INITIAL DECISION RELEASE NO. 305
ADMINISTRATIVE PROCEEDING
FILE NO. 3-11672-EAJA

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

In the Matter of	:	
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BRANDT, KELLY & SIMMONS, LLC, and	:	INITIAL DECISION
KENNETH G. BRANDT	:	February 10, 2006

APPEARANCES: John S. Yun, Sahil W. Desai, and Michael S. Dicke for the Division of Enforcement, Securities and Exchange Commission

Bradley J. Schram and Brian Witus of Hertz, Schram & Saretsky, P.C., for Respondents Brandt, Kelly & Simmons, LLC, and Kenneth G. Brandt

BEFORE: Carol Fox Foelak, Administrative Law Judge

SUMMARY

This Initial Decision grants the application of Brandt, Kelly & Simmons, LLC (BKS) and Kenneth G. Brandt (Brandt) for an award of fees and expenses pursuant to the Equal Access to Justice Act (EAJA), in the amount of $11,926. BKS and Brandt had been exonerated of all charges in an administrative proceeding against them, and this Decision concludes that there was no substantial justification for prosecuting those charges after December 9, 2004. It further concludes that they incurred attorney fees and other expenses of $29,750 in defending themselves after that date and in litigating this EAJA proceeding. The amount awarded was reduced from the actual fees and expenses, pursuant to the $75 maximum hourly rate for attorney fees set by the Securities and Commission's (Commission) Rules as authorized by statute.

I. INTRODUCTION

A. Procedural Background

This Initial Decision concerns an Application for Fees and Expenses pursuant to the EAJA, 5 U.S.C. § 504, and Sections 201.31–.59 of the Commission's Rules, 17 C.F.R. §§ 201.31–.59, timely filed August 24, 2005, by BKS and Brandt. The Division of Enforcement

(Division) filed an Answer on October 4, 2005,[1] and BKS and Brandt, a Reply on November 1, 2005, pursuant to 17 C.F.R. §§ 201.52 and .53, respectively.[2]

BKS and Brandt's EAJA application followed a final disposition that was favorable to them in a proceeding against them. Brandt, Kelly & Simmons, LLC, and Kenneth G. Brandt, 85 SEC Docket 3359 (A.L.J. June 30, 2005) (June 30, 2005, Initial Decision). The date of final disposition of the proceeding was July 26, 2005, when the June 30, 2005, Initial Decision became the final decision of the Commission. Brandt, Kelly & Simmons, LLC, and Kenneth G. Brandt, Investment Advisers Act Release No. 2408 (July 26, 2005). See 17 C.F.R. § 201.44(b). BKS and Brandt's filing on August 24, 2005, was within thirty days of that date, and thus timely under the EAJA and the Commission's Rules. See 5 U.S.C. § 504(a)(2); 17 C.F.R. §§ 201.44(a), .160.

The Commission's Rules disfavor further proceedings, such as an evidentiary hearing, on matters at issue in an EAJA application, and emphasize a prompt decision by the administrative law judge. See 17 C.F.R. §§ 201.55, .56. The findings and conclusions in this Decision are based on the record, which includes the record in the original proceeding and filings in the EAJA proceeding. Pursuant to the EAJA, 5 U.S.C. § 504(a)(1), and 17 C.F.R. § 201.35(a), "[t]he burden of proof that an award should not be made to an eligible prevailing applicant is on [the Division]." 17 C.F.R. § 201.35(a). All arguments and proposed findings and conclusions that are inconsistent with this Decision were considered and rejected.

B. Allegations and Arguments of the Parties

BKS and Brandt argue that they reasonably incurred fees and expenses, which were necessary to defend the proceeding against them and to litigate the EAJA proceeding, that total $76,000, when attorney fees are reduced to $125 per hour, the maximum allowable in the EAJA. They argue that the position of the Division in the proceeding against them was not "substantially justified" within the meaning of 5 U.S.C. § 504(a).

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[1] With its Answer, the Division filed a document entitled "Declaration of Sahil W. Desai in Support of Division of Enforcement's Opposition to Respondents' Verified Petition for Attorneys' Fees and Expenses" (Declaration). The Declaration purports to describe the investigation that preceded the proceeding against BKS and Brandt and includes as exhibits numerous documents that were generated in the investigation. As such, the Declaration and exhibits relate solely to the issue of substantial justification, and will be stricken as inconsistent with the EAJA and the Commission's Rules. "Whether or not the position of the agency was substantially justified shall be determined on the basis of the administrative record, as a whole, which is made in the adversary adjudication for which fees and other expenses are sought." 5 U.S.C. § 504(a)(1); accord, 17 C.F.R. § 201.55(a).

[2] The Answer and Reply were timely filed. See Brandt, Kelly & Simmons, LLC, Admin. Proc. No. 3-11762-EAJA (A.L.J. Sept. 21, 2005) (unpublished); Brandt, Kelly & Simmons, LLC, Admin. Proc. No. 3-11762-EAJA (A.L.J. Oct. 21, 2005) (unpublished) (extending the filing dates for the Answer and Reply to October 4 and November 1, 2005, respectively).

The Division argues that its position in the proceeding against BKS and Brandt was substantially justified. Additionally, the Division argues that the fees and expenses claimed are excessive.

II. FINDINGS OF FACT

The Commission commenced a proceeding, seeking various sanctions under the securities laws, against BKS and Brandt by an Order Instituting Proceedings (OIP) on September 21, 2004. The proceeding concerned the use of a $7,500 payment to BKS, a registered investment adviser, from TD Waterhouse Investor Services, Inc. (TDW), a broker-dealer that was custodian of BKS's client accounts and to which BKS directed client trades. The OIP alleged that the $7,500 was intended as fee reimbursements for BKS clients but that, instead, BKS used the money to pay its own operating expenses. Thus, the OIP alleged, BKS and Brandt misappropriated client assets in violation of the antifraud provisions of the Investment Advisers Act of 1940 (Advisers Act), Sections 206(1) and 206(2), and failed to disclose receipt of the money in Part II, Item 13.A. of BKS's Form ADV in violation of Section 207 of the Advisers Act. The OIP also alleged that Brandt violated and aided and abetted and caused BKS's violations of these provisions. The record of evidence was compiled in a two-day hearing on December 8 and 9, 2004, in Detroit, Michigan.[3] The June 30, 2005, Initial Decision, which became the final decision of the Commission, concluded that no violation alleged in the OIP was proved and dismissed the proceeding as to both BKS and Brandt.

A. Background Facts

The following facts, concerning which there was no dispute, were found in the June 30, 2005, Initial Decision, which contains citations to the record. See Brandt, Kelly & Simmons, LLC, 85 SEC Docket at 3361-66.

Brandt, who has worked in the securities industry for more than thirty years, was associated with Linsco Private Ledger (LPL), a broker-dealer and registered investment adviser, from 1996 to 2001. In 2001, he and a colleague, Craig Simmons (Simmons), left LPL and established their own registered investment adviser, BKS, which opened for business in February 2001. They hoped to profit by offering clients better service at lower cost than at LPL. BKS, which had assets under management of about $135 million as of 2003, received about $1 million in annual revenue in 2001, 2002, and 2003.

BKS needed a custodian and broker-dealer for clients' brokerage accounts. After considering alternatives, Brandt and Simmons settled on TDW because it offered the lowest fees, technology that met their needs, and good service. The cost savings to customers included lower

[3] Citations to exhibits offered in the hearing by the Division and by BKS and Brandt will be noted as "Div. Ex. __" and "Resp. Ex. __," respectively. Citations to the transcript of the hearing will be noted as "Tr. __." Citations to BKS and Brandt's EAJA Application and Reply will be noted as "Appl. at __, Ex. __" and "Reply at __, Ex. __," respectively.

or no transaction fees, no annual maintenance fee, and significantly lower 12b-1 fees[4] in the same mutual funds that clients were already holding. TDW and BKS estimated that the average account would save more than $500 per year by transferring to TDW.

Brandt and Simmons hoped that their clients at LPL would follow them to BKS and discussed the benefits and costs of the move with each client. (Eventually, about 90% of their accounts at LPL moved to BKS.) The costs that a client might incur in transitioning to TDW included IRA termination fees,[5] mutual fund Class B share contingent deferred sales charges (CDSC),[6] bounced check fees, transaction costs from selling stock to put assets under management with BKS – anything related to a customer's transfer from LPL to TDW. BKS reimbursed more than $20,000 to clients for their costs of transferring, by giving them credits against their quarterly management fees.[7] About $2,500 of this amount was for IRA termination fees. Brandt did not give any fee credits to himself or family members.

Brandt and Simmons asked TDW for reimbursement of fees to be incurred by clients transferring from LPL to TDW. Their principal contact at TDW was Sean Lindenbaum (Lindenbaum), and they also had discussions with others, including Lindenbaum's supervisor, Mark Avers (Avers). Eventually BKS and TDW settled on $7,500: on October 10, 2000, Lindenbaum telephoned and left a message for Brandt that TDW would "pay up to $7,500 in term. fees." The agreement was memorialized in an October 17, 2000, letter from TDW to Brandt, which stated in reference to this subject, in totality, "TDW is willing to commit up to

[4] The 12b-1 fee, authorized by 17 C.F.R. § 270.12b-1, permits a fund to pay "distribution" expenses, including broker's commissions, and shareholder service expenses from fund assets.

[5] LPL charged $50 to close an IRA account. Many clients were not concerned about small fees, such as the $50 IRA fee, because their savings from transferring to TDW would be so great. However, if a client complained about the $50 IRA fee, BKS offered to reimburse it. About 50 of about 200 IRA accounts received the $50 reimbursement. Brandt had originally estimated that he might reimburse as much as $15,000 for IRA fees.

[6] Some clients, who had not been managed clients at LPL, decided to move to BKS and become managed clients, but had Class B shares of mutual funds subject to a substantial CDSC on redemption. At TDW, BKS obtained access to fund classes with no load or load waived and with significantly lower 12b-1 fees than clients were paying in the same funds.

[7] The actual amount reimbursed was greater than the amount reflected in Resp. Exs. A1-26, D1-5, D7-12, D14-17, D19, D21-24, D27-31. Those exhibits reflect credits that exceeded an account's quarterly fee and were carried over to the next quarter. If the credit was less than the quarterly fee and did not have to be carried over to the next quarter, there was no separate tracking of the reimbursements.

$7,500 toward account termination fees."[8] The amount was not contingent on any particular amount of business or recommendation by TDW.

TDW placed the $7,500 payment in BKS's account at TDW in May 2001. TDW annotated the entry in its records as "reimbursement of termination fees," with no mention of "IRA." From there, the funds were wired to BKS's bank account at the Huntington National Bank. Because BKS reimbursed the clients by means of credits against their quarterly fees, rather than writing checks payable to the clients, it is literally true that BKS used the $7,500 cash that TDW placed in BKS's account to pay its normal operating expenditures.

B. Account Termination Fees

The phrase "account termination fees" was not defined in the October 17, 2000, letter or elsewhere. In the proceeding against BKS and Brandt the Division argued that "account termination fees" meant, and was restricted to, the $50 fee charged by LPL for closing out IRA accounts. In the EAJA proceeding, the Division states that the undersigned resolved this issue by crediting Brandt's testimony and discrediting Lindenbaum's and argues that it would also have been reasonable to credit Lindenbaum's and discredit Brandt's.

At the hearing Brandt testified consistently that he was never told by TDW and never had any understanding that the $7,500 was for IRA termination fees only, and that he believed that the $7,500 could be used for reimbursement of CDSCs and other charges incurred by clients.[9] Tr. 113, 125. Lindenbaum's testimony was inconsistent on this point. In the Division's direct case Lindenbaum testified that he believed that the $7,500 was only for IRA account termination fees, that he does not remember discussing any fees with BKS other than IRA termination fees, and that his contemporaneous notes referring to "term. fees" and "ind. acct. termination fees" actually referred to IRA termination fees.[10] Tr. 191-94, 196, 229; Div. Ex. 5 at TD07551, TD0553. However, his testimony on cross-examination was inconsistent with this: he testified that he discussed with Brandt and Simmons a wide variety of fees and charges that clients would incur in transferring to TDW. Tr. 223, 318. In a nutshell, Lindenbaum's testimony cannot reasonably support a finding that the $7,500 was to be used only for IRA fees because his testimony on that point was inconsistent. Cross-examination, often described as "the greatest

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[8] Avers provided this language to Lindenbaum, who drafted the letter. TDW's compliance officer, Maria Seedner, reviewed and approved the letter. BKS did not draft any of the language in the letter.

[9] As the Division argues, Brandt's testimony could be viewed as self-serving since he was a respondent. It must also be remembered that the Division, not Brandt, had the burden of proof in the proceeding against him and BKS.

[10] The June 30, 2005, Initial Decision concluded that "Lindenbaum's direct testimony was biased in favor of placing himself and his employer, TDW, in the best possible light with Commission staff" (emphasis added) and noted that Lindenbaum was represented at the hearing by TDW's attorney. 85 SEC Docket at 3364 & n.13.

legal engine ever invented for the discovery of truth,"[11] cannot be ignored. For this reason, it was found that Lindenbaum's discussions with BKS about fees and charges were not restricted to IRA termination fees and that TDW did not restrict the $7,500 to reimbursement of IRA termination fees only.

The Division did not become aware until shortly before the hearing that BKS and Brandt would argue that they had reimbursed clients more than $20,000 in termination fees. The argument was first made in BKS and Brandt's prehearing brief, filed on December 1, 2004, and the evidence concerning this was supplied between that date and the end of the hearing on December 9, 2004, in the form of Respondent Exhibits A and D and the testimony of Brandt and Simmons. Tr. 277-78. BKS first became involved in the investigation that led to the proceeding against it and Brandt when the Division, on April 29, 2003, sent it a subpoena referencing a formal order of investigation entitled In the Matter of Rudney Associates, Inc. (SF-2637). Div. Ex. 26. As relevant here, the Documents to be Produced specified: "18. All DOCUMENTS RELATING TO [BKS's] use of any money received from [TDW] in connection with an INCENTIVE CONTRACT." Div. Ex. 26 at 7-8. During the Division's investigation up until the time of the OIP, BKS and Brandt indicated that the amount of termination fees reimbursed was less than $7,500. Tr. 89, 144-47. BKS and Brandt's Answer to the OIP was also in accord with this.[12] The Division maintains that it was unaware that BKS had reimbursed far more than the $7,500 it received from TDW because BKS and Brandt withheld the information that over $20,000 had been reimbursed, while BKS and Brandt maintain that the information had not been volunteered because the Division failed to ask the right questions.

It is found that the Division became aware that BKS had reimbursed at least $20,000 as of the end of the hearing on December 9, 2004, when the hearing and record were closed. Tr. 115-27, 133, 136-37, 288-304; Resp. Exs. A1-26, D1-5, D7-12, D14-17, D19, D21-24, D27-31. At the conclusion of the hearing, BKS and Brandt's counsel suggested waiving posthearing filings, noting the need to hold costs down, but the Division indicated that it would not waive its rights (under the Administrative Procedure Act[13] and the Commission's Rules[14]) to make the filings. Tr. 334-45.

C. Fees and Expenses

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[11] See, e.g, Lilly v. Virginia, 527 U.S. 116, 124 (1999).

[12] BKS and Brandt's Answer states, in reference to OIP ¶ II.9., "Respondents deny the allegations in Paragraph 9, except that Respondents admit that in May 2001 TDW transferred $7,500 into BKS's general account and that BKS used a portion of those funds for general operating expenses. Respondents further state that BKS also used a portion of the funds to reimburse clients for account termination fees." Answer at 2.

[13] 5 U.S.C. § 557(c).

[14] 17 C.F.R. § 201.340(a).

BKS and Brandt request an award of fees and expenses in the amount of $76,000, including attorney fees reduced to $125 per hour. This sum, however, includes fees and expenses incurred before the September 21, 2004, commencement of the adversary adjudication at issue – the Commission's administrative proceeding against them.

BKS and Brandt's fees and expenses in the adversary proceeding from September 21, 2004, onward total $115,934. This includes expenses of $18,938 and attorney fees for 393.7 hours billed at hourly rates of $150 to $380. When attorney fees are reduced to $75 per hour, fees and expenses total $41,753. Fees and expenses after December 1, 2004, when the Division first learned that BKS and Brandt planned to present evidence that BKS had reimbursed more than $7,500, total $49,061, including expenses of $10,605 and attorney fees for 168.3 hours billed at hourly rates of $150 to $380. When attorney fees are reduced to $75 per hour, fees and expenses total $16,515. Fees and expenses after December 9, 2004, when the hearing and record closed, total $22,704, including expenses of $3,218 and attorney fees for 78.8 hours billed at hourly rates of $150 to $380. When attorney fees are reduced to $75 per hour, fees and expenses total $9,128.

Fees and expenses in the EAJA proceeding consist of attorney fees for 37.3 hours of $7,046. When attorney fees are reduced to $75 per hour, fees and expenses in the EAJA proceeding total $2,798.

D. Net Worth

BKS had fewer than 500 employees and a negative net worth, of approximately ($200,000), at the time of the OIP. Appl. at 3, Ex. C; Reply at 16 & n.6, Ex. A. Brandt's negative equity in BKS was approximately ($130,000). Reply at 16 & n.6, Ex. A. Brandt had a net worth of approximately $1,650,000 at the time of the OIP. Appl. at 4, Ex. D; Reply at 16 & n.5. Concerning the valuation Brandt placed on three properties, the Division urges that he has not provided detailed information regarding what the properties are worth and to whom any property liens are owed.[15] However, the Commission's Rules do not require such details in an applicant's statement of net worth,[16] and the Division has provided no evidence to question the valuations.

III. CONCLUSIONS OF LAW

There is no dispute that BKS and Brandt have met the following requirements of the EAJA: The proceeding against them was an "adversary adjudication" within the meaning of the

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[15] The Division's Answer also argues that Brandt understated his net worth because his balance sheet does not include a valuation of his interest in BKS. This argument is mooted by the information supplied in BKS and Brandt's Reply concerning BKS's negative net worth and Brandt's negative equity in BKS.

[16] See Equal Access to Justice Act Rules, 47 Fed. Reg. 609, 610 (Jan. 6, 1982).

EAJA. See 5 U.S.C. § 504(b)(1)(C).[17] They were "prevailing" in that the adversary adjudication against them was dismissed. See 5 U.S.C. § 504(a)(1). Additionally, each is a "party" consistent with the requirements of 5 U.S.C. § 504(b)(1)(B) in that BKS had not more than 500 employees and its net worth did not exceed $7,000,000 and Brandt's net worth did not exceed $2,000,000 at the time the adversary adjudication was initiated. As discussed below, the Division's position in the proceeding against BKS and Brandt was "substantially justified" within the meaning of the EAJA, through December 9, 2004. However, after that date, continued prosecution of the proceeding against BKS and Brandt was not substantially justified.

A. Fees and Expenses

BKS and Brandt argue that they should be awarded fees and expenses they incurred during the Division's investigation that predated the administrative proceeding against them. This argument is baseless. The 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. "[T]he Commission recognizes that the [EAJA] does not apply to . . . Commission investigations." Equal Access to Justice Act Rules, 47 Fed. Reg. 609 (Jan. 6, 1982).

BKS and Brandt argue that they should be awarded attorney fees reflecting the $125 per hour statutory maximum provided in 5 U.S.C. § 504(b)(1)(A). The maximum attorney fee payable in this proceeding, however, is $75 per hour. The EAJA was amended, effective March 29, 1996, to raise the maximum attorney fee payable to $125 per hour, for adversary adjudications commencing on or after that date. The adversary adjudication against BKS and Brandt was commenced after that date, and their accounting includes attorney fees over $125 per hour. The Commission, however, has not amended its Rules to raise the allowable maximum, which remains at $75 per hour. See 17 C.F.R. § 201.36(b). BKS and Brandt argue that the higher EAJA rate is controlling. This argument is without merit. The EAJA proscribes agency awards above the maximum; it does not require agencies to award fees at the maximum. Specifically, it provides, "attorney or agent fees shall not be awarded in excess of $125 per hour." 5 U.S.C. § 504(b)(1)(A)(ii). In any event, the undersigned must follow the Commission's Rules.

The undersigned has examined the schedule of fees and expenses submitted by BKS and Brandt and found them to be reasonable and necessary in the defense of their case and the EAJA

[17] Section 504(b)(1)(C) defines "adversary adjudication" as "an adjudication under section 554 of this title in which the position of the United States is represented by counsel or otherwise, but excludes an adjudication for the purpose of establishing or fixing a rate or for the purpose of granting or renewing a license . . . ." The OIP cited Sections 203(e), 203(f), and 203(k) of the Advisers Act as authority for the proceeding against BKS and Brandt. Thus the proceeding was "on the record after notice and opportunity for hearing." Sections 203(e), 203(f) of the Advisers Act. Statutory requirements for adjudications under the Administrative Procedure Act are found at 5 U.S.C. §§ 554-59; 5 U.S.C. § 554(a) commences, "[t]his section applies . . . in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing . . . ."

proceeding. BKS and Brandt even offered to waive posthearing filings to hold down expenses, but the offer was not accepted. There is no evidence that the amount sought exceeds the prevailing rate for similar services in the community in which counsel for BKS and Brandt ordinarily perform services.

B. Substantial Justification

The position of the agency was articulated in the OIP and the Division's conduct of the proceeding, including posthearing pleadings. The Division's position as to the facts was that BKS and Brandt misappropriated all or most of the $7,500 received from TDW instead of passing it on in fee reimbursements to clients. The Division's legal position was that BKS and Brandt thus violated the Advisers Act's antifraud provisions and violated its reporting provisions by failing to report the misappropriated $7,500 as compensation on BKS's Form ADV. Until the conclusion of the hearing on December 9, 2004, the Division's position was reasonable in fact and law. The Division was reasonable in its belief that BKS had reimbursed clients less than $7,500 and had used the remainder for its operating expenses. Its position was reasonable in law in that these facts could constitute violations as charged. See SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180 (1963.)

The Division first learned on December 1, 2004, from BKS and Brandt's prehearing brief, that they were planning to prove that BKS had actually reimbursed more than $20,000. The Division first received documentary evidence of this, Respondent Exhibits A and D, on December 1 and 8, respectively. The Division notes that, had BKS and Brandt supplied this information earlier, the Division would have been able to evaluate it in deciding whether to recommend an enforcement action. As the Division correctly argues, on December 1, a postponement of the hearing would not have been granted to allow the Division time to evaluate the new evidence in light of the timeline requirements of 17 C.F.R. § 201.360(a)(2).

By the end of the hearing on December 9, after Brandt's and Simmons' testimony concerning Respondent Exhibits A and D, there could be no doubt that BKS had reimbursed more than $20,000. Also, as found above, the record could not reasonably support a finding that BKS was restricted to using the $7,500 solely to reimburse clients for LPL's $50 charge for closing out IRA accounts. This limitation was not found in the documentary evidence, and, as the Division notes, such a finding would have to rest on Lindenbaum's testimony. However, his testimony could not reasonably support a finding that the limitation existed because it was inconsistent on this point. Thus, a position that BKS had reimbursed less than, or otherwise misappropriated, $7,500 was not reasonable in fact, and a conclusion that it had violated the antifraud provisions by misappropriating the $7,500 instead of passing it on to clients in fee reimbursements was not reasonable in law. Likewise, since BKS did not retain the $7,500, it had no obligation to disclose it as compensation on its Form ADV. Accordingly, after December 9, 2004, the Division no longer had substantial justification to continue prosecuting the charges against BKS and Brandt, and they are entitled to an award of fees and expenses incurred after that date. See Leeward Auto Wreckers v. NLRB, 841 F.2d 1143 (D.C. Cir. 1988). Reasonable attorney fees in an EAJA proceeding include fees for litigating the EAJA proceeding as well as the original adversary adjudication. See Russo Sec., Inc., 54 S.E.C. (1999) (citing Commissioner, INS v. Jean, 496 U.S. 154 (1990); Trichilo v. Secretary of HHS, 823 F.2d 702,

707 (2d Cir. 1987)). As found above, when attorney fees are reduced to $75 per hour, the fees and expenses incurred by BKS and Brandt after December 9, 2004, in the adversary and EAJA proceedings total $11,926.

IV. RECORD CERTIFICATION

Pursuant to 17 C.F.R. § 201.351(b), it is certified that the record includes the items set forth in the record index issued by the Secretary of the Commission on March 1, 2005, and the items filed in this EAJA proceeding. Those items are: (1) BKS and Brandt's Application, titled "Verified Petition for Attorneys' Fees and Expenses," filed August 24, 2005; (2) the Division's Answer, filed October 4, 2005; and (3) BKS and Brandt's Reply, filed November 1, 2005.

V. PROCEDURAL ORDER

IT IS ORDERED that the Declaration of Sahil W. Desai in Support of Division of Enforcement's Opposition to Respondents' Verified Petition for Attorneys' Fees and Expenses, including attached exhibits A-M, IS STRICKEN from the record of this proceeding.

VI. ORDER

IT IS ORDERED that Brandt, Kelly & Simmons, LLC, and Kenneth G. Brandt's Application for Fees and Expenses IS GRANTED in the amount of $11,926 and IS OTHERWISE DENIED.

This order shall become effective in accordance with and subject to the provisions of Section 201.57 of the Commission's Rules of Practice, 17 C.F.R. § 201.57. Pursuant to that rule, a petition for review of this Initial Decision may be filed within twenty-one days after service of the decision. If neither party seeks review and the Commission does not take review on its own initiative, this Initial Decision shall become a final decision of the Commission on March 13, 2006.

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Carol Fox Foelak
Administrative Law Judge