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.

APPLICATION OF EDEN ARC CAPITAL ADVISORS, LLC AND EDEN ARC CAPITAL MANAGEMENT, LLC FOR RECOVERY OF LEGAL FEES AND EXPENSES PURSUANT TO THE EQUAL ACCESS TO JUSTICE ACT

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Counsel for Respondents Donald F. Lathen, Jr., Eden Arc Capital Management, LLC and Eden Arc Capital Advisors, LLC

Petitioners Eden Arc Capital Advisors, LLC ("EACA") and Eden Arc Capital Management, LLC ("EACM"), by and through their undersigned counsel, respectfully submit this application for the recovery of legal fees and expenses incurred in connection with the referenced matter pursuant to the provisions of the Equal Access to Justice Act, 5 U.S.C. § 504, et seq. (the "EAJA").

PRELIMINARY STATEMENT

On or about August 15, 2016 the Division of Enforcement of the U.S. Securities and Exchange Commission (the "Division") initiated an administrative proceeding against EACA, EACM and Donald F. "Jay" Lathen. A three week administrative hearing ensued in February 2017 and on August 16, 2017 this Court issued its Initial Decision dismissing all charges against EACA, EACM and Mr. Lathen.[1] The Division did not appeal the Initial Decision. Thus, on November 2, 2017 the Commission issued a Notice reporting and advising that the Initial Decision had become final.

Pursuant to the SEC's Rules of Practice, the Initial Decision is now final and non-appealable. EACA and EACM (and Mr. Lathen) therefore are prevailing parties in the referenced matter. As detailed below, the Division's position herein was not substantially justified and the request herein for legal fees and expenses is wholly reasonable.

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[1] Pursuant to a motion filed by the Division to correct manifest errors in this Court's Initial Decision, on September 15, 2017 this Court entered an Order modifying certain aspects of its Initial Decision. That Order, however, did not impact upon the ultimate outcome – that is, dismissal of all charges against EACA, EACM and Mr. Lathen.

ARGUMENT

I.

The EACA/EACM Fee Request Is Timely

Pursuant to the provisions of the EAJA, an application for recovery of legal fees and expenses must be filed within thirty (30) days of the Commission's final and non-appealable disposition of the referenced matter, which, as detailed above, took place on November 2, 2017. The instant application for recovery of legal fees and expenses therefore is timely pursuant to the relevant provisions of the EAJA.

II.

EACA and EACM Are "Eligible Parties"

EACM is a limited liability company registered in Delaware. It has one employee (Mr. Lathen). EACM is wholly-owned by Mr. Lathen. On February 12, 2017 (during the course of the administrative proceeding herein), EACM had a net worth of less than $7 million.

EACA is a limited liability company registered in Delaware. It has one employee (Mr. Lathen). EACA is the general partner of Eden Arc Capital Partners, LP (the "Fund"). EACA is wholly-owned by Mr. Lathen. On February 12, 2017 (during the course of the administrative proceeding herein), EACM had a net worth of less than $7 million.

The Fund is a Delaware private investment partnership. The Fund is owned by EACA (its general partner) and eighteen limited partners. On the date upon which the administrative proceeding herein was initiated, the Fund had a net worth of approximately $6.2 million.

EACA and EACM submitted SEC Forms D-As with the Court at the hearing herein, which forms substantiate their net worth as detailed above.[2] Both EACA and EACM therefore are "eligible parties" pursuant to the relevant provisions of the EAJA.

III.

EACA and EACM Are "Prevailing Parties"

The Order Instituting Proceedings herein (the "OIP") alleged that EACA and EACM 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 and Section 206(4) of the Investment Advisers Act of 1940 and Rule 206(4)-2 promulgated thereunder. The Initial Decision, which became final on November 2, 2017, dismissed all such charges. There can therefore be no doubt but that EACA and EACM are "prevailing parties" pursuant to the relevant provisions of the EAJA.

IV.

EACA and EACM Incurred Legal Fees and Expenses in Connection With Defending Against the Charges in the Order Instituting Proceedings

Pursuant to an indemnification clause contained within its Limited Partnership Agreement, the Fund advanced all of the legal fees and expenses that EACA and EACM (and Mr. Lathen) incurred in defending against the charges in the OIP. Thus, the legal fees and expenses that EACA and EACM incurred in defending against the charges in the OIP were paid from the Fund's bank and securities accounts. EACA and EACM are contractually obligated to repay the Fund from any recovery awarded under this application.

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[2] Although submitted at trial as exhibits, we do not believe that the Court assigned exhibit numbers to the Form D-As submitted by EACA and EACM. If requested, EACA and EACM would be pleased to submit their Form D-As under seal.

Both EACA and EACM "incurred" legal fees and expenses pursuant to the relevant provisions of the EAJA. Initially, the EAJA contains no requirement that a prevailing party directly pay the legal fees for them to be "incurred" by it. Indeed, as demonstrated by cases in which EAJA fees were awarded to a prevailing party who was represented by *pro bono* counsel, the prevailing party need not even be obligated to have any legal fees for such fees to be "incurred" under the EAJA. See Watford v. Heckler, 765 F.2d 1562, 1567 n.6 (11th Cir. 1985) ("It is well-settled that, in light of the act's legislative history and for reasons of public policy, plaintiffs who are represented without charge are not generally precluded from an award of attorneys' fees under the EAJA"). The caselaw provides ample support for the recovery of legal fees and expenses where, as here, the prevailing party's costs were paid by a third-party. See Morrison v. C.I.R., 565 F.3d 658, 662 (9th Cir. 2009) (prevailing party "incurred" legal fees under comparable IRS fee-shifting statute where such fees were paid by his employer to whom he had assigned any recovery); Ed A. Wilson, Inc v. GSA, 126 F.3d 1406, 1408-10 (Fed. Cir. 1997) (prevailing party "incurred" legal fees under EAJA where such fees had been paid by its insurer). As the Honorable Richard A. Posner put it, "nothing in the Equal Access to Justice Act suggests that Congress intended to deprive a prevailing plaintiff of the ability to obtain a recovery under the EAJA simply because it entered into a contractual agreement with a third party to pay its legal fees." United States v. Thouvenot, Wade & Moerschen, Inc., 596 F.3d 378, 383 (7th Cir. 2010).

Some courts have reasoned that Congressional intent in enacting the EAJA's "incurrence requirement" was to prevent claimants under the EAJA from reaping a "windfall" by recovering legal fees and/or expenses that they never actually paid. Here, no such windfall will occur because any amounts that EACA or EACM recover will be remitted directly to the Fund

pursuant to the aforementioned indemnification clause in the Fund's Limited Partnership Agreement.

The bottom line is that the Fund's limited partners – actual individuals who collectively financed the defenses of EACA and EACM against the Division's claims in the OIP pursuant the Fund's Limited Partnership Agreement – have been damaged by the Division's wrongful decision to file the meritless claims in the OIP.[3] Now that those charges have been dismissed in their entirety, the Fund's limited partners should be able to recover the legal fees and expenses that EACA and EACM incurred and that they financed.

V.

EACA and EACM Are Entitled to Recover Legal Fees and Expenses Incurred From the Date Upon Which the Division Initiated Its Investigation

The EAJA is codified in scattered sections of the U.S. Code. 5 U.S.C. § 504(b)(1)(C) defines an "adversary adjudication" as an "adjudication under section 54 of this title in which the United States is represented by counsel or otherwise." 5 U.S.C. § 554(a)(1), in turn, details adjudications required by statute to be determined on the record after opportunity for an agency hearing. They are defined by 5 U.S.C. § 551(7) as the "agency process for the formulation of an order" and 5 U.S.C. § 551(6) defines an "order" the "whole or part of a final disposition."

Legal fees and costs incurred after the OIP herein was filed are clearly part of an "adversary adjudication." Based on a plain reading of the EAJA, though, we respectfully submit that the Division's investigation of EACA and EACM preceding the filing of the OIP also

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[3] It also bears noting that the Fund (as detailed above), had it been a named party in the referenced matter, would also have qualified as an "eligible party" pursuant to the provisions of the EAJA because it had a net worth under $7 million when the Division filed the OIP.

constitute part and parcel of that same "adversary adjudication" for which recovery of legal fees and expenses is authorized. Among other things, the Division's investigation led directly to the filing of the OIP. Indeed, no OIP would have been filed but for the Division's investigation. Moreover, the Division attorneys who handled the investigation of EACA and EACM were virtually identical to the Division attorneys who tried the administrative proceeding. And, from the very early stages of the Division's investigation through the date on which the OIP was filed, counsel for EACA and EACM engaged in ongoing, detailed exchanges with Division counsel concerning the legal and factual bases for the Division's contemplated case (including the submission of multiple "white papers," a Wells Submission and two supplemental Wells Submissions) – adversarial exchanges concerning the very subjects at issue in the OIP. Simply put, the Division's investigation, Wells Process and the follow-on administrative hearing were essential and inseparable components for the "final disposition" of the case and together constituted an "agency process for the formulation of an order." See In the Matter of Rita Villa, SEC Initial Decision Release No. 132, Admin, Proc. File No. 3-8527-EAJ.

VI.

All of the Legal Fees and Expenses Claimed by EACA and EACM Are Reasonable and Well-Documented

The Division commenced its investigation in February 2015 (through the issuance of subpoenas) and the referenced matter was concluded on November 2, 2017 (when the Commission issued its notice that the Initial Decision is now final). Given the complexity and number of legal issues as well as the volume of information at issue herein, the number of hours that counsel for EACA/EACM spent in representing EACA/EACM was wholly fair, reasonable and justifiable.

Moreover, many such legal fees and expenses were driven by actions taken by the Division itself. For example and with respect to its investigation, the Division required the hard-copy production of virtually every sheet of paper in the offices of EACA/EACM (even though they represented to the Division that more than 90% of such documents had already been produced electronically), required the electronic production of virtually every e-mail sent or received by Mr. Lathen and his assistant (Michael Robinson) and took Mr. Lathen's investigative testimony over four days. Likewise, with respect to the administrative proceeding itself, the Division engaged in excessive and repetitive motion practice, issued subpoenas to scores of third parties and submitted more than 1,000 individual proposed findings of fact. Also, counsel for EACA/EACM were required to prepare for and participate in a three-week hearing, the length and scope of which were largely outside their control.

In total, counsel for EACA and EACM spent 4,695.2 hours in representing EACA and EACP from the commencement of the investigation that resulted in the referenced matter (February 2015) through the date upon which the Initial Decision herein became final pursuant to Commission action (November 2, 2017). In addition, EACA and EACM incurred expenses of $114,567.83 in doing so. The rates charged by counsel for EACA/EACM ranged from $400/hour to $960/hour, which we respectfully submit are fair rates based on the market for government/regulatory counsel in New York, NY.

Respondents are aware that the SEC's own EAJA regulations (contained in Subpart B of the SEC's Rules of Practice) impose a cap on fees at $75/hour. The SEC's regulations, however, are contrary to the actual text of the EAJA, which requires that expenses be paid at the prevailing market rates, but not to exceed $125 per hour. See 5 U.S.C. § 504 (B)(1)(A). Courts, however, have routinely awarded general CPI-based cost-of-living increases

to that hourly rate to account generally for inflation, including in the Rita Villa matter. Indexing the 1981 rate of $75 to 2015-2017 yields hourly rates of $203.83 for 2015, $206.43 for 2016 and $210.40 for 2017. Applying these hourly rates to the time expended in the relevant years herein results in a total of $1,010,398.49 in legal fees. See Exhibit 1-6.[4] Combined with the aforementioned expenses yields a total reimbursement request of $1,124,966.32.[5]

VII.

No Special Circumstances Warrant Denial of
Recovery of Legal Fees and Expenses

While it is the Division's burden to demonstrate the existence of any special circumstances that might warrant denial of recovery of legal fees and expenses, we respectfully submit that we are not aware of any such circumstances.

VIII.

The Division's Position Was Not Substantially Justified

The Division must establish that its position was "reasonable . . . in both law and fact" to establish that its position in the referenced matter was substantially justified, which burden must be "justified to a degree that could satisfy a reasonable person." Pierce v. Underwood, 487 U.S. 552, 565 (1988). Moreover, the Division must establish that its position

[4] In 1998 the EAJA statutory rate of $75/hour was increased to $125/hour. The SEC, however, never updated its own internal regulations to reflect the new statutory rate. Thus, the SEC's internal regulations has stood in conflict with the EAJA for close to twenty years. EACA and EACM calculated CPI adjustments based on the 1981 $75/hour rate still residing in the SEC's internal regulations. An alternative calculation based on CPI-adjusting the 1998 rate of $125/hour would yield slightly lower figures.

[5] The foregoing amounts above do not include legal fees and expenses incurred by EACA and EACM in connection with the instant EAJA application or any follow-on legal services/expenses (fees-on-fees). It bears noting, though, that such legal fees and expenses are also recoverable pursuant to the relevant provisions of the EAJA. EACA and EACM will submit additional documentation supporting such additional legal fees and expenses at the conclusion of this EAJA proceeding.

was reasonable "as a whole." As the U.S Court of Appeals for the Third Circuit held in Hanover Potato Prods., Inc. v. Shalala, 989 F.2d 123, 131 (3d Cir. 1993) the court "must evaluate every significant argument made by [the government]" to determine if the argument is substantially justified, and then conclude "whether, as a whole, the Government's position was substantially justified."

EACA and EACM look forward to addressing the Division's "substantial justification" arguments once they have been made. At the outset, though, we note that the Division's sweeping defeat (through dismissal of all charges against EACA, EACM and Mr. Lathen) suggests that the Division's position – as a whole, at the outset of its investigation and through litigation of the administrative proceeding – was substantially unjustified and unjustifiable. For example, EACA and EACM (and Mr. Lathen) forcefully and repeatedly tried to persuade the Division to abandon its case because Mr. Lathen completely lacked the requisite level of scienter necessary to sustain the claims in the OIP in light of the extensive evidence showing that he relied on the advice of attorneys at every stage of the activities that formed the basis for the charges. In evaluating that position, the Division had an unusually broad range of information at its disposal upon which it could evaluate Mr. Lathen's good faith, including four days of Mr. Lathen's testimony, access to communications between Mr. Lathen and his attorneys and actual interviews with the attorneys upon whom Mr. Lathen relied.

Any fair-minded evaluation of such overwhelming evidence of good faith should have caused the Division to stand down. Instead, the Division sought, through repeated and borderline abusive motion practice, to prevent Mr. Lathen from presenting this evidence to the Court. When that effort failed, the Division unjustifiably advanced an illogical narrative that Mr. Lathen merely maintained an outward veneer of transparency, legitimacy and legality with third

parties while secretly knowing that his investment strategy was unlawful, despite the fact that not one of his attorneys ever advised him of such. This Court wisely rejected that theory, finding instead that Mr. Lathen lacked the requisite level of scienter necessary to establish the claims alleged in the OIP. And, since scienter was a threshold argument for the Division to prevail on its fraud charges, its unjustified position on scienter means its "position as a whole" could not have been substantially justified.

Likewise, the Division's entire theory of fraud was flawed and hopelessly unjustified. We respectfully submit that the Division was willfully blind to evidence that the vast majority of survivor's option bond and CD issuers viewed Mr. Lathen's investment strategy as a legitimate and legal exploitation of a contractual loophole. Such evidence included early press reports in the Wall Street Journal concerning Mr. Lathen's investment strategy, an FBI analysis of that investment strategy, declarations by issuers and trustees in a similar case and Mr. Lathen's own successful dealings with issuers who had seen the contracts underlying his investment strategy.

While the Division unreasonably attempted to elevate isolated contractual disputes into a scheme to defraud, we respectfully submit that any fair-minded, reasonable person would have viewed the facts at issue herein in a far less nefarious light – to wit: Many large and sophisticated financial institutions were sloppy in drafting their contracts. They are aware of their own sloppiness. A savvy investor has been taking advantage of the situation. The issuers are aware of that savvy investor and others like him. Nearly all of the issuers are paying.

Some issuers are fixing their problems. Others are not. Some are refusing to pay and that has led to contractual disputes. But none of these things has anything to do with securities fraud.[6]

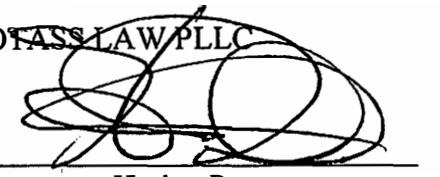
CONCLUSION

Accordingly and for all of the foregoing reasons, Eden Arc Capital Management, LLC and Eden Arc Capital Advisors, LLC respectfully request that this Court enter an Order: (1) directing the Division to pay $1,124,966.32 for the legal fees and expenses they have incurred to date as detailed herein; and (2) awarding them the legal fees and expenses that they have and will be incurring in connection with this EAJA proceeding.

Dated: New York, NY
December 4, 2017

Respectfully submitted,

PROTASS LAW PLLC

By: 

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[6] The Division's position with respect to its alleged "Custody Rule" violation was similarly lacking in substantial justification. As this Court noted, Mr. Lathen's contracts established that the Fund did not own funds or securities subject to the Custody Rule. The Division's entire Custody Rule theory hinged on disregarding binding written contracts. It is hard to imagine a less substantially justified position.

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that on December 4, 2017 I caused a true and correct copy of the foregoing APPLICATION OF EDEN ARC CAPITAL ADVISORS, LLC AND EDEN ARC CAPITAL MANAGEMENT, LLC FOR RECOVERY OF LEGAL FEES AND EXPENSES PURSUANT TO THE EQUAL ACCESS TO JUSTICE ACT, dated December 4, 2017, to be served upon the parties listed below via e-mail and/or Federal Express Overnight Service:

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

Brent Fields, Secretary
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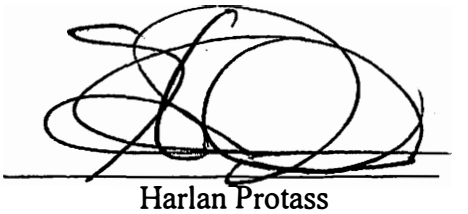

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December 4, 2017

VIA FEDERAL EXPRESS

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 Advisors, LLC, Admin. Proc. File No. 3-17387

Dear Judge Patil:

This firm represents the Eden Arc Respondents in connection with the referenced matter. Enclosed please find a copy of the Application of Eden Arc Capital Advisors, LLC and Eden Arc Capital Management, LLC for Recovery of Legal Fees and Expenses Pursuant to the Equal Access to Justice Act, dated December 4, 2017.

Thank you for your consideration and attention to this matter.

Respectfully submitted,

Harlan Protass

Encls.

cc: Brent Fields, Secretary (via Federal Express)
Robert Stebbins, Esq., General Counsel (via Federal Express)
Judith Weinstock, Esq. (via e-mail and Federal Express)
Sarah H. Concannon, Esq. (via e-mail and Federal Express)