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.

AFFIRMATION OF HARLAN PROTASS IN SUPPORT OF THE EDEN ARC RESPONDENTS' OPPOSITION TO THE DIVISION OF ENFORCEMENT'S MOTION *IN LIMINE* TO PRECLUDE ADVICE OF KEVIN GALBRAITH

HARLAN PROTASS hereby affirms under the penalty of perjury that the following statements are true and correct, except where otherwise indicated:

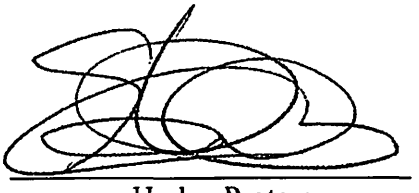
1. I am a member of the law firm Clayman & Rosenberg LLP, which has offices at 305 Madison Avenue, New York, NY, 10165. Clayman & Rosenberg LLP represents respondents Donald F. Lathen, Jr., Eden Arc Capital Management, LLC and Eden Arc Capital Advisors, LLC (the "Eden Arc Respondents") in the referenced matter. I am admitted to the practice of law before the courts of the State of New York, the United States District Courts for the Southern and Eastern Districts of New York and the United States Court of Appeals for the Second Circuit.

2. I submit this Affirmation in support of the Eden Arc Respondents' Opposition to the Division of Enforcement's Motion to *in Limine* to Preclude Evidence of the Advice of Kevin Galbraith, dated January 18, 2016.

3. Attached hereto as Exhibit 1 is a true and correct copy of Judge Grimes' Order on Motion to Preclude Advice-of-Counsel Defense, dated October 18, 2016.

4. Attached hereto as Exhibit 2 is a true and correct copy of an Affirmation of Kevin Galbraith, Esq., dated January 18, 2017.

Dated: New York, NY
January 18, 2017



Harlan Protass

EXHIBIT 1

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

ADMINISTRATIVE PROCEEDINGS RULINGS
Release No. 4272/October 18, 2016

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	ORDER ON MOTION TO PRECLUDE ADVICE-OF-COUNSEL DEFENSE

Respondents want to present an advice-of-counsel defense. The Division of Enforcement opposes Respondents' plan. For the reasons that follow, the Division's motion to preclude Respondents' defense is denied in part.

Background

Following a prehearing conference held on September 12, 2016, Respondents filed a notice:

> that the Eden Arc Respondents intend to invoke the advice of counsel defense at the hearing in the referenced matter with respect to (and hereby waive the attorney-client privilege with respect to attorney-client communications, whether written, oral or electronic, concerning) the legal advice they received concerning and relating to the structure of, and structuring of, the Eden Arc Respondents' investment strategy.

Letter from Harlan Protass (Sept. 23, 2016).[1] The Division of Enforcement later moved to preclude Respondents from relying on this defense. The Division contends that Respondents' proposed defense is irrelevant because this case is not about the structure of Respondents' investment strategy but is instead about disclosures Respondent Donald F. Lathen made when he redeemed securities held in various joint tenancies. Mot. at 4-5.

---

[1] The term "Eden Arc Respondents"—as used by Respondents' counsel in certain letters—appears to collectively refer to all three Respondents, including Donald F. Lathen. *See* Janghorbani Decl. (Sept. 26, 2016), Ex. J; Letter from Harlan Protass (Sept. 23, 2016).

Respondents contend that it is not for the Division to say what is or is not relevant. They concede that "the Eden Arc Respondents are not asserting that they sought, received or relied on legal advice concerning whether Mr. Lathen was required to disclose his 'contractual regime' when redeeming survivor's option bonds and CDs, as the Division maintains." Opp'n at 4; *see id.* at 5 ("[T]he genesis of the Division's argument is its misguided attempt at imposing a requirement on Mr. Lathen to have sought legal advice that he did not seek - that is, advice concerning the sufficiency of his disclosures to issuers of survivor's option bonds and CDs."). In other words, the Eden Arc Respondents have waived any claim that they sought or relied on advice about what disclosures Lathen was required to make.

Legal Principles

In a bench trial, "it is virtually impossible for a trial judge to commit reversible error by receiving incompetent evidence, whether objected to or not."[2] Courts should hesitate to exclude evidence during a bench trial and should instead "take factors that otherwise might affect . . . admissibility into consideration in determining . . . weight."[3] Applying this principal to administrative agencies, courts have "strongly advise[d] administrative law judges: if in doubt, let it in."[4] Following this guidance, the Commission has held that "all evidence which 'can conceivably throw any light upon the controversy' should normally be admitted."[5] Administrative "law judges should [thus] be inclusive in making evidentiary determinations."[6]

The attorney-client privilege protects from disclosure certain "communications between a client and his attorney."[7] Courts construe the attorney-client privilege narrowly "because [it] . . . obstructs the search for the truth and" provides "benefits [that] are, at best, 'indirect and

---

2 *Builders Steel Co. v. Comm'r*, 179 F.2d 377, 379 (8th Cir. 1950); *see Herlihy Mid-Continent Co. v. N. Ind. Pub. Serv. Co.*, 245 F.2d 440, 444-45 (7th Cir. 1957).

3 *In re Unisys Sav. Plan Litig.*, 173 F.3d 145, 164 (3d Cir. 1999) (Becker, C.J., dissenting); *see Builders Steel Co.*, 179 F.2d at 379-80; *see Eagle-Picher Indus., Inc. v. Liberty Mut. Ins. Co.*, 682 F.2d 12, 18 (1st Cir. 1982) ("[A] district judge, sitting without a jury, might be well advised to admit provisionally all extrinsic evidence of the parties' intent, unless it is clearly inadmissible, privileged, or too time consuming, in order to guard against reversal.").

4 *Multi-Med. Convalescent & Nursing Ctr. of Towson v. NLRB*, 550 F.2d 974, 978 (4th Cir. 1977); *see Samuel H. Moss, Inc. v. FTC*, 148 F.2d 378, 380 (2d Cir. 1945).

5 *Charles P. Lawrence*, Admin. Proc. File No. 3-609, 1967 WL 87762, at *4 (Dec. 19, 1967).

6 *City of Anaheim*, Exchange Act Release No. 42140, 1999 WL 1034489, at *2 (Nov. 16, 1999).

7 *In re EchoStar Commc'ns Corp.*, 448 F.3d 1294, 1298-99 (Fed. Cir. 2006).

speculative."'[8] It is "established that if a party interjects the 'advice of counsel' as [a] . . . defense, then that party waives the privilege as to *all* advice received concerning the same subject matter."[9]

The question of what constitutes "the same subject matter" is fact specific and necessarily determined on a case-by-case basis.[10] A party asserting advice of counsel as defense may not selectively define the "same subject matter" in a way that prevents the party's opponent from determining whether the party asserting the defense provided counsel with all relevant facts and then followed the advice in good faith.[11]

Because the advice-of-counsel defense operates to waive the privilege as to all advice received concerning the same subject matter, a party asserting this defense may not "disclos[e] [some] communications that support its position while simultaneously concealing communications that do not."[12] It follows that a litigant may not limit the temporal reach of his or her waiver of the attorney-client privilege to prevent disclosure of communications related to that subject matter.[13]

Discussion

I reject the Division's argument that Respondents' defense is irrelevant and should be disallowed. Because the defense is at least "conceivably" relevant, disallowing it would be inconsistent with Commission precedent.[14] Whether Respondents will be able to establish all of

---

[8] *In re Grand Jury Investigation*, 599 F.2d 1224, 1235 (3d Cir. 1979); *see In re Grand Jury Proceedings*, 219 F.3d 175, 182 (2d Cir. 2000); *see also Trammel v. United States*, 445 U.S. 40, 50 (1980).

[9] 1 Kenneth S. Broun et al., McCormick on Evidence § 93 (7th ed. 2013) (emphasis added); *see EchoStar Commc'ns Corp.*, 448 F.3d at 1299.

[10] *Fort James Corp. v. Solo Cup Co.*, 412 F.3d 1340, 1349-50 (Fed. Cir. 2005).

[11] *Glenmede Trust Co. v. Thompson*, 56 F.3d 476, 486 (3d Cir. 1995); *see Trouble v. Wet Seal, Inc.*, 179 F. Supp. 2d 291, 304 (S.D.N.Y. 2001) ("When a party intends to rely at trial on the advice of counsel as a defense to a claim of bad faith, that advice becomes a factual issue, and 'opposing counsel is entitled to know not only whether such an opinion was obtained but also its content and what conduct it advised.'" (quoting *Vicinanzo v. Brunschwig & Fils, Inc.*, 739 F. Supp. 891, 894 (S.D.N.Y. 1990))).

[12] *Fort James Corp.*, 412 F.3d at 1349; *see United States v. Workman*, 138 F.3d 1261, 1263-64 (8th Cir. 1998).

[13] *Bd. of Trustees of Leland Stanford Junior Univ. v. Roche Molecular Sys., Inc.*, 237 F.R.D. 618, 627 (N.D. Cal. 2006).

[14] *See Charles P. Lawrence*, 1967 WL 87762, at *4.

the elements of the defense, including full disclosure to counsel and subsequent good faith reliance on that advice,[15] remains to be seen. If, as the Division suggests, Respondents' advice-of-counsel defense misses the point, then it will not matter what Respondents discussed with counsel about the structure of the joint tenancies. In that case, the Division is free to ignore the defense. On the other hand, as discussed below, the Division is free to explore the circumstances surrounding the advice Respondents sought and received.

Respondents state that they are waiving "the attorney-client privilege . . . with respect to the *entirety* of the 'transaction,' not some portion of it – to wit, 'the legal advice they received concerning and relating to the *structure* of, and *structuring* of, the Eden Arc Respondents' investment strategy.'" Opp'n at 6. The Division counters that Respondents are selectively disclosing evidence relating to their proposed defense.

Assuming Respondents have not adopted an overly narrow construction of the "entirety of the 'transaction,'" *i.e.*, one that does not includes the transaction's conclusion, as to the attorneys with whom Respondents discussed the "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."[16] And the "same subject matter" is the joint tenancies. This means that if Respondents consulted with an 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.[17] Put another way, once it is established that Respondents consulted with a given attorney, the Division must be able 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.[18]

To the extent Respondents have not already done so, they shall forthwith disclose to the Division every attorney they consulted, at any time "through approximately February 2016,"

---

15 *See United States v. DeFries*, 129 F.3d 1293, 1308 (D.C. Cir. 1997).

16 *In re Sealed Case*, 676 F.2d 793, 809 (D.C. Cir. 1982) (emphasis added).

17 OIP ¶ 2. The Division asserts that Respondents purport to limit their waiver of their attorney-client privilege so as to exclude communications before their Fund was formed in 2011. Respondents cannot limit their waiver in this manner. *See Bd. of Trustees of Leland Stanford Junior Univ.*, 237 F.R.D. at 627. Additionally, this purported limitation is inconsistent with their counsel's letter through which Respondents unequivocally waived their attorney-client privilege without any such limitation. *See* Letter from Harlan Protass (Sept. 23, 2016). The privilege waiver does not, however, encompass attorney-client communications related to the Division's investigation or this administrative proceeding. *See Bowne of N.Y. City, Inc. v. AmBase Corp.*, 150 F.R.D. 465, 487 (S.D.N.Y. 1993).

18 *See DeFries*, 129 F.3d at 1308.

about "the structure of and structuring of" the joint tenancies at issue in this case.[19] They shall also disclose all communications in their possession that concern discussions with those counsel about any aspect of the joint tenancies. In other words, if Respondent Lathen exchanged e-mails with an attorney in which a discussion occurred about the "the structure of and structuring of" the joint tenancies, those e-mails shall be disclosed even if they contain discussions about other aspects of the joint tenancies. Finally, Respondents shall inform these attorneys of their waiver. Failure to comply with the above will preclude Respondents from relying on an advice-of-counsel defense.[20]

Given Respondents' waiver, the Division may inquire of the attorneys who were consulted, regarding their discussions with Respondents or their representatives about the joint tenancies. This means that the Division may fully explore with the attorneys everything Respondents or their representatives told the attorneys about the joint tenancies, what advice the attorneys provided about the joint tenancies, and whether they know if their advice was followed.[21]

Respondents should complete any disclosures required by this order by November 1, 2016. The parties are encouraged to engage in good faith negotiations about production in compliance with this order. If such negotiations fail, the Division may renew its request for documentary subpoenas by November 4, 2016.

James E. Grimes
Administrative Law Judge

---

[19] As noted, Respondents' waiver does not encompass attorney-client communications related to the Division's investigation or this administrative proceeding.

[20] *See Minn. Specialty Crops, Inc. v. Minn. Wild Hockey Club, L.P.*, 210 F.R.D. 673, 676-77 (D. Minn. 2002).

[21] *See Glenmede Trust Co.*, 56 F.3d at 486; *see also United States v. Jones*, 696 F.2d 1069, 1072 (4th Cir. 1982) (citing *Garfinkle v. Arcata Nat'l Corp.*, 64 F.R.D. 688, 689 (S.D.N.Y. 1974), for the proposition that "where defendant injected his counsel's opinion letter as a defense, plaintiff was entitled to probe into the circumstances surrounding issuance of the letter and could not be limited to the letter itself").

EXHIBIT 2

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.

AFFIRMATION OF KEVIN GALBRAITH

KEVIN D. GALBRAITH, Esq., an attorney duly licensed to practice law in the State of New York, affirms under penalty of perjury as follows:

1. I write in response to the Division's Motion *in Limine* to Preclude Respondents from Offering Testimony or Evidence on Advice Received from Attorney Kevin Galbraith, filed January 11, 2017 ("Motion").
2. My law firm has represented Mr. Lathen since July 1, 2014, and the scope of our engagement has included (a) the litigation captioned *Prospect Capital Corp. v. Lathen et al.*, Index No. 14-156375, pending before the Honorable Nancy Bannon in the Supreme Court of the State of New York, County of New York; (b) disputes with several issuers of bonds and certificates of deposit regarding the attempted redemption of such instruments; (c) a dispute with indenture trustee U.S. Bank regarding the attempted redemption of bonds and certificates of deposit issued by U.S. Bank's issuer clients; (d) providing

general legal advice concerning Mr. Lathen's business; and (e) providing general additional counsel and advice regarding the instant proceeding, working in conjunction with Respondents' lead SEC defense counsel, both current and prior.

3. At no point has my firm been lead SEC defense counsel in this matter, nor to my understanding has there ever been a basis or requirement for us to file a notice of appearance.

4. On November 16, 2016, I agreed to accept email service of a subpoena from the Division. Immediately thereafter, I reviewed the subpoena and began assessing what responsive documents might be in my firm's possession.

5. My goal was to produce all responsive documents by December 1, 2016, despite the fact that my firm—consisting of myself and one associate—has an extremely busy practice with over two dozen current engagements, and that the subpoena response date, just two weeks away, covered the Thanksgiving holiday.

6. I spent very significant time gathering and reviewing documents that were potentially responsive to the subpoena. Given the length and scope of my firm's engagement, this involved reviewing thousands of documents, including emails, correspondence (including drafts), court filings (including drafts) and handwritten notes covering an extremely wide range of topics.

7. During this process, I conferred with SEC defense counsel and understood that the vast majority—if not all—of the documents responsive to the subpoena had already been produced by counsel—including prior counsel—to the Division during its productions of nearly 200,000 documents in response to subpoena and in connection with its advice of counsel and good faith defenses.

8. On November 29, 2016, I informed the Division in writing that I was continuing to gather and review potentially responsive documents, and that I anticipated making an initial production on December 5, 2016. As part of that communication, I advised the Division that "[a]s a result of the volume of materials requested and the complications that have arisen with respect to Clayman & Rosenberg's prior productions, the document-gathering process is taking a bit longer than anticipated."

9. The Division was by this time well aware of the complications I referenced, having received substantial inadvertent productions of otherwise privileged materials that included many communications between my firm and Mr. Lathen.

10. On December 1, 2016 (followed up on December 2, 2016 with a production using the Division's preferred format), I provided to the Division an initial production. I informed the Division that, consistent with my prior written communications, I expected to supplement my production in the coming days, and that I would also provide an item-by-item written response setting forth the categories of materials being produced in response to the subpoena.

11. On December 2, 2016, consistent with my prior written communications, I informed the Division that my initial production would be supplemented within three days. I wrote, "As I wrote to you on November 29, the scope of the subpoena, combined with the moving parts regarding the advice of counsel / good faith defense and the fact that some portion of the materials responsive to the subpoena have already been produced by Mr. Lathen's SEC counsel, have led to a brief delay in completing my firm's production. I expect to complete our supplemental production on December 5 and will let you know if that changes. I do not have an estimate regarding volume for you."

12. On December 5, 2016, I wrote to the Division, providing an item-by-item written response to the subpoena.

13. On December 5, 2016, I exchanged multiple emails with the Division explaining my understanding of productions made by SEC defense counsel, which I had referenced in my letter. I assured the Division that to the extent there were any additional documents responsive to the subpoena that were potentially not included in such production, I would endeavor to identify, review and produce them in the near term.

14. I wrote, "I am consulting with Mr. Lathen's SEC defense counsel regarding the scope of their productions to date as they pertain to the items you note below. To my understanding, many such communications have already been produced. However, in an abundance of caution and to ensure that our productions are comprehensive, I will review my own emails with Mr. Lathen regarding trustee U.S. Bank, issuer GE Capital and other issuers about which we communicated. To the extent the communications I identify do not pertain to litigation strategy, I will produce them."

15. I reminded the Division that "As you may know, I have represented Mr. Lathen and his company for well over two years, so gathering and reviewing potentially responsive emails will take a bit of time. Nonetheless, I will make it a priority and will work to produce them in the near-term."

16. On December 8, 2016, I spoke with the Division regarding the final steps I had undertaken to complete my response to the subpoena.

17. On December 10, 2016, I wrote to the Division to provide an update on the supplemental production I was preparing to make. I wrote, "I will send a thumb drive (or upload to your FTP) with the bulk of the responsive emails on Monday, and will follow up with

any remaining emails, plus the privilege log, later in the week. The first portion of the production, 627 emails plus attachments, have been sent to a third-party service provider for processing."

18. On December 12, 2016, I made the above-referenced supplemental production.

19. On December 15, 2016, I wrote to the Division to provide an update regarding a final archive I needed to search in order to ensure that all responsive documents had been produced, and regarding the timing of my preparation of a privilege log.

20. On December 23, 2016, I made a final supplemental production to the Division. On that same date, I wrote to the Division, "This morning I produced, by way of the SEC's secure filing sharing platform, one additional document responsive to your subpoena. I have now completed the review of my firm's email and document archives, and I am not aware of any additional responsive documents. As such, my firm's compliance with the subpoena is complete. Attached please find a log identifying 11 emails that are being withheld on the basis of privilege. With any questions regarding this matter, please contact me, rather than filing a motion of any kind or communicating with other counsel without copying me, as has occurred more than once in the past."

21. Beginning on December 27, 2016, while I was out of the country with my family on a long-scheduled vacation of which I had previously informed the Division, the Division repeatedly contacted me, and on December 29, 2016, insisted on a meet-and-confer call. I agreed to the call, which was held on December 30, 2016.

22. On December 31, 2016, the Division wrote in an effort to schedule an interview of me prior to the trial of this matter. Around this time, I alerted Mr. Lathen and SEC defense counsel to the Division's request.

23. On January 3, 2017, I provided to the Division additional details we had discussed during our December 30, 2017 meet-and-confer.

24. On January 4, 2017, the Division again wrote in an effort to schedule an "interview" of me prior to the trial of this matter, and to see if I would accept email service of a trial subpoena; I agreed to accept service.

25. At this point, I was aware of this Court's ruling of October 18, 2016, in which it indicated that the Division would be permitted to "fully explore with the attorneys everything Respondents or their representatives told the attorneys about the joint tenancies." I viewed that order as authorizing the Division to explore such topic at the trial, during my testimony. I did not believe it granted the Division the authority to compel me to sit for a pre-trial interview—nor do I believe that now.

26. Nor does the case law referenced in this Court's October 18, 2016 Order relate in any way to the argument now advanced by the Division. It certainly does not announce some newly conjured authority to compel a witness to submit to a pre-trial interview. Rather, it simply addresses the scope of waiver in the advice-of-counsel / good faith context.

27. On January 5, 2017, I wrote to the Division, "Regarding your request for a pre-hearing interview, I will respectfully decline."

28. On January 11, 2017, I received a copy of the present motion and reviewed the Division's representations therein. On the basis of the facts outlined above, I strongly disagree with the version of events presented by the Division.

29. With regard to the productions I have made in response to the subpoena, I produced 627 emails, many of which included substantive attachments. I have articulated in detail the legal bases for withholding certain documents. Despite the Division's objections, it is

plainly true that I have made every effort to comply in every respect with its subpoena.

30. I have been entirely transparent with the Division in my multiple written and oral communications over the past two months. By contrast, the Division has repeatedly raised its objections not with my firm but rather with and through other counsel, and it has made repeated motions attempting to preclude not just Respondents' defenses but my own testimony in support of those defenses, rather than seeking to resolve disputes without resort to needless litigation.

31. To the extent there has been any temporary gap or slight delay in my firm's response to the subpoena, those have been the result of (a) the broad scope and short response date of the subpoena; (b) the scope and duration of our representation of Mr. Lathen's business, including the attendant volume of potentially responsive documents requiring review; (c) the difficulty in ascertaining exactly what had been produced by Mr. Lathen's current and prior SEC defense counsel; (d) the continuing disputes between the Division and Mr. Lathen's SEC defense counsel regarding inadvertent productions of otherwise privileged communications between my firm and Mr. Lathen; and (e) the multiple additional engagements being handled by my firm during the time we prepared our subpoena responses, including a number of matters with time-consuming and time-sensitive obligations imposed by the SEC and FINRA.

32. Nothing presented in the Division's motion remotely supports the drastic remedy of precluding my testimony. To the contrary, given the Division's oft-stated confidence in its legal position, it should welcome the opportunity to take my testimony.

DATED: New York, New York
January 18, 2017

THE GALBRAITH LAW FIRM

/Kevin D. Galbraith/

Kevin D. Galbraith, Esq.
236 West 30th Street, 5th Floor
New York, New York 10001
(212) 203-1249
kevin@kevingalbraithlaw.com

Counsel for Respondents
Eden Arc Capital Management
and Donald F. Lathen, Jr.