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 THIRD PARTY HINCKLEY ALLEN TO COMPLY WITH THE SUBPOENA, OR TO PRECLUDE RESPONDENTS FROM OFFERING TESTIMONY OR EVIDENCE REGARDING THEIR RELIANCE ON THE ADVICE OF HINCKLEY ALLEN

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December 29, 2016

TABLE OF AUTHORITIES

Page

CASES

Pursuant to the Securities and Exchange Commission's Rule of Practice 154, the Division of Enforcement ("Division") moves for an order (1) compelling third party Hinckley Allen and Snyder LLP ("Hinckley Allen") to comply with the Court's November 15, 2016 Subpoena; or (2) precluding Respondents from offering testimony or evidence of their reliance on any advice sought from or offered by Hinckley Allen.[1]

Preliminary Statement

By asserting a reliance on advice of counsel defense, Respondents waived not only the protections of the attorney-client privilege, but also the work product doctrine for all material created by the lawyers on whose advice they allegedly relied. If Respondents' former counsel are permitted to assert a claim of attorney work product to withhold certain documents they assert were prepared in anticipation of litigation, Respondents will be able to present an incomplete and potentially misleading picture of the advice they received; specifically, they could – under the guise of work product -- offer only those documents helpful to their defense, while withholding documents that undermine their position. Such a result is patently inequitable, and one that is contrary to well-established case law.

As a matter of fairness, if Respondents or Hinckley Allen are permitted to withhold documents – particularly the documents reflecting or referring to communications with Respondents – then the Court should preclude any testimony or evidence of Respondents' reliance on Hinckley Allen's advice.

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[1] Given the approaching hearing date, the Division respectfully requests that if the Court grants the Division's motion, its Order provide that (1) Hinckley Allen comply within two business days of the Court's Order, and that failing compliance within that time frame, (2) Respondents are precluded from offering evidence or testimony regarding their reliance on any advice provided by Hinckley Allen to them.

with Respondents was recorded, it is her practice to take notes of her conversations with clients. When asked for specifics about conversations she had with Respondents, Ms. Farrell responded on several occasions that she could not recall, or could not recall the advice she had provided in discussing specific matters on particular calls with Lathen or his associate, Mr. Robinson. (Brown Decl. ¶¶ 6-8.)

The Amended Engagement Letter executed by Hinckley Allen and Respondents in the summer of 2012 identified two main components of the representation: (1) Provide "advice and related legal services with respect to Eden Arc Capital Partners' Investment Strategy and Business Model"; and (2) prepare a memorandum that will "summarize the issues raised for EACP's Business Model by the allegations against the defendants in the Grand Jury Indictment against Joseph Caramadre . . . and how EndCare's Financial Assistance Program may be distinguished from the activities which are the subject of the Caramadre Indictment."[3] (Brown Decl., Ex. B (Amended Engagement Letter, dated July 30, 2012).)

The Division has attempted to negotiate a resolution of this motion prior to its filing with both counsel for Hinckley Allen and counsel for Respondents. Counsel for Hinckley Allen has not advised whether or not they would produce any of the documents on their privilege log after a December 21, 2016 telephonic "meet and confer." Instead, they have agreed only to review and consider making a supplemental production "by the end of next week" that may contain attorneys' notes that "reflect client communications along with drafts, if any, that do not reflect the significant thought processes and mental impressions of the attorneys related to anticipated litigation." (Brown Decl. ¶¶ 10-11, and Ex. D.) Counsel for Respondents advised that they

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[3] Caramadre was indicted for fraud in connection with his scheme to defraud insurers who issued certain variable annuity products to Caramadre in the names of certain terminally ill persons he recruited. See In the Matter of Joseph A. Caramadre, CPA, ID Rel. No. 765, 2015 WL 1519700 (April 6, 2015).

> does it contain a substantive reference to what was communicated, it will aid the parties in determining what communications were made to the client and protect against intentional or unintentional withholding of attorney-client communications from the court.

Id.

Other courts have gone further, finding that a waiver of work-product protection is effected for the entire file of the attorney on whose advice the party claims he relied. E.g., JJK Mineral Co., LLC v. Swiger, 292 F.R.D. 323, 338 (N.D. W. Va. 2013) (finding waiver of work product for all of law firm's material where litigant asserted advice of counsel); SEC v. McNaul, 277 F.R.D. 439, 446 (D. Kan. 2011) (ordering law firm to produce entire file where former client asserted advice of counsel defense); Adidas Am., Inc. v. Payless Shoesource, Inc., No. 01 Civ. 1655, 2006 WL 2999739, at *2 (D. Ore. 2006) (finding that advice of counsel defense waived all work product and collecting cases); cf. Byers v. Burleson, 100 F.R.D. 436, 439-40 (D.D.C. 1983) (ordering production of all of attorney's file relating to determination of compliance with statute of limitations, an issue the client had put at issue in the matter).

As support for finding that a complete waiver was warranted, these courts have relied on the inherent unfairness that arises if the client asserting the defense has information the opposing party is denied, and the dangers of a misleading record that might result. "Discovery of such 'uncommunicated' documents may help to evaluate the reasonableness of the Defendant's reliance on the advice of counsel; it may also lead to the development of circumstantial evidence of conflicting or contradictory opinions. . . . Furthermore, were discovery of 'uncommunicated' materials not allowed, accused infringers could easily and unfairly shield themselves from discovery of unfavorable advice by simply asking their counsel not to send it." Adidas, 2006 WL 2999739, at *2 (internal citations omitted). Accord Beneficial Franchise Co. v. Bank One, N.A., 205 F.R.D. 212, 218 (N.D. Ill. 2001) ("'[I]t would be . . . irrational to assume that there

Respondents asserted the advice of counsel defense. In the Court's order requiring them to produce all materials relating to that advice, the Court warned them that "failure to comply with the above will preclude Respondents from relying on an advice-of-counsel defense." (October 18, 2016 Order, at 5.)[4] If they (or their former counsel) seek to withhold any document that reflects that advice, they should be precluded from asserting the defense.

B. Hinckley Allen Cannot Separately Raise a Claim of Work Product for Files That Belong to Respondents, Its Former Clients

Any attempt by Hinckley Allen to assert its own work product claim in an effort to withhold the documents should be denied. While it is true that Hinckley Allen may assert its own work product protection claim, Hanson v. USAID, 372 F.3d 286, 294 (4th Cir. 2004), its files belong to its client. McNaul, 277 F.R.D. at 445 (the work product "'doctrine does not apply to the situation where the client seeks access to documents or other tangible things created or amassed by his attorney during the course of the representation.'") (quoting Spivey v. Zant, 683 F.2d 881, 885 (5th Cir. 1982)); see also Newmarkets Partners, LLC v. Sal. Oppenheim Jr. & Cie. S.C.A., 258 F.R.D. 95, 105 (S.D.N.Y. 2009) (same). Thus, if the client waives the protections – as it must in situations like this one – then the law firm's own claims of work product protection must fall. McNaul, 277 F.R.D. at 446 (overruling law firm's claim of work product protections to withhold file where former client asserted advice of counsel defense); see also United States v. Bachynsky, No. 04 Cr. 20250, 2007 WL 1521499, at *3 (S.D. Fla. May 22, 2007) (ordering law

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[4] The Court ordered Respondents to turn over "all communications in their possession that concern discussions with those counsel [on whom they relied] about any aspect of the joint tenancies." (October 18, 2016 Order at 5.) As discussed below, an attorney's file belongs to the client; therefore, Respondents have the power to retrieve those documents as if they were in their possession and should have done so here. See also Brown Decl. ¶ 4, n. 1 (noting Respondents' reported insistence that Hinckley Allen turn over all documents to Respondents' current counsel for a pre-production review).

Line Agreement"); 2, Entry undated ("Internal drafts of Participant Agreement; Discretionary Line Agreement; Power of Attorney; Profit Sharing Agreement").[5]

As reflected in the Engagement Letter Hinckley Allen drafted for its Eden Arc engagement, the firm was retained to do two things: (1) Provide "advice and related legal services with respect to Eden Arc Capital Partners' Investment Strategy and Business Model"; and (2) prepare a memorandum that will "summarize the issues raised for EACP's Business Model by the allegations against the defendants in the Grand Jury Indictment against Joseph Caramadre . . . and how EndCare's Financial Assistance Program may be distinguished from the activities which are the subject of the Caramadre Indictment." (Brown Decl., Ex. B (July 30, 2012 Engagement Letter), at 1-2.) Thus, by terms of its own devising, Hinckley Allen's role in preparing documents in anticipation of litigation related at most to the memorandum on the Caramadre Indictment.

The rest of the work Hinckley Allen lawyers did for Eden Arc related to business advice, not preparing documents in anticipation of litigation. Thus, and as reflected on the privilege log, and in the produced documents, Hinckley Allen lawyers drafted numerous agreements for Respondents that they subsequently used to conduct their business, including a "Discretionary Line Agreement," (Brown Decl., Ex. C (Privilege Log), at 1, Entry 09/18/12); a "Participant Agreement; Discretionary Line Agreement; Power of Attorney; Profit Sharing Agreement" (id., at 2, first undated Entry); had internal communications concerning "Revised Participant Agreement and Loan Document" (id. at 6, Entry 06/23/14; and Entry 06/17/14); and prepared an unspecified "draft agreement." (id., Entry 09/18/12).

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[5] It should be noted that many of the entries omit specific reference to any substance, making it impossible to discern whether the withheld document relates to preparation of agreements or the "Caramadre memo." E.g., Brown Decl., Ex. C (Privilege Log) at 3, Entry 09/27/13 ("Internal communication regarding engagement").

Hinckley Allen will be unable to establish that the draft agreements it prepared for Respondents were drafted because of litigation, and therefore no work product protections should be recognized for those materials.

D. Even if Protected by the Work Product Doctrine, the Notes of Communications with Respondents and any Internal Memoranda Referencing Those Communications Should Be Produced Because the Division Has Substantial Need for Them and Will Suffer Undue Hardship Without Them

Assuming that Hinckley Allen can satisfy its burden that any of the documents on its Privilege Log are entitled to work product protections, the notes of any of its attorneys who spoke to Respondents throughout the engagement, and any internal communications referencing such communications, should be produced because Farrell has already admitted that her memory of her conversations with Lathen are imprecise and imperfect, and Respondents plan to call her as a witness at the hearing.

The work product doctrine provides a qualified immunity from production, not an absolute one. Under Fed. R. Civ. P. 26(b)(3)(A)(ii), a party is entitled to factual work product if it can show "that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means." Courts have routinely held that notes of a witness should be produced if the witness has a "faulty memory and no longer remembers details of the event." 8 Charles Allen Wright, et al., Fed. Practice and Proc. § 2025 (3d ed.). See also Colon v. City of NY, No. 12 Civ. 9205 (JMF), 2014 WL 3605543, at *2 (S.D.N.Y. July 8, 2014) (ordering production of party's draft witness affidavit where events transpired several years prior to litigation and could provide important piece of impeachment material); FEC v. The Christian Coalition, 178 F.R.D. 456, 466-67 (E.D. Va. 1998) (party showed substantial need and undue hardship where witnesses' ability to recall events set out in the withheld documents appeared compromised).

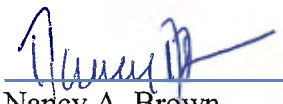
So it is here. Even if Farrell professed a flawless memory of every conversation she had with Respondents, her notes and internal memoranda might reveal inconsistencies that it would be unfair to keep from the Division. Thus, even if Respondents had not put Farrell's advice at issue, the hardship to the Division requires that any work product protection claim should be denied and the documents produced.

CONCLUSION

For these reasons, the Division respectfully requests that the Court (1) order Hinckley Allen to comply with the November 15, 2016 Subpoena in full, and if Hinckley Allen does not comply within two business days of the Court's Order, (2) order that Respondents are precluded from offering any evidence or testimony respecting their reliance on any advice sought from or offered by any attorney from Hinckley Allen.

Dated: December 29, 2016
New York, New York

DIVISION OF ENFORCEMENT



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