

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

ADMINISTRATIVE PROCEEDINGS RULINGS
Release No. 4371/November 18, 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 DENYING THE DIVISION’S
SECOND MOTION TO PRECLUDE
RESPONDENTS’ ADVICE-OF-
COUNSEL DEFENSE

Respondents gave notice in September 2016 that they intend to rely on an advice-of-counsel defense. *See Donald F. (“Jay”) Lathen*, Admin. Proc. Release No. 4272, 2016 SEC LEXIS 3915, at *1 (ALJ Oct. 18, 2016). The Division of Enforcement moved to preclude Respondents from relying on this defense. *Id.* I denied the Division’s motion and instructed Respondents to make certain disclosures by November 1, 2016, related to their proposed defense. *Id.* at *6-12.

On October 25, Respondents provided the Division with a list of 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.” *See* Div. Second Mot. to Preclude (Mot.), Ex. A. On November 1, Respondents provided a collection of e-mails reflecting communications between Respondents and those attorneys. *See* Mot., Ex. B. Respondents also reported that they had engaged a third-party vendor to help extract e-mails from the Yahoo e-mail account of Respondent Donald F. Lathen that were sent or received from 2009 through 2012. *Id.* Respondents reported that they had experienced technical difficulties retrieving these e-mails but hoped to resolve those problems within a short period of time. *Id.*

The next day, the Division filed its second motion to preclude Respondents’ defense. The Division points to Respondents’ failure to provide all the e-mails from Lathen’s Yahoo account, *i.e.*, the ones Respondents’ vendor was having difficulty retrieving. Mot. at 1. It also suggests that Respondents have failed to fully comply with existing orders. *Id.* at 2.

Respondents respond that their vendor has now retrieved the relevant e-mails from Lathen’s account, which they have provided to the Division. Opp’n. at 6. They fault the Division for not having called their counsel to resolve this matter before filing its motion. *Id.* at 7.

The Division filed a reply in which it now asserts that Respondents have failed to disclose all counsel with whom they had relevant discussions and failed to disclose all communications. Reply at 4-7. These new assertions prompted Respondents to request permission to file a sur-reply.

The Division's motion is DENIED. The Division does not dispute that Respondents' vendor experienced technical challenges in retrieving e-mails from Lathen's Yahoo account. Respondents have now disclosed those e-mails. And, the delay in disclosing these e-mails—six days, eleven weeks before the scheduled start of the hearing—will not seriously prejudice the Division.

If the Division believes that Respondents' disclosures related to their advice-of-counsel defense are incomplete, it may request subpoenas, which it has already done and which were issued. Moreover, the completeness of Respondents' disclosures is more appropriately judged in the context of the hearing. Whether Respondents have made complete and forthcoming disclosures will affect the weight given to and credibility of their advice-of-counsel defense.

James E. Grimes
Administrative Law Judge