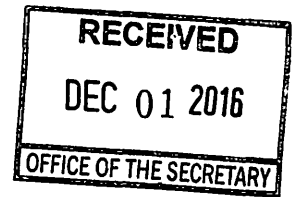


UNITED STATES OF AMERICA
Before the
U.S. SECURITIES AND EXCHANGE COMMISSION



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
FURTHER SUPPORT OF THEIR MOTION FOR RECONSIDERATION
OF THIS COURT'S "ORDER ON PRIVILEGE WAIVER"

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Jr., Eden Arc Capital Management, LLC
and Eden Arc Capital Advisors, LLC*

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 further support of their motion for reconsideration of this Court’s “Order on Privilege Waiver,” dated November 10, 2016 (the “Privilege Waiver Order”).

ARGUMENT

The Division makes several arguments as to why this Court should not reconsider the Privilege Waiver Order. Those arguments, however, do not diminish the appropriateness of this Court reconsidering the Privilege Waiver Order.

Initially, the Division asserts that “[n]one of the arguments Respondents make are new, or ones that derive from newly discovered facts.” (Division Mem. at 2.)¹ The Division is wrong.

For example, and based on what we believe were erroneous impressions arising from the 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, dated November 1, 2016, this Court found with respect to the Eden Arc Respondents’ September 2015 production that counsel “expected [Michael] Robinson to conduct the privilege review” and “operating on the assumption that Robinson had done the review for which he received no training, counsel then disclosed privileged documents.” As detailed in the Protass Aff.,² those conclusions were

¹ “Division Mem.” refers to the Division of Enforcement’s Memorandum of Law in Opposition to Respondents’ Motion for Reconsideration, dated November 23, 2016.

² “Protass Aff.” refers to the Affirmation of Harlan Protass in Support of the Eden Arc Respondents’ Application for Reconsideration of the “Order on Privilege Waiver,” dated November 17, 2016.

incorrect. The Protass Aff. also offered new facts and a more detailed description of that production that we respectfully submit resolves this Court's erroneous impressions.

In particular, all Mr. Robinson did was segregate e-mails between Mr. Lathen and/or himself, on the one hand, and counsel for the Eden Arc Respondents, on the other hand ("Attorney-Client E-Mails"), which effort resulted in the segregation of 2,422 Attorney-Client E-Mails that were not produced to the Division. Thereafter, contrary to this Court's finding in the Privilege Waiver Order, counsel did not rely on Mr. Robinson to conduct a privilege review of those Attorney-Client E-Mails (and no confusion existed as to who was to do so). Rather, Brune Law P.C. conducted that privilege review and produced a privilege log of those Attorney-Client E-Mails that were privileged.

Likewise, with respect to the April 2016 production, the Protass Aff. provided this Court with newly discovered facts, such as that not all of the six .PST files contained privileged e-mails and that, pursuant to the Eden Arc Respondents' invocation of an advice of counsel defense, the Division was entitled to 305 of the 329 privileged e-mails that were produced in April 2016. Moreover and most importantly, the privileged e-mails produced to the SEC in April 2016 were segregated and placed in folders clearly labeled as "Privileged." The Eden Arc Respondents also offered a more comprehensive analysis with respect to the April 2016 production, including how the .PST files containing Attorney-Client E-Mails (some privileged, some not) were compiled and who compiled those .PST files.

Additionally, the Division asserts that the Eden Arc Respondents do not "offer anything new to justify their delayed response to the Division's notice of their production errors." (Division Mem. at 3.) The Privilege Waiver Order, though, based its conclusions on factors other than Eden Arc Respondents' response to "the Division's notice of . . . production

errors.” (Division Mem. at 3.) See, e.g., Privilege Waiver Order at 5 (“The time taken after discovery of the disclosure weighs neither for nor against Respondents”). The Protass Aff. therefore focused on the facts and circumstances relating to the actual production of privileged e-mails.

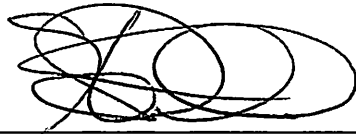
CONCLUSION

Accordingly, and as set forth herein and in the Protass Aff., this Court should reconsider the “Order on Privilege Waiver” and issue a new Order finding that the Eden Arc Respondents’ production of privileged e-mails in May 2015, September 2015 and April 2016 did not constitute a waiver of the attorney-client privilege with respect to those e-mails.

Dated: New York, NY
November 29, 2016

Respectfully submitted,

CLAYMAN & ROSENBERG LLP

By: 

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*Counsel for Respondents Donald F. Lathen,
Jr., Eden Arc Capital Management, LLC
and Eden Arc Capital Advisors, LLC*

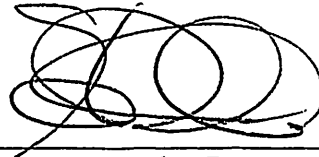
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that on November 29, 2016 I caused a true and correct copy of the foregoing THE EDEN ARC RESPONDENTS' MEMORANDUM OF LAW IN FURTHER SUPPORT OF THEIR MOTION FOR RECONSIDERATION OF THIS COURT'S "ORDER ON PRIVILEGE WAIVER," dated November 29, 2016, to be served via e-mail and via UPS Overnight Mail upon the parties listed below:

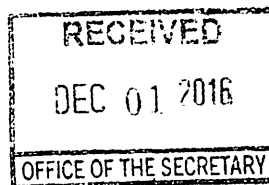
Honorable Jason S. Patil
Administrative Law Judge
U.S. Securities and Exchange Commission
100 F. Street, N.E.
Washington, DC 20549-2557

Brent Fields, Secretary
Office of the Secretary
U.S. Securities and Exchange Commission
100 F. Street, N.E.
Washington, DC 20549-2557

Nancy Brown, Esq.
U.S. Securities and Exchange Commission
New York Regional Office
Brookfield Place
200 Vesey Street, Suite 400
New York, NY 10281-1022

A handwritten signature in black ink, consisting of several overlapping loops and a horizontal line at the bottom, positioned above a solid horizontal line.

Harlan Protass



November 29, 2016

VIA E-MAIL AND UPS OVERNIGHT MAIL

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

Re: In the Matter of Donald F. Lathen, Jr., Eden Arc Capital Management, LLC
and Eden Arc Capital Advisors, LLC, Admin. Proc. File No. 3-17387

Dear Judge Patil:

This firm 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.

By way of background, on November 10, 2016 the Honorable James E. Grimes issued the "Order on Privilege Waiver," which adjudicated the Division of Enforcement's Motion for a Finding of Privilege Waiver, dated October 25, 2016. On November 17, 2016 the Eden Arc Respondents submitted a motion requesting that Judge Grimes reconsider the "Order on Privilege Waiver." In support thereof, the Eden Arc Respondents submitted the Affirmation of Harlan Protass in Support of the Eden Arc Respondents' Application for Reconsideration of the Order on Privilege Waiver, dated November 17, 2016. On November 21, 2016 Judge Grimes issued the "Order Regarding Motion for Reconsideration," in which the Court directed the Division "to file a response by December 1 and to continue to segregate any e-mails at issue until the motion is resolved." On November 23, 2016 the Division submitted the Division of Enforcement's Memorandum of Law in Opposition to Respondents' Motion for Reconsideration.

Given the foregoing and pursuant to Rule 154(b) of the SEC's Rules of Practice, enclosed please find a copy of the Eden Arc Respondents' Memorandum of Law in Further Support of Their Motion for Reconsideration of This Court's "Order on Privilege Waiver," dated November 29, 2016.

Thank you for your consideration and attention to this matter.

Respectfully submitted,

A handwritten signature in black ink, consisting of several overlapping loops and a horizontal line at the bottom, positioned above the name Harlan Protass.

Harlan Protass

Encl.

cc: Brent Fields, Secretary
(original and three copies via UPS Overnight Delivery)

Nancy Brown, Esq. (via e-mail and UPS Overnight Delivery w/ encl.)

Judith Weinstock, Esq. (via e-mail w/ encl.)

Janna Berke, Esq. (via e-mail w/ encl.)

Alex Janghorbani, Esq. (via e-mail w/ encl.)