

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

ADMINISTRATIVE PROCEEDINGS RULINGS
Release No. 4564 / January 27, 2017

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 REGARDING THE
DIVISION’S MOTION TO COMPEL
OR PRECLUDE, AND FOLLOWING
FURTHER *IN CAMERA* REVIEW

Background

Under further consideration is the Division of Enforcement’s December 19, 2016, motion to compel Respondents to comply with various orders or, alternatively, to preclude Respondents from offering testimony or evidence regarding their reliance on the advice of attorney Kevin Galbraith. Respondents previously identified Galbraith as one of the attorneys who provided legal advice concerning the structure or structuring of Respondents’ investment strategy and have listed him a potential witness in support of their advice-of-counsel defense. To allow the Division an opportunity to test Respondents’ defense, Respondents were previously ordered to “disclose all communications in their possession that concern discussions with those counsel [upon whom they purportedly relied] about any aspect of the joint tenancies” at issue. *Donald F. (“Jay”) Lathen, Jr.*, Admin. Proc. Rulings Release No. 4272, 2016 SEC LEXIS 3915, at *10 (ALJ Oct. 18, 2016).

Respondents submitted an opposition to the Division’s motion on December 29 and submitted documents for in camera review on December 30. Following my review of Respondents’ December 30 in camera submission, I issued an order requiring certain disclosures. *Donald F. (“Jay”) Lathen, Jr.*, Admin. Proc. Rulings Release No. 4508, 2017 SEC LEXIS 58 (ALJ Jan. 9, 2017). But it was unclear whether Respondents had fully complied with my prior directive to search for relevant documents. *Id.* at *3-4. Respondents were “again directed to search for relevant documents, including their own files, and either produce them to the Division or identify the basis for withholding them,” and to submit any withheld documents for in camera review. *Id.* at *4.

Thereafter, Respondents submitted additional withheld documents for in camera review, on January 18 and 23, 2017. Respondents represent that their January 18 in camera submission contains communications between Respondents and Galbraith that took place through February

2016 that have not been produced to the Division. Respondents represent that their January 23 in camera submission contains copies of Respondent Donald F. Lathen, Jr.'s handwritten notes reflecting communications with Galbraith concerning litigation strategy that have not been produced to the Division.

January 18 Submission

In their January 18 transmittal letter accompany this in camera submission, Respondents represent that the documents were not previously produced to the Division because they “do not fall within the scope of the waiver of the attorney-client privilege” associated with their advice-of-counsel defense, i.e., because the “documents do not contain or reflect legal advice” that Lathen received from Galbraith concerning joint tenancies or the structure and structuring of their investment strategy. The surrounding circumstances in which any purported legal advice was rendered, however, are highly relevant to assessing Respondents’ defense. *See Rodney R. Schoemann*, Securities Act Release No. 9076, 2009 SEC LEXIS 3939, at *46 & n.41 (Oct. 23, 2009) (summarizing elements of advice-of-counsel defense).

The following documents are either not privileged or relevant to Respondents’ advice-of-counsel defense and shall be disclosed.¹ In some instances, as noted below, I permit Respondents to make minimal redactions to portions of the document that may contain non-waived privileged information or wholly irrelevant information. In making redactions, Respondents shall retain sufficient information for context.

KG E-mails 1

CTRL 00026291 (JLKG 00001, the e-mail header and paragraph “CIT” shall be disclosed, with redactions to the rest of the page)
CTRL 00026299 (JLKG 00018)
CTRL 00026300 (JLKG 00019 to 00020)
CTRL 00026301 (JLKG 00021 to 00031)
CTRL 00026305 (JLKG 00036 to 00037)
CTRL 00026306 (spreadsheet)
CTRL 00026307 (JLKG 00038 to JLKG 00049)
CTRL 00026309 (JLKG 00058 to 00066)
CTRL 00026310 (JLKG 00067 to JLKG 00078)
CTRL 00026311 (JLKG 00079 to JLKG 00091)
CTRL 00026312 (JLKG 00092 to JLKG 00105, excluding the March 5, 2015, e-mail from Galbraith to Lathen on the first half of JLKG 00092)
CTRL 00026313 (JLKG 00106 to 00124)
CTRL 00026314 (JLKG 00125 to 00144)
CTRL 00026315– (JLKG 00145 to 00164, not including Galbraith’s May 13, 2015, e-mail to Lathen on JLKG 00145)

¹ Based on my review, certain documents may have already been ordered disclosed. Nonetheless, for the sake of completeness, I have reviewed all documents. Nothing in this order should be interpreted as obviating disclosures required by prior orders.

CTRL 00026316 (JLKG 00165 to 00188, not including Galbraith's May 19, 2015, e-mail to Lathen on JLKG 00165)
CTRL 00026319 (JLKG 00193 to 00194)
CTRL 00026320 (JLKG 00195 to 00196)
CTRL 00026323 (JLKG 00199 to 00200)
CTRL 00026324 (JLKG 00201)
CTRL 00026331 (JLKG 00212 to 00215)
CTRL 00026336 (JLKG 00225 to 00226)
CTRL 00026337 (JLKG 00227 to 00229)
CTRL 00026338 (JLKG 00230 to 00441)
CTRL 00026339 (JLKG 00442 to 00445)
CTRL 00026340 (JLKG 00447 to 00449)
CTRL 00026341 (JLKG 00450 to 00454)
CTRL 00026342 (JLKG 00455 to 00459)
CTRL 00026343 (JLKG 00460 to 00464)
CTRL 00026344 (JLKG 00465 to 00469)
CTRL 00026348 (JLKG 00473 to 00479, but not including points #7 to 10 in Lathen's May 5, 2015, e-mail to Galbraith)
CTRL 00026349 (JLKG 00480 to 00487, but not including points #7 to 10 in Lathen's May 5, 2015, e-mail to Galbraith)
CTRL 00026352 (JLKG 00504 to 00511, but not including points #7 to 10 in Lathen's May 5, 2015, e-mail to Galbraith, and Galbraith's responses to those points)
CTRL 00026357 (JLKG 00522 to 00527)
CTRL 00026360 (JLKG 00535 to 00981)
CTRL 00026361 (JLKG 00982 to 00991)
CTRL 00026362 (JLKG 00992 to 00995)
CTRL 00026372 (JLKG 01037 to 01073)
CTRL 00026373 (JLKG 01074 to 01140)
CTRL 00026374 (JLKG 01141 to 01199)
CTRL 00026375 (JLKG 01200 to 01270)
CTRL 00026382 (JLKG 01294 to 01296)
CTRL 00026383 (spreadsheet)
CTRL 00026390 (JLKG 01308 to 01311, but not including JLKG 01310)
CTRL 00026391 (JLKG 01312 to 01320; minimal redactions permitted)
CTRL 00026398 (JLKG 01346 to 01347, redacting the second and third full paragraphs on 01346 and excluding the rest of the document)
CTRL 00026417 (Galbraith's May 28, 2015, e-mail to Lathen on JLKG 01641 to 01642, excluding the rest of the document)
CTRL 00026421 (JLKG 01676 to 01677)
CTRL 00026422 (JLKG 01678 to 01679)
CTRL 00026424 (JLKG 01681 to 01682)
CTRL 00026425 (JLKG 01683 to 01684)
CTRL 00026426 (JLKG 01685 to 01686)
CTRL 00026427 (JLKG 01687 to 01690; minimal redactions permitted)

CTRL 00026675 (JLKG 03493 to 03495; redact “interface with SEC” section on JLKG 03495)

CTRL 00026711 (JLKG 03590 to 03593; redact “interface with SEC” section on JLKG 03592 to 03593)

KG E-mails 3

CTRL 00026783 (JLKG 03876 to 03877)

CTRL 00026784 (spreadsheet)

CTRL 00026838 (JLKG 03976 to 03977)

CTRL 00026839 (JLKG 03978 to 03985)

CTRL 00026863 (JLKG 04035 to 04045; minimal redactions permitted)

CTRL 00026876 (JLKG 04073)

CTRL 00026877 (spreadsheet)

CTRL 00026882 (JLKG 04078 to 04080; minimal redactions permitted)

CTRL 00026886 (JLKG 04089 to 04131)

CTRL 00026891 (JLKG 04159 to 04160)

CTRL 00026892 (JLKG 04161 to 04174)

CTRL 00026896 (Lathen’s August 27, 2014, e-mail to Galbraith on JLKG 04184 to the end of JLKG 04185, JLKG 04187 to 04188; remainder of document excluded)

KG E-mails 4

CTRL 00026432 (JLKG 01695 to 01717)

CTRL 00026442 (JLKG 01831 to 01847)

CTRL 00026444 (JLKG 01849 to 01862)

CTRL 00026462 (JLKG 01993; minimal redactions permitted, but not to the paragraph beginning with “On a related note . . .”)

CTRL 00026471 (JLKG 02067 to JLKG 02078)

CTRL 00026475 (JLKG 02082; minimal redactions permitted, but not to the paragraph beginning with “Regardless of whether . . .”)

CTRL 00026476 (JLKG 02083 to 02096)

CTRL 00026477 (JLKG 02097 to 02098)

CTRL 00026478 (JLKG 02099 to 02103)

CTRL 00026479 (JLKG 02104 to 02107)

CTRL 00026481 (JLKG 02109 to 02131)

CTRL 00026482 (JLKG 02132 to 02133)

CTRL 00026514 (JLKG 02327 to 02328; minimal redactions permitted)

CTRL 00026515 (JLKG 02329 to 02540)

CTRL 00026516 (JLKG 02541 to 02661)

CTRL 00026517 (JLKG 02662 to 02693)

CTRL 00026550 (JLKG 02784 to 02786)

CTRL 00026565 (JLKG 02828 to 02839; minimal redactions permitted)

CTRL 00026568 (JLKG 02846 to 02859; minimal redactions permitted)

CTRL 00026569 (JLKG 02860 to 02873; minimal redactions permitted)

CTRL 00026600 (JLKG 02950 to 02952; minimal redactions permitted)
CTRL 00026601 (JLKG 02953 to 02960; minimal redactions permitted)
CTRL 00026607 (JLKG 02972 to 02978; minimal redactions permitted)
CTRL 00026608 (JLKG 02979 to 02987; minimal redactions permitted)
CTRL 00026612 (JLKG 03013 to 03022)
CTRL 00026613 (JLKG 03023 to 03030)
CTRL 00026651 (JLKG 03298 to 03314)
CTRL 00026652 (JLKG 03315 to 03331)

The remaining documents in the January 18 submission need not be disclosed because they are either privileged or irrelevant.

January 23 Submission

Regarding the January 23 in camera submission, some of the documents are relevant to Respondents' advice-of-counsel defense, as they reference or relate to the joint tenancies issue. *See, e.g.*, JLKG 04205, 04207, 04214. Respondents are directed to again review the notes and produce relevant portions, including portions necessary for context, with some redactions.

Deadlines

The Division requests that any additional disclosures occur by January 30, 2017, rather than by February 3, as I had indicated at the final prehearing conference. January 30 is the first day of the hearing and it would be prejudicial to order disclosure that same day. Minimal effort, however, would be required to produce disclosures that do not involve any redactions. I therefore ORDER Respondents to produce disclosures that do not involve any redactions by January 31. And by no later than by February 3, Respondents shall produce disclosures in which redactions are permitted.

Conclusion

The Division's December 19 motion is GRANTED insofar as further Galbraith disclosures have been compelled. The motion is DENIED in all other respects. As I ruled at the final prehearing conference, Galbraith's testimony will not be precluded.

Jason S. Patil
Administrative Law Judge