UNITED STATES OF AMERICA
Before the
U.S. SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-17387

In the Matter of

DONALD F. LATHEN, JR.,
EDEN ARC CAPITAL MANAGEMENT, LLC,
EDEN ARC CAPITAL ADVISERS, LLC,

Respondents.

THE EDEN ARC RESPONDENTS' MEMORANDUM OF LAW IN OPPOSITION TO THE DIVISION OF ENFORCEMENT'S MOTION *IN LIMINE* TO PRECLUDE CERTAIN EVIDENCE

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Respondents Donald F. Lathen, Jr., Eden Arc Capital Management, LLC and Eden Arc Capital Advisors, LLC (the "Eden Arc Respondents"), by and through their undersigned counsel, respectfully submit this memorandum of law in opposition to the motion of the Division of Enforcement (the "Division") to preclude certain evidence and testimony.

PRELIMINARY STATEMENT

The Division objects to virtually all of the evidence that Respondents have indicated that they intend to present at the hearing, including exhibits also listed on the Division's list. At best, the Division's motion is patently unreasonable and reflects an untenable disregard for the rules of evidence. But it also demonstrates the Division's persistent inability to appreciate the nature of their own allegations and the facts relevant to those allegations.

The Division has levied serious allegations of fraud. Yet their motion suggests to this Court that the only evidence relevant to these proceedings is Respondents' communication with bond issuers. If that were the case, there would be no need for a hearing. Context matters. State of mind matters. Mr. Lathen's actions and statements concerning his investment strategy and operations demonstrate Mr. Lathen's state of mind – that is, his good faith – which is critical to the issue of scienter. None of this evidence can be reasonably characterized as irrelevant and, for obvious reasons, none of it is hearsay being offered to prove the truth of the matter(s) asserted.

What the Division really seeks is to eliminate evidence of Respondents' good faith—because it undermines their allegations and contradicts their myopic view of this case. But there is no basis, in law or equity, for doing so.

ARGUMENT

I. EVIDENCE OF INVESTOR COMMUNICATION IS RELEVANT AND ADMISSIBLE

It is ironic that the Division seeks to exclude evidence and testimony from investors as "irrelevant" on the basis that "there is no allegation of investor fraud." That simple yet critical fact is exactly why investor-related evidence is important—it is probative of Mr. Lathen's good faith and negates the Division's allegations that Mr. Lathen intended to deceive issuers. The evidence will show that Mr. Lathen understood, from his own knowledge and from the advice of his attorneys, that he was required to be open and forthcoming in dealing with his investors. His communications with investors will demonstrate that Mr. Lathen abided by that obligation, plus some. In addition, investors will testify about things that Mr. Lathen said and did that are inconsistent with the allegation that he knew he was engaged in a fraud. This evidence is indisputably relevant to Respondents' defense. The Division is certainly entitled to its own view of the facts and the case; however, their subjective views are not a valid basis for excluding evidence.

The Division's vague arguments about hearsay are equally as unavailing. As an initial matter, the Division does not explain the basis for their hearsay objection, which is patently insufficient. Nevertheless, we lay out the pertinent law on hearsay because the Division's apparent misunderstanding of the law pervades its entire motion.

First, Respondents are not offering evidence of investor communication for any purpose that implicates hearsay. Hearsay is evidence of a declarant's out-of-court statement to prove the truth of what is asserted in the statement. *See* Fed.R.Evid. 801; 5 Wigmore, On Evidence § 1364 (3d ed. 1974); 2 McCormick, On Evidence § 246 (4th ed. 1992). "Under the Federal Rules of Evidence, if the significance of an offered statement lies solely in the fact that it

was made, no issue is raised as to the truth of anything asserted, [then] the statement is not hearsay." *U.S. v. Cardascia*, 951 F.2d 474, 486 (2d Cir. 1991) (citing Advisory Committee Note to Fed. R. Evid. 801(c)). The communications at issue here are not hearsay because Respondents are not seeking to prove the truth or falsity of any factual statements made. Rather, the communications with investors are relevant and admissible because they provide important context, demonstrate transparency and consistency with respect to relevant facts, and, perhaps most importantly, are probative of Mr. Lathen's good faith – that is, Mr. Lathen's belief that this was a lawful investment strategy and the absence of any intent to deceive issuers.

Mr. Lathen's statements are also admissible under Federal Rule of Evidence 803(3), which permits his statements to be admitted as non-hearsay evidence of his then-existing state of mind. *See* Fed. R. Evid. 803(3) (recognizing a hearsay exception for "[a] statement of the declarant's then existing state of mind . . . (such as intent, plan, motive, design, mental feeling . . .), but not including a statement of memory or belief to prove the fact remembered or believed . . ."); *see also* 5 Weinstein's Federal Evidence, § 801.11[5]. Here, again, Mr. Lathen's communications with investors reveal his state of mind, are "offered to show the context within which [he] was acting" as well as the "motive or intent for [his] behavior." *Arista Records LLC v. Lime Group LLC*, 715 F. Supp. 2d 481, 504 (S.D.N.Y. 2010) (admitting publicly rendered statements under the 803(3) to show knowledge or awareness and recognizing that the truth or falsity of these statements is irrelevant). The Division's unsubstantiated hearsay objections therefore are wholly without merit.

The Division's concession that Mr. Lathen did not seek to defraud investors does not eviscerate Respondents' right to demonstrate Mr. Lathen's beliefs, intent, and state of mind as evidenced by his statements about Respondents' investment strategy, whether such statements

were made to investors or anyone else. Counsel's argument is "no substitute for the argument that could [be] made through the admission of [Mr. Lathen's] statement[s]" revealing his mindset throughout the relevant time period. *United States v. DiMaria*, 727 F. 2d 265, 272 (2d Cir. 1984) (reversing on the basis of evidence that should have been admitted under 803(3) to show defendant's state of mind).

II. EVIDENCE OF REGULATORY COMMUNICATION IS RELEVANT AND ADMISSIBLE

The Division makes similar objections about evidence of Mr. Lathen's communication with regulators. These objections fail for the same reasons.[1] Mr. Lathen *proactively* reached out to state regulators, including New York's Department of Financial Services and the Consumer Financial Protection Bureau, to file complaints against issuers who refused to honor what he believed to be their contractual obligations to him. Mr. Lathen's act of asking regulators to examine his investment strategy and to instruct the issuers to honor their obligations is, for obvious reasons, wholly inconsistent with the notion that Mr. Lathen believed that he was engaged in a fraud against those issuers. It is also probative of Mr. Lathen's beliefs, intent and state of mind. The truth or falsity of what was said is not relevant. But the fact that Mr. Lathen filed a complaint with a government regulator is.

Respondents' communication to regulators, particularly those made before the commencement of the Division's investigation, provides important background, is probative of intent and state of mind – that is, Mr. Lathen's good faith –and should be admitted. *U.S. v.*

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[1] The Division should not be heard to complain about the admission of communications with the Division regarding Brady material or the Wells submissions because their exhibit list also contains communications with Respondents and the same Wells submissions. The Division also appears to be trying to use inadvertently produced communications between Respondents and prior counsel. *See* Exhibits 135, 137-139, 310, 574, 707, 708, 733, 796, 797, 801, 802, 805, 809, 812.

Cardascia, 951 F.2d 474, 486 (2d Cir. 1991) (citing Advisory Committee Note to Fed. R. Evid. 801(c)).

III. EVIDENCE OF LEGAL AUTHORITY IMPACTING RESPONDENTS' STATE OF MIND IS RELEVANT AND ADMISSIBLE

The Division's speculation about Respondents' use of legal authority misses the mark entirely. Respondents intend to admit legal authority relied upon by Mr. Lathen only to the extent that Respondents can lay the appropriate foundation to show that Mr. Lathen personally undertook to review, understand, and / or relied upon that authority. In a case where conflicting views about relevant legal precedent is at issue, there is absolutely no basis for excluding evidence of that legal authority.

Furthermore, the fact that Respondents intend to show that the Mr. Lathen relied upon the advice of attorneys in creating and implementing his investment strategy defense does not mean that he is prohibited from offering other evidence of his lack of scienter. Nor does the fact that Mr. Lathen is not a lawyer have any bearing whatsoever on the admissibility of the facts here; all things Mr. Lathen did that evidence his state of mind are relevant, notwithstanding the Division's crabbed view of what evidence Mr. Lathen should be permitted to use to defend himself.

The same rationale applies to evidence regarding the *Staples* case. By way of background, *Staples* is another case involving a survivor's options investment strategy that was similar to Respondents'. The Staples became the subject of an SEC enforcement action shortly before Respondents.[2] It likely would be inappropriate to submit evidence concerning that case in

[2] The SEC's case against the Staples ended in a settlement dismissing, with prejudice, violations Section 10(b) of the Securities Exchange Act of 1934 and Rule 10-b(5) thereunder, and Section 17(a)(1) of the Securities Act of 1933. The SEC alleged more than $6 million in ill-gotten gains and settled for disgorgement of $58,049.63, prejudgment interest of $5,804.97, and a civil penalty of $58,049.63.

a hearing to challenge the SEC's prosecutorial decisions. Rather, Respondents intend to offer evidence of the case, with an appropriate foundation for doing so, to demonstrate the impact the case had on Mr. Lathen's state of mind. For example, there is significant evidence of relevant parties, including Mr. Lathen and his attorneys and investors, discussing and distinguishing from the *Staples* case. Such evidence is incredibly relevant, and there is no basis for excluding it.

IV. EVIDENCE OF HOSPICE COMMUNICATIONS IS RELEVANT

Respondents intend to offer testimony regarding communication with Participants' families, hospices and social workers because it is relevant background information. It was part of Respondents' business operations, and it is difficult to see how Respondents could explain their business operation without discussing it. More importantly, the evidence will show that counsel informed Mr. Lathen of the importance of being fully transparent with his dealings with participants, and Mr. Lathen's communications with the Participants' care givers will show that he followed that advice. While the Division may not like the fact that this evidence also shows the strategy's useful and significant benefit to people facing high end-of-life expenses, as it does not mesh with the picture they wish to paint of him, that is no basis to exclude it.

Furthermore, there is no basis for excluding testimony from Dennisse Alamo, the daughter of one of the Participants, who interacted with Respondents. Participants' intent to form a joint tenancy with right of survivorship ("JTWROS") with Mr. Lathen is one of the issues at the forefront of the case, and there is no basis for precluding evidence of that intent. If the Division will stipulate to the fact of Participant good faith intent to form JTWROS's, then Respondents would consider withholding such evidence. Furthermore, the Division is offering testimony from Joy Davis, another participant, and cannot expect the Court to preclude

Respondents from proffering testimony and evidence that the Division itself intends to use in its own case.

V. TESTIMONY FROM WITNESSES REGARDING THEIR UNDERSTANDING OF RESPONDENTS' INVESTMENT STRATEGY IS RELEVANT AND NOT TANTAMOUNT TO EXPERT TESTIMONY

The Division's argument regarding "lay person" testimony is unclear. There is nothing inappropriate about having non-experts testify as to their understanding of Respondents' investment strategy to the extent that the testimony is relevant in a given context. Obviously witnesses' understanding of the strategy is pertinent background information and not tantamount to expert testimony.

To the extent that a witness testifies as to his or her beliefs about the legitimacy of Respondent's investment strategy, such testimony would be permissible to the extent that it is "(1) rationally based on the witness's perception; (2) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and (3) not based on scientific, technical, or other specialized knowledge . . ." Fed. R. Evid. 701 (defining the bounds of permissible lay person opinion testimony). Such testimony would also be relevant if it is based upon information conveyed to the witness by Mr. Lathen and demonstrated that he lacked any intent to defraud.

Finally, Mr. Lathen should be permitted to offer testimony regarding his understanding of the impact of his strategy on issuers. This is obviously not being offered as expert testimony, but as relevant contextual evidence of Mr. Lathen's understanding of his investment strategy and his good faith belief that his strategy was not based upon a fraud. In this context, Mr. Lathen's understanding of the impact of his strategy, as a former investment banker, is certainly relevant and probative on the issue of scienter and good faith.

VI. RESPONDENTS DO NOT INTEND TO OFFER TESTMONY FROM ANYONE NOT ON THEIR AMENDED WITNESS LIST

Finally, the Division asks the Court to preclude Respondents from offering testimony from certain witnesses whom Respondents removed from their amended witness list. Respondents amended their witness list to remove the individuals at issue because Respondents have no intention of calling them. Respondents expect that, absent leave of the Court, neither side will offer testimony from witnesses not on their most recent witness list.

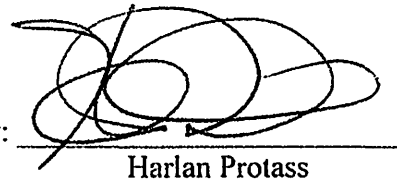
CONCLUSION

Accordingly and for all of the foregoing reasons, we respectfully submit that this Court should: (1) enter an order denying the Division's motion *in limine* to preclude certain testimony and evidence, in toto, and (2) grant Respondents such other and further relief as this Court deems just and appropriate.

Dated: New York, NY
January 18, 2017

Respectfully submitted,

CLAYMAN & ROSENBERG LLP

By: 

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that on January 18, 2017 I caused a true and correct copy of the attached, THE EDEN ARC RESPONDENTS' MEMORANDUM OF LAW IN OPPOSITION TO THE DIVISION OF ENFORCEMENT'S MOTION *IN LIMINE* TO PRECLUDE CERTAIN EVIDENCE, to be served upon the parties listed below via UPS Overnight Mail:

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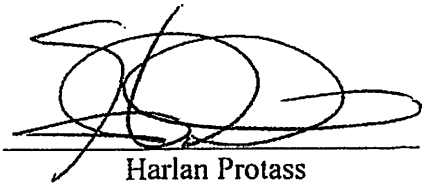

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