

**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 NANCY A. BROWN**

I, Nancy A. Brown, pursuant to 28 U.S.C. § 1746, declare as follows:

1. I am employed as a Senior Trial Counsel in the Division of Enforcement (the “Division”). I submit this declaration in support of the Division’s Motion to Compel Third Party Hinckley Allen to Comply with the Subpoena, or to Preclude Respondents from Offering Testimony or Evidence Regarding Their Reliance on the Advice of Hinckley Allen. I am fully familiar with the facts and circumstances herein.

2. Appended hereto as Exhibit A is a true and correct copy of the November 15, 2016 Subpoena issued to Hinckley Allen and Snyder LLP (“Hinckley Allen”).

3. Appended hereto as Exhibit B is a true and correct copy of the executed Amended Engagement letter, dated July 30, 2012, between Hinckley Allen and Eden Arc Capital Partners, produced by Hinckley Allen.

consulted in connection with his investment strategy at issue in this case. He promised to confirm that representation with his client and report back. In that conversation, we asked Mr. Protass to intercede with Hinckley Allen to produce the withheld documents on its privilege log. He advised that he would take the matter under advisement. Division counsel has heard nothing further from Mr. Protass on either topic.

10. In a telephonic “meet and confer” on December 21, 2016, I raised the matters addressed in the Division’s instant motion to compel with counsel for Hinckley Allen, Mr. Grimm, and asked him to reconsider his privilege assertions in light of the advice of counsel defense asserted by Respondents. In an effort to resolve our disagreement with the privilege assertions made by the firm, I asked that Mr. Grimm review Hinckley Allen’s privilege log and consider the Division’s proposed compromise that the firm produce any withheld notes or internal memoranda that reflected or referenced conversations with the client. Mr. Grimm promised to get back to me during the week of December 27th.

11. On December 27, 2016, I called Mr. Grimm and left a message asking for his position on our request that they release certain documents listed on their privilege log, including any notes or memoranda reflecting or referencing conversations with Mr. Lathen. On December 28, 2016, Mr. Grimm wrote that he was on vacation but that his partner and a legal assistant were reviewing certain of the documents on the firm’s log to determine whether additional documents might be produced. He advised that he would review that work and decide whether any additional documents should be produced when he returned sometime after the new year, estimating that he “should be able to make any supplemental production by the end of next week.” A true and correct copy of Mr. Grimm’s email communication to me is appended hereto as Exhibit D.

# **EXHIBIT A**

## SUBPOENA ATTACHMENT

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

### DEFINITIONS

1. The term "communication" means the transmittal of information (in the form of facts, ideas, inquiries or otherwise).
2. The term "document" is defined to be synonymous in meaning and equal in scope to the usage of the term "documents or electronically stored information" in Fed. R. Civ. P. 34(a)(1)(A). A draft or non-identical copy is a separate document within the meaning of this term.
3. The term "concerning" means relating to, referring to, describing, evidencing or constituting.
4. The following rules of construction apply to all discovery requests:
  - (a) The terms "all," "any," and "each" shall each be construed as encompassing any and all.
  - (b) The connectives "and" and "or" shall be construed either disjunctively or conjunctively as necessary to bring within the scope of the discovery request all responses that might otherwise be construed to be outside of its scope.
  - (c) The use of the singular form of any word includes the plural and vice versa.
5. "You" or "Your" shall refer to Hinckley Allen & Snyder, LLP and all of its current and former partners, counsel, associates, agents and representatives.
6. For each entity listed below, the entity shall be defined to include any parent corporations, subsidiaries, affiliates, predecessors, successors, officers, directors, employees, agents, general partners, limited partners or partnerships, wherever located:

Eden Arc Capital Management, LLC

4. If any document sought by these document requests once was, but no longer is, within Your possession, custody or control, please identify each such document and its present or last known custodian, and state: (a) the reason why the document is not being produced; and (b) the date of the loss, destruction, discarding, theft or other disposal of the document.

5. This request is ongoing in nature and You should continue to produce responsive documents as they are found or created on an ongoing basis.

#### **DOCUMENTS AND INFORMATION TO BE PRODUCED**

1. All documents concerning the structure of, and structuring of, Eden Arc Capital Management, LLC, Eden Arc Capital Advisers, LLC, Eden Arc Capital Partners, LP, and/or EndCare (“Lathen Entities”) and any investment strategy contemplated or pursued by the Lathen Entities and/or Lathen.

2. All documents concerning the structure of, and structuring of, the joint tenancies at issue in this case, including all communications about any aspect of the joint tenancies, in connection with Your representation of Lathen or the Lathen Entities.

3. All documents concerning any agreements concerning any of the Lathen Entities and/or Lathen, including but not limited to the Participant Agreements, Investment Management Agreement, Discretionary Line Agreement, and Profit Sharing Agreement (collectively, “Lathen Agreements”).

4. All documents concerning the disclosure of Lathen’s or the Lathen Entities’ investment strategies to anyone, including but not limited to, disclosure of the Lathen Agreements.

5. All billing records concerning Your representation of Lathen or the Lathen Entities.

6. All documents concerning any communications between You and Lathen and/or the Lathen Entities related to the advice he sought from You on behalf of himself or the Lathen Entities.

7. All documents concerning any communications between You and any investor or prospective investor in the Lathen Entities.

8. All documents concerning any communications between You and any issuer of any investment instrument containing a Survivor’s Option on behalf of, or relating to, Lathen or the Eden Arc Entities.

**Robert G. Flanders, Jr.**  
[rflanders@haslaw.com](mailto:rflanders@haslaw.com)

July 30, 2012

**AMENDED ENGAGEMENT LETTER**

*Via Electronic Mail and U.S. Mail*

Jay Lathen  
Chief Investment Officer and Managing Member of the General Partner  
Eden Arc Capital Partners  
One Penn Plaza, Suite 3671  
New York, NY 10119

**Re: Legal Representation – Advice and related legal services with respect to Eden Arc Capital Partners' Investment Strategy and Business Model (the "Business Model") (as more particularly described in EndCare Financial Assistance Brochure and the Eden Arc Capital Partners Private Placement Memorandum) (a copy of which is attached hereto) (the "Matter") and the preparation of a memorandum (the "Memorandum") as described below.**

Dear Mr. Lathen:

Thank you for engaging our firm to represent Eden Arc Capital Partners ("EACP") in connection with the above-referenced Matter and Memorandum. This letter will confirm our discussion with you regarding our engagement and describe the basis on which our firm will provide legal services to EACP. This letter agreement also supersedes our prior engagement agreement dated as of February 18, 2010.

**Client.**

EACP is our client in this Matter, with respect to the so-called financial assistance and investment program carried out by EACP and its affiliates, including the EndCare Financial Assistance Program.

**Scope of Engagement.**

We have been engaged to represent EACP solely in connection with the Matter and Memorandum. The Memorandum will summarize the issues raised for EACP's Business Model by the allegations against the defendants in the Grand Jury Indictment against Joseph Caramadre

Jay Lathen, President  
July 30, 2012  
Page 3

**Advice about Possible Outcomes.**

Either at the commencement or during the course of our representation, we may express opinions or beliefs concerning the Matter, Memorandum, or various courses of action and the results that might be anticipated. Any such statement made by any lawyer of our firm is intended to be an expression of opinion only, based on information available to us at the time, and should not be construed by you or EACP as a promise or guarantee.

**Termination of Engagement.**

EACP may at any time terminate our services and representation upon written notice to the firm. Such termination shall not, however, relieve you of the obligation to pay for all services already rendered, including work in progress and remaining incomplete at the time of termination, and to pay for all expenses incurred on your behalf and on behalf of EACP through the date of termination.

We reserve the right to withdraw from our representation as required or permitted by the applicable rules of professional conduct upon written notice to you. In the event that we terminate the engagement, we will take such steps as are reasonably practicable to protect your and EACP's interests in the above Matter, and you and EACP agree to take all steps necessary to free us of any obligation to perform further, including the execution of any documents necessary to perfect our withdrawal. We will be entitled to be paid for all services rendered and costs or expenses incurred on EACP's behalf through the date of withdrawal. If permission for withdrawal is required by a court or arbitration panel, we will promptly request such permission, and EACP agrees not to oppose our request.

Unless previously terminated, our representation of EACP in this Matter will terminate upon our sending you our final statement for services rendered in the Matter.

**File Retention and Destruction.**

Upon the conclusion of our engagement (or earlier termination according to the foregoing provision), we will promptly return to you any original records and documents you provided to us (or otherwise dispose of them if you so direct), reserving the right to retain copies for our files. We will also provide you originals or copies of documents we believe it is important for you to have or that you may reasonably request. In accordance with our firm's document retention and destruction policy, we will retain our file for 10 years, after which we may have the file destroyed, without further notice, in a manner that protects confidentiality. During the 10-year retention period, we will honor reasonable requests from you for copies of papers from our file.

Jay Lathen, President  
July 30, 2012  
Page 5

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**HinckleyAllenSnyder** LLP  
ATTORNEYS AT LAW

**Estimates.**

As we have discussed, the fees and costs relating to this Matter are not predictable. Accordingly, we have made no commitment to you or EACP concerning the maximum fees and costs that will be necessary to resolve or complete this Matter. Any estimate of fees and costs that we may have discussed represents only an estimate of such fees and costs. It is also expressly understood that EACP's obligation to pay the firm's fees and costs is in no way contingent on the ultimate outcome or success of the Matter, the Memorandum, or the subjects of such legal work.

**Payment of Statements.**

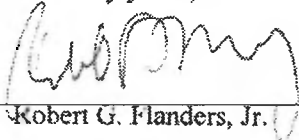
Statements normally will be rendered monthly for work performed and expenses recorded on our books during the previous month. Payment is due promptly upon receipt of our statement. If any statement remains unpaid for more than 30 days, we may suspend performing services for EACP until arrangements satisfactory to us have been made for payment of outstanding statements and the payment of future fees and expenses.

**Retainer.**

We have asked that you provide us with an initial payment of \$10,000.00 for our work on the Memorandum. During our representation of EACP on the Matter, we may ask you or EACP to pay us a retainer and/or to increase it, depending on the volume of legal work we are engaged in or that we anticipate will occur. We will deposit any funds paid to us as a retainer for the Matter in a non-interest-bearing account at our firm and hold the funds there to satisfy any unpaid legal bills or disbursements we have incurred in our representation of EACP. Unless you instruct us otherwise, however, we will hold any retainer funds paid to us in your account and use them only to pay any legal bills, disbursements, and consulting fees that are not paid to us in due course or that remain due and owing at the end of this engagement. We will remit any balance in the retainer account to you at that time.

Please review this letter carefully. If it meets with your approval, sign the enclosed copy of the letter in the space provided below and return it to me so that we may continue our work. Please call me if you have any questions.

Sincerely yours,



Robert G. Flanders, Jr.

RGF:dmf  
Enclosures



# **EXHIBIT C**

Hinckley Allen Snyder's Privilege Log  
 Response to the SEC's Subpoena re: Donald Lathen, Jr. et al.  
 Admin. Proc. File No. 3-17387

12/14/2016

Date	Author	Recipient	Recipients copied	Description	Privilege
07/27/12	Farrell, Margaret	Galvin, Samantha		Internal communication regarding Caramadre Indictment Summary	Attorney Work Product
08/24/12	Farrell, Margaret	Mancini, Jacquelyn		Internal communication regarding Caramadre article	Attorney Work Product
09/25/13				Attorney notes	Attorney Work Product
11/06/13				Attorney notes	Attorney Work Product
11/13/13				Attorney notes	Attorney Work Product
11/18/13				Attorney notes	Attorney Work Product
02/14/14				Attorney notes	Attorney Work Product
				Attorney notes	Attorney Work Product
01/14/14				Attorney notes	Attorney Work Product
				Internal drafts of Participant Agreement ; Discretionary Line Agreement; Power of Attorney; Profit Sharing Agreement	Attorney Work Product
09/27/13	Briggs, Rebecca	Farrell, Margaret; Flanders, Robert		Internal communication regarding legal research	Attorney Work Product
				Attorney notes	Attorney Work Product
08/05/11				Attorney notes	Attorney Work Product
03/18/11				Attorney notes	Attorney Work Product

Hinckley Allen Snyder's Privilege Log  
 Response to the SEC's Subpoena re: Donald Lathen, Jr. et al.  
 Admin. Proc. File No. 3-17387

12/14/2016

Date	Author	Recipient	Recipients copied	Description	Privilege
09/26/13	Briggs, Rebecca	Farrell, Margaret		Internal communications regarding research and draft documents	Attorney Work Product
09/27/13	Briggs, Rebecca	Farrell, Margaret		Internal communications regarding research	Attorney Work Product
09/27/13	Briggs, Rebecca	Flanders, Robert	Farrell, Margaret	Internal communication regarding draft letter to Goldman Sachs	Attorney Work Product
10/31/13	Briggs, Rebecca	Falcoa, Donna		Internal communication regarding engagement and file opening	Attorney Work Product
11/07/13	Briggs, Rebecca	Flanders, Robert		Internal communications regarding FIRREA research	Attorney Work Product
10/01/13	Briggs, Rebecca	Falcoa, Donna		Internal communication regarding New File	Attorney Work Product
09/27/13	Briggs, Rebecca	Flanders, Robert		Internal communication regarding Case Summaries	Attorney Work Product
09/27/13		Flanders, Robert	Farrell, Margaret	Internal communications regarding research	Attorney Work Product
06/17/14	Clark, Justine	Farrell, Margaret		Internal communications regarding Revised Participant Agreement and Loan Document	Attorney Work Product
09/18/12	Farrell, Margaret	Doring, Matthew		Internal communication regarding Lathen Agreement	Attorney Work Product
09/10/12	Farrell, Margaret	Mancini, Jacquelyn		Internal communications regarding Survivor options Memo	Attorney Work Product
09/18/12	Farrell, Margaret	Mancini, Jacquelyn		Internal communication regarding draft memorandum	Attorney Work Product
09/18/12	Farrell, Margaret	Doring, Matthew		Internal communications regarding Eden Arc Private Placement - Line Agreement drafts	Attorney Work Product
08/17/12	Polito, Stacey	Farrell, Margaret		Internal communication regarding research	Attorney Work Product
08/17/12	Polito, Stacey	Farrell, Margaret		Internal communication regarding research	Attorney Work Product

Hinckley Allen Snyder's Privilege Log  
 Response to the SEC's Subpoena re: Donald Lathen, Jr. et al.  
 Admin. Proc. File No. 3-17387

12/14/2016

Date	Author	Recipient	Recipients copied	Description	Privilege
12/01/12	Flanders, Robert	Farrell, Margaret		Internal communication regarding work on Caramadre Memorandum	Attorney Work Product
09/25/13	Flanders, Robert	Farrell, Margaret		Internal communication regarding Goldman Sachs	Attorney Work Product
09/26/13	Flanders, Robert	Falcoa, Donna	Farrell, Margaret	Internal communication regarding conflicts check	Attorney Work Product
09/25/13	Flanders, Robert	Farrell, Margaret		Internal communication regarding investigation	Attorney Work Product
09/17/12	Doring, Matthew	Farrell, Margaret		Internal communication regarding draft agreement	Attorney Work Product
09/18/12	Doring, Matthew	Farrell, Margaret		Internal communication regarding draft agreement	Attorney Work Product
06/23/14	Clark, Justine	Farrell, Margaret		Internal communication regarding Revised Participant Agreement and Loan document	Attorney Work Product
09/27/13	Briggs, Rebecca	Farrell, Margaret		Internal communication regarding research	Attorney Work Product
08/17/12	Farrell, Margaret	Casci, Gail Library <library@haslaw.com>		Internal communication regarding research	Attorney Work Product
08/15/12	Farrell, Margaret	Mancini, Jacquelyn		Internal communication regarding investigation	Attorney Work Product
07/20/12	Farrell, Margaret	Flanders, Robert		Internal communication regarding Lathen Amended Engagement Letter	Attorney Work Product
06/23/14	Farrell, Margaret	Clark, Justine		Internal communication regarding Revised Participant Agreement and Loan Document	Attorney Work Product
10/01/13	Farrell, Margaret	Falcoa, Donna; Briggs, Rebecca	Kalenkiewicz, Linda	Internal communication regarding New File	Attorney Work Product
06/17/14	Farrell, Margaret	Clark, Justine		Internal communication regarding Revised Participant Agreement and Loan Document	Attorney Work Product

# **EXHIBIT D**

> Bill,  
> Thanks for your response. We've tried to respond to your request and believe we have responded sufficiently for us to have a dialogue. We will move forward if you cannot speak Monday. If you can speak Sunday, happy to try to find some time.

> Thank you.

>

> Original Message

> From: Grimm, William R.

> Sent: Friday, December 16, 2016 9:44 PM

> To: Brown, Nancy A

> Cc: Grimm, William R.

> Subject: Re: Lathen

>

>

> In order to respond meaningfully to your issues I will need to know more about what they are than these vague references. My schedule on Monday is full. Please get me your detailed concerns in writing and I will consider them. Have a good weekend

>

> On Dec 16, 2016, at 7:38 PM, Brown, Nancy A <BrownN@SEC.GOV<<mailto:BrownN@SEC.GOV>>> wrote:

>

>

> In addition to the issues I flagged yesterday, my list includes items affected by ms farrell's statements today concerning the scope of the engagement and her lack of precise memory concerning what she and Mr Lathen discussed.

> Given the holidays we will need to schedule the meet and confer for Monday. Please send me some times you're available for a call.

> Thank you.

> From: Grimm, William R.

> Sent: Friday, December 16, 2016 1:34 PM

> To: Brown, Nancy A

> Cc: Grimm, William R.

> Subject: RE: Lathen

>

>

> Send me a list off your issues and we can discuss next week.

>

> From: Brown, Nancy A [<mailto:BrownN@SEC.GOV>]

> Sent: Friday, December 16, 2016 1:28 PM

> To: Grimm, William R.

> Subject: Lathen

>

> When can you participate in a meet and confer about your privilege log? I'm generally available this afternoon at your convenience.

> Thank you.