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

ADMINISTRATIVE PROCEEDINGS RULINGS
Release No. 4504/January 6, 2017

ADMINISTRATIVE PROCEEDING
File No. 3-17651

In the Matter of ADRIAN D. BEAMISH, CPA	ORDER DENYING RESPONDENT'S MOTION FOR JUDGMENT ON THE PLEADINGS

On October 31, 2016, the Securities and Exchange Commission issued an order instituting proceedings (OIP) against Respondent pursuant to Section 4C of the Securities Exchange Act of 1934 and Rule 102(e) of the Commission's Rules of Practice. On November 28, 2016, Respondent filed an answer. On December 7, 2016, Respondent submitted a motion for judgment on the pleadings pursuant to Rule 250(a). The Division of Enforcement timely filed an opposition, and Respondent timely submitted a reply.

To my knowledge, the present motion is the first to be filed pursuant to recently adopted Rule 250(a), and it presents at least one issue of first impression. Rule 250(a) permits any party, within fourteen days after a respondent's answer has been filed, to

> move for a ruling on the pleadings on one or more claims or defenses, asserting that, even accepting all of the non-movant's factual allegations as true and drawing all reasonable inferences in the non-movant's favor, the movant is entitled to a ruling as a matter of law.

17 C.F.R. § 201.250(a). As the Commission noted in its adopting release, the rule is analogous to Federal Rules of Civil Procedure (FRCP) 12(b)(6) and 12(c), which respectively provide for motions to dismiss for failure to state a claim and for judgment on the pleadings. Amendments to the Commission's Rules of Practice, 81 Fed. Reg. 50212, 50224 n.110 (July 29, 2016). Such motions must be decided based only on the pleadings, matters subject to judicial notice, matters of public record (such as the contents of the Federal Register), and documents attached to, or incorporated by reference in, the complaint. *See United States v. Ritchie*, 342 F.3d 903, 907-08 (9th Cir. 2003); *Marshall Cty. Health Care Auth. v. Shalala*, 988 F.2d 1221, 1226 & n.6 (D.C. Cir. 1993); *Baumann v. District of Columbia*, 744 F. Supp. 2d 216, 222 (D.D.C. 2010). If other matters are offered and not excluded in deciding a motion under FRCP 12(b)(6) or 12(c), the motion must be treated as one for summary judgment. *See* FRCP 12(d); *Ritchie*, 342 F.3d at 907-08.

Applying these principles to Rule 250(a), I hold that a motion for a ruling on the pleadings must be based only on the pleadings, matters subject to official notice, matters of public record, and documents attached to, or incorporated by reference in, the OIP or answer. I further hold that if other evidence is considered as part of a Rule 250(a) motion, the motion must be treated as one for summary disposition, assuming an answer has been filed and the investigative file has been made available. *See* 17 C.F.R. § 201.250(a)-(c). But in 120-day cases such as this one, there is the additional requirement that motions for summary disposition may only be made with leave of the hearing officer, which leave shall be granted "only for good cause shown" and if consideration of the motion does not delay the hearing. *See* 17 C.F.R. § 201.250(c). Therefore, if a party in a 120-day case files a Rule 250(a) motion and attaches or cites to extrinsic evidence that cannot normally be considered under Rule 250(a), the hearing officer may not consider such extrinsic evidence, and may not treat the motion as one for summary disposition, unless: (1) an answer has been filed and the investigative file has been made available; (2) the movant has sought leave to file a motion for summary disposition; (3) the movant has shown good cause for the motion; and (4) consideration of the motion will not delay the hearing. That is, the hearing officer may not "convert" a Rule 250(a) motion into a Rule 250(c) motion merely because the movant attached extrinsic evidence to the motion. I note that if the prerequisites are met and the 250(a) motion is treated as one under 250(c), the parties should be given a reasonable opportunity to present all material pertinent to the motion. *See* FRCP 12(d).

In short, Rule 250(a) was not designed to circumvent the requirement that a motion for summary disposition be made only with leave of the hearing officer. Yet that appears to be what Respondent has attempted to do. *See* Reply at 13 ("Respondent referenced information [in the motion] that Respondent provided to the Division during its investigation."). Although Respondent asserts that his motion should not be construed as, or converted to, one for summary disposition, his motion cites to a number of extrinsic facts regarding his family and professional life, and denies the OIP's allegation that he currently conducts public company audits. *See* Mot. at 5; OIP at 2. For example, he contends that the "advanced management fees" appearing in the financial statements he audited were "accurately disclosed," in direct contradiction of the OIP's allegations. *Compare* Mot. at 6, *with* OIP at ¶¶ 27-28. And he attached to the motion the Declaration of Thad A. Davis and one exhibit, which were not incorporated in the pleadings and which I may not consider in ruling on the motion.

I previously ruled explicitly that Respondent was required to seek leave before filing a summary disposition motion. *See Adrian D. Beamish, CPA*, Admin. Proc. Rulings Release No. 4404, 2016 SEC LEXIS 4444 (ALJ Nov. 30, 2016). Respondent has not complied with my previous ruling, or with Rule 250(c), and Respondent's extrinsic evidence will not be considered.

Disregarding the extrinsic evidence, the motion is not well-taken. Respondent argues that he may not be sanctioned because the audit work at issue does not qualify as practicing before the Commission. *See* Mot. at 8-11. But the Commission has held that "appearing or practicing before the Commission at the time of the misconduct is not [a] precondition to imposing" a practice bar under Rule 102(e). *Robert W. Armstrong, III*, 58 S.E.C. 542, 574 (2005). Even if this holding were dictum, as Respondent contends, the Commission's analysis of Rule 102(e) was thorough and there is no reason to think the Commission would hold differently if the question were squarely presented. *See* Reply at 6 & n.2. In any event, the OIP alleges (and I

therefore must take as true here) that Respondent "conducts audits of both public and private entities," which qualifies as practicing before the Commission. *See* OIP at 2. It is irrelevant that he may not have been practicing before the Commission in connection with the audits at issue. *See* 17 C.F.R. § 201.102(f) (defining "practicing before the Commission"); 58 S.E.C. at 574.

Respondent argues that the five-year statute of limitations, 28 U.S.C. § 2462, applies to Rule 102(e) proceedings, that his audit work for the 2009 and 2010 fiscal years was complete more than five years before the OIP issued, and that "[a]ll allegations related to the 2009 and 2010 audits therefore cannot form the basis of the OIP." Mot. at 12-17. The Commission has held that associational bars are remedial in nature and not subject to the statute of limitations, notwithstanding *Johnson v. SEC*, 87 F.3d 484 (D.C. Cir. 1996). *See Timbervest, LLC*, Investment Advisers Act of 1940 Release No. 4197, 2015 WL 5472520, at *15-16 & n.71 (Sept. 17, 2015). Assuming that a practice bar under Rule 102(e) is similarly remedial in nature, it is similarly not subject to the statute of limitations. In any event, acts outside the statute of limitations may be considered to establish a respondent's motive, intent, or knowledge in committing violations that are within the statute of limitations. *See id.* at *15 n.71; *Sharon M. Graham*, 53 S.E.C. 1072, 1089 n.47 (1998), *pet. denied*, 222 F.3d 994 (D.C. Cir. 2000).

Respondent argues that as a matter of law he was not negligent, because he "confirmed that the Fund's financial statements adequately disclosed" the pertinent facts. Mot. at 17-18. As noted, however, this assertion is inconsistent with the OIP. *See* OIP at ¶¶ 27-28, 32-34.

Respondent's motion for judgment on the pleadings is therefore DENIED.

Cameron Elliot
Administrative Law Judge