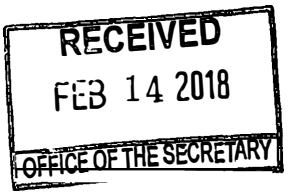
UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-17387

In the Matter of

DONALD F. ("JAY") LATHEN, JR., EDEN ARC CAPITAL MANAGEMENT, LLC, EDEN ARC CAPITAL ADVISERS, LLC

Respondents.



DIVISION OF ENFORCEMENT'S RESPONSE TO APPLICATION FOR FEES AND EXPENSES OF EDEN ARC CAPITAL MANAGEMENT, LLC AND EDEN ARC CAPITAL ADVISERS, LLC

February 14, 2018

DIVISION OF ENFORCEMENT
U.S. Securities and Exchange Commission

Sarah Heaton Concannon
100 F. St., N.E.
Washington, DC 20579-5977
T: (202) 551-5361
F: (202) 772-9292
ConcannonS@sec.gov

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

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PRELIMINARY STATEMENT

Pursuant to 17 C.F.R. § 201.52, the Division of Enforcement of the United States Securities and Exchange Commission ("Division") hereby answers and objects to the application for legal fees and expenses of Eden Arc Capital Management, LLC ("EACM"), and Eden Arc Capital Advisors, LLC ("EACA," and, together with EACM, "Applicants") under the Equal Access to Justice Act, 5 U.S.C. § 504, *et seq.* ("EAJA"). Applicants invent new law wholesale, make demands hinging on tenuous application of inapplicable legal principles, and ignore the governing EAJA standards to seek $1.125 million in legal fees and expenses. The Application fails at every turn and should be denied on four independently sufficient grounds.

First, Applicants do not establish their net worth eligibility and that of all affiliates as of the date the Order Initiating Proceeding was filed. *Donald. F. ("Jay") Lathen*, Securities Act Release No. 10120, 2016 SEC LEXIS 3064 (Aug. 15, 2016) ("OIP"). Applicants' failure to meet their burden of proof to establish eligibility for relief derails their application at the outset.

Second, Applicants do not show that they incurred fees under EAJA, and instead rest their motion for $1.125 million in relief on the questionable foundation of contractual indemnification and a post-dated agreement purportedly providing for reimbursement of a non-applicant.

Third, the Division's case against Applicants as a whole, and its fraud and custody rule claims specifically, were appropriately charged and prosecuted, reasonable, and substantially justified at the inception of the adversary proceeding and throughout the litigation.

Fourth, even if Applicants could somehow surmount the eligibility and no substantial justification hurdles (which they cannot), the legal fees and expenses sought by Applicants—which include costs incurred during the investigation and in private litigation, exceed $75.00/hour, seek an impermissible cost-of-living adjustment, are not pro-rated to exclude fees

incurred by non-applicants, are inadequately documented, and include costs expressly disallowed by statute—are not reasonable under EAJA and the Commission's rules.

In short, Applicants advocate for a "winner takes all" interpretation of EAJA that is both legally baseless and factually unsupported. Applicants are ineligible for relief and did not incur fees. The Division's action was substantially justified. And, even if Applicants could surmount these fundamental issues, the relief sought in their application is grossly excessive and indefensible as a matter of law. The Application should be denied.

PROCEDURAL BACKGROUND

On August 15, 2016, the Commission issued the OIP in this matter. In the OIP, the Division alleged that:

(1) Applicants EACM and EACA, together with non-applicant Donald ("Jay") Lathen ("Lathen") violated Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, by engaging in a fraudulent scheme involving the establishment of a fund that would profit from the use of misrepresentations and omissions of material facts to issuers of medium and long-term bonds and notes by falsely portraying Lathen and other individuals as owners of those bonds, in order to redeem the instruments prior to maturity at par pursuant to survivor options, OIP ¶ 1; and

(2) EACM willfully violated Section 206(4) of the Advisers Act and Rule 206(4)-2 thereunder (the "custody rule") and Lathen willfully aided, abetted, and caused EACM's custody rule violations by failing to custody the funds and securities of EACM's client, Eden Arc Capital Partners, LP ("EACP" or the "Fund") in an account under EACP's name or in an account that contained only clients' funds and securities, under EACM's name as agent or trustee for the clients. *Id.* ¶ 2.

In support of its claims, the Division alleged that Lathen, EACM, and EACA defrauded issuers of bonds. *Id.* ¶¶ 35-40. Lathen identified terminally ill individuals, referred to as "Participants," who became joint owners of brokerage accounts with Lathen (or a relative of Lathen's) in exchange for one-time payments of $10,000. OIP ¶¶ 12, 19, 20, 23-24. Using money supplied by the Fund, Lathen would purchase, at a discount to par, securities containing a survivor option. *Id.* ¶¶ 9-10, 31-32. On the death of the Participant, Lathen, as the joint account survivor,

exercised the option and sold the security back to the issuer at par plus interest. *Id.* ¶¶ 9, 11, 36-37. The Division alleged that Lathen, EACM, and EACA engaged in fraud when Lathen opened the accounts (the opening fraud) and when he exercised the options (the exercising fraud). The opening fraud allegedly occurred because although the forms used to open the accounts listed Lathen and the Participants as the joint owners, they were actually nominees of the Fund. OIP ¶¶ 24-25. The Fund could not have been a joint owner because corporate entities do not have survivorship rights. *Id.* ¶ 30. The exercising fraud allegedly occurred when Lathen exercised the survivor option, falsely claiming that the Participants were joint owners and that he was the surviving joint owner and not disclosing the General Partner's or the Adviser's "relationship to the investments" or the nature of their involvement with the investments. *Id.* ¶¶ 37-38.

After Lathen, EACM, and EACA answered the OIP, they moved for leave to file a motion for summary disposition. The Division opposed. On September 19, 2016, ALJ Grimes denied the motion for leave, finding that Lathen and Applicants "have not shown a likelihood that they will be able to demonstrate the absence of a 'genuine issue with regard to any material fact.'" *Donald. F. ("Jay") Lathen*, Admin. Proc. Release No. 4168, 2016 SEC LEXIS 3510, at *1 (ALJ Sept. 19, 2016) (quoting 17 C.F.R. § 201.250(b)) ("Sept. 19, 2016 Order").

Following a prehearing conference with ALJ Grimes on September 12, 2016, Lathen and Applicants filed notice stating that they intended to invoke an advice-of-counsel defense at the hearing with respect to legal advice that they allegedly received concerning and relating to the structure and structuring of their investment strategy. The Division opposed. On October 18, 2016, ALJ Grimes denied in part the Division's motion to preclude, finding the defense "at least 'conceivably' relevant." *Donald. F. ("Jay") Lathen*, Admin. Proc. Release No. 4272, 2016 SEC LEXIS 3915, at *1 (ALJ Oct. 18, 2016) ("Oct. 18, 2016 Order"). The Court observed that

"[w]hether Respondents will be able to establish all of the elements of the defense, including full disclosure to counsel and subsequent good faith reliance on that advice, remains to be seen." *Id.* at *7. The Court further stated that "[i]f, as the Division suggests, Respondents' advice-of-counsel defense misses the point, then it will not matter what Respondents discussed with counsel about the structure of the joint tenancies. In that case, the Division is free to ignore the defense. On the other hand ... the Division is free to explore the circumstances surrounding the advice Respondents sought and received." *Id.*

The case was reassigned to this Court in November 2016, and, on January 25, 2017, the Court held a final prehearing conference. In its final prehearing conference order, this Court denied, *inter alia*, the Division's motion *in limine* to preclude Respondents' advice-of-counsel defense. *Donald. F. ("Jay") Lathen*, Admin. Proc. Release No. 4551, 2017 SEC LEXIS 264, at *1 (ALJ Jan. 26, 2017) ("Jan. 26, 2017 Order").

A hearing was held from January 30, 2017 to February 17, 2017, during which the Court heard evidence from 27 witnesses and admitted 765 exhibits. Following closing arguments on March 1, 2017, the parties submitted extensive post-hearing briefing, including proposed findings of fact. *Donald. F. ("Jay") Lathen*, Admin. Proc. Release No. 4628, 2017 SEC LEXIS 575, at *1-2 (ALJ Feb. 24, 2017). The parties also submitted proposed factual stipulations, which were ordered by the Court on March 31, 2017. *Donald. F. ("Jay") Lathen*, Admin. Proc. Release No. 4723, 2017 SEC LEXIS 1005 (ALJ Mar. 31, 2017) ("Mar. 31, 2017 Order").

This Court issued an initial decision on August 16, 2017, in which it dismissed the Division's fraud and custody rule claims against Lathen and Applicants. *Donald F. Lathen, Jr., et al.*, Initial Decision Release No. 1161, 2017 SEC LEXIS 2509 (ALJ Aug. 16, 2017) ("Initial Decision"). After no petition for review was filed by any party, the Securities and Exchange

Commission ordered that the decision become final on November 2, 2017. *Donald. F. ("Jay") Lathen*, Securities Act Release No. 10434, 2017 SEC LEXIS 3494, at *1-2 (Nov. 2, 2017).

On December 4, 2017, Applicants filed a motion for legal fees and expenses under EAJA, which they supplemented on December 15, 2017 with an affirmation from Lathen and several exhibits, including their February 2017 Form D-A financial disclosure forms. Applicants further supplemented the Application—by order of this Court—on December 22, 2017 and December 29, 2017. Applicants electronically submitted documents in support of their Forms D-A and those of related parties, Lathen, and the Fund to the Court and the Division, with paper copies to the Office of the Secretary.

ARGUMENT

Contrary to Applicants' claim, EAJA does not automatically authorize an award of legal fees and expenses, but rather provides that an applicant *may* be entitled to fees and costs if—and only if—it: (i) prevails against the government on a "significant and discrete substantive portion" of a proceeding[1]; (ii) files a timely application[2]; (iii) establishes net worth eligibility on the date the OIP was filed; (iv) shows that it incurred legal fees and expenses in an adversary adjudication; (v) establishes that the legal fees and expenses sought are statutorily permissible

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[1] EAJA limits recovery to a "prevailing party" and the Commission's EAJA rules provide that a "prevailing applicant may receive an award for fees and expenses" under certain circumstances. 5 U.S.C. § 504(a)(1); 17 C.F.R. § 201.35(a). The Division does not dispute that the Applicants are prevailing parties under EAJA. *See* Initial Decision at *2-3, *157-58.

[2] An EAJA application must be filed no later than thirty days after the Commission's final disposition of a proceeding. 5 U.S.C. § 504(a)(2); 17 C.F.R. § 201.44(a). Applicants filed their Application on December 4, 2017 and thereafter supplemented it three times. Despite Applicants' supplements, the Division does not dispute that the Application was filed within thirty days of the Commission's finality order. *See Thomas R. Delaney II*, Admin. Proc. Release No. 976, 113 SEC Docket 3641, at *2 (ALJ Mar. 6, 2016) ("That the content of the application was imprecise does not warrant dismissal.") (citing *Scarborough v. Principi*, 541 U.S. 401, 420 (2004) (recognizing that—under civil analogue 28 U.S.C. § 2412—a fee application may be amended, out of time, to attempt to show that the applicant is eligible)).

and reasonable; *and* (vi) the government's position was not "substantially justified." Here, despite multiple opportunities to get it right, the Application fails to satisfy *four* of these six requirements. This Court should deny the Application.

I. Standard Of Review—The Equal Access To Justice Act

"The governing principle of the [Equal Access to Justice] Act is that the 'United States should pay those expenses which are incurred when the government presses unreasonable positions during litigation.'" *Matthews v. United States*, 713 F.2d 677, 683-84 (11th Cir. 1983) (quoting *Goldhaber v. Foley*, 698 F.2d 193, 197 (3d Cir. 1983)). Congress, by enacting EAJA, created a substantial exception to the general rule set forth in *Alyeska Pipeline Service, Co. v. Wilderness Society*, 421 U.S. 240, 257 (1975), which held that parties to a lawsuit generally must bear their own legal fees and expenses.

Fee claims arising from administrative proceedings, such as this one, are governed by 5 U.S.C. § 504. Under Section 504, the Commission has adopted regulations for EAJA applications arising in Commission administrative proceedings. *See* Commission Rules of Practice 31-60, 17 C.F.R. §§ 201.31-60. Commission Rule of Practice 35(a) provides that "a prevailing applicant may receive an award for fees and expenses incurred in connection with a proceeding or in a significant and discrete substantive portion of the proceeding, unless the position of the Office or Division over which the applicant has prevailed was substantially justified." 17 C.F.R. § 201.35(a). Other provisions set forth the specific requirements an applicant must meet to qualify for an award of fees and expenses.

Importantly, EAJA "is not intended to be an automatic fee-shifting device in cases where an applicant prevailed." *Michael Flanagan*, Initial Decision Release No. 241, 2003 SEC LEXIS 2795, at *9 (ALJ Nov. 24, 2003). Rather, EAJA's aim is to redress unjustified and *abusive* litigation initiated by the government. *E.g.*, *SEC v. Price Waterhouse*, 41 F.3d 805, 809 (2d Cir.

1994) (Leval, J., dissenting in part from denial of EAJA award: "The provisions of the EAJA ... are designed to compensate victims of *unjustified* litigation by the Government .... The Act essentially recognizes that abusive litigation tactics by the United States government, whether the Government appears in the role of plaintiff or defendant, can inflict great unjustifiable cost and expense. It is designed to furnish relief from such governmental litigation abuse.") (emphasis in original); *Jones v. Hodel*, 685 F. Supp. 4, 7 (D.D.C. 1988) ("Congress enacted EAJA to 'reduce the enormous financial burden' that litigants would face in challenging abusive governmental tactics.").

II. Applicants Have Not Met Their Burden To Show That EACM And EACA Are Eligible Parties Under EAJA

As a threshold question of eligibility under EAJA, the Commission's regulations require financial disclosures in a format that "provides full disclosure of applicant's and its affiliates' assets and liabilities and is sufficient to determine whether applicant qualifies under the [Commission's EAJA] standards." *Donald. F. ("Jay") Lathen*, Admin. Proc. Release No. 5398, 2017 SEC LEXIS 4137, at *2 (ALJ Dec. 18, 2017) ("Dec. 18, Order") (quoting 17 C.F.R. §§ 201.34(b)(5), .41(b), .42(a)). EAJA applicants have the burden to establish their eligibility by demonstrating that their net worth did not exceed the statutory threshold at the time the suit was filed. 17 C.F.R. § 201.34(a) ("The applicant must show that it meets all conditions of eligibility set out in this subpart"); *Estate of Woll by Woll v. U.S.*, 44 F.3d 464, 470 (7th Cir. 1994), *reh'g, en banc, den.*, 1995 U.S. App. LEXIS 1820 (7th Cir. 1995) (denying EAJA application of party who failed to satisfy "the burden of establishing that it met the net worth limitations of the EAJA"). Because EAJA serves as a partial waiver of sovereign immunity, it must be strictly construed in favor of the government. *See, e.g., Kirk Montgomery*, Exchange Act Release No. 45161, 2001 SEC LEXIS 2775, at *42-43 (Dec. 18, 2001).

Under the Commission's EAJA standards, Applicants' net worth, aggregated with all affiliates, cannot exceed $7 million as of August 15, 2016—the OIP filing date. 17 C.F.R. §§ 201.34(b)(5), .34(c) .34(f), .41(b), .42(a). Despite supplementing their Application multiple times (at the urging of both the Division and this Court), Applicants have failed to provide this Court with "full disclosure" of their assets and liabilities, aggregated with all affiliates, as of the OIP date. Moreover, the financial disclosures that Applicants *have* provided suggest that as of the OIP date, their net worth and that of all affiliates may well have exceeded EAJA's eligibility threshold.

To date, Applicants have presented the following documents and information in an attempt to meet their eligibility burden:

- December 4, 2017: Application of Eden Arc Capital Advisors, LLC and Eden Arc Capital Management, LLC for the Recovery of Legal Fees and Expenses Pursuant to the Equal Access to Justice Act ("App."), alleging (without supporting documentation) that EACM and EACA had a net worth of less than $7 million on February 12, 2017 and that the Fund had a net worth of approximately $6.2 million as of the OIP date. App. at 2-3.

- December 15, 2017: 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 Lathen Aff.") and four exhibits thereto, comprising: (1) unsigned Form D-A for EACA dated February 12, 2017; (2) unsigned Form D-A for EACM dated February 12, 2017; (3) Eden Arc Capital Partners, LP Amended Limited Partnership Agreement dated April 13, 2015 ("Limited Partnership Agreement"); and (4) Agreement Regarding Recovery of Fees and Expenses under EAJA dated December 2, 2017 and signed by Lathen on behalf of himself, EACM, EACA, and the Fund.

- December 22, 2017: 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. 22 Lathen Aff."), and exhibits thereto, comprising: (1) Form D-A for Lathen dated February 7, 2017 and signed by Lathen on February 16, 2017; and (2) copies of Lathen's Citizens Bank, First Republic Bank, TD Bank, and USAA statements for August 2016.

- December 29, 2017: 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 ("Supp. App.") and six exhibits thereto, comprising: (1) Form D-A for EACM dated February 12, 2017 and signed by Lathen on

December 22, 2017; (2) Form D-A for EACA dated February 12, 2017 and signed by Lathen on December 22, 2017; (3) Bank of America statements for EACM for periods ending Jan. 31, 2017 and Aug. 31, 2016; (4) EACP Performance and Capital Summaries for July 1, 2016 to Sept. 30, 2016, June 1, 2016 to June 30, 2016, and Oct. 1, 2016 to Dec. 31, 2016; (5) Summary Net Worth Exhibit in Support of EAJA Application; and (6) EACP Balance Sheet as of June 30, 2016.

- Approximately January 10, 2018: Electronically-Submitted Documents relating to Forms D-A.

These materials, both individually and collectively, are insufficient to meet Applicants' burden of proof with regard to EAJA eligibility.

First, Applicants do not provide "full disclosure" sufficient to demonstrate their net worth as of the OIP date, August 15, 2016. 17 C.F.R. §§ 201.34(c), .42. Applicants rely on Forms D-A and supporting documentation prepared in February 2017 and signed in December 2017, and merely aver that their net worth as of the OIP date was "substantially the same." Supp. App. Exs. 1-2, 5; Dec. 15 Lathen Aff. ¶ 2. The statement that Applicants' net worth was "substantially the same" on August 15, 2016 as it was on February 12, 2017—which is supported by *no* contemporaneous documents for EACA and a single August 2016 bank statement for EACM—is not a sufficiently "detailed exhibit" showing Applicants' net worth on the date the OIP was filed.

Second, Applicants admit that Lathen is an "affiliate" of EACM and EACA. Supp. App. at 3 (admitting that as the sole member and control person of EACM and EACA, Lathen "is an affiliate ... under a plain reading of 17 C.F.R. § 201.34(f)"). Commission Rule of Practice 34(f) states that "[t]he net worth ... of the applicant and all of its affiliates shall be aggregated to determine eligibility." 17 C.F.R. § 201.34(f). Accordingly, it is Applicants' burden to establish not only their *own* net worth as of August 15, 2016 (which they fail to do), but also *Lathen's* net worth as of that date. But Lathen has stated under pains and penalties of perjury that he does not have a net worth statement for the date on which the OIP issued and cannot calculate his net

worth as of that date. Dec. 22 Lathen Aff. ¶ 10 ("I do not currently possess, nor do I have a means to easily obtain, all of my account statements as of the date of the OIP. I therefore cannot calculate or fully document my net worth as of the date of the OIP."). Thus, rather than providing this Court with a "detailed exhibit showing the net worth of the applicant and any affiliates" as of the OIP date, Applicants instead ask this Court to assume, without documentary evidence, that Lathen is correct when he estimates that his net worth in August 2016 was just $200,000 higher than his net worth in February 2017. *Id.* ¶ 12.

Third, even apart from the infirmities of Lathen's affirmation, the support for his net worth even as of February 2017 is insufficient. Lathen admits to holding assets as of February 7, 2017 in excess of $16.5 million. Dec. 22 Lathen Aff. Ex. 1. The sole basis for Lathen's supposedly nominal net worth as of that date is his alleged liabilities in excess of $16.3 million, which result in an alleged net worth of $193,933. *Id.*[3] But neither the exhibits to Lathen's December 22 Affirmation nor the additional documents submitted electronically in support of his Form D-A adequately document those liabilities, which purportedly include $10.5 million in mortgage debt, $796,692 in credit card debt, and over $1 million in "other loans, notes, or accounts payable." *Id.* For example, Lathen's $10.5 million in mortgage debt includes two second mortgages with a total outstanding principal balance as of February 2017 of $3.7 million. But this snapshot in time does not establish when these credit lines were fully drawn. Ex. A ("Mortgage Loans" PDF). Similarly, Lathen's $796,692 in credit card debt is documented by

[3] The documents submitted by Lathen in support of his Form D-A show that this enormous alleged debt load is the result of Lathen's luxury lifestyle and expenses of nearly $1.6 million annually. During the time when Lathen is claiming a total net worth of only $193,993, he owned multiple homes on which he paid hefty maintenance and utilities (including an $8 million property in Sag Harbor), owned and maintained a boat, owed hundreds of thousands of dollars to the IRS and various New York State Tax Authorities, and had three children in private school. Dec. 22 Lathen Aff. Ex. 1.

credit card statements dated February 2017, without showing when that debt was incurred. Ex. B ("Credit Cards" PDF). The $1 million in "other loans" claimed by Lathen appears to largely consist of loans to friends and families documented by (in at least one instance) an email. *See* Ex. C ("Loan Document—Family and Friends" PDF).

Fourth, even if this Court were to deem Applicants' and Lathen's after-the-fact and unsupported estimations of their net worth adequate (which it should not), Applicants' showing of their net worth and that of all affiliates as of the OIP date is still deficient. Not only must *Lathen's* net worth be aggregated with Applicants' for consideration of eligibility, but *the Fund's* net worth must be as well. "Affiliates" are business concerns, organizations, or individuals that are "united ... in close connection, allied, associated, or attached." *Affiliate*, BLACK'S LAW DICTIONARY (6th ed. 1994). An "affiliate company" is a "[c]ompany effectively controlled by another company." *Id.* Control may consist of shared management or ownership or common use of facilities, equipment, and employees. *E.g.*, *In re Typhoon Industries, Inc.*, 6 B.R. 886, 891 (Bankr. E.D.N.Y. 1980) (finding "usual indicia of control" present where same individual was sole shareholder, director, and president of company and each of its affiliates and company and its affiliates "had common management ... differing only to the extent that each affiliate had a different general manager"). *Cf.* 17 C.F.R. § 230.144(a)(1) (defining "affiliate" as "a person that directly, or indirectly ... controls, or is controlled by, or is under common control with [the] issuer").

Here, there is no question that Lathen controls EACM, EACA, and the Fund and that EACA controls the Fund. Lathen is the sole member and control person of both EACM and

EACA. SFOF ¶¶ 4, 7-8.[4] EACA is the Fund's General Partner and EACM is the Fund's Investment Manager. *See* Dec. 15 Lathen Aff. Ex. 3 (Limited Partnership Agreement) § 1.2. As the General Partner of the Fund, EACA has the express authority to "select and pursue the investment objectives of the Partnership" and to "carry out any and all of the objectives and powers of the Partnership ... and to perform all contracts and other undertakings which the General Partner and/or the Investment Manager may deem necessary, advisable or incidental thereto." *Id.* Ex. 3 (Limited Partnership Agreement) § 3.1. The Fund paid Lathen, EACM, and EACA's legal fees and expenses in this matter out of Partnership assets. *Id.* § 12.2.2. Lathen signed the Agreement Regarding Recovery of Fees and Expenses under EAJA submitted in this proceeding as the "Managing Member of the General Partner," EACP. Dec. 15 Lathen Aff. Ex. 4.

Fifth, not only is treating Lathen and the Fund as affiliates consistent with the meaning of "affiliate" and the facts, but it is also in furtherance of EAJA's goals. Applicants should not be permitted to recover fees and expenses incurred by the Fund—a high net-worth non-party, or Lathen—a non-applicant with substantial assets. 17 C.F.R. § 201.34(a)-(b).[5] The Commission's

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[4] Citations to "SFOF" refer to the paragraphs of the Stipulated Findings of Fact adopted by the Court in its Order on Stipulations. *See* Mar. 31, 2017 Order. Citations to "PFOF" refer to the paragraphs of the Division's Proposed Findings of Fact.

[5] Applicants' and Lathen's financial disclosures underscore why the Fund must be treated as an affiliate to advance EAJA's policy goals. Lathen's Form D-A includes a $3.885 million asset for "joint accounts" offset by a liability in the identical amount for "loans and profit sharing rights in joint accounts." Dec. 22 Lathen Aff. Ex. 1. This appears to reflect amounts Lathen alleges were held by him, but owed to the Fund. *See* Tr. 2385. The Division believes that asset is included on the Fund's Balance Sheet as part of "Debt Instruments." Supp. App. Ex. 6 (Fund balance sheet dated June 30, 2016 showing debt instruments of $12,783,291.84; Fund balance sheet dated September 30, 2016 showing debt instruments of $10,513,272.56). It would be inappropriate under EAJA to *exclude* the $3.885 million from Lathen's assets, yet fail to *include* it as a substantial asset of the affiliated Fund.

affiliation rules are intended to prevent end-runs around EAJA's statutory limitations precisely like Applicants' attempt here. Lathen and the Fund should be treated as affiliates for EAJA purposes.

Sixth, assuming that the net worth of both Lathen and the Fund is aggregated with Applicants', as is appropriate, Applicants' own submissions make clear that they are perilously close to the net worth threshold. Applicants admit that, as of June 30, 2016, the Fund had a net worth of at least $6.2 million. Supp. App. Exs. 5-6. Together with Lathen's alleged net worth as of February 7, 2017 of $193,933, EACA's alleged net worth as of February 12, 2017 of $1,048, and EACM's alleged net worth as of February 12, 2017 of $0, Applicants' and their affiliates admitted total net worth of $6,402,419 is less than $600,000 away from the $7 million EAJA statutory threshold. Even Lathen admits that as of the OIP date, his net worth was likely $200,000 higher than disclosed on his Form D-A. Dec. 22 Lathen Aff. ¶ 12. This reduces the difference between Applicants' *admitted* net worth and the statutory threshold to less than $400,000. When Lathen's disclosures are corrected to remove undocumented and speculative liabilities as of August 2016, it is very likely that, as of the OIP date, Applicants' net worth together with all affiliates exceeds the $7 million statutory threshold.

Finally—and most importantly—the fact that the Division and this Court are left to engage in guesswork about Applicants' net worth as of August 15, 2016 underscores the infirmities of the Application. Applicants have failed to produce financial disclosures in a format that "provides full disclosure of [each] applicant's and its affiliates' assets and liabilities" as of the OIP date, which forces this Court and the Division to speculate about their total net worth as of that date. Applicants have failed to meet their burden to establish EAJA eligibility.

III. Applicants Have Not Met Their Burden To Show That They Incurred Fees Under EAJA

Under EAJA, Applicants may recover only those fees and expenses that they "incurred" in this proceeding. 17 C.F.R. § 201.35(a) ("[A] prevailing applicant may receive an award for fees and expenses *incurred in connection with a proceeding*.") (emphasis added). Here, Applicants seek to recover $1.125 million in legal fees and expenses that were paid by the *Fund*, which was neither a party in the underlying proceeding nor an applicant. App. at 3-5. To permit Applicants to recover under these circumstances is unprecedented under EAJA and would fail to advance EAJA's public policy. This Court therefore should deny the Application, because Applicants have not (and cannot) establish that they incurred fees.

The Commission and the courts have recognized that a party whose fees were paid pursuant to an indemnification agreement or an existing contractual obligation does not "incur" fees and is not entitled to recover under EAJA. *See Montgomery*, 2001 SEC LEXIS 2775 at *38 (noting that it was "undisputed that [Applicant] Montgomery's legal fees and expenses were paid by" his employer, and concluding that "[u]nder such circumstances, the EAJA requires that an application for reimbursement be denied"); *see also 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. Comserv Corp.*, 908 F.2d 1407, 1414-15 (8th Cir. 1990) (denying fee application by corporate officer whose employer was legally obligated to pay his legal fees).

Applicants acknowledge that all of the legal fees and expenses—for EACM and EACA (and Lathen[6])—sought in the Application were paid by the Fund pursuant to an Indemnification

[6] *See* App. at 3 ("[T]he Fund advanced all of the legal fees and expenses that EACM and EACA (and Mr. Lathen) incurred defending against charges in the OIP.").

provision within the Fund's Limited Partnership Agreement. *See* Dec. 15 Lathen Aff. Ex. 3 (Limited Partnership Agreement) § 12.2.2. The Limited Partnership Agreement contains no language obligating EACM, EACA, or Lathen to reimburse the Fund for fees or expenses in this matter.[7] Immediately prior to the Application filing deadline, however, Lathen apparently became aware that the Limited Partnership Agreement's Indemnification clause language precludes any plausible argument that fees and expenses were incurred in the proceeding, rendering Applicants (and Lathen) ineligible for an award. In response, on December 2, 2017—two days before the Application was filed—Lathen executed an Agreement Regarding Recovery of Fees and Expenses under EAJA (the "Agreement"). *See id.* Ex. 4. The Agreement purports to "interpret the language of Section 12.2.2 as meaning the Partnership shall be entitled to recoup any costs expended" in the administrative proceeding, and to require that "any and all recoveries that the General Partner [EACA], the Investment Manager [EACM] *and/or Donald F. Lathen Jr. may receive* ... shall be immediately paid to the Partnership." *Id.* (emphasis added). Lathen signed this document on behalf of EACM, EACA, the Fund, and himself. Significantly, the highlighted language clearly indicates that Lathen expects to recover the fees and expenses that the Fund paid on his behalf pursuant to the Indemnification clause of the Limited Partnership Agreement,[8] notwithstanding the fact that Lathen is not an applicant and therefore is not entitled

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[7] The Limited Partnership Agreement's Indemnification clause only excludes "Losses" (including legal fees/expenses) incurred by an Indemnified Person determined by a Court's entry of final judgment to have engaged in willful misconduct or gross negligence (§ 12.2.2), which is not the case here.

[8] EACA, EACM, and Lathen constitute "Indemnified Persons" under Section 12.2.2 of the Limited Partnership Agreement. Pursuant to Section 12.2.1, "Indemnified Persons" include the General Partner [EACA], the Investment Manager [EACM], and the respective "Affiliates." The Agreement defines "Affiliate(s)" to include "the principal(s), affiliate(s), manager(s), members(s)" of EACM and EACA. *See* Dec. 15 Lathen Aff. Ex. 3 (Limited Partnership Agreement) at 1. The Application states that EACM and EACA are "wholly-owned by Mr. Lathen." App. at 2. Lathen also executed the December 2 agreement as "Managing

to any recovery. The last minute attempt to impose an obligation to repay upon the Applicants demonstrates that Lathen realized that neither he nor Applicants were entitled to an EAJA recovery under the Limited Partnership Agreement.

Nor do any of the cases cited in the Application provide a basis for Applicants to recover fees and expenses under EAJA. These cases—which involve EAJA applicants who paid premiums to an insurer for liability coverage to cover their fees and expenses,[9] were represented on a *pro bono* basis,[10] assumed a contingent obligation to repay fees covered by another individual/entity,[11] or received free legal services from a non-profit or public interest group[12]—are distinguishable from this case, in which all of Applicants' fees and expenses were paid by the Fund pursuant to the Indemnification clause. At most, the cases cited by Applicants reflect that courts are cognizant that EAJA was enacted to enable less affluent individuals and entities to pursue meritorious claims and defenses against the government, and have been unwilling to adopt a strict interpretation of when fees are incurred which would deny such litigants a potential recovery of fees and deter them from litigating against the government.[13]

Member" of both EACM and EACA. *See* Dec. 15 Lathen Aff. Ex. 4. This raises serious doubts as to why Lathen (the true party in interest in the proceeding whose fees were paid by the Fund) did not join in the Application, and whether it is possible to segregate fees/costs paid on Lathen's behalf from those paid on behalf of EACM and EACA.

[9] *See* App. at 4 (citing *Ed A. Wilson, Inc. v. GSA*, 126 F.3d 1406, 1408-10 (Fed. Cir. 1997); *U.S. v. Thouvenot, Wade & Moerschen, Inc.*, 596 F.3d 378, 383 (7th Cir. 2010)).

[10] *See* App. at 4 (citing *Watford v. Heckler*, 765 F.2d 1562, 1567 n.6 (11th Cir. 1985)).

[11] *See* App. at 4 (citing *Morrison v. C.I.R.*, 565 F.3d 658, 662 (9th Cir. 2009)).

[12] *See* Letter from Applicants' Counsel to the Hon. Jason S. Patil (Jan. 12, 2018) (citing *Nadrajah v. Holder*, 569 F.3d 906 (9th Cir. 2009)).

[13] *See Comserv*, 908 F.3d at 1415-16 (analyzing whether prevailing parties whose fees/expenses were paid "incurred" fees and concluding that "EAJA awards should be available where the burden of attorneys' fees would have deterred the litigation challenging the government's actions, but not where no such deterrence exists."); *Owner-Operator Indep.*

This is not the case here. Applicants were not deterred by financial constraints from defending against the Division's action when the OIP was filed on August 15, 2016, the relevant point in time from an EAJA policy perspective. Applicants knew that their fees and expenses would be covered by the Fund pursuant to the Limited Partnership Agreement's Indemnification clause. And, indeed, the Fund honored its obligation under the Limited Partnership Agreement and paid all legal fees and expenses related to the defense of Applicants and Lathen—a point that Applicants do not challenge. It would be at odds with both precedent and the purpose of EAJA to allow Lathen—one month after the decision in this matter became final—to retroactively amend the Limited Partnership Agreement in an attempt to craft a basis for the Fund (and Lathen) to benefit from an award for fees and expenses that the Fund was obligated to pay, and which Lathen (a non-applicant) is not entitled to recover.

IV. The Position Of The Division Was Substantially Justified

Assuming, *arguendo*, that Applicants could establish eligibility and that they incurred fees under EAJA—which they have not and cannot[14]—the burden shifts to the Division to establish that its position was "justified to a degree that could satisfy a reasonable person" and

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Drivers Ass'n v. Fed. Motor Carrier Safety Admin., 675 F.3d 1036, 1040 (7th Cir. 2012) (denying fee application and concluding that "the purpose of the EAJA would not be served by awarding fees to the individual petitioners" and noting that "[f]inancial considerations would not have deterred [petitioners] from pursuing this action, because they are not liable for payment of the attorneys' fees").

[14] Because Applicants have not established eligibility under EAJA or that they incurred fees, this Court could stop here. 17 C.F.R. § 201.34, .35(a). *Cf., e.g., Industrial Sec. Services*, 289 NLRB 459, 461 (N.L.R.B. 1988) (quoting prior order stating "[b]ased on the documentary evidence now before us, we are unable to ascertain whether Applicant has adequately established its eligibility for an award. Until this threshold question is resolved, we cannot determine the merits of the application"). The Division understands, however, that this Court wishes to consider all of the questions presented by the Application at a single time to avoid the risk of protracted litigation. *See Donald F. ("Jay") Lathen*, Admin. Proc. Release No. 5533, 2018 SEC LEXIS 266, at *1 (ALJ Jan. 25, 2018) (citing 17 C.F.R. § 201.56 (contemplating a decision that includes findings on both eligibility and substantial justification)).

had a "reasonable basis in law and fact." *Pierce v. Underwood*, 487 U.S. 552, 565-66 & n.2 (1988); *see also McDonald v. Schweiker*, 726 F.2d 311, 316 (7th Cir. 1983) (substantial justification "means that the government must have a solid though not necessarily correct basis in fact and law for the position that it took in this action"). This case more than meets this standard.

Contrary to Applicants' position, the outcome of the underlying case is not dispositive; rather, this Court must conduct an "independent evaluation ... through an EAJA perspective." *Richard J. Adams*, Exchange Act Release No. 48146, 2003 SEC LEXIS 1600, at *15 & n.14 (July 9, 2003) (quoting *FEC v. Rose*, 806 F.2d 1081, 1087 (D.C. Cir. 1986)). Moreover, as the Commission made clear in *Clarke T. Blizzard*, because:

> "substantial justification" is a different and less stringent standard than the "preponderance of the evidence" standard used to determine liability for a substantive securities violation, the conclusions ... in the proceeding on the merits are not dispositive of the outcome of the matter before us now. An agency position can be substantially justified even if the trier of fact finds the evidence insufficient to prove the violations alleged.

Investment Advisers Act Release No. 2409, 2005 SEC LEXIS 1940, at *11 (July 29, 2005).

As this Court acknowledged in the initial decision, this case presented novel and complex questions of law and fact concerning the types of disclosures that must be made to issuers of survivor's bonds about the relationship between the purported joint holders of the bonds and the scope of undisclosed limitations on the authority of one holder to exercise rights to the bonds to the validity of the joint tenancy. Initial Decision at *1. The investigative record was rife with evidence showing that Lathen and Applicants were aware that their conduct was walking a fine line of legality. Given the weight of the factual evidence and the Division's good faith argument as to how existing law should apply to those facts, the Division exercised sound judgment and

prosecutorial discretion to bring this case in the interest of issuers and the public.[15] The Division's case against Applicants as a whole and its fraud and custody rule claims were appropriately charged and prosecuted, reasonable, and substantially justified at the inception of the adversary proceeding and throughout the litigation. This Court should deny the Application. *E.g.*, *Michael Flanagan*, Securities Act Release No. 8437, 2004 SEC LEXIS 1447, at *13 (July 7, 2004) ("If the Division's case is justified to a degree that could satisfy a reasonable person then no fees are to be awarded under the EAJA.") (internal quotation omitted).

A. The Division's Fraud Claims Were Substantially Justified

Applicants' submissions to date are largely silent on the question of substantial justification. Applicants do little more than aver that the Division's "sweeping defeat ... suggests that the Division's position—as a whole, at the outset of this investigation and through litigation of the administrative proceeding—was substantially unjustified and unjustifiable." App. at 9. Applicants' attempt to convert EAJA into a "winner takes all" statute is legally baseless. *See, e.g.*, *Williams v. Astrue*, 600 F.3d 299, 302 (3d Cir. 2009) ("EAJA is not a 'loser pays' statute .... The inquiry into reasonableness for EAJA purposes may not be collapsed into the antecedent evaluation of the merits, for EAJA sets forth a distinct legal standard.") (internal citation omitted). More importantly, the record here establishes that the Division's action—both viewed as a whole and on a claim-by-claim basis—had a "reasonable basis in law and fact" and

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[15] Indeed, the Commission's EAJA rules specifically safeguard the government's ability to litigate cases involving "close calls." *See* 17 C.F.R. § 201.35(b) ("An award will be reduced or denied if ... special circumstances make the award sought unjust.") (interpreting 5 U.S.C. § 504(a)(1)). "This 'safety valve' helps to insure that the Government is not deterred from advancing in good faith the novel but credible extensions and interpretations of the law that often underlie vigorous enforcement efforts." *Bennett v. Schweiker*, 543 F. Supp. 897, 898 (D.D.C. 1982) (quoting H.R. Rep. No. 1418, 96th Cong., 2d Sess. 11 (1980), reprinted in U.S.C.C.A.N. 1980, at 4990) (interpreting similar "special circumstances" language in 28 U.S.C. § 2412(d)(1)(A)).

was "justified to a degree that could satisfy a reasonable person." *Pierce*, 487 U.S. at 565-66 & n.2; *see also* 5 U.S.C. § 504(a)(1); 17 C.F.R. § 201.35(a).

1. The Division's Position On Scienter Was Substantially Justified

Applicants' principal contention is that the Division's fraud claims were not substantially justified, because this Court's initial decision found that Lathen "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 ...." App. at 9. Contrary to Applicants' assertion, the record shows that the Division had a reasonable basis in fact to believe that the evidence adduced at trial would and did establish that Lathen, EACM, and EACA knowingly, recklessly, or at least negligently, engaged in fraud in violation of Sections 10(b) and 17(a).

(a) The Division's Evidence That Applicants And Lathen Knowingly, Recklessly, Or At Least Negligently Engaged In Fraud

The Division had significant evidence (both gathered during the investigation and presented at trial) to support its claim that Lathen—whose knowledge is imputed to EACM and EACA— knowingly or recklessly committed fraud:

- Lathen understood the true nature of the ownership structure, understood that the issuers might dispute that ownership, and made a decision to submit the redemption requests without the side agreements and other relevant information concerning the nature of his and the Participants' ownership interests. (PFOF ¶¶ 413-14; 424.)

- Lathen conceded during testimony and in evidence admitted at trial that he knew the Participant Agreements were material to the issuers' determinations. (PFOF ¶¶ 421-22.) Thus, when Lathen and Applicants told issuers that Lathen and the Participants were the "owners" of the survivor's option bonds, they consciously withheld material information necessary to enable the issuers to evaluate that claim.

- In their Private Placement Memoranda ("PPMs"), Lathen and Applicants acknowledged that the issuers might take a "contrary view" as to the validity of the redemption requests and that "objections to the Partnership's strategy and implementation ... could arise by various third persons or parties, federal, state, or local regulatory or similar bodies or otherwise, which could frustrate or defeat the Partnership's investment strategy." (PFOF ¶¶ 416-17; 423-24.)

- Lathen admitted using "stealth and tact" in his disputes with issuers. (PFOF ¶ 433.) Lathen told one investor that he would not be "open-kimono" with issuers/trustees "for obvious reasons," and that he could not sue an issuer to force payment on the survivor's option, because "the publicity around the case could alert other issuers to my strategy and cause them to tighten up the loopholes in their docs and/or decline to make payments to me." (PFOF ¶¶ 427-28.)

- Lathen assured one prospective investor that all the issuer or trustee would see was the "registration on the account as a JTWROS." The issuer or trustee would not "see the Participant Agreement so they are not privy to where the capital is sourced and how the economics of the account have been shared between the Participant and the fund." (PFOF ¶ 341.)

- Because of Lathen's familiarity with survivor's option bond prospectuses, Lathen and Applicants were aware from the start that beneficial ownership was a necessary predicate to redemption. (PFOF ¶¶ 39-41.)

- In his investor presentations, Lathen noted that the "decedent must have been a beneficial owner of the bond at the time of death." (PFOF ¶ 420). Lathen made a similar concession in an affidavit he submitted in private litigation with Prospect Capital Corp. ("Prospect"). (*Id.*)

- Both Goldman Sachs and GE Capital Corp. ("GECC") rejected Lathen's redemptions after seeing his Participant Agreement, putting Lathen on notice that at least some issuers considered these agreements important. (PFOF ¶¶ 93; 95; 130; 135; 162-63; 257; 456; 1037.) Lathen continued to submit his redemption requests to other issuers without including the Participant Agreements. (PFOF ¶ 413.)

- In 2013, Lathen became aware that the SEC sued two individuals for fraud for similar conduct, alleging they "failed to inform the brokerage firms or bond issuers that the deceased Program participants had signed the Estate Assistance Agreements and Participant Letters relinquishing all ownership in the bonds." (PFOF ¶ 449.)

- In late 2013, FINRA began investigating Lathen and Applicants' broker-dealers in relation to Lathen's accounts, leading two brokers to terminate their business. (PFOF ¶¶ 443-44.)

- Lathen and Applicants resisted furnishing the information that one issuer, Prospect, requested, calling the additional information request "both unnecessary and inappropriate." (PFOF ¶ 218.)

- Lathen also rebuffed GECC's requests for information, and never provided GECC with either the Investment Management Agreement ("IMA") or the Profit Sharing Agreement ("PSA"). (PFOF ¶¶ 157; 169.)

- At the time Lathen withheld information from Prospect and GECC, he knew that Goldman Sachs had already denied Lathen and Applicants' redemption requests after seeing the Participant Agreements.

- Not wanting to have to "fold up shop and return money to investors," (PFOF ¶ 426) Lathen and Applicants sought to avoid both regulatory scrutiny and publicity. (PFOF ¶¶ 428-29; 432.)

- Lathen did not sue any of the issuers that refused to honor his redemption requests. (PFOF ¶¶ 429; 432-33).

- Lathen "crafted the Participant Agreement in a manner which is intended to defeat the straw man argument in the event the issuer ever does see the Participant Agreement and tries to challenge the putback." (PFOF ¶ 341.)

- Lathen and Applicants removed language from the original Participant Agreement prohibiting the Participant from "exercis[ing] any right of ownership with respect to the Investments or other assets from the Account(s)." (PFOF ¶¶ 333-34; 342.) But Lathen knew that despite this change, Participants would not be able to access the funds without his consent. (PFOF ¶¶ 285; 901-02).

- Lathen admitted that he could not revise the Participant Agreement to give the Participants 50% of the accounts, because he needed to "protect the [F]und" and he did not want Participants to "come and say, 'I want to withdraw funds from the account'" when that was "'not possible' because the 'discretionary line agreement prohibits that.'" (PFOF ¶ 345.)

- Lathen's long tenure in the securities industry, where he apparently earned a reputation for thoroughness and intelligence (PFOF ¶¶ 28-29), means that he understood his obligation to fully disclose the nature of his arrangement to issuers.

Likewise, the Division offered evidence at trial in support of its claim that Lathen and Applicants negligently violated Sections 17(a)(2) and (3):

- Lathen testified to the applicable industry standards of care—honesty, integrity and professionalism—which were imposed by EACM's Code of Ethics. (PFOF ¶ 11.)

- Lathen routinely fell short of those standards by concealing the Participant and Fund Agreements from issuers (PFOF ¶¶ 413-14), deflecting issuer requests for additional information (PFOF ¶¶ 157; 218), and lying in response to questions from issuers and his own lawyer (PFOF ¶¶ 159; 610-11.)

(b) The Division's Evidence Rebutting The Advice-Of-Counsel Defense

Much of the initial decision's holding on scienter hinged on the Court's analysis of the advice-of-counsel defense, which Lathen and Applicants first raised in September 2016 (after the Division filed this action), and the Court found "conceivably relevant" in October 2016. *See* Oct. 18, 2016 Order. In its Order, the Court invited the Division to "explore the circumstances surrounding the advice Respondents sought and received." *Id.* At trial, the Division did just that, presenting substantial evidence underscoring the weaknesses of Lathen and Applicants' advice-of-counsel defense, including:

- Lathen did not seek any advice on his disclosures to issuers and conceded that no lawyer reviewed his disclosures to issuers. (PFOF ¶¶ 651-52; 654.)

- Lathen did not provide his redemption letters to any lawyers. (PFOF ¶¶ 690; 752-53; 824; 862-63; 1017.)

- Lathen and Applicants proffered no evidence that Lathen sought or obtained advice of counsel about the adequacy of his redemption letters, (PFOF ¶ 654; *see also* ¶¶ 690; 752-53; 824; 862-63; 1017), or on his disclosure obligations under the securities laws. (PFOF ¶ 651.)

- Two lawyers—Daren Domina of Katten Muchin Rosenman LLP ("Katten Muchin") in 2009 and Peggy Farrell of Hinckley Allen & Snyder LLP ("Hinckley Allen") in 2012—warned Lathen to take care with regard to disclosures. Farrell advised Lathen to completely disclose the nature and intent of his program to all third parties. (PFOF ¶¶ 741-42; 889-92.)

- Lathen sought advice on his legal relationships with the Participants from Katten Muchin, but never provided Katten Muchin with his Power of Attorney. (PFOF ¶¶ 712-15.)

- Lathen sought advice on his joint tenancies from Beth Tractenberg, Katten Muchin's Trusts & Estates lawyer—but there is no evidence that Tractenberg was provided with a Participant Agreement. (PFOF ¶¶ 698-703.)

- Before Farrell got involved, Lathen did not provide Robert G. Flanders, Jr. (then of Hinckley Allen) with any documents, a fact confirmed by billing records that show no document review. (PFOF ¶¶ 820-22.)

- There is no evidence that Kevin Galbraith, retained in July 2014 to represent Lathen and EACM in the Prospect dispute (PFOF ¶¶ 939-42; 944), received either the IMA or the PSA. (PFOF ¶¶ 959-71; 1020.)

- As early as 2010, Lathen told Bruce Hood of Withers Bergman LLP that he planned to conceal the Fund's role from issuers (PFOF ¶ 780), acknowledging that issuers might not redeem under the survivor's options if he provided all material facts to them. (PFOF ¶¶ 422-28.)

- Before Lathen opened the Fund, his lawyers at Katten Muchin warned him that regulators might not like his strategy, urged him not to finance it by raising money from third-party investors, and declined to represent him in setting up a Fund. (PFOF ¶¶ 683; 685; 692-93.)

- Lathen understood that his strategy would succeed only if he concealed material facts from the issuers. From the start, Lathen saw his strategy as a "loophole," (PFOF ¶ 1033) which, by definition, he could only exploit if the issuers did not know the complete truth about his relationship with Participants. (PFOF ¶¶ 425; 427; 780-82.)

- Lathen knew that none of his lawyers who reviewed the Participant Agreements could find clear authority that his joint tenancies were valid. (PFOF ¶¶ 827-30; 868-69; 893; 898-99; 1023.) And despite extensive efforts, he could not procure a legal opinion to that effect. (PFOF ¶¶ 653; 985-86; 988-90.)

- Lathen did not seek advice about the IMA's impact on his joint tenancies until prospective investors asked for assurances about the legality of his strategy; Lathen then put the question to Farrell. (PFOF ¶¶ 558-60.)

- Farrell told Lathen that the IMA stripped both Lathen and the Participant of beneficial ownership, and that the Participant Agreement he was then using (and continued to use) gave the Participants an insufficient ownership interest to support a valid joint tenancy. (PFOF ¶¶ 835-37; 871-76.)

- Despite Farrell's advice, Lathen and Applicants continued to redeem survivor's option bonds in accounts governed by both the IMA and PSA, claiming that Lathen and Participants were "owners" or "beneficial owners" of the bonds. (PFOF ¶¶ 351-53; 871-76; 913-94; 409; 460.)

- When Lathen forwarded Farrell a new PSA, which he had drafted, she concluded that the Fund was a co-tenant, destroying the joint tenancies. (PFOF ¶¶ 905-09.) Lathen continued to redeem securities held in accounts governed by that agreement, and failed to disclose Farrell's advice when consulting Galbraith. (PFOF ¶¶ 837; 871-77; 904-09; 1011.)

- Lathen also disregarded Farrell's advice to: (1) stop moving funds and securities among the joint accounts (PFOF ¶¶ 933-37); (2) implement an Account Control Agreement like one Hinckley Allen provided to Lathen (PFOF ¶¶ 925-28); and (3) stop touting the

charitable contributions EndCare would make on Participants' behalf, or potentially be subject to claims of fraudulent representation. (PFOF ¶¶ 582; 882-84.)

- Lathen gave Eric Roper, his Fund counsel, materials saying that his investment strategy was blessed by counsel (PFOF ¶ 763), but there is no evidence that Lathen disclosed to Roper (or any other attorneys) that Katten Muchin warned him not to execute his strategy through a Fund. (PFOF ¶¶ 692-93; 719-22.)

- Lathen appears to have lied to Galbraith, telling him that he had not withdrawn funds from the joint accounts (*e.g.*, PFOF ¶¶ 999; 1022; 1025-29), a claim that Galbraith then conveyed to at least one issuer's counsel. (PFOF ¶¶ 998-1000.)

- Katten Muchin's Tractenberg told Lathen that in a valid joint tenancy under New York law, each Participant would have a one-third interest in the joint accounts, but Lathen prepared a Participant Agreement that stripped Participants of their interest in the accounts. (PFOF ¶¶ 704; 707.)

- Tractenberg advised Lathen that the joint tenancies would produce gift tax obligations because Lathen was gifting the moiety to the Participants, but Lathen paid no gift tax. (PFOF ¶¶ 291; 709-11; *see also* ¶¶ 345; 371.) Katten Muchin told Lathen not "to go out and become a hedge fund and start selling securities to other people." (PFOF ¶ 693.)

- According to Lathen, Roper advised him on a form of Participant Agreement. Although Roper could not recall doing so (PFOF ¶ 1019), Lathen testified that Roper had revised the Participant Agreement in a way that Lathen thought incorrect, so Lathen changed it himself. (PFOF ¶ 1018; *see also* ¶ 750.)

- Lathen disregarded Hood's 2014 advice that all income from the accounts under the loan structure would be taxable as ordinary income, advice he had already received from Farrell. (PFOF ¶¶ 808-12; 912.)

- Although Galbraith recommended that Farrell spell out that Participants held a 50% interest in the JTWROS accounts in the Participant Agreements, Lathen rejected this advice. (PFOF ¶¶ 345; 1014.)

In its initial decision, this Court weighed the Division's evidence that Lathen and Applicants acted knowingly, recklessly, or at least negligently against evidence of Lathen's state of mind and advice received from counsel, and concluded that "Lathen retained counsel to ensure Respondents acted lawfully." Initial Decision at *39. Such determinations regarding the overall weight of the evidence are intrinsic to the role of the factfinder, however, and do not suggest that the Division's fraud claims were not substantially justified. Indeed, if it were

possible for this Court to conclude, prior to the presentation of the evidence at trial, that there was no genuinely disputed evidence to be considered by the fact-finder at trial, then the Court could have granted leave to move for summary disposition. Not only did the Court *not* grant leave, but it expressly held that Lathen and Applicants failed to show "a likelihood that they will be able to demonstrate the absence of a 'genuine issue with regard to any material fact.'" Sept. 19, 2016 Order at *1 (quoting 17 C.F.R. § 201.250(b)). Likewise, in its order denying in part the Division's motion to exclude the reliance on counsel defense and evidence, the Court expressly observed that "[w]hether Respondents will be able to establish all of the elements of the defense, including full disclosure to counsel and subsequent good faith reliance on that advice, remains to be seen." *See* Oct. 18, 2016 Order at *6-7.

* * * *

Thus, although this Court found (after a three-week hearing, testimony of over two dozen witnesses, and admission of over 750 exhibits) that the Division's evidence of scienter was insufficient to meet the Division's burden to prove scienter by a preponderance of the evidence, the Division's evidence, including that summarized above, was enough to satisfy a reasonable person that the Division's allegations regarding scienter were justified and that it could succeed on its fraud claims.

2. The Division's Position On Other Elements Of Its Fraud Claims Was Substantially Justified

In the face of a record replete with evidence of scienter (which, at a minimum, is sufficient to show that the Division's fraud claims were "justified to a degree that could satisfy a reasonable person," *Flanagan*, 2004 SEC LEXIS 1447, at *13), Applicants fall back on an argument that "the Division's entire theory of fraud was flawed and hopelessly unjustified." App. at 10. Applicants maintain 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." *Id.* Again, Applicants' rhetoric is belied by the actual record evidence:

- In attempting to redeem survivor's option bonds from issuers, Lathen and Applicants wrote a letter, in which they stated: "[Participant], a joint owner"—or a "joint and beneficial owner" in some letters—"on the above-referenced account, recently passed away. As the surviving joint owners on the account, we would like to exercise the survivor's option with respect to the following notes in the account." These statements were made in connection with bond redemptions where the offering materials required beneficial ownership to exercise the survivor's option. (*E.g.*, PFOF ¶¶ 106-09.)

- One prospectus at issue read: "The survivor's option is a provision in a note pursuant to which we agree to repay that note, if requested by the authorized representative of the *beneficial owner* of that note, following the death of the *beneficial owner* of the note.... The death of a person holding a *beneficial ownership interest* in a note as a joint tenant ... will be deemed the death of a *beneficial owner* of that note... (PFOF ¶¶ 106(b); 107(b).)

- The prospectuses universally required evidence to substantiate that the decedent was a beneficial owner at the time of death. For example: To obtain repayment pursuant to exercise of the Survivor's Option for a note, the deceased beneficial owner's authorized representative must provide . . . appropriate evidence satisfactory to the trustee and us . . . that the deceased was the beneficial owner of the note at the time of death . . . . (PFOF ¶ 108(b).)

- And, the beneficial ownership interest was frequently defined as "the right, immediately prior to such person's death, to receive the proceeds from the disposition of the Note" or the person holding the economic privileges and risks of ownership. (PFOF ¶ 113.)

- As Lathen's own lawyer expressed, the various side agreements into which Lathen and Applicants entered destroyed the joint tenancy that Lathen, EACM, and EACA attempted to create. (PFOF ¶¶ 836-37; 871-72; 874-75; 904-09.)

- Participant Agreements stated that she "[would] not be permitted to pledge, borrow against, or withdraw funds from the Account(s) without the express written permission of Lathen, which permission may be withheld in Lathen's sole discretion." (PFOF ¶ 311.)

- Participants also signed over to Lathen the right to open accounts (which Lathen did on their behalf) and to transfer funds or securities into and out of the accounts (which Lathen also did). (PFOF ¶¶ 310-12.) Participants did this before their accounts were opened. (PFOF ¶¶ 309-10; 321; 126-27; 133; 142; 152-53; 175-77.)

- Lathen executed another agreement—his IMA—wherein he promised that he would hold assets in the JTWROS accounts as "nominee" for the Fund, and divested all "legal or

beneficial interest in the S[urvivor's] O[ption] Investments." (PFOF ¶ 357.) The PSA, executed in 2013, similarly eliminated the Participants' and Lathen's interests, transferring all interests in the profits of the accounts to the Fund. (PFOF ¶ 374.)

- Lathen and Applicants' letters of redemption contradicted what they told investors—namely, that the assets in the JTWROS accounts belonged to the Fund. Lathen and Applicants characterized any theoretical attempt by Participants to access the assets in the JTWROS accounts as a misappropriation, telling investors that "strict governance protections and funds flow protocols" would be placed on the accounts in order to assure them that neither Lathen nor the Participants would misappropriate assets in the accounts. (PFOF¶ 589-90; 592.)

- Lathen told prospective investors that "as a practical matter, the Participants are not informed about any details of the JTWROS account (*e.g.*, the name of the brokerage firm, the account number, etc.)" and that "even if [Participants] found out where the account was carried and called the brokerage firm to attempt a withdrawal, they wouldn't be successful." (PFOF ¶ 346.) Lathen gave further assurances, including that Participants could not remove assets from the JTWROS accounts because "Jay Lathen has full discretion to move assets from one JTWROS account to another at any time." (PFOF ¶ 346; 287.)

- Lathen and Applicants reported in their audited financial statements that the entire net asset value of the JTWROS accounts were Fund assets. (PFOF ¶ 292.)

- The Fund carried all JTWROS brokerage expenses. (PFOF ¶ 293.)

- Fund investors paid all taxes associated with the profits in the JTWROS accounts—including receiving the benefits of capital gains treatment associated with redeeming the bonds. (PFOF ¶¶ 288; 810.)

- Investors were told that Participants "do not bear any expenses or liabilities, including any costs associated with the purchase of securities in their accounts." (PFOF ¶¶ 288; 526.)

- Lathen's redemption letters contradicted what he was telling, and how he was treating, Participants. Participants were told they were getting $10,000 "full stop" and "the conversation kind of ends." (PFOF ¶¶ 44; 273; 282.) Participants, most of whom had "never had a brokerage account," understood that they were not entitled to additional funds. (PFOF ¶ 282.)

- No Participant ever asked about the "mechanics of a brokerage account" and, as participant Joy Davis testified, "it was more or less like a Make a Wish thing .... [T]hey were going to give me $10,000 for me to do what I wanted to do." (PFOF ¶¶ 282; 320.) David Jungbauer, purportedly a joint tenant on the accounts, also understood that he had no financial interest in the accounts. (PFOF ¶¶ 360; 362). Jungbauer was added as a nominee accountholder, to ensure that Participants would not outlive Lathen. (PFOF ¶ 359.)

- Lathen and Applicants deliberately endeavored to keep Participants ignorant about the JTWROS accounts by signing the account opening documents under a power of attorney and instructing the broker-dealers not to send account statements to the Participants. (PFOF ¶¶ 281; 283-84.)

- Lathen and Applicants freely moved Participant assets from one account to another. (PFOF ¶¶ 296-97.) When Lathen discovered that a Participant's death was imminent he would transfer assets into that account to generate an immediate profit. (PFOF ¶ 297.) Conversely, when Lathen and Applicants learned Davis was cured of cancer, they transferred all assets out of Davis' account without her knowledge. (PFOF ¶¶ 322; 325-27.)

- Multiple issuers testified that Lathen's arrangements with the Participants and the Fund were (in GECC's words) "critical" to their determination of Lathen and Applicants' eligibility to redeem. (PFOF ¶ 124; *see also* ¶¶ 116-26; 130-34; 138;142; 160-63; 165; 167; 171; 178-82; 200; 228; 230; 239-41; 243; 245; 1037.)

- In 2013, based on its review of the Participant Agreements and Powers of Attorney, Goldman Sachs told Lathen that the deceased was not a beneficial owner of the notes, and that the joint tenancies were not valid. (PFOF ¶¶ 130; 135; 451.)

- Goldman Sachs expressed: "As reflected in the Participant Agreements that Mr. Lathen executed (and undoubtedly drafted), Mr. Lathen is engaged in an investment scheme—a 'highly unusual absolute return fixed income strategy'—whereby he attempts to profit by creating the appearance of a 'joint account' with the identities of terminally ill patients who have absolutely no economic interest in the accounts at issue." (PFOF ¶ 257.)

- GECC explained that the Participant Agreements stripped the deceased of beneficial ownership rights and invalidated the joint tenancies. (PFOF ¶ 165.)

- In 2014, trustee US Bank's attorney wrote to Lathen's attorney, after receiving the Participant Agreements, that "those Participation Agreements materially bear upon the eligibility of such submissions" (PFOF ¶ 240) and, upon review of such Participant Agreements, there was not "satisfactory evidence or information indicating the existence of a joint tenancy..." (PFOF ¶ 239.)

- Prospect brought a claim against Lathen and EACM in New York State Supreme Court for "fraudulent conduct designed to profit from the deaths of terminally ill individuals." (PFOF ¶ 200.)

- Goldman Sachs and Prospect had never refused a redemption request based on a survivor's option before this case. (PFOF ¶¶ 248-49.)

- GECC told Lathen that his Participant Agreement "presents evidence of a scheme designed to create the appearance that the deceased person was a joint tenant or beneficial owner of the securities (when, in reality, the deceased person was not the beneficial owner of the securities)...." (PFOF ¶ 163); *see also* (PFOF ¶ 167) ("it has become clear

that GE Capital has been the recipient of an attempted fraud by Mr. Lathen"; and "When Mr. Lathen opened the brokerage account, he checked a box on the application stating "Joint Tenants with Right of Survivorship. If the owner dies his/her interest passes to the surviving owner. This was simply not true. . . . It appears to us that Mr. Lathen made a false representation on the brokerage account application when he checked that box.") (PFOF ¶ 165.)

- Lathen was the principal author of the redemption letters and signed them. (SPOF ¶ 59; PFOF ¶ 405.)[16]

These facts, together with other substantial evidence discovered during the investigation and presented at trial, were, in the Division's estimation, sufficient to prove its fraud claims by a preponderance of the evidence. This Court disagreed. What is clear in *this* proceeding, however, is that these facts were sufficient to create a reasonable basis for the Division's fraud claims at the inception of the case and throughout the presentation of the evidence. The Division introduced evidence that Lathen and Applicants made misstatements and omissions to issuers concerning the side letter agreements, PSAs, IMAs, and impediments to the Participants' exercise of the full privileges of joint tenancies and beneficial ownership. The Division's fraud claims were substantially justified.

3. This Court's Prior Orders (Including The Initial Decision) Support A Finding That The Fraud Claims Were Substantially Justified

Applicants' abbreviated attacks on the Division's fraud claims as purportedly lacking substantial justification also ignore this Court's prior orders and initial decision. The Court's summary disposition order expressly acknowledges a genuine issue of material fact for trial, and the Court's advice-of-counsel orders contemplate a full presentation of evidence by both sides.

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[16] Contrary to Applicants' claim (App. at 10), there simply was *no* evidence at trial that issuers viewed Lathen's investment strategy as "legitimate"—Lathen never called any issuers to the stand. Although there was evidence that some issuers *paid*, Lathen and Applicants did not show that those who paid did so because they believed the full investment strategy was legitimate or fully understood it (or, indeed, that they were doing anything other than succumbing to Lathen's threats to sue). (PFOF ¶¶ 253-55.)

See pp. 3-4, 25-26, *supra*. More importantly, this Court's 71-page initial decision—far from dismissing the Division's proof of fraud out of hand—carefully and extensively evaluates the weight of the evidence in favor of and against each element of each of the Division's claims before reaching its ultimate conclusion.

At trial, the Division raised two potential theories of liability on its fraud claims; Lathen, EACM, and EACA made: (1) material misstatements to the issuers, and/or (2) materially misleading omissions by failing to disclose side agreements to the issuers. Initial Decision at *82-83. The Court found favorably to the Division on two "threshold arguments. (1) Did Lathen actually make statements to the issuers? (2) is the redemption of a bond a sale under the securities laws." *Id.* at *84. The Division's position with regard to these elements of its fraud claims was substantially justified.

The Court next considered whether misstatements were made regarding the existence of joint tenancies. As the Court observed, if joint tenancies were clearly invalid, then Lathen and Applicants would be liable for making material misstatements. *Id.* at *81. This question, which the Court deemed "*the* material issue" was one requiring the Court to apply New York Banking Law and hotly contested by the parties. *Id.* (emphasis in original). The Court's consideration of this question—which required weighing of the credibility of witnesses, assessment of the importance of different elements of joint tenancies under New York Banking Law, and consideration of "ambiguous" contracts and extrinsic evidence—was far from simple.

As this Court held, under New York law, "convenience accounts" include those where:

> the depositor supplied all the money for the account, made all investment decisions relating to account, was the sole possessor of checkbook for the account, and made all withdrawals from the account.

Id. at *103 (citing *Pinasco v. Ara*, 631 N.Y.S.2d 346, 347 (App. Div. 1995)). Additional probative facts include whether one party did not receive account statements or did not know what would happen to the account when the depositor died. *Id.* at *103-04. Here, although the Division presented evidence that each of these imprimaturs of convenience accounts was present, the Court found that the key underlying issue to determining whether a valid joint tenancy exists is the depositor's *intent* at the time that the account was created, *id.* at *105-06, and further found that because the "intent of the parties is not readily knowable, a court must rely on circumstantial evidence surrounding the opening and managing of an account," *id.* at *106. The Court then held that because Lathen "needed valid joint tenancies for his investment model to succeed .... [h]e certainly intended to create valid joint tenancies, and, for this reason, it is hard to call them convenience accounts." *Id.* at *106; *see also id.* at *121 ("I am convinced that Lathen had a sincere good faith belief that each version of the participant agreement created valid joint tenancies.").

This Court's decision to weigh Lathen's intent most heavily of all of the markers of convenience accounts was based on the Court's understanding of the application of New York Banking Law § 675 to the evidence presented at trial. It does not, however, indicate that the Division was not substantially justified in maintaining that a New York court would determine, under these facts and circumstances, that the Division rebutted the presumption of joint tenancy. Notably, this Court weighed Lathen's intent *more heavily* than precedent. *Id.* at *106-07 (distinguishing "all the cases cited by the Division" because of "Lathen's clear intent"). The Division's position was not unreasonable. *E.g.*, *Saysana v. Gillen*, 614 F.3d 1, 5 (1st Cir. 2010) ("When the issue is a novel one on which there is little precedent, courts have been reluctant to

find the government's position not substantially justified.") (quoting *Schock v. United States*, 254 F.3d 1, 6 (1st Cir. 2001)).[17]

The Court's initial decision also places great weight on the credibility of certain witnesses and evidence as to Lathen's character. Initial Decision at *39-40, *58-62, *128-30. These witnesses' credibility and character evidence, and how they would be assessed by this Court, were not known or knowable until the hearing, well after the case was charged. Indeed, the Division did not even know that many of these witnesses would be permitted to testify until the eve of trial. *See* Jan. 26, 2017 Order (denying Division's motion *in limine* five days before trial). That this Court made ultimate credibility determinations that differed from the Division's position does not suggest that the Division's position was not substantially justified. As the Seventh Circuit has reasoned:

> [W]e cannot find the [government]'s decision to litigate an issue that turned on a credibility assessment was itself unreasonable; the fact that an ALJ might make an adverse finding on a credibility issue does not, in and of itself, deprive the [government]'s position of a basis in fact.

Temp Tech Indus., Inc. v. NLRB, 756 F.2d 586, 590 (7th Cir. 1985); *see also Montgomery*, 2001 SEC LEXIS 2775, at *13 ("A determination of substantial justification may be premised on evidence, including testimony that was rejected by the initial trier of fact.").

In arguing that the Division's position at trial was not substantially justified, Applicants disregard the complexities of the issues presented and this Court's extensive analysis, and instead

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[17] The initial decision is even more supportive of the reasonableness of other aspects of the Division's fraud claims. With regard to the side agreements, for example, the Court acknowledged that "because the law is unsettled, and the side agreements would have been material to issuers' decisions on how they wished to proceed, Respondents' decision not to disclose the side agreements may have been a materially misleading omission." Initial Decision at *126. Although the Court ultimately rejected this claim on grounds of scienter, the Court's own initial decision supports a finding that the Division's position was a reasonable interpretation of the unsettled landscape.

intimate that the Division should have known—from the outset—how this Court would resolve a question of first impression under New York law and that the Court would make credibility determinations that were unfavorable to the Division. EAJA does not require such ability to predict the future. Rather, it requires that the Division's position have been *reasonable*, which the Court's own analysis makes clear it was.

4. The Holdings Of FINRA In *C.L. King* And The District Court In *Staples* Provide Objective Indicia Of Reasonableness And Further Support A Finding That The Division's Fraud Claims Were Substantially Justified

The Division's interpretation of the law as warranting fraud claims against Applicants is also supported by the decisions of at least two other independent adjudicators, which provide objective indicia of the reasonableness of the Division's action and further support a finding by this Court that the Division's action was substantially justified. *Cf., e.g., Johnson v. HUD*, 939 F.2d 586, 590 (8th Cir. 1991) (the fact that the government's interpretation of the law was accepted by the district court is a circumstance that indicates the government was substantially justified).

First, less than one month after this Court issued its initial decision, a FINRA panel issued a decision in its related disciplinary proceeding, *Dep't of Enforcement v. C.L. King & Assocs.*, Disciplinary Proc. No. 2014040476901, 2017 FINRA Discip. LEXIS 33 (Sept. 6, 2017) ("FINRA Decision"), in which it found, *inter alia*, that C.L. King, one of the broker-dealers through which Lathen and Applicants redeemed their debt securities, was liable for negligent material misrepresentations and failure to disclose material facts to issuers in connection with its bond redemptions in violation of Sections 17(a)(2) and (3) of the Securities Act and FINRA Rule 2010. *Id.* at *2-6; *compare* Initial Decision at *1-3, *134-37. The broker-dealer was censured

and fined $750,000. FINRA Decision at *6.[18] Although the FINRA Decision was issued after this Court's initial decision, FINRA's judgment, based on the same facts as in this action, that C.L. King was liable for negligence-based fraud provides objective indicia that it was reasonable for the Division to bring this action, and lends further support for a finding that the Division's fraud claims were substantially justified.

FINRA's fraud claim concerned whether C.L. King made negligent misrepresentations and omissions to issuers of debt securities during the Firm's representation of Lathen and EACM with respect to their redemptions of the survivors' bonds at issue in the Division's action. *Id.* at *3-4. FINRA's Division of Enforcement alleged that C.L. King had an obligation to disclose to issuers during the redemption process that terminally ill Participants were not in fact beneficial owners of the survivor bonds, because Lathen and EACM required them to sign side agreements in which they gave up their ownership rights to the assets held in the accounts with Lathen. *Id.* at *3. Thus, there was direct overlap between the questions presented in this action with those presented in the FINRA action. *Compare, e.g.*, FINRA Decision at *1-7, *with* Initial Decision at *1-3. FINRA held that C.L. King made negligent misstatements and omissions to issuers in connection with its redemptions of survivor bonds on Lathen and Applicants' behalf in two ways:

> First, Enforcement charge[d] that during the process of redeeming the survivor bonds C.L. King misrepresented the status of the deceased Participants as "joint owners" of accounts with Lathen in its cover letters to issuers and their agents. Enforcement contend[ed] that this statement is a misrepresentation because, by surrendering their rights to the accounts they opened with Lathen in the Participant Agreements, Participants were not beneficial owners of the accounts under New York law.

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[18] FINRA's action also concerned C.L. King's failure to establish and maintain a supervisory system designed to ensure the Firm's compliance with Section 17(a) and its sale of penny stocks. FINRA Decision at *1, *3.

> Second, Enforcement allege[d] that the Firm made material omissions by failing to provide issuers or their transfer agents with copies of the Participant Agreements even though C.L. King knew of their existence by at least December 2012. Enforcement contend[ed] that the existence of the Participant Agreements, which affected a Participant's ownership rights in the account, would have had a material effect on issuers' decisions whether or not to honor Eden Arc's redemption requests.

FINRA Decision at *34-35. FINRA further held that the existence of the Participation Agreements was material, and that:

> Lathen was not a survivor because the Participant agreements created unequal rights to the accounts such that they were not valid joint tenancies. Thus, when C.L. King told an issuer during the redemption process that a Participant was a joint owner of a survivor bond at the time of death, the Firm made a false statement.

Id. at *41; *see also id.* at *54-55 ("A reasonable issuer would have wanted to know of the existence of Participant Agreements in order to come to its own conclusion as to whether the Participants were in fact beneficial owners of the bonds held in joint accounts at the time of their deaths."). FINRA held, under the circumstances, that the accounts were not true joint accounts, but instead were "convenience accounts" as a matter of New York law. *Id.* at *45-46.

Although this Court reached different conclusions than FINRA in the initial decision, FINRA's independent judgment to the contrary evidences that the Division was not unreasonable in its contentions and that the Division's action was substantially justified.

Second, the favorable decision of the United States District Court for the District of South Carolina on the motion to dismiss in *SEC v. Staples*, 55 F. Supp. 3d 831 (D.S.C. 2014), provides further objective indicia of this action's reasonableness and that the Division's claims were substantially justified. In September 2013, the Commission filed a litigated civil action against Benjamin Sydney Staples and Benjamin Oneal Staples (the "Staples") for engaging in fraudulent conduct similar to that of Lathen. Like Lathen, the Staples paid terminally ill patients a lump

sum in exchange for opening joint brokerage accounts with them in order to purchase survivor's options securities. The Staples similarly required that the Participants relinquish their rights in the accounts. Based on those and other relevant facts, the Commission brought claims under Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder.[19] In September 2014, the District Court denied defendants' motion to dismiss, finding that the SEC sufficiently alleged, *inter alia*, that "'when the Staples redeemed their bonds under the survivor's option, they falsely claimed that the decedents were owners of the bonds when in fact the deceased participants had relinquished all ownership interest in the bonds through the Estate Assistance Agreement and the Participant Letter.'" *Staples*, 55 F. Supp. at 838. The finding of the District Court that the Commission's Complaint stated a claim for scienter based fraud further supports a finding that the SEC's action was substantially justified.[20]

* * * *

The complete record shows that the Division's fraud claims would satisfy a reasonable person and were therefore substantially justified. *See, e.g.*, *Pierce*, 487 U.S. at 566 n.2 ("[A] position can be justified even though it is not correct, and we believe it can be substantially ... justified if a reasonable person could think it correct.").[21]

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[19] The Staples were not investment advisers and did not control a fund, but rather were trading for their own profit.

[20] The District Court's decision on the motion to dismiss in *Staples* evidences that, by September 2014 at the latest, a court had determined that the SEC's claims were sufficient to withstand a motion to dismiss. Lathen first became aware of the *Staples* case in September 2013 and believed that issuers would have grounds to refuse to redeem under the survivor's option, if he had Participant Agreements like those at issue in *Staples*. PFOF ¶¶ 449-50. Nonetheless, Lathen's conduct continued.

[21] *See also, e.g., Broussard v. Bowen*, 828 F.2d 310, 314 (5th Cir. 1987) (government's position had reasonable basis in fact, so EAJA application denied even though applicant "prevailed and should have prevailed," and the government's "position was hardly objective").

B. The Division's Custody Rule Claims Were Substantially Justified

The Division's claims under the custody rule—which Applicants relegate to a footnote, App. at 11 n.6—likewise were substantially justified.

In the OIP and at trial, the Division alleged that EACM violated the custody rule, and Lathen aided and abetted EACM's violations, by failing to maintain client funds and securities in a separate account for each client in the client's name, or in accounts containing assets of only the adviser's clients, in the adviser's name as agent or trustee. OIP ¶ 2 (citing 15 U.S.C. § 80b-6(4); 17 C.F.R. § 275.206(4)-2); *id.* ¶¶ 65-67. Notably, unlike the Division's claims under Sections 10(b) and 17(a)(1), a claim brought under the custody rule does not require a showing of scienter and thus "'[l]ack of intent is no defense.'" *James A. Winkelmann, Sr.*, Initial Decision Release No. 1116, 2017 WL 1047106, at *57 (ALJ Mar. 20, 2017) (quoting *Abraham & Sons Capital, Inc.*, Investment Advisers Act Release No. 1956, 75 SEC Docket 1147, at *8 & n.28 (July 31, 2001)).

1. The Division's Evidence Of EACM's Custody Rule Violation

Here, the Division adduced significant evidence at trial showing that EACM willfully violated the custody rule:

- EACM reported in Items 7 and 9 of its Forms ADV that it was investment adviser to one client—the Fund. (PFOF ¶¶ 462; 465; 469; 478; 495-505.)
- EACM, via Lathen, had custody of the Fund's assets. Lathen was the managing member of EACM and EACA, and had access to the JTWROS accounts. (SFOF ¶¶ 5; 7-8; 16; 58.)
- Lathen admitted that "as a general partner of a fund, I'm deemed to have custody of everything." (PFOF ¶ 482; *see also* ¶¶ 494; 495-503; 515.)
- The client "funds or securities" that had to be properly custodied were the assets in the JTWROS accounts, which belonged to the Fund and had to be held in the Fund's name. (PFOF ¶¶ 466-67.)

- The IMA made clear that Lathen was holding the assets in the JTWROS accounts "as nominee for and on behalf of the partnership only." (PFOF ¶ 357.) Lathen, the Adviser, and the Fund agreed that Lathen had "no legal or beneficial interest in the S[urvivor's] O[ption] Investments." (*Id.*; *see also* PFOF ¶ 358).

- The Fund held itself out as owner of the assets in the joint accounts in its PPM (PFOF ¶ 32-3), Fund financials (PFOF ¶ 519-20; 522), and in EACM's management representation letter to its auditors (PFOF ¶ 514).

- The Division's expert, Martin Lybecker, opined—based on his review of the Forms ADV, financial statements, tax returns, and agreements pre-2013—that the assets in the JTWROS accounts "were the funds and securities of the Fund (*not* Mr. Lathen and *not* the Participants) and ... should have been held in a proper custody account in the name of the Fund." (PFOF ¶ 477.)

- Post-2013, nothing changed—not the economics of the transactions; not the flow of funds; not the representations to investors in the Forms ADV; not the treatment of the assets in the Adviser's financials; not Lathen's individual taxes nor the Fund investors' taxes. (PFOF ¶¶ 288; 290; 292; 295; 383; 495-503; 520; 523-24; 812.)

- The Fund continued to receive all the economic benefits from assets that Lathen and Applicants told the Court were simply "collateral." *E.g.*, EACM's Form ADVs reported that the Adviser had custody of Fund assets and the gross asset value of the Fund was equal to the amount in the JTWROS accounts, inclusive of margin. (PFOF ¶¶ 488-513.)

- Lathen continued to record the income in the JTWROS accounts on his personal tax returns as "nominee" gains, and the Fund continued to issue K-1s to investors allotting capital gains treatment for the bonds that were redeemed in the JTWROS accounts. (PFOF ¶¶ 811-12.)

- The Fund paid all brokerage and clearing charges relating to the JTWROS accounts, which were reported in the Fund financials as expenses to the Fund (even though the PSA did not state that the Fund would cover such "expenses"—only that Lathen would "assign all profits and losses he derives" from the JTWROS accounts to the Fund). (PFOF ¶¶ 293; 374-75; 815.) (*See also* PFOF ¶ 526; *see generally* PFOF ¶¶ 465-68; 474.)

- Under the IMA and the DLA, EACM managed a pool of securities for the Fund; the Fund had 100% economic exposure to that pool, and in return, EACM collected management fees.

2. The Division's Evidence That Lathen Aided And Abetted And Controlled EACM's Custody Rule Violation

The Division likewise presented significant evidence at trial that Lathen aided and abetted and caused EACM's custody rule violation:

- As sole control person and the senior-most employee of EACM's two person staff, Lathen executed each step that caused EACM's Custody Rule violation: Lathen executed, and signed on behalf of all parties, the agreements that caused the Adviser to put the Fund's money into Lathen's and the Participants' names. (PFOF ¶¶ 354; 368; 373.) Lathen opened the JTWROS accounts (SFOF ¶ 58; PFOF ¶¶ 281; 321); and Lathen transferred investor funds into those accounts. (PFOF ¶¶ 294-96.)

- Lathen was the CEO, CCO, CFO, CIO, managing member and founder of EACM. (SFOF ¶ 4.) He was the sole person who could act on EACM's behalf. The Compliance Manual, wherein Lathen acknowledged that EACM had a fiduciary duty to the Fund, stated that "Eden Arc will maintain Fund assets with a qualified custodian in a separate account for each client under that Fund's name, or in accounts that contain only Fund assets, under the Fund's name or Eden Arc's name as agent or trustee for the Fund. The CFO [Lathen] is responsible for causing Fund assets to be held with qualified custodians . . . ." (PFOF ¶ 515; *see also* PFOF ¶¶ 517; 575.)

- In Exhibit A to the Compliance Manual, Lathen acknowledged that he had read and understood the policies and procedures set forth therein, and agreed to abide by them. (PFOF ¶ 516.) Lathen also signed and certified under penalty of perjury that the Fund's assets were custodied by qualified custodians on EACM's Forms ADV. (PFOF ¶¶ 488-90; 492-93; 509-13.)

- Lathen testified that he has "deep regard and respect . . . for the securities laws" and that he understood, as an investment adviser, that it was important to be accurate. (PFOF ¶ 616; *see also* PFOF ¶¶ 11-12.)

- In January of 2015, based upon concerns raised orally by SEC Exam staff, Lathen's consultants at Mission Critical sent Lathen a Draft Risk Assessment and Gap Analysis which noted that "current account arrangements are not in compliance with [EACM's] procedure because they are in the JT accounts in Jay's and participant's names without the Fund's name" and marked the failing as a "High" risk. (PFOF ¶ 545.) It also noted that "Eden Arc did not conduct any annual[] reviews as required by 206(4)-7 since its initial SEC registration on 10/31/12." (*Id.*) These deficiencies were then reiterated to Lathen by SEC Exam staff in their deficiency letter. (PFOF ¶ 573.)

- No evidence was presented that Lathen took steps to remedy the (1) violation that Exam staff identified, nor (2) risks that Mission Critical identified. (PFOF ¶ 518.)

3. This Court's Extensive Analysis Of The Division's Custody Rule Claims Further Evidences Their Reasonableness And That They Were Substantially Justified

As with the Division's fraud claim, this Court's extensive analysis in the initial decision of the Division's custody rule claim further evidences the reasonableness of and substantial justification for the Division's position.

At trial, the Division presented, among other evidence, testimony from its expert, Martin Lybecker, that the joint accounts were Fund assets or securities, because of: (1) the terms of the various Partnership agreements; (2) the Partnership's beneficial interest in the proceeds of the accounts; (3) Lathen and the Partnership's descriptions of the joint accounts; and (4) the practical consequences of the investment model. Initial Decision at *62-63. Although this Court ultimately did not accept the majority of this testimony (finding that it amounted to legal conclusions, *id.* at *63), the testimony of the Division's expert provides objective indicia of the reasonableness of the Division's position. The Division rightfully believed—based on consultation with and testimony by an expert with over 40 years' experience with respect to the applicability of the custody rule to the types of arrangements used by EACM, EACA, and the Fund—that the Division's position with regard to the custody rule was well supported both by the facts of this case and the applicable law. That this Court ultimately reached a different conclusion based on its own application of the law to the facts does not change the fact that the Division had substantial justification for its belief in the legal and factual merits of its claim. *E.g.*, ***Williams***, 600 F.3d at 302 ("The inquiry into reasonableness for EAJA purposes may not be collapsed into the antecedent evaluation of the merits, for EAJA sets forth a distinct legal standard.") (internal citation omitted).

Moreover, as this Court acknowledged in the initial decision, the evidence with regard "to whether Respondents considered the joint accounts assets of the Partnership," was "mixed." Initial Decision at *63-64. The Court weighed the mixed evidence—including statements in EACM's Forms ADVs, statements in EACM's Compliance Manual concerning EACM's custody of Partnership assets and Lathen's roles with regard to the Partnership assets, the Partnership's audited financial statements, a due diligence questionnaire dated July 1, 2013,

Lathen's tax returns, and Lathen's own testimony and admissions to Commission staff. *Id.* at *63-72. Ultimately, this Court concluded, based on the weight of the evidence, that EACM did not violate the custody rule (and Lathen did not aid and abet a custody rule violation), because the joint accounts were not client funds. *Id.* at *140-44. The Court recognized, however, that the analysis under the IMA was "complex." *Id.* at *142. Likewise, the Court acknowledged the undisputed statements in EACM's Forms ADV and in other documents cited by the Division, but held that they were not dispositive, stating that "[t]he fact that EACM's Forms ADV sometimes stated that the company had custody of funds in the joint accounts does not mean that it did." *Id.* at *146-47. It cannot, however, have been inherently unreasonable for the Division to have asserted claims for custody rule violations directly supported by Lathen and EACM's own admissions in their Forms ADV and that required this Court to engage in a thoughtful weighing of the evidence. This is precisely the type of consideration of genuinely disputed questions of fact that is the province of the fact-finder.

* * * *

That this Court ultimately was not persuaded at trial by the Division's evidence in support of its fraud and custody rule claims is a far cry from the type of case that EAJA was meant to address. This Court's own initial decision shows that the issues presented in this case were far from simple or clear-cut. The Court therefore should reject Applicants' after-the-fact assertion that because the Division ultimately did not prevail, its claims were doomed from the start. The record shows that the Division's claims were substantially justified at the time it initiated the proceeding, and remained so at all times.

V. The Legal Fees And Expenses Applicants Seek Are Unreasonable

This Court should also reject the Application because the legal fees and expenses sought are not reasonable. The Application impermissibly seeks fees and expenses that: (i) were

incurred during the investigation or in private litigation; (ii) exceed the statutory maximum of $75.00 per hour; and (iii) are insufficiently documented and unreasonable under Commission Rule of Practice 43. Applicants also seek costs that are expressly disallowed under Section 27 of the Exchange Act. Because Applicants bear the burden of demonstrating the reasonableness of the fees and expenses requested in the Application and have failed to meet that burden in multiple ways, this Court should deny (or, at a minimum, substantially reduce) the Application.

A. Applicants May Not Recover Legal Fees And Expenses Incurred In The Investigation Or Private Litigation

Applicants seek over $250,000 in fees and expenses that were incurred before August 15, 2016 (the date the OIP was filed), and also seek thousands of dollars in fees and expenses related to private litigation against Lathen and Applicants. *See* App. at 5-6; *id.* Exs. 1-6; Ex. D (Division Worksheet, Tab 1 – Calculations). Because EAJA "does not apply to Commission investigations," *Equal Access to Justice Act Rules*, 47 Fed. Reg. 609 (Jan. 6, 1982), and private litigation to which neither the Division nor the Commission is a party is not an "adversary adjudication[] conducted by the Commission," 17 C.F.R. § 201.33(a), these purported fees and expenses should be disallowed.

1. Applicants Impermissibly Seek Fees And Expenses From The Investigation

Applicants' "Summary of Expenses Recoverable Under EAJA" (App. Ex. 1, "Summary") and supporting exhibits (*id.* Exs. 2-6) show that Applicants seek a total of $253,151.04 in legal fees and expenses that predate the filing of the OIP and are therefore impermissible. Ex. D (Division Worksheet, Tab 1 – Calculations); *id.* (Tabs 2-5).

Brune Law PC: The Summary includes four invoices—totaling $111,740.00 in legal fees and $6,503.95 in expenses—from Brune Law PC, all of which predate the filing of the OIP. App. Ex. 1 (Summary); *Id.* Ex. 3 (itemized invoices); Ex. D (Division Worksheet, Tabs 1 & 2).

Brune Law was not counsel of record in the administrative proceeding and did not appear at any time after the filing of the OIP. *See, e.g.,* Letter from Harlan Protass to Janna Berke (Aug. 17, 2016) (stating that Clayman & Rosenberg represents Lathen, EACM, and EACA and confirming receipt of the OIP) (attached to Joint Letter from Parties to Hon. James E. Grimes (Sept. 8, 2016)). Moreover, the attached invoices make clear that Brune Law performed work in connection with the investigation. *See* App. Ex. 3 (including, *e.g.*, entries for "Review and revise Wells submission"; "Wells revision"; "Outline for settlement/Wells presentation"; "Work on PowerPoint presentation to SEC"; "Practice SEC presentation with S. Brune"; "Revise supplemental Wells"; "Research to determine dates of upcoming closed SEC meetings").

The Galbraith Law Firm: The Summary includes $31,167.51 in legal fees from the Galbraith Law Firm for 150.7 hours of work on "various" dates. *See* App. Ex. 1. The Galbraith Law Firm's itemized invoices show that all but 67.1 of these hours were worked *before* the OIP filing date. *Id.* Ex. 4; Ex. D (Division Worksheet, Tab 3 – Legal Services by Date). And, the invoice entries confirm that these invoices comprise work in connection with the Commission staff's investigation. *See* App. Ex. 4 (including, *e.g.*, entries for "Telephone consultations with client re: SEC subpoenas"; "Telephone consultation with Harlan Protass re: developments in SEC investigation"; "Telephone and email consultations with client re: SEC investigation status; research regarding SEC defense firms and firms that might be appropriate to issue legal opinion regarding investment strategy; research potential firms to respond to Wells notice; contact same"; "Meeting with client and prospective counsel Susanna Buergel of Paul Weiss re: Wells notice and structure of potential engagement").[22]

[22] Eliminating legal fees sought for work performed before the OIP filing date reduces Galbraith's fees from $31,167.51 to $5,032.50. Ex. D (Division Worksheet, Tab 3 – Legal Services by Date). This amount should be further reduced to eliminate amounts related to

Clayman & Rosenberg: The Summary also includes 14[23] Clayman & Rosenberg invoices—totaling $86,412.04 in legal fees and $8,294.19 in expenses—that predate the OIP date. App. Ex. 1; Ex. D (Division Worksheet, Tabs 3-4). Clayman & Rosenberg's invoices verify that these fees were incurred in connection with the investigation. *See* App. Ex. 2 (including, *e.g.*, "prepared documents for production to the SEC"; "Drafted white paper"; "Reviewed Wells submission and other relevant documents"; "Researched and drafted audit response letter"; "Drafted Second Supplemental Wells Submission").

Finally, Applicants seek $22,531.89 in "Other Services" from Empire Discovery[24] and Eisner Amper that predate the OIP. App. Ex. 1; Ex. D (Division Worksheet, Tab 4 – Other Services).[25]

2. Applicants Impermissibly Seek Fees And Expenses From Private Litigation

Applicants also impermissibly seek fees relating to private litigation against Lathen and Applicants to which the SEC was not a party. For example, the invoices for the Galbraith Law Firm contain numerous entries, both before and after the OIP filing date, such as:

- "Email consultations with U.S. Bank counsel and client re: redemption requests; email consultations with Prospect counsel and client re: proposed amendment to complaint and

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private litigation and Galbraith's service as a fact witness. *See* Sections V.A.2 & V.D, *infra*; Division Worksheet, Tab 2 – Legal Services).

[23] The September 14, 2016 Clayman & Rosenberg invoice includes entries both before and after the OIP date. 49.4 of 74.4 hours billed are after the OIP date, together with $30.07 in expenses. *See* Ex. D (Division Worksheet, Tabs 2-3, 5).

[24] Applicants do not appear to have submitted itemized invoices for Empire Discovery, as required under Commission Rule of Practice 43. App. Ex. 6. Nevertheless, the Summary states that these expenses were incurred on June 12, 2015 and therefore predate the OIP. *Id.* Ex. 1.

[25] These expenses, which include disbursements for printing and fact witnesses that are not permitted under Exchange Act Section 27, should be denied on that basis as well. *See* Section V.D, *infra.*

briefing schedule; phone consultation with client re: Prospect complaint, strategy, and next steps...." (Feb. 20. 2015)

- "Telephone consultation with Prospect counsel re: privilege, settlement and discovery...." (Sept. 21, 2016)
- "Discovery compliance conference with court in Prospect litigation; discussions with Prospect counsel in connection with same ... email consultation with client and Prospect counsel re: outstanding discovery issues" (Sept. 29, 2016)
- "Analyze procedure for voluntary discontinuance of counterclaims in Prospect litigation ...." (Nov. 20, 2016)
- "Review and produce materials in Prospect litigation ... email consultation with Prospect counsel re: adjourning oral argument on MTD" (Jan. 1, 2017)
- "Telephone consultation with U.S. Bank counsel re: subpoenas; email consultation with client re: same and re: other issues relating to Prospect litigation; review materials provided by client in connection with Prospect litigation ...." (May 17, 2017)

App. Ex. 4. Because the Galbraith Law Firm's itemized invoices contain entries that include work both in the SEC matter and in private litigation, it is impossible to determine precisely how much of the $31,167.51 sought by Applicants for work performed by the Galbraith Law Firm relates to private litigation. What is clear, however, is that these fees are not recoverable under EAJA for three separate reasons: (1) $17,688.41 of the $31,167.51 sought predates the OIP date, Ex. D (Division Worksheet, Tabs 2-3); (2) substantial charges relate to private litigation; and (3) fees relating to Galbraith's testimony as a fact witness are not recoverable under EAJA.[26] Since Applicants have not met their burden to establish the reasonableness of The Galbraith Law Firm's fees, they should be stricken in their entirety.

[26] *See* Sections V.A & V.D. The Catch-22 is obvious: Galbraith cannot have represented Applicants in the adjudicatory proceeding, since he testified as a fact witness. To the extent Galbraith represented Applicants in connection with the Division's investigation (as opposed to in connection with private litigation), these fees are not recoverable under EAJA because they predate the OIP.

3. These Fees And Expenses Must Be Excluded From Any EAJA Award

Both the Commission's implementing regulations for EAJA and case law definitively reject Applicants' attempt to recover an award for fees and expenses incurred during the investigative phase. 17 C.F.R. § 201.33(a) ("[EAJA] applies to adversary adjudications conducted by the Commission. These are on the record adjudications under 5 U.S.C. § 554 in which the position of an Office or Division of the Commission as a party ... is presented by an attorney or other representative who enters an appearance and participates in the proceeding."); *see also, e.g., Brandt, Kelly & Simmons*, Initial Decision Release No. 305, 2006 SEC LEXIS 292, at *19 (ALJ Feb. 10, 2006) ("EAJA applies to an adversary adjudication as defined in 5 U.S.C. § 504(b)(1)(C). An investigation is not an adjudication, as the Commission has long recognized.") (citing *Equal Access to Justice Act Rules*, 47 Fed. Reg. 609 (Jan. 6, 1982)); *Douglas W. Powell,* Exchange Act Release No. 51594, 2005 SEC LEXIS 903, at *3 (Apr. 21, 2005) ("Legal fees and expenses incurred prior to the institution of the administrative proceeding are not covered under EAJA") (citing *Flanagan*, 2003 SEC LEXIS 2795, at *32). Nor is private litigation to which neither the Division nor the Commission is a party an "adversary adjudication[] conducted by the Commission." 17 C.F.R. § 201.33(a).

The sole case on which Applicants rely for their contrary position, *Rita C. Villa*, Initial Decision Release No. 132, 1998 SEC LEXIS 2033 (ALJ Sept. 23, 1998), is no longer good law. App. at 6. The Commission overturned the initial decision in *Rita Villa* after concluding that the Division's case was substantially justified and Applicant was not entitled to an award under EAJA. *See Rita C. Villa*, Exchange Act Release No. 42502, 2000 SEC LEXIS 410, at *10-22 (Mar. 8, 2000).

Thus, because the Commission's EAJA implementing regulations and precedent make clear that EAJA applies only to "adversary adjudications," fees and expenses expended during

the course of the investigation (prior to the initiation of the administrative proceeding through filing of the OIP on August 15, 2016) are not compensable. Likewise, Applicants cannot recover fees and expenses incurred in private litigation in which the SEC was not a party.[27]

B. Applicants May Not Recover Legal Fees And Expenses Greater Than $75.00/Hour

Applicants request an award of attorneys' fees at hourly rates ranging from $203.83 for work performed in 2015, $206.43 for 2016, and $210.40 in 2017, based on indexing of the 1981 rate. App. at 7-8; *id.* Exs. 1-6. The Commission's EAJA regulations, however, 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). The Commission has rejected the argument that Section 504(b)(1)(A)(ii) mandates the calculation of attorneys' fees at an hourly rate of $125.00 and continues to calculate fee awards at an hourly rate of $75.00. *See, e.g.*, *Powell*, 2005 SEC LEXIS 903, at *3-4 (citing 17 C.F.R. § 201.36(b)); *Flanagan*, 2003 SEC LEXIS 2795, at *40-45 (explaining why the Commission continues to adhere to the maximum hourly rate of $75.00 prescribed in Section 201.36(b)). Likewise, there is no support in Commission regulations or precedent for Applicants' request that this Court adjust the $75.00/hour hourly rate for CPI-based cost-of-living increases.[28]

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[27] Removing these improper fees and expenses from the Application reduces the total amount potentially recoverable from $1,125,349.52 to $872,198.48 (before further required adjustments under the $75.00/hour cap and pro-rata allocation, discussed below). Ex. D (Division Worksheet, Tab 1 – Calculations).

[28] Applying a $75.00/hour hourly rate to fees allegedly incurred between the OIP date and the date of the Application reduces the amount sought from $761,870.74 to $268,515.00. Ex. D (Division Worksheet, Tabs 1-2).

C. Applicants' Fees And Expenses Are Not Adequately Documented Or Reasonable

Applicants bear the burden, under Commission Rule of Practice 43, of adequately documenting their fees and expenses and demonstrating that the number of hours charged to the matter was reasonable. 17 C.F.R. § 201.43. To that end, Applicants' "supporting documentation must be of sufficient detail and probative value to enable the court to determine *with a high degree of certainty* that such hours were *actually and reasonably expended.*" *E.g.*, *Role Models America v. Brownlee*, 353 F.3d 962, 970 (D.C. Cir. 2004) (quoting *In re North (Bush Fee Application)*, 59 F.3d 184, 189 (D.D.C. 1995)) (internal quotation marks omitted) (emphasis added)). Applicants fail to meet this burden.

Applicants seek reimbursement for 4,695.2 attorney hours worked between February 2015 and the date on which the initial decision became final (Nov. 2, 2017). App. at 7; *id.* Ex. 1. The Division calculates that Applicants seek reimbursement for 3647.3 attorney hours[29] spent on this litigation from the OIP date (August 15, 2016) and the date on which the initial decision became final. *See* Section V.A.1, *supra.* Even setting aside Applicants' impermissible attempts to recover fees and expenses incurred outside the adjudicatory proceeding and in excess of $75.00/hour, it is clear that Applicants have not met their burden of showing that the fees and expenses charged to the matter were reasonable.

First, Applicants include fees and expenses incurred for Lathen's defense, but do not distinguish in any way between work performed on behalf of EACM and EACA and work performed on behalf of Lathen. Accordingly, Applicants seek hundreds of thousands of dollars in fees and expenses that were incurred on behalf of Lathen, a *non-applicant.* This, presumably,

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[29] Including 67.1 hours billed by the Galbraith Law Firm that should be excluded on other grounds. *See* pp. 44-45 n.22, *supra.*

is because Applicants know that Lathen would not be able to establish that he incurred fees and expenses in this matter, because all of his fees and expenses were indemnified by the Fund pursuant to the Limited Partnership Agreement, and (unlike EACM and EACA) Lathen does not even purport to have a duty to reimburse the Fund. *See* Dec. 15 Aff. Exs. 3-4. But Applicants cannot evade EAJA's requirement that an applicant file a timely application for attorney's fees, its limitation on payments to indemnified parties, or its net worth requirements by simply not including Lathen in the Application. As a non-applicant and non-indemnified party, Lathen should not be permitted to recover *anything* under EAJA. *See* pp. 15-16 & n.8, *supra*. Applicants should be required to distinguish, on an item-by-item basis, work performed on their behalf from work performed on behalf of Lathen. At a minimum, Applicants must pro-rate their fees and expenses to reduce them by *at least* 33 percent to reflect work performed on behalf of Lathen.[30]

Second, Applicants' fees and expenses are not adequately documented pursuant to Commission Rule of Practice 43. Applicants' sole support for their purported fees and expenses are six exhibits appended to their initial Application. These exhibits comprise:

- Exhibit 1: A summary of fees incurred for legal services and expenses incurred for other services by invoice date
- Exhibit 2: Itemized invoices for Clayman & Rosenberg
- Exhibit 3: Itemized invoices for Brune Law P.C.
- Exhibit 4: Itemized invoices for the Galbraith Law Firm

[30] An offset of only 33 percent is highly conservative. Not only was Lathen the primary respondent at trial, but he is also the alter ego of both EACM and EACA. Pro-rating the legal fees sought (after $75.00/hour adjustment) for the adjudicatory period by 33 percent reduces them from $268,515.00 to $177,219.90. Ex. D (Division Worksheet, Tab 1 – Calculations).

- Exhibit 5: Printout from www.time59.com apparently containing itemized entries for 19.2 hours of work performed by Protass Law

- Exhibit 6: Assorted invoices for: (i) Michael D. Robinson; (ii) Mission Critical Services Corp.; (iii) OnTrial Associates, Inc.; (iv) Diversified Reporting Services, Inc.; (v) Withers Bergman, LLP; (vi) Driven Database Services; (vii) Eisner Amper; (viii) Whelan, Corrente, Flanders, Kinder & Siket LLP (Bob Flanders); and (ix) Nigro, Karlin, Segal, Feldstein & Bolno (Eric Rosenthal).

Although some of these invoices comport with Rule 43's requirement that "[a] separate itemized statement shall be submitted ... showing the hours spent in connection with the proceeding by each by each individual, a description of the specific services performed, the rate at which each fee has been computed, any expenses for which reimbursement is sought, the total amount claimed, and the total amount paid or payable by the applicant or by any other person or entity for the services provided," 17 C.F.R. § 201.43, others do not.

The entries submitted by Clayman & Rosenberg are vague and compound—consolidating work performed on disparate tasks in large hourly entries. For example, Applicants seek reimbursement for:

- 5.20 hours for "Review OIP; reviewed SEC Rules of Practice; Comm. J. Lathen; drafted press statement; addressed press issues" (Aug. 15, 2016)

- 3.0 hours for "Reviewed documents; Drafted Answer to OIP" (Sept. 1, 2016)

- 7.0 hours for "T/C SEC; T/Cs Lathen; Drafted Proposed Schedule; Reviewed documents; Drafted answer to OIP" (Sept. 6, 2016)

- 8.5 hours for "Reviewed emails; Reviewed memorandum" (Nov. 1, 2016)

- 7.0 hours for "Prepared Production to SEC; addressed document production issues" (Nov. 1, 2016)

and many similar entries. *See* App. Ex. 2. Such itemizations are insufficient under Rule 43.

The invoices submitted on behalf of the Galbraith Law Firm are likewise vague and compound, impermissibly lumping together work performed in the SEC action with work performed in private litigation and work related to Galbraith's appearance as a fact witness with

work performed as an attorney. Moreover, the Galbraith Law Firm's invoices appear to include numerous entries that are not included in the total fees sought in Applicants' Summary. Applicants do not, however, inform the Division or this Court what fees are, or are not, included in their totals.

Many of the invoices submitted for "Other Services" likewise do not adequately describe the specific services performed. For example, Michael Robinson's work log contains only hours and hourly rate, and does not describe the services performed. Further, the cover letter to the work log states that Mr. Robinson did not "adjust the timesheet" for "time spent away from my desk for lunch and errands each day," because "I am confident that this time was more than made up by unbilled hours spent working on this project from home during this period." *Id.* Ex. 6. The Eisner Amper invoice contains a $20,000 "retainer for deposition preparation," but does not identify the "hours spent in connection with the proceeding by each individual [or] a description of the specific services performed" or even the name of the witness. The Nigro, Karlin, Segal, Feldstein & Bolno invoice itemizing Mr. Rosenthal's fees includes $7,715.00 "[f]or professional services rendered ... with respect to the preparation of your 2016 personal income tax returns" and itemized invoices reflecting $7,750.34 in personal tax work for Jay and Kathleen Lathen, including numerous entries for Mr. Rosenthal. *Id.* Although the Summary identifies only $5,359.64 in fees for Mr. Rosenthal, *id.* Ex. 1, nowhere do Applicants explain for which work by Mr. Rosenthal they do and do not seek reimbursement. No itemized invoices whatsoever were submitted for Empire Discovery. *Id.* Ex. 6. Such documentation does not comport with Rule 43 and these fees and expenses should be excluded.

D. Applicants Seek Costs Expressly Disallowed By Statute

Applicants' Summary seeks $114,567.83 in "Other Services" or expenses. App. at 7; *id.* Exs. 1, 6; Ex. D (Division Worksheet, Tab 4 – Other Services). The Summary also includes,

under "Legal Services," $33,089.94 in disbursements by Brune Law PC and Clayman & Rosenberg, for total alleged expenses of $147,657.77, $110.327.74 of which were incurred after the OIP filing date. App. Exs. 1-2; Ex. D (Division Worksheet, Tab 4 – Other Services). Applicants' expenses include costs enumerated in 28 U.S.C. § 1920, which are not recoverable against the Commission under Exchange Act Section 27, 15 U.S.C. § 78aa. *E.g., SEC v. Kaufman*, 835 F. Supp. 157, 159 (S.D.N.Y. 1993), *aff'd*, 41 F.3d 805 (2d Cir. 1994). Further, certain expenses are double-counted. This Court should reject Applicants' inclusion of these expenses in the Application.

Applicants seek $80,850.49 in post-OIP costs falling within categories expressly proscribed by Section 27 and 28 U.S.C. § 1920, including: (i) fees for printed or electronically recorded transcripts (Diversified Reporting, $26,382.00); and (ii) fees and disbursements for printing (Driven, $42,775.35).[31] 15 U.S.C. § 78aa (interpreting 28 U.S.C. § 1920). Most troublingly, Applicants seek $12,647.52 in post-OIP fees and expenses relating to "fees and disbursements for [fact] witnesses" that are expressly disallowed:

- Michael Robinson, investigative and trial witness: $2,081.25 (App. Exs. 1, 6);
- Mission Critical (Darren Kane and David Hartman, compliance counsel to Lathen, investigative witnesses): $756.25 (App. Exs. 1, 6);
- Nigro, Karlin, Segal, Feldstein & Bolno, LLC (Eric Rosenthal, investigative witness): $5,359.64 (App. Exs. 1, 6);
- Whelan, Corrente, Flanders, Kinder & Siket LLP (Robert G. Flanders, Jr., trial witness): $655.88 (App. Exs. 1, 2, 6);

[31] Driven Database Services appears to have provided document hosting, processing, and production services to Lathen and Applicants. Although no itemized invoices are included, Empire Discovery appears to provide similar services. *See* Empire Discovery, http://empirediscovery.com (last visited Feb. 1, 2018). The services provided by Driven and Empire are analogous to the printing and copying charges expressly disallowed under Section 27, and therefore should not be awarded here.

- Withers Bergman LLP (Bruce Hood, trial witness): $3,496.00 (App. Exs. 1, 6); and
- Margaret D. ("Peggy") Farrell, Hinckley Allen & Snyder LLP, trial witness: $298.50 (App. Exs. 2, 6).[32]

By including certain expenses both in Clayman & Rosenberg's invoices and in vendors' invoices, Applicants also engage in double-counting. Clayman & Rosenberg's March 8, 2017 invoice includes three disbursements to OnTrial Associates, Inc., totaling $10,519.57, which are *also* included in OnTrial Associates' invoice. *Compare* App. Exs. 1-2, *with id.* Ex. 6; Ex. D (Division Worksheet, Tab 4 – Other Services). The March 2017 Clayman & Rosenberg invoice also includes a duplicative disbursement to Whelan, Corrente, Flanders, Kinder & Siket LLP in the amount of $655.88.[33]

VI. CONCLUSION

In sum, the Application fails because: (i) Applicants have not established eligibility under EAJA; (ii) Applicants have not proven that they incurred fees; (iii) the Division's action was substantially justified; and (iv) the fees and expenses sought by Applicants are not authorized by EAJA or reasonable. Despite Applicants' rhetoric, there is *no* evidence that the Division acted in an unjustified or abusive manner in bringing its action, and this is not the type of case EAJA was intended to address. This Court should deny Applicants' motion for legal fees and expenses under EAJA.

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[32] Applicants also seek $20,000 in expenses paid to Eisner Amper, which (although the invoice does not so indicate) may be related to the appearance of Stephen Mazotti as an investigative witness. App. Exs. 1, 6. These expenses predate the OIP. *See* Section V.A.1, *supra*.

[33] Eliminating these impermissible costs from the expenses potentially recoverable under EAJA reduces them from $147,657.77 ($110,327.74 of which were incurred during the adjudicatory period) to $17,337.42 ($11,442.70 after pro-rata adjustment). Ex. D (Division Worksheet, Tab 1 – Calculations). Accordingly, once all necessary adjustments are made (and without further adjustment to remove vague and compound time entries), the most Applicants could potentially recover under EAJA—were they able to meet its other requirements (which they are not)—is $177,219.90 in fees and $11,442.70 in expenses. *Id.*

February 14, 2018

Respectfully submitted,

DIVISION OF ENFORCEMENT
U.S. Securities and Exchange Commission

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

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

CERTIFICATE OF SERVICE

I hereby certify that true copies of the foregoing were served on the following, this 14th day of February 2018, in the manner indicated below:

By hand:

Brent Fields, Secretary
Office of the Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-2557

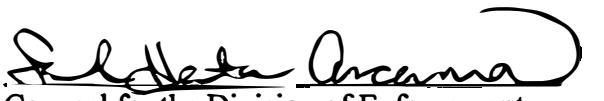
By hand and email:

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

By email:

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

Paul S. Hugel
Clayman & Rosenberg LLP
305 Madison Avenue
Suite 1301
New York, NY 10165
Tel: (212) 922-1080
Fax: (212) 949-8255
hugel@clayro.com



Counsel for the Division of Enforcement

DONALD F. ("JAY") LATHEN, ET AL.

File No. 3-17387

Exhibits A-C to Division's Response to the Application for Fees and Expenses

Dated 2/14/2018
Filed 2/14/2018

UNDER SEAL (per AP-5601)

Exhibit A

Exhibit B

Exhibit C

Exhibit D

SEC v. Eden Arc Capital Management et al. - Exhibit D - Division Worksheet
Tab 1 - Division's Calculations

	Applicants	SEC
Legal Fees		
Tab 2 (Legal Services)		
Hours billed		
Pre-OIP Legal Services	1049.7	-
Post-OIP Legal Services	3647.3	3647.3
LESS Galbraith Adjustment:	-	-67.1
	4697.0	**3580.2**
Legal Services Billable Hourly Rate	$208.15 *(Weighted Average)*	$75.00 *(Allowable Under EAJA)*
Legal Services Billable Pre-OIP Subtotal:	$215,821.01	-
Legal Services Billable Post-OIP Subtotal:	$761,870.74	**$268,515.00**
	100% *(All Respondents)*	66% *(Applicants only)*
Legal Services Total:	**$977,691.75**	**$177,219.90**
Expenses		
Tab 4 (Other Services); App. Exs. 2 & 6		
Pre-OIP Expenses	$37,330.03	-
Post-OIP Expenses	$110,327.74	$110,327.74
Subtotal:	**$147,657.77**	**$110,327.74**
LESS Post-OIP Fact Witnesses:		
Michael Robinson	-	-$2,081.25
Mission Critical	-	-$756.25
Nigro, Karlin, Segal, Feldstein & Bolno (Eric Rosenthal)	-	-$5,359.64
Whelan, Corrente, Flanders, Kinder & Siket (Robert Flanders)	-	-$655.88
Withers Bergman (Bruce Hood)	-	-$3,496.00
Margaret ("Peggy") Farrell	-	-$298.50
		-$12,647.52
LESS Post-OIP Expenses Impermissible Under Section 27		
Transcripts	-	-$26,382.00
Printing	-	-$42,775.35
		-$69,157.35
LESS Post-OIP Duplicative Expenses		**-$11,185.45**
Subtotal Expenses Less Impermissible:	**$147,657.77**	**$17,337.42**
	100% *(All Respondents)*	66% *(Applicants only)*
Expenses Total:	**$147,657.77**	**$11,442.70**
Legal Services and Expenses Subtotals:		
Pre-OIP	**$253,151.04**	-
Post-OIP	**$872,198.48**	**$188,662.60**
Legal Services and Expenses Total:	**$1,125,349.52**	**$188,662.60**

SEC v. Eden Arc Capital Management et al. - Exhibit D - Division Worksheet
Tab 2 - Division's Adjustments to Legal Services Fees Sought by Applicants

Vendor Invoice Information			Alleged by the Applicants Pre- and Post-OIP (8/15/2016)		Post-OIP Only (8/15/2016)	
Vendor Name	Inv Date	Applicants' Rate	Hours	Fees [1]	Post-OIP Hours	Post-OIP Fees Using Allowable Rate (Hours*$75.00)
Brune Law PC	2/24/2016	$206.43	137.70	$28,425.41	-	-
	3/21/2016	$206.43	179.80	$37,116.11	-	-
	4/19/2016	$206.43	184.50	$38,086.34	-	-
	5/23/2016	$206.43	39.30	$8,112.70	-	-
Subtotal:			**541.30**	**$111,740.56**	**0.0**	**$0.00**
Clayman & Rosenberg [2]	5/7/2015	$203.83	53.10	$10,823.37	-	-
	6/4/2015	$203.83	32.10	$6,542.94	-	-
	7/7/2015	$203.83	56.60	$11,536.78	-	-
	8/11/2015	$203.83	73.40	$14,961.20	-	-
	9/82015	$203.83	50.70	$10,334.18	-	-
	10/7/2015	$203.83	34.20	$6,970.99	-	-
	11/6/2015	$203.83	24.60	$5,014.22	-	-
	12/7/2015	$203.83	23.20	$4,728.86	-	-
	12/14/2015	$203.83	1.30	$264.98	-	-
	5/5/2016	$206.43	9.60	$1,981.73	-	-
	6/2/2016	$206.43	5.80	$1,197.29	-	-
	7/21/2016	$206.43	6.50	$1,341.80	-	-
	8/4/2016	$206.43	26.90	$5,552.97	-	-
	9/14/2016 [2]	$206.43	25.00	$5,160.75	-	-
	9/14/2016 [2]	$206.43	49.40	$10,197.64	49.40	$3,705.00
	10/8/2016	$206.43	298.60	$61,640.00	298.60	$22,395.00
	11/18/2016	$206.43	195.90	$40,439.64	195.90	$14,692.50
	12/21/2016	$206.43	345.50	$71,321.57	345.50	$25,912.50
	1/19/2017	$206.43	442.00	$91,242.06	442.00	$33,150.00
	12/1/2017	$210.40	2229.60	$469,107.84	2229.60	$167,220.00
Subtotal:			**3984.00**	**$830,360.79**	**3561.0**	**$267,075.00**
Law Office of Kevin Galbraith [3]	Pre-OIP	$206.89	85.40	$17,668.41	-	-
	Post-OIP	$206.89	67.1	$13,882.32	-	-
Subtotal:			**152.50**	**$31,550.73**	**0.0**	**$0.00**
Protass Law	12/1/2017	$210.40	19.20	$4,039.68	19.2	$1,440.00
Subtotal:			**19.20**	**$4,039.68**	**19.2**	**$1,440.00**
TOTAL:			**4,697.0**	**$977,691.75**	**3580.2**	**$268,515.00**

SEC v. Eden Arc Capital Management et al. - Exhibit D - Division Worksheet
Tab 2 - Division's Adjustments to Legal Services Fees Sought by Applicants

[1] Due to apparent unshown rounding in Applicants' Summary Ex. 1, the Division was unable to exactly replicate the totals set forth in the Summary. Because the differences are nominal, this spreadsheet calculates total legal fees by multiplying Applicants' Rate by Applicants' Hours.
[2] See Tab 3 (breakdown of Clayman & Rosenberg 9/14/16 invoice hours before and after OIP date)
[3] See Tab 3 (breakdown of Law Offices of Kevin Galbraith invoice hours before and after OIP date)
[4] Kevin Galbraith was a witness at trial, and Galbraith invoices include fees incurred in private litigation

SEC v. Eden Arc Capital Management et al. - Exhibit D - Division Worksheet
Tab 3 - Legal Services Out of Pocket Expenses by Date (Support for Tab 2)

Vendor Invoice Information		Sought by Applicants		Recoverable Under EAJA POST-OIP Only		
Vendor Name	Date	Hours	Expenses	Post-OIP Hours	Fees Using Allowable Rate (Hours * $75.00)	Post-OIPExpenses
Clayman & Rosenberg	8/1/2016	7.7	-	-	-	-
(App. Ex. 2, 9/14/16 Invoice)	8/3/2016	2.7	-	-	-	-
	8/4/2016	4.3	-	-	-	-
	8/5/2016	4.7	-	-	-	-
	8/8/2016	4.2	-	-	-	-
	8/9/2016	0.1	-	-	-	-
	8/11/2016	0.2	$66.99	-	-	-
	8/12/2016	1.1	-	-	-	-
	8/15/2016	7.7	$30.07	7.7	$577.50	$30.07
	8/16/2016	6.9	-	6.9	$517.50	-
	8/17/2016	4.0	-	4.0	$300.00	-
	8/18/2016	3.4	-	3.4	$255.00	-
	8/19/2016	3.1	-	3.1	$232.50	-
	8/22/2016	2.2	-	2.2	$165.00	-
	8/23/2016	2.3	-	2.3	$172.50	-
	8/24/2016	0.4	-	0.4	$30.00	-
	8/26/2016	2.6	-	2.6	$195.00	-
	8/29/2016	3.9	-	3.9	$292.50	-
	8/30/2016	6.3	-	6.3	$472.50	-
	8/31/2016	6.6	-	6.6	$495.00	-
Subtotal:		**74.4**	**$97.06**	**49.4**	**$3,705.00**	**$30.07**
The Galbraith Law Firm	2/20/2015	2.3	-	-	-	-
(App. Ex. 4) [1] and [2]	2/23/2015	2.8	-	-	-	-
	2/24/2015	3.3	-	-	-	-
	2/25/2015	1.0	-	-	-	-
	2/26/2015	2.0	-	-	-	-
	2/17/2015	1.5	-	-	-	-
	3/2/2015	2.0	-	-	-	-
	3/5/2015	0.8	-	-	-	-
	3/9/2015	1.3	-	-	-	-
	3/31/2015	1.0	-	-	-	-
	7/20/2015	1.0	-	-	-	-
	8/6/2015	0.5	-	-	-	-
	8/13/2015	1.8	-	-	-	-
	8/14/2015	4.5	-	-	-	-
	8/17/2015	3.5	-	-	-	-
	8/21/2015	2.8	-	-	-	-
	8/24/2015	1.0	-	-	-	-
	9/4/2015	1.5	-	-	-	-

SEC v. Eden Arc Capital Management et al. - Exhibit D - Division Worksheet
Tab 3 - Legal Services Out of Pocket Expenses by Date (Support for Tab 2)

Vendor Invoice Information		Sought by Applicants		Recoverable Under EAJA POST-OIP Only		
Vendor Name	Date	Hours	Expenses	Post-OIP Hours	Fees Using Allowable Rate (Hours * $75.00)	Post-OIPExpenses
The Galbraith Law Firm cont'd.	10/7/2015	0.3	-	-	-	-
	10/9/2015	1.3	-	-	-	-
	10/29/2015	0.5	-	-	-	-
	11/6/2015	0.8	-	-	-	-
	11/9/2015	1.5	-	-	-	-
	11/10/2015	1.5	-	-	-	-
	11/11/2015	2.8	-	-	-	-
	11/12/2015	1.3	-	-	-	-
	11/13/2015	0.3	-	-	-	-
	11/15/2015	1.0	-	-	-	-
	11/16/2015	2.3	-	-	-	-
	11/17/2015	2.3	-	-	-	-
	11/18/2015	0.3	-	-	-	-
	11/20/2015	3.3	-	-	-	-
	11/24/2015	0.8	-	-	-	-
	12/2/2015	0.5	-	-	-	-
	12/3/2015	1.0	-	-	-	-
	12/11/2015	0.3	-	-	-	-
	12/17/2015	1.3	-	-	-	-
	1/12/2016	2.8	-	-	-	-
	1/28/2016	0.5	-	-	-	-
	1/29/2016	0.3	-	-	-	-
	2/4/2016	0.5	-	-	-	-
	2/5/2016	0.8	-	-	-	-
	3/8/2016	0.5	-	-	-	-
	4/6/2016	0.5	-	-	-	-
	4/7/2016	3.3	-	-	-	-
	4/12/2016	1.8	-	-	-	-
	4/13/2016	0.8	-	-	-	-
	4/14/2016	0.8	-	-	-	-
	4/19/2016	0.3	-	-	-	-
	4/21/2016	0.3	-	-	-	-
	4/25/2016	0.8	-	-	-	-
	5/10/2016	1.5	-	-	-	-
	5/17/2016	0.5	-	-	-	-
	6/1/2016	1.8	-	-	-	-
	6/23/2016	0.5	-	-	-	-
	6/24/2016	0.3	-	-	-	-
	6/25/2016	0.3	-	-	-	-
	7/3/2016	0.3	-	-	-	-
	7/22/2016	3.3	-	-	-	-

SEC v. Eden Arc Capital Management et al. - Exhibit D - Division Worksheet
Tab 3 - Legal Services Out of Pocket Expenses by Date (Support for Tab 2)

Vendor Invoice Information		Sought by Applicants		Recoverable Under EAJA POST-OIP Only		
Vendor Name	Date	Hours	Expenses	Post-OIP Hours	Fees Using Allowable Rate (Hours * $75.00)	Post-OIPExpenses
The Galbraith Law Firm cont'd.	8/2/2016	1.0	-	-	-	-
	8/3/2016	1.5	-	-	-	-
	8/4/2016	1.3	-	-	-	-
	8/5/2016	0.5	-	-	-	-
	8/12/2016	0.3	-	-	-	-
	8/13/2016	0.3	-	-	-	-
	8/15/2016	0.8	-	0.8	$60.00	-
	8/16/2016	1.3	-	1.3	$97.50	-
	8/17/2016	1.0	-	1.0	$75.00	-
	8/18/2016	0.3	-	0.3	$22.50	-
	8/19/2016	0.8	-	0.8	$60.00	-
	8/30/2016	1.0	-	1.0	$75.00	-
	8/31/2016	1.5	-	1.5	$112.50	-
	9/8/2016	2.3	-	2.3	$172.50	-
	9/15/2016	1.5	-	1.5	$112.50	-
	9/21/2016	0.3	-	0.3	$22.50	-
	9/22/2016	0.5	-	0.5	$37.50	-
	9/23/2016	4.3	-	4.3	$322.50	-
	9/26/2016	0.5	-	0.5	$37.50	-
	9/27/2016	1.3	-	1.3	$97.50	-
	9/28/2016	4.8	-	4.8	$360.00	-
	9/29/2016	2.3	-	2.3	$172.50	-
	9/30/2016	1.3	-	1.3	$97.50	-
	10/4/2016	1.3	-	1.3	$97.50	-
	10/5/2016	0.1	-	0.1	$7.50	-
	10/7/2016	1.1	-	1.1	$82.50	-
	10/13/2016	0.3	-	0.3	$22.50	-
	10/22/2016	0.1	-	0.1	$7.50	-
	10/25/2016	0.6	-	0.6	$45.00	-
	10/26/2016	0.8	-	0.8	$60.00	-
	10/27/2016	0.3	-	0.3	$22.50	-
	11/10/2016	0.1	-	0.1	$7.50	-
	11/15/2016	0.2	-	0.2	$15.00	-
	11/16/2016	0.7	-	0.7	$52.50	-
	11/17/2016	0.5	-	0.5	$37.50	-
	11/18/2016	0.8	-	0.8	$60.00	-
	11/20/2016	0.3	-	0.3	$22.50	-
	11/25/2016	0.3	-	0.3	$22.50	-
	11/29/2016	0.1	-	0.1	$7.50	-
	12/1/2016	0.2	-	0.2	$15.00	-
	12/2/2016	0.6	-	0.6	$45.00	-

SEC v. Eden Arc Capital Management et al. - Exhibit D - Division Worksheet
Tab 3 - Legal Services Out of Pocket Expenses by Date (Support for Tab 2)

Vendor Invoice Information		Sought by Applicants		Recoverable Under EAJA POST-OIP Only		
Vendor Name	Date	Hours	Expenses	Post-OIP Hours	Fees Using Allowable Rate (Hours * $75.00)	Post-OIPExpenses
The Galbraith Law Firm cont'd.	12/5/2016	0.6	-	0.6	$45.00	-
	12/6/2016	1.1	-	1.1	$82.50	-
	12/7/2016	1.5	-	1.5	$112.50	-
	12/12/2016	0.3	-	0.3	$22.50	-
	12/13/2016	0.1	-	0.1	$7.50	-
	12/14/2016	0.2	-	0.2	$15.00	-
	12/15/2016	0.3	-	0.3	$22.50	-
	12/17/2016	1.3	-	1.3	$97.50	-
	12/19/2016	2.3	-	2.3	$172.50	-
	12/20/2016	1.6	-	1.6	$120.00	-
	12/21/2016	0.6	-	0.6	$45.00	-
	12/22/2016	0.2	-	0.2	$15.00	-
	12/23/2016	0.9	-	0.9	$67.50	-
	12/26/2016	0.1	-	0.1	$7.50	-
	12/27/2016	0.1	-	0.1	$7.50	-
	12/29/2016	0.2	-	0.2	$15.00	-
	12/30/2016	0.2	-	0.2	$15.00	-
	1/3/2017	0.5	-	0.5	$37.50	-
	1/5/2017	0.3	-	0.3	$22.50	-
	1/6/2017	0.7	-	0.7	$52.50	-
	1/7/2017	0.6	-	0.6	$45.00	-
	1/9/2017	0.2	-	0.2	$15.00	-
	1/10/2017	0.1	-	0.1	$7.50	-
	1/11/2017	0.2	-	0.2	$15.00	-
	1/12/2017	0.9	-	0.9	$67.50	-
	1/17/2017	3.8	-	3.8	$285.00	-
	1/18/2017	2.4	-	2.4	$180.00	-
	1/20/2017	0.9	-	0.9	$67.50	-
	1/23/2017	0.4	-	0.4	$30.00	-
	1/29/2017	0.2	-	0.2	$15.00	-
	2/2/2017	1.1	-	1.1	$82.50	-
	2/3/2017	0.5	-	0.5	$37.50	-
	2/12/2017	0.1	-	0.1	$7.50	-
	2/13/2017	0.1	-	0.1	$7.50	-
	2/23/2017	0.1	-	0.1	$7.50	-
	2/28/2017	1.6	-	1.6	$120.00	-
	4/12/2017	0.5	-	0.5	$37.50	-
	5/12/2017	0.8	-	0.8	$60.00	-
	5/17/2017	1.8	-	1.8	$135.00	-
	8/16/2017	0.9	-	0.9	$67.50	-
	8/25/2017	0.2	-	0.2	$15.00	-

SEC v. Eden Arc Capital Management et al. - Exhibit D - Division Worksheet
Tab 3 - Legal Services Out of Pocket Expenses by Date (Support for Tab 2)

Vendor Invoice Information		Sought by Applicants		Recoverable Under EAJA POST-OIP Only		
Vendor Name	Date	Hours	Expenses	Post-OIP Hours	Fees Using Allowable Rate (Hours * $75.00)	Post-OIPExpenses
The Galbraith Law Firm	8/29/2017	1.9	-	1.9	$142.50	-
cont'd.	10/10/2017	0.2	-	0.2	$15.00	-
	10/11/2017	0.3	-	0.3	$22.50	-
Subtotal:		**152.5**	**$0.00**	**67.1**	**$5,032.50**	**$0.00**

[1] Includes all Galbraith time entries with a written hashmark to their right (as shown in App. Ex. 4)

[2] Total of Pre-OIP hours (85.4) and Post-OIP hours (67.1) is 152.5, which is 1.8 hours more than 150.7 hours stated in Applicants' Summary (App. Ex. 1). The Division has been unable to determine the reason for the discrepancy.

SEC v. Eden Arc Capital Management et al. - Exhibit D - Division Worksheet
Tab 4 - Division's Adjustments to Other Services Out of Pocket Expenses Sought by Applicants

Vendor Invoice Information		Sought by Applicants	LESS Disallowed Expenses			Recoverable Under EAJA	
Vendor	Invoice Date	Expenses	Pre-OIP (8/15/2016)	Duplicative (appear in App. Ex. 2)	Disallowed by Section 27	Potentially Recoverable Expenses	[I] Division Notes
Other Services							
Empire Discovery	6/12/2015	$2,531.89	-$2,531.89	-	-	$0.00	
Eisner Amper	1/18/2016	$20,000.00	-$20,000.00	-	-	$0.00	[4]
On Trial Associates	Post-OIP [1]	$10,529.57	-	-$10,529.57	-	$0.00	[5]
Bob Flanders	2/15/2017	$655.88	-	-$655.88	-	$0.00	[5]
Driven Database Services	Post-OIP [1]	$42,775.35	-	-	-$42,775.35	$0.00	
Eric Rosenthal	10/25/2017	$5,359.64	-	-	-$5,359.64	$0.00	
Diversified Reporting	Post-OIP[1]	$26,382.00	-	-	-$26,382.00	$0.00	
Bruce Hood	8/17/2017	$3,496.00	-	-	-$3,496.00	$0.00	
Mission Critical	1/9/2017	$756.25	-	-	-$756.25	$0.00	
Michael Robinson	10/19/2016	$2,081.25	-	-	-$2,081.25	$0.00	
Subtotal:		**$114,567.83**	**-$22,531.89**	**-$11,185.45**	**-$80,850.49**	**$0.00**	
Out of Pocket Expenses			-	-	-		
Brune Law PC [3]	Pre-OIP	$6,503.95	-$6,503.95	-	-	$0.00	
Clayman & Rosenberg [3]	Pre-OIP [2]	$8,294.19	-$8,294.19	-	-	$0.00	
Clayman & Rosenberg [3]	Post-OIP [2]	$18,291.80	-	-	-$954.38	$17,337.42	[6]
Subtotal:		**$33,089.94**	**-$14,798.14**	**$0.00**	**-$954.38**	**$17,337.42**	
TOTAL:		**$147,657.77**	**-$37,330.03**	**-$11,185.45**	**-$81,804.87**	**$17,337.42**	

[1] Various invoice dates, all after OIP Date (App. Ex. 6)
[2] Various invoice dates, some before, and some after, OIP Date (App. Ex. 1); See Tab 3 - Legal Services by Date
[3] Included in App. Exs. 1-3 under "Legal Services"
[4] Expenses both pre-date the OIP and are disallowed under Section 27, but not included to avoid double-counting
[5] Expenses are both duplicative and disallowed under Section 27, but not included to avoid double-counting
[6] Expenses disallowed by Section 27 are comprised of expenses for fact witnesses Margaret ("Peggy") Farrell and Robert G. Flanders, Jr. that appear in Clayman & Rosenberg invoice (App. Ex. 2)

SEC v. Eden Arc Capital Management et al. - Exhibit D - Division Worksheet
Tab 5 - Out of Pocket Expenses by Date (Support for Tab 4)

Vendor Invoice Information		Sought by Applicants	Post-OIP Expenses
Vendor Name	Date	Expenses	Expenses
Brune Law PC	2/24/2016	$3,261.41	-
(App. Exs. 1 & 3)	3/21/2016	$1,321.43	-
	4/19/2016	$1,416.11	-
	5/23/2016	$505.00	-
Subtotal:		**$6,503.95**	**$0.00**
Clayman & Rosenberg	5/7/2015	$170.58	-
(App. Exs. 1 & 2)	6/4/2015	$302.10	-
	7/7/2015	$710.21	-
	8/11/2015	$4,135.00	-
	9/82015	$1,324.45	-
	10/7/2015	$62.98	-
	11/6/2015	$32.02	-
	12/7/2015	$0.00	-
	12/14/2015	$0.00	-
	5/5/2016	$0.00	-
	6/2/2016	$747.97	-
	7/21/2016	$0.00	-
	8/4/2016	$741.89	-
	9/14/2016 (Pre-OIP)	$66.99	-
	9/14/2016 (Post-OIP)	$30.07	$30.07
	10/8/2016	$580.29	$580.29
	11/18/2016	$148.37	$148.37
	12/21/2016	$666.19	$666.19
	1/19/2017	$472.86	$472.86
	3/8/2017	$15,984.72	$15,984.72
	4/6/2017	$187.80	$187.80
	5/11/2017	$221.50	$221.50
Subtotal:		**$26,585.99**	**$18,291.80**