



**UNITED STATES  
SECURITIES AND EXCHANGE COMMISSION**

100 F Street, NE  
Washington, DC 20549-5937

**DIVISION OF ENFORCEMENT**

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March 12, 2018

**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



**Re: In the Matter of Donald F. Lathen, Jr., Eden Arc Capital Management, LLC,  
and Eden Arc Capital Advisers, LLC, Admin. Proc. File No. 3-17387**

To the Office of the Secretary and the Honorable Jason S. Patil:

Together herewith and pursuant to the Court's Order Following Oral Argument in the Above-Referenced Matter (Admin. Proc. Release No. 5642), the Division of Enforcement ("Division") is filing with the Office of the Secretary the slide presentation it used during oral argument on March 8, 2018, with one minor correction. Specifically, the Division has corrected a small error in Slide 22, which came to its attention after the hearing. Where the slide previously stated "Respondents did not waive privilege for much of the investigation," it now states "Respondents did not waive privilege during the investigation."

In addition, Slide 8 of the slide presentation references certain assets and liabilities of Mr. Lathen, which, in an excess of caution, the Division believes may be subject to the Court's prior sealing order. *See* Admin. Proc. Release No. 5533. Accordingly, the Division has provided both redacted and unredacted versions of the slide presentation for the Office of the Secretary's convenience.

Respectfully submitted,



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**U.S. Securities and Exchange Commission**

**In the Matter of Donald F. Lathen, Jr.,  
Eden Arc Capital Management, LLC,  
and Eden Arc Capital Advisers, LLC.**

Division of Enforcement's Oral Argument  
in Opposition to Application of EACA and  
EACM for Recovery of Legal Fees and  
Expenses Pursuant to the Equal Access  
to Justice Act

March 8, 2018





## Court Should Reject Applicants' Invitation to "Push the Envelope"

- ▶ **EAJA's governing principle:** "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)

- ▶ Because EAJA serves as a **partial waiver** of **sovereign immunity**, it must be **strictly construed** in favor of the government.

– *Kirk Montgomery*, Exchange Act Release No. 45161, 2001 SEC LEXIS 2775, at \*42-43 (Dec. 18, 2001)



## EACA and EACM's EAJA Application Fails at Every Turn

- ▶ Invent new law and urge Court to disregard existing law
- ▶ Ignore EAJA's burdens and requirements
- ▶ Engage in gross speculation
- ▶ Mischaracterize evidentiary record



## EAJA Is Not a “Loser Pays” Statute

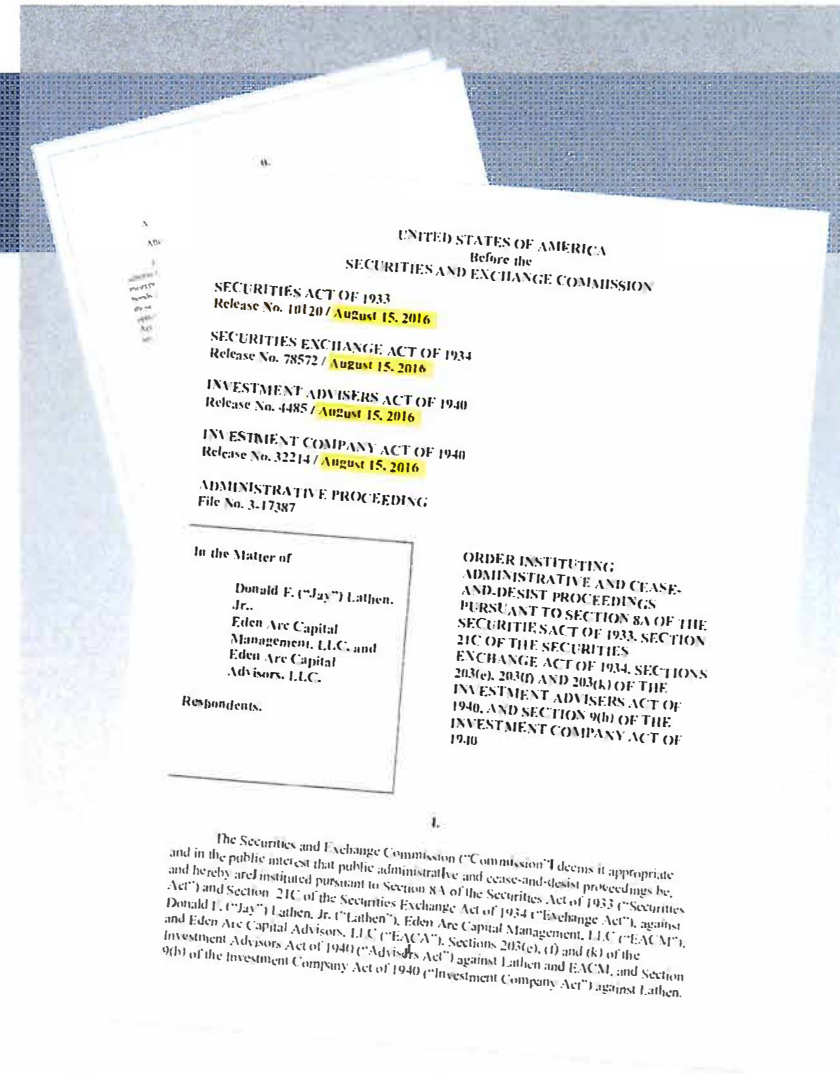
Applicants fail **four** of EAJA’s six requirements:

- ▶ Applicants are **not eligible**
- ▶ Applicants did **not incur fees and expenses**
- ▶ Division’s action was **substantially justified**
- ▶ Fees and expenses sought by Applicants are **not reasonable or adequately documented**



## Absent Showing of Eligibility, Nothing Else Matters

- ▶ Applicants' Burden
- ▶ Net worth – Together with all Affiliates – Must be Less than \$7MM as of OIP Date
- ▶ Applicants point to “voluminous” documents, but continue to focus on the **wrong date**
  - OIP date – **August 15, 2016** – is sole date relevant to eligibility
  - No “Full Disclosure” as of that Date: **“substantially the same”**





## Lathen's Affirmations are Not Trustworthy

▶ December 22 Lathen Affirmation:

*"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 OIP.**"*

[Dec. 22 Lathen Aff. ¶ 10]

▶ March 1 Lathen Affirmation:

*"At the time of the OIP, I estimate my net worth was [REDACTED]."* [Mar. 1 Lathen Aff. ¶ 5]

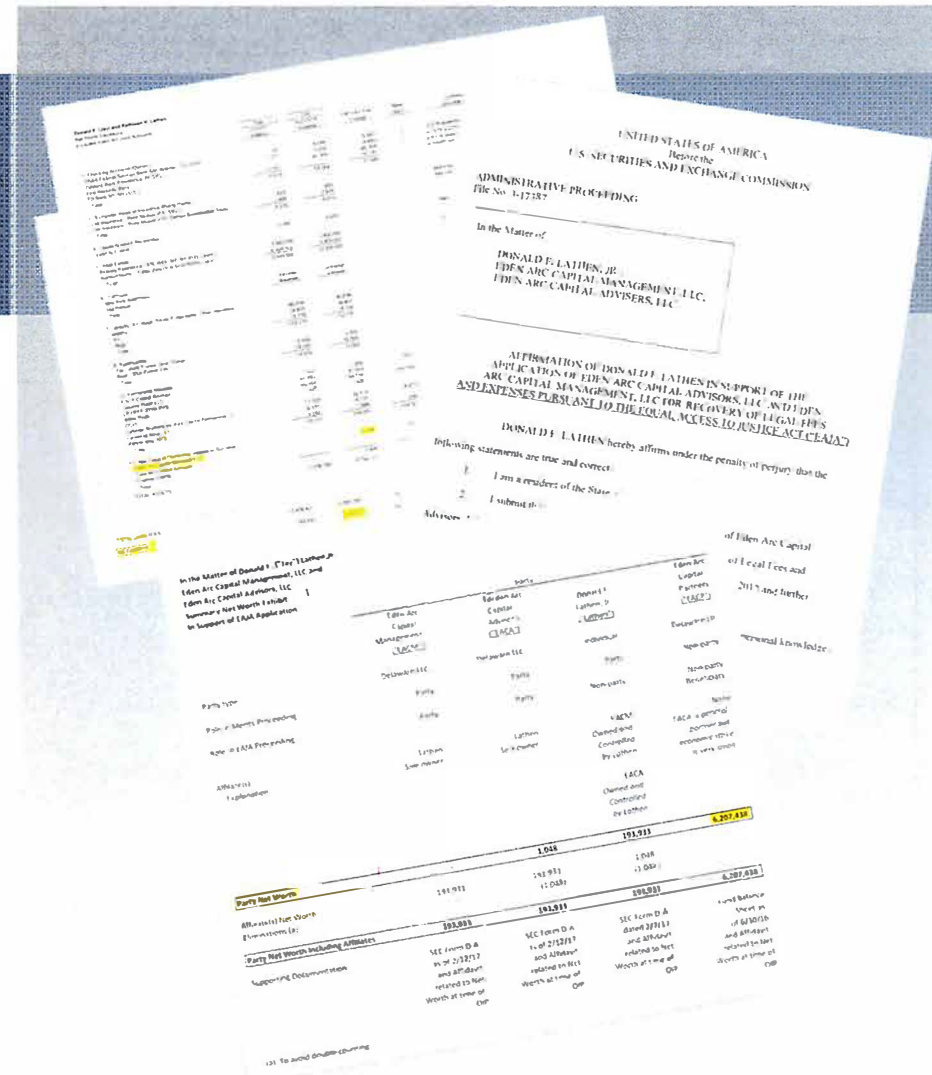
# Applicants' Admitted Net Worth Is Just 3 Percent Away from \$7MM Threshold

▶ Applicants admit their net worth, with all Affiliates, was [REDACTED] as of the OIP Date

- EACA: \$0 [Supp. Ex. 5]\*
- EACM: \$1,048 [Supp. Ex. 5]\*
- Lathen: \$428,416 [Mar. 1 Lathen Aff. ¶ 5]
- Fund: \$6,207,438 [Supp. Ex. 5]

▶ **3 Percent** – **\$364,146** – away from \$7MM Threshold

\* As of 2/17; not included in total to avoid double-counting





## Record Does Not Contain "Full Disclosure" Supporting [REDACTED] Net Worth

- ▶ "Substantially the Same"
- ▶ Inadequately Documented Assets:
  - New York Condo
  - "Unknown" Furniture
- ▶ Inadequately Documented Liabilities:
  - Loans from Friends and Family
  - Material changes in alleged mortgage and credit card debt between submissions



## Uncertainty in Record Should Be Construed Against Applicants

- ▶ *SEC v. Butler*, 2005 LEXIS 47782, \*7-8 (W.D. Pa. Dec. 29, 2005):
  - Applicant filed **three** affidavits “replete with **inconsistent results, methods** and **documentary evidence**...” attempting to show net worth under \$2MM
  - Applicant “made a **mockery** of process”
  - Held: Applicant ineligible



Applicants fail **four** of EAJA's six requirements:

- ▶ Applicants are **not eligible**
- ▶ Applicants did **not incur fees and expenses**
- ▶ The Division's action was **substantially justified**
- ▶ The fees and expenses sought by Applicants are **not reasonable or adequately documented**



## Fund Incurred Fees and Expenses – Not Applicants (or Lathen)

- ▶ Fund agreed to pay (and paid) fees and expenses for EACA, EACM, **and Lathen** under LPA § 12.2.2
- ▶ Applicants **knew** Fund would pay fees and expenses under LPA
- ▶ Applicants **never at risk** of being unable to defend against the Division's claims



## Established Commission and Federal Court Precedent

- ▶ *SEC v. ComServ Corp.*, 908 F.2d 1407, 1414-15 (8th Cir. 1990)
  - ▶ Fees indemnified by employer not “incurred”
  - ▶ Material inquiry is not whether litigation costs were paid by someone other than the applicant, but whether “**the burden of attorneys’ fees would have deterred**” the applicant from litigating.
- ▶ *Kirk Montgomery*, 2001 SEC LEXIS 2775, at \*38 (Dec. 18, 2001)
- ▶ *U.S. v. Paisley*, 957 F.2d 1161, 1164 (4th Cir.), *cert denied*, 506 U.S. 822 (1992)

# Applicants' Claim Hangs on a Gossamer Thread

Now therefore, the Parties agree that any and all recoveries that the General Partner, the Investment Manager and/or Donald F. Lathen, Jr. may receive from a court of competent jurisdiction in connection with an EAJA Claim, shall be immediately paid to the Partnership.

On this date, December 2, 2017, the undersigned parties do so agree.



Managing Member  
Eden Arc Capital Advisors, LLC ("General Partner")



Managing Member  
Eden Arc Capital Management, LLC ("Investment Manager")



Managing Member of the General Partner  
Eden Arc Capital Partners, LP ("Partnership")



Donald F. Lathen, Jr.

## Agreement Regarding Recovery of Fees and Expenses under EAJA

Whereas, the parties hereto have previously entered into an Amended Limited Partnership Agreement ("LPA") dated 1/12/16;

Whereas the LPA provides under Section 12.2.2 for the Partnership to indemnify the General Partner, Investment Manager and other Indemnified Persons from and against any and all claims, damages, losses, penalties, expenses, judgments or liabilities of any nature whatsoever, including but not limited to legal fees, losses, expenses and costs associated with investigating or preparing

expenses in connection with the SEC's SEC Matter") against the Investment

decided to bring a counterclaim ("EAJA Act" ("EAJA") in order to recover certain pursuant to Section 12.2.2 of the LPA in

2.2 as meaning the Partnership shall be through a counter claim recovery related

overies that the General Partner, the re from a court of competent jurisdiction d to the Partnership.

so agree.



## Applicants' Reply Makes it Clear They Did Not Incur Fees and Expenses

- ▶ Applicants argue “[t]here was never any question that any legal fee recovery would go to the Fund,” even while admitting LPA is **silent** on that issue. Reply at 14.
  - Cases cited merely state that fees may be “incurred” under EAJA where they are covered by a **pre-existing agreement** with a liability insurer (*Thouvenot*, in dicta) or a **pre-existing contingency arrangement** with pro bono counsel (*Morrison*).
  - Do not address situation where **affluent** Applicants with **single control person** attempt to manufacture an **after-the-fact** duty to reimburse (including the fees of a **non-Applicant**) through a post-dated, self-executed document

## Other Cases Applicants Cite in Reply Are Distinguishable or Support Division

- ▶ *Temme v. Bemis Co.*, 762 F.3d 544 (7th Cir. 2014): Dealt exclusively with availability of award of attorneys' fees under **ERISA**
  - **No** waiver of sovereign immunity
- ▶ *Turner v. Cmm'r of Social Security*, 680 F.3d 721 (6th Cir. 2012): Action for fees and expenses covered by **pre-existing** contingency fee arrangement
  - “Litigants with **no** obligation to pay over fees do not ‘**incur**’ them.”  
*Id.* at 725.





Applicants fail **four** of EAJA's six requirements:

- ▶ Applicants are **not eligible**
- ▶ Applicants did **not incur fees and expenses**
- ▶ Division's action was **substantially justified**
- ▶ Fees and expenses sought by Applicants are **not reasonable or adequately documented**

## Applicants Misstate and Misapply Legal Standard

- ▶ **Legal Standard:** Whether Division's action was "justified to a degree that could satisfy a **reasonable person**" and had a "**reasonable basis** both in **law** and **fact**."
  - *Pierce v. Underwood*, 487 U.S. 552, 565 (1988) (quoted in App. at 8; Reply at 15).
- ▶ Applicants now claim – based on 1985 legislative report from three years prior to *Pierce* (which *Pierce* expressly rejected) – action must be "more than reasonable." Reply at 2.
- ▶ This is not the law.



## Division's Action Had a Reasonable Basis in Law and Fact

- ▶ “This proceeding concern[ed] a **novel** investment strategy ...” Initial Decision at \*1.
- ▶ EAJA contemplates that government should not be “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)

## Not Unreasonable for Division to Press its Position

- ▶ **Facts** Detailed in Opposition
- ▶ Court's **Prior Orders**
  - Initial Decision
    - “**Novel**” and “**complex**” issues
    - **Credibility/character** of witnesses
    - Issue of **First Impression**
  - Summary Disposition: **Genuine Disputes** of Material Fact for Trial
  - Order on **Advice of Counsel** Defense
- ▶ **FINRA** Initial Decision and **Staples** Motion to Dismiss Decision



## Division's Fraud Claim Was Substantially Justified

- ▶ Facts Cited in Division's Opposition, *e.g.*:
  - Lathen understood **true nature of ownership structure** and that issuers might dispute ownership (PFOF ¶¶ 413-14, 424)
  - Lathen knew Participant Agreements were **material** to redemption decisions (PFOF ¶¶ 421-22)
  - Lathen admitted to using "**stealth and tact**" and to rebuffing issuers' requests for information (PFOF ¶¶ 433, 157, 169, 218)
  - Lathen sought to **avoid regulatory scrutiny** (PFOF ¶¶ 428-29, 432)
- ▶ Applicants argue this "laundry list" of facts was **disputed**. Reply at 24. But resolving disputes of fact is the role of the **fact-finder**.

## Division's Position on Scienter and Negligence Was Objectively Reasonable

- ▶ Lathen told one investor he would not be "open kimono" with issuers and trustees "for obvious reasons" (PFOF ¶¶ 427-28)
- ▶ Lathen knew SEC sued two individuals (the Staples Defendants) for fraud based on similar conduct, and that federal district court denied their motion to dismiss (PFOF ¶ 449)
- ▶ Industry standards of care – honesty, integrity, and professionalism – were imposed by EACM's Code of Ethics. (PFOF ¶ 11)
- ▶ Lathen routinely fell short of standards of care 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 issuer questions (PFOF ¶¶ 159, 610-11)



## Division's Position on Advice of Counsel Defense Was Objectively Reasonable

- ▶ Division did not learn, until eve of trial, that advice of counsel defense would be permitted
  - Respondents did not waive privilege during the investigation
  - Division spent **months** seeking evidence Respondents intended to offer
  - One lawyer refused to speak with the Division; another testified at trial to advice allegedly provided, but not disclosed to Division during interviews
- ▶ Evidence at trial showed Lathen **did not**:
  - Seek advice on disclosure obligations or custody rule violation charged
  - Provide counsel with relevant documents (*e.g.*, IMAs)
  - Consistently follow advice of counsel

## Division's Custody Rule Claim Was Substantially Justified

- ▶ Complex issue of first impression
- ▶ Facts detailed in Division's Opposition, *e.g.*:
  - **IMA**, by its terms, made Fund owner of the Bonds, giving the Fund custody (PFOF ¶ 357)
  - Fund held itself out as owner of assets in joint accounts in its **PPM** (PFOF ¶¶ 32-33), **Fund financials** (PFOF ¶¶ 519-20, 522), and EACM's **management representation letter** to its auditors (PFOF ¶ 514)
  - EACM's **Forms ADV** stated it was adviser to one client, the Fund, and that Advisor had custody of Fund assets (PFOF ¶¶ 462, 465, 469, 478, 488-513)



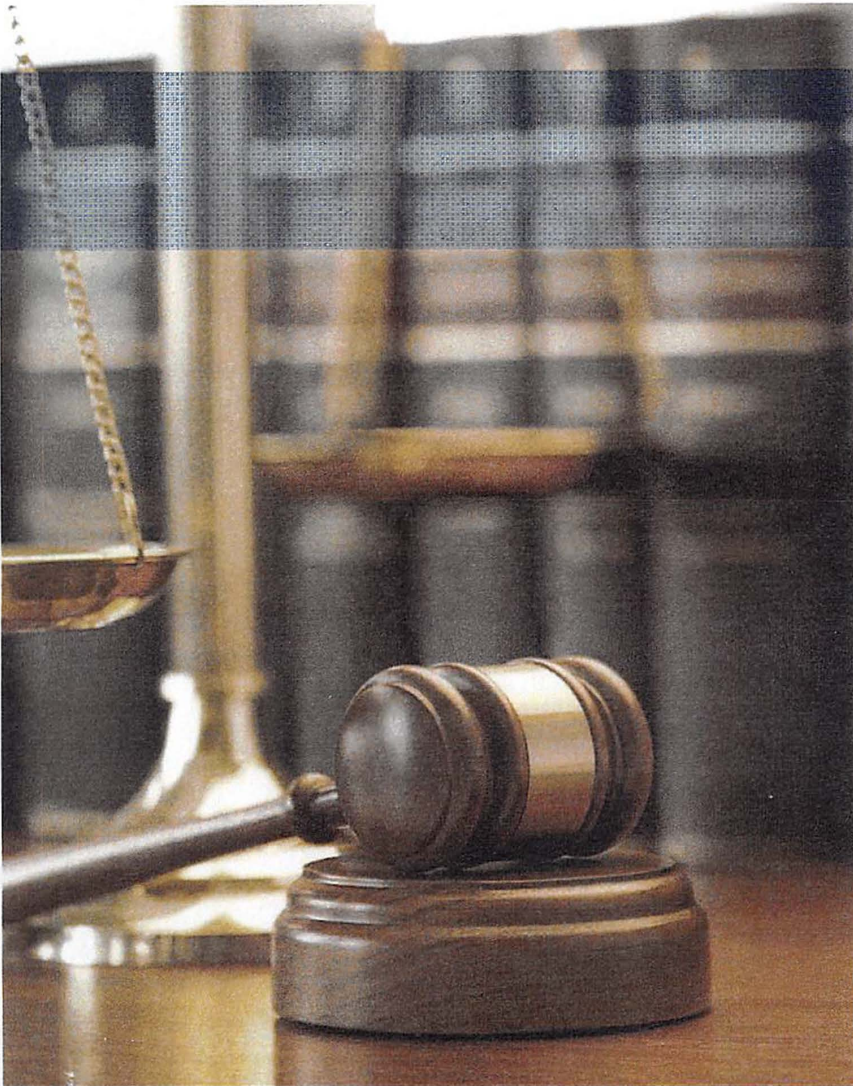
## Division's Action Was a Reasonable Exercise of Prosecutorial Discretion

- ▶ Part of Commission's enforcement efforts necessary to maintain **fair, orderly, and efficient** markets
- ▶ Objective basis in law and fact to find:
  - Applicants' and Lathen's conduct **defrauded issuers**
  - **Disrupted** fair operation of the markets

## Applicants' Piecemeal Attacks on Substantial Justification Fail

- ▶ Focus on Division's failure to win at trial, rather than whether Division's action was "justified to a degree that could satisfy a **reasonable person**"
- ▶ Engage in self-serving speculation about what Record showed, **without citing the Record**
- ▶ Concede that validity of Lathen's joint tenancies – a matter of first impression under New York law – was a "**close question.**" Reply at 25.





## Applicants fail **four** of EAJA's six requirements:

- ▶ Applicants are **not eligible**
- ▶ Applicants did **not incur fees and expenses**
- ▶ Division's action was **substantially justified**
- ▶ Fees and expenses sought by Applicants are **not reasonable or adequately documented**

## Applicants' Demand for Over \$1.125MM in Fees and Expenses Is Not Reasonable

- ▶ Fees from **investigation** and **private** litigation
- ▶ Fees in excess of **\$75.00/hour**
- ▶ Fees **not adequately documented** or **reasonable** under Rule 43
- ▶ Expenses **disallowed** by **Section 27** of the Exchange Act, 15 U.S.C. § 78aa, and **28 U.S.C. § 1920**



## Applicants Impermissibly Seek Investigative and Private Litigation Fees

- ▶ EAJA applies in “adversary adjudications”
  - 17 C.F.R. § 201.32-33
- ▶ Fees incurred **before the OIP date** and in **private litigation** are not part of the “adversary adjudication”
- ▶ Applicants’ arguments would reinvent the law of EAJA wholesale and **dramatically expand** the scope of fees awarded

## Cases On Which Applicants Rely Provide No Support for Their Claims

- ▶ *ITT v. Electrical Workers*, 419 U.S. 428 (1975)
  - Pre-dates enactment of EAJA by **five years**
  - **Adjudication** requires “a **hearing** before an **administrative law judge** who **makes findings of fact** and **conclusions of law**, initially decides the case, and whose recommended decision becomes the decision of the agency...” 419 U.S. at 445.



## Cases On Which Applicants Rely Provide No Support for Their Claims

- ▶ *Family Television v. SEC*, 608 F. Supp. 882 (D.D.C. 1985)
  - Appeal from Commission's rejection of EAJA application for fees and expenses incurred during **investigation**
  - Applied literal meaning of "**adjudication**" and found that investigation dropped without filing of an action is not an adjudication

## Applicants Impermissibly Seek More Than \$75.00/Hour

- ▶ Commission's rules cap legal fees at **\$75.00/hour**.
  - 17 C.F.R. § 201.36(b).
- ▶ Applicants urge Court to “push the envelope” and rewrite the Commission's rules
- ▶ Applicants' “fairness” arguments fail



## Applicants' Fees and Expenses Are Not Adequately Documented or Reasonable Under Rule 43

- ▶ Opposition details errors and issues in Application
  - Applicants now **admit** they sought **\$25,000** in fees and expenses that were: (1) incurred in private litigation; (2) not documented; or (3) duplicative.
- ▶ Do **not** redress other errors
- ▶ Most significantly: Applicants seek fees and expenses incurred in **Lathen's – a non-applicant's** – defense.

## Applicants' Request for Lathen's Fees and Expenses Is Not Reasonable

- ▶ Lathen was the primary Respondent at trial, yet Applicants make no effort to distinguish his fees and expenses from their own
  - Belated request to add Lathen as an Applicant is *untimely*
- ▶ Many of Applicants' other fees and expenses are vague, incomplete, or inadequately documented
  - Bulk billing
  - Include invoice for Robinson that expressly includes *time not worked during lunch and errands!*



## Applicants Seek Costs Expressly Disallowed by Statute [Section 27 and 28 U.S.C. § 1920]

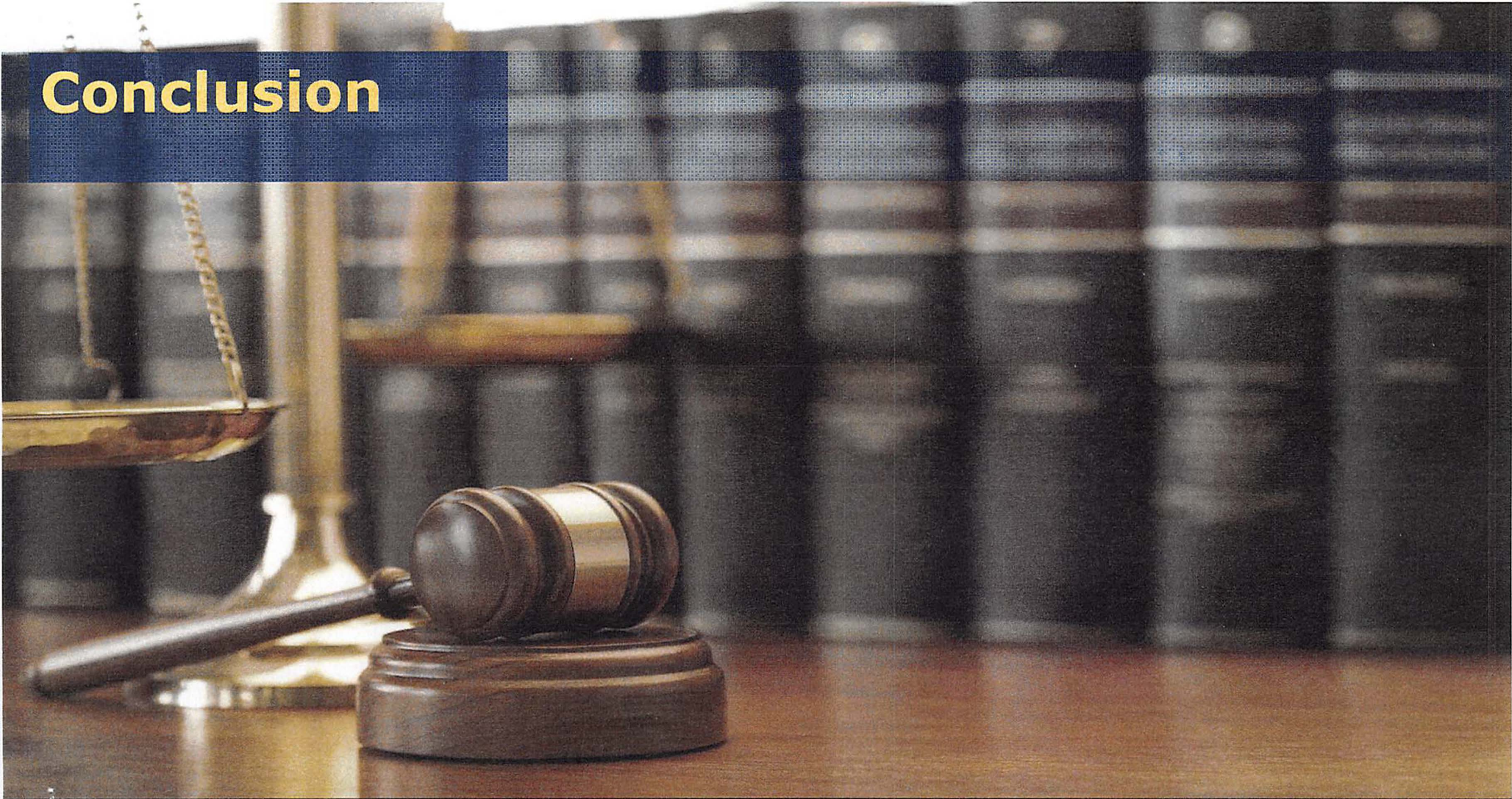
- ▶ **Section 27** of the **Exchange Act** states that costs enumerated under **28 U.S.C. § 1920** are not recoverable:
  - *SEC v. Kaufman*, 835 F. Supp. 157, 159 (S.D.N.Y. 1993), *aff'd*, 41 F. 3d 805 (2d Cir. 1994) (“Costs are available under EAJA ... only when not specifically precluded by another statute... Since **Section 27** of the ... **Exchange Act** expressly precludes recovery of costs against the Commission, **[Applicant] cannot recover costs.**”).
- ▶ Expenses for **fact witnesses, documents, and transcription** not allowed

## Division's Correction of Applicants' Calculation of Fees and Expenses

		Applicants	Division	
<i>FEES</i>				
Hours Billed	Pre-OIP: 1,049.7 Post-OIP: 3,647.3	<b>4,697.0</b> hours	<b>3580.2</b> hours	Pre-OIP: <del>1,049.7</del> Post-OIP: 3,580.2 Galbraith: <del>67.1</del>
Fee Rate	349.2 hours @ \$203.8 1946.5 hours @ \$206.43 152.5 hours @ \$206.89 2,248 hours @ \$210.40	<b>\$208.15</b> average	<b>\$75.00</b> Commission's EAJA Allowable Rate	<del>349.2 hours @ \$203.8</del> <del>1946.5 hours @ \$206.43</del> <del>152.5 hours @ \$206.89</del> <del>2,248 hours @ \$210.40</del>
Legal Work on Behalf of	Lathen: 33% EACM: 33% EACA: 33%	<b>100%</b> EACM, EACA & Lathen	<b>66%</b> (of \$268,515.00) Applicants Only	Lathen: <del>33%</del> EACM: 33% EACA: 33%
<b>Fees Calculation Total:</b>		<b>\$977,691.75</b>	<b>\$177,219.90</b>	
<i>EXPENSES</i>				
Expenses Billed	Pre-OIP: \$37,330.03 Post-OIP: \$110,327.74	<b>\$147,657.77</b>	<b>\$110,327.74</b>	Pre-OIP: <del>\$37,330.03</del> Post-OIP: \$110,327.74
Less Duplicative & Prohibited Post-OIP Expenses			<b>\$17,337.42</b> <del>\$92,990.32</del>	Fact Witnesses: <del>\$12,647.52</del> Duplicative: <del>\$11,185.45</del> Section 27: <del>\$69,157.35</del>
Legal Work on Behalf of	Lathen: 33% EACM: 33% EACA: 33%	<b>100%</b> All Defendants	<b>66%</b> (of \$17,337.42) Applicants Only	Lathen: <del>33%</del> EACM: 33% EACA: 33%
<b>Expenses Calculation Total:</b>		<b>\$147,657.77</b>	<b>\$11,442.70</b>	
<b>TOTAL</b>		<b>\$1,125,349.52</b>	<b>\$188,662.60</b>	



# Conclusion





**U.S. Securities and Exchange Commission**

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