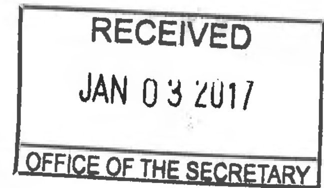
UNITED STATES OF AMERICA
Before the
U.S. SECURITIES AND EXCHANGE COMMISSION



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 TO COMPEL

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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: (1) compel the production of certain e-mails between Mr. Lathen and Kevin Galbraith, Esq., who is one of the attorneys the Eden Arc Respondents identified in connection with their invocation of an advice of counsel defense; or (2) preclude the Eden Arc Respondents from offering testimony or evidence concerning their reliance on advice sought from or offered by Mr. Galbraith.

PRELIMINARY STATEMENT

The Division has now twice moved to preclude the Eden Arc Respondents from relying on an advice of counsel defense. This Court denied both such motions. The instant motion seeks the same relief, albeit on a smaller scale – it seeks to preclude the Eden Arc Respondents from offering testimony or evidence of their reliance on legal advice sought from or offered by Kevin Galbraith, Esq., one of the attorneys the Eden Arc Respondents identified in connection with their invocation of an advice of counsel defense.[1]

As detailed below, the Division's motion to compel is moot because the Division already has full access to the documents they seek. This Court therefore should enter an Order denying the Division's motion. For the same reasons, the Division's motion to preclude the Eden Arc Respondents from offering testimony or evidence concerning reliance on advice sought from or offered by Mr. Galbraith is moot. It is also inappropriate under the circumstances

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[1] We note that earlier today the Division filed yet another motion (that is, a fourth motion) attempting to attack the Eden Arc Respondents' advice of counsel defense – a motion to compel directed to another of the Eden Arc Respondents' attorneys (Hinckley Allen & Snyder LLP) or, alternatively, to preclude the Eden Arc Respondents from offering testimony or evidence of their reliance on advice sought from or offered by that firm.

in that the Division understood, before filing its Motion to Compel, that Mr. Galbraith was not seeking to formally assert some new privilege over the formerly privileged e-mails at issue herein. Rather, Mr. Galbraith was seeking the return of those e-mails as a professional courtesy because of their patent irrelevance to the instant matter. The Division also has not been "severely disadvantaged" by any delay in its access to a small subset of e-mails pertaining to (as detailed below) a wholly unrelated matter that are neither useful to the Division nor relevant to this proceeding.

FACTUAL AND PROCEDURAL BACKGROUND

On November 10, 2016 this Court issued its "Order on Privilege Waiver," in which it found principally that the Eden Arc Respondents had waived privilege with respect to certain privileged e-mails that had been inadvertently produced to the Division in May 2015, August 2015 and May 2016. In making such findings, however, this Court also found that "Lathen's discussions with his counsel about strategy" relating to the instant matter "are not relevant to the Division's case" and that "revealing those discussions to the Division could seriously prejudice [the Eden Arc] Respondents' case." Thus, the "Order on Privilege Waiver" directed the Eden Arc Respondents to: (1) identify "defense strategy" e-mails for *in camera* review; and (2) directed the Division to continue to segregate all privileged e-mails that had been inadvertently produced "until Respondents identify the documents containing discussions between Lathen and his counsel regarding their strategy."

In compliance with the "Order on Privilege Waiver," on November 19, 2016 the Eden Arc Respondents submitted a letter to this Court enclosing copies of privileged e-mails (and attachments) that contained "discussions between Lathen and his counsel regarding their

strategy." (Protass Aff. Ex. 1.)[2] In doing so, the Eden Arc Respondents also identified a related issue concerning certain other privileged e-mails that had been inadvertently produced to the Division. In particular, the Eden Arc Respondents noted that respondents Donald F. Lathen, Jr. and Eden Arc Capital Management, LLC "are named as defendants in a case currently pending in Supreme Court, State of New York, County of New York captioned Prospect Capital Corp. v. Donald Lathen, Jr., et al., Index No. 156375/2014" – the "Prospect Case" – and that certain of the privileged e-mails inadvertently produced to the Division constitute "communications between Mr. Lathen and Kevin Galbraith, Esq., who represents Mr. Lathen and Eden Arc Capital Management, LLC in the" Prospect Case. (Id.) The Eden Arc Respondents further noted that those "e-mails contain and constitute discussions between Mr. Lathen and Mr. Galbraith concerning litigation strategy for defending the" Prospect Case. (Id.) And the Eden Arc Respondents stated that, "like [the Court] found in the Order on Privilege Waiver with respect to the e-mails enclosed herewith, we respectfully submit that those e-mails also are not relevant to the Division's case and revealing those discussions . . . could seriously prejudice Mr. Lathen and Eden Arc Capital Management, LLC in the" Prospect Case. (Id.) Finally, the Eden Arc Respondents asserted that, "like [the Court] found in the Order on Privilege Waiver, the Division has no need to know the litigation strategy of Mr. Lathen and Eden Arc Capital Management, LLC in the" Prospect Case. (Id. (internal quotation marks omitted.) In light of the foregoing, the Eden Arc Respondents did not include such e-mails in their *in camera* submission. But they did state the following in their transmittal letter to this Court:

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2 "Protass Aff." refers to the "Affirmation of Harlan Protass in Support of the Eden Arc Respondents' Opposition to the Division of Enforcement's Motion to Compel," dated December 29, 2016 and submitted herewith.

> We understand that Mr. Galbraith intends to request that the Division voluntarily return all such e-mails to him for the reasons detailed herein. If the Division refuses Mr. Galbraith's request, we intend to request that Your Honor enter an Order directing the Eden Arc Respondents to submit those e-mails to Your Honor for an *in camera* review like that which Your Honor will undertake with respect to the e-mails enclosed herewith.

(Id.)

On December 14, 2016 this Court entered its "Order Denying Reconsideration and Regarding Defense-Strategy Documents." In addition to denying the Eden Arc Respondents' motion for reconsideration of the "Order on Privilege Waiver," this Court decided which of the e-mails previously submitted to the Court for *in camera* review would have to be produced to the Division and which of those e-mails would not have to be produced to the Division.

Following receipt of the "Order Denying Reconsideration and Regarding Defense-Strategy Documents," on December 19, 2016 the Eden Arc Respondents produced the following to the Division: (1) a chart listing the Bates numbers of the privileged e-mails that had been submitted for *in camera* review that this Court determined did not contain "defense strategy" communications related to the instant matter; and (2) a chart listing the Bates numbers of the remaining privileged e-mails the production of which was required by the "Order on Privilege Waiver." (Protass Aff. Ex. 2.) The second such chart excluded the "defense strategy" e-mails between Mr. Lathen and Mr. Galbraith pertaining to the Prospect Case, as detailed in our November 19, 2016 transmittal letter to this Court. (Id.)

On December 19, 2016 the Division filed the instant Motion to Compel. In response, on December 22, 2016 this Court sent an e-mail to the parties posing two questions related to the Division's Motion to Compel. (Protass Aff. Ex. 3.) The Division responded to

those questions on the same date requesting, in satisfaction of their Motion to Compel, the Bates numbers of the privileged e-mails pertaining to "defense strategy" that the Eden Arc Respondents did not have to disclose to the Division. (Protass Aff. Ex. 4.) And, in response to the Division's request, on December 22, 2016 the Eden Arc Respondents produced a chart complying with that request. (Protass Aff. Ex. 5.)

ARGUMENT

I.

THIS DIVISION'S MOTION TO COMPEL IS MOOT AND SHOULD BE DENIED

As detailed above, the Division already has the information its Motion to Compel seeks: The Eden Arc Respondents produced it to them when they clarified the Division's request on December 22, 2016. In particular, the Division knows the identity (by Bates number) of the "pool" of privileged e-mails that the Eden Arc Respondents inadvertently produced as to which this Court found that privilege had been waived. The Division also knows: (1) the Bates numbers of the privileged e-mails that this Court found did not contain "defense strategy" communications related to the instant matter; (2) the Bates numbers of the privileged e-mails that this Court found did contain "defense strategy" communications related to the instant matter; and (3) the Bates numbers of all remaining privileged e-mails as to which this Court found that privilege had been waived. Thus, the Division has full access to all of the e-mails between Mr. Lathen and Mr. Galbraith, including the "defense strategy" e-mails between Mr. Lathen and Mr. Galbraith pertaining to the Prospect Case

The Division's Motion to Compel therefore is moot and should be denied. Accordingly, and for the same reasons, the Division's alternative request to preclude the Eden

Arc Respondents from offering testimony or evidence concerning their reliance on advice sought from or offered by Mr. Galbraith is also moot and should be denied.

II.

THE DIVISION HAS NOT BEEN PREJUDICED IN ITS ACCESS TO E-MAILS BETWEEN MR. LATHEN AND MR. GALBRAITH

Although the Division's Motion to Compel is moot in its entirety, it also worth noting that, contrary to its assertions, the Division has not been "severely disadvantaged without" access to the small subset of e-mails between Mr. Lathen and Mr. Galbraith at issue herein. (Moving Mem. at 2.)[3] This Court therefore should also reject the Division's hyperbolic claim as to prejudice.

First, the Division has virtually the entirety of Mr. Galbraith's privileged e-mail communications with Mr. Lathen. On December 12, 2016 Mr. Galbraith produced 893 documents to the Division, including 627 e-mails (with their attachments). According to the privilege log that he produced on December 23, 2016, Mr. Galbraith only withheld ten privileged communications. (Protass Aff. Ex. 6.) Furthermore, the Division has all of the "defense strategy" e-mails relating to the Prospect Case on Mr. Galbraith's116 document "clawback" privilege log and has had access to those e-mails since December 22, 2016 – six weeks before trial. (Protass Aff. Ex. 7.)

Second, as detailed above, the "Order on Privilege Waiver" directed the Division to continue to segregate all privileged e-mails that had been inadvertently produced "until Respondents' identify the documents containing discussions between Lathen and his counsel

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3 "Moving Mem." refers to the "Division of Enforcement's Motion to Compel Respondents' Compliance With Court's October 18, November 10 and December 4, 2016 Orders or to Preclude Respondents From Offering Testimony or Evidence Regarding Their Reliance on the Advice of Kevin Galbraith," dated December 19, 2016.

regarding their strategy." This Court only entered an Order with respect to those "defense strategy" e-mails on December 14, 2016, when it issued the "Order Denying Reconsideration and Regarding Defense-Strategy Documents." Given that the Division was not authorized to review any of the privileged e-mails that had been inadvertently produced (including privileged e-mails between Mr. Lathen and Mr. Galbraith) until this Court entered its "Order Denying Reconsideration and Regarding Defense-Strategy Documents," the earliest date upon which the Division could have reviewed the relevant e-mails between Mr. Lathen and Mr. Galbraith was December 14, 2016. The Division therefore should not be heard to complain that it has been "severely disadvantaged without" access to those e-mails because the first opportunity it had to review those e-mails was December 14, 2016 – five days before it filed its Motion to Compel.

Third, the universe of e-mails between Mr. Lathen and Mr. Galbraith that are the subject of the Division's Motion to Compel is objectively small. Mr. Galbraith's "clawback" privilege log listed 116 e-mails – 32 of which this Court deemed to be "defense strategy" e-mails in its "Order Denying Reconsideration and Regarding Defense-Strategy Documents." The Division has four attorneys working full-time on the instant matter. If the remaining 84 e-mails were divided evenly among them, each of those Division attorneys would be required to review approximately 21 e-mails – a task that those attorneys surely can complete in the approximately six weeks that remain before the January 30, 2017 hearing herein. Any claim of "severe[] disadvantage[]" therefore is highly exaggerated.

Finally, the e-mails at issue herein are wholly unrelated to the instant matter. Rather, they relate to the Prospect Case. Thus, again, the Division could not possibly be "severely disadvantaged" in having six weeks to review a small number of privileged e-mails pertaining to an unrelated matter.

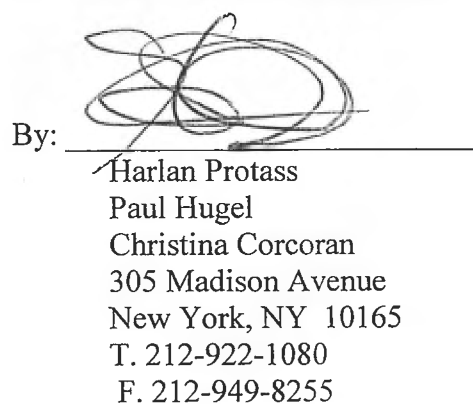
CONCLUSION

Accordingly and for all of the foregoing reasons, the Eden Arc Respondents respectfully submit that this Court should deny the Division of Enforcement's Motion to Compel in its entirety.

Dated: New York, NY
December 29, 2016

Respectfully submitted,

CLAYMAN & ROSENBERG LLP



By: ______________________

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<u>CERTIFICATE OF SERVICE</u>

The undersigned attorney hereby certifies that on December 29, 2016 I caused true and correct copies of the foregoing THE EDEN ARC RESPONDENTS' MEMORANDUM OF LAW IN OPPOSITION TO THE DIVISION OF ENFORCEMENT'S MOTION TO COMPEL, dated December 29, 2016, and attached AFFIRMATION OF HARLAN PROTASS IN SUPPORT OF THE EDEN ARC RESPONDENT'S OPPPSITION TO THE DIVISION OF ENFORCEMENT'S MOTION TO COMPLE, dated December 29, 2016, to be served upon the parties listed below via e-mail and UPS Overnight Mail:

Honorable Jason S. Patil
Administrative Law Judge
U.S. Securities and Exchange Commission
100 F. Street, N.E.
Washington, DC 20549-2557

Brent Fields, Secretary
Office of the Secretary
U.S. Securities and Exchange Commission
100 F. Street, N.E.
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Nancy Brown, Esq.
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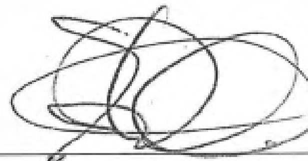

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