

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

ADMINISTRATIVE PROCEEDINGS RULINGS
Release No. 4149 / September 13, 2016

ADMINISTRATIVE PROCEEDING
File No. 3-17387

In the Matter of

DONALD F. (“JAY”) LATHEN, JR.,
EDEN ARC CAPITAL MANAGEMENT, LLC, and
EDEN ARC CAPITAL ADVISORS, LLC

ORDER FOLLOWING
PREHEARING CONFERENCE

The Securities and Exchange Commission instituted this proceeding in August 2016. In their joint prehearing conference statement, the parties advised that Respondents—who were served with the OIP on August 17, 2016—have elected to exercise their right to a hearing within sixty days of service of the order instituting proceedings (OIP). *See* 15 U.S.C. §§ 77h-1(b), 78u-3(b), 80b-3(k)(2). The parties also proposed a procedural schedule, culminating in a hearing to begin on October 17, 2016, in New York City. Lastly, the parties advised that they have elected to proceed under the Commission’s pre-amendment Rules of Practice.¹

I held a telephonic prehearing conference on September 12, 2016. During the conference, I adopted the parties’ procedural schedule as set forth in their prehearing statement. The hearing will begin on October 17, 2016, in New York City, at a location to be determined. I also adopted Respondents’ proposal to set September 23, 2016, as the deadline for Respondents’ disclosure of their advice-of-counsel defense. Lastly, in the event that Respondents are granted leave to file a summary disposition motion, I set the following schedule: Respondents’ motion would be due September 23, the Division’s opposition would be due October 3, and Respondents’ reply would be due October 11, 2016.

¹ On July 13, 2016, the Commission adopted amendments to its Rules of Practice that take effect September 27, 2016. *See* Amendments to the Commission’s Rules of Practice, 81 Fed. Reg. 50212, 50212 (July 29, 2016) (to be codified at 17 C.F.R. pt. 201), <https://www.gpo.gov/fdsys/pkg/FR-2016-07-29/pdf/2016-16987.pdf>. For proceedings initiated between those dates, the Commission provided that parties may elect to apply the new rules. *See id.* at 50228-29 & n.184.

The parties are reminded that all filings must be filed in hard copy with the Office of the Secretary. See 17 C.F.R. §§ 201.151, .152. They are asked to always email courtesy copies of filings to alj@sec.gov in Word and in PDF text-searchable format. Electronic copies of exhibits should not be combined into a single PDF file, but sent as separate attachments, and should be provided in text-searchable format whenever practicable.

Hearing Guidelines

I will follow the general guidelines described below during these proceedings. The parties should review what follows *and promptly raise any objections they may have to the application of these guidelines in this matter.*

1. Subpoenas. A party's motion to quash a subpoena will be due within five business days of the submission of the subpoena for signing. Any opposition to the motion to quash will be due within five business days thereafter.
2. Exhibits. The parties shall confer and attempt to stipulate to the admissibility of exhibits. In order to avoid duplication of exhibits, the parties should identify joint exhibits. Exhibits are not filed with the Office of the Secretary until the close of the hearing at my instruction.
3. Exhibit lists. A comprehensive exhibit list prevents other parties from being surprised in the middle of the hearing. Given this fact, exhibit lists shall be exchanged among the parties and should include all documents that a party expects to use in the hearing for any purpose. This includes documents that are relevant only for impeachment purposes or which are presumptively inadmissible. The parties should serve their opponents with any amendments to their individual exhibit list. Because I rely on the parties' exhibit lists, the parties should provide me with a paper copy of their final exhibit lists at the beginning of the hearing. There is no need in the interim to submit exhibit lists or amendments to my office. Following the hearing, I will issue a separate order directing the parties to file a list of all exhibits, admitted and offered but not admitted, together with citations to the record indicating when each exhibit was admitted.
4. Expert reports and testimony. Expert witness disclosures must, at minimum, comply with Rule 222(b), including the provision of a "brief summary" of an expert's expected testimony. 17 C.F.R. § 201.222(a)(4), (b). Expert reports should be as specific and detailed as those presented under Federal Rule of Civil Procedure 26(a)(2). Failure to comply with these requirements may result in the striking of an expert's report. *Cf.* Fed. R. Civ. P. 37(c). The filing of the expert's report according to the prehearing schedule essentially constitutes the filing of the expert's direct testimony. During the hearing, the expert will not be subject to direct examination, and will simply be sworn in and proffered for cross-examination. On request, however, a party may conduct a brief direct examination of the party's expert.
5. Hearing schedule. The first day of the proceeding will begin at 9:30 a.m. Unless circumstances require a different schedule, we will begin each subsequent day at 9:00 a.m. Each day of the proceeding should last until at least 5:15 p.m. I generally take one break in the morning, lasting about 15 minutes, and at least one break in the afternoon. I generally break for lunch between noon and 12:30 p.m., for about one hour.

6. Hearing issues.

i) In general, the Division presents its case first, because it has the burden of proof. Respondents then present their case. If necessary, the parties may agree to proceed in some other order and may take witnesses out of order.

ii) If the Division calls a non-party witness that Respondents also wish to call as a witness, Respondents should cross-examine the witness as if they were calling the witness in his own case. This means that cross-examination may exceed the scope of direct examination. This will avoid the need to recall a witness just so the witness can testify for Respondents' case.

iii) I am flexible regarding the manner of presenting the testimony of Respondent Lathen, so long as the parties agree on it. By way of example, if the Division calls Respondent Lathen as its last witness, the parties may agree that Respondent's counsel will conduct the direct examination, followed by the Division's cross-examination, which may exceed the scope of direct. In the absence of any agreement, Respondent's testimony will proceed in the usual manner, *i.e.*, Respondent will be called as a witness and examined potentially multiple times. If the Division calls Respondent Lathen as a witness and he later testifies as part of his own case, the Division's cross-examination during Respondents' case will be limited to the scope of the direct examination.

iv) In general, cross-examination may be conducted by leading questions, even as to Division witnesses that Respondents wish to call in their case. Counsel may not lead his or her client, however. As a result, if Respondent Lathen is called as a witness in the Division's case, his counsel may not ask leading questions on cross-examination. Similarly, if a Commission employee is called as a witness for Respondents, the Division may not ask leading questions on cross-examination.

v) Avoid leading questions on direct examination. Leading questions during direct examination of a non-hostile witness are objectionable. Repeatedly having to rephrase leading questions slows down the hearing.

7. Pleadings. Prehearing and post-hearing briefs are limited to 14,000 words. *Cf.* 17 C.F.R. § 201.450(c) (imposing a word-limit for briefs filed before the Commission). Parties may seek leave to exceed this limit through a motion filed seven days in advance of the relevant briefing deadline. To enhance the readability of pleadings, I urge counsel to limit the use of acronyms to those that are widely known. *See* Antonin Scalia & Bryan A. Garner, *Making Your Case: The Art of Persuading Judges* 120-22 (2008); *see also Del. Riverkeeper Network v. FERC*, 753 F.3d 1304, 1320-21 (D.C. Cir. 2014) (Silberman, J., concurring). For the same reason, I ask that counsel use the same font size in footnotes as that used in the body of a pleading.

James E. Grimes
Administrative Law Judge