UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-18292

In the Matter of **Anton &Chia, LLP, Gregory A. Wahl, CPA, Michael Deutchman, CPA, Georgia Chung, CPA, and Tommy Shek, CPA,** **Respondents.**	**RESPONDENT MICHAEL DEUTCHMAN'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW**

STATEMENT OF FACTS

1. On December 4, 2017 the Securities and Exchange Commission filed its Order Instituting Public Administrative And Cease-And-Desist Proceedings Pursuant to Sections 4c And 21c of the Securities Exchange Act of 1934 And Rule 102(E) of the Commission's Rules of Practice And Notice of Hearing ("OIPP"). Hearings were held before the Honorable Jason S. Patil, U.S. Administrative Law Judge.
2. The Commission made the following allegations against Mr. Deutchman, a 73-year old man with over 50 years of public audit experience, who previously worked for the SEC, KPMG, and has written and edited publications for the AICPA, regarding his one audit of Accelera as A&C's Concurring Partner for Accelera's December 31, 2014:
    a. 4. A&C [Anton &Chia hereafter "A&C"], Wahl, and Deutchman disregarded red flags and violated professional standards in the audits of Accelera from 2013 to 2015, and so did A&C and Wahl in the audit of Premier in 2013. The process was fundamentally flawed. They then issued or approved reports on the financial

statements of Accelera and Premier, claiming that A&C had conducted the audits in accordance with the standards of the PCAOB. The reports, in turn, opined that the financial statements fairly presented the financial positions and results of Accelera and Premier, respectively, and followed Generally Accepted Accounting Principles ("GAAP")[1]. A&C, Wahl, and Deutchman knew, or were reckless in not

[1] See FASB § 805 *Business* Combinations, codifying the GAAP standards at https://asc.fasb.org/section&trid=2899136#d3e841-128460. According to the CPA Journal, *Common Control Entities and Consolidation of Variable Interest Entities*, "Research Bulletin (ARB) 51, Consolidated Financial Statements under Generally Accepted Account Principles ("GAAP"). ARB 51 requires a company to consolidate any affiliate for which the company retains a direct or indirect controlling financial interest. A controlling financial interest is defined as an investment of 50% or more of the voting equity of another entity (or related group of entities). Therefore, in accordance with ARB 51, a company that holds 50% or more of the voting equity of an affiliate is viewed as the controlling parent company and should include the affiliate (or affiliated group) in its consolidated financial statements. In accounting jargon, ARB 51 codified the "voting interest model" (VOE). Under a VOE model, the entity with the majority ownership interest retains significant influence over the way in which the affiliate manages its operations, and the controlled affiliate should therefore be included in the financial statements of its majority interest investor. ARB 51's guidance presumes that the controlling parent would exercise its voting power to prevent the affiliate from entering transactions that the parent's management views as being contrary to its own best interest or contrary to the best interest of the controlled group. As one might assume, companies have developed very complex approaches for financing and administering the activities of their affiliated legal entities. Many of these approaches render the guidance contained in ARB 51 ineffective for ensuring that the controlling investor is properly consolidating affiliates for which it retains significant controlling influence. ARB 51's guidance is particularly ineffective when a parent entity maintains control over its affiliate in an ownership structure different from the VOE approach, such as without retaining a direct majority ownership interest in its affiliate. Therefore, FASB's guidance regarding consolidation of affiliated entities has evolved beyond the ARB 51 VOE model." See https://www.cpajournal.com/2018/08/15/common-control-entities-and-consolidation-of-variable-interest-entities/. See also *Statement of Financial Accounting Standards No. 141* (revised 2007) *Business Combinations*, at https://www.fasb.org/jsp/FASB/Document_C/DocumentPage?cid=1218220124931&acceptedDisclaimer=true; c.f. SEC Financial Reporting Manual, Topic 2, § 2015.12: "Significance – 'Related Businesses' - Acquisitions of 'related businesses' must be treated as a single business acquisition. Businesses are related under S-X 3-05 if: they are under common control or management, or their acquisitions are dependent on each other or a single common event or condition." https://www.sec.gov/corpfin/cf-manual/topic-2; and see Deloitte's *A Roadmap to SEC Reporting Considerations for Business Combinations,* § 1.3.3 Differences Between the

knowing, that the statements in A&C's reports for Accelera and Premier were false and misleading. OIPP, p. 3, ¶ 4;

b. 6. As described below, in connection with A&C's audits and interim reviews of Accelera's FY 2013 through FY 2015 financial statements:

i. a. A&C willfully violated Exchange Act Section 10(b)[2] and Rule 10b-5(b)[3] thereunder, and Deutchman willfully aided and abetted A&C's violation of Exchange Act Section 10(b) and Rule 10b-5(b) thereunder;

Definition of a Business for SEC Reporting Purposes and U.S. GAAP Accounting Purposes Q&A Regulation S-X: Rule 11-01(d)-4A "Question Is the definition of a business for SEC reporting purposes the same as the definition for U.S. GAAP accounting purposes? Answer No. The definition of a business for SEC reporting purposes in Rule 11-01(d) is different from the definition for U.S. GAAP accounting purposes." at https://dart.deloitte.com/USDART/ov-resource/401b96f2-838c-11e8-85b9-7172a0502bbd.pdf.

[2] 15 U.S. Code § 78j.Manipulative and deceptive devices: It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—…(b)**To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, or any securities-based swap agreement [1] any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors**." [Bold added.]

[3] 17 C.F.R. § 240.10b-5 Employment of manipulative and deceptive devices: "It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(a) **To employ any device, scheme, or artifice to defraud**, (b) **To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading**, ***or*** (c) **To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security**." [Emphasis added.]

ii. b. A&C, Wahl, and Deutchman willfully aided and abetted and were a cause of Accelera's violation of Section 13(a) of the Exchange Act, and Rules 13a-1 and 13a-13 thereunder;

iii. c. A&C willfully violated Rule 2-02(b) of Regulation S-X,[4] and Wahl and Deutchman willfully aided and abetted and were a cause of A&C's violation of Rule 2-02(b) of Regulation S-X; and

iv. d. A&C, Wahl, and Deutchman willfully violated or willfully aided and abetted violations of the federal securities laws or the rules and regulations thereunder for the purposes of Section 4C(a)(3) of the Exchange Act and Rule 102(e)(1)(iii)[5] of the Commission's Rules of Practice, and engaged in improper professional conduct within the meaning of Section 4C(a)(2) of the Exchange Act and Rule 102(e)(1)(ii) of the Commission's Rules of Practice. OIPP, pp. 3-4:¶ 6.

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[4] Rule 2-02 of Regulation S-X reads as follows: "…(b) **In certifying the financial statements, the accountants may give due weight to an internal system of audit regularly maintained by means of auditors employed on the registrant's own staff**. The accountants shall review the accounting procedures followed by the person or persons whose statements are certified and by appropriate measures shall satisfy themselves that such accounting procedures are in fact being followed. **Nothing in these instructions shall be construed to imply authority for the omission of any procedure which independent accountants would ordinarily employ in the course of an audit made for the purpose of presenting comprehensive and dependable financial statements**. (c) Any matters to which the accountants take exception shall be clearly identified and the exception thereto specifically and clearly stated. (d) If certification is made by an individual accountant, the above provisions as to accountants shall be read in the singular." [Bold added.]

[5] Rule 102: "(e) Suspension and Disbarment. (1) Generally. The Commission may censure a person or deny, temporarily or permanently, the privilege of appearing or practicing before it in any way to any person who is found by the Commission after notice and opportunity for hearing in the matter: …(iii) to have *willfully* violated, or *willfully aided and abetted* the violation of any provision of the Federal securities laws or the rules and regulations thereunder." [Italics added.]

3. The Commission neither alleged nor provided evidence that there were any errors or misstatements in any of the auditing work performed by either Mr. Deutchman or A&C regarding Accelera and BHCA. Rather, the Commission's *only* claim of "securities fraud" raised in its pleadings and evidence was that no one should have allowed Accelera and BHCA's financial statements to appear together in a publicly filed document, as this arguably created the incorrect appearance that the two companies had fully merged or had a *completed* parent/subsidiary relationship, in that Accelera was a "shell" company whereas there were actual operations in BHCA, even if both companies' financials showed that they operated at a net loss.
4. The evidence adduced by the Commission and Respondents showed the following regarding the Commission's claims against Mr. Deutchman regarding his work on the Accelera audit, and is supported by admitted Exhibits 100-315, and 1248-1250.
5. Behavioral Health Care Associates, Ltd ("BHCA") entered into a Share Purchase Agreement ("SPA") with Accelera Innovations, Inc. ("Accelera"), a publicly traded company in 2013, by which BHCA should a controlling block of stock to Accelera under certain terms and conditions.
6. BHCA and Accelera had signed the SPA before Mr. Deutchman's involvement in the audit process.
7. Mr. Deutchman's audit work in Accelera was performed between 2014 and 2015 regarding the 2014 audit of Accelera.
8. By the time Mr. Deutchman started work on the Accelera audit in 2014, A&C had already made the difficult audit decision to include Accelera's audited financial statements with BHCA's in its public filings.

9. Generally, an auditor may rely on the work of other auditors under Rule 2-02 of Regulation S-X.

10. Generally, a public company's management team is primarily responsible for the information contained in its financial statements. "Although this section focuses on the auditor's consideration of fraud in an audit of financial statements**, it is management's responsibility to design and implement programs and controls to prevent, deter, and detect fraud**. That responsibility is described in [PCAOB] AS 1001.03, which states, 'Management is responsible for adopting sound accounting policies and for establishing and maintaining internal control that will, among other things, initiate, record, process, and report transactions (as well as events and conditions) consistent with management's assertions embodied in the financial statements.' Management, along with those who have responsibility for oversight of the financial reporting process (such as the audit committee, board of trustees, board of directors, or the owner in owner-managed entities), should set the proper tone; create and maintain a culture of honesty and high ethical standards; and establish appropriate controls to prevent, deter, and detect fraud. When management and those responsible for the oversight of the financial reporting process fulfill those responsibilities, the opportunities to commit fraud can be reduced significantly." See PCAAOB Auditing Standard ("PCAOB AS") § 2401.04, https://pcaobus.org/Standards/Auditing/Pages/AS2401.aspx. (Bold added.)

11. Under PCAOB AS § 2401.05, "**Fraud is a broad legal concept and auditors do not make legal determinations of whether fraud has occurred. Rather, the auditor's interest specifically relates to acts that result in a material misstatement of the financial statements**. The primary factor that distinguishes fraud from error is whether

the underlying action that results in the misstatement of the financial statements is intentional or unintentional. For purposes of the section, fraud is an intentional act that results in a material misstatement in financial statements that are the subject of an audit." See https://pcaobus.org/Standards/Auditing/Pages/AS2401.aspx. (Bold added.)

12. This decision was difficult in that it involved a combination of making legal and audit determinations that were not "clear" given the efforts of the two companies to hold themselves out as having merged and then jointly attempt to raise capital together to finalize the closing of the merger between the companies for years.
13. For example, Accelera's management team credibly testified that when they asked their lawyers to give an opinion whether a merger had been effected when the parties had contractually bound themselves to each other but all conditions of closing had not been finalized, they represented that their lawyers claimed that this was an "audit" question and so refused to answer.
14. Even when cash is a stated consideration in an agreement, contracts can be enforced through estoppel or by other means, and contractual conditions, including the specific form of consideration contractually demanded can be *waived*, which is why the Restatement (Second) of Contracts has long held that even when cash payment is due, the parties can expressly or implied agree to that other performance may be substituted. See, e.g., Rest. 2nd § 249 *When Payment Other Than by Legal Tender Is Sufficient*.
15. Conversely, A&C's witnesses testified that whether a merger had occurred had to be a determination by Accelera's management team in consultation with their attorneys, and that, as independent auditors, that A&C was concerned with losing its independence as independent auditors were they to provide legal/auditing advice to Accelera.

16. This problem was underscored by Daniel Freeman's testimony that he attempted to get guidance other members of Accelera's management team, Accelera's legal counsel, and even A&C whether BHCA's audited financial statements should be combined with Accelera's audited financial statements. However, neither he nor anyone at Accelera attempted to get an audit opinion regarding Accelera's decision to combine BHCA's audited financials with Accelera's during his tenure with Accelera, which was Accelera's *management's* primary responsibility to do.

17. The Commission made much that the Commission had somewhat "relaxed" the independent auditor ethical rules that ensure auditors remain "independent" however, a single bulleting is far from "clear" in view of the following ethical and legal rules independent auditors must follow.

18. The existing FASB standards still expressly provide that, "Management is responsible for the financial statements, and responsibility for the choices and judgments inherent in the preparation of those financial statements cannot be delegated to the auditor or to anyone else." See https://pcaobus.org//Standards/EI/Documents/ISB_Interp_99-1.pdf at p. ¶ 6.

19. Similarly, the AICPA, which auditors are required to follow under PCAOB AS 1005 Indepdence at ¶ 04 ["The profession has established, through the AICPA's Code of Professional Conduct, precepts to guard against the presumption of loss of independence"], and AICPA *requires* that, "The member [auditor] should not perform management functions or make management decisions for the attest client." See https://www.aicpa.org/Research/Standards/CodeofConduct/DownloadableDocuments/2011June1CodeOfProfessionalConduct.pdf at p. 1722, ¶ 1. Compare with PCAOB AU §

110.03's requirement that, "The financial statements are management's responsibility." See https://pcaobus.org/Standards/Archived/PreReorgStandards/Pages/AU110.aspx.

20. A&C's witnesses and documents showed that A&C reviewed Accelera's management's determination to include Accelera's audited financial statements with BHCA's because:

    a. The Companies had fully executed a Stock Purchase Agreement that indebted BHCA to buy Accelera and which precluded Accelera from being purchased by any other entity;

    b. Dr. Wolfram, Accelera's undisputed CEO, signed an employment agreement with BHCA and for several years received payment from BHCA in the form of stock;

    c. The executives of BHCA and Accelera had told A&C that that the two companies had executed a merger;

    d. BHCA's management filed 8ks, 10ks, and 10Qs that BHCA and Accelera had merged with BHCA before Mr. Deutchman was involved in Accelera's audits;

    e. Accelera's management never provided an opinion that BHCA's audited financials should not be included with Accelera's, and never told any at A&C that they should not be consolidated—and certainly never told A&C this after Accelera's management told A&C that they had merged with BHCA and had executed documents to such legal effect;

    f. Dr. Wolfram repeated signed acknowledgements that Accelera was indebted to BHCA under the SPA and provided these to A&C;

    g. Between 2013 and 2015, Accelera and BHCA signed not only the SPA to contractually bind themselves to each other, but four (4) separate Amendments to the SPA to extend the closing date to complete the merger.

21. Given these facts, Mr. Deutchman testified that in performing his audit work in 2014-2015 regarding Accelera, he booked all the debt but wrote off the goodwill, meaning that an objective reader looking at his audit work would conclude that the fully executed but incomplete merger of Accelera and BHCA resulted in Accelera incurring all the debt but none of the benefits of this contractual transaction in that the value of the merger would be in the goodwill, which Mr. Deutchman indisputably testified had been written off in its entirety. A&C also provided a "going concern" opinion, which stated that, in the opinion of the auditor, it was *unlikely* that Accelera had the financial wherewithal to stay in business as a going concern. See PCAOB AS 2415 regarding going concern opinions at https://pcaobus.org/Standards/Auditing/Pages/AS2415.aspx.

22. The purpose of writing off BHCA's goodwill and providing the going concern opinion was to provide a red flag to potential investors that Accelera's financial condition was extremely poor in that it was operating at a loss and dependent on the success of raising capital to close on potential subsidiaries. That is, one of the reasons why Accelera's financials were poor and running at a cash negative was *because of* Accelera's contractual obligation to buy BHCA. Even BHCA's own financial documents showed that while it did have operations, it too operated at a loss.

23. Mr. Deutchman testified that given all the public records and documents in the audit file, given Accelera's management made the determination to combine BHCA's financials and never directed that this should change, and given A&C's own internal and earlier determination that the two companies should combine their financial statements, Mr. Deutchman felt comfortable keeping the audited financials combined, but with the red

flags he insisted be put in the audit opinion to warn investors that this was high risk investment since Accelera's liabilities far exceeded its assets.

24. Notably, Accelera always public disclosed that it was indebted to but had not yet paid the cash consideration for its merger with BHCA, and both Accelera and BHCA testified how they worked together to help Accelera raise capital to effect the merger as both companies wanted the merger to happen, but Accelera was not successful in raising sufficient capital to effect the closing.
25. The following facts were also proved at the hearings.
26. Under the SPA, BHCA and Dr. Wolfram sold 100% of BHCA's shares to Accelera. See Ex. 100, Bill of Sale.
27. Under the SPA, BHCA indebted itself to both Accelera and to its principal, Dr. Blaise Wolfrom.
28. As part of the SPA, BHCA employed Dr. Wolfram under an Accelera employment agreement.
29. While the SPA was in effect and each of the Amendments thereto, BHCA was precluded from merging with any other company or selling off its assets pledged under the SPA to Accelera, and BHCA/Dr. Wolfram had considered Accelera in breach of its contractual obligation to purchase BHCA's stock up through the time the parties terminated the SPA.
30. Dr. Wolfram filled out documents to be insured under Accelera's Directors & Officers Liability Insurance.
31. Dr. Wolfram knowingly allowed A&C to audit BHCA and knew that A&C was doing so to combine BHCA's audited financials with Accelera's financials, and his hope was that

this process would enable Accelera to raise enough to capital to finalize the closing of SPA.

32. Accelera paid Dr. Wolfram in Accelera stock as an Accelera employee as consideration for his agreeing to extend the final closing date between Accelera & BHCA.

33. For its case, the SEC relied on the expert opinion testimony of Harris Devor, who disagreed with Accelera's management's decision that sufficient evidence of a merger existed warranting the combining of Accelera's and BHCA's audited financial statements together.

34. Mr. Devor's opinion was largely based on his legal conclusion that the closing of the merger required Accelera to make the initial cash down payment under the SPA, and since Accelera failed to make such cash payment to BHCA, in his opinion, a merger had not legally occurred for public auditing purposes, even though Accelera and BHCA's principals undoubtedly wanted the merger and worked together towards raising capital for their merger.

35. Mr. Devor also relied on his interpretation of various auditing standards to support his determined that the above facts were not sufficient to show that a merger happened, which are discussed more fully below.

36. Finally, Mr. Deutchman testified that he is presently retired, and, because of an earlier SEC disciplinary action, he has lost his California license to practice as a CPA.

37. In his 50 years of practice, this is his third SEC disciplinary action. The first action was a minor disciplinary action for practicing before the SEC without having the proper registration, which occurred approximately 15 years ago.

38. The second disciplinary action involved Mr. Deutchman's failure to properly supervise the audit work of other employees while he was a senior auditor at Kabani and Company in 2007 regarding sophisticated changes some employees made to their computer system without his knowledge thirteen years ago, for which the Commission imposed a 2-year bar (now over) and a fine (which he paid).

39. This action is the only other disciplinary action against Mr. Deutchman, which involves his audit work in 2014-2015.

40. Both earlier disciplinary actions involve facts and circumstances entirely different from the issues raised in this hearing.

CONCLUSIONS OF LAW

1. The Commission must prove each of its allegations by a preponderance of the evidence. *Steadman v. SEC* (1981) 450 U.S. 91, 100-101; 101 S.Ct. 999, 1007; 67 L.Ed.2d 69, 78; 5 U.S. Code § 556(d); SEC Rules of Practice, rule 320.

2. That is, the Commission must prove that is more likely than unlikely that Mr. Deutchman's auditing work was far below the applicable standard of care, that his auditing work was not only incorrect, but negligent, and not only negligent, but so very negligent that it was "reckless" so as to be liable for securities fraud. See *Tellabs, Inc. v. Makor Issues & Rights, Ltd*., 551 U.S. 308, 322 (2007), holding that in order for an inference of scienter to qualify as "strong" under the Reform Act, it must "be more than merely plausible or reasonable — it must be cogent and at least as compelling as any opposing inference of nonfraudulent intent"; see *In re Worlds of Wonder Securities Litigation*, 35 F.3d 1407, 1426 (9th Cir. 1994), holding that an outside auditor acts recklessly only when "the accounting practices were so deficient that the audit amounted

to no audit at all, or an egregious refusal to see the obvious, or to investigate the doubtful, or that the accounting judgments which were made were such that no reasonable accountant would have made the same decisions if confronted with the same facts."

3. While it is true that the Commission's auditing expert testified credibly that he personally would not have combined the audited financial statements, that is not the legal standard for securities *fraud*, which requires something significantly more.
4. The Commission has not proved that *no* hypothetically "reasonable" accountant would have ever consolidated the balance sheets at issue under the facts presented the auditors; rather, its evidence was that its expert would not have done so and personally did not believe it reasonable to do so.
5. However, Mr. Devor did not convincingly testify that *no* rational auditor would have agreed to consolidate the two companies' financials given the unique facts of this case. Moreover, if this were such an "obvious error," then it is more likely than unlikely that Accelera's attorneys would have advised Accelera to not consolidate the financials. That they refused to express an opinion on this key issue speaks to the complexity of the auditing and legal determination needed to be made under the unique facts presented.
6. That is not to say that A&C's failure to object to Accelera's management's decision that the two companies' financials should be audited and combined was correct. Rather, assuming for sake of argument only, even if they had incorrectly failed to object to Accelera's management's determination, the issue is whether they had any rational, non-fraudulent or "good faith" basis for doing so.

7. Here, there record is replete with facts indicating that the two companies intended to merge, and were actively working together to try to complete their merger up through the

time that they later decided to terminate the merger in March of 2016. At no time did Accelera tell or direct A&C that the companies were not merging, and, as stated in all its public filings, Accelera's management has primary responsibility for the accuracy of the information provided to the auditors under Rule 2-02 of Regulation S-X and PCAOB AS 1001.03. See https://pcaobus.org/Standards/Auditing/Pages/AS1001.aspx: "The financial statements are management's responsibility. The auditor's responsibility is to express an opinion on the financial statements. Management is responsible for adopting sound accounting policies and for establishing and maintaining internal control that will, among other things, initiate, record, process, and report transactions (as well as events and conditions) consistent with management's assertions embodied in the financial statements."

8. The Court notes that the Commission has separately filed an action and has obtained judgments against Accelera and Mr. Thompson in Case No. 1:17-cv-07052 in the U.S. Northern District of Illinois, Eastern Division in the action styled *SEC vs. Accelera et al.* regarding, in part, Accelera's filings regarding BHCA.
9. While Mr. Devor cited innumerable auditing standards in his lengthy report and at hearing, he failed to cite a single standard or rule or guidance that provides what an auditor should do when the parties have contractually bound themselves to merge, hold themselves as having merged by taking affirmative steps together to raise a capital together, continue to extend their closing date, etc.
10. The applicable auditing standards are not clear. For example, SEC Regulation S-X, Rule 3-05, §210.3-05 *Financial statements of businesses acquired or to be acquired*, which provides: "(a) Financial statements required. (1) Financial statements prepared and audited in accordance with this regulation should be furnished for the periods specified in

paragraph (b) below if any of the following conditions exist: (i) A business combination has occurred *or is probable* (for purposes of this section, this encompasses the acquisition of an interest in a business accounted for by the equity method); or (ii) Consummation of a combination between entities under common control is probable. (2) For purposes of determining whether the provisions of this rule apply, the determination of whether a business has been acquired should be made in accordance with the guidance set forth in [17 CFR] § 210.11-01(d). (3) Acquisitions of a group of related businesses that are probable or that have occurred subsequent to the latest fiscal year-end for which audited financial statements of the registrant have been filed shall be treated under this section as if they are a single business combination. The required financial statements of related businesses may be presented on a combined basis for any periods they are under common control or management. For purposes of this section, businesses shall be deemed to be related if: (i) They are under common control or management; (ii) The acquisition of one business is conditional on the acquisition of each other business; or (iii) Each acquisition is conditioned on a single common event."

11. Similarly, Title 17 CFR § 210.3-05(a) "Financial statements required" provides that, "(1) Financial statements prepared and audited in accordance with this regulation should be furnished for the periods specified in paragraph (b) below if any of the following conditions exist: (i) A *business combination has occurred or is probable* (for purposes of this section, this encompasses the acquisition of an interest in a business accounted for by the equity method); or (ii) Consummation of a combination between entities under common control is *probable*."

12. Additionally, S-X 3-05(a)(3) states in part "Acquisitions of a group of related businesses that are probable or that have occurred subsequent to the latest fiscal year-end for which audited financial statements of the registrant have been filed *shall be treated under this section* [emphasis added] *as if they are a single business combination*." See SEC Financial Reporting Manual, Topic 2, § 2020.8 at Note 3 found at https://www.sec.gov/corpfin/cf-manual/topic-2.

13. Notably, S-X 3-05 (17 CFR § 210.305(a)-(b) refers to consummation of a transaction. One common understanding of consummation is "to complete (an arrangement, agreement, or the like) by a pledge or the signing of a contract." See https://www.dictionary.com/browse/consummated.

14. Title 17 CFR § 210.305(b)(4)(i)(A) expressly provides that auditors "may" omit reporting the audited financials of an acquisition when it has not yet occurred: "Financial statements required for the periods specified in paragraph (b)(2) of this section may be omitted to the extent specified as follows: …(A) The consummation of the acquisition has not yet occurred…" https://www.law.cornell.edu/cfr/text/17/210.3-05.

15. The use of the term "may" is commonly understood to be permissive, in that one may or may not do something. See https://www.dictionary.com/browse/may?s=t. That is, the Regulation provides that the auditor may or may not include the acquisition's audited financials when the acquisition agreements have been signed but has not yet been fully completed.

16. Further, and perhaps more relevant, Financial Accounting Standards Board ("FASB") § ASC 805 regarding *Business Combinations* provides further guidance that whether the

two companies' financial statements were permissibly consolidated. According to FASB, their accounting standards are a codification of GAAP.

17. FASB ASC 805-10-25-1 provides, "An entity shall determine whether a transaction or other event is a business combination by applying the definition in this Subtopic, which requires that the assets acquired and liabilities assumed constitute a business. If the assets acquired are not a business, the reporting entity shall account for the transaction or other event as an asset acquisition."

18. FASB ASC 805-10-55-2 provides in relevant part that, "Paragraph 805-10-25-1 requires an entity to determine whether a transaction or event is a business combination. In a business combination, an acquirer might obtain control of an acquiree in a variety of ways, including any of the following: a. By transferring cash, cash equivalents, or other assets (including net assets that constitute a business) b. *By incurring liabilities* c. *By issuing equity interests* d. *By providing more than one type of consideration* e. *Without transferring consideration including by contract alone* (see paragraph 805-10-25-11). [Italics added.]

19. FASB ASC 805-10-55-3 further provides that, "A business combination may be structured in a variety of ways for legal, taxation, or other reasons, which include but are not limited to, the following: a. One or more businesses become subsidiaries of an acquirer or the net assets of one or more businesses are legally merged into the acquirer. b. One combining entity transfers its net assets or its owners transfer their equity interests to another combining entity or its owners. c. All of the combining entities transfer their net assets or the owners of those entities transfer their equity interests to a newly formed entity (sometimes referred to as a roll-up or put-together transaction). d. *A group of*

former owners of one of the combining entities obtains control of the combined entity. [Italics added.]

20. There is no dispute that all contracts were fully signed and that BHCA and Accelera wanted their merger. There is also no dispute that Dr. Wolfram as the sole shareholder and key executive officer was contractually the employee of Accelera and was paid by Accelera in Accelera shares.

21. This shows common control between the two entities sufficient under FASB ASC § 805 to allow auditors to combine the audited financials of both companies, *as long as* proper disclosures were made that the consideration for the transaction was not paid, the debt was booked on Accelera's balance sheet (it was), and there was no corresponding "good will" provided for the BHCA acquisition since the merger was not complete despite the common control regarding both companies.

22. Under the above standards, the auditors were faced with the complex problem as to whether a merger had occurred in that BHCA and Accelera had executed all documents necessary to complete their intended merger and the parties intended to merger, whether the merger was "probable" if not completely consummated, and whether the two companies' financials should be consolidated because the merger was conditioned on a single common event, namely, the consideration for BHCA shares which both BHCA and Accelera worked together to raise.

23. Finally, Title 17 CFR 210.4-08 subdivision (k) regarding, "Related party transactions that affect the financial statements" *requires* that "(1) Amounts of related party transactions should be stated on the face of the balance sheet, statement of comprehensive income, or statement of cash flows. (2) In cases where separate financial statements are presented for

the registrant, certain investees, or subsidiaries, any intercompany profits or losses resulting from transactions with related parties and the effects thereof ***shall be disclosed***."

24. This presented Mr. Deutchman and A&C with a "damned if we do, damned if we don't" dilemma regarding whether to report the audited financials.

25. Put another way, given the unique facts of this case, the Commission could just have easily claimed that Mr. Deutchman and A&C were guilty of securities fraud for *failing* to disclose BHCA's financial/contractual relationship with Accelera.

26. That is, this case presented a unique set of facts that the existing auditing standards do not expressly address or expressly contemplate—the "half merger" where the parties have contractually bound themselves under fully executed agreements and work together to raise capital but keep extending their closing date.

27. As one court put it, "…the auditors are not lawyers…" *Coastal States Gas Corp. v. Department of Energy,* 617 F.2d 854, fn. 8 (1980). Accordingly, holding an audit firm or its members liable for securities fraud for their good faith but arguably incorrect legal analysis of all the contractual documents related to a merger transaction when the existing audit regulations are unclear regarding important terms like "probable" or "control" or "single contingent event" or "may" is improper.

28. Fraud requires more than a mistake of judgement. Reckless conduct requires more than ordinary negligence. "A reckless statement is a material misrepresentation or omission 'involving not merely simple, or even excusable negligence, *but an extreme departure from the standards of ordinary care,* and which presents a danger of misleading buyers or sellers *that is either known to the defendant or is so obvious that the actor must have*

*been aware of i*t." *GSC Partners CDO Fund v. Washington,* 368 F.3d 228, 239 (3d Cir. 2004). [Italics added.]

29. This level of "scienter" for a claim of securities fraud is particularly high against an independent auditor. "Recklessness on the part of an independent auditor entails a mental state 'so culpable that it "approximate[s] an actual intent to aid in the fraud being perpetrated by the audited company."' *Fidel,* 392 F.3d at 227 (citing *PR Diamonds,* 91 Fed. Appx. at 438; see also, *Decker v. Massey Ferguson, Ltd*., 681 F.2d 111, 121 (2d Cir. 1982); *Pegasus Fund, Inc. v. Laraneta*, 617 F.2d 1335, 1341 (9th Cir. 1980) (auditor's recklessness 'must come closer to being a lesser form of intent (to deceive) than merely a greater degree of ordinary negligence') (internal quotations omitted)). Scienter 'requires more than a misapplication of accounting principles'; the plaintiff must prove 'that the accounting practices were so deficient that the audit amounted to no audit at all, or an egregious refusal to see the obvious, or to investigate the doubtful, or that the accounting judgments which were made were such that no reasonable accountant would have made the same decisions if confronted with the same facts.' *PR Diamonds,* 91 Fed. Appx. at 438 (citing *Miller v. Pezzani* (*In re Worlds of Wonder Sec. Litig.),* 35 F.3d 1407, 1426 (quoting *SEC v. Price Waterhouse*, 797 F. Supp. 1217, 1240 (S.D.N.Y. 1992))." *In re Cardinal Health, Inc. Sec. Litigs*. (S.D. Ohio, 2006) 426 F.Supp.2d 688, 763.

30. Certainly, once Accelera and BHCA executed their Termination Agreement in March of 2016 there was no credible basis to consolidate the balance sheets of these two companies; however, this determination/Termination Agreement did not occur during the time of Mr. Deutchman's auditing work and occurred *after* A&C's engagement with Accelera had ended.

31. Accordingly this tribunal finds for Respondent Michael Deutchman and against the Commission.

Respectfully submitted,

HORWITZ + ARMSTRONG

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