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 SECOND MOTION TO PRECLUDE RESPONDENTS' ADVICE OF COUNSEL DEFENSE AND MEMORANDUM OF LAW IN SUPPORT

DIVISION OF ENFORCEMENT
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November 2, 2016

The Division of Enforcement ("Division") submits this memorandum of law renewing its prior motion, dated September 26, 2016, seeking to preclude Respondents from asserting a defense of good-faith reliance on advice of counsel.

ARGUMENT

Respondents have made clear that they intend to block the Division from being able to adequately explore their purported advice of counsel defense by—yet again—failing to meet this Court's deadlines for disclosing all information relevant to that defense. On October 18, 2016, the Court ordered Respondents to disclose to the Division, by November 1, 2016, (1) every attorney they consulted; and (2) "all communications in their possession that concern discussions with those counsel about any aspect of the joint tenancies." (Order, Oct. 18, 2016, at 4-5.) The Court further ordered that "[f]ailure to comply . . . will preclude Respondents from relying on an advice-of-counsel defense." (Id. at 5.) Respondents timely produced a list of 18 attorneys with whom Respondents "consulted, at any time 'through approximately February 2016[]' about the 'structure of and structuring of' the joint tenancies at issue in this case.'" (Ex. A at 1 (letter from Harlan Protass to Judith Weinstock, Oct. 25, 2016).) This disclosure stands in sharp contrast to the five attorneys they initially identified on September 23, 2016, and makes it clear that Respondents did not fully, and truthfully, disclose the names of all attorneys they relied on by September 23rd, as originally to ordered to do. (See Order, Sept. 13, 2016, at 1.) In any event, Respondents by their own admission have now failed to disclose all communications with these attorneys and, thus, are in violation of the Court's October 18th Order.

On November 1, 2016, Respondents wrote to the Division that they were sending a CD "containing .pst files of e-mails the production of which is required by Judge Grimes' Order . . .

."[1] (Ex. B (letter from Harlan Protass to Judith Weinstock, Nov. 1, 2016).) In that same letter, Respondents admitted that their production was not complete:

> As you know from the prior production of e-mails, Mr. Lathen utilized a yahoo e-mail address to conduct business from January 1, 2009 to early July 2012. We have engaged an outside vendor, Anthony Whitledge in Arlington, VA, to extract those e-mails from Mr. Lathen's yahoo account, a laborious and time-consuming process that Mr. Whitledge has not yet been able to complete but that Mr. Whitledge anticipates completing in the next 24-48 hours. Upon completion of that extraction, we will supplement the production of e-mails produced to you today.

(Ex. B at 1.) Thus, Respondents acknowledge that their production is incomplete.

Moreover, Respondents failed to inform the Division what number of documents was in the purportedly produced (but not yet received) production versus the new production that they anticipate producing at some point. Indeed, Respondents' stated reason for delay appears not to be accurate. For example, one of the e-mails in Respondents' most recent production is between attorney Margaret Farrell and Lathen's yahoo e-mail account. (See Ex. D at 1.) Moreover, this e-mail—which is a communication between Lathen and an attorney as to whom he explicitly waived more than a month ago in September 2016—plainly should have been produced pursuant to the Court's September 23rd Order.[2] Therefore, it appears as if Lathen has already searched his yahoo e-mail account and is perfectly capable of producing those documents when he chooses to. Here, he has chosen not to do so in a timely manner.

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[1] Respondents also informed the Division that they were making these documents available via "DropBox." (Id.) The Division promptly informed Respondents that it could not access DropBox and asked Respondents to use Accellion and to provide documents by CD. (See Ex. C (e-mail from Judith Weinstock to Harlan Protass, Nov. 2, 2016).) The Division did not receive this production until November 2, 2016.

[2] That it was not produced earlier is concerning and telling of Respondents' intention to play games with their waiver. The email is but one example of many emails received today that are from the Hinkley Allen firm. Respondents do nothing to explain this piecemeal and delayed production of communications on relevant topics from attorneys as to which they long ago waived their privilege.

Respondents' refusal to comply with the Court's October 18th Order is yet another example both of their efforts to block the Division's ability to timely review the documents that underpin their purported defense, as well as their lassitude in complying with this Court's orders. Moreover, the Division is prejudiced. First, it cannot possibly review all of the communications with attorneys in order to renew its request by November 4th when Respondents refuse to even produce those documents. (See Order, Oct. 18, 2016, at 5 (ordering Division to renew any request for preclusion by November 4, 2016).) Second, and more crucially, the Division has been blocked from exploring the defense in advance of the rapidly-approaching trial date. For example, the Division cannot adequately prepare to interview 18 attorneys and ensure that Respondents actually have produced all of the documents they are required to in the time remaining when Respondents are unwilling even to meet the Court's second deadline for producing privileged materials. This gamesmanship has gone on long enough.

CONCLUSION

The Division, therefore, respectfully requests that the Court preclude Respondents from asserting an advice of counsel defense.

Dated: November 2, 2016
New York, New York

DIVISION OF ENFORCEMENT

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Certificate of Service

I hereby certify that I served (1) the Division of Enforcement's Second Motion to Preclude Respondents' Advice of Counsel Defense, dated November 2, 2016; and (2) the Declaration of Alexander Janghorbani, dated November 2, 2016, and all exhibits attached thereto on this 2nd day of November, 2016, on the below parties by the means indicated:

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Attorneys to Respondents
(By E-mail)

The Honorable James E. Grimes
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Brent Fields, Secretary
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(UPS (original and three copies))

Alexander Janghorbani