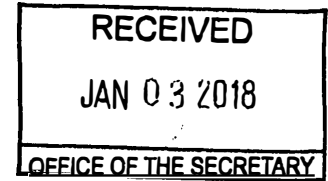


UNITED STATES OF AMERICA  
Before the  
U.S. SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING  
File No. 3-17387



In the Matter of

DONALD F. LATHEN, JR.,  
EDEN ARC CAPITAL MANAGEMENT, LLC,  
EDEN ARC CAPITAL ADVISERS, LLC.

SUPPLEMENTAL MEMORANDUM OF LAW RELATED TO THE EAJA  
APPLICATIONS OF EDEN ARC CAPITAL MANAGEMENT, LLC AND EDEN ARC  
CAPITAL ADVISERS, LLC AND MOTION TO SEAL FINANCIAL DISCLOSURES

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Jr., Eden Arc Capital Management, LLC  
and Eden Arc Capital Advisors, LLC*

Applicants Eden Arc Capital Management, LLC (“EACM”) and Eden Arc Capital Advisors, LLC (“EACA”), by and through their undersigned counsel, respectfully submit this supplemental memorandum of law in response to the Court’s “Order On Equal Access to Justice Act Proceedings.” dated December 18, 2017 (the “December 18 Order”). This memorandum of law supplements the initial EAJA applications of EACM and EACA dated December 4, 2017 and as supplemented thereafter.

#### THE DECEMBER 18 ORDER

The December 18 Order directed EACM and EACA to: (1) submit executed Forms D-A for both EACM and EACA; (2) submit evidence supportive of the assertions made in such Forms D-A organized in a manner that allows the reader to easily identify which evidence supports which assertion; and (3) consider the requirement that they file a “detailed exhibit showing the net worth of the applicant *and any affiliates.*” As to the third point, EACM and EACA were asked to address the question of whether Mr. Lathen, Eden Arc Capital Partners, LP (the “Fund”) and/or any other person or entity are affiliates for purposes of the EAJA applications of EACM and EACA.

The December 18 Order also directed EACM and EACA to specify the basis for their objection to public disclosures of the net worth exhibits in connection with the instant EAJA proceeding and detail whether it is possible to file public redacted versions of their financial disclosures along with sealed versions.

#### SIGNED FORMS D-A AND SUPPORTING EVIDENCE

Attached as Exhibits 1 and 2 are executed Forms D-A for EACM and EACA, respectively. As detailed in Mr. Lathen’s December 15, 2017 affirmation, these Forms D-A were dated as of February 12, 2017 (during the course of the administrative hearing herein). Mr.

Lathen stated in that affirmation that the net worth of each of EACM and EACA on the date upon which the Order Instituting Proceedings herein (the "OIP") was filed (August 15, 2016) was substantially the same as the net worth of each of EACM and EACA on the date upon which those Forms D-A were dated and submitted to this Court. Attached hereto as Exhibits 3 and 4 are back-up information supporting the net worth figures contained in the Forms D-A of EACM and EACA, respectively, as well as additional documentation contemporaneous with the OIP that substantiates Mr. Lathen's representations in his December 15, 2017 affirmation.

#### AFFILIATES OF THE APPLICANTS

The net worth requirements of 5 U.S.C. § 504(b)(1)(B), upon which the SEC's EAJA regulations derive their authority, look only to the net worth of an applicant alone, not to the net worth of an applicant and its "affiliates." In particular, 5 U.S.C. § 504(b)(1)(B) provides as follows:

(B) "party" means a party, as defined in section 551(3) of this title, who is (i) an individual whose net worth did not exceed \$2,000,000 at the time the adversary adjudication was initiated, or (ii) any owner of an unincorporated business, or any partnership, corporation, association, unit of local government, or organization, the net worth of which did not exceed \$7,000,000 at the time the adversary adjudication was initiated, and which had not more than 500 employees at the time the adversary adjudication was initiated; except that an organization described in section 501(c)(3) of the Internal Revenue Code of 1986 (26 U.S.C. 501(c)(3)) exempt from taxation under section 501(a) of such Code, or a cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)), may be a party regardless of the net worth of such organization or cooperative association or for purposes of subsection (a)(4), a small entity as defined in section 601.

By contrast, the SEC's EAJA regulation (17 C.F.R. § 201.34(f)) instructs as follows:

The net worth and number of employees of the applicant and all of its affiliates shall be aggregated to determine eligibility. Any individual, corporation or other entity that directly or indirectly controls or owns a majority of the voting shares or other interest of the applicant, or any corporation or entity of which the applicant directly or indirectly owns or controls a majority of the voting shares or other interest, will be considered an affiliate for purposes of this subpart, unless the administrative law judge determines that such treatment would be unjust and contrary to the purposes of the Act in light of the actual relationship between the affiliated entities.

Notwithstanding the conflict between the text of the EAJA and the SEC's EAJA regulations, EACM and EACA hereby respond to this Court's request for information about their "affiliates" as follows:

With respect to EACM, Lathen is the sole member and control person. Lathen therefore is an affiliate of EACM under a plain reading of 17 C.F.R. § 201.34(f). The Fund is not an affiliate of EACM. Rather, EACM acts as an Investment Manager to the Fund and is entitled to receive management fees from the Fund's limited partners. EACM, however, does not own an interest in, nor does it control, the Fund.

With respect to EACA, Lathen is the sole member and control person. Lathen therefore is an "affiliate" of EACA under a plain reading of 17 C.F.R. § 201.34(f). The Fund is not an affiliate of EACA under any fair reading of 17 C.F.R. § 201.34(f). Although EACA is the general partner of the Fund and has full authority and control over its operations, its economic stake in the Fund is small. (See EACA's Form D-A.) Substantially all of the Fund's capital is owned by its limited partners, all of whom are unaffiliated with EACM, EACA or Mr. Lathen. The "affiliates" definition in 17 C.F.R. § 201.34(f), though inconsistent with the enabling statute, expands the "net worth" of any EAJA applicant to include assets of related entities, presumably

under the theory that this provides a better picture of the applicant's financial resources. In some circumstances, this might be consistent with the intent of the EAJA. For instance, a subsidiary of Exxon might not be the type of small business entity that Congress intended to protect under the EAJA, even if it has few assets on its books. This rationale breaks down, however, where an EAJA applicant controls assets as a fiduciary – such as a trustee who controls the assets of a trust, or general partner who controls the assets of a limited partnership. In such a situation, looking at the assets “controlled” by the applicant in its fiduciary capacity does not present a fair picture of the applicant's actual net worth. Thus, while EACA controls the Fund's assets, only a tiny portion of the Fund's net worth “belongs” to EACA. It would be “unjust and contrary to the purpose of the” EAJA to include the entirety of the Fund's net worth in calculating EACA's net worth.

Exhibit 5 contains a net worth summary for EACM and EACA on both a standalone basis and a basis including affiliates. It also includes net worth information on the Fund and Mr. Lathen to assist the Court in determining the EAJA eligibility of EACM and EACA if the Court makes alternative conclusions regarding affiliation. As detailed in Exhibit 5, each of EACM and EACA has a net worth of less than \$7 million including affiliates.

Exhibit 6 contains balance sheets for the Fund dated June 30, 2016 and September 30, 2016, which substantiate its net worth at the time of the OIP. The Fund, though not a party to the underlying administrative proceeding, nonetheless had a net worth of less than \$7 million at the time of the OIP.

Finally, accompanying this submission is an affirmation dated December 22, 2017 from Mr. Lathen related to his personal net worth along with supporting documentation relating to same.

MOTION FOR PROTECTIVE ORDER ON NET WORTH DISCLOSURES

EACA and EACM respectfully request that all the net worth exhibits attached herein and those attached to Mr. Lathen's December 15, 2017 and December 22, 2017 Affirmations be protected under seal. EACM, EACA and Mr. Lathen are entitled to privacy in their financial affairs, including the right to keep the precise size and details of their net worth outside of the public domain. Public disclosure of this information would cause harm to EACM, EACA and, in particular, Mr. Lathen, without providing any particular public benefit. As the Court may recall, it granted a protective order for the Forms D-A and supporting materials during the administrative proceeding itself. The arguments for protection now are equally strong. If anything, Mr. Lathen's individual argument for protection is even stronger because he is not an applicant in this EAJA proceeding and this Court dismissed all charges against the Eden Arc Respondents in the underlying administrative proceeding.

EACA and EACM do not believe it is practicable, and it may prove very time-consuming, to file public redacted versions of their financial disclosures along with the sealed versions. Moreover, neither EACA nor EACM see any appreciable benefit in redacted public disclosure. But, insofar as the Court may be disinclined to grant protective order *in toto*, EACA and EACM (and, potentially, Mr. Lathen individually) would be amenable to providing redacted public versions of any financial disclosures the Court determines to be in the public interest.

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 in their EAJA application; (2) awarding them the legal fees and

expenses that they have and will be incurring in connection with this EAJA proceeding; and (3) granting protection to the financial disclosures of Eden Arc Capital Management, LLC, Eden Arc Capital Advisors, LLC and Donald F. Lathen made in connection with the instant EAJA proceeding.

Dated: New York, NY  
December 29, 2017

Respectfully submitted,

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Jr., Eden Arc Capital Management, LLC  
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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that on December 29, 2017 I caused true and correct copies of the foregoing SUPPLEMENTAL MEMORANDUM OF LAW RELATED TO THE EAJA APPLICATIONS OF EDEN ARC CAPITAL MANAGEMENT, LLC AND EDEN ARC CAPITAL ADVISERS, LLC AND MOTION TO SEAL FINANCIAL DISCLOSURES, dated December 29, 2017, and the accompanying AFFIRMATION OF DONALD F. LATHEN IN SUPPORT 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 22, 2017, to be served upon the parties listed below via e-mail and/or Federal Express Overnight Service:

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