

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

Administrative Proceedings Rulings
Release No. 5398 / December 18, 2017

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 on Equal Access to
Justice Act Proceeding**

I issued an initial decision dismissing this proceeding on August 16, 2017. On November 2, the Securities and Exchange Commission issued a notice that the initial decision had become final. On December 4, Eden Arc Capital Management, LLC, and Eden Arc Capital Advisors, LLC (collectively, Eden Arc Respondents), submitted an application for recovery of legal fees and expenses under the Equal Access to Justice Act. On December 15, the Eden Arc Respondents submitted an affirmation from Donald F. Lathen and several exhibits supporting their application, including financial disclosure forms (Forms D-A) for the Eden Arc Respondents.

Verification and Net Worth Eligibility Requirements

The Commission’s EAJA regulations require “a written verification under oath or under penalty of perjury that the information provided in the application is true and correct.” 17 C.F.R. § 201.41(e). Lathen’s December 15 affirmation makes certain representations, but it does not represent that the information provided in the application is true and correct. Therefore, the Eden Arc Respondents are directed to file the required verification by December 22, 2017.

By December 29, the Eden Arc Respondents must resubmit their financial disclosures in a format that “provides full disclosure of [each] applicant’s and its affiliates’ assets and liabilities and is sufficient to determine whether [each] applicant qualifies under the [Commission’s EAJA]

standards,” under which each Eden Arc Respondent’s net worth cannot exceed \$7 million to be eligible for an award. 17 C.F.R. § 201.34(b)(5), .41(b), .42(a). “The net worth . . . of the applicant and all of its affiliates shall be aggregated to determine eligibility.” 17 C.F.R. § 201.34(f).

With their resubmission, the Eden Arc Respondents shall: (1) include Forms D-A that are signed; (2) provide supporting evidence for the assertions made in the Forms D-A organized in a manner that allows the reader to easily identify which evidence supports which assertion; and (3) consider the requirement that they file a “detailed exhibit showing the net worth of the applicant *and any affiliates.*” 17 C.F.R. § 201.42(a) (emphasis added). As to the third point, the Eden Arc Respondents should address whether Lathen, Eden Arc Capital Partners, LP, or any other person or entity are affiliates for the purpose of this proceeding.

Confidential Treatment

“Ordinarily, the net worth exhibit will be included in the public record of the proceeding.” 17 C.F.R. § 201.42(b). The Eden Arc Respondents request a protective order covering their Forms D-A, but provide no basis to support their request. Accordingly, by December 29, they must file a motion specifying the basis for their objection to public disclosure and address whether it is possible to file public redacted versions of their financial disclosures along with sealed versions. The Division of Enforcement may file a response to such motion by January 5, 2018.

Answer and Reply Deadlines

Absent an extension or statement of intent to engage in settlement negotiations, the Division’s answer would be due thirty days after service of the application. 17 C.F.R. § 201.52(a). Taking into consideration the supplemental submissions directed above, I extend the deadline for the Division’s response to January 29, 2018. The Eden Arc Respondents may file a reply by February 13, 2018. *See* 17 C.F.R. § 201.53.

Further Proceedings

The Commission’s EAJA regulations permit me to order further proceedings—“such as an informal conference, oral argument, additional written submissions or, as to issues other than substantial justification (such as the applicant’s eligibility or substantiation of fees and expenses) an evidentiary hearing”—if such proceedings are necessary for a full and fair resolution of the issues arising from the EAJA application. 17 C.F.R. § 201.55(a).

Upon consideration of the application, I ORDER that the parties shall meet and confer, and report the results of their conference in a filing by January 5, 2018. Their report should address:

- 1) Whether the Division has any potential objections to the application aside from an argument that its position was substantially justified.
- 2) Whether the parties intend to negotiate a settlement; if so, whether they request the appointment of an administrative law judge for such negotiations.
- 3) Whether an evidentiary hearing is necessary; if so, the parties should advise me of the nature of evidence sought or to be presented, the anticipated length of the hearing, any proposed prehearing schedule, and their mutual availability in the second half of February 2018 for a hearing to be scheduled.
- 4) If no evidentiary hearing is necessary, the parties shall confer as to the time, date, and preferred medium (for example: telephone, video conference, or in-person in Washington, D.C.) for an oral argument to be held in the second half of February 2018.

In addition to the required filing with the Commission Secretary, I ask the parties to email a courtesy copy of their submissions to alj@sec.gov in PDF text-searchable format and, for briefs, in MS Word format if practicable. Supporting exhibits should be submitted as separate attachments, not as a combined PDF. If supporting exhibits are very large electronic files, the party should first contact my office.

Jason S. Patil
Administrative Law Judge