

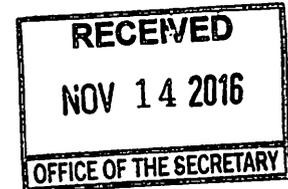
UNITED STATES OF AMERICA
Before the
U.S. SECURITIES AND EXCHANGE COMMISSION

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.



MEMORANDUM OF LAW IN OPPOSITION TO THE DIVISION
OF ENFORCEMENT'S SECOND MOTION TO PRECLUDE
RELIANCE ON THE ADVICE OF COUNSEL DEFENSE

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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 second motion of the Division of Enforcement (the “Division”) to preclude the Eden Arc Respondents from relying on the advice of counsel defense at the January 23, 2017 hearing herein.

PRELIMINARY STATEMENT

Whether born out of a desire to frustrate the revelation of all facts relevant to these proceedings or otherwise, the Division seeks – for a second time – to preclude the Eden Arc Respondents from presenting an advice of counsel defense at the hearing herein. Like its prior attempt at blocking that defense, the Division’s second motion is also without merit. Indeed, it is based almost entirely on hyperbolic claims and apocalyptic predictions concerning the Division’s ability – that is, the ability of the *four lawyers* comprising the Division’s trial team – to contend with the Eden Arc Respondents’ advice of counsel defense before the hearing herein (scheduled for January 23, 2017), a date that is four months after the date (September 23, 2016) upon which Eden Arc Respondents first invoked the advice of counsel defense and notified the Division and this Court of same. (Protass Aff. Ex. 1.)¹

Accordingly and as further detailed below, we respectfully submit that this Court should deny the Division’s second motion to preclude the Eden Arc Respondents from relying on the advice of counsel defense.

¹ “Protass Aff.” refers to the Affirmation of Harlan Protass in Support of the Eden Arc Respondents’ Opposition to the Division of Enforcement’s Second Motion to Preclude Reliance on the Advice of Counsel Defense, dated November 9, 2016 and submitted herewith.

FACTUAL AND PROCEDURAL BACKGROUND

On September 23, 2016 the Eden Arc Respondents advised the Division and this Court of their intent to rely on the advice of counsel defense at the hearing herein. (Protass Aff. Ex. 1.) In doing so, they disclosed the names and contact information for five attorneys who provided the legal advice upon which they relied and produced all communications with those attorneys relevant to the Eden Arc Respondents' invocation of the advice of counsel defense. (Id.) One business day later, on September 26, 2016 the Division filed a motion seeking to preclude the Eden Arc Respondents from relying on the advice of counsel defense. (Protass Aff. ¶ 4.) On October 3, 2016 the Eden Arc Respondents submitted a memorandum of law in opposition to the Division's preclusion motion and on October 6, 2016 the Division submitted a memorandum of law in further support of its preclusion motion. (Protass Aff. ¶¶ 5, 6..)

On October 18, 2016 this Court issued its "Order on Motion to Preclude Advice-of-Counsel Defense." (Protass Aff. Ex. 2.) In particular, this Court "reject[ed] the Division's argument that [the Eden Arc] Respondents' defense is irrelevant and should be disallowed," finding instead that "the defense is at least 'conceivably' relevant" and further finding that "disallowing" the Eden Arc Respondents' advice of counsel defense "would be inconsistent with Commission precedent." (Id. at 3.) Additionally, this Court directed (among other things) the Eden Arc Respondents to "forthwith disclose to the Division every attorney they consulted, at any time through approximately February 2016, about the structure of and structuring of the joint tenancies at issue in this case. They shall also disclose all communications in their possession that concern discussions with those counsel about any aspect of the joint tenancies." (Id. at 3-4 (internal quotation marks omitted).) This Court also instructed that the Eden Arc Respondents "should complete any disclosures required by this order by November 1, 2016" and directed the

Division and the Eden Arc Respondents “to engage in good faith negotiations about production in compliance with this order.” (*Id.* at 5.)

Consistent with that Order, on October 25, 2016 the Eden Arc Respondents produced a chart to the Division “listing the names and contact information for” eighteen attorneys with whom they “consulted, at any time through approximately February 2016, about the structure of and structuring of the joint tenancies at issue in this case.” (Protass Aff. Exs. 3, 4 (internal quotation marks omitted).)² Thereafter on November 1, 2016 the Eden Arc

² The Division complains (among other things) that the Eden Arc Respondents identified five attorneys who provided legal advice upon which they relied when they first invoked the advice of counsel defense on September 23, 2016 and thereafter on October 25, 2016 identified eighteen such attorneys. See Division of Enforcement’s Second Motion to Preclude Respondent’s Advice of Counsel Defense and Memorandum of Law in Support, dated November 2, 2016, at 2 (the “Moving Mem.”). The Division further asserts that the latter disclosure somehow “makes it clear that Respondents did not fully, and truthfully, disclose the names of all attorneys they relied on” when they first invoked the advice of counsel defense on September 23, 2016. (*Id.* at 1.)

The Division is wrong. In fact, the Eden Arc Respondents disclosed an expanded list of attorneys on October 25, 2016 out of an abundance of caution after reviewing this Court’s “Order On Motion to Preclude Advice-of-Counsel Defense,” in which this Court provided instruction concerning the attorneys who the Eden Arc Respondents would be required to identify. (Protass Aff. Exs. 3, 4.) Moreover, in providing that expanded list and, again, out of an abundance of caution, the Eden Arc Respondents went so far as to provide: (A) the names of attorneys with whom Mr. Lathen held only preliminary discussions (but whom he never retained and from whom he never received legal advice); (B) the names of other attorneys with whom Mr. Lathen consulted concerning the structure of his investment strategy before the existence of Eden Arc Capital Partners, LP); and (C) the names of still other attorneys with whom Mr. Lathen consulted with respect to potential changes to the structure of his investment strategy that were never implemented. (Protass Aff. ¶ 9.)

The Division also complains that it “cannot adequately prepare to interview 18 attorneys.” (Moving Mem.) Unfortunately for the Division (and the Eden Arc Respondents), that is the number of attorneys that this Court’s “Order on Motion to Preclude Advice-of-Counsel Defense” required the Eden Arc Respondents to identify. Moreover, the Eden Arc Respondents produced that list of attorneys on October 25, 2016, approximately one week before the November 1, 2016 date set forth in that Order. In any event, and as detailed herein, Mr. Lathen only had true substantive contact with several of those attorneys, which should relieve the “burden” about which the Division complains. In any event, the Division has *four attorneys*

(continued ...)

Respondents produced 824 e-mails (with attachments) to the Division constituting communications between the Eden Arc Respondents' and the attorneys on the list of attorneys provided to the Division on October 25, 2016. (Protass Aff. Ex. 5.)

The November 1, 2016 cover letter that accompanied the Eden Arc Respondents' production of 824 e-mails advised the Division that extraction of Mr. Lathen's e-mails from his yahoo.com account (which he used for business purposes from January 1, 2009 to in or about July 2012) was "a laborious and time-consuming process" for which they had hired an outside vendor, Anthony Whitledge of Arlington, VA, who, in turn, had not yet succeeded in extracting all of those Mr. Lathen's yahoo.com emails. (Protass Aff. Ex. 5.) The Eden Arc Respondents further advised the Division that Mr. Whitledge anticipated completing that extraction process "in the next 24-48 hours" and that they would thereafter promptly supplement their November 1, 2016 production of e-mails. (Id.) And, on November 7, 2016 the Eden Arc Respondents did just that – they producing an additional 198 e-mails (with attachments). (Protass Aff. Ex. 6.)

With respect to the production of Mr. Lathen's yahoo.com e-mails, and as detailed in the Eden Arc Respondents' November 1, 2016 letter to the Division, extracting e-mails from Mr. Lathen's yahoo.com account proved to be difficult and time-consuming. (Protass Aff. Ex. 5), we engaged Mr. Whitledge to address the complexities of extracting e-mails from that account. (Protass Aff. ¶ 11.)

(... continued)

assigned to this matter who easily could split-up responsibility for contacting those attorneys (that is, each Division attorney contact four attorneys), which by no objective measure is unduly burdensome.

In particular, Mr. Whitledge used Mr. Lathen's login credentials to create a Microsoft Outlook e-mail account. (Id. ¶ 12.) Mr. Whitledge then used "iMap software" to connect that Microsoft Outlook account to Mr. Lathen's yahoo.com account and, using that software, downloaded all e-mails from Mr. Lathen's yahoo.com account into .PST files within that Microsoft Outlook account. (Id.) Next, Mr. Whitledge filtered those e-mails in that Microsoft Outlook account by date, focusing (per the undersigned's instructions) on the January 1, 2009 to July 2012 time frame (that is, the time frame at issue herein with respect to Mr. Lathen's yahoo.com account, which he discontinuing using for business purposes after July 2012). (Id.) Mr. Whitledge then transmitted those files to Driven, Inc., our outside database vendor. (Id.) The foregoing is the only means could be developed for the review of e-mails found in Mr. Lathen's yahoo.com account because they cannot be downloaded directly from a yahoo.com account.³ (Protass Aff. ¶ 13.) Thus, it was the foregoing technical complications associated with extracting e-mails from Mr. Lathen's yahoo.com account that precipitated production of those e-mails on November 7, 2016, rather than on November 1, 2016. (Protass Aff. ¶ 5.)

After their receipt of the Eden Arc Respondents' November 1, 2016 letter (in which they identified the foregoing issue relating to Mr. Lathen's yahoo.com account) (Protass Aff. Ex. 5), the Division neither called nor sent an e-mail nor otherwise communicated with me concerning that delayed production of yahoo.com emails (Protass Aff. ¶ 15). The Division's failure to do so was in direct contravention of the instruction in this Court's "Order on Motion to

³ The foregoing issues are not unique to Mr. Lathen. Rather, any individual seeking to extract e-mails from a yahoo.com account would have to deal with the same difficulties. (Protass Aff. ¶ 14.)

Preclude Advice-of-Counsel Defense,” which directed that the Division and the Eden Arc Respondents to “engage in good faith negotiations about production [of e-mails] in compliance with this order.” Rather, on November 2, 2017, the Division just jumped to the filing of the instant motion seeking for a second time to preclude the Eden Arc Respondents’ reliance on the advice of counsel defense at the hearing herein.

ARGUMENT

Setting aside the alarmist rhetoric that permeates their moving papers, the Division’s second motion to preclude the Eden Arc Respondents’ advice of counsel defense boils down to two basic complaints, neither of which has merit.

First, the Division complains that it could not “possibly [have] review[ed] all of the communications with attorneys” by November 4, 2016 (as provided for in this Court’s “Order on Motion to Preclude Advice-of-Counsel Defense”) so as to determine whether to renew their prior motion for documentary subpoenas (addressed to the attorneys from whom the Eden Arc Respondents received the legal advice upon which they relied) because the Eden Arc Respondents did not complete production of those e-mails until November 7, 2016. (Moving Mem. at 3.) We respectfully submit that the Division’s complaint is exaggerated and does not provide a basis for precluding the Eden Arc Respondents from asserting an advice of counsel defense at the hearing herein.

Specifically, the Eden Arc Respondents produced more than 80% of the e-mails they were required to produce (824 e-mails) on November 1, 2016. (Protass Aff. Ex. 5.) They produced the balance of those e-mails (198 e-mails) on November 7, 2016 (Protass Aff. Ex. 6) and, as detailed above, would have done so on November 1, 2016 but for the technical problems experienced in extracting those e-mails from Mr. Lathen’s yahoo.com account (Protass Aff. ¶¶

12, 13 and 14.) Given that *four Division lawyers* are working on the instant matter, the Division should not be heard to credibly complain that it is prejudiced by the production of those 198 e-mails on November 7, 2016 rather than November 1, 2016.

Additionally, this Court's "Order on Motion to Preclude Advice-of-Counsel Defense" specifically instructed the Division and the Eden Arc Respondents to "engage in good faith negotiations about the production [of e-mails] in compliance with this order" and that the Division would be permitted to "renew its request for [such] documentary subpoenas" if "such negotiations fail."⁴ (Protass Aff. Ex. 2.)

In contravention of this Court's "Order on Motion to Preclude Advice-of-Counsel Defense," the Division did not engage in any negotiations concerning the Eden Arc Respondents' production of e-mails. (Protass Aff. ¶ 15.) In fact, the Division did not even call me concerning that production of e-mails before filing its second motion to preclude the Eden Arc Respondents from relying on an advice of counsel defense. (Id.)

If the Division had done so, and in light of the problems experienced in the production of Mr. Lathen's yahoo.com e-mails, the Eden Arc Respondents would have consented to an application by the Division to this Court to extend that November 4, 2016 date. (Id.) The Eden Arc Respondents continue to have no objection to a reasonable extension of that November 4, 2016 date, and respectfully submit that this Court can easily resolve the Division's first complaint by reasonably extending that November 4, 2016 date. (Protass Aff. ¶ 16.) Such a

⁴ The Moving Mem. incorrectly states that this Court's "Order on Motion to Preclude Advice-of-Counsel Defense" provides that it could "renew any request for preclusion by November 4, 2016." (Moving Mem. at 3.) In fact, that Order provides that if the "negotiations" between the parties concerning "production" of e-mails "in compliance with this order" should "fail," the Division would be permitted to "renew its request for documentary subpoenas by November 4, 2016." (Protass Aff. Ex. 2.)

remedial measure could easily have been implemented if the Division had only picked up the phone and called me (or even e-mailed me) concerning same rather than rushing to file the instant motion. (Protass Aff. ¶ 17.)

Second, the Division complains that it cannot adequately prepare to respond to the Eden Arc Respondents' advice of counsel defense because the production of 198 e-mails on November 7, 2016 should have been completed on November 1, 2016. The Division's argument borders on frivolous for the following reasons (among others):

- The Division has *at least four attorneys* working on its case against the Eden Arc Respondents, which is objectively more than enough manpower to review 184 e-mails produced six days later than they should have been produced (particularly given their largely non-substantive contents, as detailed below);
- A large number of the e-mails produced on November 7, 2016 are short and non-substantive, such as e-mails for purposes of scheduling conference calls or meetings (Protass Aff. Exs. 7, 8 and 9), e-mails concerning attorney retention and invoices (Protass Aff. Exs. 10, 11 and 12) and e-mails passing along contact information for other individuals and other similar information, such as publicly available articles (Protass Aff. Exs. 13, 14 and 15);
- The 198 e-mails the Eden Arc Respondents produced on November 7, 2016 (and the 824 e-mails they produced on November 1, 2016) are but a small fraction of the approximately 90,000 e-mails contained in the Division's Investigative File;
- The 198 e-mails that the Eden Arc Respondents produced on November 7, 2016 (and the 824 e-mails they produced on November 1, 2016) are an even smaller fraction of the Division's 600,000 page Investigative File;

Additionally, the Division's complaint about the production of 198 e-mails on November 7, 2016 instead of November 1, 2016 is absurdly hypocritical in that *the Division itself* produced a substantial number of documents from its Investigative File *after* the date upon which it was required by Rule 230 of the SEC's Rules of Practice to have completed production of its Investigative File. Indeed, the Division made at least seven such supplemental productions. (Protass Aff. Exs. 16, 17, 18, 19, 20, 21 and 22.) Moreover, and of particular relevance here, the Division produced an additional 141 documents on November 7, 2016, the very day upon which the Eden Arc Respondents produced the aforementioned 198 e-mails.⁵ (Protass Aff. Ex. 22.)

Simply put, the Division suffered no prejudice from the Eden Arc Respondents' production of 198 e-mails on November 7, 2016, particularly in that the Division knew on November 1, 2016 that additional e-mail from Mr. Lathen's yahoo.com account were forthcoming and knew the reason why those e-mails had not been produced on November 1, 2016. Moreover and consistent with this Court's "Order on Motion to Preclude Advice-of-Counsel Defense," the Division could have called (but did not call) the undersigned about the

⁵ It also bears noting that this Court determined (in its "Order on Motion to Preclude Advice-of-Counsel Defense") the schedule for the Division's potential renewal of its application for subpoenas to the Eden Arc Respondents' attorneys who provided the legal advice upon which they relied – November 4, 2016, three days after November 1, 2016 – without knowing how many e-mails the Eden Arc Respondents would produce and, thus, without knowing how many e-mails the Division would have to review before determining whether or not to renew its application for such subpoenas. The Division therefore would have been required to have reviewed *all* e-mails produced by the Eden Arc Respondents supportive of their advice of counsel defense by November 4, 2016 even if such e-mails totaled one-thousand, ten-thousand or even more.

The Division therefore cannot credibly be heard to complain that it is prejudiced by the production of 198 e-mails on November 7, 2016, particularly since the Eden Arc Respondents would have consented to an extension of that November 4, 2016 date if the Division had just asked (rather than filing the instant motion).

production of such yahoo.com e-mails, and worked with the undersigned to the address the Division's concerns regarding the November 4, 2016 subpoena renewal request date set forth in the "Order on Motion to Preclude Advice-of-Counsel Defense." Rather than dutifully complying with this Court's "Order on Motion to Preclude Advice-of-Counsel Defense," the Division instead filed the instant motion seeking once again to block the Eden Arc Defendants' legitimate assertion of their advice of counsel defense, in a misguided attempt at eliminating the Division's burden of meeting and challenging that defense (and forcing the Eden Arc Respondents to incur additional legal expenses in contending with patently unnecessary motion practice).⁶

⁶ The Division also suggests that the Eden Arc Respondents affirmatively chose not to produce all required e-mails on November 1, 2016 because the collection of e-mails produced on that date included yahoo.com emails. (Moving Mem. at 2.) Again, the Division is wrong. In particular, the Eden Arc Respondents knew that yahoo.com e-mails existed within the database of e-mails searched for purposes of production to the Division on November 1, 2016. Out of an abundance of caution and because of prior problems experienced in extracting e-mails from Mr. Lathen's yahoo.com, we went back and retraced our steps with respect to Mr. Lathen's yahoo.com account to confirm that we extracted all e-mails therefrom. (Protass Aff. ¶ 27.) Our intuition proved correct in that retracing those steps resulted in the production of an additional 198 e-mails on November 7, 2016. The Division therefore should be pleased to learn of the thoroughness with which we searched for e-mails, rather than attacking the Eden Arc Respondents' e-mail production through the filing of the instant motion.

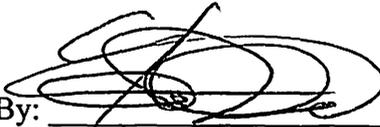
CONCLUSION

Accordingly and for all of the foregoing reasons, we respectfully submit that this Court should: (1) deny the Division of Enforcement's second motion to preclude the Eden Arc Respondents from relying on the advice of counsel defense at trial herein; and (2) grant the Eden Arc Respondents such other and further relief as this Court deems just and appropriate.

Dated: New York, NY
November 9, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that on November 9, 2016 I caused true and correct copies of the attached MEMORANDUM OF LAW IN OPPOSITION TO THE DIVISION OF ENFORCEMENT'S SECOND MOTION TO PRECLUDE RELIANCE ON THE ADVICE OF COUNSEL DEFENSE, dated November 9, 2016, and the accompanying AFFIRMATION OF HARLAN PROTASS IN SUPPORT OF THE EDEN ARC RESPONDENTS' OPPOSITION TO THE DIVISION OF ENFORCEMENT'S SECOND MOTION TO PRECLUDE RELIANCE ON THE ADVICE OF COUNSEL DEFENSE, dated November 9, 2016, to be served upon the individuals listed below via e-mail and UPS Overnight Mail:

Honorable James E. Grimes
Administrative Law Judge
U.S. Securities and Exchange Commission
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Washington, DC 20549-2557

Brent Fields, Secretary
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