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

ADMINISTRATIVE PROCEEDINGS RULINGS
Release No. 4272/October 18, 2016

ADMINISTRATIVE PROCEEDING
File No. 3-17387

In the Matter of DONALD F. ("JAY") LATHEN, JR., EDEN ARC CAPITAL MANAGEMENT, LLC, and EDEN ARC CAPITAL ADVISORS, LLC	ORDER ON MOTION TO PRECLUDE ADVICE-OF-COUNSEL DEFENSE

Respondents want to present an advice-of-counsel defense. The Division of Enforcement opposes Respondents' plan. For the reasons that follow, the Division's motion to preclude Respondents' defense is denied in part.

Background

Following a prehearing conference held on September 12, 2016, Respondents filed a notice:

> that the Eden Arc Respondents intend to invoke the advice of counsel defense at the hearing in the referenced matter with respect to (and hereby waive the attorney-client privilege with respect to attorney-client communications, whether written, oral or electronic, concerning) the legal advice they received concerning and relating to the structure of, and structuring of, the Eden Arc Respondents' investment strategy.

Letter from Harlan Protass (Sept. 23, 2016).[1] The Division of Enforcement later moved to preclude Respondents from relying on this defense. The Division contends that Respondents' proposed defense is irrelevant because this case is not about the structure of Respondents' investment strategy but is instead about disclosures Respondent Donald F. Lathen made when he redeemed securities held in various joint tenancies. Mot. at 4-5.

[1] The term "Eden Arc Respondents"—as used by Respondents' counsel in certain letters—appears to collectively refer to all three Respondents, including Donald F. Lathen. *See* Janghorbani Decl. (Sept. 26, 2016), Ex. J; Letter from Harlan Protass (Sept. 23, 2016).

Respondents contend that it is not for the Division to say what is or is not relevant. They concede that "the Eden Arc Respondents are not asserting that they sought, received or relied on legal advice concerning whether Mr. Lathen was required to disclose his 'contractual regime' when redeeming survivor's option bonds and CDs, as the Division maintains." Opp'n at 4; *see id*. at 5 ("[T]he genesis of the Division's argument is its misguided attempt at imposing a requirement on Mr. Lathen to have sought legal advice that he did not seek - that is, advice concerning the sufficiency of his disclosures to issuers of survivor's option bonds and CDs."). In other words, the Eden Arc Respondents have waived any claim that they sought or relied on advice about what disclosures Lathen was required to make.

Legal Principles

In a bench trial, "it is virtually impossible for a trial judge to commit reversible error by receiving incompetent evidence, whether objected to or not."[2] Courts should hesitate to exclude evidence during a bench trial and should instead "take factors that otherwise might affect . . . admissibility into consideration in determining . . . weight."[3] Applying this principal to administrative agencies, courts have "strongly advise[d] administrative law judges: if in doubt, let it in."[4] Following this guidance, the Commission has held that "all evidence which 'can conceivably throw any light upon the controversy' should normally be admitted."[5] Administrative "law judges should [thus] be inclusive in making evidentiary determinations."[6]

The attorney-client privilege protects from disclosure certain "communications between a client and his attorney."[7] Courts construe the attorney-client privilege narrowly "because [it] . . . obstructs the search for the truth and" provides "benefits [that] are, at best, 'indirect and

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[2] *Builders Steel Co. v. Comm'r*, 179 F.2d 377, 379 (8th Cir. 1950); *see Herlihy Mid-Continent Co. v. N. Ind. Pub. Serv. Co.*, 245 F.2d 440, 444-45 (7th Cir. 1957).

[3] *In re Unisys Sav. Plan Litig*., 173 F.3d 145, 164 (3d Cir. 1999) (Becker, C.J., dissenting); *see Builders Steel Co.*, 179 F.2d at 379-80; *see Eagle-Picher Indus., Inc. v. Liberty Mut. Ins. Co*., 682 F.2d 12, 18 (1st Cir. 1982) ("[A] district judge, sitting without a jury, might be well advised to admit provisionally all extrinsic evidence of the parties' intent, unless it is clearly inadmissible, privileged, or too time consuming, in order to guard against reversal.").

[4] *Multi-Med. Convalescent & Nursing Ctr. of Towson v. NLRB*, 550 F.2d 974, 978 (4th Cir. 1977); *see Samuel H. Moss, Inc. v. FTC*, 148 F.2d 378, 380 (2d Cir. 1945).

[5] *Charles P. Lawrence*, Admin. Proc. File No. 3-609, 1967 WL 87762, at *4 (Dec. 19, 1967).

[6] *City of Anaheim*, Exchange Act Release No. 42140, 1999 WL 1034489, at *2 (Nov. 16, 1999).

[7] *In re EchoStar Commc'ns Corp*., 448 F.3d 1294, 1298-99 (Fed. Cir. 2006).

speculative."'[8] It is "established that if a party interjects the 'advice of counsel' as [a] . . . defense, then that party waives the privilege as to *all* advice received concerning the same subject matter."[9]

The question of what constitutes "the same subject matter" is fact specific and necessarily determined on a case-by-case basis.[10] A party asserting advice of counsel as defense may not selectively define the "same subject matter" in a way that prevents the party's opponent from determining whether the party asserting the defense provided counsel with all relevant facts and then followed the advice in good faith.[11]

Because the advice-of-counsel defense operates to waive the privilege as to all advice received concerning the same subject matter, a party asserting this defense may not "disclos[e] [some] communications that support its position while simultaneously concealing communications that do not."[12] It follows that a litigant may not limit the temporal reach of his or her waiver of the attorney-client privilege to prevent disclosure of communications related to that subject matter.[13]

Discussion

I reject the Division's argument that Respondents' defense is irrelevant and should be disallowed. Because the defense is at least "conceivably" relevant, disallowing it would be inconsistent with Commission precedent.[14] Whether Respondents will be able to establish all of

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[8] *In re Grand Jury Investigation*, 599 F.2d 1224, 1235 (3d Cir. 1979); *see In re Grand Jury Proceedings*, 219 F.3d 175, 182 (2d Cir. 2000); *see also Trammel v. United States*, 445 U.S. 40, 50 (1980).

[9] 1 Kenneth S. Broun et al., McCormick on Evidence § 93 (7th ed. 2013) (emphasis added); *see EchoStar Commc'ns Corp*., 448 F.3d at 1299.

[10] *Fort James Corp. v. Solo Cup Co*., 412 F.3d 1340, 1349-50 (Fed. Cir. 2005).

[11] *Glenmede Trust Co. v. Thompson*, 56 F.3d 476, 486 (3d Cir. 1995); *see Trouble v. Wet Seal, Inc*., 179 F. Supp. 2d 291, 304 (S.D.N.Y. 2001) ("When a party intends to rely at trial on the advice of counsel as a defense to a claim of bad faith, that advice becomes a factual issue, and 'opposing counsel is entitled to know not only whether such an opinion was obtained but also its content and what conduct it advised.'" (quoting *Vicinanzo v. Brunschwig & Fils, Inc*., 739 F. Supp. 891, 894 (S.D.N.Y. 1990))).

[12] *Fort James Corp.*, 412 F.3d at 1349; *see United States v. Workman*, 138 F.3d 1261, 1263-64 (8th Cir. 1998).

[13] *Bd. of Trustees of Leland Stanford Junior Univ. v. Roche Molecular Sys., Inc*., 237 F.R.D. 618, 627 (N.D. Cal. 2006).

[14] *See Charles P. Lawrence*, 1967 WL 87762, at *4.

the elements of the defense, including full disclosure to counsel and subsequent good faith reliance on that advice,[15] remains to be seen. If, as the Division suggests, Respondents' advice-of-counsel defense misses the point, then it will not matter what Respondents discussed with counsel about the structure of the joint tenancies. In that case, the Division is free to ignore the defense. On the other hand, as discussed below, the Division is free to explore the circumstances surrounding the advice Respondents sought and received.

Respondents state that they are waiving "the attorney-client privilege . . . with respect to the *entirety* of the 'transaction,' not some portion of it – to wit, 'the legal advice they received concerning and relating to the *structure* of, and *structuring* of, the Eden Arc Respondents' investment strategy.'" Opp'n at 6. The Division counters that Respondents are selectively disclosing evidence relating to their proposed defense.

Assuming Respondents have not adopted an overly narrow construction of the "entirety of the 'transaction,'" *i.e.*, one that does not includes the transaction's conclusion, as to the attorneys with whom Respondents discussed the "the structure of and structuring of" the joint tenancies at issue in this case, Respondents have necessarily waived the privilege "as to *all* . . . communications relating to the same subject matter."[16] And the "same subject matter" is the joint tenancies. This means that if Respondents consulted with an attorney at any time "through approximately February 2016"—the end of the period of alleged misconduct—about the structure or structuring of the joint tenancies, they must disclose the name of the attorney and all communications with that attorney about the joint tenancies.[17] Put another way, once it is established that Respondents consulted with a given attorney, the Division must be able test (1) whether Respondents made full disclosure to that attorney; (2) what advice the attorney provided; and (3) whether the advice given was followed in good faith.[18]

To the extent Respondents have not already done so, they shall forthwith disclose to the Division every attorney they consulted, at any time "through approximately February 2016,"

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15 *See United States v. DeFries*, 129 F.3d 1293, 1308 (D.C. Cir. 1997).

16 *In re Sealed Case*, 676 F.2d 793, 809 (D.C. Cir. 1982) (emphasis added).

17 OIP ¶ 2. The Division asserts that Respondents purport to limit their waiver of their attorney-client privilege so as to exclude communications before their Fund was formed in 2011. Respondents cannot limit their waiver in this manner. *See Bd. of Trustees of Leland Stanford Junior Univ.*, 237 F.R.D. at 627. Additionally, this purported limitation is inconsistent with their counsel's letter through which Respondents unequivocally waived their attorney-client privilege without any such limitation. *See* Letter from Harlan Protass (Sept. 23, 2016). The privilege waiver does not, however, encompass attorney-client communications related to the Division's investigation or this administrative proceeding. *See Bowne of N.Y. City, Inc. v. AmBase Corp.*, 150 F.R.D. 465, 487 (S.D.N.Y. 1993).

18 *See DeFries*, 129 F.3d at 1308.

about "the structure of and structuring of" the joint tenancies at issue in this case.[19] They shall also disclose all communications in their possession that concern discussions with those counsel about any aspect of the joint tenancies. In other words, if Respondent Lathen exchanged e-mails with an attorney in which a discussion occurred about the "the structure of and structuring of" the joint tenancies, those e-mails shall be disclosed even if they contain discussions about other aspects of the joint tenancies. Finally, Respondents shall inform these attorneys of their waiver. Failure to comply with the above will preclude Respondents from relying on an advice-of-counsel defense.[20]

Given Respondents' waiver, the Division may inquire of the attorneys who were consulted, regarding their discussions with Respondents or their representatives about the joint tenancies. This means that the Division may fully explore with the attorneys everything Respondents or their representatives told the attorneys about the joint tenancies, what advice the attorneys provided about the joint tenancies, and whether they know if their advice was followed.[21]

Respondents should complete any disclosures required by this order by November 1, 2016. The parties are encouraged to engage in good faith negotiations about production in compliance with this order. If such negotiations fail, the Division may renew its request for documentary subpoenas by November 4, 2016.

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James E. Grimes
Administrative Law Judge

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[19] As noted, Respondents' waiver does not encompass attorney-client communications related to the Division's investigation or this administrative proceeding.

[20] *See Minn. Specialty Crops, Inc. v. Minn. Wild Hockey Club, L.P.*, 210 F.R.D. 673, 676-77 (D. Minn. 2002).

[21] *See Glenmede Trust Co.*, 56 F.3d at 486; *see also United States v. Jones*, 696 F.2d 1069, 1072 (4th Cir. 1982) (citing *Garfinkle v. Arcata Nat'l Corp.*, 64 F.R.D. 688, 689 (S.D.N.Y. 1974), for the proposition that "where defendant injected his counsel's opinion letter as a defense, plaintiff was entitled to probe into the circumstances surrounding issuance of the letter and could not be limited to the letter itself").