

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

ADMINISTRATIVE PROCEEDINGS RULINGS
Release No. 4322/November 4, 2016

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

ORDER REQUIRING
IN CAMERA SUBMISSION

Respondents submitted a request that I issue a subpoena directed to the Securities and Exchange Commission concerning communications between it and the Financial Industry Regulatory Authority and various state and federal authorities related to their investigations of Respondents. The Division of Enforcement opposed claiming that “otherwise-privileged documents” given to the Commission by law enforcement authorities were privileged under Section 24(f)(3)(A) of the Securities Exchange Act of 1934, 15 U.S.C. § 78x(f)(3)(A). Mot. to Quash at 6.

By its terms, Section 24(f)(3)(A) does not independently create a privilege. Instead, it preserves existing privileges and protects from disclosure privileged information given to the Commission by FINRA and state and federal authorities. *See* 15 U.S.C. § 78x(f)(3)(A). Because the Division did not assert the existence of any underlying privilege that might be preserved by subsection (f)(3)(A), I directed it to “produce a detailed privilege log describing the withheld communications, a thorough explanation of the applicability of any privilege it believes is relevant to the communications, and an appropriate declaration supporting its factual assertions.” *Donald F. (“Jay”) Lathen, Jr.*, Admin. Proc. Rulings Release No. 4247, 2016 SEC LEXIS 3850 (ALJ Oct. 12, 2016).

The Division responded with a letter in which it explained its position, a declaration authored by its counsel, Judith Weinstock, and a privilege log. The privilege log lists a series of forty documents—emails, email chains, and letters—all of which the Division asserts are protected by the work-product and common interest doctrines and Section 24(f).¹ Ms. Weinstock declares that after the Division’s investigation began, she communicated with FINRA

¹ The privilege log actually references Section 929K of The Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 124 Stat. 136 (2010). Section 929K of the Dodd-Frank Act added subsection (f) to Exchange Act Section 24.

and various state and federal regulatory and law enforcement authorities about the investigation. Decl. at 1-2. She asserts that

These communications were in furtherance of the Division's investigation and in contemplation of litigation. The correspondence includes, for example, attorneys' mental impressions of the pertinent facts, and information about the Division's investigative strategy, with an eye toward litigation. The communications also include exchanges of information between the Division and the agencies listed above, as well as strategic and timing discussions. The communications also reveal information about FINRA's examination and investigation, as well as inquiries from other agencies. The communications do not contain *Brady* material.

Id. at 2.

In its letter, the Division asserts that its communications constitute work product. It notes that the communications took place after its investigation started and "reflect [its] efforts to further its investigation." Letter at 1. It says the communications concern matters such as the sharing of relevant information between law enforcement agencies. *Id.* In addition to asserting that Section 24(f) applies, the Division argues that the common interest doctrine applies to its communications with other agencies because those agencies "have a 'unity of interest'" with the Division. *Id.* at 2.

Respondents disagree. They argue that nothing supports the assertion that the Division's communications with other authorities is "*per se* 'work product.'" Opp. at 2. Respondents also assert that the privilege log is unclear as to who initiated certain communications and whether outside agencies that initiated communications did so in anticipation of litigation. *Id.*

The work product doctrine protects tangible things prepared by or for a party or its representative "in anticipation of litigation." *SEC v. Yorkville Advisors, LLC*, 300 F.R.D. 152, 159 (S.D.N.Y. 2014); *see* Fed. R. Civ. P. 26(b)(3)(A). As the proponent of the privilege, the Division bears the burden to show that it applies. *In re Subpoena Duces Tecum Issued to CFTC*, 439 F.3d 740, 750 (D.C. Cir. 2006); *United States v. Constr. Prods. Research, Inc.*, 73 F.3d 464, 473 (2d Cir. 1996). A privilege log must give enough detail to allow one to judge whether a document alleged to be privileged "is at least potentially protected from disclosure." *Constr. Prods. Research*, 73 F.3d at 473 (quoting *Bowne of New York City, Inc. v. AmBase Corp.*, 150 F.R.D. 465, 474 (S.D.N.Y. 1993)); *see Yorkville Advisors*, 300 F.R.D. at 162-64. It is not sufficient to give a cursory description in a privilege log of the basis for a claim of privilege. *Constr. Prods. Research*, 73 F.3d at 473-74.

The Division's privilege log bears more than a passing resemblance to the privilege log the court found deficient in *Yorkville Advisors*. *See* 300 F.R.D. at 163-64. The court in *Yorkville*, relying on *Construction Products Research*, found the information provided in the

Commission's privilege log was too cursory to support the Commission's privilege claims. *Id.* at 162-64. Such is the case here.

Indeed, as Respondents note, the Division provides no evidence that communications from outside agencies were made by those agencies in anticipation of litigation. And while the Division relies on the common interest doctrine, that doctrine "is not a privilege in its own right." *Hunton & Williams v. U.S. Dep't of Justice*, 590 F.3d 272, 280 (4th Cir. 2010). It does not apply before the putative common interest is established. *Id.* at 285. When that might have occurred with respect to the communications at issue in this proceeding and whether a common interest was established between the entities communicating is not demonstrated by the evidence presented.

Within ten days, the Division shall submit for *in camera* review the forty items listed in its privilege log, together with specific information sufficient to explain why each item qualifies for protection as work product and why the common interest doctrine applies.

James E. Grimes
Administrative Law Judge