UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-[redacted] 17387

In the Matter of

DONALD F. ("JAY") LATHEN, JR., EDEN ARC CAPITAL MANAGEMENT, LLC, and EDEN ARC CAPITAL ADVISORS, LLC,

Respondents.

HINCKLEY, ALLEN & SNYDER, LLP'S OBJECTION TO THE DIVISION OF ENFORCEMENT'S MOTION TO COMPEL

Hinckley, Allen & Snyder LLP,
By its Attorney,

William R. Grimm, Esq.
Hinckley, Allen & Snyder LLP
100 Westminster Street, Suite 1500
Providence, RI 02903
(401) 274-2000
(401) 277-9600 – fax
wgrimm@hinckleyallen.com

Dated: January 5, 2017

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Rules

I. INTRODUCTION

Non-party Hinckley, Allen & Snyder LLP ("Hinckley Allen") respectfully asks that the Securities and Exchange Commission (the "Commission") deny the Division of Enforcement's (the "Division") 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 (the "Motion") for at least three reasons.

First, the Motion is premature. Hinckley Allen and the Division were in the middle of negotiating revisions to Hinckley Allen's privilege log and a supplemental document production when the Division unilaterally cut off those negotiations and filed the Motion. Further, the description of those negotiations and discussions provided by counsel for the Division mischaracterizes and misstates the positions taken by counsel for Hinckley Allen. Nevertheless, Hinckley Allen has prepared a revised privilege log and made a supplemental document production that should make the Motion moot. The Division could have avoided this needless waste of resources if it had a little patience and shown a modicum of respect for the fact that counsel for Hinckley Allen had a scheduled vacation with his family over the holidays.

Second, Hinckley Allen has complied with the subpoena. Hinckley Allen produced many documents in response to the subpoena together with its privilege log. Hinckley Allen has not been recalcitrant. Rather, it has been cooperative. It is standard practice for a law firm to be protective of potentially privileged documents when subpoenaed. It is also to be expected that, if the party issuing the subpoena has questions about the assertions of privilege, then the parties conduct a constructive dialogue to try and answer those questions and reach a mutually satisfactory conclusion. Hinckley Allen has maintained its spirit of cooperation throughout – and continues to do so.

Third, the fact that Hinckley Allen's client has waived the attorney-client privilege by asserting an advice of counsel defense does not result in the abrogation of Hinckley Allen's right to assert the protection of the work product doctrine for certain categories of documents. Contrary to the Division's erroneous interpretation of the law, documents that reflect the opinions and analysis of attorneys that were not conveyed to the client as part of communications retain immunity from discovery. The documents that remain on Hinckley Allen's revised privilege log all fall into this category.

For these reasons, the Commission should deny the Motion.

II. FACTS

The Division served the subpoena on Hinckley Allen on November 15, 2016, seeking production of documents in its possession related to its representation of Donald F. "Jay" Lathen in connection with Eden Arc Capital Management, LLC, Eden Arc Capital Advisors, LLC, Eden Arc Capital Partners, LP, and/or EndCare. The subpoena sought production of the documents by December 1, 2016 – providing Hinckley Allen with only ten (10) business days to respond, considering the Thanksgiving holiday. Hinckley Allen sought and obtained extensions of time to respond and produced documents in response to the subpoena on December 12, 2016. Hinckley Allen completed its document production and produced its privilege log on December 14, 2016.

On December 15, 2016, in a telephone conversation, counsel for the Division raised initial questions about the documents on the privilege log, and counsel for Hinckley Allen agreed to assess those questions. See Declaration of Adam M. Ramos ("Ramos Declaration"), ¶ 3, Exhibit A.[1] Then, on December 16, 2016, counsel for the Division requested a meet and confer regarding the privilege log. See id. Counsel for Hinckley Allen responded that same day asking counsel for the Division to provide a list of issues to discuss and offering to discuss them the

[1] The Declaration of Adam M. Ramos is attached hereto as Exhibit 1.

following week. See id. Counsel for the Division did not provide a written list of issues and demanded that the meet and confer take place on Monday, December 19, 2016. See id. Counsel for Hinckley Allen again requested a written list of issues and explained that he was unable to have the meet and confer on December 19, 2016, but promised to consider the Division's concerns. See id. At 10:31 p.m. on Friday, December 16, 2016, counsel for the Division again responded without providing a written list of the issues and sought a meet and confer on Sunday, December 18, 2016. See id. Counsel for Hinckley Allen and the Division did not communicate again until Wednesday, December 21, 2016, when they held a telephone conference discussing the Division's questions about the privilege log. See id. On that call, counsel for Hinckley Allen reminded counsel for the Division that he had a scheduled vacation starting the next afternoon and again asked for a written list of the Division's concerns with the privilege log. See id. The Division still did not provide any written documentation of its concerns about the privilege log. See id. Nevertheless, Hinckley Allen began the work of assessing its privilege log in light of its understanding of the Division's concerns about some of the documents identified and withheld. See Ramos Declaration, ¶¶ 2-3.

On December 27, 2016, counsel for the Division left a voicemail for counsel for Hinckley Allen inquiring about the status of Hinckley Allen's review of its privilege log. The next day, counsel for Hinckley Allen responded:

> I received your voice mail. As you know I am on vacation this week with my daughter and granddaughter. During my absence, one of my partners and a legal assistant are reviewing the documents on our privilege log which you questioned. When I return to the office after the new year, I will review their work and decide on whether any additional documents should be produced. Any attorney's notes which reflect client communications will be produced along with drafts, if any, that do not reflect the significant thought processes and mental impressions of the attorneys related to anticipated litigation. As I told you previously, we are following the second circuit precedent I gave you in making our initial designations and in this supplemental review being conducted at your request. We

should be able to make any supplemental production by the end of next week. Have a happy new year.

See Ramos Declaration, ¶ 3, Exhibit A (emphasis added). Despite the clear promise to produce additional documents, the Division falsely disavowed any prior knowledge of counsel for Hinckley Allen's vacation plans and, thereafter, filed the Motion. See id.

After the Division filed the Motion, the Commission set an expedited schedule for resolution of this dispute, requiring Hinckley Allen to submit this objection and copies of any documents it has determined it will continue to withhold under the work product doctrine. Hinckley Allen has now provided a revised privilege log and made a supplemental production to the Division, consistent with its previous promises. See Ramos Declaration, ¶ 11. Contemporaneous with this objection, Hinckley Allen has provided the Commission with the revised privilege log and copies of the withheld documents for *in camera* review.

III. ARGUMENT

A. The Motion Is Premature

As the Commission has recognized, the hearing date in this matter is soon. The Division's Motion, unfortunately, has unnecessarily siphoned the resources of the Commission and the parties away from preparation for the hearing. Hinckley Allen has attempted to work cooperatively with the Division to provide it with all the documents to which it is entitled, while still protecting those documents appropriately subject to privilege. Hinckley Allen has been working diligently to respond to the Division's concerns about its initial privilege log. See Ramos Declaration, ¶¶ 2-10. Despite the Division's unwillingness to provide Hinckley Allen with a clear, written statement of its concerns, Hinckley Allen agreed to conduct a review of the documents it withheld and assess whether any of them could be produced based on its understanding of the Division's concerns. See Ramos Declaration, ¶ 3, Exhibit A. At the time

the Division filed the Motion, Hinckley Allen was identifying additional documents to produce and preparing a revised privilege log. See id. Further, Hinckley Allen had informed the Division that it was doing so. See id.

Federal courts regularly deny motions to compel when the motion is deemed a waste of time. See e.g., United States v. Grandison, 2013 WL 11323276, *1-*2 (W.D. Mo. June 24, 2013) (denying motion to compel as a waste of time when the party from whom discovery was sought had not actually refused to provide the discovery requested); In re Lorazepam & Clorazepate Antitrust Litigation, 2001 WL 1795665, *3 (D.D.C. July 17, 2001) (denying motion because to decide it would be a "waste of time"). Here, Hinckley Allen has not refused to provide the discovery originally sought by the Division in the aborted meet and confer. In fact, at the time the Division filed the Motion, Hinckley Allen was preparing to provide additional documents to the Division based on the Division's apparent concerns – which have now been provided. See Ramos Declaration, ¶¶ 2-11, Exhibit A. It makes little sense for the Commission to spend its time and resources deciding the Motion when the Division did not even allow itself the opportunity to first assess whether Hinckley Allen's revised privilege log and supplemental production satisfied its concerns about the completeness of Hinckley Allen's response to the subpoena.

B. Hinckley Allen Has Complied With the Subpoena

The Division's subpoena to Hinckley Allen directed Hinckley Allen to produce documents related to its representation of its former client. In its initial response, Hinckley Allen produced 4,292 pages of documents, but withheld certain documents on the basis of the work product doctrine. The Division asserted non-specific concerns that certain of the withheld documents should not be subject to work product protection. See Ramos Declaration, ¶ 3,

Exhibit A. Despite the Division's steadfast refusal to put in writing its concerns, in the face of multiple requests, Hinckley Allen determined that the Division thought some of the withheld documents reflected communications between Hinckley Allen and its former client that should have been produced because of the former client's waiver of the attorney-client privilege through the assertion of the advice-of-counsel defense.

Based on this understanding, Hinckley Allen reviewed the withheld documents to assess whether any of them reflected such communications. See Ramos Declaration, ¶ 4. For example, Hinckley Allen reviewed documents described on the original privilege log as "Attorney Notes" to determine whether those notes described communications with its former client, or, instead, were notes reflecting the internal thought processes of the attorneys regarding the legal issues involved in the representation. See Ramos Declaration, ¶ 6. As a result, Hinckley Allen subsequently produced some of the "Attorney Notes" because it concluded that they reflected, at least in part, client communications. Hinckley Allen undertook a similar process with communications between attorneys about the representation and with drafts of documents it prepared in connection with the representation. See Ramos Declaration, ¶¶ 7-8. As a result, Hinckley Allen has now produced an additional 148 documents and determined that the remaining withheld documents all reflect internal thought processes of its attorneys concerning legal issues related to anticipated litigation, which were not communicated to the client. See Ramos Declaration, ¶ 11.

Hinckley Allen has, therefore, complied with the subpoena. It has not refused to provide the requested discovery. It has acted in good faith to provide additional documents and has only withheld documents that fall within the work product protection in circumstances where a client has waived the attorney-client privilege.

C. The Documents Withheld by Hinckley Allen Are Protected Work Product

The work product doctrine shields from discovery the opinions and thought processes of attorneys in anticipation of litigation. United States v. Adlman, 134 F.3d 1194, 1196 (2d Cir. 1998) ("The work-product doctrine . . . is intended to preserve a zone of privacy in which a lawyer can prepare and develop legal theories and strategy with 'an eye toward litigation,' free from unnecessary intrusion by his adversaries") (quoting Hickman v. Taylor, 329 U.S. 495, 510-11 (1947)); see also In re Initial Public Offering Securities Litigation, 249 F.R.D. 457, 460 (S.D.N.Y. 2008). The anticipated litigation need not be definite; rather, if the documents are "prepared or obtained because of the prospect of litigation[,]" then the work product doctrine protects them from discovery. Schaeffler v. United States, 806 F.3d 34, 42 (2d Cir. 2015).

Protection for attorney work product "promotes the rendering of effective legal services." In re Sealed Case, 107 F.3d 46, 51 (D.D.C. 1997). "The attorney 'work product' privilege . . . is historically and traditionally a privilege of the attorney and not that of the client. Its rationale is based upon the right of lawyers to enjoy privacy in the course of their preparations for suit." Radiant Burners, Inc. v. Am. Gas Ass'n, 207 F. Supp. 771, 776 (N.D. Ill.), adhered to, 209 F. Supp. 321 (N.D. Ill. 1962), and rev'd on other grounds by, 320 F.2d 314 (7th Cir. 1963).

> [I]t is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he . . . prepare his legal theories and plan his strategy without undue and needless interference. That is the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interests. This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways[.] . . . Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be

> demoralizing. And the interests of the clients and the cause of justice would be poorly served.

Hickman v. Taylor, 329 U.S. 495, 510–11 (1947). Opinion work product, such as the mental impressions and legal theories of attorneys, enjoys even greater protection from discovery because of the need to preserve "the adversary system's interest in maintaining the privacy of an attorney's thought processes and in ensuring that each side relies on its own wit in preparing their respective cases. Sporck v. Pell, 759 F.2d 312, 316 (3d Cir. 1985). It is clear, therefore, that the purpose of the work product protection is to allow attorneys the freedom to engage in free thought and to debate advocacy internally in order to determine the best legal advice to provide to a client without fear that such internal deliberations might later be discovered. If such thought processes become generally available, attorneys will be reluctant to engage in such important activity.

In Adlman, the Second Circuit determined that "a litigation analysis prepared by a party to inform a business decision which turns on the party's assessment of the likely outcome of litigation expected from the transaction" could be protected by the work product doctrine if the analysis would not have been prepared in the absence of the expectation of litigation – despite the fact that the litigation was not specifically threatened or imminent. Adlman, 134 F.3d at 1197, 1203-04. In reaching this conclusion, the Second Circuit rejected the test that a document must have been prepared "primarily to assist in litigation." Id. at 1198-1202.

In Schaeffler, the Second Circuit expanded upon its reasoning in Adlman, concluding that the work product doctrine protected advice that "was specifically aimed at addressing the urgent circumstances arising from the need for a refinancing and restructuring and was necessarily geared to an anticipated audit and subsequent litigation[.]" Schaeffler, 806 F.3d at 44. Further, the Second Circuit concluded that the advice and analysis at issue was "highly detailed" and

"litigation focused" such that it would not have been necessary in the course of an ordinary business transaction. Id. The "complexity and ambiguity" of the legal issues supported extending work product protection to the document at issue. Id. at 44-45.

Here, the documents Hinckley Allen has withheld all are "litigation focused" and deal with complex and ambiguous legal issues. Lathen engaged Hinckley Allen expressly for the purpose of assessing litigation risk in the development of his business model in light of other similar business models that had resulted in litigation.[2] Everything that Hinckley Allen did was with "an eye toward litigation." See Ramos Declaration, ¶ 5. Thus, it was not only Hinckley Allen's direct litigation analysis documents that constitute attorney work product, but also much of its internal commentary on and revisions to the documents to be used in connection with Lathen's business model. Hinckley Allen made such commentary and changes for the express purpose of avoiding the litigation pitfalls that had befallen others in the industry.

D. The Work Product Doctrine Protects Attorney Mental Impressions Even When the Attorney-Client Privilege Has Been Waived

Lathen's waiver of the attorney-client privilege does not result in a waiver of all Hinckley Allen work product. The principal case upon which the Division relies contradicts this argument.

In In re Echostar Communs. Corp., 448 F.3d 1294 (Fed. Cir. 2006) ("Echostar"), the Federal Circuit analyzed the application of the work product doctrine in circumstances in which a law firm had been subpoenaed to produce its files regarding representation of a client who had been deemed to have waived the attorney-client privilege. The court analyzed the work product claims by separating the asserted work product into three categories:

---

[2] A true and accurate copy of the Amended Engagement Letter between Lathen and Hinckley Allen is attached as Exhibit B to the Declaration of Nancy A. Brown. The content of the letter demonstrates that the scope of Hinckley Allen's engagement focused entirely on the prospect of litigation related to his business plan and the anticipated likelihood of future litigation given the complexity and ambiguity of the legal issues involved.

> (1) documents that embody a communication between the attorney and client concerning the subject matter of the case, such as a traditional opinion letter; (2) documents analyzing the law, facts, trial strategy, and so forth that reflect the attorney's mental impressions but were not given to the client; and (3) documents that discuss a communication between attorney and client concerning the subject matter of the case but are not themselves communications to or from the client.

Id. at 1302. The Federal Court determined that "asserting the advice-of-counsel defense . . . [did] not give their opponent unfettered discretion to rummage through all of their files and pillage all of their litigation strategies." Id. at 1303. Consequently, the Federal Circuit concluded that the second category of work product – uncommunicated analysis and mental impressions – remains protected by the work product doctrine even after a waiver of the attorney-client privilege because "any relative value is outweighed by the policies supporting the work-product doctrine." Id. at 1304. Further, the Federal Circuit cautioned that, although the third category of work product – documents discussing communications – becomes discoverable upon waiver of the attorney-client privilege, such documents "may contain work product of the second kind – legal analysis that was not communicated[,] which should be redacted and protected." Id.

No other federal circuit court of appeals has addressed this question. As such, the Federal Circuit is the highest court to have addressed the impact of a waiver of the attorney-client privilege on the protections of the work product doctrine. Many federal district courts have applied the same rationale as the court in Echostar. See e.g., Steelcase Inc. v. Haworth, Inc., 954 F. Supp. 1195, 1200 (W.D. Mich. 1997) (finding work product documents irrelevant unless they were communicated to the client); Thorn Emi North America, Inc. v. Micron Technology, Inc., 837 F. Supp. 616, 622 (D. Del. 1993) (finding only "mental impressions, conclusions, opinions or legal theories" actually communicated to the client are discoverable because of advice of counsel defense); In re Taxable Mun. Bond Securities Litigation, No. MDL

863, 1993 WL 323069, *4 (E.D. La. Aug., 18, 1993) (finding that waiver of attorney-client privilege did not extend to documents that client had never seen). Even the court in JJK Mineral Co., LLC v. Swiger, 292 F.R.D. 323, 329 (N.D. W. Va. 2013), upon which the Division relies for its assertion that "[o]ther courts have gone further, finding that a waiver of work-product protection is effected for the entire file of the attorney on whose advice the party claims he relied," acknowledged that "the better position is that assertion of the advice of counsel defense . . . does not necessarily fully waive the opinion work product immunity."

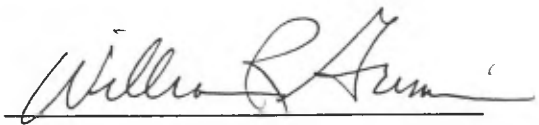
Here, Hinckley Allen has provided a revised privilege log that limits its assertion of work product protection only to those documents that fall within the second category of work product identified by the Federal Circuit in Echostar – the mental impressions and analyses of attorneys that were not shared with Lathen. See Ramos Declaration, ¶¶ 4-5. Echostar clearly provides that such documents remain subject to the shield of the work product doctrine. The cases that have not followed Echostar are unpersuasive and do not address the well-founded reasoning of Echostar: that the advice-of-counsel defense is focused on the client's state of mind, and therefore the uncommunicated thoughts of attorneys are irrelevant to the defense. Further, many of the cases cited by the Division relied on the now-eliminated standard that requested discovery must be "calculated to lead to the discovery of admissible evidence." That language has since been excised from Fed. R. Civ. P. 26. In short, the uncommunicated analyses and opinions of Hinckley Allen attorneys are not subject to discovery, and Hinckley Allen appropriately withheld them in response to the subpoena.[3]

[3] The assertion that Hinckley Allen cannot assert the work product protection because these documents are in files that belong to Lathen is meritless. First, the subpoena does not seek only documents contained within the client file, but all documents in Hinckley Allen's possession. Thus, there is no basis to assume that any documents withheld are necessarily a part of the client file. Second, the very concept that attorneys have the right to assert work product protection independent of their clients (which the Division concedes at page 7 of its memorandum, citing Hanson v. USAID, 372 F.3d 286, 294 (4th Cir. 2004)) belies this contention. If attorneys have such an independent right, it would be subsumed by a rule that attorneys cannot withhold documents in their client files.

IV. CONCLUSION

For these reasons, the Commission should deny the Division's Motion.

Hinckley, Allen & Snyder LLP,
By its Attorney,



William R. Grimm, Esq.
Hinckley, Allen & Snyder LLP
100 Westminster Street, Suite 1500
Providence, Rhode Island 02903
(401) 274-2000
(401) 277-9600 – fax
wgrimm@hinckleyallen.com

Third, and finally, the implication of Echostar is that the work product protection for these documents was not waived. Thus, even if Lathen has the right to obtain these documents from Hinckley Allen now, it does not follow that he would then have to turn them over to the Division. These documents remain protected by the work product doctrine.

CERTIFICATE OF SERVICE

I hereby certify that I served this Hinckley, Allen & Snyder LLP's Objection to the Division of Enforcement's Motion to Compel and the Declaration of Adam M. Ramos attached thereto on this 5th day of January, 2017, on the below parties by the means indicated:

The Honorable Jason S. Patil
Administrative Law Judge
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-2557
(By E-Mail)

Anthony Francis Bruno
Office of Administrative Law Judges
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-2557
(By E-Mail)

Nancy A. Brown
Judith Weinstock
Janna I. Berke
Lindsay S. Molianen
Securities and Exchange Commission
New York Regional Office
Brookfield Place, 200 Vesey Street, Ste. 400
New York, New York 10281
(By E-Mail)

Brent Fields, Secretary
Office of the Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-2557
(Original and 3 Copies by Federal Express)

Harlan Protass
Clayman & Rosenberg LLP
305 Madison Avenue, Ste. 1301
New York, New York 10165
Attorneys to Respondents
(By E-Mail)

EXHIBIT 1

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-13787

In the Matter of

DONALD F. ("JAY") LATHEN, JR., EDEN ARC CAPITAL MANAGEMENT, LLC, and EDEN ARC CAPITAL ADVISORS, LLC,

Respondents.

DECLARATION OF ADAM M. RAMOS

I, Adam M. Ramos, pursuant to 28 U.S.C. § 1746, declare as follows:

1. I am a partner in the law firm of Hinckley, Allen, & Snyder, LLP ("Hinckley Allen"). I am a member in good standing of the bars of the State of Rhode Island, the Commonwealth of Massachusetts, the United States District Court for the District of Rhode Island, the United States District Court for the District of Massachusetts, the United States Circuit Court of Appeals for the First Circuit, the United States Circuit Court of Appeals for the Federal Circuit, and the United States Supreme Court. I make this declaration in support of Hinckley Allen's Objection to the Division of Enforcement's Motion to Compel.

2. I have reviewed the documents Hinckley Allen withheld from its original document production and identified on its privilege log in response to the subpoena served by the Division of Enforcement (the "Division").

3. I conducted this review at the direction of William R. Grimm, Esq., a Hinckley Allen attorney representing Hinckley Allen in connection with the subpoena. Mr. Grimm asked

me to perform this review after he had several communications over the telephone and via email with Nancy A. Brown, Esq., counsel for the Division, concerning Hinckley Allen's privilege log. A true and accurate copy of an email chain between Attorney Grimm and Attorney Brown reflecting these discussions is attached to this declaration as Exhibit A.

4. The purpose of my review of the documents withheld from the initial production was to determine whether they contained information regarding the communications with Hinckley Allen's former client, Donald F. "Jay" Lathen, or if they contained only internal thought processes and analysis that was never communicated to Mr. Lathen. I performed this review using the framework established in In re Echostar Communs. Corp., 448 F.3d 1294 (Fed. Cir. 2006).

5. I was further guided in my review by my understanding that Hinckley Allen's representation of Mr. Lathen and his business entities was solely for the purpose of assisting him to minimize litigation risk in the development of his business plan in light of litigation involving other participants in the industry. It was my understanding that everything Hinckley Allen did in connection with its representation of Mr. Lathen and his business entities was with an eye toward litigation because of the complexity and ambiguity of the legal issues associated with the proposed business model. I developed this understanding through discussions with attorneys at Hinckley Allen and review of the Amended Engagement Letter between Mr. Lathen and Hinckley Allen, which described the scope of work Hinckley Allen agreed to perform for Mr. Lathen. A true and accurate copy of the Amended Engage Letter is attached as Exhibit B to the Declaration of Nancy A. Brown.

6. Some of the documents I reviewed were handwritten notes by attorneys at Hinckley Allen. For those documents, I assessed whether the notes reflected communications

with Mr. Lathen (or his business associates), or whether the notes reflected only the internal analysis of legal issues in anticipation of litigation by Hinckley Allen, which was not shared with Mr. Lathen. When necessary and when possible, I consulted with the attorney who prepared the handwritten notes to assist with determining the nature of the handwritten notes.

7. Some of the documents I reviewed were internal communications between and among attorneys and paralegals at Hinckley Allen. For these communications, I assessed whether they discussed communications with Mr. Lathen, or whether they reflected only the internal analysis of legal issues in anticipation of litigation by Hinckley Allen, which was not shared with Mr. Lathen.

8. Some of the documents I reviewed were drafts of documents prepared by Hinckley Allen in the course its representation of Mr. Lathen and his business entities. For these communications, I assessed whether the drafts were shared with Mr. Lathen, and whether the changes made in the drafts that were not shared with Mr. Lathen reflected the internal thought processes of Hinckley Allen attorneys in anticipation of litigation.

9. At the conclusion of my review, I directed a paralegal at Hinckley Allen to prepare a supplemental document production and revised privilege log. For each document I reviewed, I gave her specific instructions as to whether it should be a part of the supplemental production.

10. I directed that any document that Hinckley Allen shared with Mr. Lathen or that included discussion of communications between Hinckley Allen and Mr. Lathen or others associated with his businesses be made part of the supplemental production and removed from the revised privilege log.

11. On January 5, 2017, Hinckley Allen made the supplemental production to the Division and provided the Division with the revised privilege log.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 5, 2017

Providence, Rhode Island

Adam M. Ramos, Esq.

EXHIBIT A

Grimm, William R.

From: Brown, Nancy A <BrownN@SEC.GOV>
Sent: Wednesday, December 28, 2016 3:37 PM
To: Grimm, William R.
Cc: Weinstock, Judith; Berke, Janna; Moilanen, Lindsay S
Subject: RE: Lathen

Thank you Bill. When we spoke last Wednesday, the 21st, we discussed getting back together "next week." You did not advise that you would be unavailable, on vacation or otherwise.
As to the documents I "questioned," please keep in mind that I asked you to consider whether any of the documents on your log were properly withheld given the assertion of advice of counsel. The case you cited to me makes no reference to that context and thus has little relevance to the issue.
If you are unavailable to discuss these matters this week, we will have to proceed, as we discussed last week.

-----Original Message-----
From: Grimm, William R. [mailto:wgrimm@hinckleyallen.com]
Sent: Wednesday, December 28, 2016 3:19 PM
To: Brown, Nancy A
Cc: Weinstock, Judith; Berke, Janna; Moilanen, Lindsay S; Grimm, William R.
Subject: Re: Lathen

I received your voice mail. As you know I am on vacation this week with my daughter and granddaughter. During my absence, one of my partners and a legal assistant are reviewing the documents on our privilege log which you questioned. When I return to the office after the new year, I will review their work and decide on whether any additional documents should be produced. Any attorney's notes which reflect client communications will be produced along with drafts, if any, that do not reflect the significant thought processes and mental impressions of the attorneys related to anticipated litigation. As I told you previously, we are following the second circuit precedent I gave you in making our initial designations and in this supplemental review being conducted at your request. We should be able to make any supplemental production by the end of next week. Have a happy new year.

> On Dec 21, 2016, at 3:40 PM, Brown, Nancy A <BrownN@SEC.GOV> wrote:
>
> Bill,
> I'm available this afternoon before you leave. Please give me a call to discuss the other documents other than the ones I've already identified.
> Thanks.
>
> -----Original Message-----
> From: Grimm, William R. [mailto:wgrimm@hinckleyallen.com]
> Sent: Wednesday, December 21, 2016 3:32 PM
> To: Brown, Nancy A
> Cc: Weinstock, Judith; Berke, Janna; Moilanen, Lindsay S; Grimm, William R.
> Subject: RE: Lathen
>
> Nancy-- As I indicated previously, please send me a list of your privilege log issues and the specific documents you question so that we can have a meaningful meet and confer. I am out of the office starting tomorrow afternoon until the New Year . I will gladly make some time to talk next week while I am on vacation if you tell me what your issues are so that the conversation can be productive. Let me know. Thanks. - Happy Holidays.-- Bill
>

> -----Original Message-----
> From: Brown, Nancy A [mailto:BrownN@SEC.GOV]
> Sent: Friday, December 16, 2016 10:31 PM
> To: Grimm, William R.
> Cc: Weinstock, Judith; Berke, Janna; Moilanen, Lindsay S
> Subject: Re: Lathen
>
> Bill,
> Thanks for your response. We've tried to respond to your request and believe we have responded sufficiently for us to have a dialogue. We will move forward if you cannot speak Monday. If you can speak Sunday, happy to try to find some time.
> Thank you.
>
> Original Message
> From: Grimm, William R.
> Sent: Friday, December 16, 2016 9:44 PM
> To: Brown, Nancy A
> Cc: Grimm, William R.
> Subject: Re: Lathen
>
>
> In order to respond meaningfully to your issues I will need to know more about what they are than these vague references. My schedule on Monday is full. Please get me your detailed concerns in writing and I will consider them. Have a good weekend
>
> On Dec 16, 2016, at 7:38 PM, Brown, Nancy A <BrownN@SEC.GOV<mailto:BrownN@SEC.GOV>> wrote:
>
>
> In addition to the issues I flagged yesterday, my list includes items affected by ms farrell's statements today concerning the scope of the engagement and her lack of precise memory concerning what she and Mr Lathen discussed.
> Given the holidays we will need to schedule the meet and confer for Monday. Please send me some times you're available for a call.
> Thank you.
> From: Grimm, William R.
> Sent: Friday, December 16, 2016 1:34 PM
> To: Brown, Nancy A
> Cc: Grimm, William R.
> Subject: RE: Lathen
>
>
> Send me a list off your issues and we can discuss next week.
>
> From: Brown, Nancy A [mailto:BrownN@SEC.GOV]
> Sent: Friday, December 16, 2016 1:28 PM
> To: Grimm, William R.
> Subject: Lathen
>
> When can you participate in a meet and confer about your privilege log? I'm generally available this afternoon at your convenience.
> Thank you.