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 REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF ITS MOTION FOR A FINDING OF PRIVILEGE WAIVER

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The Division of Enforcement ("Division") submits this memorandum of law in further support of its motion for a finding of a privilege waiver, dated October 25, 2016 ("Div. Br.").[1]

PRELIMINARY STATEMENT

Respondents' opposition papers demonstrate that they conducted virtually no privilege review before making their productions to the Division, just as their conduct since they became aware of their inadvertent production has demonstrated their lassitude in correcting their errors.

First, Respondents' current counsel acknowledges that he and his firm undertook no privilege review for any of the document productions they made, and instead either relied on their non-laywer clients to undertake such review or simply assumed that there would be no privileged documents in the production. (See Protass Aff., ¶¶ 20, 24, 25, 36 (" we believed that the . . . production . . . could not, or, at least, should not, have included any privileged emails"; "I understood at the time that Mr. Robinson was to have extracted all . . . privileged e-mails . . . ."); ¶ 38 (affirming that Mr. Lathen segregated out purportedly privileged documents, but that counsel did not then review the purportedly non-privileged documents); ¶ 42 ("I did not review – for purposes of privilege – the documents I received . . . from Mr. Lathen before they were produced to the SEC").) Tasking untrained non-lawyers with a privilege review without any lawyer supervision or failing to review multiple document productions—— virtually defines failing to take "reasonable steps to prevent disclosure." Fed. R. Evid. 502(b). Respondents have, therefore, waived on that basis alone.

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[1] Pending the Court's decision on this motion, the Division has segregated the documents enumerated in Respondents' Exhibit 15 to Affirmation of Harlan Protass, executed Nov. 1, 2016 ("Protass Aff.") (table of inadvertently produced documents). (See Declaration of Judith Weinstock, dated Nov. 4, 2016 ("Weinstock Decl."), ¶ 3.)

In addition, however, by Respondents' own admission, Respondents did almost as little to protect their privilege after they were notified of their production errors. The Division notified Respondents that they had produced potentially privileged documents on multiple occasions, starting in mid-September 2016. (Protass Aff., ¶¶ 47, 48.) Nonetheless, Respondents waited until after the Division filed the present motion—six weeks after the Division notified them of the problems in their production—to begin taking steps "to rectify the error." Fed. R. Evid. 502(b); see Protass Aff. ¶ 56 ("I only reached the final conclusions set forth herein between October 27, 2016 and November 1, 2016.").

Nor can Respondents point to one or two documents that slipped through the cracks. Respondents admit that they produced approximately 1,500 privileged documents. (Protass Aff., Ex. 15 (table of inadvertently produced documents).) Thus, Respondents admit that they produced nearly half of the documents on their privilege log. (Id., Ex. 6 (privilege log with 3,033 entries).)

Now, faced with their patently unreasonable efforts, Respondents attempt to shift blame to the Division for not undertaking a privilege review on their behalf. This is nonsensical. And, as Respondents are forced to admit, it was the Division, not Respondents, that identified the issue and repeatedly warned Respondents of its discovery. Respondents' arguments now should be viewed for what they are: an after-the-fact attempt to distract from their total failure to take reasonable steps to protect their privilege.

ARGUMENT

I. Respondents' Acknowledge That They Undertook No Privilege Review Before Producing Documents

As an initial matter, Respondents' Reply Brief operates as an admission that Respondents failed to conduct any meaningful privilege review on multiple document productions to the Division. Thus, Respondents' current counsel admits that: (1) there were no privilege reviews

conducted by anyone for the first document production (Protass Aff., ¶ 20); (2) he delegated the privilege review responsibility for the second and fourth productions to his non-lawyer clients (Protass Aff., ¶ 25 ("I understood at the time that Mr. Robinson was to have extracted all . . . privileged e-mails . . . ."); ¶ 36 (affirming that Mr. Lathen segregated out purportedly privileged documents); and (3) counsel "did not review – for purposes of privilege – the documents [he] received . . . from Mr. Lathen before they were produced to the SEC." (Id., ¶ 42.) Consequently, Respondents' actions were "wholly inconsistent with any desire to maintain confidentiality in the communication." United States v. Finazzo, 2013 WL 619572 at *13 (E.D.N.Y. Feb. 19, 2013).

No privilege review whatsoever was conducted for Respondents' first document production. For Respondents' second and fourth document productions, those privilege reviews were delegated to non-lawyer clients. Delegating a privilege review to a non-lawyer is not reasonable. See Pick v. City of Remsen, No. 13 Civ. 4041, 2014 U.S. Dist. LEXIS 57685 at *10 (N.D. Iowa 2014) ("had he delegated this task to a non-lawyer, with no review by an attorney, I would have no trouble finding that the process was unreasonable."). Even where courts have found non-attorney review reasonable, they did so only where such review was accompanied by both attorney supervision and training, circumstances that were wholly absent here. See, e.g., EEOC v. Office Concepts, Inc., No. 14 Civ. 0290, 2015 WL 9308268, at *5 (N.D. Ind. Dec. 22, 2015) ("courts have noted that document review by non-lawyers is only reasonable where they 'have the legal training necessary to implement and oversee reasonable review procedures,' (),... and where they 'were given specific direction and supervision by a lawyer who is lead counsel in the case.'" (quotations omitted). Here, Respondents offer no indication that either Lathen or Robinson—tasked by Mr. Protass to review and collect responsive emails—received any instruction from any attorney. Nor do they claim that Mr. Protass exercised any supervision over

Lathen or Robinson's work. To the contrary, as Mr. Protass readily admits, for the three productions he made, he simply turned over to the Division whatever his non-lawyer clients provided without any review at all. (Protass Aff., ¶¶ 14, 24, 42.)

Courts have no trouble finding a waiver where counsel takes efforts far greater than those demonstrated here. See, e.g., Mt. Hawley Ins. Co v. Felman Prod. Inc., 271 F.R.D. 125, 135-36 (S.D. W.Va. 2010) (finding that even though defendant and counsel selected, and tested search terms, as well as set aside potentially privileged materials for document-by-document review, their precautions were not reasonable); Rhoads Indus. v. Bldg. Materials Corp. of Am., 254 F.R.D. 216, 224-26 (E.D. Pa 2008) (even though counsel spent 40 hours reviewing documents for privilege, totality of efforts, including searching only by email address lines not reasonable); Victor Stanley, Inc. v. Creative Pipe, Inc., 250 F.R.D. 251, 262 (D. Md. 2008) (finding keyword search for privileged material not reasonable). Indeed, it is difficult to imagine a situation where less was done than here, where counsel did not review any of the documents produced in their first, second, and part of Respondent's fourth productions to the Division. (Protass Aff., ¶ ¶ 20, 25-26, 37-43.)[2]

[2] Underscoring Respondents' lack of concern for protecting their privilege is counsel's lack of explanation for such a lackadaisical review. Whatever the reason, it could not have been time pressures, which is a factor in weighing reasonableness of precautions taken. MSP Real Estate, Inc. v. City of New Berlin, No. 11 Civ. 281, 608, 2011 WL 3047687, at *6 (E.D. Wis. July 22, 2011). As Mr. Protass notes, three months elapsed between Respondents' receipt of the Commission's subpoena and their first production. (Protass Aff., ¶ 16.) And another three months went by before they made their next production, still apparently in response to the February Subpoena. (Id. ¶ 21.) The Brune production appears to have been made in a shorter time frame (id. ¶ 27), and it, at least, involved some effort at attorney review, although the universe of communications was apparently much smaller. (Id. ¶ 28 (emails from only late August through December 2015).) While current counsel's third production at the end of April also appears to have occurred in a shorter time frame, it, too, like the ones Mr. Protass oversaw before, involved absolutely no effort by an attorney to review any aspect of the production.

In addition, Respondents have now identified approximately 1,500 ostensibly privileged documents on a new privilege log, a number which shows that any privilege review they did do was inherently unreasonable. "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." FDIC v. Marine Midland Realty Credit Corp., 138 F.R.D. 479, 482-83 (E.D. Va. 1991); see also Baranski v. United States, No. 11 Civ. 0123, 2015 WL 3505517 at *6 (E.D. Mo. June 3, 2015) (finding 58 documents "should not have gone unnoticed if the government had conducted even a cursory review of the disc on which they were produced."); 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"); Mt. Hawley, 271 F.R.D. 125 at 136 ("The number of inadvertent disclosures is large [377 documents], . . . a number which underscores the lack of care taken in the review process."); compare Quinby v. Westlb AG, 04 Civ. 7406 (WHP), 2007 WL 2068349, at *2 (S.D.N.Y. July 18, 2007) (no waiver where party produced only a handful of privileged documents among a 650,000 documents production). Here, of course, Respondents have finally tallied the number of privileged documents they produced—over four different productions—at approximately 1,500 documents.

In addition, Respondents' reliance on SEC v. Blackburn, No. 15 Civ. 2451, 2015 WL 10911438 (E.D. La. Oct. 26, 2015) (Respondent's Opposition Brief, dated November 1, 2016 ("Resp. Br.") at 1) is misplaced. Unlike here, in that case the Commission made a single production error, and one that was caused entirely by a ministerial mistake by a paralegal in readying the documents for production. Id. at *2. And unlike the circumstances here, the trial attorney in charge of the litigation had undertaken a careful document by document privilege

review prior to production. Id. at *2, 3. Thus, Blackburn can provide no support for excusing Respondents' multiple careless production errors. Indeed, the only error in the first two and final productions here appears to be Respondents' failure to use any care at all in the review and production of documents to the Division. That is simply not the kind of production error recognized as inadvertent by Fed. R. Civ. P. 508 or the caselaw.

II. Respondents' Efforts to Correct Their Error Were Wholly Inadequate

Given Respondents' wholesale failure to conduct any real privilege review in the first instance, when notified by the Division in September 2016 of the issue, Respondents' obligation to rectify the error should have increased. See, e.g., Finazzo, 2013 WL 619572 at *14 (noting that efforts to rectify an inadvertent production, including the speed of such efforts, is "one of the most important factors in the waiver inquiry..."). Moreover, in response to the Division's motion, Respondents needed to provide the Court with evidence, via declaration or other method, of particularized steps they took to rectify their error and the circumstances excusing any delay to act. See, e.g., United States v. Sensient Colors, Inc., 07 Civ. 1275 (JHR) (JS), 2009 WL 2905474, at *3 (D. N.J. Sept. 9, 2009) (disclosing party has burden to prove the elements of 502(b) have been met). Here, however, Respondents have merely stated: "I only reached the final conclusions set forth herein between October 27, 2016 and November 1, 2016. I would have corrected the foregoing inadvertent productions of privileged e-mails earlier if I had earlier discovered the source and means by which those privileged e-mails were produced to the Division." (Protass Aff., ¶ 56.) Tellingly, Respondents do not describe any steps they took prior to October 27th—six weeks after the Division notified them of a potential issue—to rectify the error. While Rule 502 does not require a party to re-review its production for inadvertently disclosed material, it does require immediate action by the Respondents when they learn of their errors. See Altronic Int'l, CmbH v. SAI Semispecialists of Am., Inc., 232 F.R.D. 160, 165-66 (E.D.N.Y. 2005) (holding that six day

delay weighed in favor of finding waiver); SEC v. Cassano, 189 F.R.D. 83, 85-86 (S.D.N.Y. 1999) (twelve day delay considered too long). [3]

Rather than defend their gross inaction, Respondents raise a red herring—they blame the Division for their failure to correct their errors. (Resp. Br. at 12-13.) This is of course nonsensical, given that the Division repeatedly notified Respondents of their production issues. Moreover, Respondents' claim that they were not aware of the breadth of the issue until the Division filed the current motion is contradicted by Respondents' letter on September 20, 2016, in which they identify three categories of domain names that they asked to be searched for and segregated. (See Janghorbani Oct. 25 Decl., Ex. G (Respondents' September 20, 2016 letter).)[4] But Respondents fail to explain why they themselves did not conduct their own search to determine the extent of the errors. This was yet another missed opportunity to conduct a privilege review. A third missed opportunity to rectify their errors occurred on September 22, 2016, when Respondents stated they would "shortly provide the SEC with a log of all documents that the Eden Arc Respondents inadvertently produced," but never did. (Id., Ex. I, (Respondents' Sept. 22 letter).) It is only now, after the Division filed its motion, that Respondents finally undertook the privilege review that was required (i) in May 2015, when the first set of privileged documents was produced; or (2) again in late August/early September 2015, when the second set of privileged documents was produced; or

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[3] In contrast, the SEC trial lawyer who noticed the error in her own production in SEC v. Blackburn, a case inexplicably relied on by Respondents, notified opposing counsel on the same day she discovered the error, and requested the documents' return. 2015 WL 10911438, at *2, 4. Within days thereafter, the SEC produced a new disc containing the full production without the privileged material. Id.

[4] It bears noting that such a search by the Division would not have resulted in the actual privilege review required.

(3) in February 2016 when the third set of privileged documents was produced; or (4) even in May 2016 when the fourth set of privileged documents was produced.

Respondents' claim that the Division should have discovered this sooner, because the files were "segregated and labelled as 'privileged'" (Resp. Br. at 2) is completely baffling (and does nothing to excuse their six week delay in attempting to retrieve them). By Respondents' own admission, the privileged items came from four different productions. (Protass Aff., Ex. 15.) Yet Respondents only point to two productions in which Respondents' privileged files were at all segregated. (Protass Aff., ¶¶ 29, 37). And, their claim that the files were segregated and labelled as privileged is contradicted by their own Affirmation in which Mr. Protass states that in the April 2016 production, the privileged items resided in 6 different email folders, none of which was labelled as privileged. (Protass Aff., ¶¶ 36 to 45.) In particular, Mr. Protass states that with respect to the April 2016 production, although he removed the privileged folder, he did not review or remove privileged items from six email folders that were not marked as privileged. "It did not occur to me (notwithstanding Mr. Lathen's April 28, 2016 e-mail) that privileged documents could or would be found in any of the other folders on that zip drive." (Protass Aff., ¶ 43.). It strains credulity that the Division is somehow to blame for not discovering the privileged items sooner when Respondent had the original files and did not discover them, and produced them without any notice that they were privileged.

And as to the Brune production in which privileged documents were indeed apparently produced in a labelled folder, the folder structure Respondents describe was not evident to the Division's attorneys. The Division's files are maintained in a Recommind database, and each email and its attachments are treated as unique records within Recommind. The folder structure maintained by the Respondent is only reflected in the meta-data associated with each record.

(Weinstock Decl., ¶ 2.) Thus, unless the Division scoured meta-data document by document - something it rarely has a need to do -- it would have no way to identify the labels of the folders in which those documents were produced. (Id.) Consequently, any claim that some of the files were "segregated and labelled as 'privileged'" in the Division's files is wrong. (Resp. Br. at 2). But, even if correct, it does nothing to excuse Respondents' blatant failures in production and retrieval, both of which evidence a disregard for protecting their privilege, and in turn warrant a waiver.

CONCLUSION

As Respondents' brief and counsel's affirmation now make clear, Respondents cannot justify their failure to protect their privilege. Respondents' privilege review was not reasonable by any standard. And once they learned of the issues, Respondents concede that they took no reasonable steps to rectify the error. The Division, therefore, respectfully requests that the Court find that the Respondents have waived privilege as to the documents they have produced to date.

Dated: November 4, 2016
New York, New York

DIVISION OF ENFORCEMENT

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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 (1) the Division of Enforcement's Reply Memorandum of Law in Further Support of its Motion for a Finding of Privilege Waiver, dated November 4, 2016; (2) the Declaration of Judith Weinstock in Support of the Division of Enforcement's Motion for a Finding of Privilege Waiver, dated November 4, 2016, by the means indicated:

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Judith Weinstock