UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
100 F Street, NE
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DIVISION OF ENFORCEMENT

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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:

We write on behalf of the Division of Enforcement of the United States Securities and Exchange Commission (the "Division") in further explanation of the Division's positions set forth in the parties' joint correspondence to the Court of this date.

As noted in the parties' joint correspondence, 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 first two of these objections are threshold questions of eligibility under Equal Access to Justice Act ("EAJA"), which must be resolved in Respondents' favor before this Court need reach the question whether the Division's action was substantially justified.[1] Accordingly, the

[1] 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.

Division maintains that in the interest of justice and efficiency, the question of eligibility, on which Respondents' bear the burden of proof, should be resolved before this Court requires briefing or argument on the question of substantial justification, on which the Division bears the burden of proof. If this Court determines that Respondents have 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.

The following is a brief overview of the Division's objections, aside from its argument that its position was substantially justified.

Respondents have not shown that they meet all conditions of eligibility pursuant to 17 C.F.R. § 201.34(a):

The Division intends to argue that Respondents have not shown that they meet all conditions of eligibility pursuant to 17 C.F.R. § 201.34(a). In its EAJA Order, this Court instructed Respondents, by December 29, 2017, to resubmit their financial disclosures in a format that "provides full disclosure of [each] applicant's and its affiliates' assets and liabilities and is sufficient to determine whether [each] applicant qualifies under the [Commission's EAJA] standards." EAJA Order at 1 (alterations in original). On December 29, 2017, Respondents submitted additional materials to the Court, namely, a 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 (Dec. 27, 2017) ("Supp. Mem.") and six exhibits thereto, and the 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, and two exhibits thereto. On January 2, 2017, in a letter request to the Court, Respondents suggested that there are an additional "1,000-plus pages" "supportive of Mr. Lathen's Form D-A." Letter from Mr. Protass to the Hon. Jason S. Patil (Jan. 2, 2018).

Based on the Division's review of the materials submitted by Respondents on December December 4, 15, and 29 (which do not include the additional 1000-plus pages referenced in Mr. Protass' correspondence of January 2, 2017, which the Division has not yet received) the Division does not believe that Respondents have met their burden of proof to establish their eligibility for relief under EAJA for at least two reasons:

First, it is Respondents' burden to demonstrate their net worth as of the date of the filing of the Order Initiating Proceeding ("OIP"), August 15, 2016. *See* 17 C.F.R. § 201.42 (requiring applicant to submit a "detailed exhibit showing the net worth of the applicant" in a form that adequately discloses the applicant's "assets and liabilities and is sufficient to determine whether the applicant" is eligible for an award). Here, Respondents largely rely on Forms D-A prepared in February 2017 and signed in December 2017, and merely aver that their net worth as of the OIP date was "substantially similar." The statement that Respondents' financial condition was "substantially similar" on February 17, 2017 and August 15, 2016 is not a sufficiently "detailed exhibit" showing EACM and EACA's net worth as of August 15, 2016, the date the OIP was filed.

Second, Respondents acknowledge that Mr. Lathen is an "affiliate" of EACM and EACA. Pursuant to 17 C.F.R. § 201.34(f), "[t]he net worth ... of the applicant and all of its affiliates shall be aggregated to determine eligibility." The Division disagrees with Respondents' argument that Eden Arc Capital Partners LP (the "Fund") is not likewise an affiliate. Even based on Respondents own submissions, when the net worth of Mr. Lathen, the Fund, EACA, and EACM is appropriately aggregated, Respondents' net worth is very close to the $7 million statutory threshold. 17 C.F.R. § 201.34(b)(5), .41(b), .42(a). *See* Summary Net Worth Exhibit, attached as Exhibit 5 to Supp. Mem. (alleging $6.2 million in aggregate net worth). Although the Division's review of the materials produced and to be produced by Respondents is ongoing, the Division believes that as of the OIP date, when properly aggregated, Respondents likely exceed the statutory threshold for eligibility, and, in any event, that Respondents have failed to meet their burden to show otherwise. *See, e.g.*, 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 ¶ 10 (Dec. 28, 2017) (stating that Mr. Lathen does not have a net worth statement for the date on which the OIP issued).

Respondents have not shown that they incurred legal fees and expenses:

The Division also intends to object to Respondents' application because Respondents have not established that they incurred the fees and expenses sought. Generally, a party whose fees were paid pursuant to an indemnification agreement or contractual obligation does not "incur" fees. *See In re Montgomery*, Rel. No. 34-45161, 2001 WL 1618266, *9 (Dec. 18, 2001) ("It is undisputed that Montgomery's legal fees and expenses were paid by FSC. It also appears that FSC was required, under applicable Georgia law, to reimburse Montgomery for his legal costs (had the Firm not already paid them) because Montgomery prevailed. Under such circumstances, the EAJA requires that an application for reimbursement be denied.") (citing *U.S. v. Paisley*, 957 F.2d 1161, 1164 (4th Cir.), *cert. denied*, 506 U.S. 822 (1992) (denying EAJA fees where applicants' employer was legally obligated to indemnify them for attorney's fees); *SEC v. Comserve Corp.*, 908 F.2d 1407, 1414-15 (8th Cir. 1990) (denying fee application by corporate officer whose employer was contractually obligated to pay his legal fees)). Here, Respondents acknowledge that the Fund—not EACM, EACA, or Mr. Lathen—paid the legal fees and expenses sought. *See* Eden Arc Capital Partners, LP Amended Limited Partnership Agreement § 12.2.2 (Apr. 13, 2015), attached as Exhibit 3 to 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 (Dec. 15, 2017) ("Dec. 15 Affirmation"). Respondents' EAJA application is based on their purported obligation to forward any recovery to the Fund. But Respondents' sole ground for that obligation is a document dated December 2, 2017—two days before Respondents' application—and signed by Mr. Lathen. *See* Agreement Regarding Recovery of Fees and Expenses Under EAJA (Dec. 2, 2017), attached as Exhibit 4 to Dec. 15 Affirmation.

Respondents seek fees and expenses that are not reasonable:

Finally, the Division intends to object to Respondents' application because the legal fees and expenses sought are not reasonable. Respondents bear the burden of demonstrating the reasonableness of the fees and expenses requested in the Application. The Commission's

implementing EAJA regulations state that "[n]o award of the fee of an attorney ... under these rules may exceed $75 per hour," 17 U.S.C. § 201.36(b), and Section 201.36(b) lists several factors that the administrative law judge "shall consider" when determining the reasonableness of fees requested by an attorney, while Section 201.43 specifies the documentation that must be submitted in support of a request for fees.

Here, Respondents fees and expenses are not adequately documented pursuant to Commission Rule of Practice 43. For example, Respondents include fees and expenses for Mr. Lathen, and do not distinguish in any way work performed on behalf of EACM and EACA and work performed on behalf of Mr. Lathen. Accordingly, Respondents seek hundreds of thousands of dollars in fees and expenses for a non-applicant. Many of the invoices submitted by Respondents in support of their application do not describe the specific services performed. Further, Respondents appear to include and exclude certain fees and expenses in their itemized invoices from the total amounts sought without informing the Court or the Division as to their methodology.

More importantly, Respondents include nearly $1 million in fees and expenses that pre-date the filing of the OIP and also seek a cost of living adjustment, impermissible under the Commission's implementing regulations for EAJA. The Commission's implementing regulations for EAJA applications arising in its administrative proceedings, 17 C.F.R. § 201.31-60, make clear that the regulations apply to "adversary adjudications." *See* 17 C.F.R. § 201.32-33. Accordingly, fees and expenses expended during the course of the investigation (prior to the initiation of the administrative proceeding through filing of the OIP) are not compensable. Respondents request an award of attorneys' fees at hourly rates ranging from $203.83 for work performed in 2015 to $210.40 in 2017, based on indexing of the 1981 rate. The Commission's EAJA Regulations state that "[n]o award of the fee of an attorney or agent under these rules may exceed $75.00 per hour. 17 C.F.R. § 201.36(b).

Many of the expenses Respondents seek likewise are not reasonable, and Respondents have included costs enumerated in 28 U.S.C. § 1920, which are not recoverable against the Commission under Section 27 of the Exchange Act, 15 U.S.C. § 78aa. By way of example, Respondents include costs related to the testimony of fact witnesses, as well as to private litigation against Mr. Lathen.

* * * *

Because the Division's objections raise threshold questions of eligibility under EAJA, and because the Division's arguments, as summarized above, are very strong, the Division respectfully requests that this Court consider whether Respondents have met their burden of proof on eligibility before proceeding further. If this Court determines that Respondents have 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.

Respectfully submitted,

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