

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

ADMINISTRATIVE PROCEEDINGS RULINGS
Release No. 4447/December 14, 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 RECONSIDERATION
AND REGARDING DEFENSE-STRATEGY
DOCUMENTS

Motion for Reconsideration

On November 10, 2016, the administrative law judge previously assigned to this proceeding found that Respondents had waived the attorney-client privilege with respect to certain documents they produced to the Division of Enforcement during the investigation that led to this proceeding. *See Donald F. (“Jay”) Lathen, Jr.*, Admin. Proc. Rulings Release No. 4341, 2016 SEC LEXIS 4219.

On November 17, 2016, Respondents submitted a motion for reconsideration of the November 10 ruling. The affidavit filed by Respondents’ counsel in support of the motion does not, however, provide sufficient cause for reconsideration. Without regard to whether the affiant was at fault, in any way, for the disclosures of professedly privileged information, the additional underlying minutiae supplied by the affidavit—though informative—do not change the legal outcome. There is no reason to doubt that if the affiant had carefully reviewed each and every document prior to the principal productions to the Division and withheld each assertedly privileged document (and provided a privilege log entry in its place) the issue of waiver would not have arisen. However, that did not happen. Instead the parties are left with the undeniable fact of three large-scale productions to the Division with privileged material resulting from inadequacies both in the privilege review process and in Respondents’ belated efforts to address the disclosures. Reconsideration is therefore denied.

Defense-Strategy Documents

In the November 10 ruling, the judge did not permit the Division to immediately consider all privileged documents that were produced to it as a result of the three document productions for which privilege waiver was found. Rather, the judge ordered that documents about Respondents’ current and

former counsel's strategies in mounting a defense to the Division's allegations in this matter be submitted for *in camera* review. See *Donald F. ("Jay") Lathen, Jr.*, 2016 SEC LEXIS 4219, at *15-16. The judge directed:

The Division shall continue to segregate the disclosed privileged documents until Respondents identify the documents containing discussions between Lathen and his counsel regarding their strategy. At that point, the Division will be free to consider the privileged documents that Respondents do not identify as containing discussions between Lathen and his counsel regarding their strategy.

Id. at *16.

Thereafter, Respondents submitted *in camera* documents, spanning Bates-stamp numbers DS 00001 to DS 02563, as involving their defense strategies. The following documents, however, do not reveal Respondents' current or former counsel's defense strategies. Rather, they involve, for example, document production issues in response to Commission subpoenas, methods and questions related to such production, purely factual information, invoices for legal services with no substantive information, and logistical and scheduling matters. Therefore these documents must be disclosed pursuant to the November 10 order on privilege waiver: DS 00001 to 00011, 00017 to 00025, 00031 to 00032, 00037 to 00050, 00054 to 00069, 00077 to 00080, 00082, 00084 to 00093, 00226 to 00229, 00239 to 00240, 00248 to 00255, 00313 to 00315, 00404 to 00405, 00416 to 00417, 00453 to 00454, 02537 to 02539, 02556 to 02563.

The remaining documents relate to Respondents' defense strategies or implicate attorney-client communications that could reveal such strategies. The Division should promptly return them to Respondents and certify that it has: conducted a diligent search to identify and segregate any copies in its possession; returned all hard copies or data storage devices (such as CD-ROMs, DVDs, or flash drives) that exclusively contain such segregated documents to Respondents; and permanently destroyed all electronic copies stored on any other device or computer system, including any temporary files and metadata. The Division shall not use these documents in this proceeding or any other proceeding, unless otherwise permitted by further order.

In due course, I will re-review Respondents' withheld defense-strategy documents in the context of considering Respondents' compliance with the October 18 order on their advice-of-counsel defense and related subject-matter privilege waiver. See *Donald F. ("Jay") Lathen, Jr.*, Admin. Proc. Rulings Release No. 4272, 2016 SEC LEXIS 3915. Certain withheld documents may relate to what advice Respondents received from prior counsel about the structure or structuring of the joint tenancies at issue. See, e.g., DS 00026 to 00030.

Jason S. Patil
Administrative Law Judge