



January 5, 2017

**BY EMAIL (alj@sec.gov)**

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

**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:

Pursuant to this Court's Order on Equal Access to Justice Proceeding ("EAJA Order"), dated December 18, 2017, undersigned counsel to the Division of Enforcement of the United States Securities and Exchange Commission (the "Division") and Respondents Eden Arc Capital Management, LLC ("EACM"), and Eden Arc Capital Advisers, LLC ("EACA") (together, "Respondents") have met and conferred and submit this joint letter to report the results of our conference to the Court.

**(1) Whether the Division has any potential objections to the application aside from an argument that its position was substantially justified:**

The Division has three principal objections to the application in addition to the Division's argument that its position was substantially justified: (1) Respondents have not shown that they meet all conditions of eligibility pursuant to 17 C.F.R. § 201.34(a); (2) Respondents have not shown that they incurred legal fees and expenses; and (3) Respondents seek fees and expenses that are not reasonable.

The Division contends that the first two of these objections are threshold questions of eligibility under EAJA, which must be resolved in Respondents' favor before this Court need reach the question whether the Division's action was substantially justified.<sup>1</sup> Accordingly, the Division proposes that its answer on questions of eligibility be submitted on January 29, 2018, with Respondents' reply due February 13, 2018. If this Court determines that Respondents have

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<sup>1</sup> The two other threshold questions are whether the application was timely and whether Respondents are prevailing parties. The Division does not intend to challenge that the application was timely filed on behalf of Respondents EACM and EACA, or that they were prevailing parties.

met their burden of proof on eligibility, then the Division requests that the Court set a schedule for further briefing and argument on the question of substantial justification.

Respondents contend that Division should not be permitted to bifurcate its response to the EAJA application and that separately litigating eligibility and justification would needlessly prolong and extend these proceedings. Respondents submit that any objections the Division has to the application should be made in an answer to be filed on January 29, 2018, with Respondents reply due on February 13, 2018.

**(2) Whether the parties intend to negotiate a settlement, and, if so, whether they request the appointment of an administrative law judge for such negotiations:**

Counsel to the Division and Respondents conferred regarding settlement before the filing of the EAJA action. Respondent is amenable to settlement negotiations before an ALJ. Because the Division believes that Respondents' have not met and cannot meet their burden of proof to establish eligibility under EAJA or that they incurred fees, the Division does not believe settlement discussions would be statutorily permissible.

**(3) Whether an evidentiary hearing is necessary; if so, the parties should advise me of the nature of evidence sought or to be presented, the anticipated length of the hearing, any proposed prehearing schedule, and their mutual availability in the second half of February 2018 for a hearing to be scheduled:**

The Division and Respondents agree that an evidentiary hearing is not necessary.

**(4) If no evidentiary hearing is necessary, the parties shall confer as to the time, date, and preferred medium (for example: telephone, video conference, or in-person in Washington, D.C.) for an oral argument to be held in the second half of February 2018:**

The Division maintains that in the interest of justice and efficiency, the threshold question of Respondents' eligibility under EAJA should be resolved before the Court need reach the question of substantial justification. The parties agree that no evidentiary hearing on the question of eligibility is needed and that this question may be addressed on the papers. Accordingly, the Division submits that it is premature at this time to require briefing or set an oral argument date on the question of substantial justification.

To the extent it would be helpful for the Court to hear oral argument on the question of eligibility, the Division requests an in-person argument in Washington, D.C., with thirty minutes allocated per side, during the week of February 26, 2017. Counsel to the Division is not available between February 19 and 23, 2017, due to scheduled college visits with her children.

Respondents request that in-person oral argument be held as to all matters related to the EAJA application during the week of February 26, 2017, and submit that the bifurcated proceeding proposed by the Division does not serve the interest of justice and would needlessly delay and extend these proceedings.

**(5) Position on Sealing of Respondents' financial disclosures:**

Respondents have requested that all of the net worth exhibits attached to their December 29, 2017 Supplemental Submission, Mr. Lathen's December 15, 2017 Affirmation, and Mr. Lathen's December 22, 2017 Affirmation be protected under seal. *See* 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 at 5 (Dec. 27, 2017). In its order of December 18, 2017, the Court invites the Division to file a response to such motion by January 5, 2018.

The Division agrees with Respondents that any benefit to full public disclosure of Mr. Lathen and Respondents' financial affairs is likely outweighed by the potential harm to them and therefore agrees that sealing and/or redaction of these submissions is appropriate. The Division believes, however, that because Respondents' and Mr. Lathen's net worth is directly relevant to the question whether they are eligible to bring an application under EAJA, there is a strong public interest in access to public redacted versions of their financial disclosures, and that this public interest outweighs Respondents' objections that redaction would not be practicable, or, in any event, very time consuming.

Respectfully submitted,

/s/ Sarah Heaton Concannon  
Sarah Heaton Concannon  
100 F. St., N.E.  
Washington, DC 20579-5937  
T: (202) 551-5361  
F: (202) 772-9292  
ConcannonS@sec.gov

/s/ Harlan Protass  
Harlan Protass  
Protass Law PLLC  
260 Madison Avenue  
22nd Floor  
New York, NY 10016  
T. 212-455-0335  
F. 646-677-0667  
M. 917-733-3901  
hprotass@protasslaw.com

Nancy A. Brown  
Judith Weinstock  
Janna I. Berke  
Lindsay S. Moilanen  
200 Vesey Street, Suite 400  
New York, NY 10281  
T: (212) 336-1023 (Brown)  
F: (703) 813-9504

*Counsel to Applicants Eden Arc Capital  
Management, LLC and Eden Arc Capital  
Advisers, LLC*

*Counsel to the Division of Enforcement  
U.S. Securities and Exchange Commission*