UNITED STATES
SECURITIES AND EXCHANGE COMMISSION

100 F Street, NE
Washington, DC 20549-5937

DIVISION OF ENFORCEMENT

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BY EMAIL (alj@sec.gov)

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

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

Dear Judge Patil:

We write on behalf of the Division of Enforcement of the United States Securities and Exchange Commission (the "Division") in response to the letter dated March 26, 2018 submitted by applicants Eden Arc Capital Advisors, LLC ("EACA") and Eden Arc Capital Management, LLC ("EACM") ("Applicants") in connection with their application under the Equal Access to Justice Act ("EAJA") ("Letter").

The Division respectfully seeks leave of Court to submit this correspondence to address portions of the Letter that are factually inaccurate, constitute new argument to which the Division has not had an opportunity to respond, or are outside the scope of this Court's March 12 Order. *See* Order Following Oral Argument, Admin. Proc. Release No. 5642 (Mar. 12, 2018). It is important to note, however, that nothing in the Letter—whether responded to below or not—changes the necessary outcome of this EAJA proceeding.[1] This Court should deny the Application for fees and expenses because: (i) Applicants have not established eligibility under EAJA; (ii) Applicants have not proven that they incurred fees; (iii) the Division's action was

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[1] The Letter addresses just eight of the 37 slides presented by the Division during oral argument on March 8 and filed with the Office of the Secretary on March 12, 2018.

substantially justified; and (iv) the fees and expenses sought by Applicants are not authorized by EAJA or reasonable.

Applicants' Factual Inaccuracies

Slide 22: Applicants advise this Court that "[t]he Division had *full access* to the Applicants' privileged communications with their attorneys starting in September 2016...." Letter at 2 (emphasis added). This is incorrect.

Although the Division agrees that it had access to a *limited* number of Applicants' privileged communications starting in late September 2016, the Division did not receive the majority of documents and information relating to the advice of counsel defense until after multiple rounds of motion practice, with some documents and information withheld by Respondents until after trial was underway. *E.g.*, The Division of Enforcement's Statement of Fact, ¶¶ 661-79 (Apr. 27, 2017) ("PFOF"); *see also, e.g.*, Trial Tr. 132, 283. Mr. Galbraith (who testified toward the end of the hearing) did not agree to an interview by the Division prior to trial, as Applicants acknowledge. Letter at 2. One of Mr. Lathen's attorneys, Robert Flanders, testified at trial to advice allegedly provided, which had not previously been disclosed to the Division during its informal interviews.[2] These delays prevented the Division from fully investigating the advice of counsel defense prior to trial, let alone during the Division's investigation. As Applicants acknowledge, they did not even assert the advice of counsel defense until September 2016, over a month after the OIP was filed.

Finally, and most importantly, the evidence at trial showed that Mr. Lathen did not seek advice on the disclosure obligations[3] or custody rule violation charged, did not provide counsel with all relevant documents, and did not consistently follow the advice of counsel defense. In light of these facts, which (although disputed) were established through testimony and documents at trial, the Division's position on advice of counsel was reasonable. And, as this Court is well-aware, the question for the Court is whether the Division's position was substantially justified *overall*, which it was. *Pierce v. Underwood*, 487 U.S. 552, 565-66 & n.2 (1988) (question whether action "justified to a degree that could satisfy a reasonable person" and had a "reasonable basis in law and fact").

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[2] *Compare* Declaration of Judith Weinstock in Support of Division of Enforcement's Memorandum of Law in Support of its Motion *in Limine* to Preclude Irrelevant Evidence and Argument Regarding Reliance on Advice of Counsel, or in the Alternative, to Preclude Respondents from Offering Evidence of Uncorroborated Attorney Advice and Evidence of Advice from Attorneys Not on Respondents' October 25, 2016 List of Attorneys ¶ 5 & n.3 (Jan. 11, 2017) (averring, based on Mr. Flanders' interview with the Division, that Mr. Flanders did not provide advice on disclosure obligations or validity of joint tenancies), *with* PFOF ¶¶ 817-67 (summarizing Mr. Flanders' trial testimony).

[3] Mr. Flanders' testimony at trial was that his advice to Mr. Lathen related to Mr. Lathen's contractual obligations under the Prospectus. PFOF ¶ 842. It did not speak to Mr. Lathen's obligations under the securities laws. *Id.*

Applicants' New Arguments

Slide 14: Applicants now argue that they intended to file an EAJA claim if they prevailed at trial, but such an intention (assuming, *arguendo*, one existed) does not establish a pre-existing obligation to pay or that Applicants incurred fees under EAJA. Applicants expressly acknowledge that the "specific circumstances of any EAJA recovery are not specifically referenced in the LPA's indemnification language," and again fail to point this Court to any record citation or document evidencing their claim in this EAJA proceeding that there was a pre-existing obligation to repay. Letter at 1.

Moreover, even if there were some pre-existing unwritten intention, it would be far from dispositive of the question whether Applicants incurred fees under EAJA. The cases on which the Division relies, *see* Slide 12, strongly support a finding that Applicants (and Mr. Lathen) did not incur fees, much like indemnified employees do not incur fees. In contrast, the cases on which Applicants rely do not address the question whether a single control person and non-applicant can belatedly execute an agreement on behalf of himself, the Fund (a non-party), and the two Applicants purporting to memorialize the agreement. And, Applicants (unlike the petitioners in the cases they cite) are not indigent social security beneficiaries seeking pro bono assistance to adjudicate their claims or premium-paying insureds, but rather sophisticated and well-off financial markets participants who could have documented their agreements more than 48 hours before filing their application. EAJA is not intended to permit such end-runs around its threshold requirements.

Moreover, even if there were some pre-existing unwritten agreement, it would be far from dispositive of the question whether Applicants incurred fees under EAJA. The cases on which the Division relies, *see* Slide 12, strongly support a finding that Applicants (and Mr. Lathen) did not incur fees, much like indemnified employees do not incur fees. In contrast, the cases on which Applicants rely do not address the question whether a single control person and non-applicant can belatedly execute an agreement on behalf of himself, the Fund (a non-party), and the two Applicants purporting to memorialize the agreement. And, Applicants (unlike the petitioners in the cases they cite) are not indigent social security beneficiaries seeking pro bono assistance to adjudicate their claims or premium-paying insureds, but rather sophisticated and well-off financial markets participants who could have documented their agreements more than 48 hours before filing their application. EAJA is not intended to permit such end-runs around its threshold requirements.

Applicants' Arguments Outside Scope of March 12 Order

As Applicants implicitly concede through citations to their own prior briefing, their arguments with regard to Slides 28-31 and 33 merely repeat arguments previously detailed in their March 1, 2018 reply and oral argument, and do not correct any factual inaccuracy or new argument by the Division. The Division respectfully submits that these arguments should be stricken. To the extent this Court considers them, however, the Division responds as follows:

Slides 28-30: Applicants concede that there is no precedent establishing that EAJA fees and expenses may be recovered prior to the initiation of an adversary adjudication through the filing of the Order Initiating Proceeding. 17 C.F.R. § 201.32-33. There is no reason for this Court to reinvent the law of EAJA, particularly in light of proscriptions that EAJA must be strictly construed.

Slide 31: The Division rests on its prior briefing and argument, which indisputably establishes that the Commission's rules cap legal fees at $75.00/hour. 17 C.F.R. § 201.36(b).

Slide 33: Applicants concede that Mr. Lathen is an affiliate who did not timely join the initial application on December 4. Letter at 3. EAJA makes clear that to be timely, an application must be filed within 30 days of the Commission's final disposition of the proceeding. 17 C.F.R. § 201.44. EAJA's timeliness rules are a clear demarcation of whether an application can, or cannot, proceed. And, as a waiver of sovereign immunity, EAJA 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). It would be unprecedented to permit Mr. Lathen to recover his *own* fees and expenses through Applicants' petition.

Moreover, the Division's 33 percent pro rata offset is conservative and based on EAJA's well-established requirement that fees and expenses be *reasonable* and fully documented. 17 C.F.R. § 201.36 (c)(3) (instructing court to consider "[t]he time actually spent in the representation of the applicant); *id.* § 201.43 (requiring "[a] separate itemized statement" to be submitted the hours spent, the specific services provided, and the total amount payable). Here, Applicants do not dispute that the majority of the work for which they seek reimbursement was performed on behalf of Mr. Lathen, a non-applicant. To permit Mr. Lathen to recover would be the very definition of "windfall" and ignore the governing EAJA rules for timeliness, eligibility, reasonableness, and documentation.

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The Division appreciates this Court's consideration. For the forgoing reasons, and those set forth in the Division's Response and oral argument, this Court should deny Applicants' motion for legal fees and expenses under EAJA.

Respectfully submitted,

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