

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

ADMINISTRATIVE PROCEEDINGS RULINGS
Release No. 4407/December 1, 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 FOLLOWING *IN CAMERA*
REVIEW OF DOCUMENTS
WITHHELD BY THE DIVISION

In September, Respondents submitted a request for a subpoena seeking documents from the Securities and Exchange Commission. *See Donald F. (“Jay”) Lathen, Jr.*, Admin. Proc. Rulings Release No. 4247, 2016 SEC LEXIS 3850, at *1 (ALJ Oct. 12, 2016). Relevant to this order, Respondents sought communications between the Commission and various state and federal law enforcement authorities and documents in the possession of the Division of Enforcement related to investigations conducted by state and federal authorities. *Id.* at *7.

The Division objected, asserting that it had produced unprivileged material and that anything not produced is privileged under Section 24(f)(3)(A) of the Securities Exchange Act of 1934, 15 U.S.C. § 78x(f)(3)(A). Mot. at 6. Respondents responded that the Division had not made a particularized showing as to the applicability of any privilege.

The administrative law judge previously assigned to this proceeding agreed that the Division had failed to show that any underlying privilege existed that could be protected by Section 24(f)(3)(A). *See Donald F. (“Jay”) Lathen, Jr.*, 2016 SEC LEXIS 3850, at *8. The judge therefore ordered the Division 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.” *Id.*

The Division produced the required items and asserted that its communications constituted work product and that the common interest doctrine also applies. *See Donald F. (“Jay”) Lathen, Jr.*, Admin. Proc. Rulings Release No. 4322, 2016 SEC LEXIS 4127, at *3-4 (ALJ Nov. 4, 2016). Respondents disputed the assertion that the communications were *per se* work product and argued that the Division’s privilege log was deficient. *Id.* at *4. The judge

again agreed with Respondents and ordered the Division to produce the referenced communications for *in camera* review. *Id.* at *5-6. The judge also directed the Division to provide “specific information sufficient to explain why each item qualifies for protection as work product and why the common interest doctrine applies.” *Id.* at *6.

On November 10, the Division supplied my office with forty documents comprising the communications at issue. It also provided a letter and supporting declaration. According to the Division’s declaration, its investigation began in November 2014. Decl. at 1. The Division learned of FINRA’s then-ongoing investigation in November or December 2014. *Id.* at 2.

This proceeding was reassigned to me on November 29. I resolve Respondents’ subpoena request regarding the forty documents and the Division’s opposition to the request as follows.

The Division may withhold attorney work product. 17 C.F.R. § 201.230(b)(1)(ii); *see* Rules of Practice, 60 Fed. Reg. 32,738, 32,762 (June 23, 1995). The attorney work-product privilege shields from disclosure documents that “were prepared ‘in anticipation of litigation.’” *SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197, 1202 (D.C. Cir. 1991) (quoting Fed. R. Civ. P. 26(b)(3)(A)).

Except with respect to the six documents discussed below, the forty documents at issue are irrelevant and not likely to lead to any relevant evidence. Indeed, the forty documents chiefly reflect discussions about when the sender and recipient might later speak by telephone.

Documents 2, 15, 24, and 39 constitute work product. Document 2 is almost entirely irrelevant. The only relevant sentence, which is in a December 11, 2014, e-mail, concerns FINRA’s response to the Division’s substantive inquiry based on what FINRA learned during the course of its investigation. Because this document originated during and as a result of the Division’s investigation, it was prepared in anticipation of litigation. *See SafeCard Servs.*, 926 F.2d at 1202-03.

Document 15 is an e-mail from an attorney with FINRA sent several months after Document 2. Because it contains the attorney’s mental impression of certain evidence, it constitutes work product and the Division need not disclose it. *See Clarke T. Blizzard*, Advisers Act Release No. 2030, 2002 WL 662783, at *3-4 (Apr. 23, 2002).

Document 24 contains a series of e-mails between counsel for FINRA and Division counsel. With the exception of the most recent two e-mails—the two at the top of the first page—it contains irrelevant discussions about whether the attorneys can arrange a time to discuss their respective investigations. The last two e-mails in the series concern FINRA counsel’s inquiry regarding the nature of Lathen’s relationship to another person. This inquiry and the response were made in the context of anticipated litigation and thus constitute fact work product. Because Lathen has not shown “a substantial need for the materials and an undue hardship in acquiring the information any other way,” *Dir., Office of Thrift Supervision v. Vinson*

& Elkins, LLP, 124 F.3d 1304, 1307 (D.C. Cir. 1997), he is not entitled to this series of e-mails. Indeed, because Lathen necessarily knows how he is related to the person mentioned in the inquiry, he cannot show undue hardship in acquiring the information any other way.

Document 39 follows a substantive discussion the Division had with the Office of the Comptroller of the Currency. Decl. at 3. As stated in the Division's declaration, the discussion reflected in document 39 relates to the Division's thought process about certain matters and whether to include them in the order instituting this proceeding. *Id.* This document, therefore, need not be disclosed. *See Clarke T. Blizzard*, 2002 WL 662783, at *3-4.

Document 6 is a letter from FINRA to Division counsel forwarding six documents. Because it is not clear how this letter constitutes work product, it should be disclosed to Respondents.

Document 22 is a set of e-mail discussions in which a FINRA official provides Division counsel with an update regarding the status of FINRA's investigation. As with Document 6, it is not clear how this document constitutes work product. It should be disclosed.

Jason S. Patil
Administrative Law Judge