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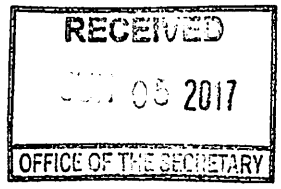

VIA E-MAIL

Honorable Jason S. Patil
Administrative Law Judge
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Re: In the Matter of Donald F. Lathen, Jr., Eden Arc Capital Management, LLC and Eden Arc Capital Advisers, LLC. Admin. Proc. File No. 3-17387

Dear Judge Patil:

This firm represents respondents Donald F. Lathen, Jr., Eden Arc Capital Management, LLC and Eden Arc Capital Advisers, LLC (the "Eden Arc Respondents") in the referenced matter. Pursuant to this Court's Post-Hearing Order, dated February 24, 2017 and the Orders entered thereafter by this Court modifying the schedule set forth therein, we write today to lodge and preserve the Eden Arc Respondents' constitutional objections to the instant SEC Administrative Proceeding.

A.

The Division's Case Against the Eden Arc Respondents

On August 16, 2016 the Division of Enforcement (the "Division") filed the Order Instituting Proceedings (the "OIP") herein against the Eden Arc Respondents. It alleges that the Eden Arc Respondents violated Section 17(a) of the Securities Act of 1933, Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder. It also alleges that Eden Arc Capital Management, LLC violated Section 206(4) of the Investment Advisers Act of 1940 and Rule 206(4)-2 promulgated thereunder (the "Custody Rule") and that Mr. Lathen aided and abetted, or caused, Eden Arc Capital Management, LLC's purported violation of the Custody Rule.

The Division claims in the OIP that it has jurisdiction and authority to initiate and pursue the foregoing alleged violations of the Securities Act of 1933 and the Securities Exchange Act of 1934 pursuant to Section 8A of the Securities Act of 1933 and Section 21C of the Securities Exchange Act of 1934, respectively The Division also claims that it has jurisdiction

and authority to initiate and pursue the foregoing alleged violations of the Investment Advisers Act of 1940 pursuant to Sections 203(e), (f) and (k) of the Investment Advisers Act of 1940 and Section 9(b) of the Investment Company Act of 1940. And, finally, the Division seeks remedies as provided for in the Securities Act of 1933 and the Securities Exchange Act of 1934 against the Eden Arc Respondents including, but not limited to, disgorgement, civil penalties, cease and desist orders and industry bars.

B.

SEC Administrative Proceedings Generally

With passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Congress expanded the Division's authority to impose civil penalties in SEC Administrative Proceedings where such penalties could previously only be sought against non-regulated persons or entities in federal district court. See Pub. L. No. 111–203, § 929P(a), 124 Stat. 1376, 1862–64 (2010); see also Duka v. SEC, No. 15-CV-0357 (RMB), 2015 WL 1943245, at *2 (S.D.N.Y. Apr. 15, 2015); Bebo v. SEC, No. 15-C-3, 2015 WL 905349, at *1 (E.D. Wis. Mar. 3, 2015). The instant matter is but one of a number of cases in which the Division has brought charges within its own in-house administrative court system, rather than in federal district court.

SEC Administrative Proceedings "shall be presided over by the Commission or, if the Commission so orders, by a hearing officer." 17 C.F.R. § 201.110. "Hearing officers" are defined to include Administrative Law Judges. 17 C.F.R. § 201.101(a)(5). Unless the SEC directs otherwise, an Administrative Law Judge "shall prepare an initial decision in any proceeding" over which s/he presides. 17 C.F.R. § 201.360(a)(1). The Commission itself may on its own initiative or on a party's petition review that initial decision. 17 C.F.R. § 201.411(b), (c). If no petition for review is filed and the Commission does not review an initial decision on its own initiative, the Commission "will issue an order that the decision has become final" 17 C.F.R. § 201.360(d)(2).

Congress has established a scheme for judicial review of Commission actions, providing that a "person aggrieved by a final order of the Commission . . . may obtain review of the order in the United States Court of Appeals for the circuit in which he resides or has his principal place of business, or for the District of Columbia Circuit. . . . On the filing of the petition, the court has jurisdiction, which becomes exclusive on the filing of the record, to affirm or modify and enforce or to set aside the order in whole or in part." 15 U.S.C. § 78y(a).

C.

The Appointment Process for
Administrative Law Judges

The means by which Administrative Law Judges are appointed is specified by statute. In particular, appointments are made by agencies based on need. 5 U.S.C. § 3105. By regulation, Administrative Law Judges may be appointed only from a list of eligible candidates

provided by the Office of Personnel Management ("OPM") or with OPM's prior approval. 5 C.F.R. § 930.204. OPM selects eligible candidates based on a competitive exam, which OPM develops and administers. All Administrative Law Judges receive career appointments and are exempt from probationary periods applicable to certain other government employees. 5 C.F.R. § 930.204(a). In other words, Administrative Law Judges do not serve time-limited terms.

D.

The Adjudicative Powers of
SEC Administrative Law Judges

The Administrative Procedure Act (the "APA"), 5 U.S.C. § 500 et seq., establishes the powers of Administrative Law Judges with respect to adjudication. 5 U.S.C. §§ 556, 557. The federal securities laws, in turn, empower the SEC to delegate certain functions to SEC Administrative Law Judges. 15 U.S.C. §78d-1. And SEC regulations establish the "Office of Administrative Law Judges" and outlines their authority. See, e.g., 17 C.F.R. § 200.14; 17 C.F.R. § 200.30-9; 17 C.F.R. § 201.111. Those regulations provide that SEC Administrative Law Judges' authority with respect to adjudications is to be as broad as the APA allows. 17 C.F.R. § 201.111 ("No provision of these Rules of Practice shall be construed to limit the powers of the hearing officer provided by the Administrative Procedure Act, 5 U.S.C. 556, 557").

E.

This Court Should Dismiss the Order Instituting
Proceedings Against the Eden Arc Respondents Because
SEC Administrative Proceedings Are Unconstitutional

SEC Administrative Proceedings are unconstitutional for a number of reasons. This Court therefore should dismiss the Order Instituting Proceedings against the Eden Arc Respondents.

First, the appointment process for SEC Administrative Law Judges violates the Appointments Clause of Article II of the U.S. Constitution. In particular, in Free Enterprise Fund v. Public Company Accounting Oversight Board, 130 S. Ct. 3138 (2010), the U.S. Supreme Court found that, for purposes of the Appointments Clause (Article II, Section 2, Clause 2 of the U.S. Constitution), the SEC is a "Department" of the United States and that the SEC's Commissioners collectively function as the "Head" of the Department with authority to appoint such "inferior Officers" as Congress authorizes through legislation. The Commission, however, does not appoint SEC Administrative Law Judges. Rather, SEC Administrative Law Judges are hired by the SEC's Office of Administrative Law Judges, with input from the Chief Administrative Law Judge, human resource functions and the OPM. Indeed, in some cases, ALJs have been simply transferred to the SEC from other federal agencies. Simply put, SEC Commissioners are not involved in the appointment of SEC Administrative Law Judges.

The appointment process for SEC Administrative Law Judges therefore violates the Appointments Clause of Article II of the U.S. Constitution. See Bandier v. SEC, 844 F.3d 1168 (10th Cir. 2016). Without the scrutiny and approval inherent in collective appointment by the SEC's Commissioners, Administrative Law Judges lack the imprimatur of the Department Head necessary to carry out such a sensitive and powerful role. Indeed, it is one thing for SEC Commissioners – appointed by the President and confirmed by the U.S. Senate – to use their collective judgment to appoint individuals who preside over important administrative proceedings. It is quite another thing, and constitutionally infirm, to fill that crucial presiding role through bureaucratic means far removed from our elected President and legislative representatives.

Second, the removal scheme for SEC Administrative Law Judges violates the vesting of executive power in the President provisions of Article II of the U.S. Constitution. Administrative Law Judges may not be protected by more than one layer of tenure. In particular, Article II of the U.S. Constitution vests "[t]he executive Power ... in a President of the United States of America," who must "take Care that the Laws be faithfully executed." U.S. Const, art. II, § 1, cl. 1; id., § 3. Given "[t]he impossibility that one man should be able to perform all the great business of the State," the Constitution provides for executive officers to "assist the supreme Magistrate in discharging the duties of his trust." 30 Writings of George Washington 334 (J. Fitzpatrick ed. 1939); see also Free Enterprise, 561 U.S. 477, 130 S. Ct. at 3146.

The vesting authority of Article II requires that the principal and inferior officers of the Executive Branch be answerable to the President and not be separated from the President by attenuated chains of accountability. As the Supreme Court held in Free Enterprise, Article II of the U.S. Constitution requires that executive officers, who exercise significant executive power, not be protected from being removed by their superiors at will, when those superiors are themselves protected from being removed by the President at will.

The removal scheme for SEC Administrative Law Judges is contrary to this constitutional requirement because it involves two or more layers of protection. SEC Administrative Law Judges can "only" be removed from their position for "good cause," which must be "established and determined" by the Merit Systems Protection Board (the "MSPB"). 5 U.S.C. § 7521(a). This removal procedure involves three levels of tenure protection. First, SEC Administrative Law Judges are protected by statute from removal absent "good cause." 5 U.S.C. § 7521(a). Second, the SEC's Commissioners, who exercise the power of removal, are themselves protected by tenure. They may not be removed by the President from their position except for "inefficiency, neglect of duty, or malfeasance in office." 5 U.S.C. § 1202(d). See, e.g., Free Enterprise, 130 S. Ct. at 3148; MFS Sec. Corp. v. SEC, 380 F.3d 611, 619-20 (2d Cir. 2004). Third, members of the MSPB, who determine whether "good cause" exists to remove an SEC Administrative Law Judge, are also protected by tenure and are removable by the President "only for inefficiency, neglect of duty, or malfeasance in office." 5 U.S.C. § 1202(d).

Under this attenuated removal scheme, "the President cannot remove an officer who enjoys more than one level of good-cause protection, even if the President determines that the officer is neglecting his duties or discharging them improperly. That judgment is instead committed to another officer, who may or may not agree with the President's determination,

and whom the President cannot remove simply because that officer disagrees with him. This contravenes the President's 'constitutional obligation' to ensure the faithful execution of the laws.'" Free Enterprise, 130 S. Ct. at 3147 (quoting Morrison v. Olson, 487 U.S. 654, 693 (1988)). Simply put, because the President cannot oversee SEC Administrative Law Judges in accordance with Article II of the U.S. Constitution, SEC Administrative Proceedings violate the U.S. Constitution.

Third, the Division's decision to bring its case against the Eden Arc Respondents in its in-house administrative court system, rather than in federal district court, deprived the Eden Arc Respondents of their rights to due process under the U.S. Constitution. Among other things, the SEC's in-house administrative court system does not constitute an impartial forum for the adjudication of the issues raised by the Division in the OIP. More particularly, an SEC Administrative Proceeding lacks the due process rights afforded to defendants in federal court in that it is an internal SEC hearing, litigated by SEC trial attorneys and governed by the SEC's Rules of Practice in which an SEC Administrative Law Judge serves as finder of fact and of law. Moreover, unlike in federal court, there is no right to a jury trial and neither the Federal Rules of Civil Procedure nor the Federal Rules of Evidence apply. Indeed, the SEC's Rules of Practice don't allow for counterclaims or motions to dismiss, discovery is limited, and depositions are generally not permitted. Appeals from decisions issued by SEC Administrative Law Judges go to the Commission itself, which has the discretion to deny them. And, although decisions affirming rulings issued by SEC Administrative Law Judges can eventually be appealed to a federal court, irreparable harm to Mr. Lathen's livelihood, business and reputation was caused by the years-long delay and considerable expense of the Division's investigation and SEC Administrative Proceeding process. Proceeding against the Eden Arc Respondents in the SEC in-house administrative court system, rather than in federal district court, therefore deny the Eden Arc Respondents of their right to due process under the U.S. Constitution.

Fourth, the Division's decision to bring its case against the Eden Arc Respondents in its in-house administrative court system, rather than in federal district court, deprived the Eden Arc Respondents of their rights to equal protection under the U.S. Constitution. In particular, the Division's decision to bring its charges against the Eden Arc Respondents in its in-house administrative court system, while at the same time bringing charges against other individuals and entities in federal district court, deprived the Eden Arc Respondents of the opportunity to contest the charges in the OIP in federal district court, thereby singling them out for uniquely unfavorable treatment in violation of their rights to equal protection under the U.S. Constitution.

Fifth, in selecting its in-house administrative court system over federal district court, the Division ignored, to the Eden Arc Respondents' detriment, its own internal provisions concerning forum selection, in violation of the Eden Arc Respondents' rights to due process and equal protection under the U.S. Constitution.[1] There are at least two factors that should have militated against the Division's selection of its in-house venue. First, the instant matter depends heavily on New York joint tenancy law. When state law is implicated, the Division's forum selection guidance suggests that federal court is the appropriate venue. Notably, the Division

[1] See https://www.sec.gov/divisions/enforce/enforcement-approach-forum-selection-contested-actions.pdf.

appeared to follow its own internal guidance in its forum selection for the Staples case, which it brought in federal district court in South Carolina in 2013. Following court-ordered mediation, the Staples case was settled (in the Staples' favor) eleven days before the OIP in the instant case was filed. In particular, all scienter-based charges against the Staples were dismissed with prejudice and the agreed disgorgement figure represented less than 1% of the Staples' alleged ill-gotten gain.[2] Second, the Division's forum selection guidance advises to select the venue which provides the greatest efficiency. Here, federal court likely would have yielded greater efficiency because the main dispute – whether Mr. Lathen's statements in his redemption letters were false and/or misleading – could have been decided on summary judgment. Considering the unfavorable outcome for the Division in the Staples case and the Division's decision to ignore its own forum selection guidance, the Eden Arc Respondents believe that the Division's venue selection herein was biased, inappropriate and prejudicial, and violated the Eden Arc Respondents' rights to due process and equal protection under the U.S. Constitution.

Finally, and somewhat ironically, the Division's venue selection seems destined to prolong, rather than shorten, the ultimate disposition of the instant matter for the Eden Arc Respondents. While the Division appears to rarely, if ever, challenge adverse trial outcomes in federal district court, it routinely challenges adverse decisions of its own Administrative Law Judges. Thus, even if this Court finds in favor of the Eden Arc Respondents, it is highly likely that the Division will appeal such decision to the Commission. And, if so, the date upon which the Eden Arc Respondents can expect a final disposition – an important element of due process – would move beyond, and possibly far beyond, what the Eden Arc Respondents could have expected if the Division had instead brought an enforcement action in federal district court.[3]

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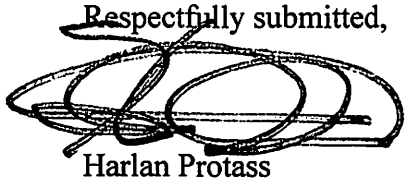
[2] See https://www.sec.gov/litigation/litreleases/2016/lr23617.htm.

[3] The Flannery case perfectly illustrates the fundamental unfairness of the SEC's in-house adjudication process. The initial decision in Flannery by Chief Administrative Law Judge Murray, which exonerated two bank executives – James Flannery and James D. Hopkins – was initially lauded as proof of the fairness of SEC administrative proceedings. The Division, though, appealed that initial decision to the Commission, which reversed Chief Administrative Law Judge Murray – an appeal that took the Commission more than three years to decide. Ultimately, the U.S. Court of Appeals for the First Circuit reversed the Commission, reinstated Chief Administrative Law Judge Murray's decision and, again, exonerated Messrs. Flannery and Hopkins – a proceeding that added another year to the adjudicative process. All in all, Messrs. Flannery and Hopkins had to wait a total of five years from the date of the initial OIP to clear their names, all because the Division proceeded by administrative proceeding rather than an enforcement action in federal district court. During that prolonged period, neither Mr. Flannery nor Mr. Hopkins could find employment in the financial industry. See http://www.sglawyers.com/sec-loses-controversial-flannery-appeal/.

Conclusion

Accordingly and for all of the foregoing reasons, the Eden Arc Respondents respectfully submit that SEC Administrative Proceedings are unconstitutional and that this Court should dismiss the OIP in its entirety because of such unconstitutionality.

Respectfully submitted,



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