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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-17387

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In the Matter of

DONALD F. ("JAY") LATHEN, JR., EDEN ARC CAPITAL MANAGEMENT, LLC, and EDEN ARC CAPITAL ADVISORS, LLC

Respondents.

DIVISION OF ENFORCEMENT'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION *IN LIMINE* TO PRECLUDE RESPONDENTS FROM OFFERING TESTIMONY OR EVIDENCE ON ADVICE RECEIVED FROM ATTORNEY KEVIN GALBRAITH

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January 11, 2017

The Division respectfully submits this memorandum of law in support of its Motion *In Limine* to Preclude Respondents from Offering Testimony or Evidence on Advice Received from Attorney Kevin Galbraith.

PRELIMINARY STATEMENT

Respondents have enlisted attorney Kevin Galbraith, their current litigation counsel, to provide testimony as to the advice he gave in support of their advice of counsel defense. But his testimony is being offered in the face of incomplete disclosure of what advice was given. It should be precluded, not simply as a matter of fairness, but because Respondents' and Galbraith's conduct in discovery violate two Court orders and one Court-issued subpoena.

First, Galbraith and Respondents have failed to produce required documents to the detriment of the Division, including by failing to make a diligent search of their files, delaying production of responsive documents, and making belated and overzealous decisions regarding privilege and responsiveness. Second, Galbraith refuses to be interviewed by the Division—and Respondents have failed to produce him for interview—in derogation of the Court's Order that the Division be able to explore fully the supposed advice sought and received by Respondents.

These games have gone far enough. Nearly three months ago, the Court admonished Respondents to make complete disclosures with regard to their advice of counsel defense no later than November 1, 2016. Anything short of full disclosure would "preclude Respondents from relying on an advice-of-counsel defense." Respondents and Galbraith have failed to be forthcoming. As such, Galbraith's testimony should be precluded and Respondents should not be allowed to offer evidence about the advice they sought from him or he gave.

BACKGROUND

A. Galbraith's Past and Current Representation of Respondents

Galbraith was retained by Respondents in mid-2014, and continues to represent them today in connection with issues relating to this case. (Declaration of Janna I. Berke, dated January 11, 2017 ("Berke Decl."), Ex. A (Engagement Letter).) He currently serves as litigation counsel to Respondents in a state court action where Prospect Capital Corporation, an issuer of survivor's options bonds, has sued Respondents for fraud. Galbraith has also served as counsel to Respondents in other disputes that have arisen with issuers and trustees that have become aware of Lathen's strategy. Finally, Galbraith appears to be advising Lathen in connection with this matter, though he has never entered an appearance. For example, Galbraith is blind copied on emails to the Division from Respondents' counsel (id. Ex. B), and he offered to provide advice on Respondents' Wells submission. (Id. Ex. C.) Further, he recently reached out to a supervisor at the Division on behalf of Eden Arc Capital Partners (the Fund). (Berke Decl. ¶ 5.)

B. Galbraith's Delayed and Incomplete Response to the Court's Subpoena

On November 15, 2016, the Court signed a subpoena for Galbraith's documents relating to Respondents' assertion of their advice of counsel defense, including documents "about any aspect of the joint tenancies" in connection with Galbraith's representation of Respondents. (Id. Ex. D.) The return date on the subpoena was December 1, 2016 at 5:00 pm.

Without request for an extension, on December 2, 2016, Galbraith produced 21 bills for legal services. Three days later, on December 5, 2016, the Division received a letter from Galbraith indicating that Clayman & Rosenberg had already provided all outstanding responsive non-privileged documents to the Division (at an unspecified date), and Galbraith had nothing further to produce. (Id. Ex. E.) That same day, the Division followed up, requesting that

Galbraith provide a log of documents that were apparently being withheld regarding Respondents' disputes with GE Capital Corporation and U.S. Bank—an issuer and a trustee, respectively, of survivor's option bonds who were disputing Lathen's purported rights to redemption. Galbraith responded that, "in an abundance of caution," he would—it appears for the first time in response to the Division's subpoena—"review [his] own emails with Mr. Lathen" regarding those topics. He indicated then—four days after his response was due—that "gathering and reviewing potentially responsive emails will take a bit of time." (Id. Ex. F.)

On December 12, 2016, the Division received a production from Mr. Galbraith consisting of 627 emails plus attachments. But that was—yet again—not based on a complete review. The Division followed up with Galbraith again on December 15, 2016 to inquire whether he had additional responsive documents to produce, and when to expect his privilege log. Galbraith responded that: (1) he had an additional archive to search for responsive documents; (2) he had "segregated a few documents that must be redacted for privilege and/or responsiveness before production"; and (3) a privilege log was forthcoming. (Id. Ex. G.)

Galbraith finally purported to complete his production on December 23, 2016, when he produced an additional document and a privilege log.[1] Galbraith apparently changed his mind about the documents segregated for redaction; as he explained in a subsequent meet-and-confer, he decided those documents were not responsive and declined to produce or log them. (Id. ¶ 10.)

But even that December 23, 2016 Galbraith production was incomplete. On December 30, 2016, Respondents wrote a letter to the Division and the Court producing yet another Galbraith communication with Lathen which had not yet been given to the Division. (Id. Ex. H.)

[1] After *in camera* review, on January 9, 2016, the Court ordered that certain of the communications between Galbraith and Lathen on the December 23, 2016 privilege log were improperly withheld and had to be produced to the Division.

C. Respondents' Equally Incomplete Production of Galbraith Communications

To date, Respondents' own production of their communications with Galbraith is incomplete. The Court's January 9, 2017 Order addressed Respondents' apparent failure to produce documents that they continue to withhold with respect to their communications with Galbraith. The Court instructed Respondents to comply with its December 23, 2016 directive to search their own files for communications with Galbraith and either produce those to the Division or explain why they are still being withheld on a privilege log—an action that Respondents should have undertaken months ago when they first waived the privilege as to Galbraith's advice.

The Court's directive was well-taken since a review of Respondents' March 2016 privilege log reveals still more Galbraith communications that have never been produced—by Respondents or Galbraith. (See id. Ex. I (representative sample of the documents that Respondents appear to continue to withhold).)[2] For example, emails regarding the "Eden Arc LPA," "US Bank Recent Rejection Letters," and "Goldman Correspondence" all appear to relate to the joint tenancies and fund structure. Communications with counsel concerning subjects covered by Respondents' privilege waiver were to be produced on November 1, 2016. And yet, two and a half months later, the Division is still wrangling with Respondents for full disclosure.

D. Respondents Have Refused to Make Galbraith Available to be Interviewed by the Division

Galbraith was identified by Respondents on September 25, 2016 as an attorney on whose advice Respondents relied in connection with "the structure, and structuring of, the Eden Arc

[2] Respondents have never produced a revised privilege log indicating which documents they continue to withhold after their assertion of the advice of counsel defense and related productions. The Division is therefore forced to compare their pre-waiver privilege log with the documents that are in its files in an attempt to recreate what documents are still being withheld.

Respondents' investment strategy" in 2015. (Id. Ex. J.) And, they intend to introduce Galbraith as a witness at trial, including as to the advice sought and received from Galbraith in furtherance of Respondents' advice of counsel defense. (Id. Ex. K.)

On December 31, 2016, the Division requested to interview Galbraith. The Division's request was in line with the Court's October 18, 2016 Order, which stated, among other things, that the Division could "fully explore with the attorneys everything Respondents or their representatives told the attorneys about the joint tenancies," and ordered Respondents to disclose "all communications" with Galbraith relating to the joint tenancies—a directive not limited to written communications. (October 18, 2016 Order at 5)

The Division reached out to Galbraith three times to request an interview before it got an answer: no. (Id. Ex. L.) The Division also enlisted Respondents' counsel, reminding Respondents of their obligations for full disclosure under the waiver Order. Despite assurances that he was "happy to contact Kevin," Mr. Protass refused to secure Galbraith's cooperation and took the position that Respondents had no obligation to do so. (Id. Ex. M.)

ARGUMENT

This Court has the authority to "do all things necessary and appropriate to discharge [its] duties," including "ruling upon the admission of evidence." 17 C.F.R. § 201.111(c). "[I]nherent in the powers of a trial judge in both federal judicial proceedings and administrative proceedings is the power to police and maintain the orderly administration of justice and the authority and dignity of the tribunal." In the Matter of Russo Secs. Inc., S.E.C. Rel. No. 562, 1998 WL 211391, at *1 (ALJ Order on Motion in Limine April 21, 1998).

Such orderly administration includes imposing sanctions on parties who disobey court orders or other court imposed deadlines. See id., 1998 WL 211391, at *1 (prohibiting expert

testimony without required disclosures by the expert deadline); In the Matter of the Robare Group Ltd., S.E.C. Rel. No. 2271, 2015 WL 12734748, at *5 (ALJ Order on Motion in Limine Feb. 2, 2015) (precluding rebuttal expert testimony without proper disclosure); see also FED. R. CIV. P. 37(b)(2) ("If a party . . . fails to obey an order to provide or permit discovery . . . [the court] may issue further just orders. They may include . . . (ii) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence."). In deciding what sanctions to impose for violation of court or other discovery orders, courts look at the proffered reasons for the disclosure failures and the prejudice that befalls the opposing party. Design Strategies, Inc. v. Davis, 469 F.3d 284, 296 (2d Cir. 2006) (quoting Patterson v. Balsamico, 440 F.3d 104 (2d Cir. 2006)) (listing factors to be considered in reviewing district court's ruling on sanctions for discovery violations, including (1) the explanation for the failure, (2) importance of the precluded testimony,[3] (3) prejudice suffered by the opposing party, and (4) possibility of continuance).

Here, the Court has already ruled what the sanction would be for failing to comply with the Court's October 18, 2016 Order: Respondents will be precluded from relying on an advice-of-counsel defense. (October 18, 2016 Order at 5.)

A. Respondents Violated the Court's October 18, 2016 and December 23, 2016 Orders

Preclusion of Galbraith's testimony relating to Respondents' advice of counsel defense is warranted because Respondents ignored at least two Court orders. The Court's October 18, 2016 Order was clear. "[I]f Respondents consulted with an attorney at any time through

[3] Weight given to any testimony that Galbraith's would proffer should be limited by the fact that he is acting as litigation counsel for Lathen on some of the same subjects that underlie this proceeding, and therefore he has an interest in a favorable outcome for his current client. Lathen's reliance on his "advice" should have been similarly tempered since whatever views Galbraith expressed had to be consistent with his litigation positions.

approximately February 2016 . . . about the structure or structuring of the joint tenancies, they must disclose . . . all communications with that attorney about the joint tenancies." (October 18, 2016 Order at 4) (internal quotations omitted) (emphasis added). "[T]he Division must be able to 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." Respondents have violated the October 18 Order by failing to timely produce all of the Galbraith communications that appear to be within the scope of the waiver—both with respect to their own files and the files of their agent, Galbraith. (E.g., Berke Decl. Ex. I (documents that continue to be withheld); see also id. Exs. E, F, G, H (documents untimely produced).)

Respondents have also violated the Court's waiver Order by refusing to make Galbraith available to the Division for an interview. Per the Order, Respondents were to "inform [the consulted] attorneys of their waiver," and "the Division may inquire of the attorneys who were consulted"—as Respondents claim Galbraith was—"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." (October 18, 2016 Order at 5) (emphasis added). Respondents were further to make available to the Division "all communications in their possession" that concerns the advice their received from consulted attorneys—a directive not limited to written communications. (Id.) Respondents' failure to produce Galbraith for questioning is in abrogation of the Court's instruction.

Additionally, Respondents violated the Court's December 23, 2016 Order, which required them to produce for *in camera* inspection any documents "reflecting communications

between them and Galbraith . . . that took place at any time through approximately February 2016 and have never been produced to the Division." Inexplicably, Respondents admit that they failed to search their own files in response to this Court order. (See Berke Decl. Ex. H.)

B. **Galbraith Violated the Court's November 15, 2016 Subpoena**

The Court's November 15, 2016 subpoena, requested by the Division, called for production of all documents related to the joint tenancies by December 1, 2016. Galbraith produced no documents by the deadline. Then he produced 21 attorney bills and said he had no documents that had not already been produced by Respondents (without providing any assurances that he had actually searched his files for responsive documents). Later, upon inquiry by the Division, Galbraith finally reviewed his "own emails with Lathen" and discovered 627 additional documents. Still other Galbraith communications with Lathen were produced on December 23, 2016 and December 30, 2016. (Berke Decl. Exs. D-H.)

Galbraith additionally claimed that he had another set of documents to redact and produce, only to later reverse course and claim that—upon further consideration—those same documents were unresponsive, so they would not be produced or logged. The manner of Galbraith's productions—and the fact that there remain unproduced documents on Respondents' March 2016 Privilege Log (id. Ex. I)—removes all doubt that neither Galbraith nor Respondents have seriously undertaken their obligations to produce all relevant communications.

C. **Preclusion of Testimony as to Galbraith's Advice Is Warranted**

Respondents have offered no explanation for why they are in violation of the Court's two orders. Nor has Galbraith his failure to comply with a Court-issued subpoena.

Respondents' and Galbraith's failure to comply with the Court's directive is with prejudice to the Division. Galbraith is being proffered as a witness upon whose legal advice Respondents relied. Respondents' and Galbraith's incomplete disclosures of their

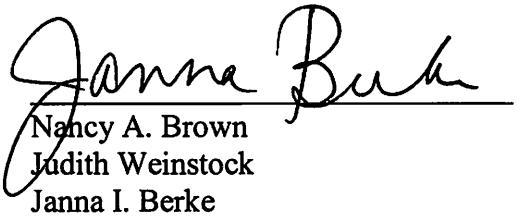
communications on subjects where the privilege has been waived lay the groundwork for a misleading picture of Galbraith's advice. As the Court noted, "a party asserting [the advice of counsel] defense, may not 'disclos[e] [some] communications that support its position while simultaneously concealing communications that do not.'" (Oct. 18, 2016 Order at 3) (quoting Fort James Corp. v. Solo Cup Co., 412 F.3d 1340, 1349 (Fed. Cir. 2005).) Fairness dictates that a privilege holder "cannot be allowed, after disclosing as much as he pleases, to withhold the remainder." Weil v. Inv./Indicators, Research & Mgmt., Inc., 647 F.2d 18, 24 (9th Cir. 1981).

At this late stage—less than three weeks before a hearing that has already been moved twice—any productions that Respondents or Galbraith now make are too little, too late. Respondents and their litigation counsel have played fast and loose with their disclosure obligations. The proper remedy is preclusion of Galbraith's testimony.[4]

CONCLUSION

For the reasons discussed above, the Division respectfully requests that the Court preclude respondents from offering testimony or evidence of advice received from Galbraith.

DIVISION OF ENFORCEMENT



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[4] Galbraith's testimony should additionally be precluded for the reasons set forth in the Division's Motion *In Limine* to Preclude Irrelevant Evidence and Argument Regarding Reliance on Advice of Counsel, filed today.

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DONALD F. ("JAY") LATHEN, JR., EDEN ARC CAPITAL MANAGEMENT, LLC, and EDEN ARC CAPITAL ADVISORS, LLC,

Respondents.

Certificate of Service

I hereby certify that I served (1) the Division of Enforcement's Memorandum of Law in Support of its Motion *In Limine* to Preclude Respondents from Offering Testimony or Evidence on Advice Received from Attorney Kevin Galbraith and (2) the January 11, 2017 Declaration of Janna I. Berke, and exhibits thereto, on this 11th day of January 2017, on the below parties by the means indicated:

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Janna Berke

Janna I. Berke