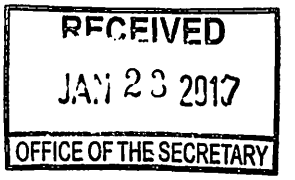
UNITED STATES OF AMERICA
Before the
U.S. SECURITIES AND EXCHANGE COMMISSION



ADMINISTRATIVE PROCEEDING
File No. 3-17387

In the Matter of

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

Respondents.

THE EDEN ARC RESPONDENTS' MEMORANDUM OF LAW IN OPPOSITION TO THE DIVISION OF ENFORCEMENT'S MOTION *IN LIMINE* TO PRECLUDE EVIDENCE REGARDING ADVICE OF COUNSEL

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Respondents Donald F. Lathen, Jr., Eden Arc Capital Management, LLC and Eden Arc Capital Advisors, LLC (the "Eden Arc Respondents"), by and through their undersigned counsel, respectfully submit this memorandum of law in opposition to the motion of the Division of Enforcement (the "Division") to preclude, *inter alia*, evidence of Respondents' advice of counsel defense.

PRELIMINARY STATEMENT

The Division's fifth motion to preclude Respondents' advice of counsel defense is as meritless as its first four such motions —all of which this Court summarily dismissed. Nothing has changed in the interim and the Division should be collaterally estopped from filing – and directed by this Court to stop filing – the same motion yet again. The Division is abusing the administrative proceeding process.

This Court has repeatedly found that Respondents have the right to present evidence of the legal counsel they sought and received. The Division's subjective opinion regarding the sufficiency of that evidence is completely irrelevant and, in any event, an issue for this Court to determine at trial. Aside from being an affirmative defense, the evidence of advice of counsel that Respondents intend to present at trial is also probative of Mr. Lathen's good faith and is factually and contextually relevant to the critical issue of scienter – i.e. Mr. Lathen's state of mind. No basis exists for excluding it.

Instead of accepting this Court's repeated rejections of their challenges to that defense, the Division now resorts to repackaging the same arguments and grossly distorts the facts in doing so. For example, the Division feigns some breakthrough discovery that Respondents did not receive a formal written opinion about the validity of the joint tenancies at issue, or advice about issuer disclosure requirements, separate and apart from the advice about structuring and implementing the investment strategy. But Respondents long ago acknowledged

as much, and this Court nevertheless held that counsel regarding the structure and implementation of Respondents' investment strategy was still relevant and admissible. Nothing has changed, beyond the Division's new spin on the same facts.

The indisputable fact is that Respondents, in good faith, sought, received and acted upon the advice of numerous attorneys in creating their investment strategies. Respondents sought and obtained the counsel of experienced and well-respected securities practitioners. These attorneys fully understood the investment strategy, and drafted or reviewed the operative documents upon which it was based. Respondents justifiably believed that these attorneys: a) would have informed them if they believed the strategy was unlawful and b) would not have assisted Respondents in implementing the investment strategy if they believed Respondents were at risk of violating federal securities laws. The fact that none of the attorneys ever told Mr. Lathen that this investment strategy was unlawful is clearly probative on the issue of scienter.

Respondents' attorneys also informed them of issues that they believed could result in the investment strategy becoming unlawful if not handled in particular manner - such as the disclosures made to investors and participants. Respondents relied upon attorneys to identify these issues and to advise Respondents regarding how to handle them. The fact that Respondents' attorneys *did not* tell them that voluntary and extra disclosure to issuers were needed to prevent this strategy from becoming a fraud, is a crucial fact which the Division seems to believe they are entitled to suppress.

The Division's latest endeavor attempts to paint a picture that Respondents are "attempting to usher a parade of lawyers into the courtroom" to create some false semblance of legal counsel. The Division blatantly mischaracterizes Respondents' defense. The Division is well aware that Respondents named the attorneys on their list (and amended list) in good faith, for the sake of full disclosure—because the Division and the Court are entitled to know about ***all***

of the attorneys from whom Respondents sought legal counsel. Given the Division's abusive motion practice, we have no doubt that it would have made the same false cry if Respondents had not provided this information. Either way, the Division's accusations are aimed at suppressing patently relevant evidence of Respondents' good faith. The Court should once again reject the Division's repetitive and meritless arguments. And, in doing so, we respectfully submit that this Court should preclude the Division from filing any further motion addressed to the Respondents' advice of counsel and good faith defenses.

ARGUMENT

I. THIS COURT HAS ALREADY REJECTED THE DIVISION'S MOTION AND HELD THAT RESPONDENTS HAVE A RIGHT TO PRESENT EVIDENCE OF ADVICE OF COUNSEL

As stated above, the Division's arguments for precluding Respondents' advice of counsel defense are no different from the arguments they have now lost four times. Specifically, the Division reargues that Respondents should be precluded from presenting such evidence because Respondents did not receive counsel regarding requirements for disclosure to issuers and did not obtain a formal legal opinion affirmatively vouching for the validity of the joint tenancies. This Court already rejected these arguments as "inconsistent with Commission precedent." *See* Order on Motion to Preclude Advice-of-Counsel Defense, dated October 18, 2016, Protass Aff. Ex. 1. Moreover, any argument that Respondents should be precluded from relying on an advice of counsel defense because they did not receive advice concerning disclosure to issuers misconstrues the meaning of the advice provided by Respondents' attorneys and arrogantly assumes that disclosure to issuers is the only issue in this case. The Division should be precluded from rehashing the same argument and hoping for a different result. *See id.* ("I reject the Division's argument that Respondents' defense is irrelevant and should be disallowed.").

II. THE DIVISION'S MOTION BLATENTLY MISCONSTRUES THE FACTS AND FAILS TO ADDRESS THE SUBSTANCE OF THE LEGAL ADVICE RESPONDENTS RECEIVED

The Division's motion also grossly mischaracterizes the advice Respondents received in an attempt to downplay its relevance and stonewall Respondents' defense. For example, the Division cherry-picks one line from a memorandum created by the law firm Hinckley Allen, which contains a high-level generic statement about the importance of not *misrepresenting* the relationship between Participants and "Endcare" (the name of the program on the hospice end), which statement emphasized the importance of complete and adequate disclosure about the purpose and nature of the "Endcare" program. However, the Division offers this statement completely out of context and ignores the sum and substance of Hinckley Allen's legal advice to Respondents. The memorandum at issue clearly did *not* contemplate the need to make any affirmative disclosures to issuers—in fact, it did not address issuers at all, and discussed only disclosures to Participants and brokers. It therefore offers no support for the Division's argument whatsoever.

In reality, Hinckley Allen created the memorandum for Respondents to share with investors so that Respondents could provide comfort to their investors that their investment strategy was above-board and distinguishable from that of an individual using a similar strategy who had recently been indicted for providing participants with improper disclosure and forging signatures on documents. Not only did Hinckley Allen have complete knowledge of Respondents' investment strategy, but they also proactively assisted Respondents with enhancing their business structure and supported their continued operation. At no time did Hinckley Allen suggest that Respondents had some affirmative obligation to provide issuers with additional information beyond that which issuers themselves requested. Indeed, Hinckley Allen believed that Respondents had a right to sue issuers who did not allow Mr. Lathen to redeem bonds. This

is just one example of the Division's continued, gross mischaracterization of Respondents' defense and the Division's utter disregard for the facts.

Indeed, the Division's motion is devoid of any of the relevant facts with respect to any of the legal advice sought and obtained by Respondents. Though we see no need to go through lawyer-by-lawyer and lay out all of the facts in this memorandum of law, we address them briefly to demonstrate the deficiencies in the Division's representations.

Katten Muchin was the first law firm that Respondents retained in connection with this investment strategy. Mr. Lathen sought advice from Katten before opening his first account (with his grandmother) and before Eden Arc Capital Partners, LP (known herein as the "Fund") was formed. Lead by attorney Rob Grundstein, Katten assisted Respondents with their operations, drafted agreements, and advised Mr. Lathen that the joint tenancies were legally defensible. The law firm Gersten Savage, like all the other firms, received full disclosure about Respondents' business and recognized the critical importance of maintaining valid joint tenancies. They created the Fund and the various legal entities needed to implement the investment strategy. They drafted all the contractual agreements between the various entities and individuals involved in the strategy and highlighted areas in which full transparency and disclosure were required.

Several other attorneys, including Kevin Galbraith and David Robbins, were retained by Respondents, at different times, to deal with disputes with issuers and clearing agents. Both defended Respondents' investment strategy, including the validity of the joint tenancies. Both believed and argued that issuers were legally obligated to redeem Respondents' bonds—a far cry from any suggestion that Respondents defrauded issuers.

Bruce Hood, an attorney at Wiggin & Dana, did not opine on the validity of the joint tenancies, but offered Mr. Lathen tax advice with full knowledge of his investment strategy

and objectives. This advice speaks to counsel about the structure and structuring of Respondents' investment strategy.

Several other firms were consulted, but were not ultimately retained (primarily due to conflict of interest issues), about various matters including writing a legal opinion vouching for the validity of the joint tenancies, as well suing issuers who refused to redeem bonds. One firm contemplated writing such a legal opinion, but ultimately decided not to because of the potential for future conflicts with other clients. It also advised Respondents that they had a cognizable legal claim against issuers like Goldman Sachs, who refused to honor redemption requests, and contemplated taking the matter on contingency to sue Goldman.

All of the foregoing goes not only to Respondents' advice of counsel defense, but also to Mr. Lathen's good faith.

Respondents offer this evidence for the sake of full disclosure as ordered by the Court. The amendments in Respondents' attorney list were made per Judge Grimes' order, in order to ensure that all attorneys who were consulted were disclosed, irrespective of whether or not they were retained. The Division's suggestion that Respondents are "attempting to usher a parade of lawyers into the courtroom" to support some false inference of good faith is nonsensical and contradicted by the indisputable facts of this case. Moving Mem.[1] at 2, 6. Respondents intend to call witnesses to describe the advice they received from the attorneys they consulted. Respondents have identified attorneys who never gave them advice because, in response the Division's motion, they were required to do so by Judge Grimes. If the Division tries to creating the inaccurate impression that Respondents only hired attorneys who would tell

[1] "Moving Mem." refers to the Division of Enforcement's Memorandum of Law in Support of Its Motion *In Limine* Regarding Respondents' Advice of Counsel Defense, dated January 11, 2017.

them what they want to hear, then Respondents will call the attorneys they consulted but did not retain, to counter that misleading narrative.

The advice Respondents received from counsel goes directly to the issue of Mr. Lathen's good faith and negates the Division's meritless allegations of intentional fraud. The fact that no attorney with whom he shared his investment strategy, and upon whose advise he relied, even suggested that it was fraudulent and might violate the federal securities laws is highly relevant to Respondents' defenses and potentially dispositive of the Division's claims in the OIP. No basis whatsoever exists for precluding it.

III. THE DIVISION'S COMPLAINTS ABOUT SPECIFIC EVIDENCE ARE WITHOUT MERIT

The second part of the Division's motion seeks to preclude specific evidence that they describe as "uncorroborated" attorney advice. However, this evidence does not constitute advice at all, nor do Respondents intend to proffer it as such. Instead, as the Division well knows, these attorneys were on Respondents' attorney list because they sought advice from them, and not because they ultimately retained the firm or received any substantive advice. Rather, this evidence will be offered at trial to support Mr. Lathen's good faith and negate the Division's meritless allegations of any intent to defraud.

Peter Pront, an attorney at a well-regarded law firm that specializes in corporate finance and investment advisors, was approached by an investor in Eden Arc about writing a legal opinion on the validity of the joint tenancies. Mr. Pront is not on Respondents' witness list because Respondents never interacted directly with him. Respondents were provided with a copy of a voice mail message that Mr. Pront left for the investor in which he opined on the validity of the joint tenancies. The investor will testify about the information he provided to Mr.

Pront about the strategy. Respondents intend to offer Mr. Pront's voicemail message, not as evidence of the validity of their investment strategy, but solely for the effect it had on Mr. Lathen's mind. Had Mr. Pront's message opined that the investment strategy was fraudulent, the Court can be assured that it would be Exhibit 1 on the Division list and that they would play it in their opening statement as evidence of Mr. Lathen's scienter. However, since Mr. Pront's opinion was that the strategy appeared to be a good one, the Division now seeks to suppress it.

There is no basis to suppress the voice mail. Mr. Lathen will testify that he listened to it and about the effect it had on his state of mind. The Division can cross-examine Mr. Lathen on his testimony and it can cross-examine the investor on the disclosures made to Mr. Pront about Respondents' strategy. Furthermore, the Division has known about this voicemail from the outset and, in fact, interviewed Mr. Pront themselves. If they wish, the Division was perfectly capable of requiring his testimony via subpoena but, in assembling their witness list, chose not to. The Division's concerns of a purported lack of corroboration are completely overblown and of their own making.

The Division's attempt to preclude "evidence or argument about what [Schulte Roth] told Respondents" is similarly misguided. Respondents and an investor reached out to Schulte Roth and the e-mails that the Division subpoenaed from that firm demonstrate the totality of the disclosures and interactions. No further corroboration is needed. Nor is hearsay an issue, because the truth or falsity of any of these statements is not at issue and is not relevant.

Finally, the Division makes a last-ditch effort to preclude evidence regarding several of the other law firms with whom Respondents consulted on the basis that these attorneys were not on Respondents' original list of attorneys upon whose advice it relied. As explained above, the Respondents originally only identified attorneys from firms they ultimately retained who provided advice on the structure and structuring of their investment strategy. In response to

the Division's motion to preclude Respondents' advice of counsel defense, Judge Grimes directed Respondents to more broadly identify attorneys with whom Respondents spoke about the strategy even if their advice extended to other topics or the attorneys were not ultimately retained. These attorneys are now on Respondents' witness list for several pertinent reasons, including to demonstrate Respondents' good faith and to negate any bogus claim by the Division that Respondents simply did not retain attorneys whose advice they did not like. No basis therefore exists for excluding this evidence either.

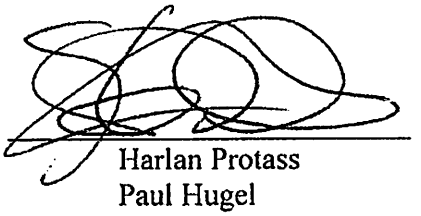
CONCLUSION

Accordingly and for all of the foregoing reasons, we respectfully submit that this Court should: (1) enter an order denying the Division's motion *in limine* to preclude Respondents' advice of counsel defense, and (2) grant Respondents such other and further relief as this Court deems just and appropriate.

Dated: New York, NY
January 18, 2017

Respectfully submitted,

CLAYMAN & ROSENBERG LLP

By: 

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that on January 18, 2017 I caused a true and correct copy of the attached, THE EDEN ARC RESPONDENTS' MEMORANDUM OF LAW IN OPPOSITION TO THE DIVISION OF ENFORCEMENT'S MOTION *IN LIMINE* TO PRECLUDE EVIDENCE REGARDING ADVICE OF COUNSEL, to be served upon the parties listed below via UPS Overnight Mail:

Honorable Jason S. Patil
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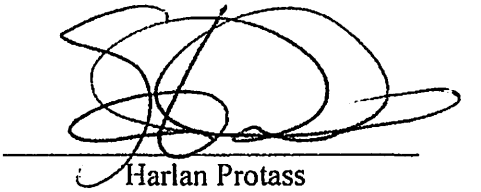

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