO Harris, Respondents claimed that their "clients" were retail investors that did not have the resources to fight BMO Harris. (Div. Ex. 501 – pp. 2-3.)

608. In an email to BMO Harris, Robinson also claimed that EACM advised the JTWROS on investment options. (Div. Ex. 501 – pp. 2-3.)

609. Robinson threatened to sue BMO Harris and report BMO Harris to the OCC and/or a state regulator. (Div. Ex. 501 – p. 1.) See also:

> "We believe your refusal to honor 7 of the 8 CUSIPs we have presented is not at all supported by your 'documentation suite.' Quite the contrary. Rather, your decision seems nothing more than a predatory business policy to willfully breach an existing contractual obligation against a group of retail investors who, you may have mercenarily judged, do not have the stomach or financial resources to fight you. Surely you must know that such conduct will not stand scrutiny with your regulators or a court of law." (Div. Ex. 501 – p. 3.)
>
> I work for a Registered Investment Advisor known as Eden Arc Capital Management, LLC. We manage a number of accounts and we advise them on investment options. Our accounts are predominantly in the form of Joint Tenant With Rights of Survivorship (JTWROS) accounts. In the past couple of years we have advised our accounts to purchase debt securities, including CDs, that have a survivor's option feature.
> (Div. Ex. 501 – p. 7.)

610. Through his attorney, Robert Flanders, Lathen falsely told Goldman Sachs' attorney that "each joint account holder with Mr. Lathen enjoyed the same benefits as Mr. Lathen during his or her lifetime..." (Div. Ex. 754 – p. 2.)

611. Through his attorney Galbraith, Lathen falsely told US Bank's counsel that the 95/5 split and bar to withdrawals in earlier versions of the Participant Agreement were "to prevent the Participant from withdrawing more than the moiety." Lathen further misrepresented that he "did not make withdrawals either." (Div. Ex. 766 – p. 1.)

612. In the Fund's 2014 financial statements, signed on April 28, 2015 and sent to Fund investors, Respondents mischaracterized the SEC's subpoena to Eden Arc as a "letter" "request[ing] information and documents. . . ." (Div. Ex. 101 – p. 17.)

613. Respondents mischaracterized the SEC's investigation as an "inquiry" and stating that "Eden Arc is cooperating fully," suggesting that Eden Arc's cooperation was voluntary, and omitting that Lathen himself had also received a subpoena. (Div. Ex. 101 – p. 17.)

Lathen Wishes to Remain in the Securities Industry But Has No Remorse or Recognition of His Wrongdoing and Has Offered No Assurances Against its Repetition

614. Lathen plans to return to the investment management industry when this matter is concluded.

3411:23 **Q So Mr. Lathen, the Judge has just brought**
3411:24 **up something about sincerity of assurance of what**
3411:25 **your future conduct would be like.**
3412:1 **Regardless of how this hearing resolves**
3412:2 **itself and what the outcome is, what are your plans**
3412:3 **for the future with respect to Eden Arc?**
3412:4 A You know, it's a hard question to answer.
3412:5 I do hope and expect to continue to operate in the
3412:6 investment management industry in some capacity.
3412:7 Whether or not that's through owning my
3412:8 own firm and continuing in some way Eden Arc Capital
3412:9 Management, or perhaps going to work for others, I
3412:10 don't -- I don't have perfect clarify on what that
3412:11 path will look like.
3412:12 And to put it bluntly, the outcome of this
3412:13 proceeding will determine which, if any, of those
3412:14 paths are available to me.
3412:15 But it is my sincere hope to continue in
3412:16 the investment management industry.

615. The only thing Lathen wishes he had done differently with respect to his investment strategy is that he wishes he had had better joint tenancies.

3412:17 **Q With the benefit of hindsight, is there**
3412:18 **some aspect of this that you wish you had not done**
3412:19 **or wish you would have done differently or --**
3412:20 A I mean, I think, as has been clear from
3412:21 the trial, there was a continued evolution of my
3412:22 contractual regime over time, with each evolution
3412:23 making the joint tenancies stronger and stronger.
3412:24 And in a perfect world, I would have
3412:25 arrived at the best joint tenancy on the first try
3413:1 and not have it been an evolution.
3413:2 But that's -- you know, that's tough to do
3413:3 when you're in a new business and trying to get it
3413:4 right and facts and circumstances are changing.
3413:5 But it would have been ideal to have the
3413:6 best structure at the very beginning.

616. Lathen claims to have deep regard and respect for the laws of this country and securities laws.

3413:7 **Q And can you give the Court some assurance**
3413:8 **that whatever happens in this case, that you're not**
3413:9 **going to be doing something that would put you in**
3413:10 **the SEC's crosshairs at some point in the future?**
3413:11 A I have a deep regard and respect for the
3413:12 laws of this country and the securities laws. I've
3413:13 been engaged in the securities business for my
3413:14 entire career. I believe complying with the law is
3413:15 incredibly important.

617. If permitted to remain in the industry, Lathen intends to have the same level of vigilance he had during the course of the charged conduct going forward.

3413:16 And I would expect to have that same level
3413:17 of vigilance going forward in terms of complying
3413:18 with the law.

Lathen's Lifestyle

618. **[REDACTED]**

619. **[REDACTED]**

620. **[REDACTED]**

621. **[REDACTED]**

622. **[REDACTED]**

623. **[REDACTED]**

624. **[REDACTED]**

625. **[REDACTED]**

626. **[REDACTED]**

627. **[REDACTED]**

628. **[REDACTED]**

629. **[REDACTED]**

630. **[REDACTED]**

631. **[REDACTED]**

632. **[REDACTED]**

633. **[REDACTED]**

634. **[REDACTED]**

635. **[REDACTED]**

636. **[REDACTED]**

637. **[REDACTED]**

638. **[REDACTED]**

639. **[REDACTED]**

640. **[REDACTED]**

641. **[REDACTED]**

Lathen's Income from Eden Arc

642. Jindra was asked to provide summary witness testimony on (1) management and performance fees and (2) information regarding the holdings and redemptions in certain Participant accounts.

985:12 **Q And what were you asked to be a summary**

985:13 **witness about?**
985:14 A I was asked to provide summary witness
985:15 testimony on two general topics. The first one was
985:16 related to -- or provide summary witness testimony
985:17 on the topic of management and performance fees in
985:18 this case.
985:19 And the second topic of my summary
985:20 testimony is to provide a list of participant
985:21 accounts that signed participant agreements prior to
985:22 January 24, 2013, and provide additional information
985:23 with respect to their holdings, value of their
985:24 holdings and role of securities.

643. In his calculations related to management and performance fees, Jindra relied on data from Eden Arc and publicly available information, specifically, partner allocation data from Eden Arc, monthly holdings data from Eden Arc, CUSIP master file, Eden Arc Financial Statements, prospectuses, and Bloomberg. (Div. Exs. 631-A – p. 1, 631-B – p. 1, 631-C – p. 1, 631-D – p. 1.) See also:

987:8 **Q Mr. Jindra, at the top of those exhibits**
987:9 **there's a line that says "Source."**
987:10 **What does that represent?**
987:11 A The source general describes the data sets
987:12 and documents that I relied upon in performing my
987:13 calculations.

644. Div. Ex. 631-B shows Jindra's calculation of management fees generated on all bonds: $173,667. (Div. Ex. 631-B – p. 1.) See also:

994:5 **Q So let's -- let's start with Exhibit 631-B**
994:6 **and talk about how you used all of these documents**
994:7 **that we just discussed in your analysis.**
994:8 **Okay. What is Exhibit 631-B?**
994:9 A 631-B summarized my analysis of management
994:10 fees collected by the general partner on holdings of
994:11 all bonds.

645. Div. Ex. 631-D shows Jindra's calculation of management fees generated on redeemed bonds: $41,652; this number is a subset of the total in Exhibit 631-B. (Div. Ex. 631-D – p. 1.) See also:

999:16 **Q We'll move on to 631-D next.**
999:17 **And, Mr. Jindra, what does Exhibit 631-D**
999:18 **show?**
999:19 A Exhibit 631-D shows my calculation of
999:20 management fees attributable only to the bonds that
999:21 were ultimately redeemed pursuant to the put option.

999:22 **Q So what is the difference between Exhibit**
999:23 **631-B and 631-D?**
999:24 A The major difference is in Column A where
999:25 I no longer report the value of all bonds held by
1000:1 the fund, but only of the bonds that were ultimately
1000:2 redeemed.
1002:22 JUDGE PATIL: I'm sorry, excuse me. Help
1002:23 me to understand the relationship between the 41,000
1002:24 figure and the 177,000 figure.
1002:25 Meaning, is the $41,000 a component of a
1003:1 larger figure, or is it separate and distinct?
1003:2 THE WITNESS: It's a subset.

646. Div. Ex. 631-A shows Jindra's calculation of performance fees on all bonds: $1,289,596. (Div. Ex. 631a – p. 4.) See also:

1003:5 **Q What does Exhibit 631-A show?**
1003:6 A So I just want to say I believe there are
1003:7 four pages. I only have one page in front of me.
1003:8 **Q Oh.**
1003:9 A But 631-A summarizes my analysis related
1003:10 to incentive fees collected by the general partner
1003:11 on all bonds during the time period analyzed.
1004:5 **Q So turning back to Exhibit 631-A, you**
1004:6 **calculated a total amount of incentive fees the fund**
1004:7 **paid attributable to bonds; is that correct?**
1004:8 A That's correct.

647. Div. Ex. 631-C shows Jindra's calculation of performance fees on redeemed bonds: $486,506. (Div. Ex. 631c – p. 4.) See also:

1011:9 **Q Let's move on to Exhibit 631-D -- I'm**
1011:10 **sorry, C.**
1011:11 **And, Mr. Jindra, what is Exhibit 631-C?**
1011:12 A Exhibit 631-C reflects my summary
1011:13 calculation of incentive fees attributable to
1011:14 redeemed bonds only.
1011:15 **Q And what is the difference between 631-A**
1011:16 **and 631-C?**
1011:17 A The only difference is -- and I'm
1011:18 calculating the incentive fee on redeemed bonds; not
1011:19 on all bonds that are held by the fund.

648. Negative numbers that appear in Div. Exs. 631-A and 631-C do not represent fees returned to investors; rather they represent losses on the bond portion of the portfolio.

1010:15 **Q And I notice in Column D toward the bottom**
1010:16 **there is a number that is a negative number,**
1010:17 **negative $9,303. What does that represent?**
1010:18 A What that represents is that the CD part
1010:19 of the portfolio was profitable during this quarter
1010:20 while the bond side of the portfolio was losing
1010:21 money.
1010:22 And the losses on the bonds were
1010:23 effectively offsetting the higher incentive fee that
1010:24 would have been collected by the fund, by the
1010:25 general partner.
1011:1 **Q So is it fair to say this does not**
1011:2 **represent any fees that were returned to investors?**
1011:3 A It does not represent any money returned
1011:4 to the investors, correct.

VI. Lathen Has Failed to Establish an Advice of Counsel Defense

Generally

649. Lathen tried to read carefully what his lawyers sent to him.

3450:18 **Q Okay. So what your lawyers send to you,**
3450:19 **you read carefully, right?**
3450:20 I certainly try to.

650. Lathen testified that he had an open and collaborative relationship with his attorneys.

3451:14 **Q Okay. You testified that you have an open**
3451:15 **and collaborative relationship with your attorneys;**
3451:16 **is that right?**
3451:17 A Yes.

651. Lathen did not recall getting any legal advice on disclosure to issuers.

3549:10 **You didn't get any advice on disclosure to**
3549:11 **issuers?**
3549:12 A Again, I don't recall getting any advice. And
3549:13 if there was advice, it was probably along the lines of,
3549:14 you know, make sure that you're reading the prospectuses
3549:15 carefully, you're identifying the information that's
3549:16 required in connection with a put back of the instruments
3549:17 and make sure you provide that information to the
3549:18 issuers. If there was advice on that, that's likely what
3549:19 it was.
3549:20 **Q But you don't recall that advice specifically;**

3549:21 **is that right?**
3549:22 A No. I don't have a specific recollection of
3549:23 that advice.

652. Respondents asserted in their pre-hearing briefing that Lathen did not seek any advice from any attorney "respecting the sufficiency of his disclosures to issuers of survivor's option bonds and CDs." (Eden Arc Respondents' Memorandum of Law in Opposition to the Division of Enforcement's Motion to Preclude an Advice of Counsel Defense and Issue Subpoenas, dated Oct. 3, 2016 – p. 5.)

653. Although Lathen sought an opinion on the validity of his joint tenancies from multiple lawyers and law firms, he was never able to get one.

3622:9 **Q Sometime in 2014, you went to multiple lawyers**
3622:10 **to ask for a written opinion on the validity of the joint**
3622:11 **tenancy, correct?**
3622:12 A Yes.
3622:13 **Q You went to Greenberg Traurig; is that right?**
3622:14 A Sounds familiar.
3622:15 **Q Diana Zeydel?**
3622:16 A Yes.
3622:17 **Q You went to Tannenbaum Helpern; is that right?**
3622:18 A Yes.
3622:19 **Q You went to someone named Jonathan Blattmachr;**
3622:20 **is that right?**
3622:21 A Yes.
3622:22 **Q You went to Schulte Roth & Zabel; is that**
3622:23 **right?**
3622:24 A Yes.
3622:25 **Q None of those firms would give you a written**
3623:1 **opinion; is that right?**
3623:2 A Yeah.... I think as I stated earlier, there were
3623:3 never any substantive conversations with any of those
3623:4 firms beyond an initial phone call where I described what
3623:5 I was doing. Or I may have, you know, in some cases
3623:6 given them some, you know, background materials on, you
3623:7 know, what the fund was about and what the strategy was
3623:8 about . . .

654. Lathen did not have legal advice on drafting the redemption letters.

3623:18 **Q Fair to say that you did not receive advice**
3623:19 **from an attorney in terms of drafting a redemption**
3623:20 **letter; is that fair to say?**
3623:21 A That's fair to say.

655. Lathen sent an Investor Presentation to CL King, one of the brokers that carried the JTWROS accounts. In that presentation, he claimed that "[p]rior to launching business, Eden Arc received advice from counsel that the strategy is legal." (Lathen Ex. 1974 – p. LATHEN15345.)

656. Lathen sent an Investor Presentation to Jim Dean stating that "Prior to launching business, Eden Arc received advice from counsel that the strategy is legal." (Div. Exs. 2063, 2064 – p. 17.)

657. Lathen sent other Investor Presentations to other prospective investors that contained the same claim. (Div. Ex. 461 – p. 17.)

658. Lathen sent the Caramadre memo to prospective investors. (Div. Ex. 482 – p. 1; 465 – p. 3.)

659. In an email to one of the prospective investors, Lathen called the Caramadre memo a "legal opinion." (Div. Ex. 482 – p. 1.)

660. Although asked to produce information related to a reliance on advice of counsel defense during the investigation, Lathen declined to do so, and did not raise a reliance on advice of counsel defense until immediately before the initial trial date. (Div. Ex. 708 – pp. 1-2.)

3635:18 **Q You first became aware of the SEC's**
3635:19 **investigation in February 2015; is that right?**
3635:20 A Yes, that's right.
3635:21 **Q And you did not raise a**
3635:22 **reliance-on-advice-of-counsel defense at that time,**
3635:23 **correct?**
3635:24 A In February of 2015?
3635:25 **Q Correct.**
3636:1 A I mean at that point, I was just responding to
3636:2 a subpoena.
3636:3 **Q And you came in for testimony in the summer of**
3636:4 **2015; is that correct?**
3636:5 A Yes.
3636:6 **Q And you did not raise**
3636:7 **reliance-on-advice-of-counsel at that time, correct?**
3636:8 A That's correct.
3636:9 **Q And you refused to waive the privilege and give**
3636:10 **the Division an opportunity to look at documents related**
3636:11 **to your communications with lawyers; is that right?**

3637:5 JUDGE PATIL: No. It's fine. There's no
3637:6 reason why you should not. So to the best of your
3637:7 knowledge at that time, what was the timeline? 2015?
3637:8 MS. WEINSTOCK: Correct.

3637:9 JUDGE PATIL: Did you waive the attorney-client
3637:10 privilege?
3637:11 THE WITNESS: No, we did not.
3637:12 **Q And you were asked on the record during**
3637:13 **testimony to waive and you declined, correct?**
3637:14 A That is true.
3637:15 **Q You got your Wells notice in December of 2015,**
3637:16 **correct?**
3637:17 A Yes.
3637:18 **Q And you did not raise a**
3637:19 **reliance-on-advice-of-counsel defense at that time,**
3637:20 **correct?**
3637:21 A That's correct.
3637:22 **Q In your first Wells submission on January 15th**
3637:23 **of 2016, you did not raise a**
3637:24 **reliance-on-advice-of-counsel defense at that time; is**
3637:25 **that correct?**
3638:1 A Yes.
3638:2 **Q And in your supplemental Wells submission on**
3638:3 **March 28th of 2016, you did not raise a reliance on**
3638:4 **advice of counsel defense at that time, correct?**
3638:5 A That's correct.
3638:6 **Q On June 22nd of 2016, the Division wrote your**
3638:7 **attorneys a letter, asking if you were raising a**
3638:8 **reliance-on-advice-of-counsel defense, and your attorneys**
3638:9 **sent a letter saying no; is that correct?**
3638:10 A Yes.
3638:11 **Q And then you were asked again on June 29th of**
3638:12 **2016 to produce information related to this potential**
3638:13 **defense, and, again, your lawyers said no; is that**
3638:14 **correct?**
3638:15 A That's correct.
3638:16 **Q On or about August 15th of 2016, you were sued**
3638:17 **by the SEC; is that correct?**
3638:18 A That's correct.
3638:19 **Q And in your answer to the allegations, you did**
3638:20 **not raise a reliance-on-advice-of-counsel defense at that**
3638:21 **time, correct?**
3638:22 A I don't recall what we said or didn't say in
3638:23 our answer.
3638:24 **Q And the trial was initially set for October**
3638:25 **17th of 2016; is that right?**
3639:1 A Yes.
3639:2 **Q And in your attorney's leave for summary**
3639:3 **disposition motion on September 9th of 2016, nothing was**
3639:4 **raised about a reliance-on-advice-of-counsel defense at**

3639:5 **that time; is that correct?**
3639:6 A I don't recall exactly when we invoked the
3639:7 advice-of-counsel defense. We're getting too close to
3639:8 the point when we invoked it for me to answer with
3639:9 certainty.
3639:10 **Q Was it on or about September 23rd of 2016; does**
3639:11 **that sound about right?**
3639:12 A It sounds about right.
3639:13 **Q That was approximately three weeks before the**
3639:14 **trial was supposed to start; is that right?**
3639:15 A Yes.

Respondents' Repeated Failures to Make a Complete Production of Their Communications with Counsel

661. By Order dated September 13, 2016, Respondents were required to notify the Division of their election to pursue an advice of counsel defense by September 23, 2016, and to make a full and complete disclosure by that date of all relevant attorney client communications. (Order, Sept.13, 2016.) See also:

19:21 MR. PROTASS: I think Friday, September 23rd.
19:22 JUDGE GRIMES: Friday, September 23rd. That is
19:23 a week from Friday.
19:24 MR. JANGHORBANI: That's okay with us if -- if
19:25 what that means is we're going to get full disclosure on
20:1 that date. We're going to get all the documents that are
20:2 relevant. We're going to get a list of the lawyers.
20:3 We're going to get a representation that those lawyers
20:4 have been talked to and told that it's okay to talk to
20:5 us.
20:6 My concern is that this is going to end up
20:7 being a death by 1,000 cuts and we'll get a little
20:8 information, then there will be a little more, then there
20:9 will be a little more. And, practically speaking, we
20:10 won't have time to bottom out the facts prior to the
20:11 October 17th date, which was -- which was chosen by
20:12 Respondents. That really doesn't advance anyone's
20:13 interests to the extent that the purpose of the hearing
20:14 is to find out what happened.
20:15 JUDGE GRIMES: Well, I think September 23rd is
20:16 reasonable to me. It's hard for me to say exactly
20:17 what -- what would be deficient in a filing that
20:18 hasn't -- we don't even know is going to be made. So
20:19 let's -- disclosure by the 23rd of September sounds fine
20:20 with me. To the extent the Division finds that the
20:21 disclosure or feels the disclosure is not sufficient then
20:22 you can make an appropriate filing. And if that means

20:23 we're going to have to hold the hearing a little bit
20:24 longer than expected then that's what will happen. So
20:25 we'll deal with that eventuality as it presents itself.
(Transcript of Pre-hearing Conference, Sept.12, 2016.)

662. On September 23, 2016, Respondents did so notify the Division and identified four lawyers on whom Respondents relied "concerning and relating to the structure of, and structuring of, the Eden Arc Respondents' investment strategy": Farrell, Flanders, Roper and Cherryl [sic] Calaguio. (Janghorbani Sept. 26, 2016 Decl., Ex. J.)

663. On September 23, 2016, Respondents produced only 49 emails, promising to produce more documents "during the week of September 26, 2016." (Janghorbani Sept. 26, 2016 Decl., Ex. J.)

664. The day after the Division moved to preclude Respondents' defense, in part based on Respondents' failure to comply with the Court's September 13, 2016 Order that they make a complete waiver by September 23, 2016, Respondents produced another 114 emails, and the next day promised "12 or so more," ultimately producing 10 more emails on September 29, 2016. (Janghorbani Oct. 6, 2016 Decl., Ex. C; Ex. F.)

665. Thus, contending that they had produced all communications with the lawyers they consulted, by September 29, 2016, Respondents had produced a total of 173 emails.

666. On October 18, 2016, the Court entered an Order, denying in part the Division's Motion to Preclude, and Ordering Respondents to produce by November 1, 2016 (1) a list of "every attorney they consulted, at any time 'through approximately February 2016' about 'the structure of and structuring of' the joint tenancies; and (2) "all communications in their possession that concern discussions with those counsel about any aspect of the joint tenancies." (Order, Oct. 18, 2016 – pp. 4-5.)

667. On October 25, 2016, in response to the October 18, 2016 Order, Respondents disclosed 18 lawyers whom Respondents consulted. (Janghorbani Nov. 2, 2016 Decl., Ex. A.) That list did not include Tractenberg of Katten Muchin.

668. On November 1, 2016, Respondents provided a disc containing 824 emails constituting "communications between the Eden Arc Respondents and any of the attorneys on the list of attorneys provided to the Division on October 25, 2016," and another 198 emails on November 7, 2016. (Protass Nov. 9, 2016 Decl. – paras. 10, 11.)

669. Included in Respondents' November production were emails from attorneys, including Farrell, that Respondents had first identified in September, but whose

complete set of emails they had not produced. (Brown Nov. 14, 2016 Decl., Exs. A and B.)

670. The November production also failed to include still more relevant email communications with Respondents' attorneys as evidenced by email communications they had logged on their March 2016 privilege log, produced during the investigation. (Division's Reply Memorandum of Law in Support of its Second Motion to Preclude Respondent's Advice of Counsel Defense, dated Nov. 14, 2016 – pp. 5-8; Brown Nov. 14, 2016 Decl., Exs. F, H, I, K, L, M, N.)

671. On November 18, 2016, the Court issued an Order denying the Division's Second Motion to Preclude, but issued Subpoenas to Respondents' counsel that the Division requested. (Order, Nov. 18, 2016.)

672. On December 12, 2016, Hinckley Allen produced over 4,000 pages of responsive communications with Respondents. (Hinckley Allen & Snyder, LLP's Objection to the Division of Enforcement's Motion to Compel, dated Jan. 5, 2017, at 5.) In response to the Division's Motion to Compel, Hinckley Allen produced another 148 documents on January 5, 2017. (Id. at 6.)

673. On December 5, 2016, in response to the Subpoena issued to him, Respondents' current litigation counsel, Kevin Galbraith maintained that "all responsive non-privileged documents have been provided to the Division by Clayman & Rosenberg or Respondents' other prior counsel," except for his billing records. (Brown Dec. 19, 2016 Decl., Ex. G.)

674. Galbraith's representation was inaccurate. On December 12, 2016, after a meet-and-confer with Division counsel, Galbraith produced more than 600 emails with a promise of more to come. (Brown Dec. 19, 2016 Decl. – para. 9 and Ex. H.)

675. In response to the Division's December 19, 2016 Motion to Compel Respondents' production of certain documents, the Court issued an Order, dated December 23, 2016, ordering Respondents to produce any documents reflecting communications between them and Galbraith for in camera review. (Order, Dec. 23, 2016.)

676. On January 1, 2017, the Division wrote to the Court requesting that the Court order Respondents to review their files for Galbraith communications responsive to the Court's December 23, 2016 Order. (Letter to the Court from Janna Berke, dated Jan. 4, 2017.)

677. On January 9, 2017, the Court directed Respondents again to review their files for communications with Galbraith, and ordered Galbraith to produce certain withheld documents. (Order, Jan. 9, 2017.)

678. After Respondents complied with the Court's January 9, 2017 Order and submitted an unknown number of as yet unproduced communications with Galbraith for in camera review, the Court ordered Respondents to produce more

than 90 documents (some in redacted form) after the commencement of the Hearing. (Order, Jan. 27, 2017.)

679. Lathen discarded all notes he had of his communications with any of his lawyers except those with Galbraith. (Brown Dec. 29, 2016 Decl. – para. 9.)

Katten Muchin Rosenman

680. When Respondents first invoked the reliance on advice of counsel defense in their September 23, 2016 letter to Division staff, they did not claim reliance on the advice of Katten Muchin. (Div. Ex. 708.)

681. When Lathen engaged Katten Muchin in 2009, it was prior to his formation of a fund. (SFOF ¶ 67.) See also:

3180:5 **Q So when you were talking to Rob, was it**
3180:6 **with your own money or was it the idea of raising**
3180:7 **money from --**
3180:8 A At that time, it was with my own money.

3723:7 **Q What, if anything, did Mr. Lathen tell you**
3723:8 **about creating a fund?**
3723:9 A There was no mention of a fund.

682. Daren Domina of Katten gave Lathen no advice about fund structure or formation, the Investment Company Act or investor disclosure.

3723:16 **Q What, if any advice, did you give him about**
3723:17 **fund structure or formation?**
3723:18 A None.

3723:21 **Q And what advice, if any, did you give him about**
3723:22 **the Investment Company Act?**
3723:23 A None.
3723:24 **Q And how about investor disclosure?**
3723:25 A None.

683. Katten was not comfortable in representing Lathen in the execution of his strategy through a fund.

2436:6 **Q And do you recall if Mr. Lathen ever asked**
2436:7 **Katten to act as its counsel in the execution of his**
2436:8 **fund strategy?**
2436:9 A I don't. Honestly, he didn't -- whether
2436:10 he did or he didn't, I know that in the end, Katten
2436:11 wasn't comfortable just given -- given the
2436:12 regulatory and headline risk of the strategy

2436:13 engaging in such representation.

684. Lathen was aware from the beginning that the validity of the joint tenancy might be an issue.

3548:6 **Q You knew from the beginning that the validity**
3548:7 **of the joint tenancy might be an issue; is that right?**
3548:8 A Certainly. I mean it was something that was
3548:9 identified very early on.

685. Lathen acknowledged that Domina told him that his strategy would invite scrutiny by both the regulators and the issuers.

3548:22 **Q And Daren Domina told you that your strategy**
3548:23 **would invite scrutiny by both the regulators and the**
3548:24 **issuers, right?**
3548:25 A That's fair to say.

686. In his March 2011 Investor Presentation, Respondents claimed Katten Muchin had provided advice that the strategy was legal. (Div. Ex. 461 – p. 17.)

3549:24 MS. WEINSTOCK: Mr. Chan, can you pull up
3549:25 Division 461, please, and p. 17.
3550:1 **Q You say in the third bullet, "Prior to**
3550:2 **launching business, Eden Arc received advice from counsel**
3550:3 **that the strategy is legal." That's what you said in**
3550:4 **your investor presentation?**
3550:5 A Yes.
3550:6 **Q And you were referring to Katten Munchin there;**
3550:7 **is that right?**
3550:8 A Yes, because I am talking about prior to
3550:9 launching the business. So that would have been going
3550:10 back all the way to 2009.

687. Grundstein graduated from law school in 1993, practiced for three years, and then left law for 8 years until he returned in 2004 as an associate in the financial services group at Katten Muchin, focusing on hedge fund formation.

2423:6 **Q And where did you attend law school?**
2423:7 A NYU.
2423:8 **Q And what year did you graduate there?**
2423:9 A 1993.

2423:16 **Q Can you just give us a brief summary of**
2423:17 **your legal experience.**
2423:18 A Sure. I was a general transactions
2423:19 security lawyer at Stroock & Stroock & Lavan from

2423:20 1993 until 1995.
2423:21 I left and went to a small firm, called
2423:22 Morgenthal, Greenes, Goldfarb & Aronauer for more
2423:23 general corporate practice for eight years.
2423:24 '96 I left law.
2423:25 I was an options market maker for about
2424:1 eight years.
2424:2 And in 2004, I went to Katten where I was
2424:3 a hedge fund lawyer, until 2011.
2424:4 From 2011 until present, I've been the GC
2424:5 and chief operating officer of Sabby Capital and
2424:6 Sabby Management, a hedge fund in Northern New
2424:7 Jersey.
2424:8 **Q Okay. And let me just ask you a quick**
2424:9 **question about your work at Katten. What practice**
2424:10 **group were you in, and what was your practice there?**
2424:11 A It was the financial services group. We
2424:12 basically represented hedge funds and all things
2424:13 regarding -- all issues -- general, I generally was
2424:14 a hedge fund formation lawyer, but, of course, was
2424:15 involved in all other types of hedge fund issues as
2424:16 well.

688. Grundstein met Lathen in college and has known him for 32 years. (SFOF ¶ 66.)

689. Grundstein and Lathen are very close, enjoying the occasional round of golf, visits to each other's houses, and they have traveled together both with friends and with their respective families over the years.

2453:21 **And you're pretty close today?**
2453:22 A Very close.

2454:1 **Q Golf?**
2454:2 A Yeah. Occasional round of golf.
2454:3 **Q Barbecues with the family?**
2454:4 A I stay at Jay's house. Jay comes to my
2454:5 house.
2454:6 **Q Okay. And you try to arrange trips, the**
2454:7 **families together; is that right?**
2454:8 A We've -- I honestly don't remember the
2454:9 last time we traveled together, but we certainly
2454:10 have in the past.
2454:11 **Q And trips with your college buddies --**
2454:12 A Oh, yeah. I thought -- we've done that
2454:13 more than the families, yeah.

690. Grundstein recalls neither Lathen's request for, nor Katten's provision of, any advice regarding his disclosure obligations to issuers.

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.

691. Grundstein sent Lathen the complaint filed by the NY State Attorney General's Office against Canary Capital relating to its late trading and market timing activities that included claims of fraud, deception and false statements and misrepresentations.

2491:24 **Q Do you remember sending that to Mr.**
2491:25 **Lathen?**
2492:1 A Not specifically.
2492:2 **Q But you reviewed it; is that correct?**
2492:3 A I would have to take a look at it and let
2492:4 you know. I honestly don't recall. I mean -- when
2492:5 was this?

2492:16 **Q And in this complaint, the prosecutor, as**
2492:17 **you call him, State of New York, sues Canary Capital**
2492:18 **for, among other things, fraud, correct?**
2492:19 If I can help you. If you turn to page
2492:20 42, where the third, fourth and fifth causes of
2492:21 action appear.
2492:22 A Yes. They accuse them of fraud.
2492:23 **Q Okay. And, in fact, the fifth cause of**
2492:24 **action accuses them of making false statements or**
2492:25 **representations, correct?**
2493:1 A Correct.
2493:2 **Q And your recollection is -- you have no**
2493:3 **recollection of whether you sent this to Mr. Lathen**
2493:4 **or not; is that right?**
2493:5 A I mean, I do recall sending him a

2493:6 complaint against somebody. And I'm taking the fact
2493:7 that I'm looking at this document. This is the one
2493:8 that I sent to him.

(See also: Div. Ex. 2044 – pp. 41-42.)

692. Grundstein and Domina advised Lathen that he should execute his strategy on a small scale; the smaller he kept his universe of his trading, the better off he would be.

2451:10 **Q Okay. Did you ever express an opinion to**
2451:11 **Mr. Lathen as to whether he should move forward with**
2451:12 **his investment strategy or not?**
2451:13 A So Daren and I sat with Jay -- I don't
2451:14 know if it was a meeting or a phone call -- and the
2451:15 general -- the general advice that I recall was the
2451:16 strategy is -- as I said before -- it's a really
2451:17 smart strategy, though for the same reasons as for
2451:18 the market timing, you could just find somebody --
2451:19 despite the fact that you're not doing anything
2451:20 wrong -- decides to prosecute you.
2451:21 And if they do so, it could shut down the
2451:22 strategy, and you could spend a fortune defending
2451:23 yourself.
2451:24 And that, and the headline risk, just
2451:25 because of the death aspect of things. You know, we
2452:1 warned him. We could see the New York Post just
2452:2 having a headline, you know, Former -- former city
2452:3 M.D., you know, profiting from the death of -- death
2452:4 of strangers.
2452:5 So the advice was: Do the strategy in a
2452:6 smaller -- the small -- you know, the tighter you
2452:7 keep it, the more likely you will avoid that type
2452:8 of -- that type of scrutiny.

693. Grundstein told Lathen that he should not go out and become a hedge fund and start selling securities to other people; he should not institutionalize the strategy.

2496:24 **Q Okay. Is that consistent with your memory**
2496:25 **that Mr. Lathen did not take your advice to do this**
2497:1 **in a personal fashion but, in fact, proceeded with**
2497:2 **his execution of the survivor's option strategy in**
2497:3 **the form of a business?**
2497:4 A I mean, can I see -- can I see the
2497:5 participation agreement that we sent back to Jay for
2497:6 a minute, please? Because I'm pretty sure that
2497:7 participation agreement still included EndCare.

2497:8 The point I was making was that they
2497:9 shouldn't -- our advice was not to go out and become
2497:10 a hedge fund, start selling securities to other
2497:11 people and make it -- add additional eyes on what
2497:12 they were doing.

2497:18 **Q I see. Now, why don't you --**
2497:19 A It was -- not institutionalizing the
2497:20 strategy is what Katten had suggested that he should
2497:21 avoid.

694. Joint tenancies were not Grundstein's area of expertise and he never told Lathen that he was advising him on the validity of any joint tenancy Lathen sought to create.

2472:11 **Q And you never told Mr. Lathen that you**
2472:12 **were advising him on the validity of the joint**
2472:13 **tenancies he was creating, correct?**
2472:14 A Well, you saw the memo from the trust
2472:15 and estates department. So whatever -- and that was
2472:16 the advice that we gave him basically was what was
2472:17 contained in that memo.
2472:18 **Q I was talking about your personally.**
2472:19 A No.
2472:20 **Q So you personally never advised him that**
2472:21 **you were giving him advice about the validity of his**
2472:22 **joint tenancies, right?**
2472:23 A I was a conduit for the advice of Beth
2472:24 Tractenberg and Daren, usually with Beth and Daren
2472:25 involved.
2473:1 **Q And because that -- the validity of the**
2473:2 joint **tenancies wasn't your area of expertise,**
2473:3 **that's why you brought in Ms. Tractenberg, right?**
2473:4 A Of course.

695. Because the validity of joint tenancies was a Trusts and Estates issue as to which Grundstein had no expertise, he brought in Beth Tractenberg, a Trusts and Estates partner at Katten, to look at the legality of the joint tenancy.

2442:4 **Q Regarding any issue.**
2442:5 A I know that there was a memo that was sent
2442:6 to Beth Tractenberg. T-R-A-C-H-T-E-N-B-E-R-G, [as
2442:7 spelled] I believe. She was a trust and estates
2442:8 partner who we were talking to just about -- she was
2442:9 looking to the legality of the joint tenancy on
2442:10 behalf of Jay.
2442:11 And I recall that she and her associate

2442:12 team prepared a memo.

2473:1 **Q And because that -- the validity of the**
2473:2 **joint tenancies wasn't your area of expertise,**
2473:3 **that's why you brought in Ms. Tractenberg, right?**
2473:4 A Of course.
2473:5 **Q Okay. But she never advised Mr. Lathen**
2473:6 **that the joint tenancies that he was setting up were**
2473:7 **valid either, did she?**
2473:8 A Well, in the end, the joint tenancies that
2473:9 Jay set up were -- I don't know.

696. Tractenberg's Trust and Estates team prepared an "informal memo" on joint tenancies under New York law, which Grundstein forwarded to Lathen on October 30, 2009.

To: jlathen**Redacted** jlathen**Redacted**]
Cc: Tractenberg, Beth D.[beth.tractenberg@kattenlaw.com]; Domina, Daren R.[daren.domina@kattenlaw.com]
From: Grundstein, Robert
Sent: Fri 10/30/2009 6:50:16 PM
Subject: Trusts & Estates Issues

Jay,

As we discussed yesterday, below please find an informal memo prepared by our trusts & estates department. Beth has also confirmed that an interest in a JTWROS cannot be transferred in a will.

(Div. Ex. 696 – p. 1.)

697. The introduction in Tractenberg's informal memo summarizes the facts she had been provided and on which she based her analysis of New York law:

> In our scenario, the client intends to purchase corporate bonds to be held in a brokerage account. He will pay the costs of the bonds, which he will hold as joint tenants with rights of survivorship with his wife and a third party.

(Div. Ex. 696 – p. 1.)

698. Tractenberg's informal memo makes no reference to the Participant Agreement that Lathen was proposing to have his co-tenants sign, and thus, no analysis of its impact on the validity of a joint tenancy. (Div. Ex. 696 – p. 1.) See also:

2475:4 **Q So there's no reference here at all to the**
2475:5 **participant agreements that Mr. Lathen was having**
2475:6 **the participants, his other co-tenants, sign; is**
2475:7 **that right?**
2475:8 A That's right.

699. Katten's billing records do not reflect that Tractenberg ever saw Lathen's Participant Agreement, even though Grundstein forwarded the marked up version of that document to Lathen five days before Tractenberg's first time entry. (Div. Exs. 682, 683, 684, 685, 686, 687.) See also:

2477:16 **Q Okay. And continuing on, looking again at**
2477:17 **687. Paging now, scrolling down through this, do**
2477:18 **you see any reference in Ms. Tractenberg's entries**
2477:19 **to reviewing an agreement?**
2477:20 A No.

700. The email, dated October 9, 2009, by which Grundstein forwarded the marked up version of the Participant Agreement to Lathen, does not copy Tractenberg. (Div. Ex. 690.) See also:

2479:6 **Now, is Ms. Tractenberg CC'd on this**
2479:7 **exhibit?**
2479:8 A No. And I'm fairly confident that she was
2479:9 not involved in looking at this agreement.

701. Grundstein is fairly confident that Tractenberg was not involved in looking at the Participant Agreement, and fairly sure that she did not have a copy of it when she was writing her informal memo on the joint tenancies.

2479:6 **Now, is Ms. Tractenberg CC'd on this**
2479:7 **exhibit?**
2479:8 A No. And I'm fairly confident that she was
2479:9 not involved in looking at this agreement.

2479:14 **Q So having looked at the time entries and**
2479:15 **this exhibit, does that refresh your recollection**
2479:16 **that Ms. Tractenberg did not have the participant**
2479:17 **agreement at the time she was writing her memo?**
2479:18 A Yes, I'm fairly sure that's correct.

702. Tractenberg gave Lathen no advice about the impact of the Participant Agreement on the validity of his joint tenancies.

2499:14 **Q Okay. And Ms. Tractenberg hadn't given**
2499:15 **him any advice about the impact of the participant**
2499:16 **agreement on the validity of his joint tenancies,**
2499:17 **right?**
2499:18 A I believe that's right.

703. Tractenberg gave Lathen no advice about the impact of the Participant Agreement on the participant's beneficial ownership interest in the bonds.

2499:24 **Q She hadn't given him any advice about the**
2499:25 **impact of the participant agreement on the**
2500:1 **beneficial ownership interest of the participants in**
2500:2 **the bonds, correct?**
2500:3 A I believe that's right.

704. Tractenberg's informal memo advised that a valid three party joint tenancy gave each joint tenant a present interest in the property and a present right to 1/3 of all income received:

> Right/Interests: The beneficial interest of a joint tenant who furnishes nothing for the purchase of the property is the same as that of his co-owner who furnishes all of the consideration. As long as all three co-tenants are living, each has a present interest in the property and a present right to 1/3 of all income received. York Civil Practice – EPTL 6-50. In the case of a joint bank account, each co-tenant has a "present unconditional property interest in an undivided" 1/3 of the money. Matter of Kleinberg v Heller, 38 NY2d 836 (1976)

(Div. Ex. 696 – p. 2.)

705. Lathen recalled having either one or no calls with Tractenberg.

3182:21 **Q You described your initial meeting with**
3182:22 **Rob.**
3182:23 **Did you ever have any subsequent meetings**
3182:24 **after you retained them, with anyone at Katten?**
3182:25 A I think we had -- the only meeting I
3183:1 believe in person that I can recall was with Rob and
3183:2 Daren Domina. And I don't remember exactly when
3183:3 that was.
3183:4 But there was a lot of, you know,
3183:5 telephonic communication, conference calls, that
3183:6 sort of thing.
3183:7 **Q With whom?**
3183:8 A With Rob and maybe -- I mean, I do -- I
3183:9 seem to recall a conference call with Beth
3183:10 Tractenberg on the T&E side. I'm not sure if Daren
3183:11 Domina was on a conference call. It's possible. I
3183:12 just don't remember.
3189:19 **Q Did you ever meet Ms. Tractenberg?**
3189:20 A I don't believe I ever met her in person.
3189:21 Although, I do believe that we may have had a
3189:22 conference call.

706. Lathen engaged in his first transaction with a Participant before he received the Tractenberg email regarding joint tenancies. (Div. Exs. 978 – p. 62; 696.) See also:

3473:21 **Q You paid Mr. Winters on July 3rd; is that**
3473:22 **right?**
3473:23 A I don't believe that's when I paid him. I
3473:24 believe it was -- he was paid sometime after that. The
3473:25 account was opened on July 3rd. And we had, you know,
3474:1 the account -- the account opening paperwork was
3474:2 submitted on July 3rd. And even though we weren't able to
3474:3 get the brokerage firm to establish the account, I did
3474:4 make the payment to Mr. Winters. So effectively, it was
3474:5 my first transaction. And it was a loss.
3474:6 **Q I'm going to hand you Div. Ex. 978 for**
3474:7 **identification.**
3474:8 **That's 2009 tax forms; is that correct?**
3474:9 A Yes.
3474:10 **Q And for Donald F. Lathen, Jr., DBA EndCare; is**
3474:11 **that right?**
3474:12 A Yes.
3474:13 MS. WEINSTOCK: Mr. Chan, if you could take us
3474:14 to page 62, please.
3474:15 **Q You see the check on the screen, Mr. Lathen,**
3474:16 **dated July 3rd, 2009?**
3474:17 A Yes.

707. The Participant Agreement, as revised by Katten and sent to Lathen on October 9, 2009, restricted the Participant's right to any funds in the accounts: "Participant agrees that she may not withdraw any funds from the Account without the Lathen's prior written consent." (Div. Ex. 691 – p. 1.)

708. The sentence in the Participant Agreement that prohibits the Participant from withdrawing any funds from the account without Lathen's prior written consent is inconsistent with Tractenberg's advice in her informal memo that a valid joint tenancy gives a joint tenant a present interest in the property and a present right to 1/3 of all income received.

2480:10 **Q Okay. Well, it's not consistent with her**
2480:11 **statement that in a joint tenancy -- a valid joint**
2480:12 **tenancy, one joint tenant has a present interest in**
2480:13 **the property and a present right to 1/3 of all**
2480:14 **income received? That's not consistent, is it?**
2480:15 A It's not. Although, we're looking at
2480:16 one -- that one sentence is not consistent. I don't
2480:17 have trust and estates expertise.
2480:18 I am certainly not opining that -- I have

2480:19 no idea whether or not -- whether a tenant can agree
2480:20 to -- whether they can agree to withdraw funds from
2480:21 a valid joint tenancy, if doing so does or doesn't
2480:22 change a joint tenancy. I have no expertise on the
2480:23 matter.

(See also: Div. Ex. 696 – p. 2, Div. Ex. 691 – p. 1.)

709. Tractenberg's informal memo advised that Lathen would be liable for gift tax in excess of any exclusion as a result of his joint tenancies with Participants.

> Accordingly, in our case, upon the creation of the joint tenancy, a gift of 1/3 of the property is given to the third party. The gift will qualify for the gift tax annual exclusion as a gift of a present interest, yet any amount in excess of the exclusion may be subject to gift tax. BNA 823-2nd A-15. (It is worth noting that the bonds may still be partially includible in the client's estate under the consideration-furnished rule of Section 2040.)

(Div. Ex. 696 – p. 4.) See also:

2484:9 **Q Does that refresh your recollection about**
2484:10 **Ms. Tractenberg's conclusions about whether Mr.**
2484:11 **Lathen might be liable for gift tax with respect**
2484:12 **to the joint tenancies that he was creating?**
2484:13 A It clearly was considered and presented to
2484:14 him that that he would have to limit -- to avoid any
2484:15 gift tax -- because, obviously, each of Jay and
2484:16 Kathy can gift the full amount of the gift tax
2484:17 exclusion to a participant.
2484:18 So my read of this is, as long as the gift
2484:19 being given to a participant was no more than -- so
2484:20 the 1/3 is no more than twice that exclusion, that
2484:21 he would have no gift tax responsibility.
2484:22 If it was above, that there would be gift
2484:23 tax responsibility.

710. Although Tractenberg's informal memo advised that Lathen would be liable for gift tax in excess of any exclusion as a result of his joint tenancies with Participants, Lathen was dubious about that advice, as he told Grundstein in his November 3, 2009 email to him:

From: Jay Lathen [jlathen[redacted]]
Sent: Tuesday, November 03 2009 9:00:20 PM
To: Grundstein, Robert
Subject: More stuff

This link is pretty interesting. See bottom of page 149 and into page 150. Not clear if the proposals ever became law but the IRS seems to be saying that the the creation of a JTWROS brokerage account is an "incompleted gift" when the transferor can unilaterally withdraw its own contributions from the account without the consent of the other cotenant. This is similar to the position that the IRS has always taken with joint bank accounts, namely a gift doesn't occur until a cotenant actually withdraws funds (the rationale being that the donor can, at any time, strip the account of value and deprive the donee of the gift). The incomplete gift result should be easily met through either the governance on the account or, more simply, by the co-tenant delegating power of attorney back to me on the account.

(Div. Ex. 688 – p. 1.) See also:

2486:8 **Q And does that refresh your recollection**
2486:9 **about Mr. Lathen's view of Ms. Tractenberg's gift**
2486:10 **tax advice?**
2486:11 A Yeah.
2486:12 **Q How does it refresh your recollection?**
2486:13 A I mean, he was obviously dubious about it,
2486:14 and he kept looking on his own and found, you know,
2486:15 additional guidance that I have no idea whether it
2486:16 helps or doesn't, but that -- that could be a
2486:17 different interpretation that he was looking -- that
2486:18 he was looking at.

711. Lathen did not follow Tractenberg's advice as it related to gift tax.

3553:1 **Q Was there a gift tax consequence upon the**
3553:2 **formation of the JTWROS account?**
3553:3 A No. I don't believe that there was.
3553:4 **Q And how do you know that?**
3553:5 A Because I looked into some IRS instructions on
3553:6 that. And the IRS draws a distinction. They referred to
3553:7 it as a completed gift. So I read some IRS guidance
3553:8 where it said that adding an individual to a joint
3553:9 account, just the mere act of doing that, does not create
3553:10 a gift tax liability. What creates the gift tax
3553:11 liability is when the joint owner who didn't provide the
3553:12 consideration actually withdraws funds from the account
3553:13 without further recourse. And the IRS refers to that term
3553:14 as a, quote, completed gift.
3553:15 **Q The Tractenberg e-mail had said there was a**
3553:16 **gift tax consequence; is that right?**
3553:17 A She did say that.

3553:18 **Q And you decided that you didn't agree with that**
3553:19 **advice, right?**
3553:20 A She cited -- I believe she cited a situation
3553:21 where a treasury security was owned jointly. And she
3553:22 cited some treasury regulation relating to that. And I
3553:23 subsequently did further research. And I believe I
3553:24 forwarded that research back to Beth Tractenberg or back
3553:25 to Rob Grundstein, suggesting that the IRS had a different
3554:1 interpretation. And the IRS is, of course, the
3554:2 organization responsible for collecting a gift tax.
3554:3 **Q Beth Tractenberg never told you that you were**
3554:4 **right; did she?**
3554:5 A I don't recall whether she said I was right or
3554:6 wrong, to be honest. It would be sort of hard for her to
3554:7 look at the IRS regs and refute that. The regs are what
3554:8 the regs are.
3554:9 **Q So you felt confident that you were correct?**
3554:10 A I felt very confident that I was correct.

3554:23 **Q You say to Eric Roper, "See the trusts and**
3554:24 **estates work below. I'm not sure how accurate it is.**
3554:25 **For instance, the last part of it says there is a gift on**
3555:1 **the creation of the joint tenancy. This was subsequently**
3555:2 **determined not to be true." And it's you that determined**
3555:3 **it wasn't true; is that right?**
3555:4 A Yes.

712. Tractenberg's informal memo makes no reference to the Power of Attorney that Lathen planned to execute with his Participant.

2486: 22 **Q In fact, you never asked Ms. Tractenberg**
2486:23 **about the impact of his power of attorney. You**
2486:24 **remember talking about the power of attorney form**
2486:25 **you sent him, correct?**
2487:1 A Yeah.
2487:2 **Q Okay. And you never asked her about the**
2487:3 **impact a power of attorney would have on the**
2487:4 **validity of the joint tenancies, did you?**
2487:5 A I, again, don't recall.
2487:6 **Q And you never asked him whether a valid**
2487:7 **joint tenancy would be created if Mr. Lathen had**
2487:8 **power of attorney over all of the funds into and out**
2487:9 **of the account and management of the account and the**
2487:10 **trading in the account, did you?**
2487:11 A Again, I don't recall.
2487:12 **Q Okay. Well, if you want to look back at**
2487:13 **696, Ms. Tractenberg's --**

2487:14 A Uh-huh.
2487:15 **Q -- memo. Take as much time as you need,**
2487:16 **and let us know if she mentions a power of attorney**
2487:17 **in this memo.**
2487:18 **Let Mr. Chan know when you want him to**
2487:19 **scroll.**
2487:20 (The witness examined the document.)
2487:21 THE WITNESS: You can scroll, please.
2487:22 Thank you.
2487:23 (The witness examined the document.)
2487:24 THE WITNESS: You can scroll, please.
2487:25 (The witness examined the document.)
2488:1 THE WITNESS: You can scroll. Thank you.
2488:2 (The witness examined the document.)
2488:3 THE WITNESS: You can scroll, please.
2488:4 (The witness examined the document.)
2488:5 THE WITNESS: You can scroll, please.
2488:6 (The witness examined the document.)
2488:7 THE WITNESS: I don't see any mention of
2488:8 it.

(See also: Div. Ex. 696.)

713. Tractenberg's billing records make no reference to any review of a Power of Attorney in connection with her work on the Lathen engagement. (Div. Ex. 687.) See also:

2488:10 **Q In fact, if you look at her time records,**
2488:11 **you don't see any mention of a power of attorney, do**
2488:12 **you? Review of a power of attorney?**
2488:13 **You can look at 687.**
2488:14 A I don't.

714. Grundstein does not recall asking Tractenberg about what impact a power of attorney giving Lathen control over all of the funds into and out of the account and management of and trading in the account would have on the validity of a joint tenancy.

2487:2 **Q Okay. And you never asked her about the**
2487:3 **impact a power of attorney would have on the**
2487:4 **validity of the joint tenancies, did you?**
2487:5 A I, again, don't recall.

715. Grundstein himself never saw the Power of Attorney that Lathen intended to have his Participants sign; he simply sent Lathen a form of such an agreement so that Lathen could revise it himself to keep his attorneys fees down.

2439:12 **Q And could you identify this document for**
2439:13 **us, Mr. Grundstein?**
2439:14 A Yeah. It's an email exchange between Jay
2439:15 and me.
2439:16 **Q Regarding?**
2439:17 A standard form durable power of attorney.

2440:1 **Q Does this refresh your recollection as to**
2440:2 **whether you provided Mr. Lathen with any documents?**
2440:3 A Yes, it does.
2440:4 **Q And what document do you believe you**
2440:5 **provided him with?**
2440:6 A So I gave him a standard form of
2440:7 attorney --
2440:8 **Q Standard form of attorney --**
2440:9 A I'm sorry. Standard form of power of
2440:10 attorney. I'm sorry.
2440:11 So he's looking to do a power of attorney.
2440:12 And Jay was -- he was -- you know, obviously, a new
2440:13 potential manager, investor, and was cost-conscious.
2440:14 This is something I typically would have
2440:15 just prepared for a client. But, instead, I just
2440:16 spent up -- a lot less time and dug up the form I
2440:17 thought would be most appropriate for Jay to use and
2440:18 he could prepare this power of attorney upon his
2440:19 own.

(See also: Lathen Ex. 825.)

716. Respondents did not call Tractenberg as a witness at the Hearing.

717. In Grundstein's interactions with Lathen after the formal Katten engagement ended, he never gave Lathen any reason to believe that he was acting as Lathen's lawyer in providing him with his advice.

2462:16 **Q But you aren't acting as his lawyer when**
2462:17 **you offered that advice, right?**
2462:18 A Of course not.
2462:19 **Q And you've never given him any reason to**
2462:20 **believe that you were acting as his lawyer when you**
2462:21 **do that, have you?**
2462:22 A No.

718. While still at Katten, if Grundstein gave Lathen any advice after the formal Katten representation had ended in November 2009, he would have made clear to Lathen that it was as a friend and not as his attorney.

2463:7 **Q And, in fact, while you were at Katten**
2463:8 **still, before you left, but after the engagement had**
2463:9 **been terminated, you still gave him advice, right?**
2463:10 A I can't -- it is a long time ago, I can't
2463:11 say that I didn't, but I can't say that I did.
2463:12 **Q Okay. But if you had been giving him**
2463:13 **advice as a lawyer, that would have violated**
2463:14 **internal rules at Katten, wouldn't it?**
2463:15 A I, again -- we're talking about something
2463:16 that I don't even know occurred.
2463:17 If I did give him advice after Katten no
2463:18 longer represented him while I was Katten, I
2463:19 certainly would have made clear to him that it was
2463:20 as a friend and not as his -- not as his attorney.
2463:21 And also, we're talking about -- when
2463:22 did -- do you know when the Katten relationship with
2463:23 Jay ended?

719. Because Katten gave Lathen no advice on his disclosures to issuers, it could not have advised him that that aspect of his strategy was legal.

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.
2499:11 **Q Okay. So Katten couldn't have told him**
2499:12 **that that aspect of his strategy was legal, right?**
2499:13 A I believe that's right.

720. Because Katten never saw any submission Lathen was making to issuers on his redemptions, Katten could not have advised him that that aspect of his strategy was legal.

2471:22 **Q In fact, you never saw any of the**
2471:23 **submissions that Mr. Lathen was making to issuers,**
2471:24 **did you?**
2471:25 A I did not.
2472:1 **Q Never reviewed his redemption letters, for**
2472:2 **example, right?**
2472:3 A No.
2472:4 **Q And he never asked you to review them, did**
2472:5 **he?**
2472:6 A No.

721. Because Katten gave Lathen no advice on the impact of the Participant agreement on either the validity of the joint tenancies or on the Participant's beneficial ownership interest in the bonds, it could not have advised him that that aspect of his strategy was legal.

2499:14 **Q Okay. And Ms. Tractenberg hadn't given**
2499:15 **him any advice about the impact of the participant**
2499:16 **agreement on the validity of his joint tenancies,**
2499:17 **right?**
2499:18 A I believe that's right.
2499:19 **Q Okay. And she hadn't given him any advice**
2499:20 **about the impact of the participant agreement on the**
2499:21 **participant's beneficial ownership interest in the**
2499:22 **bonds, right?**
2499:23 A Say that again, please.
2499:24 **Q She hadn't given him any advice about the**
2499:25 **impact of the participant agreement on the**
2500:1 **beneficial ownership interest of the participants in**
2500:2 **the bonds, correct?**
2500:3 A I believe that's right.
2500:4 **Q Okay. So Katten hadn't given him any**
2500:5 **advice about that legality of that aspect of his**
2500:6 **strategy, had it?**
2500:7 A I don't think so, no.

722. If Lathen was not paying any gift tax on the joint tenancies (as Tractenberg's informal memo advised that he would have to), Katten had not advised him that that aspect of his strategy was legal.

2500:8 **Q Okay. And Ms. Tractenberg had told him**
2500:9 **that he had to pay gift tax on the payments to**
2500:10 **participants; isn't that right?**
2500:11 A Well, the memo -- the memo did state that
2500:12 to the extent that there was gift tax required --
2500:13 **Q He would have to pay it?**
2500:14 A -- that there would be gift tax required.
2500:15 **Q Okay. And if he wasn't doing that, then**
2500:16 **Katten hadn't given him any advice about the**
2500:17 **legality of that aspect of his strategy, had it?**
2500:18 A No.

723. Grundstein is now the chief compliance officer of both Sabby Management LLC and Sabby Capital LLC; Sabby Management is the SEC-registered adviser to two hedge funds. (SFOF ¶ 68.)

724. As CCO, Grundstein's number one responsibility is ensuring compliance by Sabby Management with all the rules and regulations imposed on it, a role he takes very seriously.

2464:25 **Okay. As CCO you're responsible for**
2465:1 **compliance by Sabby with all the rules and**
2465:2 **regulations --**
2465:3 A I am.
2465:4 **Q -- imposed on it; is that right?**
2465:5 A Yes.
2465:6 **Q Okay. And I'm guessing that you take that**
2465:7 **function seriously, right?**
2465:8 A Very seriously.
2465:9 **Q I was going to say, in fact, you take it**
2465:10 **very seriously, don't you?**
2465:11 A I do.
2465:12 **Q Okay. Because it's important for an**
2465:13 **investment advisor that's managing other people's**
2465:14 **money to maintain strict compliance with rules and**
2465:15 **regulations, right?**
2465:16 A Yes.
2465:17 **Q And as CCO, that's your No. 1**
2465:18 **responsibility, isn't it?**
2465:19 A In that role, yes.

725. Because an investment adviser manages other people's money, it is important for it to maintain strict compliance with rules and regulations.

2465:12 **Q Okay. Because it's important for an**
2465:13 **investment advisor that's managing other people's**
2465:14 **money to maintain strict compliance with rules and**
2465:15 **regulations, right?**
2465:16 A Yes.

726. Getting compliance right is the utmost priority of a CCO.

2466:8 **Q Okay. Because getting compliance right is**
2466:9 **the upmost priority of a CCO, right?**
2466:10 A Yes.

727. As CCO, Grundstein reviews all regulatory filings, including the adviser's Forms ADV, and consults with Sabby's outside counsel about what rules and regulations require be included in the filing, including by asking them questions.

2466:11 **Q And as CCO, you review all regulatory**
2466:12 **filings, right?**
2466:13 A I do.

2466:14 **Q Including Sabby's ADV?**
2466:15 A Yes.
2466:16 **Q And to do that, you familiarize yourself**
2466:17 **with the rules and regulations that set out the**
2466:18 **information that's supposed to be collected there,**
2466:19 **right?**
2466:20 A Along with my attorneys, yes.
2466:21 **Q Okay. And when you have a question about**
2466:22 **compliance, it's to those attorneys that you turn,**
2466:23 **right?**
2466:24 A Yes.
2466:25 **Q And when you consult with them, you ask**
2467:1 **them questions, don't you?**
2467:2 A I do.

728. As CCO, Grundstein reviews the work of Sabby's outside counsel if they help him with the preparation of the adviser's Forms ADV because at the end of the day, it is his responsibility that the filing is accurate and complete.

2467:6 **Q Okay. And when lawyers help you with the**
2467:7 **ADV, you review their work, right?**
2467:8 A Of course. At the end of day, it's my
2467:9 responsibility.
2467:10 **Q I was just going to say, at the end of the**
2467:11 **day, as chief compliance officer, it's your**
2467:12 **responsibility to make sure the ADV is accurate and**
2467:13 **complete; is that right?**
2467:14 A Yes.

729. Grundstein never told Lathen that he did not need to take his compliance obligations seriously, or that he should just rely on a compliance consultant, or that he did not need to worry about what was in his Forms ADV.

2467:15 **Q Okay. So fair to say you never told Mr.**
2467:16 **Lathen that he didn't need to take his compliance**
2467:17 **obligations seriously, did you?**
2467:18 A I certainly would never have said that to
2467:19 Jay.

2467:20 **Q Okay. And you never told him to just rely**
2467:21 **on a compliance consultant, right?**
2467:22 A I don't understand when I would have had
2467:23 these conversations with Jay.
2467:24 **Q I'm just asking you.**
2467:25 A Yeah. Certainly I never would have told
2468:1 Jay to just rely on –

730. Lathen never asked Grundstein for any advice about the Custody Rule at any time.

2468:9 **Q And, in fact, Mr. Lathen never asked you**
2468:10 **for any advice about the Custody Rule, did he?**
2468:11 A I don't believe so, no.
2468:12 **Q Okay. Either when you were formally**
2468:13 **retained by him as his lawyer or at any other time?**
2468:14 A I don't believe so.

2469:21 **Q Okay. And if Mr. Lathen was relying on**
2469:22 **you to tell him he should custody the fund's assets**
2469:23 **in a particular way, that would surprise you too,**
2469:24 **right?**
2469:25 A Yes.

731. Grundstein never told Lathen that Lathen did not need to worry about compliance with the Custody Rule or what information was included in his Fund's Forms ADV.

2468:2 **Q And you never told him that he didn't need**
2468:3 **to worry about what was in his ADV, did you?**
2468:4 A No.
2468:5 **Q Okay. And you never told him that he**
2468:6 **didn't need to worry about compliance with the**
2468:7 **Custody Rule, did you?**
2468:8 A No.

732. When Lathen wrote to Grundstein in May 2014 that he had decided to use "stealth and tact in any disputes" he had with issuers and trustees, Grundstein understood that he meant that he would keep the dispute "on the down low and not share with – the less trustees that knew about his, the less likely they would be to get embolden by denying what he strongly felt were his valid claims."

2462:4 **Q And what did you tell her?**
2462:5 A I told her that my take on Jay saying
2462:6 stealth and tact was simply that he was going to --
2462:7 it made sense for him to keep this on the down low
2462:8 and not share with -- the less trustees that knew
2462:9 about this, the less likely they would be to get
2462:10 embolden by denying what he strongly felt were his
2462:11 valid claims.

(See also: Div. Ex. 800 – p. 1.)

733. Domina is a partner with Haynes & Boone in the Investment Funds and Private Equity Practice Group. (SFOF ¶ 78.)

734. In 2009, Domina was a partner at Katten Muchin Rosenman, specializing in broker-dealer and investment adviser regulatory matters. (SFOF ¶ 79.)

735. Domina has practiced law since 1992. (SFOF ¶ 80.)

736. Jack Governale was the partner in Katten's financial services group who was the partner on the relationship with Lathen, although he had minimal if any contact with Lathen. (SFOF ¶ 81.)

737. Domina reviewed no bond prospectuses, nor any of the submissions that Lathen was making to issuers in connection with his strategy; nor was he asked by Lathen or Grundstein to review either the bond prospectuses or submissions.

3727:19 **Q In connection with providing whatever advice**
3727:20 **you provided to Mr. Lathen, did you make a review of any**
3727:21 **bond prospectuses?**
3727:22 A No.
3727:23 **Q And what review, if any, did you make of the**
3727:24 **submissions that he was making to issuers in connection**
3727:25 **with his strategy?**
3728:1 A None.
3728:2 **Q Were you ever asked by either Mr. Lathen or Mr.**
3728:3 **Grundstein to review the bond prospectuses?**
3728:4 A No.
3728:5 **Q And how about with respect to the submissions**
3728:6 **he was making? Were you ever asked by Mr. Lathen or Mr.**
3728:7 **Grundstein to review those?**
3728:8 A I'm sorry. The submissions --
3728:9 **Q -- he was making to the issuers.**
3728:10 A No.

738. Domina has no expertise in trust and estates law and told Lathen that he was not an expert in joint accounts.

3728:11 **Q What expertise do you have, if any, with**
3728:12 **respect to trust and estates law?**
3728:13 A None.
3728:14 **Q I'm assuming that was true also in 2009?**
3728:15 A Correct.
3728:16 **Q Did you tell that to Mr. Lathen?**
3728:17 A I think once, I mentioned that I was not an
3728:18 expert in joint accounts, yes.

739. Governale, the partner in charge on the Lathen engagement, did not give Lathen any advice and Domina does not recall Governale ever speaking to Lathen.

3722:8 **Q And who is he?**
3722:9 A He was a partner in our financial services
3722:10 group.
3722:11 **Q What role, if any, did he have in Katten's**
3722:12 **representation of Mr. Lathen?**
3722:13 A Well, as I recall, when a new client comes in,
3722:14 an associate isn't given the ability to open up the new
3722:15 client matter without a partner, basically, signing off.
3722:16 And as I recall, Jack Governale was the partner on the
3722:17 relationship and the engagement of the billing.
3722:18 **Q Can you describe with any specificity what**
3722:19 **advice Mr. Governale gave to Mr. Lathen?**
3722:20 A I don't recall if Mr. Governale spoke to Mr.
3722:21 Lathen. I believe that Rob Grundstein or, perhaps, I
3722:22 might have talked to Jack once or twice to keep him
3722:23 abreast of what was going on, or as I said, Rob
3722:24 Grundstein, because I don't recall. Maybe once I did
3722:25 that. But I don't believe that Mr. Governale spoke to
3723:1 Mr. Lathen, at least as I recall.

740. Domina warned Lathen against executing his strategy as a business and to lessen the frequency in which he would engage in the activity because he might be deemed to be an investment adviser or broker-dealer if he did it as part of a business with a certain amount of regularity.

3724:7 **Q And what was your reaction to that?**
3724:8 A Well, given that he had originally intended to
3724:9 do it under the name of some sort of business entity, my
3724:10 initial reaction was to look into -- and also that he
3724:11 wanted to do it with some frequency, was to look into
3724:12 whether there was a potential broker-dealer or dealer
3724:13 issue with him doing a certain amount of buying, selling
3724:14 of securities that might mean that he or his entity might
3724:15 be deemed to be a dealer under the federal securities
3724:16 laws.
3724:17 **Q Were there any other risks that you identified?**
3724:18 A Well, there was also an issue about whether he
3724:19 was going to be deemed to be an investment advisor as
3724:20 well. And as a general matter, I informed him that
3724:21 engaging in the business with terminally ill people would
3724:22 entail a heightened level of scrutiny because of the
3724:23 nature of dealing with somebody who's terminally ill,
3724:24 either reputationally or other risk.
3724:25 And during the course of looking at what he
3725:1 intended to do and the dealer and the investment advisor
3725:2 issues, I ended up telling him that I didn't think he
3725:3 should do it as a business because one of the factors in

3725:4 both an investment advisor and a dealer is doing it as
3725:5 part of a business with a certain amount of regularity
3725:6 and holding yourself out as doing it as a business.

3725:7 **Q What advice, if any, did you give him to**
3725:8 **mitigate those risks?**
3725:9 A Well, in order to minimize the risk that he
3725:10 would be deemed to be an investment advisor or
3725:11 broker-dealer, to not do it under the name of an entity
3725:12 and to lessen the frequency in which he would engage in
3725:13 the activity because one of the issues again is doing
3725:14 business as factor.

741. Domina advised Lathen that he should carefully look at any documents that he was signing with respect to his business to make sure that he was comfortable with the representations that he was making in them.

3725:25 **Q What advice, if any, did you give him about**
3726:1 **disclosures?**
3726:2 A Well, one of the issues was that he would be
3726:3 opening up a brokerage account and that he also would be
3726:4 dealing with the issuers on these bonds. So as a general
3726:5 matter -- and I analogized it to market timing -- that
3726:6 you should be careful about the documents that he's
3726:7 signing, that he's reading them carefully and that he's
3726:8 comfortable with what the documents are saying.
3726:9 **Q And how about his own disclosure? Any advice**
3726:10 **about that?**
3726:11 A I'm not sure I understand.

3726:14 **Q You said that he needed to be careful about**
3726:15 **reading the documents. Maybe I should ask this question.**
3726:16 **Why?**
3726:17 A Well, because similar to market timing,
3726:18 different fund structures, different mutual fund
3726:19 structures had variances in their documents. And one of
3726:20 the issues that came out on their market timing, besides
3726:21 the fact that a practice that seemed to be -- seemed to
3726:22 be permissible, then it became not permissible under
3726:23 mutual fund market timing but also that there was a
3726:24 heightened scrutiny on the mutual fund documents and how
3726:25 they were being filled out by the investors, you know, by
3727:1 the shareholders.
3727:2 And so now advising him to that, I suggest that
3727:3 he carefully look at any documents that he's signing with
3727:4 respect to his business, including the brokers'
3727:5 agreements that he's going to be entering into to make

3727:6 sure that he is comfortable with the representations that
3727:7 he's making in them.

3739:19 **And what advice, if any, did you provide to Mr.**
3739:20 **Lathen about his submissions to issuers?**
3739:21 A Other than the general advice of reviewing the
3739:22 documents that are -- the survivor's option documents,
3739:23 which I wasn't aware of, what exactly those documents
3739:24 are. I'm not familiar with that, those bonds. But
3739:25 similarly to the broker-dealer agreements, I said as a
3740:1 general matter, make sure that you're reviewing those
3740:2 documents as well, whatever they happen to be, and that
3740:3 you're comfortable with the documentation.
3740:4 **Q Including the representations?**
3740:5 A Well, anything that was in those documents. I
3740:6 didn't know what those documents were. And I do not know
3740:7 now what those documents are.

742. In advising Lathen that he should be comfortable with any representations he was making in executing his strategy, Domina analogized to the market-timing cases and the heightened scrutiny on the mutual fund documents and how they were being filled out by the investors.

3725:25 **Q What advice, if any, did you give him about**
3726:1 **disclosures?**
3726:2 A Well, one of the issues was that he would be
3726:3 opening up a brokerage account and that he also would be
3726:4 dealing with the issuers on these bonds. So as a general
3726:5 matter -- and I analogized it to market timing -- that
3726:6 you should be careful about the documents that he's
3726:7 signing, that he's reading them carefully and that he's
3726:8 comfortable with what the documents are saying.

3726:14 **Q You said that he needed to be careful about**
3726:15 **reading the documents. Maybe I should ask this question.**
3726:16 **Why?**
3726:17 A Well, because similar to market timing,
3726:18 different fund structures, different mutual fund
3726:19 structures had variances in their documents. And one of
3726:20 the issues that came out on their market timing, besides
3726:21 the fact that a practice that seemed to be -- seemed to
3726:22 be permissible, then it became not permissible under
3726:23 mutual fund market timing but also that there was a
3726:24 heightened scrutiny on the mutual fund documents and how
3726:25 they were being filled out by the investors, you know, by
3727:1 the shareholders.
3727:2 And so now advising him to that, I suggest that

3727:3 he carefully look at any documents that he's signing with
3727:4 respect to his business, including the brokers'
3727:5 agreements that he's going to be entering into to make
3727:6 sure that he is comfortable with the representations that
3727:7 he's making in them.
3727:8 **Q This advice that you just described was advice**
3727:9 **that you provided to Mr. Lathen; is that correct?**
3727:10 A Yes.

743. Domina did not edit the Participant Agreement that Grundstein forwarded to Lathen on October 9, 2009.

3730:10 **Q Just so I understand, so is it your testimony,**
3730:11 **having reviewed Exhibit 691 that you, in fact, did not**
3730:12 **provide any comments to that document, except for**
3730:13 **removing EndCare?**
3730:14 A I did not edit this document, no.
3730:15 **Q So how can you be so sure of that?**
3730:16 A Well, it doesn't have anything that I would
3730:17 normally add to a short letter agreement which would have
3730:18 some basic boilerplate at the end. I also never put
3730:19 Katten comments on the top right. It's just something I
3730:20 don't do. I would just make the change and send it clean
3730:21 and a redline back. So based on the style of the
3730:22 changes, it comports with my recollection that I did not
3730:23 edit the document.

(See also: Div. Ex. 691.)

744. Domina discussed the Participant Agreement with Grundstein and told him that all references to EndCare should be removed.

3730:3 **Q Do you recall what work, specifically, you did**
3730:4 **with respect to Division Exhibit 691?**
3730:5 A Looking at the cover e-mail where Mr. Grundstein
3730:6 says, "You will see that we have removed all references
3730:7 to EndCare and your doing business as EndCare," that, I
3730:8 believe, is my comments that I had discussed with Rob at
3730:9 the time, Rob Grundstein.

(See also: Div. Ex. 691.)

745. Domina gave no consideration to the impact of the Participant Agreement on the validity of the joint accounts Lathen was trying to set up.

3731:11 **Q During your discussions of these topics with**
3731:12 **Mr. Grundstein, what consideration, if any, did you give**

3731:13 **to the impact of this agreement on the validity of the**
3731:14 **joint accounts Mr. Lathen was trying to set up?**
3731:15 A None.

746. Domina did not review the informal memo on joint tenancy law prepared by Tractenberg in October 2009, nor does he recall talking to Grundstein or Tractenberg about it.

3732:8 **Q You will note that the e-mail is to Mr. Lathen**
3732:9 **and it's from Mr. Grundstein, dated October 30th, 2009,**
3732:10 **CC'ing Ms. Tractenberg and you.**
3732:11 **Does that help refresh your recollection of**
3732:12 **having reviewed this document?**
3732:13 A I may have like opened it to understand just
3732:14 what was in it. But I don't recollect reading it or
3732:15 talking to Mr. Grundstein or Ms. Tractenberg about it.

3733:7 **Q And I think you already testified that you**
3733:8 **don't recall making a review of this memo at the time?**
3733:9 A It's possible that I skimmed it. If I was
3733:10 CC'd, I certainly would have opened it and just looked at
3733:11 what it was. But I certainly didn't review this
3733:12 document. When I say "this document," her, you know --
3733:13 what is in effect referred to as the informal memo that's
3733:14 at the bottom of the e-mail. I did not review it, no.

(See also: Div. Ex. 696.)

747. Domina does not recall participating in any meetings, or on any calls, with Tractenberg and Lathen and did not speak with Tractenberg about joint accounts or New York law or similar trust and estates issues on the Lathen engagement.

3733:1 **Q Did you participate in any meetings with Mr.**
3733:2 **Lathen and Ms. Tractenberg?**
3733:3 A I don't recall that I did, no.
3733:4 **Q Did you participate in any calls on which Ms.**
3733:5 **Tractenberg also participated?**
3733:6 A I don't have any recollection that I did, no.

(See also: Div. Ex. 687.)

748. When shown Lathen's November 2010 investor presentation and its claim that "[p]rior to launching the business, EndCare received advice from counsel that the strategy is legal," Domina testified that he would not have told Lathen that his strategy was legal.

3737:2 **What relationship, if any, could there be**

3737:3 **between the advice your firm provided and this bullet**
3737:4 **point?**
3737:5 THE WITNESS: Well, I can't speak to what other
3737:6 people at the firm would have provided with regard to
3737:7 this. From my perspective, although I wouldn't -- this
3737:8 is not a sentence, a structure that I would be dealing
3737:9 with clients. But I've viewed that from a broker-dealer
3737:10 and an investment advisor perspective, the strategy
3737:11 wasn't, per se, illegal or impermissible, but that there
3737:12 were a number of risk factors. There were potential
3737:13 implications of if the strategy was conducted in a
3737:14 certain way, it would raise further issues on the
3737:15 broker-dealer investment advisor side. So I would say
3737:16 that -- I didn't say that it was, per se, illegal. But
3737:17 at the same time, given the facts and circumstances and
3737:18 the potential risks, I wouldn't use the words -- you
3737:19 know, the strategy as legal. But at the same time, I
3737:20 didn't say that the strategy was not legal.

749. Katten's billing records reflect the following billing breakdown by attorney on the Lathen engagement for the following attorneys:

Attorney	**Partner/ Associate**	**Months (Div. Ex. and Page No.)**	**Hours Billed**
Grundstein	Associate	April (682 – p.3), May (683 – p.2), June (684 – p.2), July (685 – p.2), September (686 – p.3), October (687 – p.3)	28.2
Domina	Partner	April (682 – p.3), May (683 – p.2), June (684 – p.2), July (685 – p.2), September (686 – p.3), October (687 – p.3)	8.1
Tractenberg	Partner	October (687 – p.3)	2.8
Governale	Partner	--	--

Gersten Savage

750. Gersten Savage was trying to protect the Fund.

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.

751. Gersten Savage did no research into the validity of the joint tenancies, nor did they advise Lathen on that topic.

2233:9 **Do you -- do you know why Mr. Lathen is**
2233:10 **writing to you an email in which he is referencing**
2233:11 **joint tenancies?**
2233:12 MS. WEINSTOCK: Objection.
2233:13 JUDGE PATIL: Overruled.
2233:14 THE WITNESS: Well, there were joint
2233:15 tenancies created as part of the strategy. And so
2233:16 I -- I can only assume that he was sending this to
2233:17 me for my information.
2233:18 BY MR. PROTASS:
2233:19 **Q What do you mean by for your information?**
2233:20 A Well, I mean, he didn't -- I can't see
2233:21 that he asked me to do anything with respect to it;
2233:22 whether to review it or to respond to it. It just
2233:23 says, "I think it makes sense to give this a fresh
2233:24 look."
2233:25 But I don't -- but I don't know – I
2234:1 don't -- I don't believe we, to the best of my
2234:2 recollection, ever did anything, including giving it
2234:3 a fresh look.
2234:4 **Q All right. And you just stated that --**
2234:5 **testified that joint tenancies were a part of Mr.**
2234:6 **Lathen's strategy? Is that what your testimony was?**
2234:7 A I believe it was.
2234:8 **Q And what role did joint tenancies play in**
2234:9 **Mr. Lathen's strategy, to the best of your**
2234:10 **recollection?**
2234:11 A Well, the strategy was based on creating a
2234:12 joint tenancy relationship between Jay and the third
2234:13 party, who was -- which was done pursuant to the
2234:14 participant agreement.
2234:15 **Q You just stated that it was a joint**
2234:16 **tenancy between Mr. Lathen and a third party.**
2234:17 **Do you know who the third party was?**
2234:18 A Well, my understanding is that there were
2234:19 a number of third parties, which were the
2234:20 participants under the participation agreements.
2234:21 **And do you know why Mr. Lathen needed to**

2234:22 **form a joint tenancy with a participant pursuant to**
2234:23 **the participant agreement?**
2234:24 MS. WEINSTOCK: Objection. Leading.
2234:25 JUDGE PATIL: Overrule the objection.
2235:1 Because I think that question is substantially
2235:2 similar to just asking why.
2235:3 So, for example -- let me make sure I'm
2235:4 right about that.
2235:5 Why did Mr. Lathen need to form a joint
2235:6 tenancy with a participant pursuant to the
2235:7 participant agreement, if you know?
2235:8 THE WITNESS: Is that the question, Your
2235:9 Honor?
2235:10 JUDGE PATIL: That is my question, yes.
2235:11 THE WITNESS: All right. My answer is
2235:12 that it's my understanding from the documentation
2235:13 that the joint tenancy was the -- was the party that
2235:14 was going to enter into the -- the securities that
2235:15 had the survivor option -- it was -- was going to
2235:16 enter into the survivor option bond securities.
2235:17 BY MR. PROTASS:
2235:18 **Q I'm sorry. You stated that the joint**
2235:19 **tenancy was going to enter into the survivor option**
2235:20 **bond securities?**
2235:21 **Did you mean -- at the risk of leading --**
2235:22 **and you're free to object -- but did you mean --**
2235:23 MS. WEINSTOCK: Thank you.
2235:24 BY MR. PROTASS:
2235:25 **Q -- that the joint tenancy was going to**
2236:1 **purchase the survivor option bond?**
2236:2 A Was going to be the recipient of the
2236:3 bonds.
2236:4 **Q Okay.**
2236:5 A I'm sorry if I misspoke.
2236:6 **Q That's quite all right.**
2236:7 **Did your firm ever conduct any legal**
2236:8 **research concerning joint tenancies?**
2236:9 A I don't believe we did.

752. Respondents did not ask Eric Roper whether he advised Respondents on disclosure to issuers.

753. There is no evidence that Roper advised Respondents on disclosure to issuers.

754. Roper testified that Lathen was very thorough in the preparation of his documents.

2186:21 **Q Okay. And did you need to obtain**
2186:22 **information from Mr. Lathen to prepare those three**
2186:23 **documents?**
2186:24 A Yes, we did need information. And we
2186:25 already had been given information from -- from Mr.
2187:1 Lathen.
2187:2 **Q Do you recall whether at this point you**
2187:3 **sought additional information from Mr. Lathen than**
2187:4 **the information that you previously had from him?**
2187:5 A I don't recall, because Jay Lathen was
2187:6 very thorough in his -- in the preparation of the
2187:7 term sheet responses and the other documents that he
2187:8 had already worked on.
2187:9 So I don't know whether we asked him for
2187:10 additional information, or what we were able to do
2187:11 was to take the information that we had already
2187:12 received and begin to draft the appropriate offering
2187:13 documents.

755. Roper testified that Lathen was a very thorough client.

2200:5 JUDGE PATIL: I think he's just asking why
2200:6 you're transmitting revised drafts of the PPM and
2200:7 the LPA to Mr. Lathen.
2200:8 MR. PROTASS: Yes.
2200:9 THE WITNESS: The answer would be that we
2200:10 were trying to be very thorough. Jay Lathen is a
2200:11 very thorough client, and we were trying to be sure
2200:12 that we were accommodating all of Mr. Lathen's
2200:13 comments, as well in this case, of forwarding them
2200:14 to Bob Kaufman, who, if I'm not mistaken, is the
2200:15 auditor, to look at the so-called tax section in the
2200:16 PPM that describes some tax issues.

756. Lathen never asked Gersten Savage for any legal opinions.

3558:5 **Q By the way, you never asked Gersten Savage for**
3558:6 **any legal opinions, right?**
3558:7 A No.

757. In August 2010, Lathen hired Gersten Savage to produce a Term Sheet. The fee was listed as $3,000. (Div. Ex. 651.)

758. In October 2010, Lathen hired Gersten Savage to prepare a private placement memorandum, a limited partnership agreement, and subscription documents for a "domestic investment limited partnership." The fee was listed as "in the range of $35,000." (Div. Ex. 730.)

759. No other engagement letters or invoices from Gersten Savage were introduced at the hearing.

760. In June 2013, Respondents hired Roper individually to draft, revise, and finalize the updated limited partnership agreement, private placement memorandum, and subscription agreement. In July 2013, Roper sent Respondents a bill for $3,500 for this work. (Div. Ex. 639.)

761. No other bills, nor other engagement letters, from Roper, were introduced at the hearing.

762. Gersten Savage's role was primarily focused around the fund documents.

3556:9 **Q Gersten Savage's role was primarily focused**
3556:10 **around the fund documents; is that right?**
3556:11A That was the principal work stream, yes

2172:17 **Q Okay. Do you recall what you and Mr.**
2172:18 **Lathen discussed at that meeting?**
2172:19 I don't have a word-for-word recollection
2172:20 for that.
2172:21 **Q I understand.**
2172:22 A I'm too old for that.
2172:23 But I can tell you when I met with Jay, he
2172:24 discussed his business, which at that point he was
2172:25 financing himself, and that he wanted a law firm to
2173:1 prepare the appropriate documentation so that he
2173:2 could, in a sense, convert his business into a more
2173:3 formal structure and make an offering to third
2173:4 parties so that he would no longer be financing the
2173:5 business himself.

2185:17 MR. PROTASS: Okay. I move SEC Exhibit
2185:18 730 into evidence.

2185:22 BY MR. PROTASS:
2185:23 **Q And you said this was a retainer to**
2185:24 **prepare documents -- could you rephrase that --**
2185:25 **restate that?**
2186:1 A I said -- I think what I said is that this
2186:2 is a retainer that we sent to Jay in order for us as
2186:3 his counsel to prepare the necessary documents for
2186:4 the proposed partnership, for the partnership.

763. Lathen sent a draft of his investor presentation to Eric Roper on October 14, 2010. In that presentation, Lathen stated, "Prior to launching business, EndCare

received advice from counsel that the strategy is legal." (Lathen Exs. 835; 836 – p. LATHEN04689.) See also:

3230:5 **Q All right. And did you provide -- I'm**
3230:6 **sorry.**
3230:7 **Did you have any documents at this point**
3230:8 **to share with Mr. Roper?**
3230:9 A Yes. I had a -- kind of an investor
3230:10 presentation, obviously, you know, the prospectuses
3230:11 and governing documents for the issuers in the
3230:12 market. I likely shared that with him.
3230:13 And I think that was it. I mean, it was
3230:14 really -- there was no -- I mean, the whole point of
3230:15 hiring them was to get all of the offering documents
3230:16 and whatever other documents we would need to launch
3230:17 the fund, to sort of get those in place.
3230:18 So it was a relatively blank sheet of
3230:19 paper other than the investor presentation and the
3230:20 objective of sort of creating a fund around the
3230:21 strategy.

764. In the October 2010 investor presentation that Lathen sent to Roper, Lathen represented that there would be a "Nominee Agreement" between the Fund and the Managing Member of the Fund GP and Third Party Fiduciary, and that there would be "Nominee Owners." (Lathen Ex. 836 – p. 12.)

765. In the October 2010 investor presentation that Lathen sent to Roper, Lathen represented that there would be "[s]trict governance on accounts to prevent unauthorized funds transfer." (Lathen Exs. 835; 836 – p. LATHEN04696.)

766. Roper worked at Gersten Savage until the late fall of 2012.

2162:3 And then I became a senior partner in the
2162:4 law firm of Gersten Savage Kaplowitz, and I was
2162:5 there until the late fall of 2012.

767. Gersten Savage ceased operations in 2012.

2162:6 **Q Is Gersten Savage still an operational law**
2162:7 **firm?**
2162:8 A It is not.
2162:9 **Q And when did it cease operations?**
2162:10 A Well, I think the ceasing of operations
2162:11 was over the course of 2012. But I don't know what
2162:12 the formal -- when they filed the dissolution. I
2162:13 don't remember. I think that was later than 2012.

768. In June 2013, Respondents hired Roper individually to draft, revise, and finalize the updated limited partnership agreement, private placement memorandum, and subscription agreement. (Div. Ex. 639.)

769. Gersten Savage did not do any follow up work on the Tractenberg memo. (Div. Ex. 982.)

2231:10 **Q Could you identify this email for was, Mr.**
2231:11 **Roper?**
2231:12 A This is an email from Jay Lathen to me,
2231:13 Eric Roper, dated November 2, 2010. The subject is
2231:14 "Trusts & Estates Issues."
2231:15 **Q Are there any letters that appear before**
2231:16 **the words trusts & estates issues?**
2231:17 A Oh, FW.
2231:18 **Q And do you know what FW means?**
2231:19 A I do not.
2231:20 **Q Okay. Can you please read the email.**
2231:21 A "See the trust and estates issues work
2231:22 below. I'm not sure how accurate it is. For
2231:23 instance, the last part of it says that there is a
2231:24 gift on the creation of the joint tenancy.
2231:25 "This was subsequently determined not to
2232:1 be true. So I can't vouch for the accuracy of the
2232:2 remaining items in the memo.
2232:3 "The memo also references the ability to
2232:4 sever the joint tenancy under NY," New York, "law.
2232:5 While this applies to real estate, I don't think
2232:6 practically speaking it applies to an investment
2232:7 account.
2232:8 "I asked several brokerage firms about
2232:9 this, and they all say that a signature of all of
2232:10 the parties is required to sever the tenancy.
2232:11 Perhaps they just have that provision to prevent
2232:12 litigation.
2232:13 "In any event, I think it does make sense
2232:14 to give this a fresh look, particularly as it
2232:15 relates to the risk of a creditor of the Participant
2232:16 being able to go after the account."
2232:17 **Q Did you just say predator or creditor?**
2232:18 A I said creditor.
2232:19 **Q Thank you.**
2232:20 A Same thing; creditor, predator.
2232:21 **Q Based on what you just said, is Mr. Lathen**
2232:22 **asking you to do something?**
2232:23 A Not that I can tell.
2232:24 **Q Okay. Can I please read you the final**

2232:25 **paragraph of that email, which states, "In any**
2233:1 **event, I do think it makes sense to give this a**
2233:2 **fresh look, particularly as it relates to the risk**
2233:3 **of a creditor of the Participant being able to go**
2233:4 **after the account."**
2233:5 **And I guess I would ask, instead of the**
2233:6 **prior question, is: Do you recall whether your firm**
2233:7 **undertook any work in response to this email?**
2233:8 A I do not believe we did.
2233:9 **Q Do you -- do you know why Mr. Lathen is**
2233:10 **writing to you an email in which he is referencing**
2233:11 **joint tenancies?**

2233:14 THE WITNESS: Well, there were joint
2233:15 tenancies created as part of the strategy. And so
2233:16 I -- I can only assume that he was sending this to
2233:17 me for my information.
2233:18 BY MR. PROTASS:
2233:19 **Q What do you mean by for your information?**
2233:20 A Well, I mean, he didn't -- I can't see
2233:21 that he asked me to do anything with respect to it;
2233:22 whether to review it or to respond to it. It just
2233:23 says, "I think it makes sense to give this a fresh
2233:24 look."
2233:25 But I don't -- but I don't know -- I
2234:1 don't -- I don't believe we, to the best of my
2234:2 recollection, ever did anything, including giving it
2234:3 a fresh look.

770. Lathen drafted the following sections of the private placement memorandum: "Investment Objective," "The General Partner," and "Description of Investment Objectives and Strategy." (Lathen Exs. 786; 787 – pp. LATHEN03861, LATHEN03867, LATHEN03868.)

771. The first draft of the private placement memorandum states, under "Risks Associated with Survivor Option Corporate Bonds (SOB'S)":

> Decisions by the Corporate Trustee
> The trustee of an entity using the SOB has broad discretion over whether, for any reason, the issuer will honor the redemption request and if the redemption request is denied, there may be no recourse by the Partnership to require that redemption to occur. In addition, the trustee could claim that there was no economic substance to the transaction by the Partnership with respect to the claimed purposes and objectives for which the SOB's were intended.
> (Lathen Exs. 786; 787 – p. LATHEN03875.)

See also:
3235:2 Caleb, Lathen Exhibit 786, please.
3235:3 BY MR. HUGEL:
3235:4 **Q What's this email?**
3235:5 A This is the first draft of the PPM that
3235:6 Eric is sending to me on November 22, 2010.

772. Respondents did not call Cheryll Calaguio as a witness at the hearing.

773. Calaguio worked on the IMA, and the private placement memorandum as it related to risk factors for survivor's option bonds. (Lathen Exs. 796, 786.)

Bruce Hood

774. In May 2010, Lathen sought tax advice from physical Hood, a partner at Wiggin & Dana. (SFOF ¶ 82.)

775. Lathen was seeking advice on tax matters related to setting up a hedge fund.

3765:11 **Q And what advice was he seeking?**
3765:12 A Well, he was seeking tax advice in connection
3765:13 with a fund that I think he was in the process of
3765:14 forming.

776. Lathen's goal was to get the best tax treatment for investors in the Fund. Hood told Lathen that capital gains treatment would be available to the Fund's investors if the Fund was deemed to be the owner of the survivor's option securities held in the JTWROS accounts.

3769:24 **Q Was there a particular tax goal that Mr. Lathen**
3769:25 **came to you with?**
3770:1 A Well, I think that the goal was -- and I'm not
3770:2 sure whether he indicated to me or I indicated to him.
3770:3 But the goal was certainly for tax purposes to try to get
3770:4 the best or the lowest tax rate for the investors in
3770:5 connection with this investment, if you will. And that
3770:6 would be the result if the fund were deemed to be the
3770:7 owner. And they were deemed to be the owner because then
3770:8 they would be entitled to capital gain treatment in
3770:9 connection with the profits.

777. Hood told Lathen that the Fund's investors would be deemed the owners of the survivor's option securities in the JTWROS accounts if Lathen and the terminally-ill Participant acted as agents for the Fund. (Div. Ex. 279.) See also:

3769:4 **Q What was your understanding of what Mr. Lathen**
3769:5 **was considering with regard to his investment structure?**

3769:6 A Well, I think that he was -- it's kind of a
3769:7 broad question. What he -- I think he desired -- what I
3769:8 told him would probably be the best from a tax
3769:9 standpoint, would be if the -- would be for the fund,
3769:10 and, therefore, the investors in the fund to be deemed to
3769:11 be the owners of the -- of these bonds for tax purposes.
3769:12 In order for that to have been the case, if Jay
3769:13 were going to be the nominal title holder, if you will,
3769:14 to the bonds, then it was going to be necessary for tax
3769:15 purposes, anyway, for him to have been deemed to be the agent
3769:16 for the fund and, therefore, for the investors.

778. Hood wrote an email to Lathen on June 18, 2010 indicating that Lathen and the terminally-ill Participant could "hold bonds as agents of an investment fund (with the result that the fund is entitled to the tax benefits associated with ownership of the bonds), as long as an agreement is in place between the parties making it clear that the agents are acting in that capacity and the parties' actions are consistent with the arrangement." (Div. Ex. 279.)

779. Despite Hood's advice that an agency agreement was integral to obtaining short term capital gains treatment, Lathen never provided Hood with his IMA. (Div. Ex. 280 – p. 3.) See also:

3770:10 **Q That sentence went on to say, "As long as there**
3770:11 **was an agreement in place between the parties, making it**
3770:12 **clear that the agents are acting in that capacity."**
3770:13 **And I'm going to stop there for a second. Did**
3770:14 **you ever see any agreement of Mr. Lathen, setting up an**
3770:15 **agency arrangement?**
3770:16 A I don't believe that I did, no. If I did, I
3770:17 don't recall it.

3781:5 **Q The next paragraph says, "Although I have not**
3781:6 **reviewed the provisions of the nominee agreement to be**
3781:7 **used in this case."**
3781:8 **Is that consistent with your understanding; you**
3781:9 **never reviewed the nominee arrangement agreement?**
3781:10 A That's consistent with my memory, yes.

3781:21 **Q And just to go back to the nominee agreement,**
3781:22 **do you remember after writing this memo, ever seeing the**
3781:23 **nominee agreement or any nominee agreement?**
3781:24 A I don't recall seeing it, no.
3781:25 **Q Did you ever review Mr. Lathen's investment**
3782:1 **management agreement?**
3782:2 A I don't recall reviewing that, no.

780. Lathen told Hood that the agency arrangement between Lathen and the terminally-ill Participant, on the one hand, and the Fund, on the other hand, would be hidden from the bond issuers. (Div. Ex. 279 – p. 1.)

3770:18 **And then the e-mail goes on. I'm skipping down**
3770:19 **a sentence.**
3770:20 **It says, "The fact that the agency arrangement**
3770:21 **will not be made public, at least as regards the issuer**
3770:22 **of the bond, does not appear to be fatal to the**
3770:23 **arrangement, although it is one of the factors pointing**
3770:24 **against agency treatment."**
3770:25 **So how did you come to understand that the**
3771:1 **agency arrangement would not be made public?**
3771:2 A I believe that I came to understand that
3771:3 because -- as a result of communications with Jay.
3771:4 **Q What do you mean by that?**
3771:5 A Well, that he -- I believe that he thought that
3771:6 that might be a problem in setting up -- not the tax, but
3771:7 the legal structure of what he was trying to do.
3771:8 **Q He thought what would be a problem?**
3771:9 A For the agency arrangement to be made public.

781. Hood told Lathen in his June 18, 2010 email that "[t]he fact that the agency arrangement will not be made public – at least as regards the issuer of the bond – does not appear to be fatal to the arrangement, although it is one of the factors pointing against agency treatment." (Div. Ex. 279.)

782. Hood did not give Lathen advice on what the implications of hiding the agency arrangement from issuers would or might be under the securities laws.

3771:22 **Q And just to be clear, again, did Mr. Lathen**
3771:23 **ever seek your advice about the securities law**
3771:24 **implication of failing to disclose the agency arrangement**
3771:25 **to the issuers?**
3772:1 A No.
3772:2 **Q Did you ever offer any such advice?**
3772:3 A No.

783. In December 2010, Lathen came back to Hood for more formal advice. (Div. Ex. 279.)

784. Lathen wrote an email to Hood: "Hi Bruce, I am in process of launching a fund and want to revisit your prior research on the structure below. Can you give me a call please?" (Div. Ex. 279 – p. 1.)

785. What followed was a January 12, 2011 memorandum to Lathen from Hood addressing a number of "tax issues impacting Eden Arc Capital Partners, L.P." (Div. Ex. 280.)

786. In advance of writing that memorandum, Hood was furnished with drafts of the EACP PPM for the Fund as well as the limited partnership agreement. (Div. Ex. 280 – p. 1.) See also:

3774:19 **Q So I'd like to flip back to 280, if you don't**
3774:20 **mind. In that second paragraph, it says, "I have been**
3774:21 **furnished with drafts of the confidential private**
3774:22 **placement memorandum for the fund, as well as a 'limited**
3774:23 **partnership agreement.'" Do you recall reviewing those**
3774:24 **documents?**
3774:25 A I don't specifically recall reviewing them.
3775:1 But I am pretty confident that I did, if I said that I
3775:2 did in this memo.

787. In drafting his memorandum, Hood was not furnished with other Fund documents, such as the IMA.

3775:3 **Q Do you recall reviewing any other documents in**
3775:4 **anticipation of writing this memo?**
3775:5 A I don't think so. I think that my practice
3775:6 would be to, you know, refer to everything that I looked
3775:7 at. And so if I didn't mention -- I would have mentioned
3775:8 all the documents I think that I looked at and not have
3775:9 omitted any.

788. Hood did not edit the PPM for the Fund or the limited partnership agreement that was provided to him.

3775:10 **Q And do you recall editing either the private**
3775:11 **placement memorandum or the limited partnership**
3775:12 **agreement?**
3775:13 A I do not.

789. In the Hood Memorandum, Hood explained that "[i]n order to enable the partners in the Fund to treat any gains attributable to the disposition of the securities held by the Fund as capital gains, it will be necessary for the Fund to 'own' the securities for tax purposes." (Div. Ex. 280 – p. 3.)

790. By "tax ownership," Hood was expressing that the arrangement had to satisfy "the requirements under the tax law that a nominal owner of an asset be deemed to be acting on behalf of the beneficial owner."

3777:24 **Q And what do you mean by tax ownership?**

3777:25 A Well, by tax ownership, I mean satisfying the
3778:1 requirements under the tax law that a nominal owner of an
3778:2 asset be deemed to be acting on behalf of the beneficial
3778:3 owner.

791. If the Fund did not own the survivor's option securities for tax purposes, then any profits the Fund derived from the survivor's option securities would have been taxed as ordinary income and capital gains treatment would not have been available to the Fund's investors.

3776:17 **So what did you mean when you wrote that it**
3776:18 **would be necessary for the fund to "own the securities**
3776:19 **for tax purposes"?**
3776:20 A Well, I mean it relates to what I said before.
3776:21 In order to derive certain tax benefits, which in this
3776:22 case would be capital gain treatment on the redemption of
3776:23 the bonds, it's necessary for the fund, you know -- also,
3776:24 the investors to own the securities for tax purposes.
3776:25 **Q And why? Why was that the case?**
3777:1 A Well, because if they don't own the securities
3777:2 for tax purposes, I guess whatever rights they would have
3777:3 had to the profits, if you will, from the investment
3777:4 program would not have been capital gains. It would have
3777:5 just simply been amounts received pursuant to a contract
3777:6 and, therefore, ordinary income.

3777:15 **If the fund was determined not to own the**
3777:16 **assets, would the investors in the fund receive the**
3777:17 **benefits of capital gains treatment?**
3777:18 A No. If the fund were not deemed to have tax
3777:19 ownership of the assets, the capital gain treatment would
3777:20 not have been available. I'm sorry. Just to make it
3777:21 clear, anytime I'm talking about ownership, I'm talking
3777:22 about tax ownership because that's essentially what --
3777:23 that's what my engagement was to deal with.

792. In order for the Fund's investors to receive capital gains treatment, Lathen had to act as a nominee or agent for the Fund.

3777:7 **Q So what did the relationship between Mr. Lathen**
3777:8 **and the fund have to be in order for the fund's investors**
3777:9 **to get capital gains treatment?**
3777:10 A Well, the relationship -- Jay had to be, for
3777:11 tax purposes, had to be an agent or a nominee or whatever
3777:12 term you want to use in order for the tax treatment to
3777:13 pass through, if you will.

793. A "nominee" is a nominal owner of an asset who is deemed not to be the true owner, the beneficial owner for tax purposes.

3778:25 **So that's a word that's come up a couple of**
3779:1 **times. What is a nominee?**
3779:2 A Well, I think a nominee and an agent are pretty
3779:3 much one in the same for tax purposes. It refers to a
3779:4 nominal owner of an asset who is not deemed to be the
3779:5 true owner, the beneficial owner for tax purposes.

794. Hood explained to Lathen what a nominee was.

3779:10 **Q Based on your communications with Mr. Lathen,**
3779:11 **do you believe that he understood what the concept of**
3779:12 **nominee was?**
3779:13 A I would hope so. Again, we're talking about
3779:14 for tax purposes, yes. I hope that I, you know,
3779:15 adequately explained what it was.

795. Indeed, Lathen understood himself to be a nominee.

183:12 **Q Is that an accurate characterization of you**
183:13 **and David Jungbauer's relationship with the fund?**

183:19 THE WITNESS: I mean, I will say I thought of
183:20 myself as an agent. A nominee -- sure, okay, I'm a
183:21 nominee.

796. Because EACP's investors received capital gains treatment, under Hood's advice, the Fund was the beneficial owner of the survivor's option securities.

3777:7 **Q So what did the relationship between Mr. Lathen**
3777:8 **and the fund have to be in order for the fund's investors**
3777:9 **to get capital gains treatment?**
3777:10 A Well, the relationship -- Jay had to be, for
3777:11 tax purposes, had to be an agent or a nominee or whatever
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3779:1 **times. What is a nominee?**
3779:2 A Well, I think a nominee and an agent are pretty
3779:3 much one in the same for tax purposes. It refers to a
3779:4 nominal owner of an asset who is not deemed to be the
3779:5 true owner, the beneficial owner for tax purposes.

3776:17 **So what did you mean when you wrote that it**

3776:18 **would be necessary for the fund to "own the securities**
3776:19 **for tax purposes"?**
3776:20 A Well, I mean it relates to what I said before.
3776:21 In order to derive certain tax benefits, which in this
3776:22 case would be capital gain treatment on the redemption of
3776:23 the bonds, it's necessary for the fund, you know -- also,
3776:24 the investors to own the securities for tax purposes.

797. The Hood Memorandum stated:

> The PPM indicates that Lathen will acquire the securities in a joint account with the terminally-ill individuals and that he will be acting as a nominee for the Fund in this regard. Generally speaking, a nominee or agency relationship will be respected, and the principal treated as the owner of the property subject to the relationship, as long as a number of elements exist. In PLR 200151014 (2001) the IRS listed four "indicia" and two "requirements" as being necessary. The four indicia are the agent's operation in the name of and for the account of the principal, the ability of the agent to bind the principal by its actions, the transmission of the money by the agent to the principal and the degree to which the income is generated by the services of the principal's employees and the use of the principal's assets.
> (Div. Ex. 280 – p. 3.)

798. The first indicia listed in the Hood Memorandum required it to be "clear that the agent is acting for the account of the principal and not for the agent's own account."

3779:16 **Q So going on in the memo, it goes on.**
3779:17 **"Generally speaking, a nominee or agency**
3779:18 **relationship will be respected, and the principal treated**
3779:19 **as the owner of the property, subject to the**
3779:20 **relationship, as long as a number of elements exist. In**
3779:21 **PLR200151014(2001), the IRS listed four indicia and two**
3779:22 **requirements as being necessary. The four indicia are**
3779:23 **the agent's operation in the name and for the account of**
3779:24 **the principal."**
3779:25 **I'm going to stop there for a second. Can you**
3780:1 **tell me what that means?**
3780:2 A Yeah. It means that the agent -- I'm not sure
3780:3 exactly how I can embellish it, that it's clear that the
3780:4 agent is acting for the account of the principal and not
3780:5 for the agent's own account.

799. The second indicia listed in the Hood Memorandum required that there be "an agreement between the agent and the principal that the agent is acting for the principal."

3780:6 **Q "The ability of the agent to bind the principal**
3780:7 **by its actions," is what it says next. Can you tell us**
3780:8 **what that means?**
3780:9 A That means there is an agreement between the
3780:10 agent and the principal that the agent is acting for the
3780:11 principal.

800. The third indicia listed in the Hood Memorandum required that "any profits that the agent earns on the activity are turned over to the principal in the principal's capacity as beneficial owner."

3780:13 **"The transmission of the money by the agent to**
3780:14 **the principal." Can you tell us what that means?**
3780:15 A Well, it means that any profits that the agent
3780:16 earns on the activity are turned over to the principal in
3780:17 the principal's capacity as beneficial owner.

801. The fourth indicia listed in the Hood Memorandum required that "the principal is the one in this particular case who furnishes the consideration or the capital to be used in the venture."

3780:18 **Q And lastly it says, "And the degree to which**
3780:19 **the income is generated by the services of the**
3780:20 **principal's employees and the use of the principal's**
3780:21 **assets." What does that mean?**
3780:22 A Well, it means that -- I guess the employee's
3780:23 part is not really relevant to this. But the principal
3780:24 is the one in this particular case who furnishes the
3780:25 consideration or the capital to be used in the venture.

802. The Hood Memorandum expressed that a valid tax agency relationship would exist under Lathen's arrangement if the nominee agreement – which Mr. Hood did not review – "obligate[d] Lathen to operate in the name of the Fund and to promptly remit any receipts from the ownership of any asset held on behalf of the Fund to the Fund." (Div. Ex. 280 – p. 3.)

803. Lathen and Hood discussed the Hood Memorandum. (Div. Ex. 2076.)

804. Lathen did not consult Hood when he changed his investment structure to implement the Discretionary Line Agreement and Profit Sharing Agreement in January 2013.

3785:9 **Q In between 2011, which was where the last**
3785:10 **e-mail left off and 2014, which is where this e-mail**
3785:11 **picks up, do you recall whether Mr. Lathen came back to**
3785:12 **you for any other advice?**
3785:13 A I don't recall it, no.

3785:14 **Q Do you recall whether Mr. Lathen consulted you**
3785:15 **about changes he made to his structure in 2013?**
3785:16 A No. I'm not sure I totally understand your
3785:17 question.
3785:18 **Q Well, I'm asking you if he came to you a year**
3785:19 **before this for any advice.**
3785:20 A I don't think so, no.

805. In February of 2014, Hood and Lathen discussed tax treatment for an alternative investment structure. (Div. Ex. 790 – p. 3.) See also:

3785:1 **Q And the e-mail reads: "Hi, Jay. It was nice**
3785:2 **to speak with you last week."**
3785:3 **I'll stop there for a second.**
3785:4 **Do you remember speaking with Mr. Lathen in or**
3785:5 **around February of 2014?**
3785:6 A I don't specifically remember it. But my guess
3785:7 is that if I said -- if I referred to a conversation that
3785:8 I'm confident that we had it.

3785:21 **Q So you go on in the e-mail.**
3785:22 **"I have given some additional thought to the**
3785:23 **issues that you raised regarding your new structure for**
3785:24 **holding the survivor's options securities. As I**
3785:25 **understand it, you will be acquiring the securities**
3786:1 **jointly with the insured person as principal and not as a**
3786:2 **nominee for the fund as had previously been the case.**
3786:3 **You will then borrow money from the fund using loans**
3786:4 **with a fixed interest rate, plus a participation feature**
3786:5 **that is based on the increase in value when the securities**
3786:6 **are put back to the issuers."**
3786:7 **So what's the basis for your understanding**
3786:8 **there?**
3786:9 A The basis for my understanding is, I'm sure,
3786:10 some communication that I had with Jay about the
3786:11 structure.

806. The alternative structure involved Lathen and a terminally-ill Participant acquiring securities in JTWROS account as principals and not as nominees. (Div. Ex. 790 – p. 3.) See also:

3785:21 **Q So you go on in the e-mail.**
3785:22 **"I have given some additional thought to the**
3785:23 **issues that you raised regarding your new structure for**
3785:24 **holding the survivor's options securities. As I**
3785:25 **understand it, you will be acquiring the securities**
3786:1 **jointly with the insured person as principal and not as a**

3786:2 **nominee for the fund as had previously been the case.**
3786:3 **You will then borrow money from the fund using loans**
3786:4 **with a fixed interest rate, plus a participation feature**
3786:5 **that is based on the increase in value when the securities**
3786:6 **are put back to the issuers."**
3786:7 **So what's the basis for your understanding**
3786:8 **there?**
3786:9 A The basis for my understanding is, I'm sure,
3786:10 some communication that I had with Jay about the
3786:11 structure.

807. The alternative structure also involved Lathen borrowing money from the Fund via a loan with a fixed interest rate and a participation feature based on the increase in value when the survivor's option securities are put back to the issuers. (Div. Ex. 790 – p. 3.) See also:

3786:12 **Q And what did you mean by participation feature?**
3786:13 A Well, what I meant was that the loans from the
3786:14 fund, and, therefore, from the investors would have
3786:15 stated interest at a fixed rate, plus a participation
3786:16 feature which would be a percentage of the profits
3786:17 realized in connection with the redemption or the put of
3786:18 the bonds.

808. Hood advised that both the fixed interest income on the loan and income earned on the participation feature would be taxed as ordinary income for U.S. tax payers. (Div. Ex. 790 – p. 3.)

3786:19 **Q And then you go on to say, "As I mentioned to**
3786:20 **you, both the fixed interest and the participation**
3786:21 **feature will be treated as ordinary income to U.S.**
3786:22 **taxpayers, and it should be deductible by you."**
3786:23 **So what was your reasoning behind that**
3786:24 **conclusion?**
3786:25 A Well, my reasoning is that it's pretty much
3787:1 black letter law, that fixed interest is ordinary income
3787:2 and also that interest expressed as a percentage of
3787:3 profits is also ordinary income.

809. Interest income on a loan that is tied to a floating rate, such as LIBOR, is taxed as ordinary income for U.S. taxpayers.

3787:4 **Q And would fixed interest include like a**
3787:5 **floating rate, interest that's based on a floating rate?**
3787:6 A Yes.

810. Throughout the Fund's existence, investors in the Fund received capital gains treatment based on the disposition of survivor's option instruments in the joint tenant accounts. This was true both before and after Hood told Lathen in 2014 that interest income on a loan should be treated as ordinary income, not capital gains. (See Div. Exs. 105; 288; 290; 294.) See also:

462:9 **Q And in terms of the gains in the joint**
462:10 **tenant accounts, the fund -- and I know you mentioned**
462:11 **it's not the fund; it's the partners.**
462:12 **But the partners, the fund, whatever you**
462:13 **want to call it, they paid capital gains taxes on**
462:14 **that, correct?**
462:15 A Capital gains were one type of income that
462:16 the fund had.
462:17 **Q And what was the other type of income?**
462:18 A Interest income.
462:19 **Q Okay. And -- but it was all classified as**
462:20 **capital gains; is that correct?**
462:21 A That's not correct.
462:22 **Q Which part was classified as capital gains?**
462:23 A The capital gains part.
462:24 **Q And to be clear, what do you mean by that?**
462:25 **You're talking about --**
463:1 A So, I'm sorry. I don't mean to be cute
463:2 about it.
463:3 When you purchase and sale -- sell an
463:4 instrument, that gives rise to capital gain based on
463:5 the difference between the purchase price and the sale
463:6 price.
463:7 So, for instance, when we purchased a bond
463:8 instrument into the joint account for, let's say, 95,
463:9 when it was subsequently put back to the issuer at
463:10 100, that would result in a $5 capital gain.
463:11 If that capital gain in that holding period
463:12 was less than one year, that capital gain would be
463:13 so-called short-term capital gain. If the holder
463:14 period exceeded a year, it would be long-term capital
463:15 gain.
463:16 Now, there's other income that's coming from
463:17 that security. Of course, it's paying -- and in most
463:18 cases it's paying a coupon payment.
463:19 So when the issuer makes its interest
463:20 payment, that's considered interest income, and that's
463:21 a different type of income than capital gain.
463:22 **Q Okay.**
463:23 A So there was a combination. The fund's
463:24 income was a combination of interest income,

463:25 short-term capital gains and long-term capital gains.

811. The capital gains treatment for the income earned on the disposition of survivor's option instruments in the joint tenant accounts occurred both before and after Hood told Lathen in 2014 that interest income on a loan should be treated as ordinary income, not capital gains.

462:9 **Q And in terms of the gains in the joint**
462:10 **tenant accounts, the fund -- and I know you mentioned**
462:11 **it's not the fund; it's the partners.**
462:12 **But the partners, the fund, whatever you**
462:13 **want to call it, they paid capital gains taxes on**
462:14 **that, correct?**
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463:4 instrument, that gives rise to capital gain based on
463:5 the difference between the purchase price and the sale
463:6 price.
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463:8 instrument into the joint account for, let's say, 95,
463:9 when it was subsequently put back to the issuer at
463:10 100, that would result in a $5 capital gain.
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463:12 was less than one year, that capital gain would be
463:13 so-called short-term capital gain. If the holder
463:14 period exceeded a year, it would be long-term capital
463:15 gain.
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463:17 that security. Of course, it's paying -- and in most
463:18 cases it's paying a coupon payment.
463:19 So when the issuer makes its interest
463:20 payment, that's considered interest income, and that's
463:21 a different type of income than capital gain.
463:22 **Q Okay.**
463:23 A So there was a combination. The fund's

463:24 income was a combination of interest income,
463:25 short-term capital gains and long-term capital gains.

812. Throughout the Fund's existence, Lathen recorded the income in the joint accounts on his tax returns only as nominee, but did not pay any taxes on the income. Rather, he transferred the tax liability to the Fund. (Div. Exs. 302-306.) See also:

199:9 **Q Well, you said that you were allocated income**
199:10 **on your taxes. But you didn't actually pay taxes on**
199:11 **that money; is that right?**
199:12 A Well, the way that -- I would receive a 1099
199:13 because I was the primary accountholder on the joint
199:14 tenancy account.
199:15 And as such, it was my Social Security
199:16 number, my personal Social Security number that was the
199:17 tax ID number of record on the account.
199:18 And so I received 1099s every year from
199:19 the -- from the IRS, and I had to report that income on
199:20 my tax return.
199:21 But then I would also allocate that income
199:22 back out to the fund pursuant to the profit sharing
199:23 arrangement.
199:24 **Q Okay. You keep saying the word "allocated**
199:25 **out."**
200:1 **You reported it on your tax return, and then**
200:2 **you subtracted the exact same amount on your tax**
200:3 **return; is that right?**
200:4 A That is true.

467:5 **Q So, to be clear, yesterday you were talking**
467:6 **about how the brokerage firm sent you a 1099; is that**
467:7 **correct?**
467:8 A Yes, that's right.
467:9 **Q And so it showed certain capital gains; is**
467:10 **that right?**
467:11 A Yes, that's right.
467:12 **Q And the bond interest as income; is that**
467:13 **right?**
467:14 A Yes, that's right.
467:15 **Q Okay. And so because it showed up on the**
467:16 **1099 for you personally, you needed to put it on your**
467:17 **tax return; is that right?**
467:18 A Yes, that's right.
467:19 **Q But then because it wasn't taxable to you,**
467:20 **you essentially subtracted it out, and ultimately the**
467:21 **partners in the fund paid those taxes; is that right?**

467:22 A Yes, that's right.

813. Hood did not recall discussing the differences between tax ownership and other types of ownership with Lathen.

3794:23 **Q Mr. Hood, did you and Mr. Lathen ever discuss**
3794:24 **the differences between tax ownership and other types of**
3794:25 **ownership?**
3795:1 A Not that I recall.

814. Lathen did not get tax advice from Hood when he introduced the Profit Sharing Agreement.

3612:2 **Q Fair to say you did not get new tax advice**
3612:3 **after you had changed to the discretionary line agreement**
3612:4 **in January of 2013; is that right?**
3612:5 A Yeah. I don't know if that's quite true. I do
3612:6 recall having conversations with Citrin Cooperman, I
3612:7 believe, around sort of late 2012 when we were
3612:8 contemplating the change in the structure. And I believe
3612:9 I may have received some tax advice relating to the new
3612:10 structure. I don't have perfect clarity. But I don't
3612:11 believe we spoke to Bruce Hood about it. That much, I
3612:12 will concede.

815. Lathen drafted the Profit Sharing Agreement himself. It was either his decision to continue to treat the character of the income under the Profit Sharing Agreement as capital gains or he had advice from Citrin Cooperman.

3615:15 **Q Can you read to us the last paragraph on p.**
3615:16 **2?**
3615:17 A "As such, in consideration for the benefits
3615:18 derived through his ownership of EACA and EACM, Lathen
3615:19 hereby agrees to assign all profits and losses he derives
3615:20 from the accounts and the participant agreements to EACP.
3615:21 Furthermore, the parties agree that this agreement shall
3615:22 be treated as a partnership for tax purposes. As such,
3615:23 the character of the income from the accounts for federal
3615:24 income tax purposes shall pass through to EACP which will
3615:25 then allocate such income or loss to its partners
3616:1 pursuant to the terms of the LPA."
3616:2 **Q Now, you were the one that decided that the**
3616:3 **character of the income should stay as capital gains,**
3616:4 **correct?**
3616:5 A I certainly wrote that language. And as I
3616:6 think I indicated earlier, I may have gotten advice from
3616:7 folks at Citrin Cooperman. I don't recall. But it was

3616:8 either -- it was either my decision or I had advice from
3616:9 Citrin Cooperman.

816. Lathen understood that interest income on a loan is treated as ordinary income.

3615:4 **Q You just said interest income on a loan is**
3615:5 **treated as ordinary income; is that right? Is that what**
3615:6 **you just said?**
3615:7 A That's what it says.
3615:8 **Q And that's what you believe, right?**
3615:9 A Yes. I believe that.

Hinckley Allen Snyder

817. Flanders specializes in litigation.

1974:6 **Q And do you specialize in any particular**
1974:7 **area of law?**
1974:8 A Yes. Litigation.

818. Lathen, in his personal capacity, retained Flanders in 2010.

1982:19 **Q And after Mr. Lathen reached out to you,**
1982:20 **did he retain your firm?**
1982:21 A He did.
1982:22 **Q Do you remember what year that was in?**
1982:23 A I'm going to say somewhere around 2010.
1982:24 **Q Okay. And Mr. Lathen retained you**
1982:25 **personally, right? He wasn't working as a company**
1983:1 **or a hedge fund at this point, right?**
1983:2 A I believe eventually we represented not
1983:3 just himself but also his companies. But I think
1983:4 initially he retained us personally.

819. Until 2012, Lathen's request for advice from Flanders was on an episodic basis and focused on distinguishing his situation from the Caramadre situation.

1986:21 **Q We'll get to that. I'm just talking about**
1986:22 **now during the initial representation.**
1986:23 A Initially, it was focused on the Caramadre
1986:24 situation and what distinctions, if any, existed
1986:25 between his situation.
1987:1 And I would describe to him how Caramadre
1987:2 got in trouble and how the participants were
1987:3 claiming they didn't really understand.
1987:4 And so my advice to him was to do
1987:5 everything possible to make full disclosure to these

participants, have the documentation notarized and do whatever he could to undercut the idea that these folks would come back later and say they had no idea that this was happening or what they were doing.

Because in the Caramadre case, the participants were claiming that they thought he was a philanthropist that was just donating money to them out of the goodness of his heart, because they were terminally ill, and they were just signing paperwork that they thought were receipts for his donations.

And even though the paperwork in Caramadre, as in the Lathen case, was completely to the contrary, I made the point to Mr. Lathen that he needed to do whatever he could, including involving a third-party notary or someone that could verify the fact that these folks were being given full disclosure so they absolutely knew what they were doing when they agreed to this arrangement for the payment that he was making to them.

So in my recollection, that was the focus of the initial part of my interactions with him. And I was also updating him on, you know, what was happening in the case.

And I put him in touch with other investors who I had learned were doing this so he could touch base with them and compare notes.

Q Now, you were retained sometime in 2010. Up until the time that you entered into a new engagement letter with Mr. Lathen, what, if any, legal services did you provide to him?

A Again, my recollection is that I basically provided him whatever information I could share with him on the status of the Caramadre litigation and whatever regulatory or other issues that were public knowledge.

And shared with him other information I had and was able to run down, such as this attorney -- this letter from the attorney general and other correspondence of like ilk where regulators were informing issuers and trustees who were balking at making payments with Mr. Caramadre, and I shared that with Mr. Lathen.

Q Okay. And is it fair to say that for the first year or two, you had sporadic contact with Mr.

2045:9 **Lathen?**
2045:10 A Yes, I would say that's correct.
2045:11 **Q Okay. Your dealings with him were fairly**
2045:12 **limited; is that correct?**
2045:13 A In the sense that he was in New York and I
2045:14 was in Rhode Island, and he would typically initiate
2045:15 requests for a call from time to time or an episodic
2045:16 basis, yes.

820. Flanders does not recall whether he received any documents from Lathen, including any bond prospectuses, Lathen's Participant Agreements, powers of attorney, EndCare enrollment form, or EndCare brochure, prior to 2012, and there is no evidence of his having received any.

2045:17 **Q And it wasn't until sometime in 2012 that**
2045:18 **he provided documents to you; is that correct?**
2045:19 A I don't remember that, but that's quite
2045:20 possible.

2052:14 **Q And this is the first time that you had**
2052:15 **seen these documents; is that correct?**
2052:16 A I don't recall. But I wouldn't be
2052:17 surprised if that were so.

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.

821. Flanders did not review bond prospectuses, Lathen's Participant Agreements or his IMA in during 2010 through 2011 in connection with his representation of Lathen.

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
2127:6 was the Caramadre situation and him verbally telling
2127:7 me what he was doing vis-a-vis the participants.
2127:8 And I don't believe we got into specific
2127:9 document review. I could be wrong about that, but I
2127:10 just don't remember.
2127:11 **Q Okay. And as far as you remember, Mr.**
2127:12 **Lathen didn't provide you the private placement**
2127:13 **memorandum until about 2012 time frame; is that**
2127:14 **right?**
2127:15 A I don't recall him doing so.
2127:16 **Q Okay. And is it fair to say that in the**
2127:17 **2010 and 2011 time frame, you relied on Mr. Lathen's**
2127:18 **representations to you in terms of his business?**
2127:19 A Yes.
2127:20 **Q Okay.**
2127:21 A I relied on them throughout, not just
2127:22 during that period.

822. Flanders' time records for the pre-2012 period reflect no review by him of any bond prospectuses, or Lathen's Participant Agreement, or IMA in connection with his representation of Lathen. (Div. Ex. 738.)

823. Flanders represented Caramadre in litigation with insurers issuing annuitants, Western Reserve Life Assur. Co. v. Conreal LLC, No. 09 Civ. 470 (D. R.I.), a case that did not involve claims under the federal securities laws. W. Reserve Life Assur. Co. of Ohio v. Caramadre, 847 F. Supp. 2d 329, 333 (D.R.I. 2012), aff'd sub nom. W. Reserve Life Assur. Co. of Ohio v. ADM Assocs., LLC, 793 F.3d 168 (1st Cir. 2015). See also:

2142:11 **Q Okay. Do you know if any of the insurance**
2142:12 **companies ever pursued that legal argument in**
2142:13 **litigation?**

2142:17 THE WITNESS: I believe I represented Mr.
2142:18 Caramadre in civil litigation where insurance
2142:19 companies who had issued these annuities did pursue
2142:20 attempts to try and nullify the annuities on the
2142:21 grounds that included arguments that are referenced
2142:22 in this letter.
2142:23 BY MR. HUGEL:
2142:24 **Q And what was the outcome of that**
2142:25 **litigation?**
2143:1 A As to the -- as to the argument that they
2143:2 were invalid because of nondisclosures to the
2143:3 insurance companies about the health and nonfamily
2143:4 relationship -- nonfamilial relationship between the

2143:5 investors and the annuitants, the Court rejected
2143:6 that.
2143:7 And similarly rejected the argument that
2143:8 it was unlawful wagering contract on the basis of a
2143:9 person's life.
2143:10 That was later affirmed by the First
2143:11 Circuit, I believe, that opinion, after it was sent
2143:12 to the round of a Supreme Court for an advisory
2143:13 opinion.
2143:14 But the aspect of the case that turned on
2143:15 whether the participants had been deceived in full
2143:16 or in part in some cases was left in the case.
2143:17 And so that -- that case may still be
2143:18 extant.

824. Flanders' advice to Lathen was as to his contractual obligations under the Prospectus, and did not speak to Lathen's obligations under the securities laws.

1998:6 **Q Why didn't you believe it was so if Mr.**
1998:7 **Caramadre was indicted for it?**
1998:8 A Well, he was indicted for misconduct with
1998:9 respect to misrepresentations vis-a-vis the
1998:10 participants.
1998:11 But he was -- he was not, in my view,
1998:12 doing anything inappropriate -- had he been -- made
1998:13 appropriate disclosures and not engaged in alleged
1998:14 fraud with respect to the participants, I didn't
1998:15 believe there was anything inappropriate about the
1998:16 investment program that he otherwise had put
1998:17 together.
1998:18 He was taking advantage, as was Lathen, of
1998:19 a loophole in the bond documents that allowed
1998:20 investors to take advantage of the early death of
1998:21 one of the joint accounts, by converting a long-term
1998:22 bond program into a short-term, stepped-up payment
1998:23 from the discounted purchase price to the full par
1998:24 value of the bond.
1998:25 And because these bonds were marketed, in
1999:1 my view, to elderly population that typically might
1999:2 include the elderly parent and their adult child,
1999:3 the issuers were taking the risk that one or more of
1999:4 the accountholders wasn't in great health and might
1999:5 die before the 30-year term bond matured.
1999:6 But they were willing to do that, because
1999:7 they were apparently having a program that was
1999:8 capturing a large segment of the market, and they
1999:9 were willing to take the risk that some people might

1999:10 die before the 30-year term was up.
1999:11 They weren't making any healthcare
1999:12 requirements as a limitation on who could take
1999:13 advantage of this program. They did not specify
1999:14 that there had to be some familial relationship in
1999:15 order to be a participant as a joint accountholder.
1999:16 They did not require disclosure of any
1999:17 agreements between the joint accountholders that
1999:18 might restrict or limit their rights in any way.
1999:19 So they were opening themselves to
1999:20 situations like the one that Caramadre and Lathen
1999:21 were attempting to exploit, and that was a market
1999:22 risk that they undertook.
1999:23 And it was totally within their power to
1999:24 correct that by putting language in the offering
1999:25 documents that would either have a healthcare
2000:1 requirement or a familial relationship requirement.
2000:2 They were the lord of their offers. And
2000:3 they had chosen not to do that. All they said is
2000:4 that you have to have a joint account, beneficial
2000:5 ownership. And if one of you dies, you'll get a
2000:6 stepped-up payment.
2000:7 So, in my view, this was a perfectly
2000:8 lawful situation. And there were no disclosure
2000:9 requirements to the issuers and the trustees and the
2000:10 brokerage houses, other than what they were
2000:11 requesting in their adhesion contracts that they
2000:12 provided to these public investors.

2000:14 **At some point after Mr. Caramadre -- well,**
2000:15 **before I go into that, what you just described to**
2000:16 **me, did you ever relate any of that advice to Mr.**
2000:17 **Lathen?**
2000:18 A I told him that was my view.

2037:17 **I'm wondering what advice, if any, did you**
2037:18 **give him with respect to making these redemption**
2037:19 **requests in letter or otherwise.**
2037:20 THE WITNESS: My advice to him was to
2037:21 provide the issuers or the trustees of these bonds
2037:22 or the brokers who were involved with whatever the
2037:23 brokers were requiring or the issuers were requiring
2037:24 as a precondition to honoring the redemption
2037:25 requests. But no more.
2038:1 **JUDGE PATIL: And why the "but no more"**
2038:2 **part?**

2038:3 THE WITNESS: Because I viewed them, as I
2038:4 said earlier, to be the lords of their offers.
2038:5 And these were, in my view, adhesion
2038:6 contracts where they set the terms on which
2038:7 consumers or others who would buy these in the open
2038:8 market could exercise this option.
2038:9 And they had complete freedom to declare
2038:10 whatever materials they wanted to see as part of a
2038:11 redemption request, such as a death certificate. Or
2038:12 if they had wanted to see a family relationship
2038:13 element. They could have put that in their
2038:14 documents.
2038:15 So they were basically telling the public
2038:16 and any holders of these, This is what we think is
2038:17 important and critical before you can lawfully
2038:18 exercise your option.
2038:19 So my advice to Mr. Lathen was to give
2038:20 them exactly that. Anything else that they weren't
2038:21 requiring was -- they had themselves deemed not to
2038:22 be important or material, and, therefore, there was
2038:23 no need for him to go beyond that.
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.

825. In 2010 and 2011, Flanders relied on what Lathen was telling him and what he himself knew about the Caramadre situation in providing Lathen with advice.

2047:22 **Now, with respect to the advice that you**
2047:23 **gave Mr. Lathen in the 2010 and 2011 time frame, is**
2047:24 **it fair to say that that advice was based on the**
2047:25 **information that Mr. Lathen provided to you?**
2048:1 A Yes. And also on what I knew from the
2048:2 Caramadre situation, of course. But, yes, of
2048:3 course, with respect to what he was doing, I was
2048:4 relying on what he was telling me and comparing it
2048:5 to what I knew about the Caramadre situation and
2048:6 advising him accordingly.

826. When Lathen asked Hinckley Allen for a "comfort opinion" in 2012, Flanders understood that he wanted some sort of assurance from the firm that his business model was not in any way illegal or inappropriate and that he was not doing something that was running afoul of the law in some way.

2010:7 **What is your understanding of what he**
2010:8 **meant by that?**
2010:9 A Yes. I understood him to mean that he
2010:10 wanted some sort of assurance from us that his
2010:11 business model was not in any way illegal or
2010:12 inappropriate or doing something that was running
2010:13 afoul of the law in some way.
2010:14 **Q And was asking for an opinion different**
2010:15 **from asking legal advice?**
2010:16 A Yes. And because I believe he -- by
2010:17 asking for a comfort opinion, he was looking for us
2010:18 to formalize in a written legal document of some
2010:19 sort an opinion letter or otherwise that -- exactly
2010:20 the advice he was seeking to have about his program
2010:21 as opposed to orally counseling him how to mitigate
2010:22 risks and doing things in a way that would lead to
2010:23 less exposure for his program being attacked.

827. Because the law on joint tenancy was unsettled, Hinckley Allen was leery about giving Lathen the comfort opinion that he wanted, and certainly not for the type of compensation that Lathen was looking to pay in order to get the comfort that he needed.

2010:24 **Q And what significance, if any, did it have**
2010:25 **to you and your firm about -- the difference between**
2011:1 **giving him a formal legal opinion versus legal**
2011:2 **advice?**
2011:3 A The difference was that if we -- by
2011:4 putting a formal opinion together in writing, we
2011:5 would have limited ability to control who would see
2011:6 that opinion; and, therefore, the firm was of the
2011:7 view, and I was of the view, that that was a step
2011:8 that would exponentially increase the risks to our
2011:9 firm of ending up dragged into litigation or
2011:10 investigations and the like.
2011:11 And so it would -- if we were to go that
2011:12 route, it would be a much -- it would have to be a
2011:13 much costlier engagement than simply giving him
2011:14 advice about his program, but not reducing it to an
2011:15 opinion letter that potentially could be used to
2011:16 solicit participants, investors and others.
2011:17 And that was -- because this was an area
2011:18 that -- of the law that had -- was unsettled, we
2011:19 were leery about going that far and not -- and
2011:20 certainly not for the type of compensation that Mr.
2011:21 Lathen was looking to pay in order to get the
2011:22 comfort that he needed.

2011:23 So we were, as a law firm and lawyers, we
2011:24 were very cautious about not going as far as Mr.
2011:25 Lathen would have preferred under the circumstances
2012:1 for those reasons.

828. Hinckley Allen was unwilling to give Lathen a written opinion on the validity of his joint tenancies because it 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.

2059:14 **Q And he also wanted an opinion on the**
2059:15 **validity of the joint tenancy; is that correct?**
2059:16 A A written opinion, yes.
2059:17 **Q Okay. And ultimately, that didn't go into**
2059:18 **the Caramadre memo; is that right?**
2059:19 A That's correct.
2059:20 **Q And that's because as you stated it was**
2059:21 **fact specific, and the law was unsettled, right?**
2059:22 A Those were part of the reasons. But also
2059:23 more importantly, that would have, in our view, been
2059:24 exposing our firm to a risk of third-party reliance
2059:25 that we were unwilling to undertake for the
2060:1 compensation that was to be paid for this matter.
2060:2 **Q Okay. Well, also it presented a risk to**
2060:3 **your law firm, because the law was unsettled; is**
2060:4 **that right?**
2060:5 A Certainly.
2060:6 **Q Okay. And you told -- as you stated**
2060:7 **earlier, you told Mr. Lathen that it was**
2060:8 **fact-specific and the law was unsettled, correct?**
2060:9 A Yes.

829. Flanders told Lathen that the firm would not provide an opinion on the validity of the joint tenancies because it was fact-specific and the law was unsettled.

2060:6 **Q Okay. And you told -- as you stated**
2060:7 **earlier, you told Mr. Lathen that it was**
2060:8 **fact-specific and the law was unsettled, correct?**
2060:9 A Yes.

830. Flanders or Farrell communicated to Lathen that his structure was anything but bulletproof, even as revised in the fall of 2012.

2085:10 **Q Okay. When you and Ms. Brown and I met on**
2085:11 **Monday evening, you told us that Peggy called Mr.**
2085:12 **Lathen to tell him that his structure was not**
2085:13 **bulletproof; is that correct?**

2085:14 A I don't recall saying that. But I --
2085:15 there is no doubt one way or another that we
2085:16 communicated to him that his structure was anything
2085:17 but bulletproof.

831. The Final Caramadre Memo, dated December 20, 2012 ("Final Caramadre Memo"), was principally Farrell's work product and she was the primary author.

2018:20 **Q Okay. I'm sorry, who is the primary**
2018:21 **author of this memo?**
2018:22 A My partner, Margaret -- or Peggy Farrell.
2018:23 **Q Did you review it before it went out?**
2018:24 A I believe I did.
2018:25 **Q How detailed was your review of the memo?**
2019:1 A I remember reading it. I may have
2019:2 consulted with her about it. I may have even
2019:3 offered -- suggested edits.
2019:4 But I think it is fair to say that this
2019:5 was principally her work product.

(See also: Div. Ex. 668.)

832. Flanders agreed with the Final Caramadre Memo and it was consistent with the advice that he had provided to Lathen.

2066:2 **Q Okay. And fair to say that you agreed**
2066:3 **with the memo that went out; is that right?**
2066:4 A Yes, I did.
2066:5 **Q Okay. And that it was consistent with the**
2066:6 **advice that you provided to Mr. Lathen; is that**
2066:7 **right?**
2066:8 A Yes.

(See also: Div. Ex. 668.)

833. Lathen never reached out to Flanders to get his consent to disseminate the Final Caramadre Memo, even though it contained an explicit provision requiring him to do so.

2074:6 **Q Now, Mr. Lathen never reached out to you**
2074:7 **to get your consent to disseminate this memo; is**
2074:8 **that right?**
2074:9 A I don't recall any such request.

(See also: Div. Ex. 668 – p. 7.)

834. Farrell was principally in charge of advice with respect to structuring of Lathen's business model and the validity of the joint account relationships.

2021:7 **Q Now, in addition to the memo that we saw a**
2021:8 **few moments ago, the one that came out around**
2021:9 **Christmas of 2012, did your firm provide the other**
2021:10 **portion of the representation, the advice about the**
2021:11 **investment strategy and business model; did your**
2021:12 **firm ever provide that advice?**
2021:13 A I believe that was ongoing throughout our
2021:14 relationship with Mr. Lathen.
2021:15 **Q Was that also Ms. Farrell in charge --**
2021:16 A Ms. Farrell was principally in charge of
2021:17 that, including principally the issue of the
2021:18 structuring and validity of the joint account
2021:19 relationships.

835. Flanders advised Lathen in or around July 2012 that the firm's view was that a valid joint tenancy would not be created if the Participant had assigned his beneficial interest to Lathen, and Lathen had assigned his to the Fund.

2056:7 **Q And I take it, in fact, that you did**
2056:8 **advise Mr. Lathen of that?**
2056:9 A I believe so.

See also: Div. Ex. 744:

On Jul 23, 2012, at 4:59 PM, "Farrell, Margaret D." <mfarrell@haslaw.com> wrote:

Bob:

FYI, just trying to figure out exactly how to describe what "opinion" we might be able to give. I did a little "searching". I found this on the Internet. It is a good summary of the Survivor's Option. In looking at this, I think that they will have a serious problem because I think it is questionable whether the "participant" has any beneficial interest in the account.

Peggy

From: Farrell, Margaret D.
Sent: Monday, July 23, 2012 10:27 PM
To: Flanders, Robert G.
Subject: RE: Emailing: survivorsOptionSummary.pdf

If Y is just the nominee of an entity, I don't think it works. First, there is question of whether it is a valid joint account (limited research indicates that only individuals can hold JTWROS accounts); second if Y is just a nominee Y doesn't have a beneficial interest in the account. There really isn't any law on this, but there will be a lot of uncertainties.

From: Flanders, Robert G. [/O=HASLAW/OU=PROVIDENCE/CN=RECIPIENTS/CN=FLANDERG]
Sent: 7/24/2012 1:44:44 PM
To: Farrell, Margaret D. [/O=HASLAW/OU=Providence/cn=Recipients/cn=FARRELMD]
Subject: RE: Emailing: survivorsOptionSummary.pdf

So this is part of what we advise Mr. Lathen.

836. Lathen understood that under the IMA, Hinckley Allen's view was that the Fund could be perceived to be an owner of the joint account.

3562:20 **Q Peggy Farrell told you that she was concerned**
3562:21 **about the validity of the joint tenancies under the**
3562:22 **investment management agreement structure; is that right?**
3562:23 A Yes. She definitely thought there was room to
3562:24 strengthen the joint tenancies.
3562:25 **Q And she was worried about beneficial ownership;**
3563:1 **is that right?**
3563:2 A I don't recall whether she termed it in exactly
3563:3 that way. I believe that she just felt like potentially,
3563:4 along the same lines as the argument that I made in an
3563:5 e-mail you showed me earlier, that the fund could be
3563:6 perceived to be an owner of the joint account. And that
3563:7 was the concern that we were trying to address.
3563:8 **Q That was the concern under the investment**
3563:9 **management agreement structure, right?**
3563:10 A Yes.

837. Flanders understood in the summer of 2012 that Farrell had determined that only individuals, and not an entity, could hold joint tenancy with right of survivorship accounts.

2056:20 **Q Okay. And as her limited research**
2056:21 **revealed, only individuals, not entities, could hold**
2056:22 **joint tenancy with right of survivorship accounts;**
2056:23 **is that right?**
2056:24 A Yes.

838. There is no evidence that Farrell told Flanders what she told Lathen about his Profit Sharing Agreement: that its assignment of all the profits in the account to the Fund invalidated joint tenancies governed by that agreement. (PFOF ¶¶ 905-909, 911, 913, infra.)

839. In the fall of 2013, Flanders represented Lathen and Eden Arc as an advocate in their dispute with GS Bank regarding Goldman Sachs' rejection of certain GS Bank CD redemption requests Lathen had made.

2086:14 **And Mr. Lathen wanted you to represent him**
2086:15 **in connection with that dispute; is that right?**
2086:16 A He wanted me to represent him in
2086:17 communicating with the Goldman bank and its
2086:18 attorneys about that situation. And so to that
2086:19 extent, yes.
2086:20 **Q And you were representing him as an**
2086:21 **advocate for him; is that right?**
2086:22 A That's correct.

840. On September 27, 2013, Flanders wrote a letter to GS Bank urging them to change their decision to reject Lathen's redemption requests:

> . . . GS Bank refuses to pay such redemption requests because it asserts that the accounts are not *bona fide* joint tenant accounts. We strongly disagree with this assertion, and, in any event, you have failed to provide any support for this conclusion.
> (Div. Ex. 572 – p. 2.)

841. After GS Bank replied (Div. Ex. 573), Flanders held a call on October 4, 2013 with William Massey, the lawyer representing GS Bank. Flanders made that call without any other Hinckley Allen lawyer participating:

> I spoke with attorney William Massey of the Sidley Austin firm on Friday, October 4, 2013. . . .
> He said that other than the $10,000.00 paid to the joint account holder, the participation agreements seemed to indicate that there was little or no benefit to the joint account holder. I told him that each joint account holder with Mr. Lathen enjoyed the same benefits as Mr. Lathen during his or her lifetime . . .
> (Div. Ex. 754 – pp. 1, 2.)

842. It was not until October 20, 2013 – almost a month after he had sent his letter on Lathen's behalf urging GS Bank to pay Lathen's redemptions – that Flanders first asked Lathen to send him the relevant GS Bank disclosure documents, Lathen's redemption submissions to GS Bank and Lathen's relevant Participant Agreements:

> **From:** Flanders, Robert G. [mailto:rflanders@hinckleyallen.com]
> **Sent:** Sunday, October 20, 2013 7:46 PM
> **To:** Jay Lathen
> **Subject:** RE: Goldman Sachs Bank USA
>
> Jay:
> Can you please provide me with copies of the documents referenced in this letter, together with any others that the court will want to review in connection with assessing whether Goldman improperly refused to redeem

the CDs upon the death of the joint account holders? In particular, any offering documents or others that specify what Goldman's obligations are upon the death of a joint account holder and the specification of any survivor's benefits. I will need these to present the proposal we discussed to my firm.
Bob

(Div. Ex. 681 – p. 5; See also Div. Ex. 681 – p. 4.)

843. Flanders had neither received nor reviewed GS Bank disclosure documents, Lathen's redemption submissions to GS Bank or Lathen's relevant Participant Agreements prior to advocating on Lathen's behalf in his September 27, 2013 letter to GS Bank's lawyers and a phone call he had in early October with them.

2092:18 **Q Okay. And can you read your email to Mr.**
2092:19 **Lathen?**
2092:20 A "Jay. Can you please provide me with
2092:21 copies of the documents referenced in this letter,
2092:22 together with any others that the court will want to
2092:23 review in connection with assessing whether Goldman
2092:24 improperly refused to redeem the CDs upon the death
2092:25 of the joint accountholders.
2093:1 "In particular, any offering documents or
2093:2 others that specify what Goldman's obligations are
2093:3 upon the death of a joint accountholder and the
2093:4 specification of any survivor's benefits.
2093:5 "I will need these to present the proposal
2093:6 that we discussed to my firm."
2093:7 **Q Okay. So in this email you were asking**
2093:8 **Mr. Lathen to provide you with the CD offering**
2093:9 **documents; is that right?**
2093:10 A Correct.
2093:11 **Q And that's after you wrote the letter, the**
2093:12 **September 27 letter to Goldman Sachs; is that right?**
2093:13 A I presume that that's so, yes.

(See also: Div. Ex. 681 – pp. 4-5.)

844. After GS Bank adhered to its determination that it would reject Lathen's redemption requests, Lathen asked Flanders to pursue a lawsuit against GS Bank on a contingent basis.

2093:14 **Q Now, when you say "I need these to present**
2093:15 **the proposal that we discussed to my firm," that**
2093:16 **proposal related to your firm taking on a lawsuit**
2093:17 **against Goldman Sachs on a contingency; is that**
2093:18 **right?**

2093:19 A Correct.
2093:20 **Q And ultimately your firm declined to take**
2093:21 **on that matter; is that right?**
2093:22 A Correct. On a contingent basis.

845. After Flanders had reviewed GS Bank's disclosure statement relating to the CDs, Flanders told Lathen his view of the weaknesses of his claim against the bank on his CD redemption claim, including, that the Bank's disclosure statements did not provide a firm promise to redeem upon the death of a joint account holder.

2093:23 **Q Understood. In connection with seeking**
2093:24 **the firm's authorization to take Mr. Lathen's claims**
2093:25 **on contingency, you analyzed the strengths and**
2094:1 **weaknesses of Mr. Lathen's claim against Goldman**
2094:2 **Sachs; is that right?**
2094:3 A I believe I did so, at least with respect
2094:4 to the documents that he had sent me.
2094:5 **Q Okay. And you put those strengths and**
2094:6 **weaknesses into a memo; is that right?**
2094:7 A I believe that is correct, yes.
2094:8 **Q To your firm; is that right?**
2094:9 A I think I did, yes.
2094:10 **Q Okay. And you discussed those same**
2094:11 **strengths and weaknesses with Mr. Lathen; is that**
2094:12 **correct?**
2094:13 A Yes.
2094:14 **Q And what were the weaknesses that you**
2094:15 **shared with Mr. Lathen?**
2094:16 A I'd have to look at the documents to
2094:17 refresh my recollection. But in sum, in looking at
2094:18 the documents, I discovered that the language in the
2094:19 memorandum or the offering documents, the bonds, the
2094:20 CDs in this case, was much too wishy-washy in terms
2094:21 of a firm promise to redeem upon the death of a
2094:22 joint accountholder.
2094:23 It was -- it gave wide, if not unfettered,
2094:24 discretion on its face to Goldman to decide whether
2094:25 to pay the full par value of the CDs instead of a
2095:1 firmer promise to do so.
2095:2 And while I believed that there would have
2095:3 been a good faith obligation on Goldman to pay,
2095:4 nonetheless, they had crafted the language here in a
2095:5 way that was not exactly an unconditional promise to
2095:6 redeem upon the death of one of the joint
2095:7 accountholders.
2095:8 And, therefore, this was not as strong a
2095:9 situation as I envisioned would exist in other

2095:10 situations where there was a rock-solid obligation
2095:11 in the documents to pay upon the death of a joint
2095:12 accountholder.

See also: Div. Ex. 681 – p. 1:

To: 'Jay Lathen'[Jaylathen@edenarccapital.com]
Cc: Farrell, Margaret D.[mfarrell@hinckleyallen.com]
From: Flanders, Robert G.
Sent: Wed 10/23/2013 11:40:30 AM
Importance: Normal
Subject: RE: Goldman Sachs Bank USA
jackson_GS CD Confirms.pdf
eDS15D.PDF

***

This is hardly a firm promise to pay the face value of the CD upon the death of any joint account holder with survivorship rights. Rather, it appears to give 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 and/or that "the owner of a CD" means all the owners, not just one of them. And is "withdrawal of the entire CD" tantamount to a promise to pay the entire principal amount of the CD plus accrued interest?

846. Because Flanders was unsuccessful in getting his Firm to agree to take on Lathen's proposed lawsuit against GS Bank on contingency, Lathen either decided not to sue GS Bank or took the case to some other law firm.

2093:14 **Q Now, when you say "I need these to present**
2093:15 **the proposal that we discussed to my firm," that**
2093:16 **proposal related to your firm taking on a lawsuit**
2093:17 **against Goldman Sachs on a contingency; is that**
2093:18 **right?**
2093:19 A Correct.
2093:20 **Q And ultimately your firm declined to take**
2093:21 **on that matter; is that right?**
2093:22 A Correct. On a contingent basis.

2109:3 **Q And he also wanted Hinckley Allen to take**
2109:4 **on the Goldman matter on a contingency?**
2109:5 A Certainly. Like every client that I have
2109:6 ever dealt with wants to shift as much risk back to
2109:7 the lawyers as possible. And -- you know, so, yes,
2109:8 he definitely wanted us to take the Goldman case on
2109:9 a contingent basis.
2109:10 **Q And after you told him no, he didn't ask**
2109:11 **you to take it on, on a non-contingency basis; is**

2109:12 **that correct?**
2109:13 A That's correct. He ultimately -- after
2109:14 Goldman communicated to me that they were not going
2109:15 to redeem the bond -- the CDs, I believe that either
2109:16 Mr. Lathen decided not to pursue that further or
2109:17 engaged, perhaps, someone else to pursue that.
2109:18 But I -- I know he did try to get them to
2109:19 respond by filing regulatory complaints of various
2109:20 sorts as well.
2109:21 So he was pursuing other avenues besides
2109:22 having a Providence, Rhode Island lawyer trying to
2109:23 get them to come around.

847. In October 2013, Lathen admitted that his agreements did not give the participants "100% or 50% or 'beneficial ownership'" in the accounts:

> Interestingly, Goldman's disclosure statement is rather spare as relates the [sic] survivor's option. It says "in the event of death or adjudication of incompetence of the owner of a CD, early withdrawal of the entire CD will generally be permitted without penalty." There is no reference to a joint tenancy unlike the language you typically see in a bond prospectus and also the disclosure statement says "owner" rather than the usual "beneficial owner" which prevails in the bond docs. Given this spare language, I wonder if we could argue that the question of joint tenancy is in fact a moot point – i.e. the participant is clearly an owner as is plainly indicated in the account opening paperwork, even if their ownership was not 100% or 50% or "beneficial ownership."
> (Div. Ex. 681 – p. 4.)

848. On a number of occasions, Lathen reported to Flanders that brokers had exercised their rights to terminate their relationship with him once they discovered what he was doing in exercising his strategy.

2102:22 **Q In fact, he told you that brokers were**
2102:23 **exercising their rights to terminate their**
2102:24 **relationship with him once they discovered what he**
2102:25 **was doing; is that right?**
2103:1 A Yes.

2108:4 **Q Okay. And so Mr. Lathen told you that**
2108:5 **four or five brokers had terminated their**
2108:6 **relationship?**
2108:7 A I don't recall that. The notes just don't
2108:8 give me that context.
2108:9 **Q Okay.**
2108:10 A But just to be clear, there is no question
2108:11 that he communicated to me that a number of

2108:12 broker-dealers had sought to or actually terminated
2108:13 their relationship with him. So, you know, he did
2108:14 communicate that to me.

849. Lathen never asked Flanders for advice on the Custody Rule throughout the representation.

2127:23 **Q Okay. And Mr. Lathen never asked you for**
2127:24 **advice on anything related to the Custody Rule; is**
2127:25 **that right?**
2128:1 A I don't even know what that is.
2128:2 **Q Okay.**
2128:3 A So I hope he didn't.
2128:4 **Q So fair to say, you didn't advise him on**
2128:5 **that?**
2128:6 A I think that's fair to conclude.

850. Flanders does not recall ever discussing with Lathen that Lathen had closed a joint account with a Participant who had been cured, but if he had, Flanders would have advised him that that conduct had to be consistent with the agreements that he had reached with Participants.

2118:10 **Q Okay. And Mr. Lathen never told you that**
2118:11 **when a participant was cured, he closed the account,**
2118:12 **thereby ensuring the participant could not outlive**
2118:13 **him? He never told you that, right?**
2118:14 A I don't recall ever discussing that with
2118:15 him.

2137:3 **Q And if Mr. Lathen had told you that**
2137:4 **information, what effect, if any, would it have had**
2137:5 **on the legal advice that you provided him?**
2137:6 A Only that if he did so, it would have to
2137:7 be consistent with the agreements that he had
2137:8 reached with the participants.
2137:9 For example, part of the agreement was
2137:10 that he was allowed to review their medical
2137:11 information. And if medical information suggested
2137:12 that for whatever reason he did not wish to have
2137:13 them as a joint accountholder, the documentation
2137:14 within the agreement should provide for that.
2137:15 So that would have been the advice I would
2137:16 have given.

851. Flanders does not recall discussing with Lathen that the Participants did not know where the brokerage accounts were to be housed.

2119:22 **Q Okay. And Mr. Lathen never told you that**
2119:23 **the participants would not know where the brokerage**
2119:24 **accounts would be held; is that right?**
2119:25 A I don't recall discussing that with him.

852. Flanders does not recall whether Lathen ever told him that the Participants were not receiving brokerage statements, but if he had, it would not have affected his advice to Lathen unless Lathen was under some legal or other obligation to provide these brokerage statements.

2118:16 **Q And he didn't tell you that the**
2118:17 **participants were not receiving brokerage**
2118:18 **statements; is that correct?**
2118:19 A I don't recall whether he did or not.

2137:22 **Q And if he had told you that participants**
2137:23 **were not receiving brokerage statements, what**
2137:24 **effect, if any, would that have had on the legal**
2137:25 **advice that you provided him?**

2138:20 No, I don't think there would have been
2138:21 anything except that, unless he was under some legal
2138:22 or other obligation to provide these brokerage
2138:23 statements.
2138:24 And I would just want him to make sure
2138:25 that either the agreements address that subject with
2139:1 the participants or that he was not otherwise under
2139:2 a legal obligation to provide brokerage statements
2139:3 or prohibited from including a provision in the
2139:4 participant agreements that would have waived the
2139:5 right of participants to receive such statements.

853. Flanders does not recall Lathen telling him that he had represented to state authorities that Participants would get no more than $10,000.

2119:2 **Q Okay. But he didn't tell you that he was**
2119:3 **representing to state authorities that participants**
2119:4 **would get no more than their $10,000? He didn't**
2119:5 **tell you that, right?**
2119:6 A I don't remember that.

854. Flanders does not recall Lathen providing him with a copy of the Fund's audited financial statements.

2119:7 **Q And he never – Mr. Lathen never gave you**
2119:8 **the fund's audited financial statements; is that**
2119:9 **right?**

2119:10 A I don't recall that.

855. Lathen never provided his personal tax returns to Flanders, and Flanders never asked for them because he did not believe they would have provided any information that was pertinent to what Lathen was asking Flanders to do.

2119:11 **Q And Mr. Lathen never gave you his personal**
2119:12 **tax returns; is that right?**
2119:13 A I don't think so.

2139:16 **Q And you testified in response to a**
2139:17 **question from Ms. Weinstock that was -- Mr. Lathen**
2139:18 **had not provided you with his personal tax returns.**
2139:19 **Do you remember that?**
2139:20 A Yes.
2139:21 **Q Had you ever asked Mr. Lathen to provide**
2139:22 **you with his personal tax returns?**
2139:23 A No.

2140:4 **Why didn't you ask Mr. Lathen to provide**
2140:5 **his tax returns?**
2140:6 THE WITNESS: If that's your question,
2140:7 Counsel, my answer is that I did not believe that
2140:8 would have provided any information that was
2140:9 pertinent to what Mr. Lathen was asking me to do.

856. Flanders does not recall Lathen providing him with the 1099s that Lathen provided to participants.

2119:14 **Q And he never gave you the 1099s that went**
2119:15 **to participants; is that right?**
2119:16 A Again, I don't remember getting such.

857. Farrell did no work on the Lathen engagement – and was not even aware of Lathen's existence – until the summer of 2012, when her litigation partner, Flanders, asked her to assist with securities law matters involving Lathen and his business.

2604:7 **Q 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.
2604:17 **Q Okay. Were you aware that Mr. Lathen had**
2604:18 **been a client of your firm through Mr. Flanders**
2604:19 **prior to 2012?**
2604:20 A Not at that time.

(See also: PFOF ¶ 938, infra; Div. Ex. 738.)

858. Farrell believes that Flanders asked her to assist on the Lathen representation because Lathen had an investment advisory firm and she advises investment advisers.

2605:2 **Q And why was it, if you know, that Mr.**
2605:3 **Flanders asked you to get involved with the Lathen**
2605:4 **representation?**
2605:5 A I'm not -- I would be speculating. But I
2605:6 believe because he had an investment advisory firm,
2605:7 and I happen to advise investment advisors.

859. The scope of the amended engagement letter was twofold: (1) 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 Lathen was doing and to make sure he was not doing anything inappropriate; and (2) because Farrell had identified some concerns about the structure of Lathen's arrangements, to look at whether or not that structure needed to be modified to make sure it was compliant.

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.

860. The Amended Engagement Letter, executed by Lathen on July 30, 2012, provided:

AMENDED ENGAGEMENT LETTER

Via Electronic Mail and U.S. Mail

Jay Lathen
Chief Investment Officer and Managing Member of the General Partner
Eden Arc Capital Partners
One Penn Plaza, Suite 3671
New York, NY 10119

Re: Legal Representation – Advice and related legal services with respect to Eden Arc Capital Partners' Investment Strategy and Business Model (the "Business Model") (as more particularly described in EndCare Financial Assistance Brochure and the Eden Arc Capital Partners Private Placement Memorandum) (a copy of which is attached hereto) (the "Matter") and the preparation of a memorandum (the "Memorandum") as described below.

* * *

Scope of Engagement.

We have been engaged to represent EACP solely in connection with the Matter and Memorandum. The Memorandum will summarize the issues raised for EACP's Business Model by the allegations against the defendants in the Grand Jury Indictment against Joseph Caramadre and Raymour Radhakrishnan (the "Caramadre Indictment") and how EndCare's Financial Assistance Program may be distinguished from the activities which are the subject of the Caramadre Indictment. We have agreed that our engagement is limited to performance of services related to this Matter and the Memorandum. Because we are not EACP's general counsel in other matters, our acceptance of this engagement does not involve an undertaking to represent EACP or its interests in any other matter.

(Div. Ex. 747 – pp. 1-3.)

861. Not included in the representation Farrell undertook pursuant to the Amended Engagement letter with Lathen was advice about the following: his 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 her comments to him after reviewing his Profit Sharing Agreement in September 2013).

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.

862. Farrell also gave Lathen no advice – and Lathen asked for none – respecting Lathen's redemption requests to issuers until his dispute arose with Goldman Sachs when Hinckley Allen agreed to represent him as an advocate.

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.

863. Except for what she learned about what Lathen submitted to GS Bank in connection with her involvement with Hinckley Allen's response to GS Bank on

Lathen's behalf, in the fall of 2013, Farrell had no idea what Lathen was submitting to issuers in making his redemption requests.

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.

864. Lathen understood the limitations of Hinckley Allen's representation.

2758:11 **Q All right. So when you say your "legal**
2758:12 **representation advice and related legal services**
2758:13 **with respect to Eden Arc Capital Partners'**
2758:14 **investment strategy and business model," the things**
2758:15 **we just discussed about the Adviser's Act, the**
2758:16 **Custody Rule, tax advice, all of those things, they**
2758:17 **weren't included in that, were they?**
2758:18 A No.
2758:19 **Q And you never told Mr. Lathen they were**
2758:20 **included in that, did you?**
2758:21 A No.
2758:22 **Q And you never told Mr. Lathen that you**
2758:23 **were looking at those matters with respect to your**
2758:24 **advice and related legal services with respect to**
2758:25 **his investment strategy and business model, did you?**
2759:1 A No.
2759:2 **Q So is it fair to say, Ms. Farrell, that**
2759:3 **under this engagement letter you did not feel**
2759:4 **responsible for the review of all matters relating**
2759:5 **to Eden Arc's investment strategy and business**
2759:6 **model?**
2759:7 A Yes.
2759:8 **Q And you made sure Mr. Lathen understood**
2759:9 **the limitations of your representation, didn't you?**
2759:10 A I hope we did.
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.

865. Farrell 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.

866. Farrell had primary responsibility for the preparation of the Caramadre Memo and for advice and related legal services regarding Lathen's strategy and business model.

2611:11 **With respect to the Caramadre memo, the**
2611:12 **preparation of the Caramadre memo, who at Hinckley**
2611:13 **Allen had the primary responsibility for the**
2611:14 **preparation of that?**
2611:15 A I oversaw that.
2611:16 **Q Okay. And the other portion of it, the**
2611:17 **advice and related legal services regarding the**
2611:18 **strategy and the business model --**
2611:19 A I over --
2611:20 **Q -- who had --**
2611:21 A I oversaw that. I had primary
2611:22 responsibility

867. Flanders did not have a great deal of involvement in either of those aspects of the representation.

2611:23 **Q What, if anything, was Mr. Flanders' role**
2611:24 **at that point in the representation?**
2611:25 A At that point, I don't know that he had a
2612:1 great deal of involvement.

(See also: PFOF ¶ 938, infra; Div. Ex. 738.)

868. Farrell refused Lathen's repeated requests for an opinion or a memo on the validity of the joint tenancies throughout the representation because there was no governing law on the question and it was heavily fact-intensive.

2613:11 **Q Okay. Do you recall him ever requesting**
2613:12 **whether it was part of that memo or part of a**
2613:13 **separate memo for an opinion --**
2613:14 A Yes.
2613:15 **Q -- regarding legality?**
2613:16 **And what was his requesting?**
2613:17 A I think he wanted a memo of the validity
2613:18 of the joint account.
2613:19 **Q All right. And did you provide him with**
2613:20 **such a memo?**
2613:21 A No.
2613:22 **Q Why was that?**
2613:23 A Because there was no governing law on the
2613:24 question. It was a heavily fact-intensive question.
2613:25 While we had advised him based on the law that was
2614:1 available, what we thought was the appropriate
2614:2 structure for what he was proposing to do, it was
2614:3 not possible to provide a legal opinion on the
2614:4 subject.

2763:1 **Q Well, is there a distinction in your mind**
2763:2 **between opinions and memoranda?**
2763:3 A As a practical matter, yes.
2763:4 **Q Okay. But you didn't offer even a**
2763:5 **memorandum of the validity of the joint tenancies in**
2763:6 **this situation, correct?**
2763:7 A I don't think -- I don't think I was asked
2763:8 for one.
2763:9 **Q Okay. Well, you didn't put it in the**
2763:10 **Caramadre memo, right?**
2763:11 A I didn't put anything in the Caramadre --
2763:12 that wasn't what the Caramadre memo was. That's
2763:13 what -- was not what we were asked to do in the
2763:14 Caramadre memo.
2763:15 **Q Okay. Well, we saw an email from Mr.**
2763:16 **Lathen where he asked you to address it in the memo,**
2763:17 **didn't we?**
2763:18 A Right. But the original engagement was to
2763:19 do the memo on Caramadre, and that's what that memo
2763:20 did.
2763:21 **Q Okay. And but you refused -- you declined**
2763:22 **his request to put any of your thoughts about the**
2763:23 **validity of the joint tenancies in the Caramadre**
2763:24 **memo, didn't you?**
2763:25 A I declined to write -- yes, that's an
2764:1 accurate statement.

2765:24 **Q And you said no, because the determination**
2765:25 **if whether a joint account creates valid joint**
2766:1 **tenancies is dependent on the facts and the**
2766:2 **circumstances, right?**
2766:3 A Also, there was just no relevant law.
2766:4 **Q And because the law is unsettled in that**
2766:5 **area, right?**
2766:6 A Yes.
2766:7 **Q And you communicated that to Mr. Lathen,**
2766:8 **right?**
2766:9 A Yes.
2766:10 **Q Throughout the engagement?**
2766:11 A Yes.
2766:12 **Q Okay. And you first said no in 2012 with**
2766:13 **respect to the Caramadre situation. And you**
2766:14 **continued to say no even after you understood that**
2766:15 **he had abandoned the investment management agreement**
2766:16 **structure, right?**
2766:17 A Yes.

869. Farrell continued to decline Lathen's requests for an opinion or a memo on the validity of the joint tenancies for the same reasons, even after Lathen had revised his structure, started using the Profit Sharing Agreement, and adopted Farrell's revisions to his Participant Agreement.

2765:24 **Q And you said no, because the determination**
2765:25 **if whether a joint account creates valid joint**
2766:1 **tenancies is dependent on the facts and the**
2766:2 **circumstances, right?**
2766:3 A Also, there was just no relevant law.
2766:4 **Q And because the law is unsettled in that**
2766:5 **area, right?**
2766:6 A Yes.
2766:7 **Q And you communicated that to Mr. Lathen,**
2766:8 **right?**
2766:9 A Yes.
2766:10 **Q Throughout the engagement?**
2766:11 A Yes.
2766:12 **Q Okay. And you first said no in 2012 with**
2766:13 **respect to the Caramadre situation. And you**
2766:14 **continued to say no even after you understood that**
2766:15 **he had abandoned the investment management agreement**
2766:16 **structure, right?**
2766:17 A Yes.

2765:7 **Q Okay. Fair enough. All right. Let's**

2765:8 **look at -- let's look at page 80.**
2765:9 **Does that refresh your recollection about**
2765:10 **a conversation with Mr. Lathen about rendering an**
2765:11 **opinion on anything?**
2765:12 A It doesn't -- I already said that I had
2765:13 something -- now I know that I had one on April 17,
2765:14 2014.
2765:15 **Q All right. And does that help inform your**
2765:16 **determination of what you were doing on May 5, 2014?**
2765:17 A No.
2765:18 **Q Okay. But it still relates to an opinion**
2765:19 **for Mr. Lathen, right?**
2765:20 A Yes.
2765:21 **Q And the firm declined to give him one,**
2765:22 **right?**
2765:23 A We declined to give him one, yes.
2765:24 **Q And you said no, because the determination**
2765:25 **if whether a joint account creates valid joint**
2766:1 **tenancies is dependent on the facts and the**
2766:2 **circumstances, right?**
2766:3 A Also, there was just no relevant law.
2766:4 **Q And because the law is unsettled in that**
2766:5 **area, right?**
2766:6 A Yes.
2766:7 **Q And you communicated that to Mr. Lathen,**
2766:8 **right?**
2766:9 A Yes.
2766:10 **Q Throughout the engagement?**
2766:11 A Yes.

See also Div. Ex. 738 – p. 80.

870. Farrell understood that she was provided with Lathen's sample Participant Agreement, among other documents, because the Firm had been asked to look at Lathen's program, and one could not do that without the documents.

2615:18 MR. HUGEL: Caleb, can we pull up on the
2615:19 screen Lathen Exhibit 1830.

2616:1 **Q So, Ms. Farrell, if you take a minute,**
2616:2 **this is an email from Mr. Lathen to Mr. Farrell --**
2616:3 A You mean Mr. Flanders?
2616:4 **Q Mr. Flanders, with some attachments.**
2616:5 **If you can take a look at -- he's also**
2616:6 **discussing what documents he's providing to Mr.**
2616:7 **Flanders. If you can take a look at that and tell**
2616:8 **me if any or all of those documents made their way**

2616:9 **to you during the course of your representation.**
2616:10 A Can you scroll?
2616:11 **Q I'll ask --**
2616:12 A I believe all of those came to my
2616:13 attention.
2616:14 **Q So the offering memorandum?**
2616:15 A I expect so.
2616:16 **Q And I think you testified about a sample**
2616:17 **copy of the participant agreement?**
2616:18 A Yes.
2616:19 **Q Sample of the limited power of attorney?**
2616:20 **And you think you got the enrollment form?**
2616:21 A I believe so.
2616:22 **Q What was the enrollment form's purpose? Do**
2616:23 **you know what that --**
2616:24 A I don't recall.
2616:25 **Q Okay. And where it says "Brochure," do**
2617:1 **you recall what the brochure was?**
2617:2 A Yes.
2617:3 **Q What was the brochure --**
2617:4 A It was a brochure. It was describing the
2617:5 program to the participant.
2617:6 **Q For the participant?**
2617:7 A Yes.

2619:19 **Q Did you have an understanding why you were**
2619:20 **being provided the documents that you testified that**
2619:21 **you got?**
2619:22 A Well, we'd been asked to look at the
2619:23 program. Kind of hard to do without the documents.

(See also: Lathen Ex. 1830.)

871. After Farrell had reviewed Lathen's IMA and the sample Participant Agreement, among other documents, she told Lathen of her concerns about the validity of his joint tenancies under those agreements.

2620:16 **Q So after speaking with him and reviewing**
2620:17 **the documents, did you have a -- what you believed**
2620:18 **at the time to be a good understanding of what his**
2620:19 **business model was?**
2620:20 A I had an understanding.
2620:21 **Q And did you believe that there were any**
2620:22 **risks associated with that business model?**
2620:23 A Yes.
2620:24 **Q Okay. And did you advise Mr. Lathen of**
2620:25 **those risks?**

2621:1 A Yes.
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.

2622:2 **Q And did you advise Mr. Lathen of the risks**
2622:3 **you identified?**
2622:4 A Yes.

872. After consulting with her partners in the estate planning group of the Firm, and her review of the documents Lathen provided, Farrell concluded that Lathen's opening of joint accounts as nominee for his investment partnership would not create a valid joint tenancy, as she told Flanders in a July 23, 2012 email, and shared with Lathen:

From: Farrell, Margaret D.
Sent: Monday, July 23, 2012 10:27 PM
To: Flanders, Robert G.
Subject: RE: Emailing: survivorsOptionSummary.pdf

If Y is just the nominee of an entity, I don't think it works. First, there is question of whether it is a valid joint account (limited research indicates that only individuals can hold JTWROS accounts); second if Y is just a nominee Y doesn't have a beneficial interest in the account. There really isn't any law on this, but there will be a lot of uncertainties.

(Div. Ex. 744 – p. 1.)

See also:
2655:21 **Q Okay. And fair to say, after looking at**
2655:22 **the documents he provided and doing some of your own**
2655:23 **research, you actually had some concern whether**
2655:24 **under his current structure he had created valid**

joint tenancies; isn't that fair to say?
A That's correct.

Q Okay. And tell us why you had that concern, if you recall?
A Well, I think it was -- I mean, because it was set up as a nominee.

Q Okay. And then you point out, if we go to page 1 of the exhibit on -- in response to -- a response from Mr. Flanders.
You point out that "There is a question of whether it is a valid joint account (limited research indicates that only individuals can hold JTWROS accounts.)"
A Uh-huh.
Q Right?
A Yes.
Q And I think you said on direct that you didn't see anything that allowed an entity to have an interest in a joint account, right?
A Correct.
Q And because you did this research, you'd agree with me -- right? -- that an entity can't die?
A That's the reason it seems a problem.

Q And then you write, "Second, if Y" -- and Y being Mr. Lathen in your email?
A Uh-huh.
Q -- "is a nominee, Y" -- again, Mr. Lathen -- "doesn't have a beneficial interest in the account," correct?
A That is what I am saying in this email.
Q And that conclusion you drew from looking at the investment management agreement, correct?
A No. The conclusion I drew -- well, I don't remember where I drew it from, but I concluded that he was a nominee.

Q Okay. Is it fair to say that that was the genesis of your concern, that Y, meaning Mr. Lathen, was only a nominee?
A Yes.
Q So that raised a question of whether the joint tenancies that Mr. Lathen had created under the investment management agreement structure had

2661:8 **created valid joint tenancies, right?**
2661:9 A I think that -- could you say that again?
2661:10 because I'm not sure I understand.
2661:11 **Q So reviewing the investment management**
2661:12 **agreement and the participant agreement created in**
2661:13 **your mind a concern about whether the joint**
2661:14 **tenancies that Mr. Lathen had created to this point**
2661:15 **were, in fact, valid joint tenancies?**
2661:16 A I can't say what specific documents
2661:17 created that concern. But that was my concern,
2661:18 reading all of the documents.

2623:2 **Q Okay. What was -- when you say you**
2623:3 **"revised the structure," to the best of your**
2623:4 **recollection, what was the structure when it came to**
2623:5 **you? And how did you advise him to change it?**
2623:6 A My understanding of the structure when he
2623:7 came to us is he opened joint accounts with
2623:8 participants as nominee for his investment
2623:9 partnership.
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.

2624:23 **Q Now, you testified a few moments ago that**
2624:24 **one of the things that concerned you in the way that**
2624:25 **Mr. Lathen was doing business before coming to you**
2625:1 **was this -- this idea that he was the nominee for**
2625:2 **the funds?**
2625:3 A Yes.
2625:4 **Q Okay. And is that a concern that you**
2625:5 **raised with him?**
2625:6 A Yes.

873. Because of the concerns Farrell had with Lathen's existing structure whereby he acted as nominee for the Fund, and that structure's impact on the validity of the joint tenancies, she suggested that he adopt a different structure by which the Fund would lend money to him.

2623:2 **Q Okay. What was -- when you say you**
2623:3 **"revised the structure," to the best of your**
2623:4 **recollection, what was the structure when it came to**
2623:5 **you? And how did you advise him to change it?**
2623:6 A My understanding of the structure when he
2623:7 came to us is he opened joint accounts with
2623:8 participants as nominee for his investment
2623:9 partnership.
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.

874. Farrell's research led her to conclude that an entity cannot be a tenant in a valid joint tenancy because entities cannot die, and the co-tenant therefore has no right of survivorship.

2657:21 **Q Okay. And then you point out, if we go to**
2657:22 **page 1 of the exhibit on -- in response to -- a**
2657:23 **response from Mr. Flanders.**
2657:24 **You point out that "There is a question of**
2657:25 **whether it is a valid joint account (limited**
2658:1 **research indicates that only individuals can hold**
2658:2 **JTWROS accounts.)"**
2658:3 A Uh-huh.
2658:4 **Q Right?**
2658:5 A Yes.
2658:6 **Q And I think you said on direct that you**
2658:7 **didn't see anything that allowed an entity to have**
2658:8 **an interest in a joint account, right?**
2658:9 A Correct.
2658:10 **Q And because you did this research, you'd**

2658:11 **agree with me -- right? -- that an entity can't die?**
2658:12 A That's the reason it seems a problem.

875. Farrell was also concerned that if Lathen were merely a nominee, he had no beneficial or economic interest in the joint account.

2658:21 **Q And then you write, "Second, if Y" -- and**
2658:22 **Y being Mr. Lathen in your email?**
2658:23 A Uh-huh.
2658:24 **Q -- "is a nominee, Y" -- again, Mr.**
2658:25 **Lathen -- "doesn't have a beneficial interest in the**
2659:1 **account," correct?**
2659:2 A That is what I am saying in this email.

2662:25 **Q So you'd agree with me that the investment**
2663:1 **management agreement bore on the analysis of the**
2663:2 **interests that Mr. Lathen had in the joint tenancy**
2663:3 **accounts?**
2663:4 MR. HUGEL: Objection.
2663:5 JUDGE PATIL: Overruled.
2663:6 THE WITNESS: I don't know how to keep
2663:7 answering this question. It is consistent with my
2663:8 analysis. I don't recall whether it was critical to
2663:9 it; whether it bore on it; what impact it had on it.
2663:10 I do know that I know what a nominee is,
2663:11 and a nominee does not have an economic interest.
2663:12 They hold in nominee name.

(See also: Div. Ex. 744 – p. 1.)

876. Farrell shared her concerns about Lathen's nominee status with him.

2663:14 **Q Okay. And so you explained all these**
2663:15 **concerns to Mr. Lathen, correct?**
2663:16 A Yes.

877. Farrell also concluded that the sample Participant Agreement provided to her in the summer of 2012 did not create a valid joint tenancy; it gave the Participant no beneficial interest in the account because the Participant's right of survivorship was limited and did not provide the required divided interest in the account, a concern she shared with Flanders in her July 23, 2012 email:

On Jul 23, 2012, at 4:59 PM, "Farrell, Margaret D." <mfarrell@haslaw.com> wrote.

Bob:

FYI, just trying to figure out exactly how to describe what "opinion" we might be able to give, I did a little "searching". I found this on the Internet. It is a good summary of the Survivor's Option. In looking at this, I think that they will have a serious problem because I think it is questionable whether the "participant" has any beneficial interest in the account.

(Div. Ex. 744 – p. 2)

See also:

2657:7 **Q Okay. But you suggest that the**
2657:8 **participant may not have any beneficial interest in**
2657:9 **the account.**
2657:10 A Oh, I think looking back, my recollection
2657:11 looking at the documents is that the agreement that
2657:12 he had provided that the participant would get --
2657:13 what the participant could get if they
2657:14 predeceased -- if he predeceased them was
2657:15 specifically limited to a dollar amount.
2657:16 **Q I see. So there really was no right of**
2657:17 **survivorship?**
2657:18 A Yeah, they were -- they were limited in
2657:19 what they could get, so they did not have the
2657:20 required divided interest in the entire account.

878. Farrell shared her concerns about the Participants' lack of beneficial interest in the accounts pursuant to the sample Participant Agreement with Lathen, and suggested he make changes to that agreement.

2664:3 **Q And you also suggested to Mr. Lathen that**
2664:4 **your review of the participant agreement also gave**
2664:5 **you concerns about their beneficial interest in the**
2664:6 **accounts, correct?**
2664:7 A I believe so.
2664:8 **Q Okay. And you suggested to Mr. Lathen**
2664:9 **that he make changes to that agreement as well?**
2664:10 A Yes.

879. While Farrell was drafting the Caramadre Memo, she was also working on revising Lathen's Participant Agreement, brochure and enrollment forms, in addition to drafting a loan agreement for the new structure she was proposing.

2663:20 **Q Okay. And under the new structure that**
2663:21 **you proposed, the fund would enter into a line of**
2663:22 **credit agreement with Mr. Lathen by which it would**
2663:23 **lend him money that he would then use to buy**
2663:24 **survivor option securities as needed, and he would**
2663:25 **take back -- or the fund, sorry -- the fund would**
2664:1 **take back a security interest in the account, right?**
2664:2 A Yes.

2664:3 **Q And you also suggested to Mr. Lathen that**
2664:4 **your review of the participant agreement also gave**
2664:5 **you concerns about their beneficial interest in the**
2664:6 **accounts, correct?**
2664:7 A I believe so.
2664:8 **Q Okay. And you suggested to Mr. Lathen**
2664:9 **that he make changes to that agreement as well?**
2664:10 A Yes.
2664:11 **Q Okay. And at the same time, you were also**
2664:12 **crafting this Caramadre memo; is that right?**
2664:13 A I believe so.

880. Farrell provided several drafts of the Caramadre memo to Lathen for his review and comment.

2664:14 **Q So let's look at the memo that you**
2664:15 **drafted. And it went through a couple of drafts,**
2664:16 **right?**
2664:17 A Yes.
2664:18 **Q Okay. Mr. Lathen didn't accept the first**
2664:19 **draft; is that right?**
2664:20 A It wasn't a final draft. It was a draft.
2664:21 **Q But he didn't accept it, did he, the first**
2664:22 **draft?**
2664:23 A It wasn't sent to him for acceptance. It
2664:24 was sent to him as a draft.
2664:25 **Q And if he had no comments --**
2665:1 A I indicated that it was still being
2665:2 reviewed internally.

2693:4 **Q Okay. So what were the purpose of getting**
2693:5 **Mr. Lathen's comments on the memo?**
2693:6 A Because our clients sometimes say, We
2693:7 don't want the memo.
2693:8 **Q Oh. So they give you comments, and if you**
2693:9 **don't agree with them, you just decide not to issue**
2693:10 **the memo?**
2693:11 A Yes.
2693:12 **Q I see. All right. Fair enough.**
2693:13 **So at some point you and Mr. Lathen agreed**
2693:14 **on a form of a memo that you would issue; is that**
2693:15 **correct?**
2693:16 A Yes, that we would issue, yes.

(See also: Div. Exs. 659; 662, 663, 665, 666.)

881. In 2012, Lathen provided an EndCare brochure to Farrell. The EndCare brochure stated that EndCare pledges to donate 15% of its profits to charities. Farrell made note of this representation in the September 18, 2012 version of the Caramadre memo. (Div. Ex. 659 – p. 41.)

882. In the draft of the Caramadre Memo discussed in PFOF ¶ 881, supra, Farrell included this footnote about Lathen's brochure's promise of a charitable contribution by EndCare:

> The Brochure additionally provides that "Participants and their families will have the opportunity to nominate charities for inclusion in EndCare's annual giving programs." The Brochure does not indicate how Participants or their families can submit such nominations. This should be clarified. Note that if EndCare fails to make such charitable contributions it will be subject to claims for fraudulent misrepresentation."
> (Div. Ex. 659 – p. 41 fn. 2.)

883. Lathen ignored this advice, and continued to include the pledge to donate 15% of EndCare's profits to charities in EndCare's brochure at least as late as 2014. (Div. Ex. 594.)

884. Although Farrell advised Lathen that he would be subject to claims for fraudulent representation if he claimed that EndCare was making charitable contributions, Respondents continued to make that claim into March 2014. (Div. Ex. 594 – p. 17.)

885. The Final Caramadre Memo explicitly limits 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.)

886. In an earlier draft, Farrell had written that the Caramadre Memo did not address "the applicability of federal or state securities laws to the Program." (Div. Ex. 665 – p. 12.)

887. Farrell was comfortable removing that language when, in the next draft, she added the sentence to the first paragraph of the memo: "This memorandum does not address any other matters." (Div. Ex. 666 – pp. 11.) See also:

> 2691:21 **Q So it no longer says that, "This**
> 2691:22 **memorandum also does not address the disclosures in**
> 2691:23 **any offering documents provided to investors or the**
> 2691:24 **applicability of federal or state securities laws to**
> 2691:25 **the program;" is that right?**
> 2692:1 A Right.
> 2692:2 **Q And I think you told us in your interview**

2692:3 **that the reason you were comfortable striking that**
2692:4 **language is because of the first sentence that you**
2692:5 **added, which was that "this memorandum does not**
2692:6 **address any other matters," right?**
2692:7 A Correct.

888. The Final Caramadre Memo does not address the applicability of federal or state securities laws to the Lathen's program, or any other matter not explicitly discussed in it. (Div. Ex. 668.) See also:

2694:3 **Q All right. Okay. So at the end of the**
2694:4 **day, the final memo includes a statement that the**
2694:5 **memo addresses no other matters than what's stated**
2694:6 **in it, right?**
2694:7 A Correct.

889. In the Final Caramadre Memo, Farrell advised Lathen that his representations to all third parties should not misrepresent the nature and intent of the program.

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.

(Div. Ex. 668 – p. 6.)

890. Farrell intended 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."

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.

891. In the Final Caramadre Memo, Farrell advised Lathen 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.

> **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.**

(Div. Ex. 668 – p. 7.)

892. Farrell did not intend to limit that that advice to Lathen's disclosures to Participants, broker-dealers or investors, and she never told Lathen that she was excluding anyone from that list.

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?**

2672:3 **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.

893. The Final Caramadre Memo provides that it does not address the validity of the joint tenancies Lathen was creating pursuant to the revised Participant Agreements on which Hinckley Allen had worked:

> **Finally, this memorandum does not address the validity of the joint account arrangements or any difference between the structure of Caramadre's activities and the Program that are not the basis for allegations in the Indictment.**

(Div. Ex. 688 – p. 7.)

894. Farrell included a paragraph in the Final Caramadre Memo prohibiting, without the Firm's written consent, Lathen from quoting or otherwise including summarizing or referring to in any publication or document, in whole or in part, for any purpose whatsoever, the guidance provided in it.

> This memorandum is provided solely for the information of the addressee, Eden Arc Capital Management, and Eden Arc Capital Partners, and not for any other person, entity or agency or for any other purpose. It may not be relied upon by any third party. Without our prior written consent, the guidance herein shall not be quoted or otherwise included, summarized or referred to in any publication or document, in whole or in part, for any purpose whatsoever.
> (Div. Ex. 668 – p. 7.)

895. The purpose of a paragraph such as the one in PFOF ¶ 894, supra, is to prevent a client, such as Lathen, from using the memo as a marketing piece, and to avoid third party reliance on it.

> 2677:22 **Q Okay. Now, you told us in our interview**
> 2677:23 **that you included that provision or paragraph so**
> 2677:24 **that Mr. Lathen wouldn't use this memo as a**
> 2677:25 **marketing piece; isn't that right?**
> 2678:1 A I think I told you that. It's also true
> 2678:2 that it's standard language in all of our
> 2678:3 communications.
> 2678:4 **Q Okay. And the purpose of it is so that**
> 2678:5 **third parties won't rely on what's in the memo,**
> 2678:6 **right?**
> 2678:7 A Yeah.

896. In the drafting process, Lathen attempted to remove this sentence to allow him to share the Caramadre Memo with third parties:

> Without our prior written consent, the guidance herein shall not be quoted or otherwise included, summarized or referred to in any publication or document, in whole or in part, for any purpose whatsoever.
> (Div. Ex. 663 – p. 8.)

> See also:
> 2685:9 **Q And the bolded material that is**
> 2685:10 **underlined, that is because Mr. Lathen had taken out**
> 2685:11 **the last line; is that correct?**
> 2685:12 A I believe so.
> 2685:13 **Q And you put it back in?**
> 2685:14 A Yes.

897. Farrell never told Lathen that the structure she advised him to adopt in the fall of 2012 was bulletproof.

2680:21 **Now, you didn't agree with Mr. Lathen that**
2680:22 **the structure you devised was bulletproof, did you?**
2680:23 A No.
2680:24 **Q And you certainly never called it that in**
2680:25 **any conversations you had with Mr. Lathen, did you?**
2681:1 A No.

898. Even after Lathen agreed to restructure his program in accordance with Farrell's advice, revising his Participant Agreement and adopting the lending structure between the Fund and him, Farrell declined his request to address the validity of the joint tenancies in the Caramadre Memo.

2681:2 **Q And, in fact, when you went to revise the**
2681:3 **memo, you still declined to address the issue of the**
2681:4 **joint tenancies and their validity, right?**
2681:5 A Yes.

2683:23 **Q And so you told Mr. Lathen that**
2683:24 **notwithstanding the change in the structure and the**
2683:25 **changes to the participant agreement, you were not**
2684:1 **going to include any discussion of the validity of**
2684:2 **the joint tenancies in this memo, right?**
2684:3 A Yes.

See also: Div. Exs. 661 – p. 1; 668 – p. 7.

899. Even after Farrell had revised the form of the Participant Agreement, her draft Caramadre Memo included the following:

> We draw your attention to the fact that it is our understanding that both Caramadre and each of his joint account holders had full access to the joint account during the holders' joint lives, including the right to sell the securities and withdraw the proceeds. This memorandum does not address the effect if any, that any restrictions imposed on a Participant's ability to access funds in the Account might have on your ability to redeem the SO Investments following the death of a Participant or to realize the investment objectives of the Program.
> (Div. Ex. 663 – p. 7.)

See also:
2684:4 **Q Okay. And on page 7, it still says, "We**
2684:5 **draw your attention to the fact that it is our**
2684:6 **understanding that both Caramadre and each of these**
2684:7 **joint accountholders had full access to the joint**
2684:8 **account during the holders' joint lives, including**
2684:9 **the right to sell the securities and withdraw the**

2684:10 **proceeds," correct?**
2684:11 A Yes.
2684:12 **Q And it still says, "This memorandum does**
2684:13 **not address the effect, if any, that any**
2684:14 **restrictions imposed on a participant's ability to**
2684:15 **access funds in the account might have on your**
2684:16 **ability to redeem the SO investments following the**
2684:17 **death of a participant or to realize the investment**
2684:18 **objectives of the program." It still says that,**
2684:19 **right?**
2684:20 A Yes.
2684:21 **Q And that's still in there, because even as**
2684:22 **redrafted, you knew that there were still**
2684:23 **restrictions on the access by the participants to**
2684:24 **the joint accounts?**
2684:25 A It says it doesn't -- it doesn't -- it
2685:1 doesn't address the effect, if any, that it might
2685:2 have on the ability to collect.

900. In the Final Caramadre Memo, Farrell agreed to strike the caution about the restrictions on the Participants' access to the joint accounts and the effect, if any, of those restrictions on Lathen's ability to redeem the survivor's option investments, because she believed the language limiting what the memo did address to be sufficient in pointing out that the memo did not address the topic of Lathen's ability to redeem the survivor's option investments. (Div. Exs. 665 – p. 12; 668.) See also:

2688:21 **Q Now, you didn't strike that because this**
2688:22 **memo now addresses Mr. Lathen's ability to redeem**
2688:23 **the survivor option investments, did you?**
2688:24 A No.

2689:3 **Q Okay. You just decided that your views on**
2689:4 **Mr. Lathen's ability to redeem his survivor option**
2689:5 **notes weren't really within the scope of this**
2689:6 **memorandum; isn't that right?**
2689:7 A I think it was covered by the first
2689:8 sentence.
2689:9 **Q Okay. And the first sentence of what?**
2689:10 **Of –**
2689:11 A Of this paragraph.
2689:12 **Q I see. Because this memorandum does not**
2689:13 **address the validity of the joint account**
2689:14 **arrangements or any difference between the structure**
2689:15 **of Caramadre's activities and the program that are**
2689:16 **not the basis for the allegations in the indictment?**
2689:17 A Correct.

2689:18 **Q And that's a change Mr. Lathen wanted;**
2689:19 **isn't that right?**
2689:20 A I don't recall that.
2689:21 **Q Well, you wouldn't have made a change if**
2689:22 **Mr. Lathen hasn't asked for it, correct?**
2689:23 A I don't recall. I'm not saying yea or
2689:24 nay. I'm just being honest. I don't recall.

901. Lathen had told Farrell that the brokers that housed the joint accounts required two signatures on any instructions with respect to joint accounts. (Div. Ex. 856.) See also:

2675:21 **So if you look at Division Exhibit 856,**
2675:22 **which is -- appears to be page 2 of those notes, can**
2675:23 **you read for us, please, what appears -- because**
2675:24 **your handwriting is so good, I can read it -- just**
2675:25 **after "just contractual rights."**
2676:1 A "For restriction on account. Standard
2676:2 practice. Any accountholder can provide
2676:3 instructions typically requires both joint holders
2676:4 to sign. Have limited power of attorney to act on
2676:5 participants."
2676:6 **Q Thank you. So does that refresh your**
2676:7 **recollection that Mr. Lathen told you that both**
2676:8 **holders on the account had to sign in order --**
2676:9 A That they typically had to sign, yes.

902. Lathen told Farrell that because of that double signature requirement, he had the Participants execute powers of attorney giving him full control over the accounts so that he could control the accounts but the Participants could not without Lathen's consent. (Div. Ex. 856.) See also:

2676:10 **Q Okay. And he had made it easier on**
2676:11 **himself by having them execute powers of attorney so**
2676:12 **that he could do -- that the broker-dealer would**
2676:13 **have to accept his instruction without their**
2676:14 **signature, correct?**
2676:15 A The broker-dealer could, yes.
2676:16 **Q So that meant because there was a double**
2676:17 **signature requirement, for lack of a better word,**
2676:18 **that the participants were not able to give**
2676:19 **instructions to the broker-dealers on the accounts;**
2676:20 **is that right?**
2676:21 A Correct.

903. Because Farrell knew that Lathen controlled the access to the joint accounts and that the brokers would not honor the Participants' instructions on the account

without Lathen's consent, she knew that the Participants' access to the accounts was restricted.

2673:15 **Q Okay. But there were still restrictions**
2673:16 **that you knew about in the participant agreement,**
2673:17 **restrictions on their ability to access the account,**
2673:18 **correct?**
2673:19 A Yes.

904. Farrell never saw the Profit Sharing Agreement that Lathen drafted until September 2013, even though she contemplated some kind of agreement between Lathen and the Fund in the new structure she had devised in the fall of 2012.

2695:14 **At the time that you were writing the**
2695:15 **Caramadre memo in the fall of 2012, you understood**
2695:16 **that Mr. Lathen was preparing a profit sharing**
2695:17 **agreement, right --**
2695:18 A Yes.
2695:19 **Q -- between him and the fund to ensure that**
2695:20 **the interests on the notes and the profits in the**
2695:21 **accounts after redemption of the securities would be**
2695:22 **shared with the fund, right?**
2695:23 A Would be shared, yes.
2695:24 **Q But you never saw it prior to issuing the**
2695:25 **Caramadre memo, correct?**
2696:1 A Correct.

2701:15 **Q Okay. But by that point in August of**
2701:16 **2013, you hadn't seen the profit sharing agreement,**
2701:17 **correct?**
2701:18 A That's correct.
2701:19 **Q So you asked Mr. Lathen to send it to you,**
2701:20 **didn't you?**
2701:21 A Yes.

(See also: Div. Ex. 2022.)

905. When Farrell saw the Profit Sharing Agreement that Lathen drafted, it raised concerns in her mind about the validity of the joint tenancies because it provided that all of the profit would be paid to the Fund, destroying any interest that Lathen or the Participant had in the account.

2696:18 **Q And at some point when you did see the**
2696:19 **profit sharing agreement, it raised some concerns in**
2696:20 **your mind about the validity of the joint tenancies,**
2696:21 **right?**

2696:22 A Correct.

2701:22 **Q And when you saw it, you got concerned**
2701:23 **that it could raise challenges that the fund did**
2701:24 **have an equity interest in the accounts, didn't you?**
2701:25 A I had a concern about whether it would
2702:1 make a -- that it would bolster a claim that the
2702:2 joint account was -- made it vulnerable to
2702:3 challenge.
2702:4 **Q And "vulnerable to challenge," you mean**
2702:5 **that the validity of the joint account might be in**
2702:6 **question --**
2702:7 A Yes.
2702:8 **Q -- right?**
2702:9 A Yes.
2702:10 **Q And that's because if the fund, the**
2702:11 **entity, had an equity interest in the joint account,**
2702:12 **that was the concern that you identified way before**
2702:13 **that; that the entity couldn't really be a joint**
2702:14 **accountholder, right?**
2702:15 A No, that wasn't my concern.
2702:16 **Q What was your concern?**
2702:17 A My concern was that the agreement he sent
2702:18 to me provided that all of the gain on redemption
2702:19 was being paid over to the fund.
2702:20 **Q And that gave the fund an equity interest**
2702:21 **in the account, right?**
2702:22 A It wasn't that it gave an equity interest
2702:23 in the account. It's if all of the -- if all of the
2702:24 profit was being paid to the fund, then neither Mr.
2702:25 Lathen nor the participant had an interest in the
2703:1 fund -- in the account.

(See also: Div. Ex. 671.)

906. In an email she wrote on the same day she received the Profit Sharing Agreement for the first time, Farrell expressed her concerns to Lathen and Robinson that the agreement destroyed the validity of the joint tenancies:

> As mentioned in our telephone call, we believe it is very important that Jay, as the joint account holder, have a meaningful direct interest in the account and that his economic interest not be solely through his interest in EACP. The Profit Sharing Agreement needs to be just that, profit sharing. This may require a change to the allocation provisions, etc. of EACP so that Jay's interest is direct, rather than indirect. Jay's share should be meaningful. Otherwise, he may be viewed as merely the agent of EACP with EACP viewed as the real account owner.

* * *

. . . Any suggestion that Jay is acting for EACP potentially supports a claim that EACP is the co-owner of the account, not Jay and would destroy the JTWROS status of the account.
(Div. Ex. 671 – p.1.)

(See also: Div. Ex. 2022.)

See also:
2707:4 **Q Okay. And then you finish that paragraph**
2707:5 **with, "Jay's share should be meaningful, otherwise**
2707:6 **he may be viewed as merely the agent of EACP with**
2707:7 **EACP viewed as the real account owner."**
2707:8 A Yes.
2707:9 **Q And that was a crystallization of the**
2707:10 **concerns that you were just expressing to me as to**
2707:11 **who had the real beneficial ownership interest in**
2707:12 **the account; is that correct?**
2707:13 A Correct.

2704:7 **Q Now, the date on this is September 25,**
2704:8 **2013; is that right?**
2704:9 A That's correct.

2704:13 **Q Now, you wrote this email after you saw**
2704:14 **the profit sharing agreement for the first time;**
2704:15 **isn't that right?**
2704:16 A That's correct.

907. Although the Profit Sharing Agreement created a different relationship between Lathen and the Fund, from Farrell's perspective it was just as problematic as the IMA in its effect on the validity of the joint tenancies.

2703:3 **So in that way it was similar to the**
2703:4 **investment management agreement, because in that**
2703:5 **situation, Mr. Lathen also didn't have a beneficial**
2703:6 **interest in the account, right?**
2703:7 A No.
2703:8 **Q He was just a nominee?**
2703:9 A It was similar. It was legally different.
2703:10 But because of the economics, I thought it was
2703:11 problematic.

2706:6 **Q What is that?**
2706:7 A It's an email dated September 25, 2013,
2706:8 from Michael Robinson. And he's apparently

2706:9 attaching the profit sharing agreement.

908. In her September 25, 2013 email, Farrell urged Lathen to revise the Profit Sharing Agreement, including by removing any reference to accounts governed by the IMA, which she assumed were no longer active:

> I don't know if you still have accounts that are governed by the IMA. I would think not (i.e., that they have all matured). I would prefer that the Profit Sharing Agreement not reference the IMA if at all possible.
> (Div. Ex. 671 – p.1.)

909. Lathen understood that Hinckley Allen had concerns that the Profit Sharing Agreement also gave all beneficial interest to the Fund.

3564:13 **Q Ms. Farrell was also concerned about the**
3564:14 **profit-sharing agreement, right?**
3564:15 A Yes. I saw some e-mails earlier relating to
3564:16 that.
3564:17 **Q And she was concerned that that also gave all**
3564:18 **beneficial ownership to the fund, right?**
3564:19 A I think she felt at the time that it would be
3564:20 helpful if I had a direct interest in the joint accounts,
3564:21 rather than receiving my economics from the joint
3564:22 accounts through the fund profit sharing allocation. And
3564:23 I think I testified yesterday on direct that we were sort
3564:24 of going through a process to establish a structure that
3564:25 would provide a direct interest in the joint accounts.
3565:1 But ultimately, we didn't adopt the structure for a
3565:2 number of reasons.

910. Farrell does not recall learning from Lathen in September 2013 or thereafter that he continued to maintain joint accounts that were governed by the IMA, and he did not tell her that he was still submitting redemptions to issuers of notes held in those accounts.

2709:3 **Now, you found out after reading this**
2709:4 **email that Mr. Lathen did, in fact, still have**
2709:5 **accounts under the IMA structure, didn't you?**
2709:6 A I don't remember that.
2709:7 **Q He never told you that?**
2709:8 A I don't recall that.
2709:9 **Q And even after you advised him of your**
2709:10 **concerns about the validity of the joint tenancies**
2709:11 **with respect to those accounts under the IMA, were**
2709:12 **you aware that he was still submitting redemptions**
2709:13 **to issuers of accounts governed by the IMA?**
2709:14 A I don't know.

2709:15 **Q He didn't tell you that?**
2709:16 A Not to -- not to my recollection.

911. In Farrell's view, the Profit Sharing Agreement's provision that it "shall be treated as a partnership for tax purposes," was also problematic because a partnership between Lathen and the Fund was not respecting the distinction between the two, and put the validity of the joint tenancy in question for yet another reason.

2713:3 **Q So my question was: Even though you don't**
2713:4 **address these last two sentences of the profit**
2713:5 **sharing agreement in your email, this notion of**
2713:6 **calling the agreement itself a partnership was**
2713:7 **concerning to you as well?**
2713:8 A I think so.
2713:9 **Q And the reason for that, again, was the**
2713:10 **lack of distinction between Mr. Lathen, as the**
2713:11 **accountholder, and the partnership, right? -- the**
2713:12 **fund. Sorry, the fund.**
2713:13 A It wasn't respecting the loan structure.
2713:14 **Q And the concern with not respecting the**
2713:15 **loan structure was that there was no distinction**
2713:16 **between Mr. Lathen and the fund so that the validity**
2713:17 **of the joint tenancy would be in question, correct?**
2713:18 A I guess that is one way to say it, I
2713:19 suppose.

(See also: Div. Ex. 72 – p. 2.)

912. In Farrell's view, and as she told Lathen in September 2013, the income from the Accounts should be treated as additional income to the Fund, not a capital transaction, and so not capital gain.

2713:20 **Q Okay. What, if anything, did you say to**
2713:21 **Mr. Lathen about the character of income language**
2713:22 **that he uses in the profit sharing?**
2713:23 A I think I indicated that that would be
2713:24 viewed as additional interest income; not a capital
2713:25 transaction.
2714:1 **Q And so not capital gains?**
2714:2 A Not capital gain.

(See also: Div. Ex. 72 – p. 2.)

913. Farrell advised Lathen to revise the Profit Sharing Agreement.

2707:14 **Q And you advised Mr. Lathen to revise the**

2707:15 **profit sharing agreement, didn't you?**
2707:16 A Yes.

914. Lathen did not follow Hinckley Allen's advice to revise the Profit Sharing Agreement.

3565:3 **Q Even though your lawyer had given you advice,**
3565:4 **there was an issue with the profit sharing agreement, you**
3565:5 **did not take her advice; is that right?**
3565:6 A Yes. That's fair to say. I think the vain of
3565:7 my discussion with her was and always has been, let's
3565:8 look for ways to improve upon the joint tenancy and make
3565:9 sure it's as ironclad as it can be. That doesn't mean
3565:10 that we, you know, took every single step that we could
3565:11 to do that. There were other factors that, you know,
3565:12 weighed on ultimately what we decided to do.

915. Farrell does not recall that Lathen told her that he had revised the Profit Sharing agreement, and she does not know whether he did or not after she expressed her concerns about it in September 2013.

2715:19 **Q Okay. Now, Mr. Lathen didn't adopt these**
2715:20 **changes, did he?**
2715:21 A I don't know that.
2715:22 **Q And he didn't make any changes to the**
2715:23 **profit sharing agreement at all, did he?**
2715:24 A I don't know that.
2715:25 **Q Did he tell you that he had?**
2716:1 A I don't recall.

916. When Farrell learned of Goldman Sachs' rejection of Lathen's CD redemptions in September 2013, it was the first time she learned that Lathen had not submitted the Participant Agreement with his redemption requests to issuers, at least to Goldman Sachs.

2716:23 **Q And when this issue came up, that was your**
2716:24 **first awareness that Mr. Lathen wasn't providing the**
2716:25 **participant agreement, for example, to the issuers,**
2717:1 **right?**
2717:2 A I guess, yes. I suppose.
2717:3 **Q Well, in learning about the rejection, you**
2717:4 **learned that Goldman Sachs had rejected his**
2717:5 **redemption when it had seen the participant**
2717:6 **agreement; isn't that right?**
2717:7 A I understand that they had rejected it.
2717:8 And part of that was that they had seen the
2717:9 participant agreement.

2717:10 But that didn't tell me anything about
2717:11 what he may or may not have provided to anybody
2717:12 else.

917. Farrell rejected Robinson's suggestion that they point out to Goldman Sachs that it had accepted numerous redemption requests in the past because "Goldman will just say that they paid out in error, because they didn't have all the facts."

From: Michael Robinson
Sent: Wednesday, September 25, 2013 10:31 PM
To: Jay Lathen
Cc: Farrell, Margaret D.; Flanders, Robert G.
Subject: Re: Goldman Sachs Bank USA
Is it relevant – therefore useful – to cite in the letter the instances earlier this year when several of our Goldman Sachs Bank CD SO redemption requests were honored without comment or delay? At least one of those CDs was from one of the "Accounts": Lathen/Jackson (xxxx-0028).

From: Farrell, Margaret D. [/O=HASLAW/OU=PROVIDENCE/CN=RECIPIENTS/CN=FARRELMD]
Sent: 9/26/2013 12:53:55 PM
To: 'Michael Robinson' [michaelrobinson@edenarccapital.com]; Jay Lathen [Jaylathen@edenarccapital.com]
CC: Flanders, Robert G. [/O=HASLAW/OU=Providence/cn=Recipients/cn=flanderg]
Subject: RE: Goldman Sachs Bank USA

I am not sure gets you anything. Goldman will just say that they paid out in error because they didn't have all the facts.

(Div. Ex. 751 – p. 1.)

918. To the associate who had been assigned to research New York law on joint tenancies for the purposes of responding to the GS Bank rejection of Lathen's redemption requests, Farrell forwarded a copy of Lathen's Participant Agreement so she could understand the "structure/arrangement":

From: Farrell, Margaret D.
Sent: Thursday, September 26, 2013 5:09 PM
To: Flanders, Robert G.
Cc: Briggs, Rebecca F.
Subject: RE: Lathen

Attached is the draft letter. We are really looking for support for the quoted statements regarding Joint Tenants with right of Survivorship (JTWROS) Accounts under NY law. I have also attached a copy of the Participation Agreement so you understand the structure/arrangement. I would be happy to answer any questions you might have.

(Div. Ex. 752 – p. 3.)

See also:
2721:21 **Q And you and Mr. Flanders enlisted the help**
2721:22 **of an associate at Hinckley Allen; is that right?**
2721:23 A Mr. Flanders asked one of the associates
2721:24 to do research in connection with the letter.

2721:25 **Q Rebecca Briggs?**
2722:1 A Yes.

2724:1 **Q So you sent her the participant agreement**
2724:2 **so she could understand the structure/arrangement,**
2724:3 **right?**
2724:4 A Yes.

919. Farrell sent the associate the Participant Agreement – and none of the other Lathen documents or agreements – because the associate probably would not have been able to understand Lathen's structure of the joint tenancies or arrangement with the Participants without it.

2724:10 **Q Okay. Well, you didn't send her just the**
2724:11 **account statements that say "joint account," right?**
2724:12 A Right. Right.
2724:13 **Q And you didn't send her the discretionary**
2724:14 **line agreement?**
2724:15 A I don't think so.
2724:16 **Q And you didn't send her the PPM?**
2724:17 A No.
2724:18 **Q Or the limited partnership agreement?**
2724:19 A No.
2724:20 **Q And you didn't send her the Caramadre**
2724:21 **memo?**
2724:22 A No.
2724:23 **Q The only document you sent her so she**
2724:24 **could understand the structure/arrangement was the**
2724:25 **participant agreement, right?**
2725:1 A Yes.
2725:2 **Q Okay. Isn't it true that you sent her the**
2725:3 **participant agreement, because the participant**
2725:4 **agreement was important to her research on the**
2725:5 **application of the joint tenancy law under New York**
2725:6 **to the arrangement that you were asking her to look**
2725:7 **at?**
2725:8 A I thought it would be helpful.
2725:9 **Q Well, would she have understood what the**
2725:10 **arrangement was without the participant agreement?**
2725:11 A Probably not.

920. Lathen had provided a draft response for the Hinckley Allen team to use in responding to GS Bank, which Flanders adopted in significant part, making the final letter sent to GS Bank "largely similar" to the draft Lathen composed.

2729:1 **Q Do they look nearly identical?**
2729:2 A I can only see a portion of it.

2729:3 **Q Oh, okay, fair enough. Let me get it for**
2729:4 **you.**
2729:5 **MS. BROWN: So I've handed the witness**
2729:6 **Lathen Exhibit 1059.**
2729:7 (The witness examined the document.)
2729:8 THE WITNESS: It's large -- excuse me.
2729:9 It's largely similar.

(See also: Div. Ex. 753; Lathen Ex. 1059.)

921. Farrell had objected to this phrase in Lathen's draft: "Courts have long recognized that documents which statutorily create a joint tenancy with rights of survivorship are presumed to 'tell the whole truth.'" (Div. Ex. 753 – p. 1.) See also:

> **From:** Farrell, Margaret D.
> **Sent:** Friday, September 27, 2013 10:30 AM
> **To:** Briggs, Rebecca F.; Flanders, Robert G.
> **Subject:** RE: Lathen
>
> Is there phrase other than "tell the whole truth" that we might use?

(Div. Ex. 752 – p. 2.)

922. Omitted from the final letter that Flanders sent on September 27, 2013 to GS Bank was the phrase that Farrell objected to in Lathen's draft: "Courts have long recognized that documents which statutorily create a joint tenancy with rights of survivorship are presumed to 'tell the whole truth.'" (Lathen Ex. 1059.) See also:

2728:10 **Q Okay. And at the end of the day, that**
2728:11 **phrase was stripped from the letter that was sent on**
2728:12 **Hinckley Allen's stationery, was it not?**
2728:13 A Yes, it was.

923. Farrell neither participated in Flanders' call with the Sidley Austin lawyers representing Goldman Sachs, nor reviewed his memo of that call before it was finalized.

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.

924. In reviewing Flanders' memo of that conversation, Farrell would not agree today that the Participant and Lathen had the same interest or benefits in the joint accounts.

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.

See also: Div. Ex. 754.

925. Farrell advised Lathen that he needed an account control agreement to perfect the Fund's security interest in each account.

2736:12 **Q Okay. All right. Now, I think you**
2736:13 **mentioned on your direct some advice you had given**
2736:14 to **Mr. Lathen about an account control agreement.**
2736:15 **Do you recall that?**
2736:16 A I think what I indicated, that they needed
2736:17 that to perfect the security interest.
2736:18 **Q All right. And you understood that Mr.**
2736:19 **Lathen had, in fact, entered into an account control**
2736:20 **agreement, correct?**
2736:21 A I knew that there had been communications
2736:22 back and forth about one, so I assumed that was
2736:23 done.

926. Although Farrell assumed that Lathen had executed an account control agreement, she does not know if Lathen ever executed the account control agreement that Hinckley Allen forwarded to him in the fall of 2012.

2736:18 **Q All right. And you understood that Mr.**
2736:19 **Lathen had, in fact, entered into an account control**

2736:20 **agreement, correct?**
2736:21 A I knew that there had been communications
2736:22 back and forth about one, so I assumed that was
2736:23 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.

See also: Div. Exs. 749, 841.

927. Lathen did not follow Hinckley Allen's advice in perfecting the lien on the JTWROS accounts.

3574:15 **In the second paragraph, she says, "Her partner**
3574:16 **will be working on the account control agreement and that**
3574:17 **she would forward you a draft;" is that right?**
3574:18 A Yes.

3574:19 **Q And ultimately, that was never executed; is**
3574:20 **that right?**
3574:21 A That is true.
3574:22 **Q And that's something that she recommended; is**
3574:23 **that right?**
3574:24 A No. I mean, I think she mentioned that, you
3574:25 know, that was something that would be important to sort
3575:1 of protect the collateral in terms of having the
3575:2 brokerage firm, you know, effectively on the hook to
3575:3 enforce, you know, assets leaving the joint accounts that
3575:4 could impair the collateral of the fund.
3575:5 **Q Didn't she say in order to perfect the lien,**
3575:6 **you had to do an account control agreement and file it**
3575:7 **with the broker; didn't she say that?**
3575:8 A Yes.
3575:9 **Q And you didn't do that, right?**
3575:10 A That is true. We certainly tried to engage
3575:11 with the brokerage firms. And ultimately, the brokerage
3575:12 firms just couldn't wrap their arms around it. And they
3575:13 probably just didn't want the liability of what if
3575:14 someone actually did take the funds out, then they'd be
3575:15 on the hook.

928. Farrell never saw the account control agreement Lathen signed and gave to the SEC exam staff when they asked for it.

743:6 **Q Okay. Have you ever seen this document**
2743:7 **before?**
2743:8 A I don't believe so.

(See also: Div. Ex. 945 – pp. 10-11.)

929. Farrell understood that the survivor's options in the bond prospectuses required the Participant to have substantially all of the beneficial ownership interest in the note during his or her lifetime, and reiterated that understanding to Lathen in an email dated October 25, 2013:

I have discussed the trust structure with one of my trust and estates partners and we concluded that the trust structure probably creates more problems than it solves and significantly complicates disclosure to the participants. The participant/grantor must have "substantially all of the beneficial ownership interest in the note during his or her lifetime" in order to "cash in" a bond. If the terms of the loan to the trust "soak up" nearly all income from the account and appreciation on death, then I think you have the same problem as you have now with the issuer and/or a judge saying that the settlor did not have "substantially all of the beneficial interest".

Div. Ex. 675 – p.1.)

See also:
2749:21 **Now you then continue, "The**
2749:22 **participant/grantor must have," quote,**
2749:23 **"substantially all of the beneficial ownership**
2749:24 **interest in the note during his or her lifetime,"**
2749:25 **closed quote, "in order to," quote, "cash in,"**
2750:1 **closed quote, "a bond."**
2750:2 **Were you looking at the prospectuses?**
2750:3 A I think that's where that language came
2750:4 from.

930. Farrell had previously advised Lathen in the fall of 2013 that the Participant had to have an interest in the account's profits, over and above the loan amount, in order to have a beneficial interest in the joint accounts, advice she reiterated in her October 25, 2013 email to him:

> I have discussed the trust structure with one of my trust and estates partners and we concluded that the trust structure probably creates more problems than it solves and significantly complicates disclosure to the participants. The participant/grantor must have "substantially all of the beneficial ownership interest in the note during his or her lifetime" in order to "cash in" a bond. If the terms of the loan to the trust "soak up" nearly all income from the account and appreciation on death, then I think you have the same problem as you have now with the issuer and/or a judge saying that the settlor did not have "substantially all of the beneficial interest".

Also, to the extent the participant has an interest in the proceeds over and above the "equity kicker" (which the beneficiary would need to have to have a beneficial interest), those assets would be part of the participant's taxable estate.
(Div. Ex. 675 – p.1.)

See also:
2751:2 **Q And you then continue – you say,**
2751:3 **"Also" – I'm in the third paragraph – "to the**
2751:4 **extent that participant has an interest in the**
2751:5 **proceeds over and above the equity quicker, (which**
2751:6 **the beneficiary would need to have to have a**
2751:7 **beneficial interest) those assets would be part of**
2751:8 **the participant's taxable estate."**
2751:9 **Do you see that?**
2751:10 A Yes.
2751:11 **Q Was that consistent with the advice that**
2751:12 **you had been giving Mr. Lathen?**
2751:13 A Yes.

931. Farrell does not know whether Lathen ever adopted her advice to give the Participant an interest in the proceeds over and above the equity kicker.

2751:23 **But in the current structure, he never**
2751:24 **gave the participant an interest in the proceeds**
2751:25 **over and above the equity kicker, right?**
2752:1 A I don't know that.

932. Farrell advised Lathen that his economic interest had to come out of the joint account and not out of the Fund in order to preserve his interest in the account, and thus the validity of the joint tenancy.

2752:2 **Q Well, one of the reasons he didn't was**
2752:3 **because if he gave participants a cut of the**
2752:4 **profits, it would cut into the profits of the fund,**
2752:5 **wouldn't it?**
2752:6 A Yes. I guess.

933. Farrell explained the purpose of an account control agreement to Robinson in an email dated September 13, 2012.

2752:7 **Q Well, didn't you suggest that one way**
2752:8 **around that would be if he reduced his fees?**
2752:9 A I said that his -- that his -- his
2752:10 economic interest should come from his ownership of
2752:11 the joint account and not out of the partnership
2752:12 fund.

2752:13 **Q Understood. But wasn't one of your**
2752:14 **solutions to this problem of expanding the**
2752:15 **participants' interest was he could reduce his fees**
2752:16 **from the fund?**
2752:17 A What I just said was -- I said his
2752:18 economic interest should come out of the joint
2752:19 account. The economics depended on how much money
2752:20 there was to spread around; whether it was still
2752:21 being economic -- you know, whether it would make
2752:22 any sense to have any interest in the fund.
2752:23 I said it had to come outside of the fund.
2752:24 It had to respect the structure.

934. In her September 13, 2012 email, Farrell advised that if Lathen and Robinson moved securities out of one account prior to paying off the loan secured by the account, it would violate the Fund's security interest in that account:

> Just an initial reaction: I don't think the structure you propose in your memo works or at least it doesn't accomplish what we are trying to accomplish legally, which is to give the Fund a perfected security interest in each individual joint account. These are separate intangibles (the accounts) with different owners and even with a power of attorney, it creates problems to move assets out of an account other than to pay down the debt for which the account serves as security.

(Div. Ex. 748 – p.1.)

See also:
2755:5 **Q And the concern there is that it would**
2755:6 **violate the fund's security interest in an account**
2755:7 **if securities were moved out of it before the loan**
2755:8 **was paid down, correct?**
2755:9 A I think that's correct, yes.

935. Farrell reiterated that advice in an email to Lathen and Robinson, dated September 18, 2012, in which she noted that the Discretionary Line Agreement she was forwarding "does NOT contemplate that securities will move between JTWROS accounts."

> Attached is a draft Credit Line Agreement for you to review. We tried to cover the various fund and securities flow options that we discussed, but you should give particular attention to whether there is a scenario that the draft doesn't cover. As I have said, this document allows for moving securities from the inventory account to the individual JTWROS accounts but does NOT contemplate that securities will move between JTWROS accounts. You also will need to decide on interest rate and other specifics.

(Div. Ex. 749 – p.1.)

See also:
2755:21 **And the -- I'll skip a line. And it says,**
2755:22 **"As I have said, this document allows for moving**
2755:23 **securities from the inventory account to the**

2755:24 **individual JTWROS accounts but does not" -- in all**
2755:25 **caps -- "contemplate that securities will move**
2756:1 **between JTWROS accounts." Right?**
2756:2 A Yes.
2756:3 **Q And you capitalize the "not" so that that**
2756:4 **word was emphasized, right?**
2756:5 A Correct.

936. Farrell did not learn one way or the other that Lathen ignored her advice about moving securities between JTWROS accounts.

2756:6 **Q Now, did you come to learn that Mr. Lathen**
2756:7 **and Mr. Robinson ignored that advice?**
2756:8 A No, I don't know anything one way or the
2756:9 other.

937. Lathen in fact ignored Farrell's advice about moving securities between JTWROS accounts. (See e.g. Div. Exs. 939, dated 2/9/15; 940, dated 4/17/15.) See also:

> Please see attached spreadsheet for cross trades to be executed today. All should be type 2. Thanks, Jay.
> (Div. Ex. 937, dated 2/25/14.)

938. Hinckley Allen billing records for the Lathen representation reflect the following hours billed by Flanders and Farrell:

Attorney/Date	Hours Billed	Dates (Div. Ex. 738 Page No.)
2010		
Flanders	13.1	March (5), May (8), June (11), August (14), November (19)
Farrell	0	n/a
2011		
Flanders	2.0	August (22), November (25)
Farrell	0	n/a
2012		
Flanders	5.1	May (33), August (38), September (41), November (46), December (49)
Farrell	41.6	August (38), September (41), November (46), December (49)
2013		
Flanders	32.9	January (52), August-October (61), November (65), December (69)
Farrell	27.4	August-October (61), November (65), December (69)
2014		

Flanders	2.1	November (94)
Farrell	5.0	January (72), February (75), March (78), April (80), May (86), June (88)

Kevin Galbraith

939. Galbraith was retained by Lathen on July 1, 2014. (Div. Ex. 641.)

940. Prior to July 1, 2014, Galbraith did not give Lathen legal advice.

2973:20 **So you began representing Mr. Lathen in**
2973:21 **July of 2014; is that correct?**
2973:22 A Yes.
2973:23 **Q Okay. And is it fair to say that you gave**
2973:24 **him no legal advice prior to that time?**
2973:25 A Yes.

941. Galbraith's primary role was as litigation counsel.

3598:8 **Q Well, wasn't there a question, in your mind,**
3598:9 **because he was litigation counsel for you?**
3598:10 A Well, I mean that's quite possible. I mean, he
3598:11 was advising on the litigation. At the same time, he did
3598:12 advise me on the final version of the Participant
3598:13 agreement. So he was providing -- primarily, what he had
3598:14 been providing was litigation counsel. And then there
3598:15 was some reworking of the Participant Agreement and the
3598:16 line of credit agreement that he also provided. This was
3598:17 a very small part of his overall billable hours.

942. Galbraith was engaged by Lathen after Prospect sued Lathen.

2975:6 **Q Okay. So you are Mr. Lathen's litigation**
2975:7 **counsel in connection with the Prospect Capital**
2975:8 **litigation; is that correct?**
2975:9 A Yes.

2979:5 **Q So does this refresh your recollection**
2979:6 **that by the time that you and Mr. Lathen signed an**
2979:7 **engagement letter, Prospect Capital had already**
2979:8 **filed a complaint against your client?**
2979:9 A It does. It had not served it. The idea
2979:10 was to persuade them not to serve it.

943. Galbraith was also engaged to represent Lathen in connection with various disputes with issuers and trustees that believe that Lathen is not entitled to redeem their survivor's option products.

2976:8 **Q And as you testified on direct, you were**
2976:9 **also retained by Mr. Lathen to be his lawyer in**
2976:10 **connection with various disputes with issuers and**
2976:11 **trustees who refused to redeem Mr. Lathen's bonds**
2976:12 **and CDs; is that right?**
2976:13 A Yes.
2976:14 **Q And so your job is to build the strongest**
2976:15 **case you can for Mr. Lathen; is that correct?**
2976:16 A In those disputes?
2976:17 **Q In those disputes, yes.**
2976:18 A Yes.

944. 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.

945. Galbraith charged Lathen a rate of $500 per hour for his legal advice.

2981:11 **Q And you were being compensated for your**
2981:12 **time representing Mr. Lathen; isn't that right?**
2981:13 A Yes.
2981:14 **Q At a rate of $500 per hour?**
2981:15 A Correct.

946. Between July 2014 and September 2016, Galbraith billed Lathen approximately $200,000, which was a significant portion of Galbraith's income over that period.

2982:18 **Q And it would be fair to say that from the**
2982:19 **time that you began representing Mr. Lathen in July**
2982:20 **of 2014 through the end of September 2016, which is**
2982:21 **the last bill you submitted to us, you billed Mr.**
2982:22 **Lathen over $200,000 in connection with your legal**
2982:23 **services?**
2982:24 A Is that a question?
2982:25 **Q It was.**
2983:1 A That sounds right. I haven't totaled it
2983:2 up, but that sounds about right.
2983:3 **Q That's the ballpark?**

2983:4 A Okay.
2983:5 **Q No. I'm asking you, is that the ballpark?**
2983:6 A Oh. I'd have to look at all of them. It
2983:7 sounds like it's in the ballpark.

2983:8 **Q Okay. And that represents -- does that**
2983:9 **represent a significant portion of your income over**
2983:10 **that period?**
2983:11 A Yes.

947. Galbraith is paid by EACP for his representation of Lathen, Kathleen Lathen, Jungbauer, as well as EACP and EACM.

2985:12 **Q But it's more than a courtesy. You're**
2985:13 **being paid for your services in connection with your**
2985:14 **representing the defendants in the Prospect**
2985:15 **litigation; isn't that right?**
2985:16 A Yes.
2985:17 **Q And that includes representation of**
2985:18 **Kathleen Lathen and David Jungbauer; is that right?**
2985:19 A Yes. And Jay Lathen personally.

2983:12 **Q And you are compensated by Mr. Lathen's**
2983:13 **hedge fund, Eden Arc Capital Partners; is that**
2983:14 **correct?**
2983:15 A I believe that's the entity that writes
2983:16 the checks.

948. EACP is not represented by independent counsel, to represent the Fund's interests in these and the Prospect litigation.

2983:17 **Q And to your knowledge, the fund is no**
2983:18 **longer independently represented by counsel; is that**
2983:19 **right?**
2983:20 A Yes.

949. Galbraith views the outcome current action, In the Matter of Donald F. Lathen, Jr., A.P. No. 3-17387, as potentially having an impact on the Prospect litigation.

2993:5 **Q And so you would agree with Mr. Protass,**
2993:6 **wouldn't you, that the Prospect litigation presents**
2993:7 **issues similar to those at issue herein?**
2993:8 A There's some overlap, yes.
2993:9 **Q And you would agree with Mr. Protass that**
2993:10 **the Court's findings here could potentially impact**
2993:11 **upon the Prospect litigation?**
2993:12 A Yes.

950. Galbraith has a self-interest in the outcome of the Prospect litigation.

2991:15 **Q And it would also be in your best interest**
2991:16 **as his attorney if he won that dispute; fair to say?**
2991:17 A Yes.

951. Galbraith has acted as a lawyer and advisor to Lathen in connection with **this** administrative proceeding.

2995:24 **Q Is it fair to say that you have provided**
2995:25 **general additional counsel and advice regarding the**
2996:1 **instant proceeding?**
2996:2 A Yes.

952. As Lathen's lawyer and advisor, both as to the current proceeding and the investigation leading up to this proceeding, Galbraith devoted time on approximately 93 separate days to the SEC's investigation and matter between February 2015 and September 2016. (See Div. Ex. 640.)

2999:10 **Q Okay. So would it surprise you to learn**
2999:11 **that you devoted time to consultation in connection**
2999:12 **with the SEC matter on at least 93 different days**
2999:13 **between February 2015 and September 2016?**
2999:14 A Not at all.
2999:15 **Q That sounds like it's in the ballpark to**
2999:16 **you?**
2999:17 A Yes.

953. Galbraith helped Lathen chose Clayman & Rosenberg as Respondents' lawyers for this administrative proceeding.

2996:10 **Q And, in fact, you helped Mr. Lathen to**
2996:11 **choose who lead SEC defense counsel would be,**
2996:12 **correct?**
2996:13 A I made several introductions for Jay and
2996:14 then facilitated meetings with prospective counsel,
2996:15 yes.

954. Galbraith reviewed and edited Lathen's Wells submissions and white paper, submitted to the Division during the investigation, as well as reviewed Clayman & Rosenberg's submissions to the Court in this administrative proceeding. (See Div. Ex. 640 – pp. 3, 6 (entries on 7/20/15, 9/4/15).)

2997:6 **Q And did you review a comment on all three**
2997:7 **of Mr. Lathen's and Respondents' Wells submissions?**
2997:8 A I definitely reviewed and commented on at

2997:9 least one. It could have been all three.
2997:10 **Q Okay. And what about Mr. Lathen's white**
2997:11 **paper submitted during the course of the**
2997:12 **investigation?**
2997:13 A I think I had a pass at that as well.

2996:24 **You've reviewed and exchanged work product**
2996:25 **with Mr. Protass and his colleagues about the SEC's**
2997:1 **investigation; isn't that correct?**
2997:2 A Reviewed and shared work product.
2997:3 I have certainly reviewed some of the
2997:4 filings that Clayman & Rosenberg has made in this,
2997:5 and I've drafted my affirmation.

955. Prior to giving testimony in this proceeding, Galbraith had already reviewed all of the transcripts of testimony given during the investigation by Lathen, Robinson, and Jungbauer. (Div. Ex. 640 – pp. 4-5 (entries for 8/14/15, 8/17/15, 8/21/15).)

2997:21 **Q Okay. Did you review Mr. Lathen's**
2997:22 **testimony given in connection with the Division's**
2997:23 **investigation?**
2997:24 A Some of it, yeah. Probably all of it.
2997:25 **Q Okay. Did you review Mr. Robinson's**
2998:1 **testimony in -- given in connection with the**
2998:2 **Division's investigation?**
2998:3 A I perused it, I believe.
2998:4 **Q Okay. And did you review Mr. Jungbauer's**
2998:5 **testimony?**
2998:6 A That I don't recall. It's possible.
2998:7 **Q Okay.**
2998:8 A Actually, yes, I did. I did. Now I
2998:9 remember, uh-huh.

956. Galbraith repeatedly referred to Clayman & Rosenberg as his "joint defense counsel." (E.g., Div. Ex. 640 – pp. 5, 54, 73 (entries on 8/24/15, 10/29/15, 11/6/15, 11/9/15).) See also:

> August 24, 2015
> *Telephone consultation with joint defense counsel Harlan Protass re: SEC investigation status; telephone and email consultations with client*

> October 29, 2015
> *Joint defense telephone consultation with Harlan Protass and C.L. King counsel*
> .5 hours (KG)

November 6, 2015
Email consultation opposing counsel in GE / Synchrony; email consultation with client re: same and other outstanding matters; telephone consultation with joint defense counsel Harlan Protass re: SEC investigation status; review memorandum re: same
.75 hours (KG)

November 9, 2015
Meeting with client, Michael Robinson, joint defense counsel Harlan Protass and Wayne Gosnell re: SEC investigation status and other matters; preparation for same
1.5 hours (KG)

November 10, 2015
Telephone consultations with joint defense counsel Harlan Protass, Wayne Gosnell and client re: SEC investigation status and negotiations; email consultations with BMO Harris counsel and client re: redemptions
1.5 hours (KG)

957. Galbraith conferred with counsel to the Staples defendants on approximately 14 occasions between July 2014 and September 2016. (E.g., Div. Ex. 640 – pp. 67, 91, 94 (entries on 2/25/15, 9/28/15, 6/1/16, 4/13/16).) See also:

3000:5 **Q And would it surprise you to learn that [you]**
3000:6 **consulted with Staples counsel on at least 14**
3000:7 **separate occasions**?
3000:8 A Not at all.

958. Galbraith conferred with counsel to CL King on a number of different occasions between July 2014 and September 2016, whom Galbraith also refers to as "joint defense counsel." (E.g., Div. Ex. 640 – pp. 16, 65, 91 (entries on 11/12/14, 1/20/15, 1/21/15, 1/30/15, 9/28/15).) See also:

3000:9 **Q And you also consulted on a number of**
3000:10 **different occasions with counsel for C.L. King in**
3000:11 **connection with the FINRA matter?**
3000:12 A That's correct.
3000:13 **Q And you've referred to telephone calls**
3000:14 **with C.L. King's counsel as, quote, Joint defense**
3000:15 **calls; is that right?**
3000:16 A Yes.

959. During Galbraith's testimony on direct examination about the advice given with regard to the Lathen's joint tenancies, he did not mention the IMA.

960. On cross-examination, Galbraith had no specific recollection as to whether he received or reviewed the IMA.

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.

961. Galbraith was also unsure as to why he did not produce the IMA to the Division in response to the Division's subpoena to him, which called for "[a]ll documents concerning the structure of, and structuring of, Eden Arc Capital Management, LLC, Eden Arc Capital Advisers, LLC, Eden Arc Capital Partners, LP, and/or EndCare ('Lathen Entities') and any investment strategy contemplated or pursued by the Lathen Entities and/or Lathen." (Div. Ex. 1017.) See also:

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.

962. Despite the fact that Galbraith had no specific recollection of the IMA, Galbraith argued to issuers that they had an obligation to redeem survivor's option notes from joint accounts that were governed by the IMA. (E.g., Div. Ex. 999 (concerning dispute with GECC over Lavina Blair account, which was opened in February 2012 and governed by the IMA).)

963. All of Galbraith's discussions with issuers were done at the instruction of Lathen.

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.

964. Lathen knew that Galbraith was making arguments about the validity of joint tenancies governed by the IMA, even though Galbraith had no specific recollection of reviewing the IMA and Farrell had already told Lathen her concerns that, if Lathen was a mere nominee for the Fund—as he was under the IMA—a valid joint tenancy was not created. (PFOF ¶¶ 871, 878, 960, 962, supra.)

965. Galbraith did not recall providing the IMA to any issuers.

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.

966. During Galbraith's testimony on direct examination about the advice given with regard to the Lathen's joint tenancies, he did not once mention the Profit Sharing Agreement.

967. On cross-examination, Galbraith had no specific recollection as to whether he received or reviewed the Profit Sharing Agreement.

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.

968. Galbraith was unsure as to why he did not produce the Profit Sharing Agreement to the Division in response to the Division's subpoena to him, which called for "[a]ll documents concerning the structure of, and structuring of, Eden Arc Capital Management, LLC, Eden Arc Capital Advisers, LLC, Eden Arc Capital Partners, LP, and/or EndCare ("Lathen Entities") and any investment strategy contemplated or pursued by the Lathen Entities and/or Lathen." (Div. Ex. 1017.) See also:

3006:18 **Q Okay. Is there a reason that you did not**
3006:19 **submit the profit sharing agreement in connection**
3006:20 **with the subpoena?**
3006:21 A Same; I don't recall.

969. Despite the fact that Galbraith had no recollection of the Profit Sharing Agreement, Galbraith argued to issuers that they had an obligation to redeem

survivor's option notes from joint accounts that were governed by the Profit Sharing Agreement. (E.g., Div. Ex. 951 – pp. 6-8; Div. Ex. 358.)

970. Lathen knew that Galbraith was making arguments about the validity of joint tenancies governed by the Profit Sharing Agreement, even though Galbraith had no specific recollection of reviewing the Profit Sharing Agreement and Farrell had told Lathen her concerns that the Profit Sharing Agreement destroyed the validity of the joint tenancies. (PFOF ¶¶ 905-909, 911, 913, 967 supra.)

971. Galbraith did not recall sharing the Profit Sharing Agreement with any issuers.

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.

972. Galbraith was unsure whether he received or reviewed the 2013 Discretionary Line Agreement.

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.

973. Galbraith was also unsure as to why he did not produce the 2013 Discretionary Line Agreement to the Division in response to the Division's subpoena to him, which called for "[a]ll documents concerning the structure of, and structuring of, Eden Arc Capital Management, LLC, Eden Arc Capital Advisers, LLC, Eden Arc Capital Partners, LP, and/or EndCare ("Lathen Entities") and any investment strategy contemplated or pursued by the Lathen Entities and/or Lathen." (Div. Ex. 1017.) See also:

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.

974. Galbraith did not recall sharing the 2013 Discretionary Line Agreement with any issuers.

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.

975. As a general matter, Lathen and Galbraith would not provide any document to an issuer or trustee unless they specifically asked for that document.

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.
3009:14 **Q So only if they had asked for it, would**
3009:15 **you have produced it?**
3009:16 A If they asked for any category of
3009:17 documents that called for me to produce that, then I
3009:18 would have. But, yes, that's the general idea.

3010:1 **Q But if an issuer or a trustee didn't ask**
3010:2 **for the participant agreement, you didn't provide**
3010:3 **it; is that right?**
3010:4 A If they did not ask for it, yes.

976. In response to a September 4, 2014 email from US Bank to Galbraith that "you have not submitted, although you were invited to do so, any additional material of an evidentiary nature concerning the existence of a joint tenancy," Lathen proposed responding "there was no need to provide additional evidence." Thus, neither the Profit Sharing Agreement, IMA, nor Discretionary Line Agreement were provided. (See Div. Ex. 763 – pp. 1, 3; see also Div. Ex. 627 (reflecting that the only agreement provided was the Participant Agreement (which was provided "recently").)

977. In September 2015, Galbraith did provide a version of the 2015 Discretionary Line Agreement to US Bank in response to a specific request from US Bank. US Bank only knew to ask for the agreement because Galbraith provided them with an updated Participant Agreement that specifically referenced the Discretionary Line Agreement. (Div. Ex. 775.)

978. On August 28, 2015, counsel for US Bank wrote to Galbraith: "Kevin, There are two documents which, based on your August 13 letter, are relevant to the matter of your client's application made under a revised Participant Agreement, but were not included with your letter, (1) the "account agreement(s)" which you contend control in the event of any conflict with the Participant Agreement, and (2) the "Discretionary Line Agreement" pursuant to which the line of credit referenced in your material was established. Please forward copies of those documents." (Div. Ex. 775 – p. 4.)

979. In response to US Bank's August 28, 2015 Letter, on September 2, 2015, Galbraith provided a version of the 2015 Discretionary Line Agreement. (Div. Ex. 775 – p. 1.)

980. Despite the fact that Galbraith had been having discussions with US Bank for over a year, this was the first time that Galbraith had provided US Bank with any version of the Discretionary Line Agreement.

3017:4 **Q Thank you. Now, you and Mr. Muccia had**
3017:5 **been exchanging letters and correspondence for over**
3017:6 **a year at this point, isn't that correct?**
3017:7 A What was the date of this?
3017:8 **Q September 10, 2015?**
3017:9 A That sounds right. And multiple phone
3017:10 calls, yes.
3017:11 **Q And multiple phone calls.**
3017:12 **But this is the -- August -- well, the**
3017:13 **email we just looked at was the first time that you**
3017:14 **provided him with a discretionary line agreement; is**
3017:15 **that correct?**
3017:16 A It looks that way, yeah.
3017:17 **Q And Mr. Lathen had used a discretionary**
3017:18 **line agreement since 2013; is that right?**
3017:19 A I would have to look at a document. That
3017:20 sounds right. That sounds possible.
3017:21 **Q And U.S. Bank told you that it bore**
3017:22 **relevance on their determination of whether or not**
3017:23 **to pay, correct?**
3017:24 A I think in one of the paragraphs I just
3017:25 read he said that, yes.

981. US Bank told Galbraith by letter dated September 10, 2015 that, after reviewing the Discretionary Line Agreement, such agreement was material to their determination that Lathen and the Participant "did not 'hold entirely identical interests' in the Account." (Div. Ex. 2056 – pp. 1, 3; PFOF ¶¶ 245, supra.)

982. After receiving the 2015 Discretionary Line Agreement, US Bank responded: "While the additional documents provided on September 2 indicate that there are

yet further relevant documents bearing on the application which have not been provided to us, including unspecified loan documents, we have reached a conclusion based on what has been provided to date that Mr. Lathen and Mr. Gilks *did not* hold interests that constitute a joint tenancy under New York law and that the application for present payment of the Caterpillar instruments made by Mr. Lathen will not be granted." (Div. Ex. 2056; PFOF ¶¶ 245, supra.)

983. US Bank was correct that there were still additional documents bearing on the application that had not been provided to them by Galbraith or Lathen. Notwithstanding that language in their letter, Galbraith did not recall providing the Profit Sharing Agreement, nor the IMA to US Bank in response to this letter.

3018:10 **After receiving this letter, you still did**
3018:11 **not provide them with the profit sharing agreement;**
3018:12 **is that correct?**
3018:13 A I don't recall if we provided the profit
3018:14 sharing agreement.
3018:15 **Q And you did not provide them with the**
3018:16 **investment management agreement; is that correct?**
3018:17 A I don't recall providing it to them.

984. Galbraith provided US Bank's September 10, 2015 letter to Lathen.

3018:22 **Q And you forwarded this letter to your**
3018:23 **client; is that correct?**
3018:24 A Yes.

985. On at least two separate occasions, Galbraith asked other lawyers to write a legal opinion for Lathen concerning the validity of the joint tenancies that Lathen attempted to create with Participants. (Div. Exs. 729; 2047.)

986. The lawyers that Galbraith asked to write an opinion on the validity of the joint tenancies that Lathen attempted to create with Participants declined to provide a legal opinion. (Div. Exs. 729; 2047.)

3039:7 **Q Okay. But you nonetheless asked a friend**
3039:8 **in June of 2014 if that -- he would write such a**
3039:9 **letter for Mr. Lathen; is that correct?**
3039:10 A I think that's right. I don't know the
3039:11 timing.

3040:13 **Q And then if you scroll up. Mr. Lathen**
3040:14 **writes back to you: "Did he pass because he didn't**
3040:15 **think it was a joint tenancy, or did he pass for**
3040:16 **other reasons?"**
3040:17 **And you respond, "He thought an opinion**
3040:18 **letter would likely have too many caveats to be**

3040:19 **truly helpful. But because he was concerned that if**
3040:20 **the letter was referenced in efforts to attract or**
3040:21 **comfort issuers or to provide an advantage in**
3040:22 **litigation, his firm could be drawn into issues it**
3040:23 **wouldn't want to be part of."**
3040:24 **So you wrote that to Mr. Lathen; is that**
3040:25 **correct?**
3041:1 A That's not what it says.
3041:2 **Q I'm sorry. Where did I make a mistake?**
3041:3 A You said "issuers." It says --
3041:4 **Q Oh, "issues." I'm sorry. Thank you.**
3041:5 **"His firm could be drawn into issues it**
3041:6 **wouldn't want to be part of."**
3041:7 **Is that what you wrote?**
3041:8 A Yes.
3041:9 **Q And you sent that email to Mr. Lathen,**
3041:10 **correct?**
3041:11 A Yes.
3041:12 **Q And then, again, in December of 2014, Mr.**
3041:13 **Lathen requested that you ask Chris Robinson at**
3041:14 **Seyfarth Shaw for an opinion. Isn't that correct?**
3041:15 A Yes.

3043:11 **Q And if you -- at the top, if you look at**
3043:12 **the November 11, 2015, entry, it says, "Telephone**
3043:13 **and email consultations with client re SEC**
3043:14 **investigation status, research regarding SEC defense**
3043:15 **firms, and firms that might be appropriate to issue**
3043:16 **legal opinion regarding the investment strategy."**
3043:17 **Does that refresh your recollection that**
3043:18 **in or around November 2015, you researched firms**
3043:19 **that might be appropriate to issue a legal opinion**
3043:20 **regarding Mr. Lathen's investment strategy?**
3043:21 A Yes.
3043:22 **Q And that was at Mr. Lathen's request; is**
3043:23 **that correct?**
3043:24 A I don't see that from this entry, but that
3043:25 sounds right.
3044:1 **Q Okay.**
3044:2 A Yeah, I would not have done that
3044:3 independently.

987. Galbraith himself did not provide a written opinion letter on the validity of Lathen's joint tenancies. Such an opinion would not have carried much weight as litigation counsel.

3038:24 **Q But you weren't an appropriate person to**

3038:25 **provide a written opinion, because you were his**
3039:1 **litigation counsel; isn't that right?**
3039:2 A That's not really the reason, but sure.
3039:3 I mean, a letter -- an opinion letter from
3039:4 his litigation counsel might have carried less
3039:5 weight than an opinion letter from, say, a trust and
3039:6 estates attorney.

988. In the first instance, Galbraith relayed to Lathen that his friend "thought an opinion letter would likely have too many caveats to be truly helpful and because he was concerned that if the letter were referenced in efforts to attract or comfort investors or to provide an advantage in litigation, his firm could be drawn into issues it wouldn't want to be part of." (Div. Ex. 729.)

989. In the second instance, Galbraith conveyed to Lathen that he had asked counsel to CL King, Seyfarth Shaw, to provide a written opinion for Lathen on the validity of the joint tenancies. They declined as well. (Div. Ex. 2047.)

990. Again, in November 2015, Lathen again asked Galbraith to research law firms that might be able to give him a written opinion on the validity of his joint tenancies.

3042:25 **Q Okay. And then, again, in November of**
3043:1 **2015, you did research into firms that might be**
3043:2 **appropriate to issue legal opinions regarding Mr.**
3043:3 **Lathen's investment strategy; isn't that right?**
3043:4 A When was that?
3043:5 **Q November of 2015.**
3043:6 A It's possible.
3043:7 MS. BERKE: And, Mr. Chan, if you could
3043:8 pull up Exhibit 640, which are the bills which are
3043:9 already in evidence. And turn to page 55.
3043:10 BY MS. BERKE:
3043:11 **Q And if you -- at the top, if you look at**
3043:12 **the November 11, 2015, entry, it says, "Telephone**
3043:13 **and email consultations with client re SEC**
3043:14 **investigation status, research regarding SEC defense**
3043:15 **firms, and firms that might be appropriate to issue**
3043:16 **legal opinion regarding the investment strategy."**
3043:17 **Does that refresh your recollection that**
3043:18 **in or around November 2015, you researched firms**
3043:19 **that might be appropriate to issue a legal opinion**
3043:20 **regarding Mr. Lathen's investment strategy?**
3043:21 A Yes.
3043:22 **Q And that was at Mr. Lathen's request; is**
3043:23 **that correct?**
3043:24 A I don't see that from this entry, but that

3043:25 sounds right.
3044:1 **Q Okay.**
3044:2 A Yeah, I would not have done that
3044:3 independently.

991. Lathen is not regulated by FINRA.

3044:9 **Q And FINRA is not Mr. Lathen's regulator;**
3044:10 **isn't that correct?**
3044:11 A Correct.
3044:12 **Q FINRA regulates broker-dealers, and Mr.**
3044:13 **Lathen is not a broker-dealer?**
3044:14 A Correct.

992. Prior to the time Galbraith was retained as an attorney by Lathen in July 2014, and thus prior to the time Galbraith and Lathen reached out to FINRA, FINRA had already made inquiries of two of Lathen's brokers, CL King and FSW. (Div. Exs. 2070; 1012.) See also:

3044:4 **Q Now, when you were first retained by Mr.**
3044:5 **Lathen in July of 2014, one of your tasks was to**
3044:6 **reach out to FINRA on behalf of Mr. Lathen; is that**
3044:7 **correct?**
3044:8 A Yes.

3044:15 **Q And FINRA at that time was already**
3044:16 **investigating C.L. King with regard to Mr. Lathen's**
3044:17 **accounts at C.L. King; is that correct?**
3044:18 A Among other things.
3044:19 **Q What other things do you have in mind when**
3044:20 **you say that?**
3044:21 A FINRA's investigation into C.L. King, I
3044:22 believe, touched on at least one and possibly two
3044:23 other subjects that were entirely distinct from
3044:24 Jay's accounts.
3044:25 **Q What subjects were those?**
3045:1 A I don't recall specifically.
3045:2 **Q Okay. And at that time when you were**
3045:3 **first retained in July of 2014, FINRA had also**
3045:4 **opened an investigation into First Southwest in**
3045:5 **connection with Mr. Lathen's accounts at First**
3045:6 **Southwest; is that correct?**
3045:7 A I don't remember if it was an
3045:8 investigation or if it was an inquiry letter.

993. Prior to the time Galbraith was retained as an attorney by Lathen in July 2014, FSW has already informed Lathen that they intended to terminate its relationship with Lathen.

3045:9 **Q And by the time you were retained, First**
3045:10 **Southwest had already asked Mr. Lathen to take his**
3045:11 **business elsewhere; isn't that correct?**
3045:12 A I think that's right.
3045:13 **Q Okay. And then you were -- subsequent to**
3045:14 **that time, you tried to reach out to FINRA to try to**
3045:15 **set up a meeting; isn't that right?**
3045:16 A Yes.

994. Galbraith set up a meeting with FINRA, during which he emphasized "robust disclosure" as one of the "Bedrock principles" of Eden Arc, and described Lathen's "respect[]" for the "importance of FINRA compliance." (Div. Ex 2069 (emphasis added).)

Agenda for Meeting with FINRA Examiners
September 15, 2014

***

- Bedrock Principles
  - Robust disclosure
  - Informed consent by participants together with their families
  - True joint tenancies

***

- BD Compliance with FINRA requirements
  - JL understands and respects importance of FINRA compliance

See also:
3049:22 **Q Is this an agenda that you created in**
3049:23 **anticipation of a meeting with FINRA on September**
3049:24 **15, 2014?**
3049:25 A It looks like it, yes.

3050:15 **Q And do you believe that this agenda was**
3050:16 **carried out in connection with that meeting?**
3050:17 A I believe that we were able to talk about
3050:18 all of the points that we had hoped to discuss, yes.
3050:19 **Q And that included an emphasis on robust**
3050:20 **disclosure?**
3050:21 A Definitely.
3050:22 **Q Including robust disclosure with regard to**
3050:**23** **the participants?**

3050:24 A Yes.
3050:25 **Q And the emphasis included that Mr. Lathen**
3051:1 **understands and respects the importance of FINRA**
3051:2 **compliance?**
3051:3 MS. BERKE: Mr. Chan, can you please
3051:4 scroll down.
3051:5 BY MS. BERKE:
3051:6 **Q Do you see under "BD compliance with FINRA**
3051:7 **requirements" it says, "JL understands and respects**
3051:8 **importance of FINRA compliance"?**
3051:9 A I see that. And I remember that as a
3051:10 topic.

995. Despite his self-professed respect for the importance of FINRA compliance, Lathen wrote in an email a few months later, when asked by CL King's outside counsel whether Lathen had a current BD Custodian, "Yes we do. What is the reason for the question. We are obviously sensitive to letting FINRA know this information given the troubles they have caused us with CLK and First Southwest." (Div. Ex. 1008.)

996. Galbraith first provided US Bank with a Participant Agreement in or around July of 2014.

3085:22 **Q And you provided U.S. Bank with the**
3085:23 **participant agreement in or around July of 2014; is**
3085:24 **that correct?**
3085:25 A That sounds about right.

997. Lathen's investment strategy would not work if a Participant were to remove all of the funds from a joint tenant account bearing his and Lathen's name after that account was open and funded.

3105:2 **Q Okay. Do you believe that the participant**
3105:3 **agreement references the participant's right to the**
3105:4 **moiety?**
3105:5 A I don't -- I don't think it references the
3105:6 moiety. But I think that, as explained here, the
3105:7 purpose of the inclusion was to prevent the
3105:8 participant from withdrawing more than the moiety.
3105:9 If the participant -- in other words, the
3105:10 strategy doesn't work if the participant empties the
3105:11 account the day after the account is set up and
3105:12 funded.
3105:13 So that, that's what that was intended
3105:14 for, as I understood it.
3105:15 **Q I'm sorry. That what's what was intended**
3105:16 **for?**

3105:17 A That's what the limitation was intended
3105:18 for.

998. In October 2014, Galbraith told Joseph Muccia that Lathen did not make withdrawals from the joint tenant accounts during the lives of the Participants. (Div. Ex. 766.)

999. Lathen told Galbraith that Lathen did not make withdrawals from the joint tenant accounts during the lives of the Participants.

3106:23 **Q Okay. And you also say to Mr. Muccia, as**
3106:24 **reflected in your email, that you did not make**
3106:25 **withdrawals either -- and the "you" there is Jay,**
3107:1 **correct -- Mr. Lathen. Excuse me.**
3107:2 A Where are you?
3107:3 **Q Following the word "moiety."**
3107:4 A Yeah. Yeah.
3107:5 **Q And that you --**
3107:6 A Yes, "you" is Jay.
3107:7 **Q "Did not make withdrawals either, so**
3107:8 **functionally there was no difference in the rights**
3107:9 **of the joint tenants during their lifetime." (Sic.)**
3107:10 **How did you know that Mr. Lathen did not**
3107:11 **make withdrawals from the account?**
3107:12 A I think that would have been from
3107:13 discussions with Mr. Lathen.

1000. Galbraith did not review JTWROS account statements to see if Lathen was withdrawing funds from the joint tenant accounts before telling Muccia that Lathen was not withdrawing funds from the joint tenant accounts.

3107:14 **Q Okay. Did you ever review the account**
3107:15 **records or account statements?**
3107:16 A I reviewed some of the account statements
3107:17 that were the subjects of disputes with issuers or
3107:18 the indenture trustee. But, no, I did not review
3107:19 all of the account statements.
3107:20 **Q And did you review them to see if Mr.**
3107:21 **Lathen was, in fact, withdrawing or not withdrawing**
3107:22 **funds from the accounts?**
3107:23 A I don't know that I reviewed with that
3107:24 purpose.

1001. Galbraith has threatened to sue US Bank on Lathen's behalf, in connection with Lathen's attempts to redeem notes where US Bank acts as trustee.

3111:18 **Q Okay. So, for example, in May of 2015,**

3111:19 **you wrote to Mr. Muccia of U.S. Bank saying that if**
3111:20 **they delayed their decision or if they made an**
3111:21 **unfavorable decision with respect to Mr. Lathen's**
3111:22 **redemption notices, you would be litigating against**
3111:23 **them not only on the Citibank and Caterpillar paper,**
3111:24 **but also with respect to Prospect; isn't that**
3111:25 **correct?**
3112:1 A Did I say that to U.S. Bank? That sounds
3112:2 right.

1002. US Bank continues to refuse Mr. Lathen's attempts to redeem survivor's option notes.

3112:6 **Q Okay. And despite those threats, U.S.**
3112:7 **Bank continues to refuse Mr. Lathen's redemptions;**
3112:8 **isn't that correct?**
3112:9 A Yes.

1003. At Lathen's request, Galbraith has threatened to file complaints with the CFPB and the OCC against GE Synchrony, a former affiliate of GE Capital.

3112:10 **Q And in November of 2015, you wrote to GE**
3112:11 **and their counsel that if GE Synchrony will not**
3112:12 **agree to redeem the instruments at issue, by that**
3112:13 **week, you would file complaints with its regulators,**
3112:14 **including the Consumer Financial Protection Bureau**
3112:15 **and the Office of the Comptroller of the Currency;**
3112:16 **isn't that correct?**
3112:17 A I don't recall that specific discussion.
3112:18 But I know that at times Jay has contacted
3112:19 regulators to inform them of the unlawful conduct of
3112:20 issuers.
3112:21 **Q Okay. Okay. But did you threaten to sue**
3112:22 **GE and Synchrony and report them to certain**
3112:23 **regulators?**
3112:24 A It sounds possible, you know. I think
3112:25 that that was part of the decision-making process.
3113:1 Just without the document in front of me, I don't
3113:2 remember specifically.
3113:3 MS. BERKE: Mr. Chan, can you pull up
3113:4 Division Exhibit 783, please.
3113:5 BY MS. BERKE:
3113:6 **Q Okay. Is this an email from you to Mr.**
3113:7 **Robustelli dated November 6, 2015?**
3113:8 A Yes. And now I see the -- I see the
3113:9 indication that you referenced earlier. So, yes, I
3113:10 did write that to GE.

3113:11 **Q Okay. And that was at Mr. Lathen's**
3113:12 **request; isn't that correct?**
3113:13 A Yes.

1004. At Lathen's request, Galbraith threatened to sue BMO Harris, in connection with Lathen's attempts to redeem BMO Harris' CDs pursuant to a survivor's option.

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.

1005. At Lathen's request, Galbraith threatened to sue CIT, in connection with Lathen's redemption requests to CIT.

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.

1006. Galbraith did not know if CIT decided to pay because they agreed with Lathen's position, or because they did not want to litigate against Lathen, after Galbraith threatened to sue on Lathen's behalf.

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.

1007. In connection with the Prospect litigation, Galbraith did not turn over the Participant Agreement to Prospect without first having them execute a non-disclosure agreement. (E.g., Div. Ex. 640 – pp. 60-61 (entries on 7/6/14, 7/7/14, 7/14/14, 7/15/147/21/14).)

1008. Galbraith attempted to have the Prospect docket sealed, by filing a motion to seal docket. (See Div. Ex. 640 – pp. 80-81 (entries for 5/12/15, 5/21/15, 6/11/15, 6/15/15, 6/16/16.) That motion was unsuccessful. (See Div. Ex. 640 – p. 90 (entry at 9/24/15).)

1009. In response to the Division's subpoena to Galbraith (Div. Ex. 1017), Galbraith wrote a letter to the Division indicating that he was in compliance with the

subpoena. (Div. Ex. 2067.) Galbraith testified at the hearing that this letter was false.

3023:15 **Q Okay. So in your search of thousands of**
3023:16 **documents, how did you conclude that all**
3023:17 **nonresponsive -- all responsive non-privileged**
3023:18 **documents have been provided to the Division by**
3023:19 **Clayman & Rosenberg?**
3023:20 A So this -- so this initial response, this
3023:21 December 5 response was based on a misunderstanding
3023:22 or miscommunication between my firm and the Clayman
3023:23 firm.
3023:24 So I understood that there were several
3023:25 hundred thousand documents or maybe a million pages
3024:1 of documents that had been provided and produced,
3024:2 and that they encompassed the items that I
3024:3 referenced here.
3024:4 But, you know, upon further discussion
3024:5 realized that there was no easy or efficient way to
3024:6 confirm that with 100 percent certainty.
3024:7 So then I had to go back and do, you know,
3024:8 the search that I described.

1010. Galbraith did not memorialize anywhere that he had provided inaccurate information to the Division in response to the subpoena, including in an affirmation he submitted to the Court.

3024:9 **Q Okay. And is that misunderstanding**
3024:10 **memorialized anywhere? For example, we looked at**
3024:11 **your affirmation before.**
3024:12 **Did you describe that misunderstanding**
3024:13 **anywhere in your affirmation to the Court?**
3024:14 A I don't recall.
3024:15 **Q Okay.**
3024:16 A I don't recall putting it in there.
3024:17 **Q Oh, okay.**
3024:18 A I don't think it's memorialized. I think
3024:19 it was a few phone calls trying to suss out what had
3024:20 been produced and whether it was possible to
3024:21 determine in an efficient way whether every
3024:22 responsive document here had been produced among the
3024:23 couple hundred thousand documents produced.

1011. There is no evidence that Lathen discussed Farrell's advice with Galbraith.

1012. Lathen did his own legal research and sent it to Galbraith. (E.g., Lathen Ex. 1358 – p. LATHEN 10724-6 (Lathen to Galbraith on August 26, 2014: "I spent a little bit of time on Bloomberg Legal search.").)

1013. Respondents did not provide the Participant documents to Prospect until after June 30, 2014. When Respondents finally provided them, they were provided under an non-disclosure agreement. (Div. Ex. 705.)

3541:14 **Q And you had provided the documents to Prospect**
3541:15 **under an NDA because you didn't want them sharing those**
3541:16 **documents with any other issuers; is that right?**
3541:17 A I believe we entered into the NDA because we
3541:18 agreed to share information with them in the context of
3541:19 hopefully diffusing their claim against us or their
3541:20 complaint against us. And, you know, Kevin thought it
3541:21 would be a good idea to have an NDA.
3541:22 **Q So that was Kevin's idea?**
3541:23 A I mean it's something that we would have
3541:24 discussed.
3541:25 **Q And that's because you didn't want Prospect**
3542:1 **sharing your strategy with any of the other issuers; is**
3542:2 **that right?**
3542:3 A Well, Prospect had filed a complaint against me
3542:4 on June 30th. It was in the public record at that date,
3542:5 that Prospect had filed a complaint against me. And so
3542:6 it was for the world to see that I was engaged in the
3542:7 strategy as of June 30th, 2014.

1014. Lathen did not follow Galbraith's advice that Lathen change the Participant Agreement to say "Lathen and the Participants shall each own a 50 percent interest in the account." (Div. Ex. 649 – p. 11.)

3590:13 **Q And one of the proposed changes is: "During**
3590:14 **their lifetimes, Lathen and the participant shall each**
3590:15 **own a 50 percent interest in the account, consistent with**
3590:16 **a joint tenancy with right of survivorship as defined by**
3590:17 **both the Common Law of the State of New York and New**
York
3590:18 **Banking Law Section 675." That's one of the proposed**
3590:19 **changes, right?**
3590:20 A Yes. And we were adding that because we were
3590:21 quite frustrated in our disputes with U.S. Bank, as well
3590:22 as issuers around this, that we would make, you know,
3590:23 very detailed arguments around Section 675, so-called
3590:24 statutory joint tenancy law. And then our opponents
3590:25 would make arguments around common law joint tenancies,
3591:1 which we didn't think was, you know, the relevant case

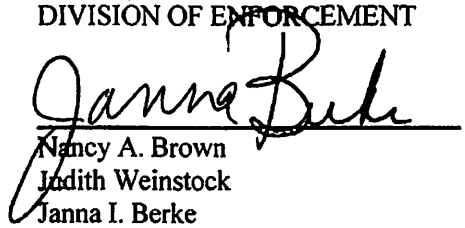
law to be looking at, not that they completely ignored the statutory law. But they made common law arguments as well.
So one of the things we contemplated was trying to create a participant agreement that would not only be a statutory joint tenancy but also -- and sort of be valid under Section 675, which we already were at the time, but to have something that would also be bulletproof under a common law lens.
Q But this change was never implemented; is that right?
A I don't know what we ended up -- the final version of the agreement would have whatever the final language was. And I'm sure Kevin and I discussed, as I did with all of my lawyers, back and forth on intermediate drafts before we reached a final.
Q Well, the final that you're talking about is February of 2015; is that right?
A Around that time, that's correct.
Q Is it fair to say that the final version in February 2015 did not have this language that "Lathen and the participants shall each own a 50 percent interest in the account;" is it fair to say that language didn't make its way in there?
A That is consistent with my recollection. I don't believe that we had the 50 percent language in the final version.

1015. FINRA was not persuaded by its conversation with Lathen and Galbraith and commenced an action against CL King.

3041:12 **Q And then, again, in December of 2014, Mr.**
3041:13 **Lathen requested that you ask Chris Robinson at**
3041:14 **Seyfarth Shaw for an opinion. Isn't that correct?**
3041:15 A Yes.
3041:16 **Q And Mr. Robinson represented Mr. Lathen's**
3041:17 **broker, C.L. King, in the FINRA investigation and**
3041:18 **the action that followed in connection with their**
3041:19 **service as Mr. Lathen's broker; is that correct?**
3041:20 A That's what I testified earlier, yes.
3041:21 **Q Okay.**

Dated: April 7, 2017
New York, New York

DIVISION OF ENFORCEMENT



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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 Post-Hearing Brief and Schedules thereto, and its Proposed Statement of Facts, on April 7, 2017, on the below parties by the means indicated:

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