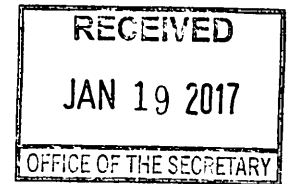




UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
NEW YORK REGIONAL OFFICE
200 VESEY STREET, SUITE 400
NEW YORK, NY 10281-1022



JANNA I. BERKE
TELEPHONE: (212) 336-9144
BERKEJ@SEC.GOV

January 17, 2017

By Email (alj@sec.gov)

The Honorable Jason S. Patil
Administrative Law Judge
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-2557

Re: In the Matter of Donald F. ("Jay") Lathen, Jr., Admin. Proc. File No. 3-17387

Dear Judge Patil:

I am writing with respect to the Division's Motion *in Limine* to Preclude Respondents from Offering Testimony or Evidence on Advice Received From Attorney Kevin Galbraith (the "Division's Motion"), and to submit a revised Exhibit I to my Declaration in Support.

On January 9, 2017, the Court noted that the Division's prior motion to compel documents on Mr. Galbraith's clawback privilege log appeared to be moot, in light of the fact that those documents were already in the possession of the Division and Galbraith is now only seeking their return as a "professional courtesy." Prior to that, the Division had segregated such documents pending the Court's ruling, so that they were unavailable to the trial team. Following the Court's Order and the submission of the Division's Motion, the Division has now had the opportunity to review those documents and has determined that certain documents on "Exhibit I" of the Berke Declaration, dated January 11, 2017, have in fact been produced by Respondents and/or Galbraith.

The Division is therefore submitting a revised Exhibit I to reflect those documents identified on Respondents' March 2016 Privilege Log that the Division believes remain unproduced by Respondents.¹ (Attachment A.)

¹ As stated in the Division's Motion, Exhibit I is not an exhaustive list and is intended only to identify a sample of documents that appear to be withheld. Also as stated in the Division's motion, Respondents have not provided the Division with an updated privilege log identifying documents that continue to be withheld following their waiver of the privilege (which would allow the Division to more accurately assess Respondents' continued claims of privilege), nor are there bates numbers on the March 2016 log, which would allow the Division to know whether these documents have already been reviewed by the Court *in camera*. Thus, the amended Exhibit I represents the Division's best attempt to recreate what is currently unavailable to it.

The following Entry Numbers were removed from Exhibit I: 659, 686, 688, 689, 691, 692, 745, 746, 833, and 1437. As reflected in Exhibit Ia, there are at least 31 documents that remain unproduced and Respondents have not identified whether they have been improperly withheld.

Hon. Jason S. Patil

January 17, 2017

Page 2

Separately, we note that Respondents have yet to either produce or identify on a privilege log any withheld documents reflecting communications between Respondents and Galbraith from a search of its own files, as required by the Court's January 9, 2017 Order. The Division has reminded Respondents that their search should include Respondents' handwritten notes reflecting such communications because, to date, we do not believe any have been produced. Respondents informed us yesterday that they will "respond to the Court in the next day or two" with regard to their obligations, including to produce handwritten notes, but have provided no date by which they plan to either produce documents or a log to the Division. (Attachment B.)

Respectfully submitted,



Janna Berke

Encl.

cc: Harlan Protass, Esq.

ATTACHMENT A

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

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,**

Respondents.

DECLARATION OF JANNA I. BERKE

I, Janna I. Berke, pursuant to 28 U.S.C. § 1746, declare as follows:

1. I am employed as Counsel in the Division of Enforcement (the “Division”). I submit this declaration in further support of the Division’s Motion *In Limine* To Preclude Respondents From Offering Testimony or Evidence on Advice Received From Attorney Kevin Galbraith, submitted on January 11, 2017. I am fully familiar with the facts and circumstances herein.

2. Appended hereto as Exhibit Ia is a true and correct copy of an amended Exhibit I, previously attached to the Berke Declaration, dated January 11, 2017. This exhibit was revised to remove documents that were released to the Division from its segregated database following

the Court's Order on January 9, 2017.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 17, 2017
New York, NY


Janna I. Berke

EXHIBIT Ia

Sample Communications Between Respondents and Galbraith that Respondents Appear to Continue to Withhold (REVISED 1.17.2017)

Entry Number	Record Type	Date	From	To	Cc	Email Subject or File Name	Privilege Type	Privilege Description
630	Email	4/4/14 10:25 AM	Galbraith, Kevin	Lathen, Jay		Message from Kevin Galbraith (Jay Lathen)	Attorney Client Privilege	Communication reflecting legal advice of counsel.
631	Email	4/4/14 11:13 AM	Lathen, Jay	Galbraith, Kevin		RE: Message from Kevin Galbraith (Jay Lathen)	Attorney Client Privilege	Communication requesting legal advice of counsel.
632	Email	4/4/14 11:19 AM	Galbraith, Kevin	Lathen, Jay		RE: Message from Kevin Galbraith (Jay Lathen)	Attorney Client Privilege	Communication reflecting legal advice of counsel.
633	Email	4/4/14 11:21 AM	Lathen, Jay	Galbraith, Kevin		RE: Message from Kevin Galbraith (Jay Lathen)	Attorney Client Privilege	Communication requesting legal advice of counsel.
634	Email	4/4/14 11:24 AM	Galbraith, Kevin	Lathen, Jay		RE: Message from Kevin Galbraith (Jay Lathen)	Attorney Client Privilege	Communication reflecting legal advice of counsel.
635	Email	4/4/14 11:36 AM	Lathen, Jay	Galbraith, Kevin		RE: Message from Kevin Galbraith (Jay Lathen)	Attorney Client Privilege	Communication requesting legal advice of counsel.
664	Email with Attachment(s)	6/25/14 4:25 PM	Galbraith, Kevin	Lathen, Jay		Engagement Letter (Eden Arc Capital Management, LLC)	Attorney Client Privilege	Communication reflecting legal advice of counsel.
730	Email	7/16/14 9:59 AM	Galbraith, Kevin	Lathen, Jay		RE: Schedule the rest of the week	Attorney Client Privilege	Communication reflecting legal advice of counsel.
767	Email	8/26/14 5:13 PM	Galbraith, Kevin	Lathen, Jay		RE: Goldman Correspondence	Attorney Client Privilege	Communication reflecting legal advice of counsel.
778	Email	8/28/14 1:55 PM	Galbraith, Kevin	Lathen, Jay		RE: Legal Research	Attorney Client Privilege	Communication reflecting legal advice of counsel.

Sample Communications Between Respondents and Galbraith that Respondents Appear to Continue to Withhold (REVISED 1.17.2017)

Entry Number	Record Type	Date	From	To	Cc	Email Subject or File Name	Privilege Type	Privilege Description
786	Email	9/2/14 2:20 PM	Galbraith, Kevin	Lathen, Jay		RE: Letter -- Draft with KG Suggested Revisions	Attorney Client Privilege	Communication reflecting legal advice of counsel.
790	Email with Attachment(s)	9/2/14 6:34 PM	Galbraith, Kevin	Lathen, Jay		Bill 9-2-14	Attorney Client Privilege	Communication reflecting legal advice of counsel.
792	Email	9/3/14 2:05 PM	Galbraith, Kevin	Lathen, Jay		RE: US Bank Recent Reject Letters	Attorney Client Privilege	Communication reflecting legal advice of counsel.
823	Email with Attachment(s)	9/11/14 2:45 PM	Galbraith, Kevin	Lathen, Jay; Robinson, Michael D.		Agenda for 9/15 FINRA Conference Call	Attorney Client Privilege	Communication reflecting legal advice of counsel.
825	Email	9/11/14 7:20 PM	Galbraith, Kevin	Lathen, Jay	Robinson, Michael D.	RE: Base Indenture	Attorney Client Privilege	Communication reflecting legal advice of counsel.
830	Email with Attachment(s)	9/15/14 6:40 PM	Galbraith, Kevin	Lathen, Jay	Robinson, Michael D.	FWD: Eden Arc Capital -- Follow-Up	Attorney Client Privilege	Communication reflecting legal advice of counsel.
832	Email	9/17/14 1:06 PM	Galbraith, Kevin	Lathen, Jay		RE: WSJ Article on Survivor's Option Securities	Attorney Client Privilege	Communication reflecting legal advice of counsel.
834	Email	9/17/14 3:34 PM	Galbraith, Kevin	Lathen, Jay		RE: [FWD: Eden Arc Capital -- Follow-Up Information]	Attorney Client Privilege	Communication reflecting legal advice of counsel.
836	Email	9/17/14 5:25 PM	Lathen, Jay	Galbraith, Kevin		RE: [FWD: Eden Arc Capital -- Follow-Up Information]	Attorney Client Privilege	Communication requesting legal advice of counsel.
837	Email	9/17/14 5:36 PM	Lathen, Jay	Galbraith, Kevin		RE: [FWD: Eden Arc Capital -- Follow-Up Information]	Attorney Client Privilege	Communication requesting legal advice of counsel.
838	Email	9/17/14 5:50 PM	Lathen, Jay	Galbraith, Kevin		FW: Redemption Rejection	Attorney Client Privilege	Communication requesting legal advice of counsel.

Sample Communications Between Respondents and Galbraith that Respondents Appear to Continue to Withhold (REVISED 1.17.2017)

Entry Number	Record Type	Date	From	To	Cc	Email Subject or File Name	Privilege Type	Privilege Description
839	Email	9/17/14 5:57 PM	Galbraith, Kevin	Lathen, Jay		Re: [FWD: Eden Arc Capital -- Follow-Up Information]	Attorney Client Privilege	Communication reflecting legal advice of counsel.
840	Email	9/17/14 6:55 PM	Lathen, Jay	Galbraith, Kevin		Muccia	Attorney Client Privilege	Communication requesting legal advice of counsel.
869	Email	9/30/14 12:09 PM	Galbraith, Kevin	Lathen, Jay		RE: FWD: Eden Arc Capital -- GE Capital Internotes	Attorney Client Privilege	Communication reflecting legal advice of counsel.
940	Email	10/17/14 10:50 AM	Galbraith, Kevin	Lathen, Jay		GE Capital	Attorney Client Privilege	Communication reflecting legal advice of counsel.
1059	Email with Attachment(s)	11/12/14 1:55 PM	Galbraith, Kevin	Lathen, Jay; Robinson, Michael D.		Re: Goldman Sachs File	Attorney Client Privilege	Communication reflecting legal advice of counsel.
1369	Email	3/4/15 8:44 AM	Lathen, Jay	Galbraith, Kevin		RE: Survivor's Option Notes	Attorney Client Privilege	Communication requesting legal advice of counsel.
1371	Email with Attachment(s)	3/4/15 11:55 AM	Galbraith, Kevin	Lathen, Jay		FW: Survivor's Option Notes	Attorney Client Privilege	Communication reflecting legal advice of counsel.
1688	Email with Attachment(s)	5/12/15 12:08 PM	Lathen, Jay	Galbraith, Kevin		Eden Arc LPA	Attorney Client Privilege	Communication requesting legal advice of counsel.
1691	Email	5/12/15 12:36 PM	Galbraith, Kevin	Lathen, Jay		Re: Eden Arc LPA	Attorney Client Privilege	Communication reflecting legal advice of counsel.
1692	Email	5/12/15 1:37 PM	Galbraith, Kevin	Lathen, Jay		Re: Eden Arc LPA	Attorney Client Privilege	Communication reflecting legal advice of counsel.

ATTACHMENT B

From: [Christina Corcoran](#)
To: [Berke, Janna](#)
Subject: Re: Eden Arc -- Galbraith docs
Date: Monday, January 16, 2017 1:25:18 PM

We turned over the privileged documents last week. I assume you are talking about the part of the order regarding searching our files? If so, I'd say we expect to respond to the Court in the next day or two and will address your request regarding handwritten notes.

On Sun, Jan 15, 2017 at 3:17 PM, Berke, Janna <berkej@sec.gov> wrote:

Hi Harlan:

Can you please tell us when you expect to produce documents and/or a privilege log pursuant to the Court's January 9, 2017 Order?

Additionally, we have not seen any handwritten notes reflecting conversations between Messrs. Lathen and/or Robinson and Galbraith. You have indicated in the past that Mr. Lathen threw out his handwritten records prior to receiving a subpoena from the Division.

It appears, however, that a number of the conversations with Mr. Galbraith would have post-dated the Division's first subpoena in February 2015 and would fall within the scope of Respondents' waiver. Please confirm that you have also searched your clients' handwritten notes in complying with the Court's orders (for Galbraith communications, communications with other lawyers, or any other communications that are called for by Court's orders or Division's subpoenas).

Thank you,

Janna

Janna I. Berke

Enforcement Division

U.S. Securities & Exchange Commission

200 Vesey Street, Suite 400

New York, NY 10281

Confidentiality Notice: This e-mail message, including any attachments, from the U.S. Securities and Exchange Commission is for the exclusive use of the intended recipient(s) and may contain confidential and privileged information. If you are not the intended recipient, please do not read, distribute, or take action in reliance upon the message. If you have received this message in error, please notify the sender immediately by return e-mail and promptly delete this message and its attachments from your computer system. Be advised that no privileges are waived by the transmission of this message.

--

Christina M. Corcoran
Clayman & Rosenberg LLP
305 Madison Avenue
New York, NY 10165
T. 212-922-1080
M. [REDACTED]
F. 212-949-8255
www.clayro.com
corcoran@clayro.com