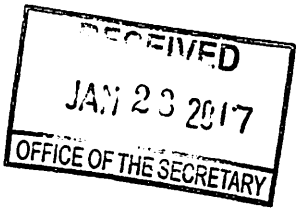
UNITED STATES OF AMERICA
Before the
U.S. SECURITIES AND EXCHANGE COMMISSION



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 OR TESTIMONY ON ADVICE RECEIVED FROM KEVIN GALBRAITH

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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 evidence and testimony of the advice of Kevin Galbraith.

PRELIMINARY STATEMENT

The Division has now made a second motion to preclude the advice of Kevin Galbraith that is as frivolous as the same motion it made a mere few weeks ago. Nothing has changed in the interim, and this Court therefore should deny the Division's motion.

The Division also seemingly has no regard for just how inappropriate their motion is under the circumstances. They have alleged that Respondents sought to defraud bond issuers and have subpoenaed ***ten*** separate representatives of these issuers to testify about their subjective "interpretation of the terms and eligibility requirements for redemption" of survivor's option bonds. Respondents intend to offer evidence and testimony from Respondents' attorney of several years, Kevin Galbraith, who represented Respondents predominantly with respect to post-redemption request disputes with these issuers. Indeed, Mr. Galbraith represents Respondents in a significant number of the e-mails that both the Division and Respondents intend to offer as evidence at the hearing. Yet by some stretch of the imagination, the Division argues that this Court should preclude Mr. Galbraith's testimony – which would effectively permit the Division's biased witnesses to go unrebutted by counsel for Respondents on an important legal issue in this case.

Furthermore, the Division's arguments consist solely of exaggerated statements and hyperbolic complaints—including unsubstantiated conjecture about the contents of withheld documents and the erroneous assertion that the Division has some court-ordered right to

interview counsel prior to the hearing. And lastly, the Division makes yet another unsubstantiated accusation of "gamesmanship" that Respondents have heretofore let slide. However, this has gone on long enough. If it is not clear to the Court by now, the Division's wanton motion practice – which evidences true gamesmanship – evinces the shameless strategy of objecting to relevant evidence based on blatant mischaracterizations of the facts and procedural history of the case.

ARGUMENT

I.

RESPONDENTS HAVE NOT VIOLATED ANY COURT ORDER

The Division recently made a motion arguing selective waiver and seeking to preclude reliance on legal advice provided by Mr. Galbraith. They now make the same argument, but throw in the added (inaccurate) claim that Respondents violated two court orders. The Court can swiftly reject this argument because it is clear from the face and context of those Orders that the Division is misconstruing them. Indeed, Respondents have made good faith efforts to comply with all court Orders.

Specifically, the Division points to the Court's October 18, 2016 Order denying their first motion to preclude Respondents' advice of counsel defense. *See* Protass Aff. Ex. 1. The sum and substance of the Division's motion was their argument that *any* counsel Respondents received beyond disclosure obligations at redemption was irrelevant. This Court disagreed and upheld Respondents' right to assert the advice of counsel defense with respect to any and all advice they received regarding the structure and structuring of Respondents' investment strategy, including the joint tenancies. *Id.* In response to that Order, Respondents waived, and turned over to the Division, any and all attorney-client communications regarding

the structure and structuring of their investment strategy, including the joint tenancies, as required.

From this context, it is plain to see that the Court's October 18 order pertained only to advice about the joint tenancies and did not encompass any and all attorney-client communications about other topics. Indeed, the Division's reading of the Court's Order would require an extremely tenuous and inexplicably broad interpretation of the phrase "communication with that attorney about joint tenancies." In this context, the Division has no reasonable argument that Respondents failed to comply with the Court's Order because their unreliable conjecture that Respondents are intentionally withholding relevant documents has no basis in reality. The Division's motion assembles a list of documents from a March 2016 privilege log and whimsically speculates as to the documents' contents. This is not a reasonable basis for an accusation of violating court orders, much less a motion to preclude evidence of advice of counsel.

As we have repeatedly made clear, Respondents have not intentionally withheld any documents containing advice regarding the structure and structuring of Respondents' investment strategy or the validity of the joint tenancies underlying it. Anything that the Respondents did not produce was outside the scope of the Court's Order and outside of the scope of Respondents' waiver, and any isolated, immaterial document missed was immediately turned over to the Division. After Respondents asserted the defense and produced the court-ordered documents, Mr. Galbraith turned over all of his communications with issuers, and Respondents willingly permitted Mr. Galbraith to produce attorney-client communications evincing Respondents' understanding of the legal disputes with issuers, beyond communications regarding the joint tenancies, as part of Respondents' good faith defense.

Under these circumstances, the Division's suggestion that they are somehow in the dark about the counsel Respondents received from Mr. Galbraith is wholly unsubstantiated. Mr. Galbraith turned over more than 600 e-mails totaling approximately 800 documents that clearly reflect his counsel, and Respondents separately produced any and all communications they received pertaining to advice about the joint tenancies. There has been no impropriety here. The same applies to the Court's most recent Order. As the Court's *in camera* review process will confirm, Respondents have not withheld any documents involving communications about joint tenancies. Mr. Galbraith has served as counsel to Respondents for several years, and both parties previously searched a significant number of documents for responsiveness and waiver.[1] The withheld documents are either non-responsive to any prior request and/or outside the scope of Respondents' waiver. The Division is neither entitled to these documents, nor prejudiced by their lack of access to them, because the Division has long-held all of the communications regarding joint tenancies, all actual correspondence with issuers, and any discussions with Respondents evincing their understanding of the legal basis for their contractual disputes. Respondents could have clarified this for the Division in a less contentious manner, if the Division would have communicated with Respondents in good faith.

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[1] Respondents' delay in completing the re-search of our files pursuant to the recent Court order was due to the manner in which the files were stored and the different sources of production. When Respondents first produced documents to the Division (during the investigative stage of the instant matter), Respondents had not engaged Driven to store and organize documents. They did so to accommodate the Division's massive investigative file. Thereafter, Respondents produced documents pursuant to advice of counsel and then Mr. Galbraith separately made a second production of his files. When the Court ordered Respondents to conduct another search for documents, our Driven platform did not contain any means of identifying which documents had never before been produced by either party. This required Respondents to conduct a new, labor-intensive comparison of documents, without the aid of technology, to identify documents not previously produced. These documents have now all been submitted for *in camera* review.

The Division also argues that Respondents violated the Court's Order "by refusing to make Galbraith available to the Division for an interview." Moving Mem.[2] at 7. But, as the Division no doubt knows, the Court's Order contains no such requirement. Indeed, the relevant portion of the Court's order merely authorizes the Division to inquire *at trial* of Respondents' attorneys about otherwise privileged communications that fall within the scope of Respondents' waiver. That permission to inquire *at trial* does not impose on Respondents any requirement to make the attorneys available for pre-hearing interviews. The Court was well aware of how to articulate such a requirement and could have, but did not, direct Respondents to make their attorneys available to the Division for interviews before trial. Indeed, the case law cited by the Court makes clear that its Order concerns only the relevant scope of the advice of counsel waiver and does not stand for any pre-hearing interview requirement. *See Glenmede Trust Co.*, 56 F.3d 476, 486 (3d Cir. 1995) (discussing the scope of waiver in an advice of counsel defense); *United States v. Jones*, 696 F.2d 1069, 1072 (4th Cir. 1982) (same); *Garfinkle v. Arcata Nat'l Corp.* 64 F.R.D. 688, 689 (S.D.N.Y. 1974) (same).

II.

THE DIVISION'S COMPLAINTS ABOUT MR. GALBRAITH ARE MISLEADING AND OTHERWISE IMMATERIAL

The Division's complaints about Mr. Galbraith's responsiveness to their subpoena are similarly overblown and otherwise immaterial. As we understand it, Mr. Galbraith's initial response to the Division's subpoena was based on his understanding as to the documents the Division had already received and his obligation in that context. Nevertheless, when the

[2] "Moving Mem." refers to the Division of Enforcement's Memorandum of Law in Support of Its Motion *in Limine* to Preclude the Advice of Kevin Galbraith, dated January 11, 2017.

Division corrected his understanding, Mr. Galbraith diligently searched his files and promptly produced more than 600 e-mails and 800 documents.

Contrary to the Division's assertions, Respondents were not privy to Mr. Galbraith's communications with the Division.[3] However, Respondents recently learned that the Division mischaracterizes the nature and frequency of their communications with Mr. Galbraith throughout the discovery process, in an apparent effort to depict him as uncooperative or lackadaisical in responding to their requests. In reality, there is abundant evidence of Mr. Galbraith's good faith efforts to communicate and cooperate with the Division. *See* Protass Aff. Ex. 2. Regardless, the Division has in no way been prejudiced by Mr. Galbraith's efforts during the discovery process.

III.

PRECLUSION OF EVIDENCE OF MR. GALBRAITH'S ADVICE IS UNWARRANTED AND WOULD BE UNFAIRLY PREJUDICIAL TO RESPONDENTS

Finally, as we stated above, preclusion of Mr. Galbraith's testimony is unwarranted under the circumstances and would unfairly prejudice Respondents. The Division has lined up issuer after issuer to opine regarding their interpretation of what amounts to contractual disputes over prospectus language and state joint tenancy law. Most of these issuers ultimately communicated with Mr. Galbraith as counsel for Respondents. It would be prejudicial

[3] Confusingly, the Division points to e-mails from Respondents to the Division during the investigation of this matter, noting that Mr. Galbraith is "blind copied" on a few of them. The mere fact that the Division was able to identify a "blind copy" in e-mails is concerning. However, their use of that information to imply the existence of some covert, inappropriate affiliation between Mr. Galbraith and Respondents' counsel is presumptuous, at best. In reality, Mr. Galbraith has been kept in the loop with respect to this investigation because he has been Respondents' counsel for many years and is currently still engaged to deal with pending civil matters. Simply put, the Division makes an inaccurate cognitive leap in concluding that Mr. Galbraith somehow represents Respondents in the instant matter just because he is blind copied on certain e-mails.

and unduly compromising to preclude evidence of Mr. Galbraith's counsel and his testimony regarding Respondents' good faith interactions with these issuers.

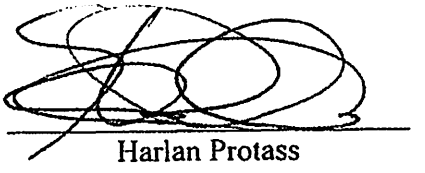
CONCLUSION

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 evidence or testimony regarding Mr. Galbraith's advice, 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 OR TESTIMONY ON ADVICE RECEIVED FROM KEVIN GALBRAITH, to be served upon the parties listed below via UPS Overnight Mail:

Honorable Jason S. Patil
Administrative Law Judge
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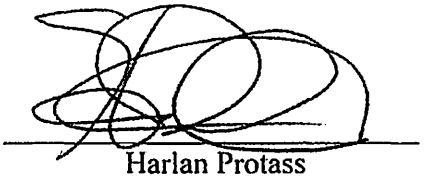

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