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March 26, 2018

VIA E-MAIL AND U.S. MAIL

Honorable Jason S. Patila
Administrative Law Judgea
U.S. Securities and Exchange Commissiona
100 F Street, NEa
Washington, DC 20549a

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

Dear Judge Patil:

As the Court knows, this firm represents Eden Arc Capital Advisors, LLC ("EACA") and Eden Arc Capital Management, LLC ("EACM") (together the "Applicants") in connection with their claims under the Equal Access to Justice Act ("EAJA") related to the referenced matter. Pursuant to this Court's March 12, 2018 "Order Following Oral Argument," we submit this letter for purposes of challenging and commenting on certain of the representations and arguments made by the Division in the PowerPoint presentation it used at oral argument on the Applicants' EAJA application.

Slide 7 -- The Division's calculations are incorrect. The Applicants' net worth is not 3% away from the $7,000,000 threshold. The correct figure is 5.2% ($264,146/$7,000,000 = 5.2%).

Slide 14 – Insofar as the Division or the Court questions the intent of the parties under the LPA with respect to the Applicants' obligation to remit any EAJA recovery to the Fund, the Fund's counsel, Kevin Galbraith, Esq., advised Lara Mehraban of the Division in December 2016 that, should the Eden Arc Respondents prevail at trial, they intended to bring an EAJA claim against the Division and, if successful, to repay any recovery to the Fund. In addition, while the specific circumstances of any EAJA recovery are not specifically referenced in the LPA's indemnification language, such an interpretation is nonetheless straightforward.

Slide 22 – The Division had full access to the Applicants' privileged communications with their attorneys starting in September 2016, a full four months prior to trial. Except for Mr. Galbraith, the Division had access to and interviewed all of Mr. Lathen's attorneys (in some cases multiple times). Thus, the Division's assertion that certain attorney advice was not disclosed to them before trial is wholly unsubstantiated. Also, contrary to its assertion on Slide 22 of its PowerPoint presentation, the Division knew full well that the Applicants intended to present evidence of their reliance on the advice of counsel at trial to show their good faith. Indeed, the Division's multiple failed attempts before trial to preclude the Applicants' reliance on an advice of counsel defense demonstrates that it knew that the advice provided by the Eden Arc Respondents' counsel would be at issue at trial. Moreover, the Division's knowledge concerning the Applicants' advice of counsel defense (learned through interviews of the Applicants' counsel and the review of attorney-client privileged documents and e-mails) provides further support for the notion that the Division knew (or should have known) before trial that its position was not substantially justified.

Slides 28-30 – The Applicants and the Division seem to agree that there can be no EAJA recovery where an investigation does not result in a Final Order adjudicating charges brought in an OIP. There can be no doubt, though, that the Division's extensive, pre-OIP investigation of the Applicants was indisputably part of "the agency process for the formulation of" a Final Order and therefore was part of the "adjudication." Outside of certain ALJ decisions which we respectfully submit misapplied the law (detailed in Footnote 14 of the Applicants' March 1, 2018 reply memorandum of law in further support of their EAJA application), the Applicants are neither aware of any other government agency that has challenged recovery of investigation-related expenses in connection with a fully adjudicated proceeding nor any Court that has held that such expenses are not recoverable. Except when it is itself contesting an EAJA application, even the Commission recognizes that investigations are an inextricably intertwined component of the adjudicative process. As former SEC Chairman Mary Jo White described Division procedures in a presentation at NYU Law School in November 2016: "To give you a sense of how we at the SEC have changed the way we enforce the federal securities laws, I am going to first discuss Enforcement's emphasis on the need to be trial-ready, reflective of our new 'investigate to litigate' philosophy." See https://www.sec.gov/news/speech/chair-white-speech-new-york-university-111816.html

Slide 31 – The Commission's internal regulations and the relevant statute are objectively at odds. In particular, the EAJA, as amended in 1996, calls for market-rate recovery of legal fees subject to a cap of $125/hour. The Commission's internal regulations, purporting to interpret the EAJA, call for market-rate recovery of legal fees subject to a cap of $75/hour. These conflicting statements peacefully co-exist *only* in instances where the market rate for services is less than $75/hour. But that is not the case here. An award here of $125/hour is mandated by the language of the EAJA, regardless of the Commission's outdated and legally invalid regulation to the contrary. Basing an award of attorneys' fees on that hourly rate would not "push the envelope."

The Applicants acknowledge that Congress' 1996 EAJA update gives agencies discretion to amend their internal regulations to provide for cost of living increases but does not mandate that they do so. As such, any award by this Court above $125/hour could be perceived

as lacking authority. However, for the reasons detailed in their March 1, 2018 reply memorandum of law in further support of their EAJA application, the Applicants urge the Court to go above the $125/hour level. As this Court noted at oral argument on the Applicants' EAJA application, there would be no debate that the Applicants could, and likely would, recover at a rate well in excess of $125/per hour if the Division had brought its case in federal district court rather than as an administrative proceeding.[1] The Division's choice of venue, and by extension the Applicants' lack of choice, have constructively deprived the Applicants of their constitutional rights to due process and equal protection under the law. An award by this Court at a rate of more than $125/hour therefore would serve the greater interests of justice and be consistent with the Applicants' constitutional rights.

Slide 33 – The Division's proration argument might potentially have merit in a proceeding in which three unaffiliated applicants did not have the benefit of an indemnification arrangement, retained their own separate counsel or agreed to evenly divide a single counsel's legal costs amongst themselves. If only two of those three applicants then sought EAJA relief, reimbursement of 100% of such legal fees could be seen as having provided a windfall in that they potentially stood to gain more than they expended.

But those circumstances are not present here. First, the Eden Arc Respondents are wholly owned and controlled by the same person (Donald F. Lathen, Jr.). Second, the defense and work streams were and would have been identical regardless of whether the Eden Arc Respondents' counsel were representing one, two or all three of the Eden Arc Respondents. Third, the legal fees incurred by the Eden Arc Respondents would have been the same whether the Division charged one, two or all three of the Eden Arc Respondents. Finally, all the Eden Arc Respondents were covered under the same LPA indemnity provisions – that is, the Fund paid all their legal fees.

Pursuant to the foregoing fact pattern, Mr. Lathen's "individual share" of the legal fees and expenses incurred by all three of the Eden Arc Respondents could just as easily be zero as one-third. The EAJA is silent on the issue of proration and we have found no caselaw directly on point. We therefore respectfully submit that it seems unlikely that Congress would have (when passing the EAJA) intended proration to apply to circumstances like those present here, wherein all parties are affiliated with one another, all parties aggregated together (including the

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[1] Moreover, Applicants could have pursued common law claims in federal district court, which would not have been subject to EAJA fee caps. As provided for in 28 U.S.C. § 2412(b): "Unless expressly prohibited by statute, a court may award reasonable fees and expenses of attorneys, in addition to the costs which may be awarded pursuant to subsection (a), to the prevailing party in any civil action brought by or against the United States or any agency or any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. The United States shall be liable for such fees and expenses to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award." Unlike EAJA claims under 28 U.S.C. § 2412(d), common law claims for recovery of legal costs under subsection (b) are not capped. For instance, if a Court were to determine that the Division acted in bad faith or that its claims were frivolous, the Applicants would be entitled to uncapped compensation under subsection (b).

Fund) fall below the eligibility threshold, one party did not formally join the others' EAJA application for privacy reasons, and a full award will not provide a windfall to anyone. Put differently, Congress surely did not intend to deprive EAJA applicants of full recovery because a potential co-applicant decided not to join in an EAJA application for reasons of privacy.

Moreover, even if Mr. Lathen was not an applicant in the formal sense, he is surely a de facto applicant because he was a prevailing party in the underlying litigation, he wholly owned both of the Applicants (that is, both EACA and EACM), his personal net worth was aggregated with that of the Applicants for purposes of determining EAJA eligibility, the Applicants' EAJA application was completed as if he was an applicant, and he has now requested that he be considered an applicant insofar as this Court entertains the Division's proration argument.

Considering all of the foregoing, for the Court to now adopt the Division's proration argument would be to arbitrarily deprive the Fund of much needed (and deserved) recompense.

Accordingly and for all of the foregoing reasons, as well as those set forth in all of their prior submissions, Eden Arc Capital Management, LLC and Eden Arc Capital Advisors, LLC respectfully request that this Court enter an Order: (1) directing the Division to pay $1,104,988.44 for the legal fees and expenses they have incurred; and (2) awarding them the legal fees and expenses that they have and have been incurring in connection with this EAJA proceeding.

Thank you for your consideration and attention to this matter.

Respectfully submitted,

Harlan Protass

cc: Sarah H. Concannon, Esq. (via e-mail and U.S. Mail)
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