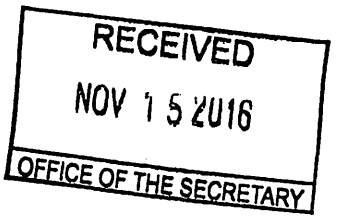
UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

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 SECOND MOTION TO PRECLUDE RESPONDENTS' ADVICE OF COUNSEL DEFENSE

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November 14, 2016

The Division of Enforcement ("Division") respectfully submits this reply memorandum of law in further support of its Second Motion to Preclude Respondents from Asserting an Advice of Counsel defense, and in support of its renewed request for the issuance of subpoenas.

ARGUMENT

A. Respondents' Make No Effort to Explain Their Repeated Disregard for Court Orders

Respondents' brief in opposition ignores their failure to comply yet again with deadlines imposed by the Court. And it offers no excuse for this or the prior failures to comply.

Respondents have approached their obligations to disclose communications with lawyers they consulted regarding their investment strategy and the joint tenancies with the same lack of care and attention as they gave to their privilege review. Ordered on September 12, 2016[1] to make a complete disclosure by September 23, 2016 of all communications with lawyers as to whom they were asserting an advice of counsel defense, on that date, Respondents provided a list of only four attorneys, and made a partial production of only 49 emails and attachments, promising to supplement it at some unspecified time during the following week with additional relevant documents. (Janghorbani September 26, 2016 Decl., Ex. J (Protass September 23, 2016 Letter).) After meeting and conferring on September 25, 2016 -- a conference in which Respondents' counsel first raised his failure to search Mr. Lathen's Yahoo email account and refused to provide a date certain by which he would do so or make a full production -- the Division filed its initial motion to preclude Respondents from relying on the defense. (See Janghorbani September 26, 2016 Decl., Ex. K (Janghorbani September 25, 2016 email to Protass

[1] Janghorbani September 26, 2016 Decl., Ex. A (September 12, 2016 Hearing Tr.) at 20:15-25.

(summarizing telephonic meet and confer).) Thereafter, Respondents made two further productions, on September 27, 2016 (114 emails) and September 29, 2016 (10 emails) and supplemented their list of relevant attorneys to include (partially) Kevin Galbraith. (Janghorbani October 6, 2016 Decl., Exs. C and F.)

After hearing from Respondents, the Court issued an Order on October 18, 2016 ("October 18, 2016 Order") which directed Respondents to expand their production and to do so by November 1, 2016. (October 18, 2016 Order at 5.) In expanding the scope of the production the Respondents were required to make, the Court ruled that by asserting the advice of counsel defense as to the "'structure of and structuring of' the joint tenancies at issue in this case, Respondents have necessarily waived the privilege "as to *all* . . . communications relating to the same subject matter." (Id. at 4.) The Court went on to the declare that the "'same subject matter' is the joint tenancies," and ordered that "if Respondents consulted with any attorney at any time 'through approximately February 2016' – the end of the period of alleged misconduct – about the structure or structuring of the joint tenancies, *they must disclose the name of the attorney and all communications with that attorney about the joint tenancies*." (Id. (emphasis added).)

But on November 1, 2016, Respondents once again ignored the Court's Order and deadlines. After identifying 13 additional lawyers (Brown Decl., Ex. D (Respondents' Attorney List) to supplement their September identification, Respondents produced some relevant documents, and stated that they intended to extract Lathen's Yahoo emails within 24 to 48 hours, but failed to specify a date certain by which they would produce them. (Janghorbani November 2, 2016 Decl., Ex. B (Protass November 1, 2016 Letter).) Respondents blamed their inability to comply with the Court's deadline on their late attempt to retrieve relevant emails from Mr.

Lathen's Yahoo account -- an email account they first identified in September, but apparently did nothing to check between October 18, 2016 and November 1, 2016. In addition, while Respondents' production on November 1, 2016 should have included only documents relating to the new 13 lawyers added to their list of consulted attorneys, it instead included documents relating to attorneys they identified on September 23, 2016, indicating that Respondents are apparently still producing relevant documents that the Court ordered them to turn over more than six weeks ago. (Declaration of Nancy A. Brown, executed November 14, 2016 ("Brown Decl."), Ex. A (Robinson November 16, 2012 email to Margaret Farrell) and Ex. B (Lathen August 30, 2012 email to Margaret Farrell[2]).)

Respondents' answer to these serial failures to comply with the Court's Orders is two-fold: (1) Many of the late-produced emails are inconsequential and the Division is so well-staffed that it does not matter when they make their productions (Respondents' Memorandum of Law in Opposition, dated November 9, 2016 ("Resp. Opp.") at 8); and (2) the Division failed to meet and confer when it learned Respondents could not complete their production on November 1 because of Mr. Lathen's Yahoo account extraction problems. (Resp. Opp. at 5-6.)[3] Neither is a valid excuse.

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[2] This email belies Mr. Protass's assurance that Lathen stopped using his Yahoo account for business purposes in July 2012. (Affirmation of Harlan Protass, dated November 9, 2016, ¶ 12.)

[3] Also mentioned, although not as an excuse, is Respondents' complaint about the Division's own allegedly late production on November 7, 2016. (Resp. Opp. at 9.) What Respondents neglect to acknowledge is that that production consisted of a document received from FINRA in October, after the OIP was issued, and 20 emails that had already been produced, but were being re-produced because the Division learned that the emails had originally been produced in truncated form. Respondents never complained about the truncated emails. (Brown Decl., Ex. C (Letter from Janna Berke to Harlan Protass, dated November 7, 2016); Declaration of Janna I. Berke, dated October 31, 2016, at 5-6 n.2 (informing the Court and Respondents of the issue).)

First, whether the emails are substantive or not, Respondents were ordered to produce *all* communications, and they did not. Nor is it relevant how many attorneys the Division has assigned to this matter. The Court issued an order, and the Respondents offer no reason why they could not comply with it. Had the Court wanted to provide a lengthier time frame in which Respondents could produce relevant communications, it could have ordered it – and indeed Respondents could have sought an extension from the Court of their time to produce. But the Court ordered the production by November 1 and Respondents sought no extension.

Second, the Division had nothing to meet and confer with Respondents about. On November 1, Respondents announced that they would not be producing Lathen's Yahoo account emails in a timely fashion because they could not. Respondents offered no points to negotiate. More importantly, given the Court's October 18 directive to produce by November 1, *and* the Respondents' acknowledgement of the Yahoo issue dating back to September, the Division perceived that Respondents were simply employing their strategy of delaying the advice of counsel-related disclosures as long as possible – a strategy that they candidly admitted in the September 12, 2016 prehearing conference would work to their benefit. (Janghorbani September 26, 2016 Decl., Ex. A (Hearing Tr.) at 19:7-11 (Mr. Protass: "I think obviously that it serves the Division's interests, of course to say that the earlier they get it [disclosures associated with the advice of counsel defense] the better for them. Obviously it serves our interests the later they get it, the better it is for us.").)

B. <u>The Production Continues to Be Incomplete and Should Result in Preclusion</u>

As detailed below, even with their self-granted extension of the Court's October 18, 2016 deadline, Respondents have not yet fully complied by producing a complete list of attorneys consulted about the structure or structuring of their investment strategy and the joint tenancies.

Nor have they made a full production of the communications they had with those attorneys.

(1) Respondents Have Not Provided a Complete Listing of the Lawyers Whom They Consulted on Waived Issues

Respondents have not included on their "Attorney List" (Brown Decl, Ex. D) the following lawyers whom – as evidenced by the documents Respondents have produced or their original privilege log – they consulted on relevant topics. They include:

- **Beth Tractenberg**: Formerly a partner at Katten Muchin, Ms. Tractenberg provided advice both as to the joint tenancies Lathen sought to create, and some of the tax implications of those arrangements. (E.g., Brown Decl., Ex. E (October 30, 2010 email).) Yet she does not appear on Respondents' Attorney List.

- **Paul Sarkozi**: Lawyer with Tannenbaum Helpern Syracuse & Hirschtritt LLP. Respondents list only one lawyer from that firm, Michael Tannenbaum, but Respondents' original privilege log includes 8 separate entries reflecting emails with Mr. Sarkozi that were not produced, including several with the subject matter "Goldman situation," reflecting, apparently, emails concerning Respondents' dispute with one of the issuers over his redemption requests. (Brown Decl., Ex. F ("Original Privilege Log"), Entry Nos. 553, 554, 560, 561, 562, 563, 587, 588.)

- **David Robbins**: Partner at Kaufmann Gildin & Robbins LLP. Although not listed on Respondents' October 25, 2016 "Attorney List" (Brown Decl., Ex. D), Respondents have produced 15 separate emails between Lathen and David Robbins, all relating to Lathen's dispute with his clearing firm JP Morgan Clearing Corporation over that firm's apparent reluctance to process his redemption requests in 2010. (Brown Decl., Ex. G (Lathen August 20, 2010 email to Robbins).)

- **Jason Neroulias**: Lawyer with Bleakely Platt & Schmidt, LLP. According to the emails that were produced, Neroulias was consulted by Respondents in the formation of EACP and the Fund, and he specifically provided advice regarding joint tenancies. (E.g., Brown Decl., Ex. H (Neroulias November 17, 2010 email, attaching materials including "Joint Account Cases and Statutes.")

(2) Respondents Have Not Yet Made a Complete Production of Communications

Respondents' production of "waived" communications remains incomplete. After a review of Respondents' Original Privilege Log (Brown Decl., Ex. F), and those communications that have been produced, the Division notes the following examples of missing documents that

supports the conclusion that Respondents either no longer retain a complete set of communications or have not made a complete disclosure of those they do retain:

- **David Robbins:** According to Respondents' Original Privilege Log, Robbins and Lathen corresponded in November 2013 and exchanged emails relating to "Follow-up." (See Brown Decl., Ex. F (Original Privilege Log), Entries 488 and 490; see also Entry No. 485.) Those communications were not produced. And, while Respondents produced many of the emails with Robbins from the August and September 2010 time frame, including at least two dated August 25, 2010, they have re-asserted privilege over a third email from August 25, 2010 (Brown Decl., Ex. I (Protass Affirm., November 1, 2016, Ex. 15, Privilege Log ("Recent Privilege Log")) (September 15 Production Privilege Log List, page 12, 6th entry).)

- **Jason Neroulias:** The production of Neroulias's communications is similarly untrustworthy. Despite the production of several relevant emails from the November 2010 period, they were never logged on Respondents' Original Privilege Log. Thus, none of the emails produced from November 9, 2010, in which Lathen and Neroulias discuss the potential problems with the Joint Tenancies, or an alternative Trust structure, vis-à-vis the issuers' prospectuses, was logged, raising questions about the completeness of Respondents' records or at least their review of them. (Compare Brown Decl., Ex. H (Neroulias November 17, 2010 email and Neroulias November 9, 2010 email) with Ex. F (Original Privilege Log) (reflecting no entries for those two emails).)

- **Paul Sarkozi:** As noted above, Respondents' Privilege Log reflects at least 8 separate communications that remain unproduced regarding Respondents' dispute with an issuer regarding redemptions. (Brown Decl., Ex. F (Original Privilege Log) Entry Nos. 553, 554, 560, 561, 562, 563, 587, 588.)[4]

Respondents' production has not been complete even as to communications with those lawyers who do appear on Respondents' "Attorney List," as the following examples make clear:

- **Margaret Farrell and Robert Flanders:** Ms. Farrell and Mr. Flanders, both then of the firm, Hinkley Allen & Snyder LLP, reviewed Respondents' Fund offering documents, the Participant Agreements, and the Discretionary Line, Investment Management and Profit Sharing agreements, and wrote a memorandum analyzing limited aspects of Respondents' strategy. While Respondents produced many communications with Ms. Farrell and Mr. Flanders, several communications listed on

[4] That these communications are likely relevant is established by the intentional production of other emails between Lathen and attorneys Margaret Farrell and Robert Flanders respecting the Goldman Sachs dispute and Flanders advice respecting Respondents' response, advice that clearly related to the validity of Lathen's joint tenancies with his participants. E.g., Brown Decl., Ex. J (Flanders October 23, 2013 email to Lathen, cc'ing Farrell).

their Original Privilege Log and apparently relevant were not produced. (E.g., Brown Decl., Ex. F (Original Privilege Log) Entry Nos. 413-417 (relating to "Sidley Letter," and relevant to Respondents' redemption dispute with Goldman Sachs).)

- **Kevin Galbraith:** Mr. Galbraith reviewed revisions Lathen made to his Participant Agreement in an effort to strengthen arguments to the issuers that his arrangements with the deceased participants were valid joint tenancies. (E.g., Brown Decl., Ex. K (Lathen December 4, 2012 email to Galbraith).) In addition, Galbraith represented Respondents in their dispute with at least one issuer (General Electric Capital Corporation ("GECC")) and the trustee for several issuers (US Bank) (Brown Decl., Ex. L (GECC counsel December 11, 2014 email to Galbraith; Galbraith September 2, 2014 letter to US Bank counsel).) In those communications – which presumably he discussed with Lathen prior to sending – Galbraith makes various arguments concerning the existence and validity of the joint tenancies. (E.g., id. (Galbraith September 2, 2014 Letter to Muccia, at 4).) As such, Galbraith was obviously providing his advice to Lathen about those topics, but none of those communications has been turned over.[5]

- **Bruce Hood:** Mr. Hood was a tax partner at Wiggin & Dana when he advised Lathen on the tax consequences of his Fund's structure and strategy, including the ownership structure of the bonds. Produced in the original productions – and not clawed back by Respondents in their Recent Privilege Log – are at least some of the communications between Hood and Lathen from May 2010, when Lathen apparently first engaged Hood, and again from December 2010, when Lathen again consulted Hood about executing his Survivor's Option strategy through a fund structure. (Brown Decl., Ex. M (Lathen May 19, 2010 email to Hood); Ex. N (Lathen December 6, 2010 email to Hood).) However, missing from that production (and all later productions, including the ones the Court ordered Respondents to make) are numerous emails documented on the Original Privilege Log, and some from periods extending into 2014. (Brown Decl., Ex. F (Original Privilege Log) Entry Nos. 19, 20, 566-570, 582, 584-586, 601, 602, 606, 609, 610, 626-628 and 1272.)[6]

Respondents' productions included no communications with the following attorneys and law firms that Respondents admit Lathen consulted (Brown Decl., Ex. D (Respondents' Attorney

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[5] The Division is not seeking the communications between Galbraith and Lathen regarding his dispute with another issuer, Prospect Capital Corporation, because that dispute is now in litigation and Mr. Galbraith is representing Respondents in that litigation.

[6] The Division has similar concerns regarding the completeness of the production with respect to Respondents' communications with Eric Roper, Cheryl Calaguio, and Stephen DeRosa, all formerly of a law firm that no longer exists, Gersten Savage LLP. The Division, however, has no information about where that firm's documents are stored or who might act as custodian, and does not therefore seek the issuance of a subpoena for those documents.

List): Schulte Roth & Zabel and Seward & Kissel.

Because Respondents have still not made the complete disclosure the Court ordered them to make, their advice of counsel defense should be precluded. (October 18, 2016 Order at 5.) ("Failure to comply with the above will preclude Respondents from relying on an advice-of-counsel defense.").

C. The Court Should Issue the Subpoenas Submitted by the Division

If the Court determines that preclusion is not appropriate despite Respondents' repeated flouting of Court orders and their obvious attempts to restrict the Division's ability to test the defense, the Court should now issue the subpoenas the Commission submits herewith.

Respondents' production provides ample evidence that it is still incomplete. Accordingly, the Court should issue the subpoenas submitted herewith to seven of the law firms identified by Respondents on their Attorney List: Katten Muchin Rosenman LLP; Law Office of Kevin Galbraith; Schulte Roth & Zabel LLP; Seward & Kissel LLP; Tannenbaum Helpern Syracuse & Hirschtritt LLP; Hinckley Allen & Snyder, LLP; and Wiggin & Dana LLP. In addition, given Respondents' production of relevant emails with two additional attorneys not appearing on their "Attorneys List" – Jason Neroulias and David Robbins – subpoenas should issue to their respective firms, as well: Bleakley Platt & Schmidt, LLP (Mr. Neroulias's former firm); and Kaufmann Gildin Robbins & Oppenheim LLP (Mr. Robbins' firm).

The subpoenas are appropriate under Rule 232(b). The Division could not have issued the Subpoenas during the investigation because Respondents had not made their counsel's advice an issue, and repeatedly refused to assert an advice of counsel defense. Since the OIP was issued and Respondents announced their intention to rely on an advice of counsel defense, Respondents have obstructed the Division's ability to explore whether the defense is properly asserted,

including by dribbling out their production, and apparently making a selective production of their communications with counsel.

Even if Respondents were to finally comply with their obligations and turned over all communications with the lawyers they consulted, the firms may have internal documents relevant to the defense, including memoranda of oral advice provided to Lathen, or the results of research provided to Lathen only orally. Accordingly, relevant documents are likely to exist only in those firms' files and the Division should be allowed access to them.

CONCLUSION

For all the foregoing reasons, and those cited in our Moving Memorandum, the Division respectfully requests that the Court either (1) preclude Respondents from asserting their advice of counsel defense; or (2) issue the Subpoenas submitted herewith so that the Division may have the tools to meet the defense.

Dated: November 14, 2016
New York, New York

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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 Reply Memorandum of Law in Further Support of its Second Motion to Preclude Respondents' Advice of Counsel Defense, dated November 14, 2016; and (2) the Declaration of Nancy A. Brown, executed November 14, 2016, and all exhibits attached thereto on this 14th day of November 2016, on the below parties by the means indicated:

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Nancy A. Brown