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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-17387

In the Matter of

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

Respondents.

DIVISION OF ENFORCEMENT'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION *IN LIMINE* TO PRECLUDE IRRELEVANT EVIDENCE AND ARGUMENT REGARDING RELIANCE ON ADVICE OF COUNSEL, OR IN THE ALTERNATIVE, TO PRECLUDE RESPONDENTS FROM OFFERING EVIDENCE OF UNCORROBORATED ATTORNEY ADVICE AND EVIDENCE OF ADVICE FROM ATTORNEYS NOT ON RESPONDENTS' OCTOBER 25, 2016 LIST OF ATTORNEYS

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January 11, 2016

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The Division of Enforcement ("Division") respectfully submits this memorandum of law in support of its motion *in limine*, to preclude Respondents from offering irrelevant evidence and argument regarding reliance on advice of counsel ("attorneys in the room"). In the alternative, the Division respectfully requests that this Court preclude Respondents from offering (A) evidence of uncorroborated attorney advice and (B) evidence of advice from attorneys not on Respondents' October 25, 2016 list of attorneys.

Preliminary Statement

This case centers on two issues. First, whether Donald F. Lathen, his registered investment adviser, Eden Arc Capital Management, LLC ("EACM"), and Eden Arc Capital Advisors, LLC ("EACA"), the general partner of his hedge fund, Eden Arc Capital Partners LP ("EACP" or the "Fund") made materially misleading statements to bond issuers when they represented that Lathen and certain terminally ill individuals (the "Participants") were the "owners" of those bonds, without revealing the fact that, in fact, EACP was deriving all benefit from the bonds and the Participants had signed away their access to the accounts before the first bond was purchased in them.

Second, whether EACM, aided and abetted by Lathen, violated the Custody Rule, Adviser's Act Rule 206(4)-2, by failing to custody Fund assets in the name of the Fund.

Respondents purport to assert an advice of counsel defense as to the fraud claims against them. But, now that Respondents have supplied most of the evidence to support their defense, it is clear that Respondents did not receive advice about the issues at hand. Now that evidence has been collected from Respondents' lawyers, it abundantly clear that Respondents never sought advice about what disclosure needed to be made to issuers under Lathen's investment scheme. And, to the extent that lawyers proffered such advice—the advice given was that Respondents should

"provide complete information regarding the purpose and nature of the Program" to all third parties. Thus, Respondents cannot meet the standard of asserting an advice of counsel defense, which requires a showing that Respondents sought and received advice that the "conduct in question" was legal, and that he "relied on that advice." Respondents did neither.[1]

Further, what has also become clear since Respondents' waiver and the parties exchange of witness lists is that—rather than actually proffering a good faith advice of counsel defense, Respondents are instead attempting to usher a parade of lawyers through the courtroom—including their tax lawyer, a trusts and estates lawyer, and their current litigation counsel—to make a showing that because they consulted a lot of lawyers, they must have acted in good faith. Such argument is impermissible.

Finally, even if the Court were to allow a presentation on Respondents advice of counsel defense, it should prohibit testimony and evidence relating to advice sought or received from lawyers who will not testify at the hearing. Any such evidence is unreliable, and deprives the Court and the Division the opportunity to fully explore the supposed advice sought or given. Nor should the Court allow evidence from attorneys not on Respondents' October 25, 2016 list of attorneys. If they are not attorneys Respondents have identified as relying on, then their advice is irrelevant and prejudicial.

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[1] The Division makes this motion after having had the benefit of interviewing most of the attorneys with whom Respondents' consulted, and after having reviewed all the attorney document productions made available to the Division in September through December. Because Respondents did not assert reliance on advice of counsel during the Division's investigation, the Division was not able to fully evaluate the claim until recently. (Ex. A (Letter from Harlan Protass to Hon. James E. Grimes, Sept. 23, 2016); Division of Enforcement's Motion to Preclude Respondents' Advice of Counsel Defense and To Issue Subpoenas at 11 n.6, Sept. 26, 2016.)

ARGUMENT

I. Evidence and Argument Related to Respondents' Advice of Counsel Defense is Irrelevant and Should Be Precluded

Respondents purport to assert an advice of counsel defense in this matter. In doing so, they must demonstrate that they (1) made a complete disclosure of the relevant facts to counsel; (2) sought and received advice from counsel that the conduct in question was legal; and (3) relied on that advice in good faith.[2] See Markowski v. SEC, 34 F.3d 99, 104-05 (2d Cir. 1994); In re Bank of Am. Corp. Sec., Derivative, and ERISA Litig., 2011 WL 3211472, at * 8 (S.D.N.Y. July 29, 2011) (citing cases). Respondents can make no such showing.

The Division has now spoken with all but one of the attorneys on Respondents' December 15, 2016 Amended Witness List ("Amended Witness List"). Many were never even retained by Respondents. Those that were retained offered Respondents no written opinion on any topic, despite Respondents' continuous efforts, apparently, to find a lawyer who would opine formally. Finally, the only advice Respondents received regarding the central issue of this matter — disclosure to issuers — was that Respondents faced disclosure issues. The lawyers that provided advice told Lathen to do the opposite of what he did do: they told him to disclose all material facts. Margaret Farrell advised that Respondents should fully disclose to all third parties, stating "[r]epresentations to third parties...must not misrepresent...the nature of the relationship between participants and you and/or EndCare," and that "all parties involved" should "receive complete

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[2] We note that the advice of counsel defense has no application at all to the Eden Arc Advisers' Custody Rule violations asserted in this matter because the Custody Rule imposes strict liability. Howard v. SEC, 376 F.3d 1136, 1147 (D.C. Cir. 2004) (advice of counsel defense is only "a relevant consideration in evaluating a defendant's scienter"); cf. Matter of Rodney R. Schoemann, No. 3-12943, 2009 WL 3413043, at *12 (S.E.C. Oct. 23, 2009) (holding that advice of counsel defense is irrelevant to liability under Section 5 of the Securities Act since that provision provides for strict liability), aff'd, 398 F. App'x 603 (D.C. Cir. 2010). In any event, Respondents have not asserted an advice of counsel defense as it relates to the Custody Rule. (See Ex. A (Letter from Harlan Protass to Hon. James E. Grimes, Sept. 23, 2016); Ex. B (Letter from Harlan Protass to Judith Weinstock, Sept. 23, 2016).)

information regarding the purpose and nature of the Program." (Weinstock Decl. ¶ 6; Ex. D.) Another attorney, Darren Domina, formerly of Katten Muchin Rosenman, LLP, advised against Respondents' investment scheme in 2009, before the Fund was even set up. He told Lathen that the investment strategy was a bad idea and that it would invite scrutiny by both the regulators and the issuers. He further stated that Lathen's interactions with issuers would raise disclosure issues. (Weinstock Decl. ¶ 5, 7 n.17.)

Below is a chart setting forth attorneys that appear on Respondents' Amended Witness List, which shows that none of those attorneys gave Respondents advice that 1) they did not have to disclose their business to issuers or 2) they had valid joint tenancies.[3]

Attorneys on Respondents' Revised Witness List

Attorney	Retained	Advice on Disclosure Obligations	Opinion on Validity of Joint Tenancies
Daren Domina Katten Muchin	Yes	Yes, that there would be disclosure issues	No. And advised that there would be issues about whether these were true joint tenancies.
Margaret Farrell Hinckley Allen	Yes	Yes, that he should disclose (Weinstock Decl. ¶ 6)	No. To the contrary—that joint tenancies created under the IMA structure were invalid (Weinstock Decl. ¶ 7)
Robert Flanders Hinckley Allen	Yes	No	No

[3] Respondents have claimed that the validity of the joint tenancies is central to this case. (Respondents' Memorandum of Law in Opposition to the Division of Enforcement's Motion to Preclude Advice of Counsel Defense and Issue Subpoenas, Oct. 3, 2016 at 5). Yet no attorney—despite the large number consulted and requested—would offer the written opinion that Respondents shopped for—stating that Respondents' joint tenancy with right of survivorship (JTWROS) accounts with the terminally-ill participants were valid. See, e.g., Ex. D (Hinckley Allen Memo, Dec. 20, 2012 at 7 ("[T]his memorandum does not address the validity of the joint account arrangements.").) And after 2012, when Lathen learned that certain accounts were not validly created joint tenancies, he redeemed securities held in them anyway. (Weinstock Decl. ¶¶ 7, 8, Ex. E (Participant Agreement of Adolph Pratola); Ex. F (Pratola Redemption Letter, Jan. 30, 2014).)

Kevin Galbraith	Yes	?[4]	?
Robert Grundstein Katten Muchin	Yes	No	No
Bruce Hood Wiggin & Dana	Yes	No	No
Jason Neroulias Bleakley Platt & Schmidt	No	No	No
David Robbins[5] Kaufmann Gildin & Robbins	Yes	No	No
Eric Roper Gerstein Savage	Yes	No	No
Paul Sarkozi Tannenbaum Helpern Syracuse & Hirschtritt	No	No	No
Michael Tannenbaum Tannenbaum Helpern Syracuse & Hirschtritt	No	No	No
Beth Tractenberg Katten Muchin	Yes	No	No
Dianne Zeydel Greenberg Traurig	No	No	No

In addition, the Division has information related to three additional attorneys that do not appear on Respondents' Amended Witness List, but that appeared on Respondents' October 25, 2016 list of attorneys consulted.[6] None of these attorneys gave Respondents' any advice that they did not have to make disclosures to issuers nor provided any written opinion that their joint tenancies were valid.

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[4] Kevin Galbraith has declined to be interviewed by the Division attorneys, in derogation of the Court's Oct. 18, 2016 order, which is the subject of another motion *in limine*. (Weinstock Decl. ¶ 5 n.4; Oct. 18, 2016 Order at 4 (Respondents "must disclose the name of the attorney and all communications with that attorney about the joint tenancies").)

[5] David Robbins represented Mr. Lathen for approximately one month in 2010. (Weinstock Decl. ¶ 5 n.8.)

[6] Respondents were ordered to produce a list of "every attorney they consulted, at any time 'through approximately February 2016,' about 'the structure of and structuring of' the joint tenancies at issue in this case." Oct. 18, 2016 Order at 4-5. Respondents complied with that order on October 25, 2016. (Ex. C (Letter from Harlan Protass to Judith Weinstock, Oct. 25, 2016).)

Additional Attorneys on Respondents' October 25, 2016 "Attorney List"

Attorney	Retained	Advice on Disclosure Obligations	Opinion on Validity of Joint Tenancies
Daniel Hunter Schulte Roth & Zabel	No	No	No
Peter Pront Seward & Kissel	No	No	No
Cherryl Calaguio Gersten Savage	Yes	No	No

As is clear from the charts, only two attorneys stated that they offered advice on the central issuer disclosure issue in this case. And both warned Respondents of potential disclosure issues. Consequently, since Respondents did not "receive[d] advice that [their] conduct was legal," their purported advice of counsel evidence is irrelevant and should be precluded. In re Bank of Am. Corp. Sec., Derivative, and ERISA Litig., 2011 WL 3211472, at * 8 (S.D.N.Y. July 29, 2011) (citing cases). See also SEC v. Meltzer, 440 F. Supp. 2d. 179, 189 (E.D.N.Y. 2006) (finding on summary judgment that defendant acted with the requisite scienter despite an advice of counsel defense because "there is nothing in the record to demonstrate that he made a complete disclosure, nor is there any indication that counsel advised [the Defendant] that the conduct was appropriate").

Clearly, Respondents are offering a parade of attorneys in attempt to put on a forbidden "lawyers in the room" defense — that a host of lawyers were involved and none explicitly told Respondents to cease submitting redemption requests without full disclosure. Thus, they proffer as witnesses Respondents' tax lawyer, a trusts and estates lawyer, and even their current litigation counsel. (Weinstock Decl. ¶ 5.) In SEC v. Tourre, the Court barred just such an attempt:

> [T]he fact that a lawyer is present at a meeting means that he or she must have implicitly or explicitly "blessed" the legality of all aspects of a transaction . . . This misunderstanding would give the defendant all of the essential benefits of an advice of counsel

> defense without having to bear the burden of proving any of the elements of the defense.

SEC v. Tourre, 950 F. Supp. 2d 666, 683 (S.D.N.Y. 2013).

To the extent Respondents intend to admit testimony and documents about communications with counsel for the impact on the recipient of that advice, that evidence and argument should also be precluded as irrelevant.[7] As none of the attorneys gave any advice or legal opinion that Lathen did not have to make full disclosure to issuers — and we now know that two lawyers explicitly warned Lathen about disclosure issues — any communications with those attorneys could not have impacted Respondents' state of mind regarding that issue (the only scienter issue of relevance to the fraud claims). Consequently, the Court should exclude this evidence of consultation with attorneys as irrelevant.

II. In the Alternative, Respondents Should be Precluded from Offering (A) Evidence of Uncorroborated Attorney Advice and (B) Evidence of Advice from Attorneys Not on Respondents' October 25, 2016 List of Attorneys

Should the Court not bar evidence and argument described above, Respondents should be precluded from offering evidence of uncorroborated attorney advice and evidence of advice from attorneys not on Respondents' October 25, 2016 list of attorneys. This evidence is unreliable and irrelevant.

A. Evidence of Uncorroborated Attorney Advice

Respondents, presumably through Lathen's testimony, also apparently seek to admit evidence of communications with attorneys who do not appear on Respondents' Amended Witness List. Allowing such testimony to come in through Lathen or others, while depriving the Division of the full opportunity to cross-examine the attorney who gave the advice, would unfairly prejudice the Division. Namely, the Division would be left with nothing to challenge the uncorroborated

[7] Nearly 750 communications on Respondents' Exhibit List are communications with law firms and attorneys. (Weinstock Decl. ¶ 15.)

evidence about consultations with these attorneys, including (1) what Lathen told them about his business, (2) what Lathen told them about disclosures , or (3) what additional or later advice they might have provided orally to Lathen, factors which go to the reasonable reliance Lathen must establish to assert the defense. Therefore, this uncorroborated evidence should be precluded.

1. Peter Pront

A particularly egregious example of this uncorroborated attorney advice is proposed Exhibit 1341 on Respondents' Exhibit List. Respondents seek to introduce a voicemail sent by Peter Pront to Michael Cooney (a hedge fund marketer Lathen had hired) allegedly forwarded to Lathen, and presumably testimony from Lathen and Cooney about the voicemail and the surrounding details of it.[8] (Ex. G (Transcript of voicemail).) Yet Pront does not appear on Respondents' Amended Witness List. In addition, Lathen admitted in his testimony that Pront and his firm did not advise him directly: "It would be a stretch to say they advised me." (Ex. H (Lathen at 312, 316).) In addition, the "advice" could not have been advice on which Respondents reasonably relied. The voicemail makes clear that this was the firm's "preliminary" conclusion, and one that still had to be confirmed by a summer associate. And Pront notes that the preliminary conclusion was not even one that Seward & Kissel, Pront's firm, was willing to formally endorse or put in writing. (Ex. G.) Moreover, the voicemail itself contains double hearsay. It states that the opinion was formed by some unnamed "T&E colleagues" at Seward & Kissel whom Pront apparently consulted. Id. To further compound the problem, the Division has no way of knowing what information Pront gave to his unnamed colleagues, or how they formed this opinion. But what Lathen, himself, admits is that he was reluctant to provide all of the information relating to his investment strategy to Seward & Kissel, so it is unlikely that Pront gave all relevant material to his colleagues who formed their "preliminary" opinion. (Ex. I (email from Lathen to Darren Kane

[8] Michael Cooney appears on Respondents' Amended Witness List.

dated February 23, 2015).) Consequently, it appears that Respondents did not make the requisite "complete disclosure to counsel" that they must in order to claim the defense with respect to anything emanating from Seward & Kissel. SEC v. Cavanaugh, 2004 WL 1594818, at * 27 (S.D.N.Y. 2004).[9] Therefore, this evidence should be precluded.

2. Schulte Roth & Zabel

As noted above, two attorneys from Schulte Roth & Zabel appear on Respondents October 25, 2016 Attorney List. Respondents have not listed either of those attorneys on their Amended Witness list, yet documents from those law firms appear on Respondents' Exhibit List. (Weinstock Decl. ¶ 13.) As Respondents apparently have no plans to call those witnesses, evidence or argument about what they told Respondents should be precluded as unreliable hearsay. In re Abbondante, 2006 SEC LEXIS 23, at *32, n. 50 (S.E.C. Jan. 6, 2006) (finding the "factors to consider [in ruling on hearsay to] include the possible bias of the declarant, the type of hearsay at issue, whether the statements are signed and sworn to rather than anonymous, oral or unsworn, whether the statements are contradicted by direct testimony, whether the declarant was available to testify, and whether the hearsay is corroborated").

B. Witnesses Not on Respondent's October 25, 2016 Attorney List

In addition, Respondents attempted to supplement their advice of counsel defense at the eleventh hour with the addition of witnesses on their witness list that Respondents failed to identify

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[9] In addition, the Division has not been afforded access to Pront's internal documents regarding the information he gave to Cooney. (Weinstock Decl. ¶ 12, Ex. J (Seward & Kissel privilege log).) Consequently, the Division is left without the ability to conduct a meaningful cross-examination of Lathen or the attorney. See In re Blizzard, 2002 WL 662783, at * 5 (Apr. 23, 2002) (in denying attorney-witness' work product claim over interview notes, the Commission held: "Without access to the Documents, Blizzard and the law judge will have limited means of verifying that [the attorney's] current recollection of the [facts] conforms with his contemporaneous notes.").

in the disclosures required by the Court's October 18, 2016 Order. Such an attempt should be precluded.

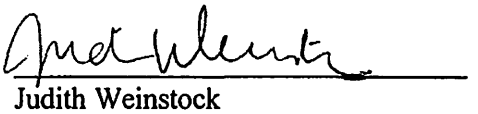
The following attorneys, who do not appear on Respondents' October 25, 2016 list, are now included on Respondents' Amended Witness List: Jason Neroulias, David Robbins, and Paul Sarkozi. (Ex. K (Respondents' Amended Witness List at 9, 10).) Thus, either Respondents are attempting to supplement their court-ordered attorney list with attorneys who should have been identified at the end of October, or (as is more likely) Respondents just seek to pad the parade of attorneys in aid of their "lawyer in the room defense." Because none of these lawyers provided Respondents with any advice on the "'structure and structuring of" the joint tenancies at issue in this case," (October 18, 2016 Order at 4-5) as Respondents admitted when they excluded them from their October 25, 2016 disclosures, and because none provided Respondents any advice on Respondents' disclosure obligations (Weinstock Decl. ¶ 5), their testimony is irrelevant. Therefore, no evidence regarding these lawyers should be permitted.

CONCLUSION

For the foregoing reasons, the Division respectfully requests that the Court grant its Motion *In Limine* to preclude Respondents from offering irrelevant evidence and argument regarding reliance on advice of counsel, or, in the alternative, to preclude Respondents from offering (A) evidence of uncorroborated attorney advice and (B) evidence of advice from attorneys not on Respondents' October 25, 2016 list of attorneys.

Dated: January 11, 2017
New York, New York

DIVISION OF ENFORCEMENT



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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 Irrelevant Evidence and Argument Regarding Reliance on Advice of Counsel, or, in the Alternative, to Preclude Respondents from Offering Evidence of Uncorroborated Attorney Advice and Evidence of Advice From Attorneys Not on Respondents' October 25, 2016 List of Attorneys, (2) January 11, 2017 Declaration of Judith Weinstock in Support of the Commission's Motion *In Limine*, on this 11th day of January 2017, on the below parties by the means indicated:

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