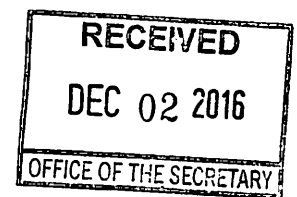




UNITED STATES
SECURITIES AND EXCHANGE COMMISSION

New York Regional Office
Brookfield Place, 200 Vesey Street, Room 400
New York, New York 10281



DIVISION OF ENFORCEMENT

JUDITH A. WEINSTOCK
Assistant Regional Director
(212) 336-9078
weinstockj@sec.gov

December 1, 2016

By UPS and 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 represent the Division of Enforcement (the "Division") in this matter and write to apprise the Court of matters relevant to Respondents' Motion for Reconsideration of the "Order on Privilege Waiver."

Background

On November 10, 2016, the Court issued an Order granting, in part, the Division's Motion for a Finding of Privilege Waiver. The Court's order relates to four document productions that Respondents produced to the Division during the Division's investigation in 2015 and 2016. The Court granted the Division's motion with respect to three of the four document productions, holding that "Respondents did not act reasonably to prevent disclosure" (Order at 6). Specifically, as to the Respondents' May 2015 production, the Court found that "the disclosure occurred because Respondents' counsel relied on an untrained, non-attorney to compile the documents at issue and then failed to conduct any privilege review at all" (Order at 4-5). As to the August/September 2015 production, the Court found that it was "unreasonable to solely rely on an untrained, non-attorney to conduct" the privilege review (Order at 5). Finally, with respect to Respondents' April 2016 production, the Court concluded that Respondents "took no steps to avoid disclosure" (Order at 6). Thus the Court held that the privilege was waived as to documents produced to the Division on those dates. But, as a matter of fairness, the Court carved out an exception for privileged documents relating to Respondents' litigation strategy. Thus, the Court ordered Respondents to submit to the Court for *in camera* review, all documents over which Respondents were claiming privilege relating to their defense in this matter. And the Court ordered the Division to keep the privileged documents segregated pending its ruling.

December 1, 2016

On November 17, 2016, Respondents moved the Court for reconsideration of that decision. The Division opposes that motion for the reasons laid out in its November 23, 2016 submission. Respondents replied on November 6, 2016.

Respondents' Counsel Asserts an Additional Privilege

On November 25 and 29, 2016—before Respondents filed their reply brief in support of their reconsideration motion—the Division received the attached emails from Kevin Galbraith, an attorney who represents Respondent Lathen in a related private litigation now pending in New York State Supreme Court.¹ Mr. Galbraith's email indicates that he is now asserting an unspecified privilege over unspecified communications that Respondents' current counsel turned over to the Division in May and September 2015 and April 2016 – *i.e.* the three productions about which the Court ruled Respondents had waived privilege. Mr. Galbraith has not yet identified either the privilege he asserts, on whose behalf he asserts it (whether on his own or Mr. Lathen's), or to which documents it relates – whether documents Respondents have already attempted to assert a privilege over, or ones produced, but not yet identified as privileged.

The Division has segregated all documents required by the Court's order on November 10, 2016, pending the Court's decision on the Reconsideration Motion. We will do the same for any documents Mr. Galbraith identifies, although it remains unclear when Mr. Galbraith will be submitting such a list to the Division. If the documents over which Mr. Galbraith is now asserting a privilege were part of those that were never apparently subject to a privilege review by Respondents' counsel, they are covered by the Court's Order of November 10, 2016. If this is the case, they are either documents for which the privilege was waived or documents purportedly pertaining to litigation strategy, which are required to be submitted to the Court *in camera* for the Court's review. And, if the documents Mr. Galbraith now demands that the Division return were never identified by Mr. Protass as privileged – not prior to production to the Division, nor in the list of “inadvertently privileged” documents Mr. Protass finally provided as Exhibit 15 to his November 1, 2016 Affirmation in Response to the Division's Motion for a Finding of Privilege Waiver – then the lack of care Respondents have taken to date to protect their privilege, which the Court discussed in its original ruling on this subject, is even more severe.

¹ Mr. Galbraith has also represented Respondents in connection with Respondents' disputes with certain issuers in this case, and has been identified by Respondents as one of the attorneys upon whose advice Lathen relied in connection with the structuring of his business. (See Protass October 25, 2016 Letter and attachment (enclosed).) Judge Grimes authorized the Division to issue a subpoena to Mr. Galbraith on November 15, 2016. The Division is still awaiting a response from Mr. Galbraith.

December 1, 2016

The Court should also be aware that Mr. Protass was copied on Mr. Galbraith's email to the Division. Consequently, the Division hoped that Respondents would have brought it to the Court's attention in their Reply to their Reconsideration Motion, filed on November 29, 2016, but they did not. Given the relevance of Mr. Galbraith's privilege claims to Respondents' reconsideration motion, the Division believes the Court should be aware of it.

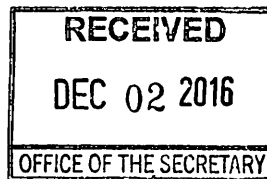
Sincerely,

A handwritten signature in black ink, appearing to read "Judith A. Weinstock". The signature is fluid and cursive, with the first name "Judith" being the most prominent part.

Judith A. Weinstock

Enclosures

Clayman &
Rosenberg^{LLP}



305 Madison Avenue
New York, NY 10165
T: 212-922-1080
F: 212-949-8255

Harlan J. Protass
Partner
protass@clayro.com

October 25, 2016

VIA E-MAIL

Judith Weinstock, Esq.
U.S. Securities and Exchange Commission
New York Regional Office
Brookfield Place
200 Vesey Street, Suite 400
New York, NY 10281-1022

Re: In the Matter of Donald F. Lathen, Jr., Eden Arc Capital Management, LLC
and Eden Arc Capital Advisors, LLC, Admin. Proc. File No. 3-17387

Dear Ms. Weinstock:

Pursuant to Judge Grimes' Order on Motion to Preclude Advice-of-Counsel Defense, dated October 18, 2016, enclosed please find a chart listing the names and contact information for every attorney (except for this firm and Brune Law P.C.) with whom Donald F. Lathen, Jr., Eden Arc Capital Management, LLC and Eden Arc Capital Advisors, LLC "consulted, at any time 'through approximately February 2016.' about 'the structure of and structuring of' the joint tenancies at issue in this case."

Very truly yours,

/s/

Harlan Protass

Encl.

cc: Nancy Brown, Esq. (via e-mail w/ encl.)
Alex Janghorbani, Esq. (via e-mail w/ encl.)
Janna Berke, Esq. (via e-mail w/ encl.)

October 25, 2016

In the Matter of Donald F. Lathen, Jr., Eden Arc Capital Management, LLC
and Eden Arc Capital Advisors, LLC, Admin. Proc. File No. 3-17387

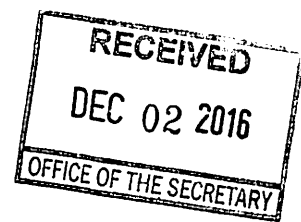
Attorney List

(Produced Pursuant to Order on Motion to Preclude
Advice-of-Counsel Defense, dated October 18, 2016)

<u>Name</u>	<u>Contact Information</u>
Kim Baptiste	Schulte Roth & Zabel LLP 919 Third Avenue New York, NY 10022 T: 212-756-2317 kim.baptiste@srz.com
Jonathan Blattmacher (formerly of Milbank Tweed Hadley & McCloy)	Pioneer Wealth Partners 515 Madison Avenue Suite 13B New York, NY 10022 T. 212-328-0312 jblattmachr@pioneerwealthpartners.com
Cherryl J. Calaguio (formerly of Gersten Savage LLP) <u>Please Note:</u> Ms. Calaguio has expressed a preference for e-mail communications through personal (i.e., gmail.com) e-mail address.	Sichenzia Ross Friedman Ference LLP 61 Broadway New York, NY 10006 T. 212-930-9700 [REDACTED]
Stephen DeRosa	DraftLaw https://www.draftlaw.com/ (No other contact information available)
Daren Domina (formerly of Katten Muchin Rosenman LLP)	Haynes and Boone, LLP 30 Rockefeller Plaza 26th Floor New York, NY 10112 T. 212-659-4963 daren.domina@haynesboone.com
Matthew Doring	Hinckley Allen & Snyder LLP 28 State Street Boston, MA 02109 T. 617-345-9000 mdoring@kinckleyallen.com

Margaret D. Farrell	Hinckley Allen & Snyder LLP 100 Westminster Street Suite 1500 Providence, RI 02903 T. 401-274-2000 mfarrell@hinckleyallen.com
Robert G. Flanders, Jr. (formerly of Hinckley Allen & Snyder LLP)	Whelan, Corrente, Flanders, Kinder & Siket LLP 100 Westminster Street Suite 710 Providence, RI 02903 T. 401-270-0154 rflanders@whelencorrente.com
Kevin Galbraith	Law Office of Kevin Galbraith 236 West 39th Street 5th Floor New York, NY 10001 T. 212-203-1249 kevin@kevingalbraithlaw.com
Rob Grundstein (formerly of Katten Muchin Rosenman LLP)	Sabby Capital Management 10 Mountainview Road Upper Saddle River, NJ 07458 T. 646-307-4500
Bruce Hood	Withers Bergman LLP 430 Park Avenue 10th Floor New York, NY 10022 bruce.hood@withersworldwide.com
Daniel Hunter	Schulte Roth & Zabel LLP 919 Third Avenue New York, NY 10022 T: 212-756-2201 daniel.hunter@srz.com
Jackie Mancini (formerly of Hinckley Allen & Snyder LLP)	(Contact information unknown)
Jessica Montello (formerly of Gersten Savage LLP)	Wilson Elser Moskowitz Edelman & Dicker 1133 Westchester Avenue White Plains, NY 10604 T. 914-872-7475 jessica.montello@wislonesler.com
Peter Pront	Seward and Kissel One Battery Park Plaza New York, NY 10004 T. 212-574-1221 pront@sewkis.com

Eric Roper, Esq. (formerly of Gersten Savage LLP)	1025 Fifth Avenue New York, NY 10028 T. 917-535-0038 eric@ericoperesq.com
Michael Tannenbaum	Tannenbaum Helpern Syracuse & Hirschtritt LLP 900 Third Avenue New York, NY 10022 Phone: 212-508-6701 tannenbaum@thsh.com
Dianne Zeydel	Greenberg Taurig 333 SE 2nd Avenue Suite 4400 Miami, FL 33131 T: 305-579-0575 zeydeld@gtlaw.com



From: [Kevin Galbraith](#)
To: [Weinstock, Judith](#)
Cc: [Janghorbani, Alexander](#); [Berke, Janna](#); [Brown, Nancy A](#); [Wayne Gosnell](#); [Christina Corcoran](#); [Harlan Protass](#)
Subject: Re: In the Matter of Donald F. Lathen, Jr., et al., Admin. Proc. File No. 3-17397
Date: Tuesday, November 29, 2016 9:06:04 AM
Attachments: [image001.png](#)
[image002.png](#)

Dear Ms. Weinstock:

Yes, I am aware of the procedural posture concerning this issue. I am writing on my own behalf to let you know that I intend to request that the Division return to me, as a matter of professional courtesy, the privileged emails I exchanged with my client regarding litigation strategy in the Prospect matter. I will identify them specifically by means of a privilege log.

Thank you.

Kevin



236 West 30th Street, 5th Floor
New York, New York 10001

212.203.1249 (p)
646.390.5935 (f)



kevin@galbraithlawfirm.com
www.kevingalbraithlaw.com

From: "Weinstock, Judith" <weinstockj@SEC.GOV>
Date: Monday, November 28, 2016 at 10:24 AM
To: Kevin Galbraith <kevin@kevingalbraithlaw.com>
Cc: "Janghorbani, Alexander" <JanghorbaniA@sec.gov>, "Berke, Janna" <berkej@SEC.GOV>, "Brown, Nancy A" <BrownN@SEC.GOV>, Wayne Gosnell <gosnell@clayro.com>, Christina Corcoran <corcoran@clayro.com>, Harlan Protass <protass@clayro.com>
Subject: RE: In the Matter of Donald F.Lathen, Jr., et al., Admin. Proc. File No. 3-17397

Dear Mr. Galbraith,

We've already segregated all documents required by the Judge's November 10, 2016 order in this case. If there are others that you wish to identify, please let us know and we will segregate them. Please include a full privilege log so that we can understand what privilege you are asserting. In segregating any documents over which you claim a privilege, however, we reserve our rights as to all challenges we may make as to any privilege claimed by you or Mr. Protass, and any waiver that may

have been asserted or effected. Further, and as you know, the Court has ordered Respondents to submit documents relating to "legal strategy" for in camera review, and Respondents have requested reconsideration of that order.

Sincerely,

Judy Weinstock

From: Kevin Galbraith [mailto:kevin@kevingalbraithlaw.com]
Sent: Friday, November 25, 2016 7:38 AM
To: Weinstock, Judith
Cc: Janghorbani, Alexander; Berke, Janna; Brown, Nancy A; Wayne Gosnell; Christina Corcoran; Harlan Protass
Subject: In the Matter of Donald F.Lathen, Jr., et al., Admin. Proc. File No. 3-17397

Dear Ms. Weinstock:

I write to notify you that my firm intends to formally request that the SEC staff return to us email communications between my firm and Mr. Lathen reflecting litigation strategy in the *Prospect Capital Corp. v. Lathen et al.* matter, which were inadvertently produced to the SEC by Clayman & Rosenberg in May 2015, September 2015 and April 2016. The emails at issue are not relevant to your case and could seriously prejudice Mr. Lathen's defense in the Prospect matter, should they be produced to Prospect counsel.

I have recently received from Clayman & Rosenberg the subject emails and am in the process of reviewing them to determine which of them should be returned. Once I have completed my review, I will identify those that should be returned and provide a copy of them for your reference and consideration.

We appreciate your expected cooperation and courtesy in this regard.

Best,

Kevin Galbraith



236 West 30th Street, 5th Floor
New York, New York 10001

212.203.1249 (p)
646.390.5935 (f)



kevin@galbraithlawfirm.com
www.kevingalbraithlaw.com

From: Harlan Protass <protass@clayro.com>
Date: Thursday, September 29, 2016 at 1:31 PM
To: "Weinstock, Judith" <weinstockj@sec.gov>
Cc: Alexander Janghorbani <janghorbaniA@sec.gov>, "Berke, Janna" <berkej@sec.gov>, "Brown, Nancy A" <BrownN@sec.gov>, Wayne Gosnell <gosnell@clayro.com>, Christina Corcoran <corcoran@clayro.com>, Caleb Miller <miller@clayro.com>
Subject: In the Matter of Donald F.Lathen, Jr., et al., Admin. Proc. File No. 3-17397

Dear Judy --

Please see the attached letter and the other attachments to this e-mail, both of which relate to the production of e-mails consistent with the invocation of an advice of counsel defense.

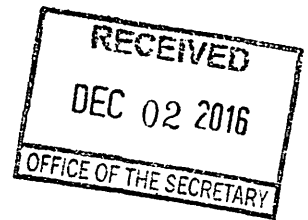
Best regards,

Harlan

Harlan Protass
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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.

Certificate of Service

I hereby certify that I served the Division of Enforcement's December 1, 2016 letter on this 1st day of December, 2016, on the below parties by the means indicated:

Harlan Protass
Clayman & Rosenberg LLP
305 Madison Avenue, Ste 1301
New York, New York 10165
Attorneys for Respondents
(By E-mail)

The Honorable James E. Grimes
Administrative Law Judge
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-2557
(Courtesy copy by E-mail)

Brent Fields, Secretary
Office of the Secretary
U.S. Securities and Exchange Commission
100 F. Street, N.E.
Washington, D.C. 20549-2557
(By UPS (original and three copies))

Judith Weinstock