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 MOTION TO COMPEL RESPONDENTS' COMPLIANCE WITH COURT'S OCTOBER 18, NOVEMBER 10 AND DECEMBER 14, 2016 ORDERS OR TO PRECLUDE RESPONDENTS FROM OFFERING TESTIMONY OR EVIDENCE REGARDING THEIR RELIANCE ON THE ADVICE OF KEVIN GALBRAITH

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December 19, 2016

Pursuant to the Securities and Exchange Commission's Rule of Practice 154, the Division of Enforcement ("Division") moves for an order (1) compelling Respondents to comply with the Court's November 10, 2016 and December 14, 2016 Orders giving the Division access to Respondents' formerly privileged documents; and the Court's October 18, 2016 Order requiring Respondents to produce all communications with attorneys they consulted regarding the joint tenancies; or (2) precluding Respondents from offering testimony or evidence of their reliance on any advice sought from or offered by Kevin Galbraith.

PRELIMINARY STATEMENT

Respondents are again attempting to make a selective waiver of the advice on which they claim to have relied, frustrating the Division's efforts to test their defense. Their latest tactic involves the attempt to withhold communications between Respondents and Kevin Galbraith, one of the attorneys they have identified as providing advice to Respondents on which they relied in redeeming the Survivor's Options Bonds.

Respondents' efforts to hide behind the privilege should not succeed. The Court has already issued three separate orders that require the disclosure of these communications: In the first, the Court ordered Respondents to produce all communications with counsel on any matter relating to the joint tenancies. (Order entered October 18, 2016.) In the second and third, the Court ordered Respondents to produce all privileged communications inadvertently produced to the Division during the investigation in three separate productions, except those relating to the strategy involved in defending the Division's investigation and this proceeding. (Orders entered November 10 and December 14, 2016.) Under any and all of those Orders, Respondents' communications with Kevin Galbraith ("Galbraith Documents") must be produced and the Division has been disadvantaged for long enough without them.

Respondents' continued efforts to wield the privilege as both sword and shield must be stopped. The trial date is fast approaching and the Division is severely disadvantaged without this critical evidence that may undermine Respondents' advice of counsel defense. Accordingly, Respondents should be ordered to produce the Galbraith Documents forthwith or be precluded from offering testimony or evidence about any advice sought from or provided by Galbraith.

Background

On October 18, 2016, the Court ruled that Respondents' assertion of a reliance on advice of counsel defense required that they immediately produce to the Division all "communications in their possession that concern discussions with those counsel [whom they consulted about the 'structure of and structuring of the joint tenancies at issue in this case'] about any aspect of the joint tenancies." (October 18, 2016 Order at 4-5.) The Court exempted from the Order only "attorney-client communications related to the Division's investigation or this administrative proceeding." (October 18, 2016 Order at 4.) And the Court further noted that failure to provide such communications would preclude Respondents from relying on an advice of counsel defense. (October 18, 2016 Order at 5.)

In response to this Order, Respondents produced an "Attorney List," purporting to list all of the attorneys with whom Respondents consulted about the "structure of and structuring of the joint tenancies at issue in this case." (Declaration of Nancy A. Brown, executed December 19, 2016 ("Brown Decl."), Ex. A.) Included on the list was Kevin Galbraith, of the Law Office of Kevin Galbraith.

On November 10, 2016, the Court ruled that Respondents had waived attorney-client privilege with respect to documents that Respondents inadvertently produced to the Division in three separate productions during the investigation. (November 10, 2016 Order at 5, 6.) It exempted certain documents from that Order, specifically those identified by Respondents as

communications that "'would . . . reveal [Lathen's] current and former attorneys' strategies in mounting a defense to the Division's allegations in this matter.'" (Id. at 6 (quoting Respondents' Opposition Brief, dated November 1, 2016, at 18).) The Court ordered Respondents to "(1) specifically identify the documents, among those they identified as privileged, that contain discussions between Lathen and his counsel regarding their strategy; and (2) produce these documents for *in camera* review." (Id. at 7.)

Respondents complied, and two days after they filed their Motion for Reconsideration of the Court's November 10, 2016 order, by ex parte letter dated November 19, 2016, Respondents apparently submitted communications between Respondent and counsel regarding strategy in defense of the investigation and this proceeding. In their letter, however, Respondents also advised the Court – but not the Division – that there were additional communications between Respondents' counsel Kevin Galbraith and Respondents that reflected Respondents' strategy in completely separate litigation with one of the issuers involved here that they were neither producing *in camera* for the Court's review, nor turning over to the Division:

> We also write to advise Your Honor about another issue relating to the e-mails that the Eden Arc respondents produced to the Division . . . . In particular, respondents . . . are named as defendants in a case currently pending in Supreme Court, State of New York, County of New York captioned Prospect Capital Corp. v. Donald Lathen, Jr., et al., Index No. 156375/2014.[1] Certain of the e-mails produced to the Division . . . are communications between Mr. Lathen and Kevin Galbraith, Esq., who represents Mr. Lathen and Eden Arc Capital Management, LLC in the Prospect Capital case. Like the e-mails enclosed herewith, those e-mails contain and constitute discussions between Mr. Lathen and Mr. Galbraith concerning litigation strategy for defending the Prospect Capital case.
>
> We did not include herewith the litigation strategy e-mails between Mr. Lathen and Mr. Galbraith relating to the Prospect Capital case because they

[1] The Prospect Capital case is related to this matter in that Prospect Capital is one of the victims in the Division's case, and the Division intends to call a witness for Prospect Capital in its case-in-chief.

> did not relate to discussions regarding defense strategy in the instant matter. . . We understand that Mr. Galbraith intends to request that the Division voluntarily return all such e-mails to him for the reasons detailed herein. If the Division refuses Mr. Galbraith's request, we intend to request that Your Honor enter an Order directing the Eden Arc Respondents to submit those e-mails to Your Honor for an *in camera* review like that which Your Honor will undertake with respect to the e-mails enclosed herewith.

(Brown Decl., Ex. B.)

Unaware of this position, the Division received a cryptic email from Galbraith on November 25, 2016, in which he advised us that he "intends to formally request that the SEC staff return to us email communications between my firm and Mr. Lathen reflecting litigation strategy in the" Prospect case. (Brown Decl., Ex. C.) On November 29, 2016, Galbraith promised to identify the specific documents he wanted returned by means of a privilege log sometime in the future. (Id.)

After the Division alerted the Court to the Galbraith communications on December 1, 2016 – again unaware that Respondents had already raised a similar issue with the Court in the ex parte November 19, 2016 letter – Respondents provided the Division with its November 19, 2016 letter for the first time. (Brown Decl. ¶ 5.) The Division immediately objected to the Court's consideration of any argument contained in it without notice and an opportunity to be heard. (Brown Decl., Ex. D (Brown December 2, 2016 Letter to the Court).) Thereafter, it heard nothing further from either Galbraith or Respondents regarding the Galbraith promise to deliver a privilege log with respect to the documents Galbraith asked to be returned until December 15, 2016. (Id., Ex. E.) In an email of that date, Galbraith responded to the Division's request for a privilege log and a date by which it would be produced: "I will continue my work on the second privilege log noted

here upon completion of my subpoena responses. I do not have a specific date in mind for that, but certainly I'll aim to get that to you as soon as practicable." (Id. at 1-2.) [2]

Having reviewed the "strategy emails" submitted by Respondents, the Court denied Respondents' Motion for Reconsideration, and ordered Respondents to produce certain of the strategy e-mails. (December 14, 2016 Order.) It did not order Respondents to identify which documents it had submitted *in camera*, and because Respondents assigned different numbers to those documents in communications with the Court than the Bates numbers originally assigned to them, the Division sought Respondents' identification of which documents were now available to it as waived. (Brown Decl. ¶ 10 and Ex. I.)

Respondents did not produce the emails the Court ordered them to produce to the Division until December 16, 2016. And, as of this motion, Respondents still have not identified the other set of emails that the Division is entitled to under the Court's November 10, 2016 Order – communications as to which Respondents have waived attorney-client privilege, but that were *not* submitted to the Court because Respondents never claimed that they related to litigation strategy.[3] However, and more troubling, Respondents insisted that the Court's Order did not require the disclosure of any communications with Galbraith respecting the Prospect Capital case, and insisted that Galbraith would soon be asserting his own privilege over them. (Brown Decl. ¶¶ 11-12.)

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[2] Mr. Galbraith's responses to his Subpoena were due December 1, 2016. On November 29, 2016, he advised that he would produce documents on December 5, 2016. (Brown Decl., Ex. F.) He later claimed that all relevant, non-privileged documents had already been turned over to Respondents' counsel in this proceeding. (Id., Ex. G.) But after a conversation with the Division counsel, on December 12, 2016, Galbraith produced more than 600 emails that were apparently responsive and not turned over by Respondents' counsel, with more still to come, as well as a privilege log, at some unspecified date. (Brown Decl. ¶ 9 and Ex. H.)

[3] In a meet and confer on Friday, December 16, 2016, Respondents' counsel represented that Galbraith would submit some sort of privilege log today, but we have not yet received it. (Brown Decl. ¶ 11.)

ARGUMENT

Respondents should be compelled to comply with the Court's Orders and to either turn over the Galbraith Documents or be precluded from asserting reliance on advice of counsel as to any advice received from him. Any other result would be unfair to the Division.

A. Galbraith Is Not Entitled to Re-assert the Privilege, Either on Behalf of Respondents or Himself

In denying Respondents' Motion for Reconsideration, the Court reaffirmed its earlier determination that any privilege protecting any of the documents Respondents turned over to the Division during the investigation was waived by them. (Order at 1.) It made no exception for the Galbraith Documents. To the extent that Respondents plan to enlist Galbraith to assert a separate privilege over the Galbraith Documents in a last-ditch effort to claw his communications back, that effort, too, must fail. Galbraith has no standing to assert the attorney-client privilege and the work-product protections cannot be asserted by him.

(1) Galbraith Cannot Assert an Attorney-Client Privilege

The attorney-client privilege belongs to the client, not the lawyer. Application of Sarrio, S.A., 119 F.3d 143, 147-48 (2d Cir. 1997) (collecting cases). Thus, Galbraith has no separate privilege interest to assert, and because the Court has already ruled (1) that Respondents' attorney-client privilege claim has been waived (except as to strategy emails regarding this proceeding), and (2) that all communications between Respondents and their attorneys concerning the joint tenancies should be produced, the Galbraith Documents should be produced.

(2) Galbraith Has Waived Any Work-Product Protection Claim for the Same Reasons as Those that Applied to Respondents

Nor can Galbraith assert a work-product protection claim with respect to the Galbraith Documents. First, he has not done so, although his client must have notified him that his communications were the subject of the Division's waiver motion when the Division filed it on October 25, 2016. Indeed, according to Respondents' ex parte November 19, 2016 letter to the

Court, Galbraith was expected to assert his privilege claims imminently. Instead, the Division never heard from him until November 25, 2016, and even then, Galbraith failed to specify the documents over which he was asserting any claim of privilege. Nor has he to date. Only after prodding by the Division did Galbraith finally advise that he intended to provide a privilege log "as soon as practicable." (Brown Decl., Ex. E.)

In inexplicably delaying assertion of his claims of privilege, Galbraith has demonstrated the same lack of care for protection of any privilege as Respondents did in responding to the Division's notice that they had inadvertently produced thousands of pages of privileged documents. Although Galbraith was not responsible for the initial production, his delay in asserting any privilege is a factor the Court should consider in assessing the merits of his claim. As one court put it, "if the proponent of the privilege does not object quickly enough, generally the privilege is waived." United States v. Finazzo, No. 10 Cr. 0457 (RRM), 2013 WL 619572, at *14 (E.D.N.Y. Feb. 19, 2013)).

(3) Because the Documents Were Disclosed to an Adversary, the Rationale for Protecting Them from Disclosure Is Vitiated

The work-product doctrine was waived, in any event, when the Galbraith Documents were produced to the Division, an obvious adversary. The doctrine is designed to protect materials prepared in anticipation of litigation, and to further the adversary system by permitting attorneys to "work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel." Hickman v. Taylor, 329 U.S. 495, 510 (1947). But where the work-product of an attorney is disclosed to an adversary, the need for the protections is vitiated. "Disclosure of work product materials can waive the privilege for those materials if "such disclosure, under the circumstances, is inconsistent with the maintenance of secrecy from the disclosing party's adversary." United States v. The Williams Cos., 562 F.3d 387, 394 (D.C. Cir. 2010) (internal

quotations omitted); see also SR Int'l Business Ins. Co. v. World Trade Center Props. LLC, No. 01 Civ. 9291 (JSM), 2002 WL 1455346, at *9 (S.D.N.Y. July 3, 2002) (disclosure of work product to "persons outside the attorney-client relationship waives the protection of the privilege only if the disclosure is to an adversary, or materially increases the likelihood of disclosure to an adversary" (citing cases)). Here, the waiver Respondents made of the Galbraith Documents by producing them to the Division, inadvertently or not, means that the protections afforded by the doctrine are no longer necessary since the "intrusion by opposing parties" cited in Hickman has already occurred.

(4) Fairness and Prevention of a Distorted Record Requires that the Galbraith Documents Be Produced

Even if Galbraith could assert a separate privilege to prevent disclosure of the Galbraith Documents to the Division, he should not be allowed to do so in this case. In asserting the reliance on advice of counsel defense, Respondents were required to disclose "all communications in their possession that concern discussions with those counsel about any aspect of the joint tenancies." (Order on Motion to Preclude Advice-of-Counsel Defense, dated October 18, 2016, at 5.) To allow Respondents to assert the defense, but permit them to withhold communications between them and one of their lawyers on whom they relied for advice would turn Respondents' privilege into the shield and the sword that the courts prohibit. As Judge Learned Hand explained with respect to the Fifth Amendment, once waived, the waiver must be complete as to all communications: "The privilege is to suppress the truth, but that does not mean that it is a privilege to garble it; ...it should not furnish one side with what may be false evidence and deprive the other of the means of detecting the imposition." United States v. St. Pierre, 132 F.2d 837, 840 (2d Cir. 1942). Such considerations of fairness, and the concern with a distorted record, were reaffirmed by Congress in 2007 when it codified the waiver rule in Fed. R. Evid. 502(a). Under

that rule, a waiver will not effect a privilege waiver beyond the documents disclosed unless "the waiver is intentional;" the disclosed and undisclosed communications "concern the same subject matter; and" the undisclosed information "ought in fairness to be considered" with the disclosed communications. Fed. R. Evid. 502(a). As explained in the Advisory Committee notes, the primary concern is the fairness to the adversary:

> A subject matter waiver (of either privilege or work product) is reserved for those unusual situations in which fairness requires a further disclosure of related, protected information, in order to prevent a selective and misleading presentation of evidence to the disadvantage of the adversary. . . . Thus, subject matter waiver is limited to situations in which a party intentionally puts protected information into the litigation in a selective, misleading and unfair manner.

2007 advisory committee note to Fed. R. Evid. 502(a).

Respondents made the choice to assert the advice of counsel defense, and after being ordered to do so, they identified Galbraith as one of the attorneys "they consulted, at any time 'through approximately February 2016,' about 'the structure of and structuring of' the joint tenancies at issue in this case.'" (October 18, 2016 Order at 5.) Thus, Respondents put at issue all of the communications they had with Galbraith on the joint tenancies at issue in this case and were ordered to produce all communications with him on that topic. If they are now permitted to select which of the Galbraith communications they will give the Division access to, they will be allowed to make "a selective and misleading presentation of evidence." 2007 advisory committee note to Fed. R. Evid. 502(a).

Courts have rejected work product claims in similar contexts, where a Respondent has asserted a reliance on advice of counsel defense. In In re EchoStar Communc'ns Corp., 448 F. 3d 1294 (Fed. Cir. 2006), for example, the court ruled that the defendant in a patent infringement case who was asserting a reliance on advice of counsel defense would have to turn over all of its

communications with the counsel on whose advice it claimed it had relied, and rejected the defendant's claim of work product protection for those communications. Id. at 1303. As the court noted, the "overarching goal of waiver in such a case is to prevent a party from using the advice he received as both a sword, by waiving privilege to favorable advice, and a shield, by asserting privilege to unfavorable advice." Id.[4] So it is here. Respondents cannot select the Galbraith communications on which they intend to rely, and hold others back as protected by work-product protections. Nor should Galbraith be allowed to do that for them. Without the full complement of their communications, the Division will not be able to challenge Respondents' claim of reliance on advice of counsel and the record before the Court will be distorted.

B. If Any of the Galbraith Documents Are Withheld, Respondents' Advice of Counsel Defense Should Be Precluded

If any of the Galbraith Documents are withheld as protected by any privilege or protection, Respondents' claim that they relied on any advice from him should be precluded. For the reasons cited above, Respondents cannot select the advice they like and withhold evidence of advice they do not. And in ordering Respondents to make a full disclosure of "all communications in their possession that concern discussions with those counsel about any aspect of the joint tenancies," the Court warned: "Failure to comply with the above will preclude Respondents from relying on an advice-of-counsel defense." (October 18, 2016 Order at 5.) If they do not immediately produce the Galbraith Documents, they will have failed to comply and the Court should order them precluded from relying on the defense.[5]

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[4] Indeed, the EchoStar Court went further and held that the work product doctrine would not protect even purely internal law firm documents if they reflected communications with the client. Id. at 1304.

[5] Respondents' delay in providing the Galbraith Documents has already prejudiced the Division. It has been two months since they were ordered to do so.

CONCLUSION

For these reasons, the Division respectfully requests that the Court orders Respondents to comply with its Orders to provide all communications with counsel or to preclude them from offering any testimony or evidence regarding their reliance on the advice sought or offered by Galbraith.

Dated: December 19, 2016
New York, New York

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Respondents.

Certificate of Service

I hereby certify that I served (1) the Division of Enforcement's Motion to Compel, dated December 19, 2016; and (2) the Declaration of Nancy A. Brown, executed December 19, 2016, and all exhibits attached thereto on this 19th day of December 2016, on the below parties by the means indicated:

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