



UNITED STATES
SECURITIES AND EXCHANGE COMMISSION

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DIVISION OF ENFORCEMENT

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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:

The Division respectfully submits this letter in response to the letter Mr. Protass submitted on December 30, 2016 in connection with Respondents’ *in camera* submission, ordered by the Court on December 23, 2016.

Mr. Protass appears to have submitted for *in camera* review two categories of documents. The “First Category” are the 116 documents reflected on a clawback privilege log submitted by Kevin Galbraith (one of Respondents’ other lawyers) to the Division on December 19, 2016. These documents are the subject of the Division’s motion to compel, dated December 19, 2016.

Mr. Protass also appears to have submitted a “Second Category” of documents – 11 communications between Mr. Galbraith and Mr. Lathen, which Mr. Galbraith is now withholding from the Division in response to the Division’s subpoena. (See Attachment A (Galbraith December 23, 2016 Privilege Log).) Mr. Protass indicates in his letter that these documents have not been produced by Respondents to the Division.

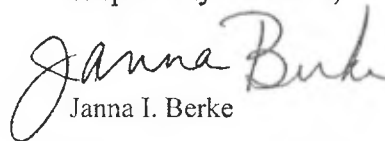
The Division objects to the submission of the Second Category documents to the Court for *in camera* review without an opportunity to brief the issues raised by the separate privilege assertions made by Galbraith and Respondents with respect to them. The Division’s December 19, 2016 Motion to Compel was directed at the First Category of documents unilaterally withheld by Respondents that the Court had ordered waived in its October 18, 2016, November 10, 2016 and December 14, 2016 Orders and which Respondents were then contending they had no obligation to produce. The Division did not address the separate issue of Mr. Galbraith’s withheld documents in the Second Category—an issue which has only recently come to light.

Nor did it address the propriety of Respondents' apparent independent decision to withhold these documents despite Respondents' advice of counsel waiver.¹

Secondly, the Division objects to the Respondents' apparent failure to comply with the Court's directive that they submit to the Court any communications with Mr. Galbraith that have not been produced to the Division. (December 23, 2016 Order.) In his letter transmitting the submission, Mr. Protass makes clear that his search for such documents was limited to Mr. Galbraith's files, not Respondents. (See Protass December 30, 2016 Letter at 1 (noting that his search was "[b]ased on the assumption that Mr. Galbraith has all communications with Mr. Lathen").) But, as the Division's review of Respondents' March 2016 privilege log indicates, there appear to be other communications between Messrs. Lathen and Galbraith in Respondents' files that they still have not produced—despite their waiver of privilege pursuant to the advice of counsel defense they have asserted—and that were not produced by Mr. Galbraith.

Accordingly, the Division asks that the Court (1) defer ruling on the 11 Galbraith emails that are listed on the December 23, 2016 privilege log until the parties have an opportunity to meet-and-confer and brief the privilege issues at hand; and (2) order Respondents to search their clients' files for documents responsive to the Court's December 23, 2016 Clarification Order, and either produce them to the Division or identify the basis for withholding them so that the Division may make whatever applications for relief may be necessary.

Respectfully submitted,


Janna I. Berke

cc: Harlan Protass, Esq.

¹ These documents appear to be on Respondents' March 2016 privilege log, indicating that they are in the possession of the Respondents. Because Mr. Galbraith has indicated that they are responsive to the Division's subpoena and therefore go to the issues raised by the advice of counsel defense, they should have been produced by Respondents as part of their advice of counsel waiver, and are just one more example of the selective waiver being effected by Respondents.

Attachment A

In the Matter of Donald F. Lathen, Jr., et al., Admin. Proc. File No. 3-17397
 Privilege Log Concerning Subpoena Issued to Law Office of Kevin Galbraith dated November 15, 2016

| Date | Author | Recipient | Subject | Privilege(s) |
|-------------|-----------------|------------------|--|---------------------|
| 12/10/14 | Jay Lathen | Kevin Galbraith | U.S. Bank | AC; WP |
| 12/11/14 | Kevin Galbraith | Jay Lathen | U.S. Bank | AC; WP |
| 12/11/14 | Kevin Galbraith | Jay Lathen | U.S. Bank | AC; WP |
| 12/12/14 | Kevin Galbraith | Jay Lathen | U.S. Bank | AC; WP |
| 12/12/14 | Jay Lathen | Kevin Galbraith | U.S. Bank | AC; WP |
| 12/12/14 | Kevin Galbraith | Jay Lathen | U.S. Bank | AC; WP |
| 12/12/14 | Jay Lathen | Kevin Galbraith | U.S. Bank | AC; WP |
| 12/15/14 | Kevin Galbraith | Jay Lathen | [Redacted for privilege] | AC; WP |
| 12/15/14 | Jay Lathen | Kevin Galbraith | [Redacted for privilege] | AC; WP |
| 12/17/14 | Kevin Galbraith | Jay Lathen | Have you heard anything back from Muccia / Apar? | AC; WP |
| 1/21/15 | Jay Lathen | Kevin Galbraith | Eden Arc Capital | AC; WP; JD |