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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 IN FURTHER SUPPORT OF ITS 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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January 6, 2017

The Division respectfully submits this reply memorandum of law in further support of its 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.

PRELIMINARY STATEMENT

Since Respondents first asserted their advice of counsel defense on September 23, 2016, they have erected road block after road block to defeat or delay producing materials bearing on what advice they actually sought or received. Instead of complying with the Court's Order that they make a full disclosure so that the Division is "able [to] test (1) whether Respondents made full disclosure to that attorney; (2) what advice the attorney provided; and (3) whether the advice given was followed in good faith," Order dated October 18, 2016, the Division has been forced to seek the Court's intervention at every turn:

- When Respondents tried to limit the scope of their waiver to exclude plainly relevant material, on the Division's Motion (dated September 26, 2016), the Court ordered Respondents to expand the scope of the waiver to include advice sought or received on "any aspect of the joint tenancies." Order, dated October 18, 2016.

- When Respondents delayed their production and refused to identify a date by which they would complete their disclosures, the Division moved to preclude Respondents' defense again on the grounds that they were in violation of the Court's Order. (Motion, dated November 2, 2016.) The Court denied the Motion to preclude, after Respondents produced the promised documents, but issued the Subpoenas to the law firms that the Division requested. Order, dated November 18, 2016.

- When Respondents failed to turn over the documents the Court had ordered them to produce as waived on November 10, 2016, and again on December 14, 2016, the Division moved to compel their production. (Motion, dated December 19, 2016.) After the Division filed its Motion, Respondents ultimately identified the documents that the Court had ordered released. (Declaration of Nancy A. Brown, executed January 6, 2017 ("Brown Decl.") ¶ 2.) (That Motion is sub judice.)

As this loop of "default followed by motion, followed by compliance" reflects, Respondents only comply with their obligations when threatened with some consequence they want to avoid.[1]

On this Motion, filed on December 29, 2016—little more than a month before the hearing is set to begin—Respondents have had some help from their prior counsel. Hinckley Allen at first refused to produce any internal documents at all, claiming work product protections, even over the documents reflecting the communications their lawyers had had with Respondents. (Declaration of Nancy A. Brown, executed December 29, 2016 ("Brown Dec. Decl.") ¶¶ 4. 10.) They then promised only to consider producing those documents. (Id. ¶ 11and Ex. D.) Now, in response to the Division's motion, Hinckley Allen has turned over some internal documents—most of which are heavily redacted—and have furnished a revised privilege log which now asserts work product protections for over 160 documents (increased from 90 on their original log). (Brown Decl., Ex. A.)

But neither Hinckley Allen nor Respondents can establish the applicability of the work product doctrine to the newly or previously identified drafts, internal memoranda or research, which clearly relate to transactional materials not specifically created in anticipation of litigation.

And even if the withheld documents assess litigation claims, Respondents' assertion of the advice of counsel defense waives those protections because Respondents are calling Hinckley Allen lawyers to testify. Under the precedent laid out in the Division's moving brief – in particular Commission precedent which neither Hinckley Allen nor Respondents address – work

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[1] Respondents' obstruction continues unabated. Most recently, Respondents' current litigation counsel, Kevin Galbraith, whom Respondents have called to testify at the hearing to their defense of advice of counsel, has flatly refused to be interviewed by the Division, and both he and Respondents continue to withhold documents relating to his advice that should have long ago been produced.

product protections must bow to the adversary's need for a meaningful ability to cross examine a witness. This is especially true where Respondents have put the advice of counsel at issue.

Finally, this need is heightened given the one-sided and selective nature of the disclosures. Respondents have access to all of Hinckley Allen's materials, even those currently withheld from the Division. (Brown Dec. Decl. ¶ 4.) Allowing the work product assertions to defeat the Division's ability to fully examine the Hinckley Allen lawyers would create the danger of a misleading presentation of the evidence, which the Commission has cautioned against.

It was Respondents' choice to assert the defense. The Division must have the ability to meet it.

ARGUMENT

A. Hinckley Allen Has Not Established Work Product Immunity for Its Documents, and Has Waived the Opportunity to Do So

It is uncontested that Hinckley Allen bears a "heavy burden" to establish work product protections for the documents it has withheld. It cannot be satisfied by "conclusory or *ipse dixit* assertions." In re Grand Jury Subpoena Dated July 6, 2005, 510 F.3d 180, 183-4 (2d Cir. 2007). Hinckley Allen has not established that the documents it has withheld are entitled to any work product protections. And because its revised privilege log is so deficient—omitting basic information to establish its claims—it has waived the ability to establish the protections.

(1) Hinckley Allen Has Not Established that the Withheld Documents Are Work Product

Hinckley Allen's only argument that its myriad draft agreements,[2] internal communications reflecting attorney discussions about them, and attorney research are protectable

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[2] Respondents have waived any objection to Hinckley Allen producing its draft agreements. (See Resps.' Opp'n Brief, dated January 5, 2017 ("Resp. Opp."), at 7) ("[W]e do not have any problem with waiving the work product privilege with respect to those drafts if the Court is concerned about them.")

work product is that some part of the advice Respondents sought was related to a fear of possible future litigation. (Hinckley Allen Opp'n Brief, dated January 5, 2017, at 9.) As the parties agree, Respondents sought two kinds of advice from Hinckley Allen: (1) advice about the prospects of litigation; and (2) advice about how to structure their business. That the second was distinct from the first is manifest in the Engagement Letters prepared by the Firm and executed by Lathen. (E.g., Brown Dec. Decl., Ex. B (Engagement Letter) at 1 ("Advice and related legal services with respect to Eden Arc Capital Partners' Investment Strategy and Business Model"[3]); Affirmation of Harlan Protass, dated January 5, 2017, Ex. 1 (February18, 2010 Engagement Letter) ("Examine EndCare's business model within the existing regulatory framework of securities, insurance and general business law"; "Review EndCare's form of contract with patients and recommend changes as appropriate"; "Create form of contract between EndCare and third party investors")). Neither Hinckley Allen nor Respondents can establish that advice given about the structure of Respondents' business were prepared in anticipation of litigation.

The cases on which Hinckley Allen and Respondents rely undercut their work product claims because they establish that no protections will adhere to documents prepared as part of a deal, or which document transactions or corporate counseling, where the avoidance of litigation in general may be just one of many goals. The Second Circuit has determined that the protections of Fed. R. Civ. P. 26(b)(3) are reserved for those documents that are prepared "because of" litigation, not merely to avoid it. "Documents should be deemed prepared 'in anticipation of litigation,' . . . if. . . the document can fairly be said to have been prepared or

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[3] This advice sought from Hinckley Allen is nearly identical to the limited waiver Respondents first tried to assert in this case, about "the structure of, and structuring of, the Eden Arc Respondents' investment strategy." (Janghorbani September 26, 2016 Declaration, Ex. B (Letter of Harlan Protass, dated September 23, 2016).)

obtained *because of* the prospect of litigation." United States v. Adlman, 134 F.3d 1194, 1202 (2d Cir. 1998). But, this test explicitly does not protect documents "that would have been created in essentially similar form irrespective of the litigation . . . [e]ven if such documents might also help in preparation for litigation." Id. Here, the draft agreements, all prepared for Respondents' use in its hedge fund business, and the documents reflecting the research and internal communications about them, would have been created in essentially similar form, a fact that Respondents do not contest because the evidence shows that they in fact used the agreements in substantially similar form until this case was brought.

Adlman further defined protectable work product documents as those that "candidly discuss[] the attorney's litigation strategies, appraisal of likelihood of success, and perhaps the feasibility of reasonable settlement." Id. at 1200. Accord Assured Guar. Mun. Corp. v. UBS Real Estate Sec. Inc., No. 12 Civ. 1579 (HB)(JCF), 2013 WL 1195545, at 8 (March 25, 2013) (rejecting work product claim for documents not "specifically directed to litigation strategy or possible litigation defenses" because "the materials at issue would have been prepared in substantially similar form regardless of litigation.") (quotations omitted). Neither Hinckley Allen nor Respondents claims that the withheld draft agreements, internal communications about them or the attorneys' research in preparing them discuss "the attorney's litigation strategies, appraisal of likelihood of success" or any other litigation matter.[4]

That the withheld documents may have been inspired by the prospect of litigation is not enough. Were it so, every document a lawyer prepares would be protected as work product because every lawyer strives to draft litigation-proof transactional documents. "[T]o find that

[4] Thus, these are not documents that were prepared in anticipation of litigation that also "assist[ed] in business dealings," as Respondents contend. (Resp, Opp. at 7.) These are documents meant and used to evidence and structure Respondents' business dealings.

'avoidance of litigation' without more constitutes 'in anticipation of litigation' would 'represent an insurmountable barrier to normal discovery' and could subsume all compliance activities by a company as protected from discovery." In re Grand Jury Proceedings, No. M-11-189, 2001 WL 1167497, at *15 (S.D.N.Y. Oct. 3, 2001) (quotations omitted). Even where litigation is certain to result, or where the preparation of the documents might assist in an upcoming or ongoing litigation, work product protections will be denied where it appears that the document would have been prepared "irrespective of the expected litigation." Allied Irish Banks, p.l.c. v. Bank of Am., 240 F.R.D. 96, 106 (S.D.N.Y. 2007). In Allied, the court held that a report and its underlying material prepared for the company's board after a massive fraud had been uncovered would not be protected from discovery as work product even though the company "believed that litigation would result." Id. Instead, the court determined from the engagement letter that the company had sought the report for non-litigation purposes as well, including public relations, and, as here, for "recommendations on any improvements which appear necessary." Id. at 108. As a result, even the likely prospect of litigation was not enough to imbue the withheld materials with work product status. Id.; see also Moving Br. at 10 and cases cited therein.[5]

(2) Hinckley Allen's Has Waived Any Work Product Protections By Providing an Inadequate Privilege Log

Because Hinckley Allen bears the heavy burden to establish that the withheld documents are protected work product, it was required to assert more than a generalized claim. Its assertion of protection must be supported by an "evidentiary showing based on competent evidence . . . and cannot be discharged by mere conclusory or *ipse dixit* assertions." Safeco Ins. Co. of Am. v. M.E.S., Inc., 289 F.R.D. 41, 46 (E.D.N.Y. 2011) (quoting von Bulow by Auersperg v. von

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[5] Further evidence that many of these documents were deal-related is established by the expertise of their authors: corporate, trust and estates, transactional or tax attorneys, and not litigators. (Brown Decl., Ex. B (appending relevant Hinckley Allen biographies).)

Bulow, 811 F.2d 136, 146 (2d Cir. 1987)). A privilege log must, "as to each document, . . . set [] forth specific facts that, if credited, would suffice to establish each element of the privilege or immunity that is claimed." SEC v. Beacon Hill Asset Mgmt. LLC, 231 F.R.D. 134, 140 (S.D.N.Y. 2004) (quotations omitted). And where work product protections are asserted, the log must "identify the withheld documents with sufficient particularity that the opposing counsel can intelligently argue that the privilege ought not to apply." Id.

Here, Hinckley Allen's revised log—expanded to include numerous documents missing from its first log—fails to provide the requisite information. Thus, row after row on the first page alone lists undated documents reflecting "Internal Research performed by attorneys." (Brown Decl., Ex. A.) None of those rows includes the preparer of the document, the recipient of the document, any identification of what type of document it is, nor any indication of the subject of the research. Mr. Ramos's Declaration submitted with Hinckley Allen's Opposition sheds no light on any of these facts. And he notes that he only consulted with attorneys regarding handwritten notes, and only "when necessary and when possible." (Declaration of Adam M. Ramos, dated January 5, 2017 ("Ramos Decl."), ¶ 6.)

With respect to the central question of whether the withheld documents were prepared in anticipation of litigation, Mr. Ramos' Declaration is equally non-specific. He says that he determined that all of the documents were attorney work product based on his "understanding that everything Hinckley Allen did in connection with its representation of Mr. Lathen and his business entities was with any eye toward litigation because of the complexity and ambiguity of the legal issues associated with the proposed business model." (Id. ¶ 5.) That understanding he says was informed through "discussions with [unidentified] attorneys at Hinckley Allen and review of the Amended Engagement Letter . . . " (Id. ¶ 5.) This conclusory statement is just the

type ruled insufficient to establish that work product protections should apply. Beacon Hill, 231 F.R.D. at 143 (work product denied where privilege log failed to identify who prepared documents and the circumstances under which each document was prepared).

Nor has Hinckley Allen or Respondents offered anything to refute that the draft agreements and underlying materials would have looked essentially the same without the specter of litigation. That failure alone is grounds to deny work product protection. Wultz v. Bank of China Ltd., 304 F.R.D. 384, 396 (S.D.N.Y. 2015) (claimant did not meet its burden where it provided "virtually no evidence" on whether it would have generated the materials at issue in similar form had it not anticipated litigation).

B. Having Produced Some Internal Communications Regarding Research, Hinckley Allen's Selective Waiver Creates an Incomplete Picture of Its Advice

Hinckley Allen has already produced some of its internal communications and drafts. (E.g., Brown Decl., Exs. C and D.)[6] It has offered no explanation for why those documents were producible, but others are not. But in producing some, but not all, of its work product, the firm has made an impermissible selective waiver. In re Qwest Comm'cns Int'l, Inc., 450 F.3d 1179, 1196-97 (10th Cir. 2006); In re Columbia/HCA Healthcare Corp. Billing Practices Litig., 293 F.3d 289, 304-07 (6th Cir. 2002); In re Sealed Case, 676 F.2d 793, 822-25 (D.C. Cir. 1982); cf. United States v. Nobles, 422 U.S. 225, 239-40 (1975) (prohibiting testimonial use of work product without disclosure to adversary). Having produced the e-mail it liked, Hinckley Allen can hardly object to producing all of the communications surrounding the work it did on the topic of joint tenancies. Anything less would fail to "guard that the offices of lawyers . . . are not used for unfair or corrupt purposes." In re Sealed Case, 676 F.2d at 825.

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[6] Some of that selective production relates to an associate's review of New York law on the validity of the joint tenancies, an issue as to which Respondents consulted Hinckley Allen and which forms a basis for their advice of counsel defense. (See Brown Decl., Ex. C.)

C. Even If Work Product Protections Apply, the Division Has Established Its Need for the Withheld Documents

Hinckley Allen and Respondents say nothing about In the Matter of Clarke T. Blizzard, Commission precedent directly applicable here. (Cited at Div. Mov. Mem. at 12.) As Blizzard makes clear, where a party calls an attorney to testify, that attorney's work product protections must give way to the adversary's need for materials available to the other side to refresh the witness's recollection or for impeachment. Blizzard, 2002 WL 662783, at *3. There, the Commission held that even though the adversary had been in attendance at an interview about which the attorney would testify, he had a substantial need for the attorney's work product memos of that interview because "denial of the Documents would put [Respondent] at a significant disadvantage" because the witness would be able to "refresh his recollection of the interview by reference to" the notes. Id.

Without the withheld documents, the Court will be deprived of the ability to make a full assessment of the witness's credibility, a result the Commission ruled should be avoided. "Without access to the Documents, [Respondent] and the law judge will have limited means of verifying that [the attorney's] current recollection of the interview conforms with his contemporaneous notes. Allowing [the attorney] to testify but denying [Respondent] access to the Documents could result in producing [a] kind of evidentiary 'half truth' the trial court sought to avoid in Nobles." Blizzard, 2002 WL 662783, at *5 (citing Nobles, 422 U.S. at 241). No different outcome should result here.

What oral advice was conveyed to Respondents is exactly the information that the Division is being blocked from obtaining, and is information that "carries great probative value on [that] contested issue[]." AmTrust N. Am., Inc. v. Safebuilt Ins. Servs., 2016 WL 3260370, at *4 (S.D.N.Y. June 10, 2016) (Resp. Opp. at 4.). Counsel has advised that Respondents long ago

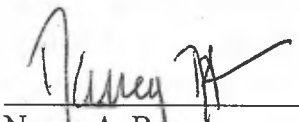
destroyed any of their own notes of those oral communications. (Brown Dec. Decl. ¶ 9.) Without Respondents' own notes and given the understandable inability of Farrell to recall what she told Lathen in 2012 (Brown Dec. Decl. ¶ 6), her contemporaneous memoranda and internal emails are the only indications of what advice she may have provided.[7] By the same token, if Farrell and Respondents have access to the withheld documents to refresh her recollection of those matters – as she has already admitted they do (Brown Decl. ¶ 3) -- it would be unfair to deprive the Division of the same materials if she testifies.

CONCLUSION

For the reasons provided herein and those cited in our Moving Memorandum, the Division respectfully requests that its Motion to Compel or to Preclude be granted.

Dated: January 6, 2017
New York, New York

DIVISION OF ENFORCEMENT



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[7] As courts have noted in ordering full productions from attorneys on whose advice defendants contend they rely, the practical realities of the practice of law make certain that when advice is conveyed only orally, that work product may be the only means to discover what that oral advice was. "Not all information conveyed to a client is neatly reflected in a transmittal letter or in a memorandum specifically directed to a client. The practical reality is that if negative information was important enough to reduce to a memorandum, there is a reasonable possibility that the information was conveyed in some form or fashion to the client." Beneficial Franchise Co., Inc. v. Bank One, N.A., 205 F.R.D. 212, 218 (N.D. Ill. 2001).

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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 Motion to Compel, dated January 6, 2017; and (2) the Declaration of Nancy A. Brown, executed January 6, 2017, and all exhibits attached thereto on this January 6, 2017, on the below parties by the means indicated:

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