

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

ADMINISTRATIVE PROCEEDINGS RULINGS

Release No. 6822/April 19, 2021

ADMINISTRATIVE PROCEEDING

File No. 3-18346

In the Matter of

CYNTHIA HOLDER, CPA,	:	
JEFFREY WADA, CPA,	:	ORDER
DAVID MIDDENDORF, CPA,	:	
THOMAS WHITTLE, CPA, and	:	
DAVID BRITT, CPA	:	

The Securities and Exchange Commission instituted this proceeding with an Order Instituting Proceedings (OIP) on January 22, 2018, pursuant to Sections 4C and 21C of the Securities Exchange Act of 1934 and Rule 102(e)(1)(ii) and (iii) of the Commission’s Rules of Practice.¹ The OIP alleges that Respondents engaged in improper professional conduct related to unauthorized disclosures of confidential information from the Public Company Accounting Oversight Board. Specifically, the OIP alleged that Respondents violated or aided and abetted violations of PCAOB Ethics Code §§ EC3 and EC9 and Rule 3500T. The OIP authorized these sanctions: cease-and-desist orders, disgorgement, civil penalties, and Rule 102(e) sanctions, (censure or temporary or permanent denial of the privilege of appearing or practicing before the Commission as an accountant). A parallel criminal action, *United States v. Middendorf*, No. 1:18-cr-36 (S.D.N.Y.) was initiated on January 17, 2018. The charges in *Middendorf*, arising from the same fact situation, were conspiracy to defraud the United States, wire fraud, and conspiracy to commit wire fraud, in violation of 18 U.S.C. §§ 371, 1343, and 1349. *Middendorf*, ECF No. 1. On February 6, 2018, this proceeding was stayed pending the resolution of *Middendorf*, on motion of the United States Attorney for the Southern District of New York (United States Attorney). *Cynthia Holder, CPA*, Admin. Proc. Rulings Release No. 5573, 2018 SEC LEXIS 380 (A.L.J.).

Thereafter, this proceeding was stayed: On June 21, 2018, “[i]n light of the Supreme Court’s decision in *Lucia v. SEC*,” 138 S. Ct. 2044 (2018), the Commission stayed all pending administrative proceedings, including this one; the stay was operative through August 22, 2018. *Pending Admin. Proc.*, Securities Act of 1933 Release Nos. 10510, 2018 SEC LEXIS 1490; 10522, 2018 SEC LEXIS 1774 (July 20, 2018). On August 22, 2018, the Commission ended the stay and ordered a new hearing in each affected proceeding before an administrative law judge who had not previously participated in the proceeding, unless the parties expressly agreed to alternative procedures,

¹ The proceeding ended as to Cynthia Holder, CPA, when the Commission accepted her Offer of Settlement. *Cynthia Holder, CPA*, Exchange Act Release No. 87642, 2019 SEC LEXIS 4871 (Nov. 29, 2019). Thus, as used in this Order, “Respondent” refers to Respondent Wada, Middendorf, Whittle, and/or Britt.

including agreeing that the proceeding remain with the previous presiding administrative law judge. *Pending Admin. Proc.*, Securities Act Release No. 10536, 2018 SEC LEXIS 2058, at *2-3. Accordingly, the proceeding was reassigned to the undersigned. *Pending Admin. Proc.*, Admin. Proc. Rulings Release No. 5955, 2018 SEC LEXIS 2264 (C.A.L.J. Sept. 12, 2018). The stay ordered by the previous presiding administrative law judge was continued in effect. *Cynthia Holder, CPA*, Admin. Proc. Rulings Release No. 6137, 2018 SEC LEXIS 2728 (A.L.J. Oct. 3, 2018).

Following a jury trial in 2019, Middendorf and Wada were convicted of wire fraud and conspiracy to commit wire fraud; their judgments of conviction were entered on September 16 and October 15, 2019, respectively. *Middendorf*, ECF Nos. 403, 438. They were sentenced to twelve months and one day and nine months of imprisonment, respectively, followed by three years of supervised release, with restitution in an amount to be set at a later date. *Id.* Their consolidated appeal, *Middendorf*, Docket Nos. 19-2983 (L) & 19-3374 (Con) (2d Cir.), is pending. Britt pleaded guilty to conspiracy to commit wire fraud, and Whittle pleaded guilty to conspiracy to defraud the United States, wire fraud, and conspiracy to commit wire fraud; their judgments of conviction were entered on October 9 and December 4, 2020, respectively. *Middendorf*, ECF Nos. 488, 498. They were sentenced to time served followed by two years of supervised release, with restitution in an amount to be set at a later date. *Id.*

Thereafter, the undersigned ordered the United States Attorney to comment, by January 22, 2021, on any need to further continue the stay and the parties to comment, by January 27, 2021, on the effect of Respondents Wada's, Middendorf's, Whittle's, and Britt's convictions and Respondents Middendorf's and Wada's orders of forthwith suspension,² on the issues to be decided in this proceeding. The United States Attorney, Middendorf, and Wada responded. No other party responded.³

The United States Attorney has no objection to lifting the stay. Middendorf and Wada's January 26, 2021, response requests that the stay be continued until after a final judgment is rendered in their appeal. In their appeal, they state that the government's appeal brief, which argues that the Second Circuit's opinion in *United States v. Blaszcak*, 947 F.3d 19 (2019), is controlling precedent to uphold their convictions, is undercut by the Supreme Court's January 11, 2021, order vacating and remanding *Blaszcak* in light of *Kelly v. United States*, 140 S. Ct. 1565 (2020). See *Blaszcak v. United States*, 141 S. Ct. 1040 (2021). Indeed, the government moved to adjourn oral argument in *Middendorf*, previously set for March 11, 2021, pending the court's decision in *Blaszcak*, and the court ordered that oral argument be adjourned and "rescheduled at a later date." *Middendorf*, ECF No. 162 (2d Cir. Feb. 16, 2021).

² The Commission issued orders of forthwith suspension pursuant to Rule 102(e)(2) as to Respondents Middendorf and Wada following their convictions. *David Middendorf, CPA*, Exchange Act No. 87969, 2020 SEC LEXIS 3404 (Jan. 15, 2020); *Jeffrey Wada, CPA*, Exchange Act Release No. 87970, 2020 SEC LEXIS 3478 (Jan. 15, 2020).

³ Middendorf and Wada's January 26, 2021, response stated, "We have discussed our request with the Enforcement Staff, and the Staff has declined to take a position."

Even if this were a follow-on proceeding based on convictions in *Middendorf*, which it is not, the pendency of Middendorf and Wada's appeal would not preclude the Commission from action based on the convictions in the United States District Court. *See James E. Franklin*, Exchange Act Release No. 56649, 2007 SEC LEXIS 2420, at *11 n.15 (Oct. 12, 2007); *Joseph P. Galluzzi*, Exchange Act Release No. 46405, 2002 SEC LEXIS 3423, at *10 n.21 (Aug. 23, 2002); *Charles Phillip Elliott*, Exchange Act Release No. 31202, 1992 SEC LEXIS 2334, at *11 (Sept. 17, 1992). If the Court of Appeals vacates the judgment on which a follow-on proceeding is based, the Commission will entertain an application to reconsider any sanction or dismiss the proceeding if it is still pending. *Evelyn Litwok*, Investment Advisers Act of 1940 Release No. 3438, 2012 SEC LEXIS 2328, at *3-4 (July 25, 2012); *C. R. Richmond & Co.*, Exchange Act Release No. 12535, 1976 SEC LEXIS 1468, at *46 n.11 (June 10, 1976). Further, as summarized above, despite arising from the same fact situation, the violations charged in the two proceedings are dissimilar. In this proceeding Respondents are charged with alleged violations of PCAOB's ethics rules; in *Middendorf* they are charged with wire fraud and conspiracy. Thus, even if *Middendorf* is decided in their favor, it will not automatically result in issue preclusion.

In light of the foregoing, the parties should confer with an eye to reaching agreement on further procedures, which may include: agreeing that the undersigned may decide this proceeding, including disputed issues, based written submissions and documentary evidence; video or audio testimony; or settlement. The parties should file a joint report concerning this by May 7, 2021. If they are unable to file a joint report, each party should file a separate report by that date. The proceeding may be resolved against a party that does not respond.

IT IS SO ORDERED.

/S/ Carol Fox Foelak
Carol Fox Foelak
Administrative Law Judge