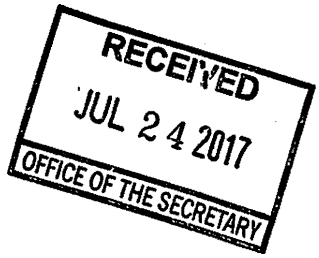
UNITED STATES OF AMERICA
Before the
U.S. SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-17387



In the Matter of

DONALD F. LATHEN, JR.,
EDEN ARC CAPITAL MANAGEMENT, LLC,
EDEN ARC CAPITAL ADVISERS, LLC.

THE EDEN ARC RESPONDENTS' AMENDED STATEMENT OF FACTS

Harlan Protass
PROTASS LAW PLLC
260 Madison Avenue
New York, NY 10165
T. 212-455-0335
F. 646-607-0760

Counsel for Respondents Donald F. Lathen, Jr., Eden Arc Capital Management, LLC and Eden Arc Capital Advisors, LLC

TABLE OF CONTENTS

PROPOSED FINDINGS OF FACTS ("PFOF")

I. THE CONTRACTUAL REGIME

REDEMPTION REQUEST REQUIREMENTS UNDER ISSUERS' GOVERNING DOCUMENTS

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

2. ¾Generally, the governing documents of an SO investment would require the deceased owner to be a "beneficial owner." However, issuer testimony at trial showed that there is no consistent definition of the term "beneficial owner"— and the governing documents provided no definition whatsoever beyond standard "Book entry" language under which beneficial ownership is defined as the registered holder with the brokerage firm. *See, e.g.*, (A) Tr. at 751:7-25 (Citigroup); (B) Tr. at 1873: 12-16 (Federal Farm Credit); and (C) Tr. at 822:15-20 (Goldman Sachs); *see infra* ¶ ¶ 193-200.

3. ¾Nonetheless, Mr. Lathen's attorneys unanimously advised that the survivor's option could be exercised through the use of a "joint tenancy with right of survivorship" or "JTWROS." (Tr. 2444:1-25; 2650:5-18; 2233:9-2236:4; 2872:7-17; 2885:16-22).

4. ¾A joint tenancy with right of survivorship is governed by New York Banking Law Section 15 and applies to the brokerage accounts used by Respondents. (Tr. 2863:22-2864:12).

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

6. ¾ Generally, the governing documents of an SO investment identify specific materials that must be submitted to exercise the survivor's option. Mr. Lathen would typically provide only a redemption request letter and a certified death certificate to the brokerage firm, which would make determinations about what additional information to send to the issuer. (Tr. 1800:1-23; 1806:13-17).

7. ¾Some issuers also had specific holding period requirements, and requested copies of current and past account statements demonstrating the holding period, as well as a letter from the brokerage firm attesting to the requestor's authority to make the request. (Tr. 976:22-977:1; 1275:13-1278:5, Div. Ex. 521 at 22 (detailing the information required by Duke Energy for redemption of their survivor's option bonds) and Div. Ex. 598 at 24 (detailing the information required by Prospect Capital for redemption of their survivor's option bonds)).

8. Issuers' governing documents did not specifically request information regarding sources of funding for the bonds, confirmation of access to brokerage accounts, evidence of future property interests in bond-proceeds or the existence of any side agreements between joint account holders with respect to the bonds. (Tr. 832:12-833:1; 1806:21 – 1808:13).

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

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

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

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

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

A. É That's -- that's fair to say.

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

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

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

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

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

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

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

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

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

MR. LATHEN'S REDEMPTION REQUESTS TO HIS BROKERS

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

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

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

15. Mr. Lathen submitted his requests only to his brokers, rather than directly to issuers, because that is what was required by the issuer's governing documents. (*Tr. 981:2-982:3*; 946:17-947:2; *Div. Ex. 600, p.24, Second Full Paragraph*).

16. The brokerage firms had responsibility for submitting whatever documentation they believed was necessary to satisfy the issuer's redemption requirements. Issuers' instructions to brokers about how to submit redemption requests specifically informed them that they had no obligation to make the redemption request if they thought it was improper. (SEC Ex. 530, p. 66). Redemption packets submitted by brokers to trustees and issuers contained broker account statements and an election form, both of which attested to who the beneficial owner was at death. *(See, e.g., Lathen Ex. 1941 p.14688-690; Tr. 623:17-627:11.)*

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

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

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

Goldman Sachs (Tr. 911:15-24)

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

A. Ó That seems correct, yes, sir.

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

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

Q. So have you ever heard of a man named Jay Ó Lathen, Donald Lathen? Ó

A. Ó Yes.

Q. Ó And how did you become familiar with that name?

A. Ó I became familiar with that name when people from the bank's treasury department came to me to inform me that there were a number of redemption requests which included an individual and Mr. Lathen.

Q. Ó And were those with respect to bonds or CDs?

A. Ó Both.

Q. Okay. And what did this person who came to you tell you about the redemptions?

A. Ó That there seemed to be a lot of them. More than one, more than two, as I recall. And that it seemed unusual that we would have one individual on so many redemption requests. As a consequence, we set up -- you call it a surveillance or review so that if anymore came in, we would be notified. And we did some research on who the requestor was and the nature of the requests, and then we asked for additional information.

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

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

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

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

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

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

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

II. RESPONDENTS' GOOD FAITH BELIEF IN THE VALIDITY AND LEGALITY OF THEIR STRATEGY, THE ACCURACY OF THEIR STATEMENTS, AND THE SUFFICIENCY OF THEIR DISCLOSURES

LATHEN'S "PRE-FUND" LEGAL COUNSEL FROM KATTEN MUCHIN

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

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

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

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

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

Katten's Legal Counsel to Lathen / the Respondents

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

> Q. What's your understanding of what type of legal support Jay was seeking from you?
> A. Jay had what -- he and I discussed it, what I thought was just a brilliant idea. He had found a -- found a security that had a loophole in it that allowed him -- particularly given the bond environment at the time, the ability to make very large returns very quickly.

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

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

32. Attorneys at Katten Muchin received, reviewed and edited the Participant Agreement. (Tr. 2429:15-19; 2439:2-4; Lathen Ex. 1036; Tr. 3184:9-13). They did so before the

Trusts & Estates Department rendered any advice regarding the joint tenancies. (Tr. 3190:22 – 3192:12).

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

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

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

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

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

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

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

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

Q. Thank you. What was your understanding of the role that joint tenancies were to play in Mr. Lathen's investment strategy?
A. Ò It was a necessary conduit for him to implement the strategy.
Q. Ò In what regard?
A. Ò The survivor option required a death of one of the joint tenants in a joint tenancy with right of survivorship in order to trigger the put option.
Q. Ò And did Katten conduct any research into joint tenancies?

A. Yes.
Q. × And did Katten reach any conclusions as to the joint tenancies that Mr. Lathen intended to form?
A. × As I recall that he was -- Jay and Kathy were going to form a joint tenancy, open a securities account and then gift a portion of a securities account to the participant. And I don't think -- the trustee department thought that there was a -- that that would form a perfectly -- perfectly good joint tenancy.

39. Katten Muchin's Trust & Estates Department spent "a large amount of time" and "an absurd amount of money" researching the joint tenancy issue. Mr. Grundstein admitted that T&E Department's work was excessive and a large portion of the billings were written off as a courtesy to Mr. Lathen. (Tr. 2449:20 – 2451:3).

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

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

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

Q. × Did you express any view as to the legality of Mr. Lathen's strategy?
A. × Yeah. We thought that the -- the actual strategy, just buying -- we thought that there was nothing illegal that was -- it was perfectly legal to buy these bonds in joint tenancies and right of survivorship with whoever in the joint tenancy – in a valid joint tenancy. And if one of the joint tenants were to -- were to become deceased, to profit from that.
Q. × Okay. Yes. I was about to ask you about that. You testified, as I recall, that your advice to Mr. Lathen was to keep it small and not make it too big. Again, can you repeat the -- tell me why it was that that was your advice?
A. × Just to avoid regulatory scrutiny. The less eyes that are looking at this, the less chance that somebody would take offense to the way that you're making money and come after you.
Q. × Did you believe then or do you believe now that the size of Mr. Lathen's operations has any link to the legality of it?
A. × I personally don't.

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

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

Jay Lathen (Tr. 3188:8-20)

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

PUBLIC ACKNOWLEDGMENT OF THE VALIDITY OF INVESTMENT STRATEGY

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

43. About one month later, on March 10, 2010, the *Wall Street Journal* published a more substantial story about the strategy. The story was referenced on the front page. It opined that the investment strategy was legal and included quotes from lawyers and other securities industry professionals vouching for the strategy's validity and legality. (Lathen Ex. 1110; Tr. 656:13-660:17; 3203:8-3212:12).

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

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

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

Jay Lathen (Tr. 3215:24 – 3216:9)|

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

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

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

RESPONDENTS' LEGAL COUNSEL FROM HINCKLEY ALLEN & SNYDER

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

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

Robert Flanders Background and Experience

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

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

52. Mr. Flanders had more than 20 years of experience in private practice before being appointed to the Rhode Island Supreme Court. (Tr. 1974:18-24.) Mr. Flanders is admitted to practice law in the state and federal courts of New York and Rhode Island, the First Circuit Court of Appeals and the U.S. Supreme Court. (Tr. 1976:12-22).

Margaret Farrell's Background and Experience

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

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

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

Hinckley Allen's Disclosures to the SEC

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

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

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

59. The Division of Enforcement aggressively attempted to preclude Hinckley Allen from testifying at the hearing and otherwise sought to obtain all attorney work product created by the firm, including work product containing uncommunicated thoughts and mental impressions of the attorneys. *See* The Division of Enforcement's Motion to Compel dated, December 29, 2016.

Hinckley Allen's Legal Counsel to Lathen / the Respondents

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

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

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

Q. ^ And what did Mr. Flanders tell you about this investment strategy?
A. ^ I mean, he said that, you know, his client Caramadre had been doing it for several years. And that, you know, it was a legal strategy. And, you know, nonetheless, he had -- Mr. Caramadre had encountered some legal difficulties on his putting back variable annuities to the insurance companies. And Mr. Flanders was representing him in those disputes. So I wanted to, you know, seek his counsel on -- you know, generally around my strategy, and, obviously, be kept abreast of any issues that arose with respect to Caramadre and his survivor's option strategy, which at that time there really weren't any issues.

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

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

64. Mr. Lathen provided Hinckley Allen with documents he was using in connection with his investment strategy, including the Private Placement Memorandum (Lathen Ex. 1831), the Participant Agreement and Power of Attorney (Lathen Ex. 1832), the EndCare Application (Lathen Ex. 1833), the Endcare Brochure (Lathen Ex. 1834), the Investment Management Agreement (Lathen Ex. 2025) and tax memorandum (Lathen Ex. 1830) (e-mail transmitting documents); Tr. 2005:22-2009:3; 2012:2-2013:14; 2615: 6-14; 2616:4-2617:7; 2619-13-23).

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

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

67. Notwithstanding Mr. Caramadre's participant-disclosure issues, Mr. Flanders believed that there was nothing inappropriate about either Mr. Caramadre's or Mr.

Lathen's investment program itself. He believed the strategy was "taking advantage. . . of a loophole in the bond documents." (Tr. 1998:11-24).

> But he was -- he was not, in my view, doing anything inappropriate -- had he been – made appropriate disclosures and not engaged in alleged fraud with respect to the participants, I didn't believe there was anything inappropriate about the investment program that he otherwise had put together.
>
> He was taking advantage, as was Lathen, of a loophole in the bond documents that allowed investors to take advantage of the early death of one of the joint accounts, by converting a long-term bond program into a short-term, stepped-up payment from the discounted purchase price to the full par value of the bond.

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

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

69. Specifically, Mr. Flanders emphasized that the bondholders did not place any limitations on the health of bondholders or relationships between joint account holders, and did not require disclosure of any agreements limiting or restricting any rights. (Tr. 1999:11-2000:1).

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

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

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

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

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

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

Q. And you testified a moment ago that the --these agreements between the joint accountholders weren't something that the issuer asked for, but couldn't Mr. Lathen have given it to them anyway?
A. [2] He could have.
Q. Objection. Leading. [2]
Court: Sustained. [2]
Q. [2] Did you believe that he was required to?
A. No.
Q. [2] Why not?
A. [2] Because they didn't deem it to be material when they structured this program.

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

Court: I'm sorry. Let me -- Okay. I think I know where you're going with this, and it is a reasonable question. Just have to ask it a different way. What understanding did you have about whether any of these contracts you've been talking about contain terms that prohibited his strategy, if any?
A. [2] Yeah. My understanding was that they didn't. They contained no terms that would prohibit what he was doing.

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

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

Court: And why the "but no more" part?

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

Court: Why are you using the phrase "lords of their offers"?

A. Ã Because it goes back to basic contract law. If you make an offer to somebody, the law is that you are the lord of your offer. You can put whatever terms you wish in your offer. If someone accepts your offer, they're bound by those terms. But if the terms are not in the offer, then they're not part of the deal, the contract. And this is basically an offer, a contract that was put out to bond purchasers, and they were asked to accept the offer by buying it. And by buying it, they agreed to abide by the terms of the offer.

If they put in there they wanted a family relationship to be established before you could exercise the death put option on a joint account, then you had to accept that.

But if it wasn't there, then -- then there was no ability to require you to substantiate a family relationship before you could realize on the death put bond. So that's what I mean by that.

Court: Okay. So you can refresh my contract law recollection. What do you attempt to convey by the use of the phrase "adhesion contract"?

A. Ã That these weren't negotiable. These were public bonds that were put out there, on a take-it-or-leave-it basis. If you want to buy this bond, here is what you got to do in order to get the benefits of it.

So they were adhesion in the sense that this wasn't something that Mr. Lathen or anybody else had a chance to negotiate with the issuers. They put it out there. These were the terms. You take our terms or you don't buy our bond. You buy our bond, you're stuck with the terms that are in there.

But, conversely, we're not going to ask you to jump through other hoops and clear other hurdles that aren't in our documents, because we haven't asked you to do that.

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

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

77. During the course of the representation, Mr. Flanders discussed and shared with Mr. Lathen examples of regulators intervening with issuers on Mr. Caramadre's behalf. For example, Mr. Flanders shared a copy of a letter written by the Rhode Island Attorney General's Office to the Bank of New York in support of Mr. Caramadre's survivor's option bond investment strategy. (Tr. 1988:8-1989:2; 1992:12 -16; Lathen Ex. 1843, 1848).

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

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

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

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

Jay Lathen, Tr. 3218:20 – 3219:11

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

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

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

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

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

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

Q. After Mr. Caramadre was indicted, did you give Mr. Lathen any advice about -- in connection with his investment strategy that arose from Mr. Caramadre's indictment?
A. ß Yes, I did give him advice.
Q. ß Okay. What was the advice that you gave him?
A. ß To avoid the conduct, if he was engaging in any such conduct that had caused Mr. Caramadre to be indicted. And that principally had to do with the way he was dealing with participants -- or allegedly dealing with

participants. But I didn't in any way advise to stop doing what he was doing, or suggest that what he was doing was in any way illegal or inappropriate.

Q. Why not?

A. Because I didn't believe it was so.

Farrell: Tr. 2769:14-20

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

A. Yes.

Farrell: Tr. 2770:5-21

A. ... Would never tell a client they could do something illegal.

Q. That's not just that. I'm asking if during the course of the representation you actually came to believe that something a client was doing was unlawful –

...

A. I would have withdrawn from the representation.

:

Q. Not just -- that doesn't just apply with Mr. Lathen. But that is with any client you have, right?

A. ... That's firm policy.

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

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

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

Q. And Mr. Lathen never asked you whether he could misrepresent the nature or intent of the program to issuers, did he?

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

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

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

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

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

<u>Margaret Farrell, Esq., Tr. 2635:19 – 2636:3; 2636:13 - 2637:12</u>

Q. × Was there anything in the participant agreements at any point when you were working on them that discussed the participants' ability to access –
A. Yes.
Q. × Okay. What was –
A. × Well, they were told they were executing a limited power of attorney, and that their -- as a result, that the control of the account was largely in Mr. Lathen's hands.

Q. During the course or your representation, did you ever have any discussions with Mr. Lathen on the subject of a participant's ability to access the joint accounts?
A. ' I believe so.
Q. ' And what was that discussion, if you recall?
A. ' I think we discussed whether or not the granting of authority on the accounts in any way jeopardized the -- the joint accounts, so the previous joint account.
Q. And what effect, if any, did a participant's ability or inability to access joint accounts during Jay's lifetime have on the business model that you were setting up?
A. ' Our analysis was that it didn't. That -- being able to grant a power of authority to someone does not, basically, turn over authority, does not change one's economic interest in the account. The analogy I had was I can set up an account with the power of attorney of my father with Alzheimer's. I have control over the account. He is incompetent. He can't use it. But it is still a valid joint account.

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

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

Margaret Farrell, Esq., Tr. 2621:22 – 2622:13

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

95. During the course of the representation, Ms. Farrell undertook an evaluation of Mr. Lathen's business model and advised of the "risk" that the current structure would not be considered a valid joint tenancy. (Tr.2620:16-2621:21; 2622:2-2622:1.) This

involved an evaluation of other potential structures, such as a trust. (Lathen Ex. 2069; Tr.2648:17-2649:12).

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

97. Hinckley Allen facilitated the new structure by drafting a line of credit agreement to allow Mr. Lathen to borrow from the Fund and to give the Fund a security interest in the assets, through UCC filings, that would entitle them to recover their loans out of the joint account assets before any general creditors. (Tr. 2622:24-2623:1; 2623:24-2624:17).

Hinckley Allen did not, at any time, advise Mr. Lathen that he should stop doing business, including after they had recommended a structure change and were in the process of preparing new documents. (Tr. 2624:23 – 2625:15).

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

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

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

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

102. Mr. Flanders' letter to Goldman, which Mr. Flanders shared and discussed with Mr. Lathen, contained common law and statutory support that the firm identified as supporting the validity of the joint tenancies. (Tr. 2025:14-2026:5.) Mr.

Lathen requested summaries of the cases, which Hinckley Allen provided. (Lathen Ex. 916-918; Tr. 2026:6-22).

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

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

GERSTEN SAVAGE'S ASSISTANCE WITH FUND FORMATION

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

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

107. × Mr. Roper graduated from University of North Carolina at Chapel Hill, studied English legal history at the London School of Economics, and received his law degree from Northwestern University School of Law. (Tr. 2160:4-23). Following law school he completed a clerkship with the Honorable Edwin A. Robson, a federal judge. (Tr. 2161:1).

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

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

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

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

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

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

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

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

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

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

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

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

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

Jay Lathen, Tr. 650:14-18; 651:12-18,20-25; 652:1-12

Q. All right. So Mr. Roper, or his associates or whoever drafted this, is it your understanding that they were aware that this risk existed?
A. Ã Certainly.

Q. Did Mr. Roper ever tell you anything about providing additional disclosures to trustees?
A. No. Mr. Roper never said that I had to send anything more than what was required under the governing documents.

Q. Ã Now, you indicated that Mr. Roper understood your strategy, right?
A. Ã Yes, he did.
Q. And from here, it's clear that he understands that there is a risk that an issuer might pay, right?
A. Ã Clearly.
Q. Okay. Would you have expected Mr. Roper if he believed that you had to give some extra disclosure to let you know that?
A. Ã Yes, of course.

Q. Ã Why would you expect him to tell you that?
A. Ã Because I hired him to protect my interests and make sure I was pursuing the strategy in a lawful manner.

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

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

123. Ã Mr. Lathen reviewed the documents drafted by Gersten Savage and did not see anything that seemed to be inconsistent with or would undermine his investment strategy. (Tr. 643:16-23).

RESPONDENTS' LEGAL COUNSEL FROM KEVIN GALBRAITH

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

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

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

Mr. Galbraith's Disclosures to the SEC

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

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

Kevin Galbraith's Legal Counsel to Lathen / the Respondents

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

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

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

132. Mr. Lathen provided Mr. Galbraith with governing documents including prospectuses, prospectus supplements, pricing supplements, trust indentures, and

the participant agreement, and the fund documents (Tr. 2857:14-2858:4; Tr. 3011:18-24; Tr. 3004:7-24).

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

Q. Firstly, did you give him any advice as to the lawfulness of his investment strategy?
A. ' I did.
Q. ' And what was the advice? Or what was the discussion?
A. ' I mean, there have been so many discussions around it, but at -- at core, my advice has been that the joint tenancies that you have formed here are valid joint tenancies under Section 675. That's the briefest summary of it can give. I can give you more detail, if you want.

Q. Okay. And did you and Mr. Lathen in those discussions reach any conclusion as to the validity of the joint tenancies under common law?
A. ' Yes. I shared my opinion that whether his joint tenancies were examined under the common law or under 675, the conclusion was the same; that these were valid joint tenancies.

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

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

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

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

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

document their intention to create a "JTWROS" account – is considered *prima* facie evidence. (Tr. 2867:3-2868:7).

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

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

Q. Okay. What did Mr. Lathen -- do you recall if Mr. Lathen expressed opinions concerning those four points?

A. Î He did. He asked a lot of questions about the cases that I had brought to his attention and analyzed. And I answered those questions. We discussed them in-depth. And he agreed with me entirely that none of the four bases for overturning the statutory presumption were present in his accounts.

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

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

143. Î Mr. Galbraith also advised that the joint tenancies at issues were not "convenience accounts" based on his evaluation of the statutory definition and applicable case law. (Tr. 2870:22-2871:6; 2876:15-2879:16). Specifically, he advised that a convenience account is typically shared between an elderly or ill person with someone who could provide "assistance" with the account, for example, by writing checks or paying bills. However, in those cases, there was a lack of evidence of a survivorship intention, i.e., that the assets would pass to the other account holder automatically upon the death of the other. (Tr. 2877:9-2878:12).

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

Q. And if you could tell us what a convenience account is and why these -- what a convenience account is and why you and Mr. Lathen in discussions concluded these were not convenience accounts?

A. £ Sure. So a convenience account most typically is a joint checking account opened between some person who needs assistance and a second person; oftentimes an elderly or ill person and a younger relative or friend, they open a joint checking account. There is no intention that the assets held in that account would pass to the other person named on the account upon the death of one or the other. Instead, they are typically opened for convenience purposes; hence, the name. For example, such that the second person can write checks on the account to help the elderly or ill person pay their bills, maybe while the elderly person is in the hospital. Or simply pay their grocery bills, their utilities, whatever it is. They are opened purely for convenience with no intention that the proceeds would pass to that other person upon the death of the first.

Q. Is no intention to pass -- is that another way of saying no survivorship intention?

A. £ Yes. There's no intention that there would be a survivorship feature.

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

Q. Okay. So how did a convenience account differ from the joint tenancy accounts that Mr. Lathen had -- how does the convenience account differ from the joint tenancy accounts that Mr. Lathen opened with participants?

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

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

146. £ Mr. Galbraith testified about his review of case law holding that mortgages, and other similar types of loans or encumbrances on property, do not invalidate the

joint tenancy. (Tr. 2880:16-2881:1.) Mr. Galbraith also reviewed and advised Mr. Lathen about case law finding that side agreements involving joint accounts did not invalidate a joint tenancy. (Tr. 2888:7-2890:20).

Kevin Galbraith, Esq., Tr. 2888:7-2890:20

Q. • And can you define what you meant by "side agreements"?
A. • I think I was referencing our discussion of the case law. And in my case law research, I came across a number of cases where there were side agreements. And I'm trying to remember if it is Stalter or Corcoran or Zecca, there are a number of cases where there are -- at least one kind of side agreement or another. And that was the context.
Q. Okay. What types of side agreements did you and Mr. Lathen read about in the case law and discuss? And what I mean by "what type," what were the nature of those actual agreements?
A. • Yeah. As I recall it, the nature of the agreements were such that they impacted the ultimate economics of the joint tenancies.
Q. Let me interrupt you, because you mentioned one type of agreement as a mortgage –
A. • Uh-huh.
Q. -- mortgage as an example of a side agreement that you discussed with Mr. Lathen. Were there any other examples of side agreements that you discussed with Mr. Lathen?
A. • Outside of the mortgage?
Q. • Yes. Other than the mortgage.
A. • Yes, yes. Other than the mortgage, there was at least one other side agreement case where one of the joint tenants had entered into a side agreement with a third party that would ultimately impact what would happen to the asset held in the joint tenancy. And the court looked at that and determined that that did not invalidate the joint tenancy. So I don't remember the specifics of what was in that side letter agreement. But as a general matter, that's my recollection.
Q. And how did you and Mr. Lathen think that that case law relating to side agreements was relevant to his investment strategy?
A. • Sure. Whether it was the mortgage on the underlying asset or the side agreement impacting the ultimate economics of the joint tenancy, as I explained, we were searching for cases that were analogous to Mr. Lathen's joint tenancies and to his investment strategy, because there was no case that was squarely on point. So we discussed how those cases applied by analogy to his facts. And we conclude -- and I advised and we concluded together that the case law holding that a side agreement or mortgage did not invalidate the joint tenancies was a good piece of support for our position.
Q. And what was the equivalent of the mortgage that you discussed with Mr. Lathen with respect to his investment strategy?

A. " So the mortgage or the side letter agreement, those are what I -- what I refer to as encumbrances. Those are contractual agreements outside of the statutory joint tenancy. In this -- in Mr. Lathen's case, the participant agreement is the side agreement.

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

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

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

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

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

Q. And during the course of your representation of Mr. Lathen, did you and he discuss this -- this particular Prospect pricing and prospectus supplement?
A. " Yes.
Q. And did you and Mr. Lathen discuss other prospectuses issued by other issuers?
A. " We did.
Q. Can you just give me a sense of what your discussions with Mr. Lathen were about with respect to these supplements, prospectuses and pricing supplement?
A. " Yes. Our discussions were primarily focused on the prospectus supplement itself and the terms that were relevant to his business. So we looked carefully at the provisions governing the survivor's option. Specifically we discussed what -- what was required for a surviving joint owner to redeem one of these bonds at par. We discussed what the documents were that were required to be submitted by the brokerage firm

to the indenture trustee in order to trigger that redemption. We discussed what an event of default was, and what the trustee's obligation was in the event of default. Those were the main topics.

Q. Okay. And why is it that you discussed the details of the Prospect prospectus?

A. • Jay held a significant amount of Prospect paper in joint tenancy and joint tenant accounts, and had put a fair amount of paper back to Prospect upon the death of his joint tenants. And then he had -- at some point, U.S. Bank -- some combination of U.S. Bank and Prospect, decided that they were going to put a hold on these redemptions and stopped honoring them. So at that point I got involved, and we studied the prospectus together pretty carefully and decided how firm our legal grounds were to contest those rejections.

A. • I did. Jay and I discussed the meaning of this provision and this entire section. So it talks about the obligation of the issuer to repay -- or to pay at par on certain - under certain circumstances. It talks about the death of a beneficial owner of the note. So in this case, we discussed the fact that there was -- had, in fact, been the death of a beneficial owner of the note; namely, Jay's participants.

Q. Let me just stop you right there before you go on. Did you and Mr. Lathen discuss the definition of the phrase "beneficial owner"?

A. • You know, I don't recall our specific discussions on that. I know, as a general matter, we discussed that both Jay and the participant did have a present beneficial interest in the assets in the accounts. I don't know how in-depth we got on the term "beneficial owner."

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

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

154. • With respect to the Prospect Capital litigation, Mr. Lathen and Eden Arc's position is that the joint tenancies were valid and the redemptions were consistent with all the obligations set forth in the prospectus supplement. For those reasons, Mr. Lathen is entitled to redeem all of the Prospect paper that he was – and is still

– holding, at par value. This position is consistent with Mr. Galbraith's research and advice to Mr. Lathen. (Tr. 2907:10-2098:8).

THE IMPACT OF KNOWLEDGE OF AND COUNSEL REGARDING OTHERS USING THE STRATEGY

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

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

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

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

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

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

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

162. ¤ Mr. Lathen sent Mr. Flanders at Hinckley Allen information regarding the Staples case, including a copy of an SEC press release and FBI memo. Mr. Flanders

recalls discussing the situation and the factual distinctions. (Lathen Ex. 2022; Tr. 2019:20-2021:6; Lathen Ex. 1556, 1557; Tr. 2022:8-24).

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

MR. LATHEN'S IMPRESSION UPON HIS LEGAL COUNSEL

Robert Grundstein, Esq.

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

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

Hinckley Allen

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

Robert Flanders, Esq., Tr. 2027:17-2028:2

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

Margaret Farrell, Esq., Tr. 2651:1-9

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

Kevin Galbraith, Esq.

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

Tr. 2874:25-2875:16

Q. Do you have any insight as to Mr. Lathen's beliefs as to the lawfulness of his investment strategy?
A. | Yes. As a result of our conversations, I have very clear belief on that topic, which is that Jay believes with certainty that these are valid joint tenancies.
Q. I asked about the lawfulness of his investment strategy. You answered the validity of his joint tenancies.
A. | Sorry.
Q. | Are they one and the same?
A. | They are -- they are essentially one and the same. But my answer is the same. He believed and believes wholeheartedly that his investment strategy is entirely lawful.

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

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

III. MANY ISSUERS EXPRESSLY OR TACITLY ACKNOWLEDGED A LEGAL OBLIGATION TO REDEEM UNDER THEIR OWN GOVERNING DOCUMENTS

REDEMPTIONS PROCESSED WITH ADDITIONAL DISCLOSURES

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

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

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

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

173. Œ BMO Harris redeemed Mr. Lathen's survivor's option CDs after receiving and reviewing the Participant Agreement and after having been apprised of Mr. Lathen's investment strategy. (Tr. 2915:7 - 2916:25). *(Tr. 2909:2-21.)*

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

175. Œ Wells Fargo and Bank of America honored requests for the redemption of survivor's option bonds after learning about the existence of the Participant agreement and the financing agreement between Eden Arc Capital Partners, LP and the account holders (Lathen and the Participant). *(Tr. 3369:11-16; Div. Ex. 417 (in native excel for additional issuers, including Wells Fargo and BOA, who received expanded disclosure; Tr. 613:1-617:1 (discussing native excel Ex 417 and issuers honoring redemption).)*

176. Œ Beginning in December 2015, Mr. Lathen began disclosing in his redemption request letters that he had entered into a separate written agreement with the

participant relating to the joint account and that the Fund had provided the financing for the Accounts. (Tr. 3407:2-20).

177. ~ At least 30 issuers honored Mr. Lathen's redemption requests following the enhanced disclosures put in place in December 2015. (Tr. 3407: 21-24; *616:16-617:1.*)

178. ~ JPMorgan Clearing Corporation submitted millions of dollars of redemption requests to issuers after attorneys in its Compliance Department received the participant agreements signed by the two joint account holders, the private placement memorandum for Mr. Lathen's fund, and the investment management agreement. In submitting those requests, they did not provide the issuers with the additional documents that Mr. Lathen had provided. (Lathen Ex. 2044; Tr. 321:10-25; *2575:9-2576:7.*)

179. ~ Bank of New York, the trustee for the bulk of the bonds redeemed by Mr. Lathen, and the determination agent for GM and Bank of America, continued to receive and honor redemption requests from Mr. Lathen after the SEC notified them of its investigation and subpoenaed it for records related to his actions. (Lathen Exs. 2077; 2070, 2070-a). *See Div. Ex 975 p. 48 ("All other questions regarding the eligibility or validity of any exercise of the Survivor's Option will be determined by the trustee, in its sole discretion, which determination will be final and binding on all parties"); Tr. at 3369:11-16, 616:16-617:1, 3219:2-24, 3390:20-3391:15.*

ISSUERS WHO CHANGED THEIR PROSPECTUS LANGUAGE

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

Q. Mr. Lathen, you knew back as early as 2012 that your strategy had a limited shelf life; is that correct?

A. ~ I think it's fair to say I assumed at some point investors would begin to change the language in their prospectus, which is indeed what has happened in several instances. I think investors realized that they were contractually obligated to pay under the language that they had in place, and they were looking to close that loophole with different language.

Q. ~ And you've been saying investors, but you mean issuers; is that correct?

A. ~ Did I say investors? . . . Okay. I meant -- I meant -- that maybe was why my counsel was standing up. I meant issuers. Issuers would obviously change their governing documentation around the survivor's option provision. And, in fact, they have done so.

Q. ~ Goldman Sachs did that; is that right?

A. ~ Yes, Goldman. Barclays, Citi.

181. ‰ In response to what it learned about Mr. Lathen's redemptions, General Electric Credit Corp. added the following language to its offering documents for survivor's option bonds:

"For the avoidance of doubt, we also retain the right to reject in our sole discretion any exercise of the survivor's option where the deceased held no or only a minimal beneficial ownership interest in the notes and entered into arrangements with third parties in relation to the notes prior to death for the purpose of permitting or attempting to permit those third parties to directly or indirectly benefit from the exercise of the survivor's option."
(SFOF ¶ 98; Tr. 1245:4-1248:20; Lathen Ex. 1937, p. 19).

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

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

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

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

Q. These weren't clarifying some prior requirement that hinted at these; this was just new requirements that were put in that someone had to comply with to be able to exercise the survivor's option?

A. ‰ I could take issue with that statement, but I understand what you're saying. I mean, I don't -- I don't think these are necessarily new. We were attempting to amend the language so that the notion of a joint tenancy with right of survivorship was as possibly clear as we could make it.

Q. This is far beyond requiring a joint tenancy. It says you have to be living in the same household or be related?

A. That is a fair comment. I would agree with that.

ISSUER WHO EXPLICITLY VERIFIED THE LOOPHOLE

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

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

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

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

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

ISSUER PAYMENT DISPUTES

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

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

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

Ian Bell, Operations Manager, U.S. Bank, Tr. 960:5-17|

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

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

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

Ian Bell, Operations Manager, U.S. Bank, Tr. 975:10-22

Q. Were you involved at all in the decision-making process at U.S. Bank concerning whether or not to approve Mr. Lathen's redemption request?
A. Ë I was not.
Q. So you don't know the reason that U.S. Bank approved or did not approve of the redemption request Mr. Lathen submitted, correct?
A. We escalated to our relationship manager.
Q. Okay. But do you know whether they did approve or did not approve the redemption request?
A. I wouldn't be able to speak to specific ones, no.

Beverly Freeney, Relationship Manager, U.S. Bank, Tr. 1069:15- 1070:19

Q. Okay. Now, it is fair to say that you're familiar with survivor option notes?
A. Ë Yes.
Q. With respect to early withdrawals pursuant to the survivor option, what role do you have personally have in any of the redemption process?
A. Ë I don't have really any role with regards to the survivor options.
Q. Ë Okay. And which area of the bank, if any, is responsible for that function?

A. ¢ That would be my operations department.
Q. ¢ Does Ian Bell work for the operations department?
A. ¢ That is correct.
Q. Thank you. And just generally, what, if you know, does the operations department do with respect to redemptions of survivor options notes?
A. ¢ That's not my expertise, so I wouldn't really know exactly what he does.
Q. Okay. Can you tell me, as far as you know, who makes the decision to pay any particular redemption on a survivor's option –

MR. HUGEL: Objection, Your Honor. She says she has no expertise in this area.
BY MS. BROWN: Q Well, do you know?
JUDGE PATIL: Overruled. Only if you know.
A. ¢ Yes. It's really up to the issuer to --

Tom Tabor, VP, Corporate Trust Department, U.S. Bank, Tr. 1101:14-18

Q. And are there eligibility requirements for exercising survivor option notes for clients you're familiar with?
A. ¢ I know that there are normally requirements, but I wouldn't know specifics.

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

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

Ian Bell, U.S. Bank, Tr. 978:14-25

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

Ian Bell, U.S. Bank (Tr. 980:1 – 981:6)

Q. Mr. Bell, you testified a few moments ago concerning the documents that are submitted in connection with a redemption request, and that included the death certificate, an account statement, current statement, account statement from six months ago, to the extent there's a six-month holding period. Do you recall that testimony?

A. • Yes.

Q. • Yes. And those documents are submitted by brokerage firms, yes?

A. • Correct.

Q. • They are not submitted by the actual holder of the bond?

A. • Correct.

...

Q. . . . What is the purpose for which account statements are submitted in connection with a redemption request?

A. • Validation that the beneficiary or the deceased had held the position for long enough.

Q. Okay. So that means that you used the account statements to determine who the beneficiary is and how long they held the bond that is being sought to be redeemed, yes?

A. • Correct.

Ian Bell, U.S. Bank (Tr. 981:25 – 982:3)

Q. You used the account statement that is submitted to determine who the beneficial owner of the bond is, correct?

A. • Correct.

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

Kevin Galbraith, Esq., (Tr. 3125:17-3126:2)

Q. Were you persuaded by any of those [issuer] letters that you received that they were right and that you were wrong?

A. • Absolutely not. . . I meant to say in response to your earlier question about this prospectus, this is an example of the type of revision that was made by issuers like CIT, BMO Harris. Clearly here GE. This is the type of change that an issuer makes when they realize that their offering documents permit Mr. Lathen's strategy. They realize it. Then they issue – they dispute it with him and take the positions they take. And then they issue new offering documents that actually prevent his strategy.

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

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

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

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

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

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

ISSUERS' GOVERNING DOCUMENTS DEFINE "BENEFICIAL OWNERSHIP" AS PERTAINING TO BROKERAGE ACCOUNT OWNERSHIP

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

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

198. Ö For example, Goldman's Indenture states that "ownership of Securities shall be proven by the Security Register." (Div Ex 564., p.16). It also states that "Prior to due presentment of a Security for registration of transfer, the Company, the Trustee and any agent of the Company or the Trustee may treat the Person in whose name such Security is registered as the owner of such Security for the purpose of receiving payment of principal of and any premium and (subject to Section 3.07) any interest on such Security and for all other purposes whatsoever, whether or not such Security be overdue, and neither the Company, the Trustee nor any agent of the Company or the Trustee shall be affected by notice to the contrary." (Div Ex 564, p. 37).

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

Div Ex. 561, p.17 (emphasis added)

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

Div Ex. 561, p.21 (emphasis added)

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

Div Ex. 561, p. 97 (emphasis added)

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

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

Div Ex 565, p. 6 (emphasis added)

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

Div Ex 565, p.9 (emphasis added)

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

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

Div Ex 513, p.21

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

Div Ex 513, p.24

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

Div Ex 513, p.54

"Thus, each beneficial owner of a book-entry security will hold that security indirectly through a hierarchy of intermediaries, with DTC at the "top" and the beneficial owner's own securities intermediary at the "bottom."
"The securities of each beneficial owner of a book-entry security will be evidenced solely by entries on the books of the beneficial owner's securities intermediary."

Div Ex 513, p.54-55

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

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

203. Ö All of the bond and CD redemptions occurred in accounts that Mr. Lathen maintained with brokerage firms who were DTC participants as defined under the governing documents. *See http://www.dtcc.com/client-center/dtc-directories.*

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

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

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

owners. In addition, brokerage firm representatives were required to execute an election form attesting to the fact that the decedent was a beneficial owner of the bond at death. *(Lathen Ex. 1941 p. 14688-14690; Tr. 623:17-627:11.)*

207. ... Issuer governing documents do not require that the authorized representative (e.g. Mr. Lathen as surviving joint owner) have an "economic stake" in the account at the decedent's death or otherwise. The only ownership requirement at death under the governing documents is with respect to the decedent. Indeed, the governing documents are completely agnostic with respect to distribution of proceeds following the death of the beneficial owner. (N/A). *(Div. Exs. 975, 600 and 521.)*

208. ... No issuer governing documents required that side agreements or financing agreements be disclosed or indicated that they were important to a determination of eligibility to redeem under the survivor's option provision. (N/A). *(Div. Exs. 975, 600 and 521.)*

209. ... No issuer governing documents required that there be any familial relationship between the decedent and the surviving joint tenant in order to be eligible to redeem under the survivor's option provision. (N/A). *(Div. Exs. 975, 600 and 521.)*

210. ... No issuer governing documents prohibited the exercise of the survivor's option in instances where the decedent had delegated power of attorney with respect to their ownership in the account. (N/A). *(Div. Exs. 975, 600 and 521.)*

211. ... No issuer governing documents prohibited someone who was in poor health or advanced in age from owning their bonds or for their survivor or heirs to exercise the survivor's option provision upon their death. (N/A). *(Div. Exs. 975, 600 and 521.)*

212. ... No issuer governing document contained any requirement that a decedent possess any particular quantum or percentage of economic interest in the account at their death. (N/A). *(Div. Exs. 975, 600 and 521.)*

213. ... No issuer governing document prohibited a bond holder from encumbering their interest or relinquishing their interest in the account holding the bond. (N/A). *(Div. Exs. 975, 600 and 521.)*

IV. RESPONDENTS' CONSPICUOUS MODUS OPERANDI: ENGAGEMENT OF BROKERS, INVESTORS, REGULATORS & OTHER PROFESSIONALS

RESPONDENTS' TRANSPARENCY WITH BROKERS

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

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

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

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

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

Auggie Celliti, Securevest (Tr. 2521:7-13)

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

217. Ê Mr. Lathen provided Securevest with many documents to further explain his strategy, including an investor presentation, the PPM, and the participant agreement. (Lathen Ex. 2028; Tr. *625:24-626:22*, 2522:1-2523:4; Lathen Ex. 2032; Tr. 2636:16-24)

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

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

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

RESPONDENTS' COMMITMENT TO FULSOME INVESTOR DISCLOSURE

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

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

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

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

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

RESPONDENTS' ACTIVE ENGAGEMENT OF REGULATORS

225. • During the course of the representation, Mr. Galbraith and Mr. Lathen reached out to, and met with, attorneys at FINRA to explain Mr. Lathen's business and investment strategy to the regulators. Mr. Galbraith explained that "[Mr. Lathen] wanted to be helpful to FINRA so that they could understand what his business actually was, so there was no misperception of misunderstanding on their part." (Tr. 2921:4-2925:13; 3044:4-3045:16, 3049:8-12).

226. In 2012, Eden Arc Capital Management pre-emptively registered as an Investment Advisor with the SEC, inviting further regulatory scrutiny into their business before it was required. (Tr. 648:12-18). *(See also SEC Rule203 (m)-1 ("For purposes of section 203(m) of the Act (15 U.S.C. 80b-3(m)), an investment adviser with its principal office and place of business in the United States is exempt from the requirement to register under section 203 of the Act if the investment adviser: (1) Acts solely as an investment adviser to one or more qualifying private funds; and (2) Manages private fund assets of less than $150 million") and* https://www.sec.gov/divisions/investment/midsizedadviserinfo.htm *("In addition, a mid-sized adviser that is required to register with the SEC, may elect to not register if it can rely on an exemption from registration, such as those for certain advisers to private funds").)*

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

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

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

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

RESPONDENTS' ACTIVE ENGAGEMENT OF SOPHISTICATED THIRD PARTIES

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

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

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

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

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

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

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

RESPONDENTS' COMMITMENT TO ADEQUATE PARTICIPANT DISCLOSURE

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

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

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

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

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

V. LATHEN'S CHARACTER & REPUTATION FOR HONESTY AND INTEGRITY

MR. LATHEN'S IMPRESSION UPON HIS COLLEAGUE

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

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

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

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

Q. JUDGE PATIL: Mr. Robinson, what frauds do you know of that Mr. Lathen committed? (1827)

A. † THE WITNESS: None.

Q. MS. CORCORAN: Can you put some color behind that, in your own words, why? . . .

A. † Yeah. . . my close working relationship with Jay over almost four years, sitting in this little room together. You know, we didn't just talk about business. But we talked about our kids, our families. You know, he dealt with contractors and, you know, buying and selling cars and all this sorts of things that you do in daily life. And it was just no sense I had that he was ever engaged in -- what you might call sharp practices, you know, was trying to cheat somebody, trying to hide something, trying to get a little more insurance money for a fender-bender than he was entitled to. He just didn't do that stuff. I just came to feel like he was playing straight.

MR. LATHEN'S CHARACTER & REPUTATION IN THE INDUSTRY

247. † Throughout his career, Mr. Lathen has no history of disciplinary action being taken against him nor has he ever been the subject of an investigation into possible misconduct. (Tr. 2156:8-10, *3156:8-10 and 3412:11-15*.)

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

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

250. Ž Mr. Dean was vice president of strategic planning and analysis at Key Energy, and worked there from 1996-2000. SFOF ¶ 70. During that time, Mr. Lathen was an investment banker at Lehman Brothers and part of the team working for Key Energy. (Tr. 2798:7-2799:1)

251. Ž Mr. Dean was head of investor relations and corporate development at Penn Virginia. (Tr. 2802:6-9). Mr. Lathen worked closely with the CEO and CFO of Penn Virginia, as well as the General Counsel, advising them on investment banking matters. (Tr. 2803:21-24).

252. Ž Mr. Dean testified that Mr. Lathen was a person of very high character (Tr. 2816:18-2819:10)

253. Ž He stated that Mr. Lathen was very trustworthy on both a personal and professional level. (Tr. 2819:7-9).

254. Ž Mr. Dean testified that Mr. Lathen's reputation amongst his peers at Lehman Brothers was excellent (Tr. 2809:17-2810:8).

255. Ž Mr. Dean stated that Mr. Lathen's reputation amongst his colleagues at Penn Virginia was excellent. (Tr. 2803:25-2804:2)

256. Ž Mr. Dean also testified that Mr. Lathen was part of team of "consummate professionals" at Lehman, and that he had a perfect record in upholding his fiduciary duties to his clients, including the responsibility of protecting confidential client information. (Tr. 2800:4-8).

Q. Okay. How did Mr. Lathen handle the responsibility of protecting confidential client information?

A. Ž I would say Jay, along with any of the bankers that we dealt with at Lehman were – you know, there's nothing short of a perfect record that's acceptable. So there was never any doubt in our minds.

Q. In terms of his business dealings, would you describe him as having a propensity for having honesty or dishonesty on the spectrum?

A. Ž Complete honesty.

THE BENEFITS OF ENDCARE AND MR. LATHEN'S KINDNESS TOWARDS PARTICIPANTS

257. ^ Mr. Lathen conceived of this investment strategy when members of his own ^ family were struggling with exorbitant healthcare and end-of-life costs. (Tr. ^ 3177:1 - 3178:12) ^

258. ^ Though profit was an obvious motivating factor, in the end, the reality is that ^ Endcare provided a real service to real people in need. ^

Dennisse Alamo, Participant's Daughter / Power of Attorney, Tr. 2355: 10-16

Q. ^ And why did you recommend EndCare to your friends?
A. ^ Well, I had a good experience. I thought it was helpful, and I think that, you know, the people that I had recommended it to were people that I knew might not have had the financial resources to appropriately handle end-of-life matters.

Joy Davis, Participant, [redacted] s, Tr. 1526:21-1527:4

Q. ^ I understand that. Did you have a specific financial need for the money? Or was it going to go towards medical expenses or something specific? Or --
A. ^ No. I used the money to -- to straighten out my kids. I wanted to make sure that, you know, my kids were, you know, were straight, you know, before I died. So I used the money to help them out.

259. ^ Mr. Lathen went to great lengths to ensure that his Participants were comfortable with the program and, ultimately, treated them with kindness, care, and concern for their well-being.

Dennisse Alamo, Tr. 2349:15 – 2350:3

Q. ^ Generally, Ms. Alamo, how would you describe your interactions with Mr. Lathen?
A. ^ Positive. Helpful. Supportive.
Q. ^ Did you ever feel pressured by Mr. Lathen to participate in the program?
A. ^ No.
Q. ^ How did you feel about the adequacy of Mr. Lathen's disclosures to you about the program?
A. ^ I think they were – that he was honest, that he was transparent. He answered, you know, any questions that I had to my satisfaction.

Dennisse Alamo, Tr. 2346:16 – 2347:11

Q. ò Would you mind reading it?
A. ò Sure. "Jay it was a wonderful surprise to receive your note. Your generous contribution on Mom's behalf means so much and was very touching. We are thrilled that she will be acknowledged on the Calvary tree of life among so many strong and courageous individuals. "Thank you from the bottom of my heart. I hope that you and your family will enjoy the assortment of treats" -- oh, yes, I do remember this -- "I prepared with you in mind. "Each item was made with much love and care as a sign of my deep appreciation .. Warmest regards."
Q. ò Do you recall why you felt compelled to send this note?
A. ò Yeah. I think that at a time when – you know, going through something like this is hard enough. I felt very appreciative and wanted to acknowledge, you know, not just the business aspect, but you know, the contribution that he had made on my mother's behalf at the hospital.

VI. THE CUSTODY RULE

260. The Fund underwent an annual audit in compliance with the Custody Rule for the entire time period during which EACM was a registered investment adviser (e.g. for fiscal years ended December 31, 2012, 2013 and 2014). With respect to each such fiscal year, the audited financial statements for the Fund were issued within 120 days of the end of the fiscal year. Eden Arc withdrew its registration as an investment adviser with the SEC in February 2016, prior to the deadline to issue audited financial statements for the fiscal year ended December 31, 2015. Once it withdrew its registration, it was no longer subject to the SEC's Custody Rule or the annual audit requirement with respect to the fiscal year ended December 31, 2015. *See* Tr. 539: 5-16; 648:12-18.

261. ò For joint accounts opened under Participant Agreements executed prior to January 2013, the Fund's economic benefits derived from its rights under the Investment Management Agreement ("IMA"). For joint accounts opened under Participant Agreements executed after January 2013, the Fund's economic benefits derived from its rights under the original Discretionary Line Agreement ("ODLA"), subsequent Discretionary Line Agreement (SDLA) and Profit Sharing Agreement ("PSA"). *See* Div. Ex. 191 / Div. Ex. 190 and Div. Ex. 72 / Div. Exs. 183, 184 and 185.

262. ò The Fund's Investments consisted of the following components: (a) "Advances" made to joint accounts under the IMA for Participants Agreements preceding January 2013; (b) "Loans" to Lathen or Lathen/Participants jointly under the ODLA or SDLAs respectively for Participant Agreements after January 2013; (c) "Profit sharing rights" under the PSA (for Participant Agreements after January 2013). *See* Div. Ex. 191 / Div. Ex. 190 and Div. Ex. 72 / Div. Exs. 183, 184 and 185.

263. z The joint accounts were always maintained with a qualified custodian and were titled in the names of Mr. Lathen, the Participant, and Mr. Jungbauer (only with respect for Participant Agreements executed prior to January 2013). *(See https://www.sec.gov/rules/final/ia-2176.htm -- "Qualified" Custodians" under the amended rule include the types of financial institutions that clients and advisers customarily turn to for custodial services. These include banks and savings associations and registered broker-dealers..)*

264. z The Instrument evidencing the Fund's ownership of the Advances is the IMA itself. *See* Div. Ex. 191.

265. z The Instrument evidencing the profit sharing rights is the PSA. *See* Div. Ex. 72.

266. z The Instrument evidencing the ODLA dated January 24, 2013 is the agreement itself and the Promissory Note ("PN"). *See* Div. Ex. 190, 193).

267. z The Instruments evidencing the SDLAs are the SDLAs themselves. See Div. Ex. 183-185.

268. z Under the initial contractual regime enacted at Fund inception, the Fund owned Advances to Messrs. Lathen and Jungbauer under the IMA which were to be expressly used to fund the joint accounts. *See* Div. Ex. 191, p.2, ¶4, 41, 8.

269. z Under the modified contractual regime adopted in January 2013, From January 2013 to January 2015, the Fund owned Loans made to Mr. Lathen under the Original DLA. After January 2015, the Fund owned Loans made to Mr. Lathen and Participant as joint borrowers. In addition to these Loans, the Fund owned profit sharing rights related to Mr. Lathen's share of the joint accounts under the PSA. *See* Div. Ex. 183-185.

Dated: New York, NY
June 8, 2017

Respectfully submitted,

PROTASS LAW PLLC

/s/

By: _____
Harlan Protass

260 Madison Avenue
New York, NY 10016
T. 212-455-0335
F. 646-607-0760
hprotass@protasslaw.com

Counsel for Respondents Donald F. Lathen, Jr., Eden Arc Capital Management, LLC and Eden Arc Capital Advisors, LLC

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that on June 8, 2017 I caused a true and correct copy of the foregoing THE EDEN ARC RESPONDENTS' AMENDED STATEMENT OF FACTS, dated June 8, 2017, to be served upon the parties listed below via e-mail and/or UPS Overnight Mail:

Honorable Jason S. Patil
Administrative Law Judge
U.S. Securities and Exchange Commission
100 F. Street, N.E.
Washington, DC 20549-2557

Brent Fields, Secretary
Office of the Secretary
U.S. Securities and Exchange Commission
100 F. Street, N.E.
Washington, DC 20549-2557

Judith Weinstock, Esq.
U.S. Securities and Exchange Commission
New York Regional Office
Brookfield Place
200 Vesey Street, Suite 400
New York, NY 10281-1022

/s/

Harlan Protass