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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.

MEMORANDUM OF LAW IN SUPPORT OF THE DIVISION OF ENFORCEMENT'S MOTION *IN LIMINE* TO PRECLUDE CERTAIN EVIDENCE AND TESTIMONY

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January 11, 2017

The Division of Enforcement ("Division") respectfully submits this memorandum of law in support of its motion *in limine* to preclude Respondents from offering irrelevant and unreliable testimony and evidence, to preclude lay witness testimony regarding the legality of Respondents' structure. and to preclude testimony from witnesses not on Respondents' witness list.

PRELIMINARY STATEMENT

Respondents' exhibit list has over 1800 entries—over two times the length of the list proffered by the Division. Even a cursory review of their list demonstrates Respondents' approach to the submission of evidence: they have robotically searched for the names of people across their database and then dumped the results onto their list. The result is a list that is intended to overwhelm the Division, but more, a listing of scores of exhibits that are irrelevant, cumulative, unreliable hearsay, or without a witness to properly lay the foundation to admissibility. Respondents' supplemental exhibit lists appear to add, wholesale, document productions made in response to the Division's November 19, 2016 subpoenas to Respondents' law firms.

The claims here center on two issues. First, whether Respondents engaged in a fraudulent scheme to redeem bonds at par under their survivor's option feature by making material false statements and omissions regarding the ownership of those bonds to the bonds' issuers. Thus, to resolve that issue, the Court must decide: (1) whether the Respondents made misrepresentations and omissions of facts to issuers, (2) whether those misrepresentations and omissions were material, (3) whether they were made knowingly, recklessly, or negligently. Second, whether Eden Arc Capital Management ("EACM"), aided and abetted by Donald J. Lathen, Jr., custodied client assets without putting those assets in the name of the client, in violation of the "Custody Rule," 15 U.S.C. §80b-6(4); 17 C.F.R. § 275.206(4)-2. The Custody Rule is a strict liability offense.

Respondents, however, seek to obscure these straightforward issues by seeking to introduce evidence and testimony that is irrelevant as a matter of law to their liability. Thus, for example, Lathen's disclosures to and communications with investors and regulators are irrelevant here—the disclosure issue is whether adequate information was disclosed to issuers. not investors or regulators.[1] In addition, hundreds of Respondents proposed exhibits contain unreliable hearsay for which no exception exists and should be precluded from trial. Accordingly, the Division seeks to preclude certain items on Respondents exhibit list as irrelevant to the issues set forth above and as unreliable hearsay because Respondents are offering out of court statements for the truth of the matter asserted. Specifically, the Division seeks to:

(1) Preclude evidence of communications between Respondents and investors in the Fund ("Investor Communications") as irrelevant and hearsay;

(2) Preclude evidence of unrelated legal cases and investigations ("Unrelated Legal Matters") as irrelevant and hearsay;

(3) Preclude evidence of communications between Respondents and regulators, including the Securities and Exchange Commission (the "Commission") ("Regulator Communications") as irrelevant and hearsay; and

(4) Preclude evidence of communications between Respondents and Participants, hospices, and social workers ("Hospice Communications") as irrelevant and hearsay;

(5) Preclude expert testimony of lay witnesses; and

(6) Preclude testimony of witnesses not on Respondents' Amended Witness List.

ARGUMENT

I. Evidence of Investor Communications Should Be Precluded

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

[1] The Division reserves its right to introduce evidence of conversations between Respondents and investors and regulators to the extent they are admissions.

fraud. It is well-accepted that evidence is relevant only if makes a consequential fact more or less probably; irrelevant evidence is not admissible. Fed. Rule Ev. 401, 402.

Despite that, Respondents seek to use more than 500 emails—over one-quarter of Respondents' Exhibit List—that are between Lathen and three specific investors in the Fund.[2] It appears Respondents conducted a search for these individuals' names and created entries for each of the communications, regardless of how trivial. Numerous iterations of the same email chains appear, and many of the documents are repetitive and cumulative. For example, Respondents produced 16 iterations (including multiple duplicates) of one July 26, 2013 email chain between Lathen and Larry Newman in which the two planned a meeting, and appear to have met. (Exs. A-P.)[3] Dozens deal with irrelevant and mundane matters such as scheduling phone calls or out of office responses. (Ex. Q.) Respondents appear to intend to offer these communications with selected investors in an attempt to show disclosure to investors and returns to investors; however, here, in a case involving issuer disclosure, investor communications are irrelevant to liability and will be prejudicial to the Division. The Court should exclude the Investor Communications pursuant to Rule of Practice 320 ("Rule 320").

Moreover, these documents should be as excluded as they contain unreliable hearsay with little probative value. In considering whether to admit hearsay, the Commission considers its probative value and reliability, and the fairness of its use. *In re Abbondante*, 2006 SEC LEXIS 23, at *32, n. 50 (S.E.C. Jan. 6, 2006) (finding the "factors to consider include the possible bias of the declarant, the type of hearsay at issue, whether the statements are signed and sworn to rather than

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[2] Investors Jerry Newman, Larry Newman, and Gary Rosenbach are apparently important enough to present copious email evidence about, but not important enough to call as witnesses.

[3] References to "Ex." refer to exhibits to the January 11, 2017 Declaration of Lindsay S. Moilanen in Support of the Commission's Motion in Limine to Preclude Certain Evidence and Testimony ("Moilanen Decl.").

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"). As noted above, none of the individual investors appear on Respondents' Amended Witness List (Ex. R), undercutting how probative the communications are and decreasing reliability, as Respondents have not shown the witnesses are unavailable. The Court should preclude Investor Communications both as irrelevant and as unreliable hearsay.[4]

In addition to attempting to offer exhibits (without testimony) from Messrs. Newman and Rosenbach, Respondents are also seeking to offer testimony from Neil Chelo, a prospective investor, and Robert Milius, an investor, related to disclosures made by Respondents.[5] For the above reasons, the testimony of these two witnesses should be precluded on the grounds of irrelevance. Similarly, Lathen should be precluded from testifying about his "[c]ommunications with . . . investors and prospective investors in Eden Arc Capital Partners, LP." (Ex. R at 6).

II. Evidence of Regulator Communications Should Be Precluded

Respondents seek to admit numerous communications between themselves and regulators, including the Division and the Commission's exam staff. Specifically, Respondents seek to admit communications (1) from the Division regarding possible *Brady* material; (2) regarding Respondents' Wells Submissions to the Division; (3) with the Commission's exam staff; (4) with

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[4] Given the volume of Exhibits that are subject to this motion, the Moilanen Decl. attaches charts of each category of Respondents' proposed exhibits that the Division seeks to preclude as addressed in this motion *in limine*. Accordingly, the Division seeks to preclude the exhibits constituting Investor Communications listed in Ex. S as irrelevant and hearsay. Each chart contains the description of the Exhibits as provided by Respondents on their Exhibit List. If the Court does not find the descriptions of documents in this and the other exhibit charts to be sufficient, the Division will provide copies of the individual documents or categories of documents as directed by the Court.

[5] A topic of expected testimony for Chelo and Milius is "communications with Donald F. Lathen, Jr., Michael Robinson and/or others concerning EndCare, the Eden Arc entities and/or the investment strategy of Donald F. Lathen, Jr. and the Eden Arc entities." (Ex. R at pp. 2, 8.)

New York's Department of Financial Services; and (5) with the Consumer Financial Protection Bureau.[6] Respondents appear to seek to introduce these communications in an effort to show their alleged cooperation and in a backhanded effort to get additional briefing before the Court via their Wells Submission. As an initial matter, all of these communications are irrelevant to this proceeding—namely, none are probative of Respondents' potential fraudulent misrepresentations or omissions to issuers or potential Custody Rule violations; whether they cooperated with regulators is of no import. In addition, the Regulator Communications constitute unreliable hearsay, as they are not probative and no witnesses from the regulators have been called to testify regarding the communications or the *Brady* declaration. *In re Abbondante*, 2006 SEC LEXIS 23, at *32, n. 50. As such, these Regulator Communications should be excluded.

In addition, certain correspondence could implicate the Division's prosecutorial and charging decisions, which are irrelevant as a matter of law. See U.S. v. Stewart, 03 Cr. 717 (MGC), 2004 WL 113506, at *1 (S.D.N.Y. Jan. 26, 2004) (precluding evidence of the government's motive in prosecuting defendant as opposed to others who may have committed the same or similar crimes). Any evidence seeking to question those decisions would be highly prejudicial to the Division. In addition, Respondents seek to admit these out of court statements for their truth; these communications should be precluded not only as irrelevant, but as hearsay.

In addition to the exhibits, Respondents seek to offer testimony from multiple witnesses related to "[c]ommunications with the U.S. Securities and Exchange Commission and/or other governmental or regulatory agency concerning Donald F. Lathen, Michael Robinson, Kathleen Lathen, EndCare, the Eden Arc entities and/or the investment strategy of Donald F. Lathen, Jr. and

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[6] Specifically, the Division seeks to preclude the exhibits constituting Regulator Communications listed in Ex. T as irrelevant and hearsay.

the Eden Arc entities." (Ex. R, *passim.*)[7] For the reasons set forth above, any such testimony is irrelevant to the proceeding at hand, would be prejudicial to the Division, and would constitute unreliable hearsay, and should therefore be precluded.

III. Evidence of Unrelated Legal Matters Should Be Precluded

Respondents' exhibit list includes dozens of entries of case printouts and statutes, some related to trust and estate law, others related to tax law, and others yet related to other government investigations into other companies and individuals regarding survivor's options instruments similar to those in the instant matter. It appears Respondents seek to argue that they, independent of the numerous attorneys they consulted, conducted legal research that gave them comfort as to the legality of their scheme. However, Respondents are not attorneys, and these documents do not constitute legal advice for the purpose of their advice of counsel defense. Respondents should not be allowed to introduce these documents as evidence, as they are irrelevant, unduly prejudicial, and unreliable hearsay.[8]

A. Evidence Regarding Legal Cases Should Be Precluded

Documents reflecting printouts of statutes and cases are not relevant to Respondents' disclosure obligations or the Custody Rule. Should Respondents wish to utilize legal authority, the proper place to do so is as citations in the pre-hearing and/or post-hearing briefs to the Court. *Cf. Rance v. Florida Dep't of Educ.*, 2011 WL 1099262, at *8 n. 10 (S.D. FL. Mar. 22, 2011) (finding exhibits of the Code of Federal Regulations to be "not evidence, but legal authority").

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[7] This entry appears for all the proposed witnesses. Lathen has a comparable entry that reads "Communications with the U.S. Securities and Exchange Commission and/or any other governmental or regulatory agency." (Ex. R at p. 7.)

[8] Specifically, the Division seeks to preclude the exhibits constituting Unrelated Legal Matters listed in Ex. U as irrelevant and hearsay.

In addition, Respondents' Amended Witness List indicates that Lathen intends to testify regarding "[r]esearch concerning joint tenancies with rights of survivorship" and "[r]esearch concerning the terms and operations of bonds and CDs featuring a 'survivor's option,' including redemption." (Ex. R at p. 6.) To the extent this testimony covers Lathen's legal research, it should be precluded as it is not relevant to his advice of counsel defense.

B. Evidence Regarding the Staples Matter Should Be Precluded

The Commission's prosecutorial determinations, like those of any government agency, are entirely committed to its discretion. *See Heckler v. Chaney*, 470 U.S. 821, 831 (1985) ("an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion"); *Schellenbach v. SEC*, 989 F.2d 907, 912 (7th Cir. 1993). Thus, the Commission's enforcement decisions in other, unrelated cases are totally irrelevant here. *See United States v. Stewart*, 03 Cr. 717 (MGC), 2004 WL 113506, at *1 (S.D.N.Y. Jan. 26, 2004) (precluding evidence of the government's motive in prosecuting defendant as opposed to others who may have committed the same or similar crimes).

Respondents' exhibit list contains documents related to an investigation into activities by a father and son both named Benjamin Staples ("Staples Matter"), including court documents and communications between Respondents and the attorney for Messrs. Staples. Similar to Respondents, the Staples engaged in the purchase and redemption of bonds with survivor's options. However, that is where the similarities end; this matter is factually distinct from the Staples Matter, and, therefore, not probative here. In addition, each of the proffered exhibits is inadmissible hearsay offered for the truth: that the events and criticisms of the government described therein are accurate.[9] The Division, therefore, cannot meet this evidence, or overcome

[9] The Staples documents include Ex. 19, a memo from an FBI agent in which he made prosecutorial recommendations regarding the Staples investigation. (Ex. V.) This document is

the prejudice it would cause, which is intended to put the Commission's prosecutorial program itself on trial. Accordingly, any evidence related to the Staples Matter, including any testimony by Lathen on the topic,[10] should be precluded.

IV. Evidence of Hospice Communications Should Be Precluded

Respondents seek to admit irrelevant exhibits and testimony related to communications with participants' families, hospices, and social workers. In terms of exhibits, Respondents seek to admit as Respondents' Exhibit 869 an email communication between Lathen and Dennisse Alamo, the daughter of the one of the terminally ill participants with whom Lathen entered into a Participation Agreement. (Ex. X.) Respondents apparently seek to admit Lathen's out of court statements that he encouraged Ms. Alamo to be open with the Commission in order to bolster his credibility. In addition to this email being irrelevant, Lathen's out of court statements are textbook hearsay, especially considering the bias of the declarant. Exhibit 869 should be precluded.

Respondents' Amended Witness List indicates that Respondents seek to offer (1) testimony from Ms. Alamo related to "[c]ommunications with hospices and social workers concerning Donald F. Lathen, Jr., Michael Robinson, Kathleen Lathen, EndCare and/or the Eden Arc entities" (Ex. R at pp. 1, 2), and (2) testimony from Michael Robinson, Kathleen Lathen, and Lathen related to "[c]ommunications with . . . hospices, hospice employees, social workers . . ." (*Id.* at pp. 6, 7, 9).

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particularly problematic as it contains two levels of hearsay which makes its statements that much more unreliable: (1) out of court statements by the agent, and (2) summaries of statements made by the other agencies. This exhibit creates the improper impression that the statements contained therein are true, while denying the Division the ability to cross-examine either the authors or the quoted parties. To the extent Respondents seek to admit this memo but for its impact on Respondents, that is improper. Respondents sent this memo to their attorneys, but did not seek, or receive, legal advice from the attorneys related to Respondents' disclosure obligations in light of this memo. (Ex. W.)

[10] Respondents' Amended Witness List indicates that Lathen intends to testify on "[r]esearch concerning joint tenancies with rights of survivorship" and "[r]esearch concerning the terms and operations of bonds . . . featuring a 'survivor's option,' including redemption." (Ex. R at p. 6.)

These communications involving hospices and social care workers are not probative of any issues in this case and constitute unreliable textbook hearsay; such testimony should be precluded.

V. Lay Witness Testimony on Legality of Respondents' Structure Should be Precluded

Respondents have not submitted any expert witness statement pursuant to Rule 222 of the Rules of Practice (providing that "[e]ach party who intends to call an expert witness shall submit . . . a statement of the expert's qualifications, a listing of other proceedings in which the expert has given expert testimony, and a list of publications authored or co-authored by the expert."). Yet Respondents seek to offer testimony from 26 of their 30 witnesses listed concerning witnesses' purported "understanding of the investment strategy of Donald F. Lathen, Jr., and the Eden Arc entities." (Ex. R, *passim.*) And, the summary of expected testimony for all witnesses includes the topic: "[r]esponse to any issues or testimony presented by the U.S. Securities and Exchange Commission during the course of its case-in-chief." (*Id.*) Because none of Respondents' witnesses have been submitted as an expert, none should be permitted to testify in this capacity or offer testimony regarding the legality of Respondents' business structure or investment strategy. To the extent Respondents intend to offer, under these broad topic headings, the testimony of these lay witnesses as expert opinion testimony, it should be precluded. *See U.S. v. Cruz*, 981 F.2d 659, 664 (2d. Cir. 1992) (holding that expert testimony could not be used "solely to bolster the credibility of the government's fact witnesses by mirroring their version of events"). Respondents cannot "evade the expert witness disclosure requirements [] by simply calling an expert witness in the guise of a layperson." Adv. Comm.Notes to 2000 Amd. to Fed. R. Evid. 701.

In addition, Respondents seek to offer testimony from Lathen on the "[i]mpact on issuers of bonds and CDs featuring a 'survivor's option' arising from the investment strategy of Donald F. Lathen, Jr. and the Eden Arc entities." (Ex. R at p. 7.) As Respondents have not proffered Lathen

as an expert under Rule 222(b), to the extent that Lathen intends to offer a hypothesis as to interest rates and the likely impact on issuers' funding costs due, his testimony should be excluded.

VI. Witnesses Not on Respondents' Amended Witness List Should Be Precluded

On December 12, 2016, Respondents filed a witness list with the Court that failed to comport with Rule 222(a)(4)'s requirements. (Ex. Y.) Thirty-five witnesses were named on the list. On December 15, 2016, Respondents filed Respondents' Amended Witness List, listing 30 names. (Ex. R.) The following witnesses were not included on Respondents' Amended Witness List: Jeff Belisle, Mellony Bell, Adam Burton, Jack Erkilla, Faris Naber, and William Reynolds. Accordingly, Respondents should be precluded from offering those six individuals as witnesses.

CONCLUSION

For the foregoing reasons, the Division respectfully requests that the Court grant its motion *in limine* seeking to preclude Respondents from offering irrelevant and unreliable testimony and evidence, to preclude lay witness testimony regarding the legality of Respondents' structure, and to preclude testimony from witnesses not on Respondents' witness list.

Dated: January 11, 2017
New York, New York

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UNITED STATES OF AMERICA
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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 Certain Evidence and Testimony, dated January 11, 2017, (2) the January 11, 2017 Declaration of Lindsay S. Moilanen in Support of the Commission's Motion *in Limine* to Preclude Certain Evidence and Testimony, and exhibits thereto, on this 11th day of January 2017, on the below parties by the means indicated:

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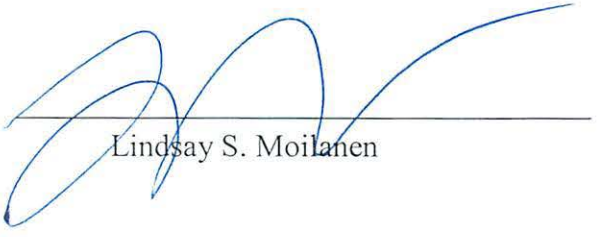

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