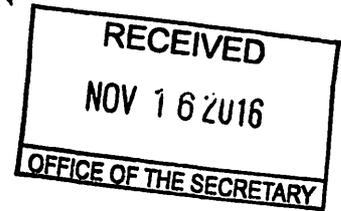


UNITED STATES OF AMERICA  
Before the  
U.S. SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING  
File No. 3-17387



In the Matter of

DONALD F. LATHEN, JR.,  
EDEN ARC CAPITAL MANAGEMENT, LLC,  
EDEN ARC CAPITAL ADVISERS, LLC.

AFFIRMATION OF HARLAN PROTASS IN SUPPORT OF THE  
EDEN ARC RESPONDENTS' OPPOSITION TO THE DIVISION OF  
ENFORCEMENT'S MOTION FOR A FINDING OF PRIVILEGE WAIVER

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' Memorandum of Law in Opposition to the Division of Enforcement's Motion for a Finding of Privilege Waiver, dated November 1, 2016.

A.

General Background

3. On or about March 10, 2015 the Eden Arc Respondents engaged my firm to represent them in connection with an investigation that the Division initiated captioned In the Matter of Eden Arc Capital Management, LLC, (NY-9197) (the "Eden Arc Investigation").

4. In or about December 16, 2016 the Eden Arc Respondents engaged Brune & Richard LLP as their counsel in place of my firm in connection with the Eden Arc Investigation. The Eden Arc Respondents thereafter engaged Brune Law P.C. the following month.

5. On or about April 16, 2016 the Eden Arc Respondents re-engaged my firm as their counsel in place of Brune Law P.C. in connection with the Eden Arc Investigation.

6. The Division issued three subpoenas to the Eden Arc Respondents during the course of the Eden Arc Investigation, dated February 19, 2015, December 21, 2015 and March 30, 2016 (the "Subpoenas"). (Exhibits 1, 2 and 3, respectively.) The Subpoenas called for the production of, among other things, *all* e-mails "concerning" the Eden Arc Respondents.

7. On behalf of the Eden Arc Respondents, my firm produced documents and e-mails responsive to the February 19, 2015 and March 30, 2016 subpoenas.

8. On behalf of the Eden Arc Respondents, Brune Law P.C. produced documents and e-mails responsive to the December 21, 2015 subpoena.

9. Both my firm and Brune Law P.C. inadvertently produced privileged e-mails to the Division in response to the Subpoenas. This Affirmation provides detail concerning the method and means by which such inadvertent productions of privileged e-mails occurred.

B.

The General Method By Which My Firm and  
Brune Law P.C. Produced E-Mails to the Division

10. Regardless of production date, my firm produced e-mails to the Division responsive to the Subpoenas using the same general method.

11. First, we identified the three e-mail addresses from which responsive e-mails may have been sent and into which responsive e-mails may have been received:

- A. [REDACTED] (Mr. Lathen's personal e-mail account, which he also used for business purposes until in or about early July 2012);
- B. jaylathen@edenarccapital.com (Mr. Lathen's business e-mail address, which he began using in or about early July 2012); and
- C. michaelrobinson@edenarccapital.com (the e-mail address of Mr. Lathen's former assistant, Michael Robinson, which Mr. Robinson began using in or about early July 2012).

12. Second, we identified the electronic "location" of the e-mails sent from or received by the foregoing e-mail addresses:

- A. E-mails sent to or from the edenarccapital.com e-mail accounts of Mr. Lathen and Mr. Robinson from July 4, 2012 to January 29, 2013 were stored on servers in Mr. Lathen's office and were transmitted to Smarsh, Inc. (the Eden Arc Respondents' outside e-mail archiving vendor) for purposes of archiving;

- B. E-mails sent to or from the edenaccapital.com e-mail accounts of Mr. Lathen and Mr. Robinson dated after January 30, 2013 were archived at Smarsh, Inc.;
- C. E-mails sent to or from Mr. Lathen's yahoo e-mail account from January 1, 2009 to February 6, 2013 were located in a .PST file<sup>1</sup> on Mr. Lathen's office computer (supplemented pursuant to the description contained in my August 20, 2016 letter, a copy of which is attached hereto as Exhibit 4) and were transferred to Smarsh, Inc. for purposes of archiving,; and
- D. E-mails sent to or from Mr. Lathen's yahoo e-mail account dated after February 6, 2013 were located within Mr. Lathen's yahoo.com e-mail account, were extracted from that yahoo.com account and were transmitted to Smarsh, Inc. for purposes of archiving.

13. Third, upon confirming that the foregoing e-mails had been archived at Smarsh, Inc., and pursuant to my instruction, Mr. Robinson searched for e-mails responsive to the Division's subpoenas. Upon identification of responsive e-mails, he created .PST files containing such e-mails and electronically "shared" those .PST files with me via DropBox.<sup>2</sup>

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<sup>1</sup> Personal Storage Table or .PST format is a file format in which copies of messages (including e-mails), calendar events and the like can be stored within the Microsoft family of software (including Microsoft Outlook).

<sup>2</sup> DropBox is an on-line file hosting service that allows users to "drop" any electronic file into a designated on-line "box" (that is, file) that is automatically uploaded to DropBox's cloud-based service and made available to such user on any of his/her computers or other electronic devices that have access to DropBox. Users of DropBox can also "share" their files with third parties.

14. Fourth, upon receipt, I shared those .PST files with the Division via DropBox.<sup>3</sup>

15. Upon information and belief, Brune Law P.C. likewise produced responsive e-mails by sharing .PST files with the Division via Accellion (an on-line file hosting service similar to DropBox).

C.

Clayman & Rosenberg LLP's Inadvertent Production of Privileged E-Mails to the Division on May 18, 2015 and the Days Immediately Thereafter

16. On May 18, 2015 the Eden Arc Respondents began production to the Division of e-mails responsive to its February 19, 2015 subpoena. Ultimately the Eden Arc Respondents produced 10,711 responsive e-mails to the Division on that date and in the days immediately thereafter.

17. In particular and pursuant to my instruction, Mr. Robinson searched for and created separate .PST files of e-mails between Mr. Lathen and/or Mr. Robinson, on the one hand, and all of the individuals in the following "classes" of individuals, on the other hand:

- A. All current and former investors in Eden Arc Capital Partners, LP (and/or their agents), each of whom had a unique e-mail address;
- B. All "Participants" (and/or their agents or attorneys in fact) – that is, the terminally ill individuals with whom Mr. Lathen opened joint tenancy with rights of survivorship ("JTWROS") brokerage accounts for purposes of purchasing bonds and/or CDs featuring a "survivor's option", each of whom had a unique e-mail address;

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<sup>3</sup> All e-mails produced to the Division were also produced to the SEC's Central Processing Unit in Washington, DC.

- C. All employees or agents of brokerage firms with which the Eden Arc Respondents transacted business, each of whom had an e-mail address with a unique domain name associated with such institution;
- D. All employees or agents of banks with which the Eden Arc Respondents transacted business each of whom had an e-mail address with a unique domain name associated with such institution; and
- E. All employees or agents of issuers of “survivor’s option” bonds and/or CDs that were purchased into the JTWR0S accounts at issue herein (and/or the administrators or trustees for those issuers of bonds and/or CDs), each of whom had an e-mail address with a unique domain name associated with such institution.

18. Additionally, the Eden Arc Respondents produced all e-mails between Mr. Lathen and Mr. Robinson.

19. None of the members of the foregoing “classes” of individuals were individuals with whom any of the Eden Arc Respondents shared an attorney-client relationship. For example, none of the Eden Arc Respondents shared an attorney-client relationship with any employee or agent of any brokerage firm with which the Eden Arc Respondents conducted business. Likewise, none of the Eden Arc Respondents shared an attorney-client relationship with any of the Participants (and/or their agents or attorneys in fact).

20. In light of the foregoing, we believed that the Eden Arc Respondents production of e-mails on May 18, 2015 and the days immediately thereafter could not, or, at least, should not, have included any privileged e-mails. To the extent that that production of e-mails included privileged e-mails, the production of those privileged e-mails was plainly inadvertent given that

Mr. Robinson searched exclusively for e-mail communications with third parties who would have been outside the scope of any attorney-client relationship.

D.

Clayman & Rosenberg LLP's Inadvertent Production of Privileged  
E-Mails to the Division In Late August/Early September 2015

21. In late August/early September 2015 the Eden Arc Respondents supplemented the foregoing production of e-mails to the Division with the production of an additional approximately 60,000 e-mails.

22. In particular, the Division's February 19, 2015 subpoena called for the production of *all* e-mails "concerning" the Eden Arc Respondents. Thus, the Eden Arc Respondents' supplemental production of e-mails to the Division in late August/early September 2015 included virtually *all* of the e-mails that Mr. Lathen and Mr. Robinson sent and received from January 1, 2009 to the date upon which such e-mails were produced.

23. Pursuant to my instruction, Mr. Robinson, after extracting non-responsive e-mails, created .PST files of *all* e-mails that he and Mr. Lathen sent or received "concerning" the Eden Arc Respondents.

24. Mr. Robinson, in turn, shared those .PST files with me via DropBox and I, in turn, shared those .PST files with the Division via DropBox.

25. I understood at the time that Mr. Robinson was to have extracted all non-responsive e-mails and all privileged e-mails – that is, all e-mails to or from the Eden Arc Respondents' attorneys – from those collections of e-mails before he created the .PST files that he shared with me via DropBox. Mr. Robinson, however, understood at the time that I was to have extracted such privileged e-mails from the .PST files that he shared with me via DropBox before I shared those .PST files with the Division.

26. Thus, in producing *all* of the e-mails that Messrs. Lathan and Robinson sent or received “concerning” the Eden Arc Respondents, privileged e-mails were inadvertently produced because of confusion in the communications between myself and Mr. Robinson concerning who was to extract privileged e-mails from the .PST files that Mr. Robinson created of *all* e-mails that he and Mr. Lathen sent and received “concerning” the Eden Arc Respondents.

E.

Brune Law P.C.’s Inadvertent Production of  
Privileged E-Mails to the Division on February 1, 2016

27. Upon information and belief, on or about February 1, 2016 Brune Law P.C. produced all documents, including all e-mails, responsive to the Division’s December 21, 2015 subpoena.

28. In particular, upon information and belief, Brune Law P.C. collected and produced all such e-mails in five separate .PST files – that is, Brune Law P.C. collected and produced in five separate .PST files *all* e-mails that Mr. Lathen and Mr. Robinson sent or received “concerning” the Eden Arc Respondents after my firm’s late August/early September 2015 production of e-mails.

29. Upon information and belief, Brune Law P.C. reviewed those e-mails in Microsoft Outlook and, within each of the five .PST files, segregated privileged e-mails in two files labeled “JCK Priv Review” and “Privileged.”<sup>4</sup>

30. Upon information and belief, Brune Law P.C. then produced those.PST files to the Division.

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<sup>4</sup> Upon information and belief, “JCK” are the initials of “Jacqueline C. Kelly,” who was at the time an associate at Brune Law P.C.

31. Upon information and belief, in doing so, Brune Law P.C. inadvertently did not delete the files labeled “JCK Priv Review” and “Privileged,” found in one of the five .PST files, before producing that .PST file to the Division even though they had previously segregated such privileged e-mails in that .PST files. In other words, Brune Law P.C. moved the privileged e-mails it identified in that .PST file to a “trash” file but did not empty that “trash” file before producing that .PST file to the Division.

32. Upon information and belief, Brune Law P.C. created an “Attorney List” of all attorneys they were able to identify as having provided legal advice to the Eden Arc Respondents. (Exhibit 5.) Additionally, upon information and belief, on March 8, 2016 Brune Law P.C. produced a privilege log to the Division of all privileged documents and communications (including e-mails) within the Eden Arc Respondents’ productions of documents and e-mails. (Exhibit 6.) \

33. Notably for purposes of the Eden Arc Respondents’ opposition to the Division’s motion for a finding of privilege waiver, the privilege log that Brune Law P.C. created includes, *inter alia*, all of the privileged e-mails in the folders labelled “JCK Priv Review” and “Privileged” that were inadvertently produced to the Division, as detailed above. There can therefore be no doubt but that Brune Law P.C. believed that it had *not* produced those privileged e-mails to the Division.

F.

Clayman & Rosenberg LLP’s Inadvertent Production of  
Privileged E-Mails to the Division on April 29, 2016

34. On or about March 30, 2016 the Division issued a subpoena to the Eden Arc Respondents for the production of additional documents – a subpoena with which the Eden Arc Respondents had not yet fully complied (and were not yet required to have fully complied) as of

the April 16, 2016 date upon which they re-engaged my firm as their counsel in connection with the Eden Arc Investigation.

35. Upon such re-engagement, my firm sought to comply with the Division's March 30, 2016 subpoena.

36. On April 28, 2016 Mr. Lathen advised me via e-mail that the documents responsive to the Division's March 30, 2016 subpoena were ready for production to the Division. In particular, Mr. Lathen advised me that he had saved all such documents on a zip drive, that privileged documents were in a folder labelled "Privileged" on that zip drive and that within each of the six e-mail folders on that zip drive were folders labeled "Privileged," which contained privileged emails. He also stated that we should remove those privileged e-mails from the e-mail files on that zip drive before same were produced to the Division.

37. On April 28, 2016 my legal assistant retrieved the aforementioned zip drive from Mr. Lathen. It contained documents sorted into eight folders bearing the following titles:

- A. 2015 1099s;
- B. 2015 Audit;
- C. Admin;
- D. Emails;
- E. EndCare;
- F. Fund Docs;
- G. Models; and
- H. Privileged.

38. As relevant here, the folder entitled “Emails” contained six files in .PST format.

Those files bore the following titles:

- A. AllReceivedbyJLonEACMJantoApr2016\_142406\_Email\_001;
- B. AllSentbyJLonEACMJantoApr2016\_142405\_Email\_001;
- C. ReceivedbyJLonYahoo\_142412\_Email\_001;
- D. ReceivedbyMDRusingEACM\_142428\_Email\_001;
- E. SentbyJLonYahoo\_142413\_Email\_001; and
- F. SentbyMDRusingEACM\_142429\_Email\_001.

39. Additionally, the folder entitled “Privileged” contained eight documents – four documents in PDF format and four documents in Microsoft Word format.

40. On or about April 30, 2016 my firm hand delivered to the Division a CD containing copies of all of the foregoing folders except for the folder labelled “Privileged.”

41. On or about May 3, 2016 my firm produced a privilege log to the Division of the eight documents in the folder labelled “Privileged.” (Exhibits 7.)

42. I did not review – for purposes of privilege – the documents I received on the zip drive on April 28, 2016 from Mr. Lathen before they were produced to the SEC on April 29, 2016.

43. Rather, in reviewing the documents on that zip drive, I assumed that all privileged documents on that zip drive were found in the folder entitled “Privileged.” Indeed and in light of the existence of a folder entitled “Privileged” on that zip drive, it did not occur to me (notwithstanding Mr. Lathen’s April 28, 2016 e-mail) that privileged documents could or would be found in any of the other folders on that zip drive. Put differently, the existence of a folder

entitled "Privileged" on that zip drive lead me to conclude that that zip drive contained no privileged documents other than those found in the folder entitled "Privileged."

44. My assumption was incorrect.

45. In fact, on October 27, 2016 I discovered (in preparing the Eden Arc Respondents' opposition to the Division's Motion for a Finding of Privilege Waiver) that each of the six .PST files on that zip drive entitled "Emails" contained sub-files which, in turn, contained privileged e-mails.

46. In light of the foregoing, the production of privileged e-mails on April 3, 2016 was inadvertent in that it was based on what I believed to have been a reasonable assumption that proved wrong – to wit, a zip drive containing a folder entitled "Privileged" contained all of the privileged documents on that zip drive.

#### G.

##### Discovery of the Source and Means By Which Privileged E-Mails Were Produced

47. On September 13, 2016 the Division sent me an e-mail advising that it had discovered a privileged document in the Eden Arc Respondents' document production. (Exhibit 8.)

48. On September 18, 2016 the Division sent me an e-mail following up on its September 13, 2016 e-mail and advising that it had discovered three additional privileged documents in the Eden Arc Respondents' document production. (Exhibit 9.)

49. On September 18, 2016 I responded to the Division's September 18, 2016 e-mail and advised the Division that my firm was in the process of investigating the source of those privileged documents. (Exhibit 10.) Additionally, I advised the Division that "the inadvertent production of any privileged emails or any other document protected from disclosure by the

attorney-client privilege, the attorney work product doctrine or any other applicable privilege or protection is not and should not be considered or interpreted as a waiver of any such privilege or protection.” (Id.)

50. On September 20, 2016 I sent the Division a letter in which I provided instruction for the segregation of privileged documents and e-mails that the Eden Arc Respondents had inadvertently produced. (Exhibit 11.)

51. On September 21, 2016 the Division sent me an e-mail in which it essentially rejected my instruction for the segregation of privileged documents and e-mails that the Eden Arc Respondents had inadvertently produced. (Exhibit 12.)

52. On September 22, 2016 I responded by letter to the Division’s September 21, 2016 e-mail. (Exhibit 13.) Among other things, that September 22, 2016 letter contested the Division’s objections to my September 20, 2016 letter and reiterated that the Division should continue to treat as privileged the privileged documents and e-mails that the Eden Arc Respondents’ inadvertently produced. (Id.)

53. On September 23, 2016 the Eden Arc Respondents advised the Division that they intended to invoke an advice of counsel defense at the hearing herein. (Exhibit 14.)

54. Invoking the advice of counsel defense complicated the issue of the Eden Arc Respondents’ inadvertent production of privileged e-mails. In particular, invocation of the advice of counsel defense requires waiver of the attorney-client privilege with respect to legal advice relied upon by a party relying on such a defense. The legal advice that was the subject of the Eden Arc Respondents’ advice of counsel defense was found in, among other things, certain of the privileged e-mails that the Eden Arc Respondents had previously inadvertently produced. Put differently, having invoked the advice of counsel defense, the Division was entitled to certain

of the privileged e-mails that the Eden Arc Respondents' previously inadvertently produced and that we were in the process of identifying for purposes of seeking their return from the Division. Attached as Exhibit 15 is a list of e-mails and e-mail attachments that: (A) were inadvertently produced; (B) are privileged, notwithstanding the Eden Arc Respondents' invocation of an advice of counsel defense; and (C) should be returned to us and expunged from the Division's investigative file.

55. Notwithstanding the foregoing and the ongoing communications between my firm and the Division concerning the Eden Arc Respondents' inadvertent production of privileged e-mails, on October 25, 2016 the Division – prematurely, in our view – filed its Motion for a Finding of Privilege Waiver.

56. After receiving the aforementioned September 13, 2016 e-mail from the Division, I began the process of attempting to discover the source and means by which the privileged e-mails at issue herein were produced to the Division. Doing so proved difficult and I only reached the final conclusions set forth herein between October 27, 2016 and November 1, 2016. I would have corrected the foregoing inadvertent productions of privileged e-mails earlier if I had earlier discovered the source and means by which those privileged e-mails were produced to the Division.

57. One additional point bears noting: My September 20, 2016 letter to the Division stated that I believed that “the overwhelming majority of those privileged documents were inadvertently produced to the SEC after January 1, 2016,” at a time when Brune Law P.C. was representing the Eden Arc Respondents. (Exhibit 11.) That sentence incorrectly implies that Brune Law P.C. produced the “overwhelming majority” of those privileged e-mail

communications. But it does correctly report that Brune Law P.C. did inadvertently produce certain privileged e-mail communications to the Division, as detailed herein.

58. It also bears noting that the Division knew or should have known of the inadvertent production on February 1, 2016 of privileged e-mails by Brune Law P.C. well before its September 13, 2016 e-mail to me (referenced above) because: (A) those privileged e-mails were listed on the privilege log that Brune Law P.C. submitted to the Division; and (B) the metadata associated with that production clearly shows that those e-mails had been produced to the Division in folders labelled "JCK Priv Review" and "Privileged," as detailed above.

59. I accept full responsibility for my firm's inadvertent production of privileged e-mails to the Division as detailed herein.

Dated: New York, NY  
November 1, 2016



Harlan Protass