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 FOR A FINDING OF PRIVILEGE WAIVER

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Respondents Donald F. Lathen, Jr., Eden Arc Capital Management, LLC and Eden Arc Capital Advisors, LLC (the "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") for a finding of privilege waiver.

PRELIMINARY STATEMENT

In a highly misleading motion that seems to intentionally distort the facts, the Division asks this Court to declare a privilege waiver over inadvertently produced documents that either were: (1) produced to the Division as segregated and marked as privileged; or (2) clearly designated as privileged in an extensive privilege log that Respondents produced to the Division long before the inadvertent production was discovered. The Division makes this argument despite their blatant failure to uphold their ethical obligations to promptly notify us of their discovery of our facially inadvertent production and return such privileged documents to us. This is an obligation of which the Division is well aware as they have asserted it, successfully, in the past, ***when they made the same mistake***. See SEC v. Blackburn, 2015 U.S. Dist. LEXIS 178322 (E.D. La 2015) (granting a clawback after the SEC segregated privileged emails into a sub-folder marked "privileged" and thereafter mistakenly produced its entire email folder, including the sub-folder marked "privileged.")

Furthermore, pursuant to Respondents' advice of counsel defense, we have given the Division access to a significant number of documents and a list of lawyers with whom Respondents consulted on a topic that we have maintained is relevant to their defense in these proceedings. Ironically, despite making the brazen, unequivocal assertion that ***any*** counsel the Respondents received beyond the narrow issue of disclosure to issuers is irrelevant, the Division now seeks to reach privileged communications with counsel that extend far beyond the scope of the Respondents' defense – including all correspondence with this firm and its predecessor in

preparing for the Division's investigation. Indeed, the Division knows that the legal advice they now seek is wholly irrelevant to the questions before this Court—the only thing it provides is insight into our litigation strategy, something that the Division is ***never*** entitled to receive. We respectfully submit that the Court should deny their motion.

ARGUMENT

Federal Rule of Civil Procedure 26(b)(5)(B) requires the return of confidential documents, stating: "If information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has." These obligations pertain to the "inadvertent productions" of privileged documents under Federal Rule of Evidence 502(b) (hereinafter "Rule 502(b)"). Specifically, Rule 502(b) states: "When made in a federal proceeding or to a federal office or agency, the disclosure does not operate as a waiver [ ] if: (1) the disclosure is inadvertent; (2) the holder of the privilege took reasonable steps to prevent disclosure; and (3) the holder promptly took steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B)."

As explained in more detail herein, the Division received the bulk of the privileged communications at issue herein in facially inadvertent form – segregated and labeled as "Privileged." The Division was in possession of these inadvertently produced privileged documents as far back as May 2015. Rather than giving us the requisite notice under the aforementioned rules, or otherwise giving us an opportunity to investigate, address, and rectify the problem, the Division shutdown communication with Respondents and resorted to filing a motion founded upon baseless assertions. These assertions have no legitimacy, ignore objective

reality, and sidestep the Division's decision not to notify us of their discovery or give us a chance to investigate and determine what took place.

This opposition (and the Affirmation of Harlan Protass in Support of the Eden Arc Respondents' Opposition to the Division of Enforcement's Motion for a Finding of Privilege Waiver, dated November 1, 2016 and submitted herewith (the "Protass Aff.")), by contrast, follows an intensive, diligent investigation into what took place. It explains with great detail exactly what steps were taken to identify and protect privileged communications, as well as the findings of our investigation of the production error. As the Court will see, the facts here clearly evince only "mistakes" in the face of otherwise reasonable efforts to protect the privileges asserted herein. These errors are the epitome of "inadvertent production" in the electronic age. And the Division would know, because the Division itself made the same mistake in the past—and there, the parties either willingly permitted a clawback of privileged documents or were ultimately required to by court order to do so. See Blackburn, 2015 U.S. Dist. LEXIS 178322 (E.D. La 2015), at *10 (explained in more detail below). Accordingly, this Court should deny the Division's motion for a privilege waiver and require the Division to promptly return, sequester or destroy the inadvertently produced documents identified in the attached "clawback list."

I.

THE DIVISION'S MOTION IS GROSSLY MISLEADING AND PREMATURE

As an initial matter, we must begin by addressing the unjustifiably misleading assertions that serve as the basis of the Division's motion. There are many things that are deceptive about it—but the most egregious are the misguided, irrelevant searches they conducted to mislead the Court and justify their motion. Specifically, instead of seeking to identify

potentially privileged communications by running a search for e-mail address domains in the "To," "From," and "CC" fields of an e-mail, the Division conducted a word search "for the last name of each attorney on the 'Attorney List'" and used the irrelevant result of "50,000 hits" to advance their motion for a finding of privilege waiver. For obvious reasons, this is a bizarre strategy that defies logic and produces only irrelevant results.

First, individuals' names appear both in their e-mail addresses and within documents themselves – for example, within boilerplate e-mail signature blocks, when they sign their name at the conclusion of a message or anywhere within the title, subject or body of an e-mail, attachment or other document. Second, as the Division well knows, lawyers work as teams, and more frequently than not, numerous members of a firm are copied on a single communication. For example, with respect to our firm, the Division searched not only "[Harlan] Protass," the only partner from Clayman & Rosenberg LLP representing Mr. Lathen, but also all of the associates, paralegals, and administrative assistants involved in the case at any point in the last two years. By doing so, they double, triple, quadruple (and so on), count each communication every time they found a name within it. As none of these other individuals were likely to have separate communications with the client, this dramatically inflated the number of hits the Division returned – further rendering their search results inaccurate and irrelevant. In addition to touting their results, the Division also produced a misleading table as an exhibit listing their "Search Results" by "Attorney" name, but including paralegals, legal assistants, and administrative assistants – people who obviously do not render legal advice. They also failed to include for the Court the names of the law firms or the titles that would reveal the highly misleading nature of the analysis. Third, for obvious reasons, keyword searches cannot account for non-privileged communications. There are innumerable non-privileged communications within the investigative file, for example, all of the e-mail correspondence between the Division

and this firm throughout the investigation. None of those communications were privileged, yet all were inappropriately reflected in the Division's search results (as well as incalculably multiplied using the Division's nonsensical approach).

The Division's motion is also premature and reflects their inexcusable failure to notify us to the extent that they are legally and ethically obligated. See Fed. R. Civ. Proc. 26(b)(5)(B) (requiring the prompt return, sequestration of destruction of privileged documents and trial-preparation material inadvertently once a party is notified of its possession of same). In stark contrast, this opposition evinces the Division's seemingly intentional decision not to notify us of their discovery of what they assert to be "potentially thousands" of privileged documents.

The Division exaggerates the sufficiency of their notification by cutting and pasting into their motion papers the vast majority of the content of a few e-mails exchanged about isolated documents that took place while both parties were immersed in preparation for the then-fast approaching hearing. In light of the Division's motion, and what we know about the Division's knowledge of the mistaken productions before filing it, these exchanges hardly constitute sufficient notification. The Division returned to us a single draft Wells submission, in mid-September, which was obviously mistakenly produced (and we confirmed as much). About a week later, the Division notified us about three additional e-mails, limited to in-house counsel and one e-mail copying Brune Law P.C., Respondents' former counsel, which we believed must have accidentally slipped through the cracks of the Respondents' 3,033 entry privilege log and 150,000 document production. Yet quite inexplicably, the Division never notified us that they had uncovered anything more than those isolated items before filing this motion asserting their discovery of potentially "thousands" of privileged documents. Not only would such notification from the Division have been courteous, but it was required.

II.

RESPONDENTS' FACIALLY INADVERTENT PRODUCTION REFLECTS MISTAKES AND DOES NOT IMPLICATE THEIR OTHERWISE PLAINLY REASONABLE EFFORTS TO PREVENT DISCLOSURE

Since we received the Division's motion and were alerted to a potentially systemic problem, we have been conducting a diligent and complicated investigation of the issue (explained in greater detail below and in the Protass Aff.). In doing so, we uncovered a significant, yet simultaneously confounding problem with our production – many of the documents we identified and segregated as privileged were buried within the Division's 600,000 page investigative file. Upon looking into the matter more deeply, we found that although great care was taken to identify and segregate privileged documents, Respondents inadvertently produced a significant number of privileged items in both "deleted" and existing folders segregated and labeled as "privileged," despite the fact that we had obviously intended and/or attempted to completely remove them. There were also privileged documents that slipped through the cracks despite plainly reasonable searches, but which were later identified as privileged on Respondents' privilege log after a second review took place.

Fortunately, the law recognizes, as it should, that production mishaps, when accompanied by otherwise reasonable steps to protect privileged documents, are plainly just mistakes and have no bearing on the reasonableness of the efforts made to protect the privilege under Rule 502(b). See Blackburn, 2015 U.S. Dist. LEXIS 178322 (E.D. La 2015), at *10 (finding sufficiently reasonable steps taken and no waiver of privilege when the SEC accidentally produced electronic documents encompassing privileged sub-folders and recognizing that "but for the mistake by the legal assistant, there would be no issue before the Court."). Indeed, legal scholars, courts, and even the recent advisory committee on Rule 502, have acknowledged that the increasing complexities of electronic discovery have undeniable

implications on the doctrine of inadvertent waiver, which necessarily requires a distinction between "mistakes" and "unreasonable steps to prevent disclosure" under Rule 502(b) to reasonably accomplish the goal of protecting privileges. See David Hricik, *Mining for Embedded Data: Is It Ethical to Take Advantage of Other People's Failures?*, 8 N.C. J. L. & TECH. 231, 233 (207) ("This recent proliferation of both electronic communications and electronic documents has dramatically increased the frequency with which mistakes happen. Consequently, it is easier to make a mistake. Now it only takes a click of a mouse . . . to inadvertently transmit a privileged electronic file."); Blackburn, 2015 U.S. Dist. LEXIS 178322, at * 8-9 (pointing to the advisory committee concerns regarding electronic discovery and opining that the issues raised by the SEC's motion [to clawback privileged inadvertently produced documents] must be viewed within the context of the production of electronically stored information). As detailed below, Respondents submit that it was the result of mere mistakes in the transmittal of electronic documents and / or the incomprehensible complexities of electronic searches that resulted in the issues here today.

A. The Division's Legal and Ethical Obligation to Return Documents They Received as Segregated and Marked "Privileged" Warrants the Return of those Documents

Turning to each production in more detail, Respondents made several disclosures of documents to the Division between May of 2015 and May of 2016, and during that time, were represented by two different law firms (Clayman & Rosenberg LLP, the undersigned counsel, and Brune Law P.C.). Under the supervision of both firms, Respondents made the same unwitting production error: What in hindsight proved to be seemingly airtight privilege reviews ended in the Division's receipt of privileged documents in a manner that clearly segregated and identified these documents as "privileged."

On February 1, 2016 Brune Law P.C. produced all documents, including e-mails, responsive to the Division's December 21, 2015 subpoena. Brune Law P.C. collected all responsive e-mails in five separate .PST files, encompassing all e-mails that Mr. Lathen and Michael Robinson, Mr. Lathen's former assistant, sent or received "concerning" Respondents between August 1, 2015 and January 4, 2016. Brune Law P.C. reviewed the e-mails directly in Microsoft Outlook, and segregated privileged e-mails in two files – "Privileged" and "JCK Priv Review" (JCK denotes a particular attorney at Brune Law P.C.). Specifically, the .PST files were searched in Outlook for the names of any of the attorneys on the list produced by Brune Law P.C. on March 18, 2016. Following its review of those e-mails, they produced the .PST files to the Division. Upon our investigatory review of the metadata of those PST files, it appears that the documents remained in those same labeled folders, but they appear to have been present within the "Deleted" folder.

Unknowingly, we repeated the same mistake with respect to the firm's April 29, 2016 production. Specifically, e-mails were reviewed by Respondents within Outlook and the documents identified as "privileged" were segregated in sub-folders labeled "privileged." Inadvertently, the documents were transmitted to the Division without deleting those folders.

Despite these production mistakes, our recent investigation into the matter confirmed that Respondents' privilege review was otherwise successful in both instances. Specifically, as demonstrated in more detail below, as part of our investigation and response to this issue, we conducted a separate, additional review of these productions as reflected by the Division in their investigative file. Our review shows that substantially all of the documents identified as "privileged" in our recent review had been marked as privileged in the initial privilege reviews corresponding with the February 2016 and May 2016 productions. Indeed, there was almost complete overlap. Additionally, in the days after that review was completed,

we uncovered the fact that the metadata itself confirmed that the documents were, in fact, received in the "privileged folders." Indeed, a closer review of the documents by "Document Location" shows that the location of the documents corresponds to the File names, which plainly indicate that they contain privileged documents.

In a recent case, SEC v. Blackburn, the Court ordered that the SEC was entitled to the return of privileged documents under the exact same circumstances. 2015 U.S. Dist. LEXIS 178322 (E.D. La 2015). There, the SEC's production was conducted by reviewing e-mails and organizing those e-mails using subfolders. Id. at *3. Like this case, the e-mails identified as privileged "were segregated into subfolders organized by the applicable privilege." Id. And, subsequently, the Division made the same production error as Respondents. Specifically, after the review was completed, the legal assistant instructed to handle the production to the parties "mistakenly attached the entire e-mail folder containing all e-mails, including privileged communications" in the sub-folders. Id. at *4.

There, in stark contrast to this case, when the majority of the opposing parties learned of the error, they immediately signed clawback letters and returned the documents to the SEC. Id. at *5. After litigating the issue, the Court held that the SEC inadvertently disclosed the documents and ordered the litigious party to also return the documents within five working days. Id. at *14.

Ironically, in Blackburn, the SEC made the same exact arguments that we are making here. Most prominently, the SEC argued that the opposing parties were required, both by Federal Rule of Civil Procedure 26(b)(5)(B), and the State Rules of Professional Conduct, to return the confidential documents. Id. at *6-7. The Court agreed. In concluding that no waiver of privilege had occurred, the Court emphasized that "[t]he issues raised by the SEC's motion must be viewed in the context of the production of electronically stored information." Id. In

support of that principle, the Court pointed to the Advisory Committee Notes for Rule 502, which discuss the heightened concerns surrounding electronic discovery and the "especially troubling" widespread concern about the prohibitive litigation costs necessary to protect against waiver of attorney-client privilege or work product." Id. at 8-9 (citing Fed. R. Evid. 502 Advisory Committee Notes (Explanatory Note – Revised 11/28/2008)). The Court then found that despite the facially inadvertent production of virtually all of the privileged documents, the SEC's review process was not the cause of the inadvertent disclosure. Rather, it was the technical production error that resulted in the erroneous transmission of privileged documents. Id. at 10. ("But for the mistake by the legal assistant, there would be no issue before the Court.").

The Court should give Respondents the same relief because the facts here are substantially the same. These were facially privileged documents marked and segregated as such when the Division received them. The Division has an obligation to return them.

B. Respondents' Searches For Responsive, Non-Privileged Documents Were Plainly Reasonable, and Regardless, Anything Overlooked Was Remedied By a Second Search by Counsel and Identified to the Division in a Privilege Log

With respect to the earliest productions at the outset of the Division's investigation, *circa* May 18, 2015 and the days immediately thereafter, we had a slightly different method for producing documents. Specifically, in response to the Division's February 18, 2015 subpoena, we intended to provide the Division with a limited universe of documents that could not, on their face, have been privileged.

Specifically, we devised strategic searches on the Smarsh consul (Respondents' e-mail archiving vendor) intended to produce only .PST files of e-mails between Respondents and five "classes" of individuals: (1) all current and former investors in Eden Arc Capital Partners, LP (and/or their agents), (2) all Participants (and/or their agents or attorneys in fact); (3) all brokerage firms with which Eden Arc transacted business; (4) all banks with which Eden Arc

transacted business; and (5) all issuers of survivor's option securities purchased in joint tenancy accounts (and/or the administrators/trustees for those issuers). Specifically, Respondents ran searches for either the domain names of each institutional member of a larger class of contacts (like brokers) or for specific e-mail addresses for smaller classes (like Participants). Additionally, Respondents produced all e-mails between Mr. Lathen and Mr. Robinson.

The search was devised this way because none of the members of these "classes" of individuals were individuals with whom Respondents shared an attorney-client relationship. Accordingly, Respondents' e-mail production in May of 2015 should not have included ***any*** privileged attorney-client communications. The fact that it did, therefore, is not the result of the unreasonableness of Respondents' efforts to protect privileged documents from disclosure.

It should not be surprising in this era of cost-prohibitive litigation that a party with limited means would design cost-conscious production methods. See, e.g., Fed. R. Evid. 502, Advisory Committee Note 2 (noting that one major purpose of the rule is to "respond[] to the widespread complaint that litigation costs necessary to protect against waiver of attorney-client privilege or work product have become prohibitive due to the concern that any disclosure (however innocent or minimal) will operate as a subject matter waiver of all protected communications or information" and that "[t]his concern is especially troubling in cases involving electronic discovery"). Outsourcing privilege review is one such reasonable cost-saving measure. See, e.g., Heriot v. Byrne, 257 F.R.D. 645, 659-60 (N.D. Ill. 2009) (finding that the use of vendors in e-discovery production was appropriate and declining to impose a condition of re-review by the attorneys of the e-discovery so produced). Courts do not look at the outcome of the privilege review – after all, in every case privileged documents were disclosed – but whether it was reasonable under the circumstances. See Valentin v. Bank of N.Y. Mellon Corp., 2011 U.S. Dist. LEXIS 40711, at *7 (S.D.N.Y. Apr. 14, 2011) (utilizing "a simple visual review

for privilege" was reasonable even though privileged documents were nonetheless produced); see generally Bretillot v. Burrow, 2015 U.S. Dist. LEXIS 121336, *71 (S.D.N.Y. 2015) (reiterating that Rule 502 is designed to grapple with the vexing problem of balancing the high costs of electronic discovery with overly harsh waiver rules).

Unlike all of the other productions, Respondents' September 2015 disclosures were the result of a patent communication error. Specifically, we produced a file to the Division that we believed incorporated a privilege review. We were mistaken. Nevertheless, although a post-production review of e-discovery is not required, see Heriot, 257 F.R.D. at 660, in this case, Respondents conducted one. Specifically, in connection with their March 2016 production, Brune Law P.C. conducted a separate, independent privilege review of the entire universe of responsive e-mails between April 2009 and July 2005. Accordingly, on March 8, 2016, Respondents produced a 52-page privilege log, containing 3,033 entries. Our investigation, in hindsight, showed that most of the privileged e-mails inadvertently produced in the earlier productions in May and September 2015 were indicated as privileged on that log. Unsurprisingly, Respondents did not claw back the inadvertently produced privileged e-mails identified in the March 2016 privilege log for the simple and obvious reason that we did not realize, at the time, that they had been produced.

Accordingly, it is clear that the Division has had constructive notice from the outset, either because the production itself actually segregated and identified the privileged documents or the privileged documents were reflected as such on our privilege log. It strains credulity, therefore, for the Division to suggest that the mistake resulted from our unreasonable efforts to protect the documents. Instead, it should have been obvious that the large-scale inadvertent production was simply an unintended oversight that could not have conceivably prejudiced the Division had they given us the appropriate notice.

III.

SINCE BEING NOTIFIED, RESPONDENTS HAVE BEEN DILIGENTLY INVESTIGATING THE CLEARLY INADVERTENT PRODUCTION OF PRIVILEGED DOCUMENTS AND NOW SEEK TO "CLAW" THEM BACK

In light of the patent insufficiency of the Division's notice to us, they cannot credibly argue that our response was unreasonable. They disingenuously suggest to this Court that they provided us "notice of the production error," which they assert in their motion involves "thousands of documents" (50,000 by their estimation). To the contrary, no reasonable person would view the Division's communication with us as so much as hinting at their knowledge of the production error, much less properly notifying us about it. Regardless, we have taken ***extensive*** measures to identify and rectify the problem. Indeed, it has taken us the better part of the entire week since we received the Division's motion to identify and understand the problem, on the one hand, and then take the necessary steps to properly rectify it.[1]

As we mentioned, since we received the Division's motion and were alerted to a potentially systemic problem, we have been conducting a diligent and extensive investigation of the production that turned out to be extremely complicated in light of the number of separate productions, the multiple different law firms involved, and the obscured nature of the error. We started by running the most inclusive, yet sensible, possible search for privileged documents using our "Driven One" database, which we put in place in an attempt to manage the Division's 600,0000 page investigative file. Specifically, we searched the domain names of any of the attorneys with whom our client consulted in the "To," "From," and "CC" fields. During the course of our efforts, we were surprised to learn from the Driven technology staff that there was

[1] It bears noting that the scope of the review we undertook to identify the production issue would not have been possible at the time that the Division first alerted us to a single privileged document or three additional documents. At that time, all of the parties were laboring under a trial date just a few weeks away with numerous impending deliverables.

no way for the program to automatically eliminate entries that involved non-client third parties. In other words, Driven could not further refine our search to eliminate presumptively non-privileged e-mails. Accordingly, we conducted a manual review of the entries to remove apparently non-privileged e-mails, and removed: (1) all the communications with our firm and our predecessor firm with the Division; (2) all communications where a lawyer communicated with a third party or was copied on such a communication. From these efforts we narrowed the issue to a still extremely overbroad universe of e-mails, which still included innumerable communications involving someone who was an attorney that was not for the purposes of seeking legal advice (and presumably there are a significant number in light of Mr. Lathen's friendly relationship with some of them). We also discovered, by sorting the documents by production date, that these e-mails appeared to be divided between four different productions – May 2015, September 2015, March 2016, and May 2016. Needless to say, we were extremely confused.

We proceeded by scrutinizing each of the productions separately. We turned first to the May 2016 production file, which encompassed eight folders worth of documents, including e-mails to and from Mr. Lathen's personal yahoo and Eden Arc accounts between January and April of 2016. We identified and segregated privileged communications within each Outlook file in a separate folder marked "privileged" – yet somehow all of these privileged e-mails appeared in our search results, meaning they reached the Division despite our concerted efforts to identify and protect them. We had provided those documents from that production to the Division on a CD containing the foregoing and had intended (obviously) to remove the privileged documents folders from each file. Nevertheless, our efforts appear to have been unsuccessful.

We repeated the same process with the other productions, and it took considerable time to isolate the respective problems. It required extensive communication with Respondents' prior counsel, who was on trial, as well as our clients, in order to proceed intelligently in analyzing the problem. Things were further complicated by the upcoming deadline for producing the remainder of the documents pursuant to our advice of counsel defense, which needed to be compared to the clawback list of inadvertently privileged documents so that efforts were not duplicated. We did not want to impose upon the Division a clawback that we might need to undo.

Ultimately, we undertook a closer look at the full universe of documents on our list of "presumptively privileged" e-mails to verify the privileged nature of the inadvertently produced e-mails on our "clawback" list. This list represents a notably small percentage of the more than 150,000 documents produced by Respondents over the course of this investigation. Indeed, it is clear that the productions where the full folders of privileged documents were inadvertently transmitted represent, by far, the largest group of documents – May 2015 (0.07% of the documents produced were inadvertently produced privileged documents), September 2015 (0.09%), February 2016 (0.20%) and May 2016 (0.625%).

Regardless, we take full responsibility for what appears to have been our honest mistake. But that mistake does not undermine our significant, concerted efforts to identify and protect our client's attorney-client privilege, as well as our diligent efforts to address and rectify the problem. We submit that if we had any idea that the Division was receiving a neat package of privileged documents in the midst of our productions, despite our concerted effort to protect them, we would have cleared up this inconvenience for the Division long ago. Indeed, we would think that the Division would have an obligation not to ignore these privileged designations.

Had the Division timely notified us, we could have resolved this issue much sooner. In fairness, the Division has had these documents for six months to a year and a half, and they either failed to identify the issue (which they criticize us for having failed to do), or they chose not to notify us until the eleventh hour. Indeed, the Division's criticism of our response over the last few weeks is: (1) taken completely out of context; and (2) disingenuously sidesteps their decision not to notify us of their discovery before making this motion. As this Court is well aware, the parties had been operating on an extremely compressed schedule in an effort to commence the hearing on October 17, 2016, within 60-days of the OIP. When the Division originally sent us the few isolated privileged documents, in mid-September, we immediately investigated and responded in a reasonable way that reflected our understanding of the issue at the time and the extremely compressed time frame both parties were operating under in preparing for the hearing.

An objective look at the relevant time period sheds light on just how unsurprising it is that we failed to detect the problem sooner. Indeed, as per our opposition to the Division's motion to quash our subpoena, we were having significant trouble gleaning information from the Division's massive, organization-less, 600,000 page investigative file. Furthermore, in the weeks that followed, the Division submitted motions to preclude our advice of counsel defense, the fundamental tenet of which was their assertion that ***any*** counsel our client actually received was irrelevant and should not be admissible, much less reviewed by the Division or presented to the Court in this proceeding. Needless to say, these were not normal circumstances; we had innumerable deadlines with respect to this case alone during that time that monopolized our

attention. Notwithstanding that fact, none of the cases the Division cites is analogous or supports their argument.[2]

IV.

PERMITTING THE DIVISION TO REVIEW THE REMAINING PRIVILEGED DOCUMENTS WOULD INEVITABLY UNDERMINE THE FUNDAMENTAL FAIRNESS OF THESE PROCEEDINGS

Finally, the Division suggests that this Court should make a finding of waiver on the basis of "fairness." However, these arguments are meritless and discount the extreme unfairness of the Division's decision to submit this motion without notifying us of the extent of their discovery. Unsurprisingly, they also fail to consider the indisputable inequity of opening up all of Respondents' private conversations with counsel to scrutiny.

The sum and substance of the Division's argument is: (1) that because the privileged documents were produced, they must be "relevant" to this proceeding; and (2) that our assertion of the advice of counsel defense makes it "unfair" to preclude them from reviewing our client's privileged communications beyond the scope of that defense. These arguments defy logic and are duplicitous. They cannot, for their own purposes, claim that all counsel we received is irrelevant, and then, when it benefits them, turn around and claim that even counsel beyond the scope of our defense is not only "relevant," but it would be "unfair" for the Court to shelter it. The hypocrisy of these arguments is obvious.

Indeed, the Division well knows that is not the least bit unfair for the Court to preserve the sanctity of the attorney-client relationship in this situation. This case is even more

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[2] Each of the cases cited by the Division references the context of two-month delay; by contrast, we have fully and completely responded immediately under the circumstances or, at worst within six weeks even ***despite*** the fact that the Division decided not to notify us of their discovery of the production error that serves as the basis of their motion. The Division's silence as to when it first reviewed our productions to it—which would have immediately alerted it to the fact that we inadvertently produced obviously privileged documents—is telling.

egregious than Blackburn, where it was apparent that the opposing party actually could affirmatively use the privileged information they received, as evidence, when they tried to attach one of their e-mails to a motion for summary judgment. 2015 U.S. Dist. LEXIS 178322, at *5-6. Here, by contrast, the Division already conceded that counsel our client received beyond the scope of the defense has little to do with the subject matter of this investigation. It would, however, reveal his current and former attorneys' strategies in mounting a defense to the Division's allegations in this matter. These things are entirely irrelevant to the Division's allegations—yet, for obvious reasons, their revelation to the Division would be grossly unfair to Respondents and runs the risk of eviscerating the fundamental fairness of these proceedings. Indeed, courts are highly motivated to protect document discussions, litigation strategy and work product under Rule 502, "in the interests of fairness and justice"—even in cases where "minimal steps" were taken to protect against inadvertent disclosure." See e.g. Peterson v. Bernardi, 262 F.R.D. 424, 4330-31(D.N.J. 2009) ("The application of FRE 502(b) was designed to be flexible. This flexibility authorizes the Court to find that a waiver did not occur in circumstances where an injustice to the client would result from a contrary ruling.").

But the hypocrisy of the Division's entire motion is patently obvious—so much so that when they found themselves in the substantially the same position as Respondents, they asserted that the opposing party's receipt of documents in this form, for these reasons, triggered an ***affirmative*** obligation under both the applicable federal and state procedural and ethical rules for the return of the documents. Not only did all but one of the counterparties in that case sign clawback letters and return the documents—without the need for litigation—but the Court ordered all parties to do the same on the merits—even without the additional, indisputable fairness issues that support Respondents' motion here.

CONCLUSION

Accordingly and for all of the foregoing reasons, the Eden Arc Respondents respectfully submit that this Court should: (1) deny the Division's motion for a finding of privilege waiver; (2) order the Division to return the privileged documents identified on Respondents' "clawback" log (produced as an attachment to the Protass Aff.); and (3) grant the Eden Arc Respondents such other and further relief as this Court deems just and appropriate.

Dated: New York, NY
November 1, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that on November 1, 2016 I caused true and correct copies of the foregoing THE EDEN ARC RESPONDENTS' OPPOSITION TO THE DIVISION OF ENFORCEMENT'S MOTION FOR A FINDING OF PRIVILEGE WAIVER, dated November 1, 2016, and the attached AFFIRMATION OF HARLAN PROTASS IN SUPPORT OF THE EDEN ARC RESPONDENT'S OPPPSITION TO THE DIVISION OF ENFORCEMENT'S MOTION FOR A FINDING OF PRIVILEGE WAIVER, dated November 1, 2016, to be served upon the parties listed below via e-mail and UPS Overnight Mail:

Honorable James E. Grimes
Administrative Law Judge
U.S. Securities and Exchange Commission
100 F. Street, N.E.
Washington, DC 20549-2557

Brent Fields, Secretary
Office of the Secretary
U.S. Securities and Exchange Commission
100 F. Street, N.E.
Washington, DC 20549-2557

Judith Weinstock, Esq.
U.S. Securities and Exchange Commission
New York Regional Office
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Harlan Protass