UNITED STATES OF AMERICA
Before the
U.S. SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-17387

In the Matter of

DONALD F. LATHEN, JR.,
EDEN ARC CAPITAL MANAGEMENT, LLC,
EDEN ARC CAPITAL ADVISERS, LLC.

THE EDEN ARC RESPONDENTS' MEMORANDUM OF LAW IN OPPOSITION TO THE DIVISION OF ENFORCEMENT'S MOTION TO COMPEL THIRD PARTY HINCKLEY, ALLEN & SNYDER LLP

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Respondents Donald F. Lathen, Jr., Eden Arc Capital Management, LLC and Eden Arc Capital Advisors, LLC ("Respondents" or "Eden Arc Respondents"), by and through their undersigned counsel, respectfully submit this memorandum of law in opposition to the motion of the Division of Enforcement (the "Division"): (1) to compel third party Hinckley, Allen & and Snyder LLP ("Hinckley Allen") to comply with the Court's November 15, 2016 Subpoena; and (2) to preclude the Eden Arc Respondents from offering testimony or evidence of their reliance on advice sought from or offered by Hinckley Allen.

PRELIMINARY STATEMENT

As the Divisions acknowledges, neither Hinckley Allen nor the Respondents object to the production of the materials that the Division's motion to compel seeks – that is, Hinkley Allen work product that references or memorializes that firm's attorneys' communications with Mr. Lathen. Indeed, Hinckley Allen explicitly informed the Division – just one day before the Division filed its motion to compel – that it would double-check for and produce such materials (to the extent that they exist). The Division's assertions about having been "compelled" to seek relief from the Court are therefore misleading and, in fact, are belied by the e-mails attached to their own motion. Moreover, Hinckley Allen has now produced the work product that they said they would produce and that is the subject of the Division's motion to compel. Accordingly, the Division's motion to compel was plainly unnecessary and is now moot.

To the extent that the Division's motion to compel now implies some entitlement to opinion work product beyond documentation of communications, Respondents disagree. First, the Division cites no applicable legal precedent holding that the invocation of an advice of counsel defense requires the production of all work product. Indeed, the law draws a very precise distinction between work product reflecting communications with a client (which is

sometimes discoverable in the context of an advice of counsel defense) and opinion work product containing an attorney's mental processes and opinions that was not communicated to a client (which typically is not discoverable). Second, the Division concedes that they have not met the burden of establishing a substantial need for such opinion work product. Opinions and mental impressions of attorneys that were not shared with the client unequivocally had no impact on the client's state of mind. As the law makes clear, such work product is entitled to a heightened level of protection, even in context of an advice of counsel defense, has no relevance with respect to scienter, and does not trigger any policy concerns about fairness. The Division is aware of this and has essentially conceded that they are not entitled to further relief.

Likewise, the Court may swiftly reject the Division's argument about precluding evidence and testimony concerning Hinckley Allen's advice. Respondents have already given the Division full access to Hinckley Allen attorneys, all of those attorneys' privileged communications with our clients (i.e., Respondents did not withhold production of any documents based on the attorney-client privilege), and innumerable documents and all drafts of documents communicated to Respondents—all of which plainly reflect Hinckley Allen's advice. We did not object to the Hinckley Allen attorneys speaking freely with the Division in advance of the hearing and, as detailed in the Division's motion to compel, the Division has interviewed those attorneys. In light of the foregoing (as further detailed herein), the Division's motion to compel is now moot, was patently unreasonable when filed and represents yet another misguided attempt at curtailing Respondents' advice of counsel defense.

ARGUMENT

I. Respondents' Assertion of the Advice of Counsel Defense Does Not Compel a Waiver of All Work Product Protections

The Division's unqualified assertion that Respondents' advice of counsel defense triggers a waiver of all work product protections blatantly mischaracterizes the relevant law—including the primary case upon which the Division relies. Moving Mem.[1] at 1 ("By asserting a reliance on advice of counsel, Respondents waived not only the protections of the attorney-client privilege, but also the work product doctrine for all material created by the lawyers on whose advice they allegedly relied."); but see In re Echostar Commc'ns Corp., 448 F.3d 1294, 1300 (Fed. Cir. 2006) ("The attorney-client privilege and the work-product doctrine, though related, are two distinct concepts and waiver of one does not necessarily waive the other)." Indeed, the very case that the Division relies upon to explain the law draws the very distinction that Respondents make here—that is, the difference between work product memorializing attorney-client communications and opinion work product reflecting an attorney's uncommunicated opinions and mental processes. See In re Echostar, 448 F.3d at 1303 ("The second category of work product, which is never communicated to the client, is not discoverable" and "deserves the highest protection from disclosure.") (citing Adlman, 134 F.3d at 1197) ("Counsel's legal opinions and mental impressions that were not communicated . . . are not within the scope of the waiver."). Indeed, the Court explained that "[w]hile [a client] may waive the immunity for work product that embodies an opinion in letters and memorandum communicated to the client, he does not waive the attorney's own analysis and debate over what advice will be given." Id.

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[1] "Moving Mem." refers to the Division of Enforcement'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, dated December 29, 2016.

The Echostar court also clarified that protecting this category of opinion work product does not implicate the Division's hyperbolic concerns about selective waiver and fairness (i.e., the risk of a litigant using it as both a sword and a shield). See id. at 1304. ("There is relatively little danger that a litigant will attempt to use a pure mental impression or legal theory as a sword and a shield . . . thus it provides little if any assistance to the court in determining [a client's scienter], and any relative value is outweighed by the policies supporting the work-product doctrine"). Indeed, there is plainly no "unfair" discretion involved in withholding this highly protected category of work product: Private attorney work product that was not shared with the client unequivocally had no impact on the client's state of mind. The suggestion that maintaining the sanctity of this privilege gives Respondents some sort of advantage defies logic. Indeed, all of the relevant case law consistently recognizes that opinion work product of this nature is highly protected and discoverable only in extreme situations where some substantial need and undue burden is articulated. In stark contrast, here, the Division concedes that they have no substantial need to any further work product (beyond documents reflecting communications, which Hinckley Allen produced, as it promised that it would).

II. The Division Does Not Have a Substantial Need for Unshared Opinion Work Product and Has Not Suggested Otherwise

The Division could not, under these circumstances, demonstrate a substantial need for the work product at issue. A substantial need exists "where the information sought is 'essential' to the party's defense, is 'crucial' to the determination of whether the defendant could be held liable for the acts alleged, or carries great probative value on contested issues." AmTrust N. Am., Inc. v. Safebuilt Ins. Servs., 2016 U.S. Dist. LEXIS 75906 (S.D.N.Y. 2016) (citing Nat'l Congress for Puerto Rican Rights v. City of New York, 194 F.R.D. 105, 110 (S.D.N.Y. 2000)). Uncommunicated attorney work product has no probative value here because documents

and opinions that, by definition, were never communicated to Respondents, could not have influenced their state of mind.

Furthermore, the Division already has access to a tremendous body of evidence reflecting the entirety of Hinckley Allen's actual advice to Respondents, including: (1) direct access, both before and during the hearing, to the Hinckley Allen attorneys who provided advice to the Respondents; (2) 876 files, including approximately 370 e-mails, encompassing every single attorney-client privileged communication exchanged between Hinckley Allen and the Respondents (that is, Respondents did not withhold any document on the basis of attorney-client privilege); (3) all drafts and redlines of every document created by Hinckley Allen for the Respondents that were exchanged with them; (4) final drafts of every document Hinckley Allen created for Respondents; and (5) every document constituting attorney work product referencing Hinckley Allen attorney communications with Respondents, all of which are documents the Respondents had never before seen. Given the foregoing, the Division's motion essentially concedes no need for any remaining opinion work product reflecting the thoughts and mental processes of attorneys that were never communicated to Respondents.

Furthermore, as a separate matter, Respondents reject the Division's assertion that Margaret ("Peggy") Farrell, one of the Hinckley Allen attorneys, has a purportedly "faulty memory" or that the state of her memory somehow supports the Division's need for work product reflecting communications with Respondents. Moving Mem. at 11-13. Respondents are waiving work product containing references to attorney-client communications as part of their advice of counsel defense. The state of Ms. Farrell's memory is consistent with that of any witness's as to isolated conversations that took place years ago. Ms. Farrell recalls the substance of her firm's advice to Respondents and that advice is clearly reflected in e-mails and documents already produced to the Division. Simply put, the Division's assertion that it has a "substantial

need" for any and all work produce based on some immaterial ability to recall the specifics of a few inconsequential telephone calls that took place years ago is illogical and without any basis in the law.

III. Hinckley Allen's Work Product Assertions are Clear and Reflect Respondents' Waiver of Work Product Shared with or Communicated to the Client

The Division argues that certain drafts of agreements and internal communications about those drafts should be produced because Hinckley Allen cannot show that these specific documents meet the definition of work product. We disagree. Although Respondents did not engage Hinckley Allen to represent them in an ongoing litigation, they sought counsel from Hinckley Allen because of a well-documented concern about the prospect of litigation, evident both in the discussions about the scope of work anticipated, as well as the actual work performed. See Protass Aff. Ex. 1 (Letter from Jay Lathen to Robert Flanders about the "scope of work" requested, dated February 18, 2010, requesting counsel to, among other things, (1) "mitigate legal and regulatory risks," (2) "review the current prospective litigation landscape for companies with business plans similar," (3) "identify potential litigation risks attendant to" the business model; and (4) review the "proposed legal structure and recommend changes as appropriate."); Brown Aff. Ex. B (Amended Engagement Letter). The Eden Arc Respondents were not merely seeking business advice— they were seeking litigation-focused counsel as to their business model and investment strategy, in the wake of pushback from issuers and litigation against other distinguishable businesses in the industry. Under these circumstances, there can be no question that these documents, and all of Hinckley Allen's counsel to Respondents, was carried out with an eye towards litigation and is entitled to work product protection. Schaeffler v. United States, 806 F.3d 34, 42 (2d Cir. 2015) (citing United States v. Adlman, 134 F.3d 1194, 1202 (2d Cir. 1998) (classifying materials with an inherent business purpose, yet containing

litigation risk assessments as work product). Indeed, the Second Circuit "explicitly embraces [a] dual-purpose doctrine" – where documents with a dual business and litigation-mitigation purpose are deemed work product. Schaeffler, 806 F.3d at 43 ("Documents prepared in anticipation of litigation are work product, even when they are also intended to assist in business dealings.").

The Division's motion concedes as much and seeks only to compel drafts of certain agreements as non-work product. For the reasons explained above, we disagree. In any event, Respondents already have waived work product privilege as to the vast majority of the drafts of the documents at issue, and most importantly, any and all drafts that Hinckley Allen shared with them as well as communications concerning those drafts. As we understand it, any drafts on Hinckley Allen's privilege log merely corresponded to internal drafts that were not shared with Respondents. This does not constitute some "selective" waiver of documents, by any means, and we do not have any problem with waiving work product privilege with respect to these drafts if the Court is concerned about them.

IV. The Division's Motion Is Patently Unreasonable

For all of the foregoing reasons, the Court should summarily reject the Division's motions. Hinckley Allen has done nothing but cooperate with the Division in making their productions and complying with the Division's requests. Under the facts, as explained above, the Division's motion to compel was patently unnecessary and unreasonable, and the notion that our advice of counsel defense should be limited under the circumstances is utterly baseless.

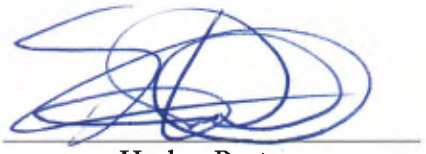
CONCLUSION

Accordingly and for all of the foregoing reasons, we respectfully submit that this Court should: (1) deny the Division's motion to compel third party Hinckley Allen & Snyder LLP to comply with the Court's November 15, 2016 Subpoena; (2) deny the Division's motion to preclude the Eden Arc Respondents from offering testimony or evidence of their reliance on any advice sought from or offered by Hinckley Allen & Snyder LLP; and (3) grant the Eden Arc Respondents such other and further relief as this Court deems just and appropriate.

Dated: New York, NY
January 5, 2017

Respectfully submitted,

CLAYMAN & ROSENBERG LLP

By: 

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that on January 5, 2017 I caused a true and correct copy of the attached THE EDEN ARC RESPONDENTS OPPOSITION TO THE DIVISION OF ENFORCEMENT'S MOTION TO PRECLUDE ADVICE OF COUNSEL DEFENSE AND ISSUE SUBPOENAS to be served upon the parties listed below via UPS Overnight Mail:

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