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.

DIVISION OF ENFORCEMENT'S MOTION FOR A FINDING OF PRIVILEGE WAIVER AND MEMORANDUM OF LAW IN SUPPORT

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October 25, 2016

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The Division of Enforcement ("Division") submits this memorandum of law in support of its motion that the Court find that the Respondents have waived privilege as to the thousands of documents they produced to the Division during the investigation that led to this matter.

PRELIMINARY STATEMENT

It is blackletter law that the inadvertent production of privileged documents causes the waiver of any privileges where the producing party either fails (1) to take "reasonable steps to prevent disclosure," or (2) "to rectify the error" once it is on notice that such documents have been produced. Fed. R. Evid. 502(b). Here, Respondents have waived their privilege by seeming to take no reasonable steps in either the production or clawback of potentially thousands of documents to and from attorneys that they produced to the Division in the investigation. Respondents' care in the production was clearly less than reasonable given the sheer volume of the documents they produced that appear to be correspondence with attorneys. And their response to notice of the production error reflects an unreasonable attempt to assert a blanket privilege over thousands of documents without actually conducting a legitimate privilege review and identifying to the Division exactly which documents they claim are privileged and inadvertently produced. The Court should, therefore, find that Respondents have waived privileged over these documents.

BACKGROUND

I. Respondents Produce Documents to the Division

Between 2015 and 2016, Respondents produced over 150,000 documents in response to investigative subpoenas issued by the Division staff in an investigation titled In the Matter of Eden Arc Capital Management, LLC (NY-9197) (the "Investigation"). (See Janghorbani Decl., ¶ 2.)[1]

[1] References herein to "Janghorbani Decl." are to the Declaration of Alexander Janghorbani, dated October 25, 2016, filed in support of this motion and memorandum of law.

II. Respondents Produce a Privilege Log

On March 8, 2016, Respondents' then-counsel produced a 52-page privilege log, containing 3,033 entries dating from April 2009 through July 2015. (Id., ¶ 3, Exs. A-B.) The privilege log did not include any Bates numbers and, beyond the "Email Subject or File Name," did not include any description of the withheld documents. (Id., Ex. B.) On the same date, Respondents also produced an "Attorney List," showing over 40 attorneys (or employees working at those attorneys' direction), from whom Respondents seemingly received advice concerning the subject matter of the Investigation. (Id., ¶ 4, Ex. C.)

III. The Division Discovers That Respondents Produced Potentially Privileged Documents

On August 15, 2016, the Commission instituted these proceedings. (See Electronic Docket for Admin. Proc. File No. 3-17387, Rel. No. 33-10120.)[2] On September 13, 2016, Division staff notified Respondents that it had identified

> a draft Wells submission we came across in our Recommind database that was produced by Respondents in this matter. We return it to you without waiver of our rights to assert that any privilege or protection that might have been asserted over the document has been waived. If we identify additional potentially privileged or protected material, we will notify you, but we have not undertaken to search the database for materials similar to that attached.

(Janghorbani Decl., Ex. D.) Respondents did not respond to the Division's e-mail. (See id., Ex. E.)

On September 18, 2016, the Division again wrote to Respondents to notify them of additional potentially privileged documents it had discovered and asked that Respondents notify the Division immediately as to whether Respondents intended to waive privilege as to the

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2 Available at https://www.sec.gov/litigation/apdocuments/ap-3-17387.xml

produced documents. (Id., Ex. E.) The Division also wrote that "[a]s we notified you earlier, we are returning these documents as a courtesy. By doing so, we do not assume any obligation to undertake a privilege review on your behalf." (Id.) On September 18, 2016, five days after they were first notified of a potential problem, Respondents finally acknowledged the issue:

> We have been and are still investigating the production of these privileged documents. Thus, please do not interpret the fact that we have not yet gotten back to you as anything other than the foregoing. Put differently, the inadvertent production of any privileged emails or any other document protected from disclosure by the attorney-client privilege, the attorney work product doctrine or any other applicable privilege or protection is not and should not be considered or interpreted as a waiver of any such privilege or protection.

(Id., Ex. F at 1.) Respondents also informed the Division that they would "endeavor to conclude the matter of the inadvertent production of privileged documents by the close of business on September 19 . . . ." (Id.) Respondents again replied to the Division on September 20, 2016. (Id., Ex. G.) In an apparent acknowledgement that they had produced purportedly privileged documents, Respondents wrote that "[w]e believe that the overwhelming majority of those privileged documents were inadvertently produced to the SEC after January 1, 2016." (Id.)

However, Respondents did not identify any additional inadvertently produced documents or provide the Division with a reliable method for segregating any such documents. (Id.) Instead, Respondents requested that the Division search Respondents' production to the Division for the full extent of the privileged documents they were now claiming had been inadvertently produced, directing the Division to search for any e-mails containing the suffixes "kevingalbraithlaw.com," "clayro.com," and "brunelaw.com." (Id. at 1-2.) Respondents further instructed the Division to "return the documents identified through those searches to us." (Id. at 2.) Finally, Respondents requested that "should the SEC determine that it has located additional documents that appear to be similarly privileged, we ask that you again refrain from reviewing such documents and return them

to us." (Id.) Respondents did not say that they would conduct their own privilege review of the communications and return to the Division any documents that were not actually privileged and/or inadvertently produced. (Id.)

On September 21, 2016, the Division notified Respondents that it could not comply with their request, noting that "it would be inappropriate" for the Division to "undertake a search on your behalf in an attempt to cull potentially privileged material[] from your own production to us." (Id., Ex. H at 1.) While the Division was "willing . . . to sequester the produced documents" identified as privileged, it asked Respondents to make that determination itself, and to provide the Division "with a list of the produced documents, by Bates number, over which you assert privilege and claim inadvertent production." (Id.)

The Division explained why undertaking the searches Respondents requested would be inconsistent with the assertion of privilege and, in any event, ineffective. "[I]f we undertook the review that you ask, you would necessarily authorize us to review the documents over which you claim to be re-asserting the privilege. That you would have us review that material is inconsistent with your assertion of privilege." (Id.) Moreover, "the search parameters that [Respondents] propose appear on their face to be ineffective at culling out only privileged, and inadvertently-produced, materials. For example, not every document copied to Kevin Galbraith is even arguably privileged, and as the attached illustrates, was not inadvertently produced." (Id.) By way of example, the Division attached to its correspondence an e-mail chain between Mr. Galbraith and Eden Arc's auditors, which would—under Respondents' proposed search terms—have been segregated, but which is facially in no way privileged. (See id. (attachment).)

In addition, the Division reminded Respondents that, should they wish to maintain the privilege, they were obligated to ensure that any inadvertently produced documents be identified quickly and that they take steps to ensure that they were returned in a timely fashion:

> [T]o reiterate what we've said before, we reserve all rights to argue that you have waived any ability to claim inadvertence given the breadth of the possibly privileged documents produced, and both the time that's elapsed since you first produced them and since you were notified of their production to us. For example, we re-produced these documents back to you in August, and provided you with direct notice on September 13, and then again this weekend. Still, it was not until yesterday morning that you even attempted to claw them back (and even then without identifying them with any specificity). For that reason, we have agreed to sequester the produced documents over which you specifically assert a privilege, but we want to make clear that, by doing so, we are not conceding the validity of your privilege assertions.

(Id. at 1.)

On September 22, 2016, Respondents wrote to the Division:

> [W]e will shortly provide the SEC with a log of all documents that the Eden Arc Respondents inadvertently produced, which documents are protected from disclosure by the attorney-client privilege, the attorney work produce doctrine and/or any other applicable privilege or protection.

(Id., Ex. I at 1.) To date, Respondents have not provided the Division with any such log. (Id., ¶ 17.)

IV. Respondents' Proposed Search Terms Are Both Under- and Over-Inclusive

Respondents' proposed search terms would both (1) cull out of their productions documents that are plainly not privileged; and (2) risk leaving in the Database documents over which Respondents may wish to claim privilege. For example, as to the former:

- Respondents produced non-privileged communications Mr. Galbraith had with third parties, including Respondents' auditors and counsel to U.S. Bank, which would be inappropriately segregated under Respondents' proposed search criteria. (See, e.g., Exs. J-K (examples of communications between Galbraith and third parties));

- Respondents produced non-privileged communications Harlan Protass had with third parties, such as BB&T Bank, and the Division, which would also be segregated using the proposed criteria. (See, e.g., Exs. L-M[3] (examples of communications between Protass and third parties)); and

- Searches for the domain name "brunelaw.com," would not return documents containing the domain name "bruneandrichard.com" (that firm's predecessor). Respondents produced to the Division 51 documents containing the term "bruneandrichard.com". (See id., ¶ 15.) In addition, like those from Galbraith and Protass, Ms. Brune had obviously non-privileged communications with many members of the Division staff.

In addition, applying Respondents' search criteria may leave a host of other documents within the Division's database, over which Respondents may later claim privilege. Respondents have claimed (and for the vast majority refused to waive) privilege over communications with the 40+ attorneys on their "Attorney List." (See id., ¶ 4, Ex. C.) The Division searched its Recommind database for documents produced by Respondents that contain the last name of each person on that list.[4] This search identified 49,529 documents. (See id., ¶ 16, Ex. N.) Of those, approximately 8,485 documents include the last names of attorneys set out on Respondents' "Attorney List," who do not work for any of Brune Law, P.C., Clayman & Rosenberg LLP, or The Law Office of Kevin Galbraith LLC and are, therefore, not associated with the domain names that Respondents proposed the Division search for. (Id., Ex. N.) In addition, Respondents' privilege log shows a number of non-e-mail documents. (See, e.g., id., Ex. B, Entry Nos. 2924-3033.)

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[3] While none of Exhibits J-L appear on Respondent's privilege log (Janghorbani Decl., Ex. B), Ex. M inappropriately does appear there. (Id., Entry No. 2437.)

[4] These search parameters are by no means a perfect filter to locate privileged documents because, inter alia, (1) they identify only stand-alone uses of the attorney's last name and, thus, do not identify instances where that name may be part of a larger word such as an e-mail address; (2) there may be other, unrelated, uses of that name in the documents (for example, where a third party has the same last name); (3) more than one search result may appear in a given document; and (4) such a search does nothing to determine if the identified documents are, in fact, privileged.

These documents—if they are contained in the Database—would not be identified by the domain-name searches that Respondents propose.

V. Many of Respondents' Communications with Attorneys Appear to Have Been Produced Advertently

Respondents' privilege log contains 3,033 entries. However, the searches run by the Division for the last name of each attorney on the "Attorney List" reveal nearly 50,000 documents. (Compare id. ¶ 16 with id., Ex. B.) Thus, Respondents appear not to have included on their 52-page privilege log the majority of documents (over 46,000) identified by searching the last names of the attorneys on the "Attorney List." The Division has no way to tell, however, whether Respondents chose to produce these documents on purpose.

ARGUMENT

Privilege assertions are narrowly construed because withholding documents under a claim of privilege "stands in derogation of the public's 'right to every man's evidence,' . . . and as 'an obstacle to the investigation of the truth.'" In re Horowitz, 482 F.2d 72, 81 (2d Cir. 1973) (internal citations omitted). The burden to establish the privilege lies with the party asserting it. Id. at 82. Equally, the burden of establishing that any privilege that exists was not waived lies with the party making such an assertion. Williams v. District of Columbia, 806 F. Supp. 2d 44, 51 (D.D.C. 2011). Respondents' inattention to protecting the privileges they assert constitutes a waiver of those privileges. By turning over literally thousands of privileged communications, Respondents have left no doubt about the lack of care they applied in producing documents. And by ignoring the Division's notice that privileged documents might be at risk, Respondents have underscored their lack of concern. Where, as here, a privilege is not protected, it will be waived. See, e.g., Williams, 806 F. Supp. 2d at 51 (the holder of the privilege "bears the burden of establishing a

factual basis . . . to conclude that it took reasonable steps to prevent disclosure" and "promptly took reasonable steps to rectify the error") (citations and quotation marks omitted).

A party waives privilege over documents that it produced, even inadvertently, where that party failed to take "reasonable steps to prevent disclosure" or "to rectify the error." Fed. R. Evid. 502(b); see also Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co., 104 F.R.D. 103, 105 (S.D.N.Y. 1985) ("[The] protection of the appropriate privilege . . . must be judged against the care or negligence with which the privilege is guarded."). The non-exclusive factors that courts consider in determining if an inadvertent waiver has occurred include (1) the reasonableness of precautions taken; (2) the time taken to rectify the error; (3) the scope of discovery; (4) the extent of disclosure; and (5) the overriding issue of fairness. Fed. R. Evid. 502, advisory committee notes (revised Nov. 28, 2007) citing, inter alia, Lois Sportswear, 104 F.R.D. at 105. "The reasonableness of precautions taken to avoid inadvertent disclosures is, of course, a function of the circumstances presented. Perhaps the most important circumstance is the number of documents involved. As the number of documents grows, so too must the level of effort increase to avoid an inadvertent disclosure. Failure to meet this level of effort invites the inference of waiver." FDIC v. Marine Midland Realty Credit Corp., 138 F.R.D. 479, 482-83 (E.D. Va. 1991); see also Sidney I. v. Focused Retail Property I, LLC, 274 F.R.D. 212, 217 (N.D. Ill. 2011) (finding that "the number of privileged documents disclosed suggests waiver, especially since they were obviously privileged").

As an initial matter, because Respondents have been unwilling to provide the Division with any information about what documents were inadvertently produced, it is difficult to determine with certainty (1) what, if any, steps they took to guard against inadvertent production; or (2) the scope of their inadvertent production. However, the sheer volume of documents that reflect at least one of their approximately 40+ attorneys—more than 50,000 documents—indicates that

Respondents must have done very little to review their production for privileged documents. Thus, this is not a situation where a single document escaped the careful review of attorneys who reviewed a production page by page. Cf. Quinby v. Westlb AG, 04 Civ. 7406 (WHP), 2007 WL 2068349, at *2 (S.D.N.Y. July 18, 2007) (that party produced only handful of privileged documents among a production of 650,000 documents, coupled with undisputed declaration of defendant's counsel to the care taken in production, supported finding of no waiver).

Even if carelessness is not demonstrated by Respondents' production of thousands of privileged documents, their cavalier attitude since they learned of the problem constitutes a waiver. Under Fed. R. Evid. 502(b), once the producing party is alerted to the issue he must "follow up on any obvious indications that a protected communication or information has been produced inadvertently." Id. Such efforts to rectify any inadvertent production (including the speed of such efforts) is "one of the most important factors in the waiver inquiry . . . ." United States v. Finazzo, 10 Cr. 457 (RRM) (RML), 2013 WL 619572, at *14 (E.D.N.Y. Feb. 19, 2013). Indeed, even ignoring "red flags" that merely suggest that it "was likely" that inadvertently produced documents "contain[ed] privileged information," is sufficient to waive the privilege. Jacob v. Duane Reade, Inc., 11 Civ. 0160 (JMO) (THK), 2012 WL 651536, at *6 (S.D.N.Y. Feb. 28, 2012).

Beyond asking the Division to search for and return thousands of documents representing communications with counsel—using search terms that are demonstrably insufficient—Respondents have taken no steps to identify which of those potentially privileged documents are indeed privileged and subject to return as having been inadvertently produced. Indeed, the number of documents containing the last names of Respondents' attorneys dwarfs the entries on their privilege log. Thus, Respondents' conduct since the Division informed them of the potential for inadvertent production demonstrates that they have made no serious efforts to "rectify the error,"

promptly or otherwise. Fed. R. Evid. 502(b); see also Clark v. J.P. Morgan Chase & Co., 08 Civ. 02400 (CM) (DF), 2009 WL 970940, at *6 (S.D.N.Y. Apr. 10, 2009) ("In this case, Defendant's assertion of privilege was far from immediate, as Defendant made no reference to the document's purportedly privileged status for over two months. This is a sufficiently long period of time to warrant a finding of waiver").

The Division produced these documents back to Respondents as part of its investigative file in August 2016, giving them their first notice of the potential production issue. Then, from September 13, 2016, the Division expressly and repeatedly notified Respondents of the existence of potentially privileged documents and asked for a list of Bates numbers of other documents, if any exist. Respondents have done nothing to rectify the issue. Courts have found that the passage of one or two months demonstrates sufficient lassitude to support a waiver. See, e.g., Clark, 2009 WL 970940, at *6 (passage of two months sufficient for waiver); LaSalle Bank Nat'l Ass'n v. Merrill Lynch Mortgage Lending, Inc., 04 Civ. 5452 (PKL), 2007 WL 2324292, at *3 (S.D.N.Y. Aug. 13, 2007) (privilege waived where counsel objected to use of privilege e-mail at deposition, but did not seek its return for a month); Liz Claiborne, Inc. v. Mademoiselle Knitwear, Inc., 96 Civ.2064 (RWS), 1996 WL 668862, at *5 (S.D.N.Y. Nov. 19, 1996) (privilege waived where document return requested one month after disclosure discovered).

Nor was the response Respondents did make appropriate or sufficient to demonstrate their intention to preserve the privilege. As discussed above, simply pulling documents containing attorney's names would cull non-privileged documents, while leaving potentially privileged documents in the database, requiring the Division to be constantly reviewing Respondents' production with an eye to maintaining Respondents' privilege. Having apparently produced documents without careful review (let alone even a pre-production search for attorneys' names),

Respondents are attempting to assert privilege over documents they refuse to review. But the privilege belongs to Respondents', not the Division, and their failure to identify or protect it has consequences: "waiver occurs where the proponent of the privilege takes actions wholly inconsistent with any desire to maintain confidentiality in the communication . . . ." Finazzo, 2013 WL 619572, at *13.

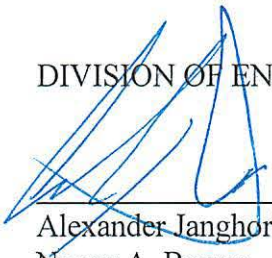
Moreover, fairness considerations support a waiver here. First, for the same reasons discussed above, Respondents' refusal to provide a list of inadvertently privileged documents for the past five weeks prejudices the Division's ability to freely review Respondents' document productions, by (1) causing the Division's attorneys to have to undertake Respondents' privilege review on their behalf, and (2) creating uncertainty as to which documents the Division is, in fact, allowed to view. Moreover, the apparent size of the inadvertent production makes it difficult for the Division to review its files with confidence that it is not going to review materials over which Respondents may later assert a privilege. Such a shifting of the privilege review and protection process is entirely inappropriate. Second, Respondents produced these documents in response to the Commission's investigative subpoenas and they are, thus, responsive and relevant to precisely the issues that led to this litigation. And, where, as here, respondents put their attorneys' advice at issue by asserting advice of counsel, the law holds that basic fairness requires production of such otherwise privileged materials. See, e.g., In re Kidder Peabody Secs. Litig., 168 F.R.D. 459, 469, 470 (S.D.N.Y. 1996) (defining the "scope" of the waiver "by the so-called fairness doctrine" and finding that the "quintessential example" of such waiver "is the defendant who asserts an advice-of-counsel defense") (citations and quotation marks omitted).

CONCLUSION

The Division respectfully requests that the Court find that the Respondents have waived privilege as to the documents it has produced to date.

Dated: October 25, 2016
New York, New York

DIVISION OF ENFORCEMENT



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Certificate of Service

I hereby certify that I served (1) the Division of Enforcement's Motion for a Finding of Privilege Waiver and Memorandum of Law in Support, dated October 25, 2016; and (2) the Declaration of Alexander Janghorbani, dated October 25, 2016, and all exhibits attached thereto on this 25th day of October, 2016, on the below parties by the means indicated:

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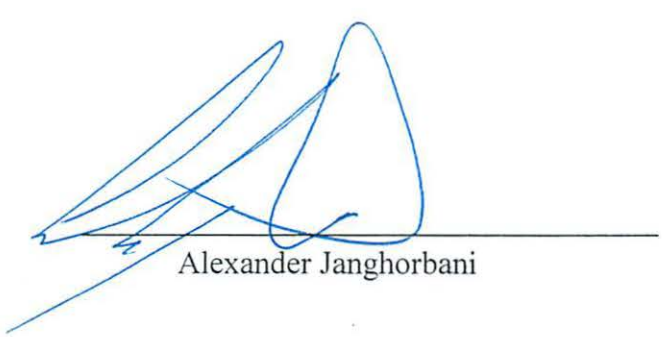

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