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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 REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF ITS MOTION TO PRECLUDE RESPONDENTS' ADVICE OF COUNSEL DEFENSE AND TO ISSUE SUBPOENAS

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October 6, 2016

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The Division of Enforcement ("Division") submits this reply memorandum of law in further support of its motion to preclude Respondents from asserting a defense of good-faith reliance on advice of counsel, dated September 26, 2016 ("Div. Br.").

PRELIMINARY STATEMENT

Through the course of a lengthy investigation, including multiple Wells submissions, focused on the central issue of whether Respondents properly disclosed the true and full ownership structure of the bonds they were redeeming, Respondents repeatedly avoided asserting an advice of counsel defense and the attendant waiver of privilege that would result. Their opposing brief suggests why: Counsel has now admitted that Respondents are not asserting that they sought legal advice concerning the sufficiency of their disclosures (Resp. Opp. Br. at 1-2), including whether they had to disclose the relevant contractual arrangements governing the ownership of the bonds (Resp. Opp. Br. at 4).[1] In brief, they do not have a legitimate advice of counsel defense. Their attempt to assert a makeshift defense fails for three reasons.

First, the category of advice they claim to rely on—"the structure, and structuring of, the Eden Arc Respondents' investment strategy"—is irrelevant. The pertinent question is whether Respondents informed counsel of all facts relevant to assessing the completeness and accuracy of the redemption requests—such as, for example, their redemption letters to the bond issuers and trustees stating, without more, that Lathen and the Participants where the "owners" of the bonds—and, then, based on those facts, received advice that the representations they made when submitting redemption requests were not false, and were not misleading because no material facts were

[1] All references to "Resp. Opp. Br." are to the Respondents' Memorandum of Law in Opposition to the Division of Enforcement's Motion to Preclude an Advice of Counsel Defense and Issue Subpoenas, dated October 3, 2016.

omitted. If they cannot establish that they received such advice in those circumstances, and relied on it in good faith, then they have no defense.

Second—in an implicit acknowledgement that they cannot meet the elements of the defense—Respondents argue that "even an 'incomplete' advice of counsel defense is still probative of good faith . . . ." (Id. at 6.) Of course, this is not the law. Respondents must either waive and disclose, or refrain from asserting the defense. Moreover, in trying to put forward some lesser form of legal advice that Respondents believe could demonstrate their lack of scienter, they are plainly cherry picking topics. For example, Respondents received legal advice from attorneys at Katten Muchin Rosenman LLP ("Katten") in April 2009 concerning "Survivors Option," but refuse to turn that over to the Division on the grounds that the advice was rendered prior to the time period for which they have decided to waive and, thus, was irrelevant to Respondents' "investment strategy." Of course, whatever advice Lathen received concerning survivor's options in 2009 would be relevant to his state of mind in structuring his Fund's "investment strategy" in later periods. Respondents should not be allowed to use the privilege as a sword and a shield, unilaterally determining which specific areas of advice the Division and the Court get to assess.

Third, even within the topics Respondents admit they have chosen to divulge, they have been highly selective in the application of their waiver. For example, they have refused to waive privilege with respect to advice (1) received from a host of firms, including Katten and Bleakley Platt & Schmidt, LLP; or (2) received concerning the preparation of their Forms ADV. Nonetheless, we know that these firms provided advice on subject matters within the scope of Respondents' waiver because they produced documents reflecting that advice, despite having stated they would not. But there are many additional documents from Katten and other such firms on their 52-page privilege log that have not been produced. Moreover, Respondents have

selectively produced a number of (but clearly not all) documents concerning advice they received about their Forms ADV and communications with the Commission.

The breadth of Respondents' selective waiver amply demonstrates what is going on here: They have (1) stated that they will not waive privilege as to communications with any of approximately 36 attorneys from whom Lathen acknowledges receiving advice; (2) blocked the Division's access to any advice that Lathen received about structuring his investment strategy prior to his establishment of his Fund; and (3) instructed even the five attorneys they have identified as having provided the advice they claim as relevant to withhold any work product concerning the relevant, and now non-privileged, advice. Moreover, and despite these efforts to block the Division's discovery, Respondents have selectively produced communications with certain of their other counsel—some of the 36 attorneys they consulted and as to whom they have not waived privilege—including work product created and advice provided during the pre-Fund time frame. These inconsistent positions, and selective waivers, make Respondents' gamesmanship plain.[2]

What Respondents appear to be attempting here is to assert at trial an advice of counsel defense as to exactly the disclosure they claim is not at issue, while blocking the Division from preparing to meet that defense. Thus, on the one hand they assure the Court that they did not seek, "receive[], or rel[y] on legal advice concerning whether Mr. Lathen was required to disclose his

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[2] In order to confuse the issue, Respondents also attempt to shift blame to the Division for its late production of a small number of documents. (Resp. Opp. Br. at 9.) As the Division explained to the Court and the Respondents, (1) all documents have now been produced, (2) the inadvertently-withheld documents, in any event, constituted approximately one-half of 1% of the entire production; and (3) the documents were mainly irrelevant cover letters and documents already within Respondents' possession. (See Division's Motion to Quash Respondents' Subpoena and Memorandum of Law in Support, Sept. 27, 2016, at 2-3.) Moreover, Respondents cannot be prejudiced as the Court has granted them an adjournment of 3.5 months longer than they requested. (See Order Revising Procedural Schedule and Hearing Date, Oct. 3, 2016, at 2.)

In any event, Respondents do not explain how the Division's inadvertent production does anything to cure their own purposeful refusal to produce documents plainly relevant to a defense as to which they have the burden.

'contractual regime' when redeeming survivor's option bonds . . . ." (Resp. Opp. Br. at 4.) On the other hand, however, Respondents state that they intend to assert the defense to show that "Mr. Lathen's representations to issuers of survivor's option bonds . . . were true and accurate." (Id. (emphasis added).) In other words, Respondents plan to argue they received advice concerning the precise disclosures to issuers they now claim they received no advice about and as to which they have blocked the Division from exploring. This should not be allowed.

Respondents also oppose the issuance of the Division's requested subpoenas (on four attorneys with respect to whom they have explicitly waived the privilege). However, Respondents have made no real effort to demonstrate either that the Division's requested subpoenas are "unreasonable, oppressive or unduly burdensome." 17 C.F.R. § 201.232(e)(2). The requested subpoenas—which seek documents going to precisely the waiver that Respondents themselves have chosen to assert—are plainly relevant. Stripped of its hyperbole, Respondents' entire opposition boils down to an argument that they, and they alone, get to define the parameters of their waiver and that the Division (and the Court) must simply trust—in the face of ample evidence to the contrary—that they are fulfilling their obligations to make a full and fair waiver. If this were the law, however, the waiver would be a meaningless exercise, allowing Respondents to assert whatever they want, secure in the knowledge that the facts underpinning their assertions cannot be exposed or tested at trial.

BACKGROUND[3]

I. Discussions Concerning the Scope of the Waiver

On September 26, 2016, Respondents responded to the Division's earlier request for clarification as to the scope of the waiver. (Janghorbani Decl., Ex. A (e-mail from Harlan Protass to Alexander Janghorbani, Sept. 26, 2016, at 1).)[4] In that e-mail, Respondents confirmed that they were not waiving privilege as "(1) to issues respecting the disclosure of the true and complete ownership structure of the investments, including the participant agreements, to the issuers or their agents; and (2) advice received concerning compliance with the federal securities laws." (See Ex. A at 2 (Division's e-mail requesting clarification on scope of waiver).) In response, Respondents wrote:

> you have again asked whether the Eden Arc Respondents are waiving privilege as to several specific topic[s]. As detailed in my September 23, 2016 letter to Judy Weinstock, the Eden Arc Respondents are invoking the advice of counsel defense with respect to (and waive the attorney-client privilege with respect to communications concerning) legal advice they received concerning and relating to the structure of, and structuring of, the Eden Arc Respondents' investment strategy.

(Id. at 1.)

In addition, the Division asked Respondents to confirm that they were not waiving (1) "privilege as to any communications with any lawyer about any topic prior to the launching of the Fund in 2011"; (2) "privilege as to any communications with any lawyer about any topic after the launching of the Fund in 2011 except the structure of and structuring of the investment strategy executed by Respondents"; and (3) "privilege as to any communications with any lawyer

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[3] This Background section addresses facts that have arisen since the Division filed the Div. Br. on September 26, 2016.

[4] References to "Janghorbani Sept. 26, 2016 Decl." are to the Declaration of Alexander Janghorbani in support of the Div. Br., filed with the Court on September 26, 2016.

concerning their Forms ADV, filed with the Commission." (Id. at 2.)[5] Respondents confirmed the topically and temporally narrow parameters on their professed waiver:

- "The advice of counsel defense that we've invoked therefore relates to that period of time [after the Fund's launch in 2011]. We therefore are not waiving the attorney-client privilege as to communications with attorneys before the Fund was launched." (Id. at 1);

- Communications with attorneys other than the five set out in their waiver are irrelevant because such lawyers "did not provide legal advice concerning and relating to the structure of, and structuring of, the Eden Arc Respondents' investment strategy." (Id.); and

- Respondents are not waiving as to the preparation of their Forms ADV because such advice, in their view, was not "concerning and relating to the structure of, and structuring of, the Eden Arc Respondents' investment strategy." (Id.)

In addition, Respondents appear to have sent e-mails to each of the five attorneys as to which they claim to have waived privilege. (See Janghorbani Decl., Ex. B at 1 (e-mail from Harlan Protass to Robert Flanders, Sept. 23, 2016).) In these e-mails, Respondents instructed their attorneys that the waiver "does not extend (at least at this time) to any documents or other information protected from disclosure by the attorney work product doctrine." (Id. at 2.) Thus, Respondents have instructed the five attorneys not to provide the Division with work product that may relate to their waiver.

II. Respondents Produce 126 Additional E-Mails

On September 27, 2016, Respondents sent an e-mail to the Division notifying it that "114 additional emails . . . will be sent to you . . . by hand delivery tomorrow . . . ." (Janghorbani Decl., Ex. C at 3 (e-mail from Harlan Protass to Judith Weinstock, Sept. 27, 2016).) Given the shortness of time until the then-scheduled Hearing, the Division asked Respondents to produce the documents electronically. (Id., Ex. N at 1 (e-mail from Nancy Brown to Harlan Protass requesting

[5] The Division attorneys called the five lawyers, Farrell, Flanders, Roper, Calaguio, and Galbraith. Only two, Roper and Flanders, were willing to speak with the Division.

that he use the Division's "secure 'drop box' system to transmit to us tonight the production . . . .").) Respondents refused to produce the e-mails electronically. (Id., Ex. C at 1 (e-mail from Harlan Protass to Nancy Brown).)[6]

Respondents also informed the Division, on September 28, 2016, that "[w]e likely have another 12 or so emails to produce to you relating to the attorney-client relationship between Mr. Lathen and Kevin Galbraith. We will send those to you via email today . . . ." (Id.) When the Division inquired later that same day when Respondents intended to produce the 12 referenced e-mails, Respondents wrote:

> Most of the emails require further discussion [among Respondents' counsel] . . . . We will therefore get them to you via email tomorrow. So you know, this universe of documents is quite limited and should not form the basis of any reasonable complaint on your part that you are in any way prejudiced in that you didn't receive them last Friday. As I mentioned on the phone, it is approximately 12 emails.

(Id., Ex. E at 1.) Respondents produced 10 e-mails to the Division on September 29, 2016. (See id., Ex. F (letter from Harlan Protass to Judith Weinstock, Sept. 29, 2016).) Respondents did not explain why they were not producing the other two e-mails referenced in their prior e-mail. (Id., Ex. E at 1.)

III. The E-mails That Respondents Have Produced to Date Are Highly Selective

Respondents' privilege log, produced to the Division during the investigation, is 52 pages long and contains 3,033 entries. (See Janghorbani Sept. 26, 2016 Decl., Ex. E.) The approximately 149 e-mails that Respondents have, to date, produced as part of their waiver demonstrate that, where they believe it suits them, they have waived the privilege as to advice they

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[6] Respondents have, in the past, accessed the Division's secure drop box to receive productions electronically. (See, e.g., id., Ex. D (E-mail correspondence between Division and Respondents indicating that documents had been posted to Respondents via the Division's drop box).)

received both (1) outside of the five attorneys; and (2) beyond the topics of their claimed limited waiver, and where it does not suit them, they have not.

A. Respondents Produced Only Select Communications with Other Attorneys

Respondents produced certain communications with attorneys as to whom they have explicitly maintained the privilege. Respondents produced communications they had with Katten, a firm that Respondents expressly informed the Division they were not including in their waiver. (See Div. Br. at 4.)[7] For example, Respondents produced a redacted e-mail chain showing that, on October 30, 2009, Robert Grundstein, an Associate at Katten, provided advice concerning "joint tenants with rights of survivorship." (Janghorbani Decl., Ex. G at 2.) That e-mail contained advice, among other things, that should a joint tenant sever the joint tenancy, he can alienate only his even share of the property:

> [E]ach co-tenant has the right to sever the tenancy and to alienate or encumber his share of the property. He can convey his share to another party, which has the effect of eliminating all survivorship rights between him and his co-tenants . . . In such a case, the other two co-tenants remain as joint tenants as to the 2/3 of the property, but the third party becomes a tenant in common with them for the remaining 1/3.

(Id. at 2-3.) On November 2, 2010, apparently unhappy with this advice, Lathen forwarded this e-mail to Eric Roper, at Gersten Savage, and asked for a "fresh look":

> See the trust and estates work below. I am not sure how accurate it is.
>
> [. . .]
>
> The memo also references the ability to sever the joint tenancy under NY law. While this applies to real estate, I don't think, practically speaking, it applies to an investment account. I asked several brokerage firms about this and they all say that a signature of

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[7] Respondents declined to waive as to Katten despite Lathen's investigative testimony that he sought and received advice from that firm relating to his "basic business plan" prior to launching his fund. (Janghorbani Decl., Ex. L at 57.)

> all of the parties is required to sever the tenancy. Perhaps they just have that provision to prevent litigation.
>
> In any event, I do think it makes sense to give this a fresh look, particularly as it relates to the risk of a creditor of the participant being able to go after the account.

(Id. at 1.)

However, Respondents have not produced a number of communications with the same Katten attorneys, which occurred during the same period of time, and which are plainly relevant to the question of structuring Respondents' Survivor's Options business. For example, Respondents have failed to produce approximately 14 e-mails involving the Katten attorneys ranging from April 2009 to November 2015. (See Janghorbani Sept. 26, 2016 Decl., Ex. E, Entry Nos. 1-15, 550, 2532.) Indeed, one of these e-mails is titled "Re: Survivors Option . . . . ." (Id., Entry No. 3.)[8]

Likewise, Respondents informed the Division that they were not waiving privilege as to communications with Stephen Derosa, a Gersten Savage attorney, who purportedly advised Respondents on the preparation and filing of their Forms ADV. (See id., Ex. A at 2 (noting that Respondents are not waiving (1) as to communications with any attorneys other than Farrell, Flanders, Roper, Calaguio, and Galbraith (and the latter as to only certain communications); or (2) as to advice received concerning the Forms ADV).)[9] However, Respondents produced a number of communications with Derosa. (See, e.g., Janghorbani Decl., Exs. J-K.) Respondents also produced only certain documents for a number of other attorneys, as to whom they have failed to

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[8] To the extent that Respondents would point to the dates of the Katten consultations as pre-dating the Fund's creation, so, too, were the Roper e-mails that they did produce.

[9] During the parties' September 25, 2016 meet and confer, Respondents informed the Division that they were also waiving privilege as to three additional attorneys, Matthew Doring and Jacquelyn Mancini of Hinckley Allen, and Jessica Montello of Gersten Savage. However, to date Respondents have not confirmed this waiver in writing, nor informed the Division as whether they have told these attorneys about the waiver. Respondents appear to have produced some, but not all, of these attorneys' communications.

waive privilege. (Compare, e.g., Janghorbani Decl., Ex. H (e-mail communication from Jason Neroulias at Bleakley Platt & Schmidt, LLP) with Janghorbani Sept. 26, 2016 Decl., Ex. E, Entry Nos. 90 (communications with Neroulias not produced).)

B. Respondents Did Not Produce All Communications Even with the Five Attorneys They Identified

Respondents' privilege log is rife with examples of communications with attorneys that they failed to produce, many with the five attorneys Respondents identified. (See, e.g., Janghorbani Sept. 26, 2016 Decl., Ex. E, Entry Nos. 662, 663, 747, 748, 1049-51, 2843, 2953-2956.)[10] For example, Respondents produced communications with attorneys Farrell and Flanders, but not later communications about, apparently, "Revised Participant Agreement and Loan Document." (Id., Entry Nos. 661-663). In another example, Respondents produced an extremely limited universe of communications with attorney Galbraith, despite purporting to waive as to him. However, the privilege log reflects hundreds of other communications with Galbraith that were not produced, including entries regarding "Opinion Letter." (Id., Entry No. 665; see generally Entries Nos. 630-2883 (hundreds of entries recording conversations between Respondents and Galbraith).)

C. Respondents Have Produced Communications Concerning Subject Matters as to Which They Claim Not to Waive Privilege

On September 26, 2016, Respondents confirmed that they are not waiving privilege as to advice received concerning (1) compliance with the securities laws; or (2) "Form ADVs that were filed with the Commission." (Id., Ex. A at 1-2.) Nonetheless, Respondents have produced certain documents concerning those two issues. (See, e.g., id., Ex. J at 2, 3 (e-mail chain discussing

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[10] If those attorneys were consulted on issues not covered by the waiver, Respondents should be directed to identify what those issues are so that the Division may test the line drawing in which Respondents have apparently engaged in deciding which communications to produce and which to hold back.

compliance with "blue sky filings" and stating that "it's important that you advise us . . . when your total number of investors increases above 35"); Ex. K at 2 (e-mail communication from Derosa to Lathen concerning "outstanding issues" with Form ADV); see also Ex. M at 3 (e-mail from Christopher Robertson of Seyfarth Shaw asking "[h]as the SEC conducted its exit interview yet? Obviously, if the SEC examination does not deem the program a violation of SEC law or rules, then that would be extremely helpful in connection with FINRA.")[11]

D. Respondents Have Selectively Produced Communications Prior to the Fund's Launch

Respondents have also produced documents before the Fund was formed in May 2011. (See, e.g., id., Entry Nos. 17, 69). However, Respondents have not produced a host of documents outside of this timeframe. (See, e.g., id., Entry Nos. 1-11, 19-20, 22, 32-33.)

E. Other Issues with Respondents' Productions

First, Respondents appear not to have produced a number of attachments reflecting attorney-client advice. (See, e.g., id., Entry Nos. 405 (contains "drop box" link, but not documents), 418.)

Second, a number of the purportedly privileged communications that Respondents did produce were not on their privilege log on March 8, 2016. (See Janghorbani Sept. 26, 2016 Decl., Ex. E (privilege log); see also, e.g., Janghorbani Decl., Ex. I (excerpts of e-mail chains not listed on privilege log).)

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[11] The privilege log reflects many more communications with Robertson that were not produced even though a number of them also included the five attorneys Respondents have identified in their waiver. (See, e.g., Janghorbani Sept. 26, 2016 Decl., Ex. E, Entry Nos. 1050-51.)

ARGUMENT

I. Respondents' Proposed Advice of Counsel Defense Is Irrelevant

Under the Rules of Practice, the Court "shall exclude all evidence that is irrelevant [or] immaterial. . . ." 17 C.F.R. § 201.320. Accepting Respondents at their word that they "are not asserting that they sought, received or relied on legal advice concerning whether Mr. Lathen was required to disclose his 'contractual regime' when redeeming survivor's option bonds," (Resp. Opp. Br. at 4), Respondents cannot demonstrate, as they must, the relevance of their purported advice of counsel defense concerning "the structure of, and structuring of, the Eden Arc Respondents' investment strategy." (Janghorbani Sept. 26, 2016 Decl., Ex. J.) No matter how Respondents now wish to recast the allegations of the OIP, this case is about whether Respondents deceived bond issuers about the true nature of their ownership structure, misrepresenting the many caveats to Lathen's and the Participants' ownership and failing to disclose material information reflecting on the Fund's role in the ownership and redemption of the bonds. (See, e.g., OIP ¶ 1 (Respondents "falsely portray[ed] Lathen and other individuals as owner of these bonds . . . ."), 37-38 (describing Lathen's false disclosures to bond issuers).) Respondents implicitly acknowledge this point. In denying that they intend to invoke counsel's advice about disclosure obligations, Respondents also told the Court that they, in fact, plan to invoke an advice of counsel defense to show that Lathen's "disclosures to issuers of survivor's option bonds" were "true and accurate." (Resp. Opp. Br. at 4 (emphasis added).)

In disclosure cases such as this one, the Commission has recognized that advice about preparing underlying agreements does not enable respondents to raise a cognizable advice of counsel defense as to later disclosure failings. In In the Matter of IMS/CPAs & Assocs., Rel. No. 33-8031, 2001 SEC LEXIS 2323, at *44 (S.E.C. Nov. 5, 2001), the Commission alleged that

Respondents failed to disclose to their clients the truth concerning, among other things, a "Servicing Agreement" to provide certain services to another client. Id. Respondents asserted advice of counsel, arguing that an attorney had drafted "the Servicing Agreement" and "represented to Respondents that those documents were legal." Id. The Commission rejected this defense, finding that:

> the central issue in this case involves Respondents' misrepresentations in documents filed with this Commission, in engagement letters, and in disclosure statements. It does not involve the legality of the Servicing Agreement or the promissory note, the only documents reviewed by World's counsel. Respondents do not contend that World's attorney reviewed any of the documents the accuracy of which is challenged here, much less that they requested, received, or relied on counsel's advice concerning the accuracy of their representations in those documents.

Id., 2001 SEC LEXIS 2323, at *45; see also In the Matter of Charles K. Seavey, Rel. No. ID-200, 2002 SEC LEXIS 3581, at *43 (Feb. 20, 2002) (rejecting advice of counsel defense where respondent consulted counsel about certain related issues, but "did not consult counsel on the representations that were made" in the relevant disclosure).

So it is here, where Respondents claim to have sought advice as to the "structure of, and structuring of, the Eden Arc Respondents' investment strategy," (Janghorbani Sept. 26, 2016 Decl., Ex. J at 1), but explicitly disclaim any such "advice concerning the accuracy of their representations," In the Matter of IMS/CPAs & Assocs., 2001 SEC LEXIS 2323, at *45, to the bond issuers. (See Resp. Opp. Br. at 4 (disclaiming advice as to "whether Mr. Lathen was required to disclose" anything at all to the bond issuers).) Tellingly—other than offering a conclusory assertion that the advice led him to believe in "the validity of the JTWROS" (id. at 5)—Respondents do not explain how any advice that Lathen received about his investment "structure" could go to the effectiveness of disclosures to issuers that Respondents now admit they never sought advice on. (Resp. Opp. Br. at 4.)

II. Respondents Continue to Inappropriately Block the Division from Exploring the Validity of the Defense

As discussed at length in its opening brief, see Div. Br. at 7-11, and in Background supra, if relevant, Respondents' purported waiver is nonetheless entirely deficient. Respondents attempt to narrowly, and artificially, limit their waiver to the advice of five attorneys, during a timeframe entirely of their own choosing, and to leave outside of the waiver information that is facially relevant to the defense. For example, Respondents consulted 36 attorneys as to whom they have not waived. They have held back reams of documents which appear on their privilege log and are facially relevant, even as to the five attorneys they identified as relevant. And they have blocked the Division from inquiring into areas—such as whether they received advice about disclosure either to issuers or the Commission—where one would expect to find exactly the type of relevant advice concerning whether "his disclosures to issuers . . . [were] true and accurate," as Respondents now claim. (Resp. Opp. Br. at 4.) Such advice plainly encompasses "the entire transaction," Glenmede Trust Co. v. Thompson, 56 F.3d 476, 487 (3d Cir. 1995), ranging from the establishment of the Fund to the presentation of the redemption requests and the redemptions themselves.

Moreover, efforts to limit the waiver temporally or as to certain attorneys are plainly inappropriate. See,e.g., Bank Brussels Lambert v. Credit Lyonnais (Suisse) S.A., 93 Civ. 6876 (KMW), 1995 WL 598971, at *3 (S.D.N.Y. Oct. 11, 1995) (Francis, M.J.) ("Once the waiver is created, parties may not limit the waiver temporally.") (collecting cases). Thus, any of Respondents' communications with attorneys about structuring the fund, the investments, or seeking redemptions are discoverable. To hold otherwise would be to block the Division from understanding if Respondents received advice not to proceed as they did. See SEB, S.A. v. Montgomery Ward & Co., 412 F. Supp. 2d 336, 348-49 (S.D.N.Y. 2006) ("Defendants cannot use

opinions from two attorneys to establish that it relied in good faith on opinions from counsel without disclosing the opinions of their third attorney"). Indeed, as discussed in the Division's opening brief, there is reason to believe that Respondents did in fact receive different advice from different attorneys and ignored advice they did not like. (See Div. Br. at 9; Janghorbani Sept. 26, 2016 Decl., Ex. D at 6.) The Division is entitled to know about all of that advice.

Nonetheless, Respondents urge the Court to allow them to define—without any explanation or apparent limitation—the scope of their waiver, even where inconsistent with their own purported limitations. Thus, Respondents have felt free to selectively disclose communications concerning subject matters, and with attorneys, as to which they otherwise refuse to let the Division inquire. (See Background, §§ A-E supra.) As discussed in the Division's opening brief, the law bars just such attempts to define the scope of the waiver. See Glenmede Trust Co., 56 F.3d at 486 ("There is an inherent risk in permitting the party asserting a defense of its reliance on advice of counsel to define the parameters of the waiver . . . ."). This is particularly worrying given that Respondents' own papers suggest that they will attempt to argue that the advice received somehow lessened Lathen's scienter as to the truth or falsity of his disclosures to the issuers. (See Resp. Opp. at 4 (his structure "made his disclosures to issuers of survivor's option bonds . . . true and accurate . . . .").)

This proposition—that Respondents can assert the reliance of advice of counsel defense without making full and complete disclosures to allow the Division to test it—goes entirely unsupported by Respondents, and they cite no authority for it.[12] To justify the many failings of

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[12] Instead, Respondents cite to three cases which stand for the entirely uncontroversial proposition that defendants can assert an advice of counsel defense, not that the assertion itself can somehow limit the scope of the required waiver. See, e.g., Howard v. SEC, 376 F.3d 1136, 1147 (D.C. Cir. 2004) (crediting evidence in the record supporting respondent's advice of counsel defense); see also Resp. Opp. Br. at 6.

their selective waiver, Respondents argue only that they have produced all privileged communications "with respect to the entirety of the 'transaction.'" (Resp. Opp. at 6.)[13] However, they do nothing to explain the many problems (both of omission and commission) discussed above and in the Division's opening brief. Instead—in an implicit acknowledgment that they cannot make out a legitimate advice of counsel defense—Respondents urge the Court to allow them to put forth the defense based on an incomplete waiver, stating "even an 'incomplete' advice of counsel defense is still probative of good faith . . . ." (Id. at 6.) Respondents' plan to assert an "incomplete" advice of counsel defense makes it plain that (1) they are blocking the Division from discovering relevant information bearing on their asserted advice; and/or (2) they understand that they cannot meet the elements of the defense. Either way, the Court should not allow this strategy.

III. Respondents' Argument Against Issuing the Requested Subpoena Is Without Merit

The Division also requested that the Court issue subpoenas to four of the attorneys and covering the topics Respondents identified. (See Div. Br. at 11-12.) In opposition, Respondents make no effort to show (as they must) that the requested subpoenas are in any way unduly burdensome. See 17 C.F.R. § 201.232(e)(2). Instead, Respondents merely argue that the Court should "reject as premature" the subpoenas. (Resp. Opp. at 10.) In other words, Respondents argue for yet further delay. The Court should reject Respondents' attempts to stall.

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[13] If that were true, it is surprising indeed that Respondents' privilege log spans 52 pages and over three thousand entries. (Janghorbani Sept. 26, 2016 Decl., Ex. E.) If they were not relevant to this "transaction," there would have been no need to log them.

CONCLUSION

Given the irrelevancy of Respondents' purported advice of counsel, the Court should (1) preclude the defense; and (2) in the meantime, issue the requested subpoenas (to alleviate any additional delay). In the alternative, the Court should order Respondents immediately (1) to produce all relevant communications, including all documents set out on their privilege log; and (2) to make all attorneys from which they sought advice concerning the structuring and disclosure regime at Eden Arc available to the Division for interviews (including the attorneys as set out on Exhibit H to the Janghorbani Sept. 26, 2016 Decl.).

Dated: October 6, 2016
New York, New York

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UNITED STATES OF AMERICA
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Respondents.

Certificate of Service

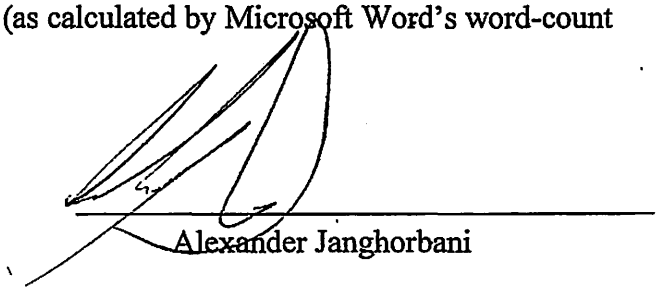
I hereby certify that I served (1) the Division of Enforcement's Reply Memorandum of Law in Further Support of Its Motion to Preclude Respondents' Advice of Counsel Defense and to Issue Subpoenas, dated October 6, 2016 ("Reply Br."); (2) the Declaration of Alexander Janghorbani, dated October 6, 2016; and (3) all exhibits attached to that declaration on this 6th day of October, 2016, on the below parties by the means indicated:

Harlan Protass
Clayman & Rosenberg LLP
305 Madison Avenue, Ste 1301
New York, New York 10165
Attorneys to Respondents
(By E-mail)

The Honorable James E. Grimes
Administrative Law Judge
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-2557
(Courtesy copy by E-mail)

Brent Fields, Secretary
Office of the Secretary
U.S. Securities and Exchange Commission
100 F. Street, N.E.
Washington, D.C. 20549-2557
(By UPS (original and three copies)
By facsimile (one copy of Reply Br.))

In addition, I hereby certify that the Reply Br. complies with the length limitations set forth in Rule 154(c) and contains 5,729 words (as calculated by Microsoft Word's word-count feature).



Alexander Janghorbani