

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

ADMINISTRATIVE PROCEEDINGS RULINGS
Release No. 4508 / January 9, 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 FOLLOWING
RESPONDENTS’ *IN CAMERA*
SUBMISSION RELATED TO
KEVIN GALBRAITH

On December 19, 2016, the Division of Enforcement submitted a 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. Respondents submitted an opposition to the Division’s motion on December 29 and documents for *in camera* review on December 30.

The first set of *in camera* documents is identified as strategy e-mails related to the New York state-court proceeding *Prospect Capital Corp. v. Donald Lathen, Jr.*, in which Galbraith represents Respondents against claims arising from similar circumstances as those alleged in the order instituting proceedings. These documents were part of Respondents’ inadvertent productions to the Division that were the subject of the November 10, 2016, order on privilege waiver. *See Donald F. (“Jay”) Lathen, Jr.*, Admin. Proc. Rulings Release No. 4341, 2016 SEC LEXIS 4219. They are now the subject of a claw-back log submitted by Galbraith to the Division on December 19. Respondents assert that Galbraith is seeking return of the documents “as a professional courtesy” and, as the Division already has them in its possession, its motion is moot in this respect. Insofar as Respondents and/or Galbraith continue to seek return of the documents, I note that some of them may be relevant to assessing Respondents’ advice-of-counsel defense or are not privileged. *See, e.g.*, SEC-EDENARC-E-0070456 to -0070457 (excluding -0070458 to the end of the email on -0070459), -0070459 (starting with the July 1, 2014, 4:39 p.m. e-mail header) to -0070461, -0072856 to -0072883, -0127108 to -0127225, -0290565 to -0290567.

The second set of *in camera* documents relate to communications between Galbraith and Lathen, which Galbraith has withheld from the Division in response to a subpoena on the basis of attorney-client privilege, work-product protection, and/or joint-defense privilege.

Respondents indicate that these documents have been not previously produced to the Division. Respondents have turned over one of the documents, bearing Bates numbers KG Priv00001 to 00016, to the Division, acknowledging that it contains communications that fall within the scope of their advice-of-counsel defense. A few other documents may be relevant to assessing Respondents' advice-of-counsel defense. See KG Priv00026 (e-mail header dated Dec. 10, 2014, and the line "Ok, I am playing amateur lawyer again. Took a quick look at the Indenture. Here are a few excerpts:"), 00028 (starting with the blue text "First, the italicized language . . .") to 00029 (end of page), and 00032 to 00033. Respondents must disclose these documents to the Division by the close of business on January 10, 2017, and the Division may consider them. The remaining documents in this set are irrelevant and therefore need not be disclosed.

If the Division intends to use any of the above documents (i.e., the Galbraith documents already in its possession or the newly disclosed documents bearing the KG Priv Bates numbers which it may consider), it should identify the document as such before offering it into evidence. I will reserve ruling on admissibility until such time.

Lastly, it is unclear whether Respondents have fully complied with my directive to submit "for *in camera* review any documents reflecting communications between them and Galbraith . . . that took place at any time through approximately February 2016 and have never been produced to the Division, whether related to this proceeding or any other proceeding." *Donald F. ("Jay") Lathen, Jr.*, Admin. Proc. Rulings Release No. 4483, 2016 SEC LEXIS 4794 (ALJ Dec. 23, 2016). Respondents' transmittal letter accompanying their *in camera* submission represents that their search was "[b]ased on the assumption that Mr. Galbraith has all communications with Mr. Lathen" and limited to the documents on Galbraith's privilege log. Accordingly, Respondents are 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. If Respondents intend to withhold such additional documents, they shall notify my office and submit them for *in camera* consideration.

Jason S. Patil
Administrative Law Judge