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

ADMINISTRATIVE PROCEEDINGS RULINGS
Release No. 4247/October 12, 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 QUASH

Respondents submitted a request for a subpoena directed to the Securities and Exchange Commission concerning twelve categories of documents and information. After I issued the subpoena, the Division of Enforcement moved to quash and Respondents filed an opposition. I resolve the motion to quash as is discussed below, addressing each category in the order listed in the subpoena.

Preliminarily, Respondents' opposition to the Division's motion to quash is animated by their assertion that in disclosing its investigative file, the Division has provided an "organization-less, behemoth" in excess of 600,000 pages, "composed almost exclusively of difficult to search PDF files." Opp. at 1, 5. In this regard, the Commission has held that absent bad faith not shown here, the Division satisfies its discovery obligations when it "turns over its investigative file—voluminous though it might be—*in an electronically searchable format*." *John Thomas Capital Mgmt. Grp. LLC*, Investment Advisers Act of 1940 Release No. 3733, 2013 WL 6384275, at *6 (Dec. 6, 2013) (emphasis added).[1] Although Respondents assert in their motion—they have not submitted a supporting declaration—that they have experienced great difficulty performing an electronic search of the documents they have received, Opp. at 1, 5, I have no way of judging this assertion.

I direct Respondents to submit a declaration within ten days detailing the difficulties they have experienced in searching the documents disclosed by the Division. Within seven days of

[1] This rule is influenced by certain appellate decisions addressing the government's obligations under *Brady v. Maryland*. *See John Thomas Capital Mgmt. Grp. LLC*, at *6 n.41 (citing, among other decisions, *United States v. Pelullo*, 399 F.3d 197, 211 (3d Cir. 2005) (concerning 75,000 pounds of documents), and *United States v. Mulderig*, 120 F.3d 534, 541 (5th Cir. 1997) (concerning 500,000 pages of documents)).

filing of Respondents' declaration, the Division should submit a responsive declaration addressing how the documents were disclosed and the specific manner in which the disclosed documents are maintained by the Division, including whether the Division's investigative file is maintained in an undifferentiated collection.[2]

1. Respondents' request for a list of everyone the Division interviewed in the course of its investigation is moot. The Division has provided Respondents with a list of interviewees.

2. Respondents seek "notes and/or summaries from the[se] interview[s]." The Division responds that its interview notes constitute work product and that Respondents have not made the requisite showing necessary to justify production of the notes. Mot. at 4-5. For their part, Respondents do not seriously contest that the Division's interview notes constitute work product. Instead, they argue that the Division has not shown that its notes constitute opinion work product. Opp. at 3-4.

Assuming the Division has failed to show that its notes are opinion work product, in order to obtain the Division's notes, Respondents must show "a substantial need for the materials" they seek "and an undue hardship in acquiring the information any other way." *Dir., Office of Thrift Supervision v. Vinson & Elkins, LLP*, 124 F.3d 1304, 1307 (D.C. Cir. 1997). In moving to quash, the Division disclosed the names of every person its staff interviewed in the course of its investigation of Respondents. Respondents have thus only recently learned the names of the people the Division interviewed. Their assertion of substantial need and undue hardship is premature. This aspect of Respondents' subpoena is quashed without prejudice to later renewal.

3. Respondents seek written witness statements obtained during the course of the Division's investigation. In its motion to quash, the Division asserts that it has already complied with this request. Mot. at 3-4 ("[T]hose documents have been produced."). Respondents' request appears to rest on their claim that the Division produced its investigative file in a disorganized manner, Opp. at 6, without further support that the Division failed to produce required material.

Rule of Practice 231(a) requires the Division to disclose witness "statements," as that term is defined in the Jencks Act, 18 U.S.C. § 3500. 17 C.F.R. § 201.231(a).[3] By its terms, the

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[2] Under Federal Rule of Civil Procedure 34(b)(2)(E), which does not apply in this proceeding but which may provide useful guidance, documents produced in civil litigation may either be produced in the manner in which they are kept or they may be produced in an organized and labeled fashion. This rule was intended to create an "equality between the parties in their ability to search . . . documents." *United States v. O'Keefe*, 537 F. Supp. 2d 14, 19 (D.D.C. 2008).

[3] The Jencks Act defines the term "statement" as

> (1) a written statement made by said witness and signed or otherwise adopted or approved by him;

Jencks Act applies in criminal proceedings. Unlike Section 3500, which requires production of a witness's statement *after* a government witness testifies on direct examination, 18 U.S.C. § 3500(b), Rule 231(a) permits a respondent to seek disclosure of statements *before* the witness testifies. 17 C.F.R. § 201.231(a).

When an issue arises in a criminal trial as to whether the government has complied with its obligation to disclose Jencks Act material, the operating presumption is that, if the defendant meets his threshold burden, the district court will review *in camera* the document at issue. *See United States v. Allen*, 798 F.2d 985, 994-96 (7th Cir. 1986); *see also United States v. Smith*, 31 F.3d 1294, 1302 (4th Cir. 1994). To meet this initial burden, a defendant must "specify[] with reasonable particularity (normally by his cross-examination at trial) that a certain document exists, that there is a reason to believe that the document is a statutory 'statement,' and that the Government failed to provide it in violation of the Act." *Allen*, 798 F.2d at 996 (quoting *United States v. Robinson*, 585 F.2d 274, 280-81 (7th Cir. 1978) (*en banc*)); *see United States v. Nickell*, 552 F.2d 684, 689-90 (6th Cir. 1977) (requiring a defendant to lay a foundation to support *in camera* review). If the defendant meets his burden, the court cannot simply take the government's word for it that the document in question does not contain Jencks material. *Allen*, 798 F.2d at 994-96.

Here, Respondents have not met their initial burden. They have merely offered unsupported speculation. This aspect of their request is thus quashed without prejudice to renewal during the hearing in this matter. *See United States v. Roseboro*, 87 F.3d 642, 645-46 (4th Cir. 1996) ("The defendant's showing need not be great, but it must be more than a mere automatic demand for government witness' statements. . . . An inadequate foundation may be grounds alone on which the court can properly deny further inquiry.").

4-5. Respondents seek communications between the Commission and various state and federal law enforcement authorities. They also seek documents in the Division's possession related to investigations conducted by state and federal authorities. The Division responds that it has produced unprivileged material and that anything not produced is privileged under Section 24(f)(3)(A) of the Securities Exchange Act of 1934, 15 U.S.C. § 78x(f)(3)(A). Mot. at 6.

Subsection (f)(3)(A) provides that "Federal agencies, State securities and law enforcement authorities, self-regulatory organizations, and the Public Company Accounting Oversight Board shall not be deemed to have waived any privilege applicable to any information by transferring that information to or permitting that information to be used by the Commission." 15 U.S.C. § 78x(f)(3)(A). In other words, *if* a privilege protects information law enforcement

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> (2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or
> (3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.

18 U.S.C. § 3500(e).

authorities have provided to the Commission, the provision of that information to the Commission will not amount to a waiver of the privilege. The Division, however, has not established the predicate for application of subsection (f)(3)(A); it has not attempted to show that any underlying privilege exists that could be protected by subsection (f)(3)(A). The party asserting a privilege has the burden of showing that it applies to documents in question. *See, e.g.*, *In re City of N.Y.*, 607 F.3d 923, 944 (2d Cir. 2010). Within ten days, the Division shall produce a detailed privilege log describing the withheld communications, a thorough explanation of the applicability of any privilege it believes is relevant to the communications, and an appropriate declaration supporting its factual assertions. *See* 17 C.F.R. § 201.230(c); *see also In re Sealed Case*, 856 F.2d 268, 272 (D.C. Cir. 1988) (discussing the privilege proponent's burden); *Landry v. FDIC*, 204 F.3d 1125, 1135 (D.C. Cir. 2000). Respondents may respond to the Division's submission within seven days after it is filed.

6. Respondents seek all documents that relate to any examination the Commission conducted of Respondent Eden Arc Capital Management, LLC. The Division argues that these documents are protected from production under Rule of Practice 230, except to the extent it offers them during the hearing. Mot. at 5 n.7. In their opposition, Respondents do not address the Division's argument. As a result, they have waived any challenge to the Division's argument and I need not resolve this issue. This aspect to the subpoena is quashed.

7. Respondents request all material that qualifies for disclosure under *Brady v. Maryland*, 372 U.S. 83, 86 (1963), as implemented under former Rule of Practice 230(b)(2), 17 C.F.R. § 201.230(b)(2). The Division asserts that it has produced all that it is required to produce, plus a withheld document list. Mot. at 3-4 & nn.5-6; *see* Berke Decl. at 2. Respondents are dubious but point to nothing specific to show that the Division has failed to comply with its obligations. Opp. at 6. The Division has produced a declaration generally describing its efforts to produce "non-privileged documents in its investigative file." *See* Berke Decl. at 2. To remove any doubt about the matter, the Division is directed to file an affidavit specifically addressing its compliance with Rule 230(b)(2). *See Orlando Joseph Jett*, Admin. Proc. Release No. 514, 1996 WL 360528, at *1 (June 17, 1996). This aspect of Respondents' subpoena is quashed pending review of the Division's affidavit. *See id.* at *1 ("speculation that government documents may contain *Brady* material is not enough to require . . . *in camera* review"); *see also Landry*, 204 F.3d at 1137 ("Normally we accept the government's representations as to whether documents in its possession constitute *Brady* material.").

8-9. Respondents seek documents relating to complaints the Commission has received about Respondents and documents relating to communications with issuers of the securities at issue in this proceeding or their trustees, brokerage firms carrying the joint tenancy with rights of survivorship accounts, or the DTCC. The Division says it has turned over all non-privileged documents relating to this request. Mot. at 4. As with previous requests, Respondents fail to provide any specific basis to rule in their favor. This aspect of the subpoena is quashed.

10-11. Respondents ask that the Division provide details as to how certain figures in the order instituting proceedings were calculated. The Division argues that these requests amount to interrogatories which are not contemplated under the Rules of Practice. Opp. at 6. As Respondents do not respond to the Division's argument, which is correct, *see* Rules of Practice,

Exchange Act Release No. 33163, 1993 WL 468594, at *47 (Nov. 5, 1993), this aspect of Respondents' request is quashed.

12. Respondents seek all documents related to the appointment process of the Commission's administrative law judges. The Division responds that the appointment process is a matter of record and is not in dispute. Mot. at 7. Because Respondents do not deny this assertion, this aspect of their request is quashed.

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James E. Grimes
Administrative Law Judge