

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

ADMINISTRATIVE PROCEEDINGS RULINGS
Release No. 4513 / January 10, 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 RESOLVING THE
DIVISION’S MOTION
TO COMPEL HINCKLEY ALLEN

Under consideration are the Division of Enforcement’s December 29, 2016, motion to compel the law firm Hinckley Allen to comply with a November 15 subpoena or to preclude Respondents from offering testimony or evidence regarding their reliance on the advice of Hinckley Allen; Respondents’ opposition to the motion; Hinckley Allen’s objection to the motion and *in camera* submission; and the Division’s reply brief. Respondents previously identified Hinckley Allen attorneys as having provided legal advice concerning the structure or structuring of Respondents’ investment strategy and intend to present evidence regarding such advice at the hearing in support of their advice-of-counsel defense.

The Division argues that Hinckley Allen is improperly withholding certain documents on the basis of attorney work product in response to the subpoena, which sought eight categories of documents—including attorney communications with Respondent Donald F. Lathen, Jr.—related to the structure or structuring of Respondents’ investment strategy. Respondents and Hinckley Allen do not object to the production of work product that references or memorializes communications with Lathen; however, they object insofar as the Division seeks all work product, including internal attorney communications and mental impressions not communicated to Respondents.

The Division’s motion is granted insofar as Hinckley Allen is directed to disclose the following documents to the Division by the close of business on January 13, 2017, subject to certain redactions.¹

¹ A comparison of Hinckley Allen’s *in camera* submission with its revised privilege log suggests that some of the *in camera* documents, or certain portions thereof, were not withheld. For the sake of completeness, however, I have reviewed the entire *in camera* submission and order disclosures where appropriate. If such disclosures have already been made, Hinckley Allen

HAS004435: This page simply reflects a question posed by Lathen and, therefore, must be disclosed.

HAS004600 to 004605: These attorney notes memorialize, at least in part, statements by Lathen to counsel. The notes contain a phone number that matches the number on Commission filings signed by Lathen and the date and time of an apparent teleconference with Lathen. Statements such as “open to advice on strengthening jtenancy” and “wants to preserve tax treatment” do not appear to be attorney mental impressions, but rather input from Lathen. The document must be disclosed subject to redactions of attorney mental impressions or internal attorney assessments/deliberations.

HAS004608 to 004609: These two pages do not contain any attorney handwritten notes or mental impressions and, therefore, must be disclosed.

HAS004639 to 004643: Except for the two internal e-mail exchanges between Justine M. Clark and Margaret D. Farrell on HAS004639, the rest of the document, including HAS004640, contains communications between Lathen and counsel. These client communications must be disclosed.

HAS004900 to 004902: This Hinckley Allen memo reflects Lathen’s fee proposal to counsel and a summary of background information that was apparently relayed by Lathen to counsel in connection with his proposal. The summary, at least in part, concerns the joint tenancies. The document must be disclosed subject to redactions of attorney mental impressions or internal attorney assessments/deliberations.

HAS005137: These attorney e-mails contain, at least in part, a summary of Lathen’s request to counsel and references to a letter from Lathen about the services or advice he sought. The document must be disclosed subject to redactions of attorney mental impressions or internal attorney assessments/deliberations.

HAS005222: Lathen’s November 7, 2013, e-mail to Robert G. Flanders must be disclosed.

HAS005393 to 005394: Lathen’s September 21, 2013, e-mail to Robert G. Flanders and Margaret D. Farrell must be disclosed.

The remaining documents (or portions not specified for disclosure above) are either irrelevant or protected attorney work product and, therefore, need not be disclosed. The Division’s motion is denied in all other respects.

Jason S. Patil
Administrative Law Judge

should inform the Division and provide the Bates numbers that match the Bates numbers on the document(s) in the Division’s possession.