UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-18994

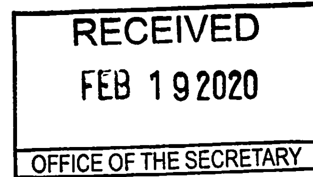
-- x

In the Matter of

Joseph S. Amundsen, CPA,
Michael T. Remus, CPA, and
Michael Remus CPA

Respondents.

-- x



OPENING BRIEF IN SUPPORT OF PETITION FOR REVIEW OF RESPONDENTS MICHAEL T. REMUS, CPA AND MICHAEL REMUS CPA

Peter R. Ginsberg
Christopher K. Shields
SULLIVAN & WORCESTER LLP
1633 Broadway, 32nd Floor
New York, New York, 10019
Phone: (212) 660-3000

TABLE OF CONTENTS

I. PRELIMINARY STATEMENT 1

II. BACKGROUND 2

A. Remus' Long Career Has Been Spotless Prior to This Proceeding 2

B. Remus Was Introduced to Amundsen While Amundsen Served as FINOP of Thomas P. Reynolds 2

C. Remus Hired Amundsen as an EQR in Response to the Commission's Adoption of the PCAOB's Engagement Quality Review Requirement 4

III. THE INITIAL DECISION ERRONEOUSLY DISCOUNTS NUMEROUS MITIGATING FACTORS AND MISAPPLIES RULE 102(e) IN ITS IMPOSITION OF SANCTIONS FOR REMUS 6

A. Remus' Wrongful Conduct Was Isolated in the Context of His Previously Spotless Career and None of the At-Issue Audits Was Alleged to Contain Inaccurate Values 8

B. The Evidence Does Not Support the Initial Decision's Finding that Remus Acted with Knowledge or with a "Reckless Degree of Scienter" 10

1. The Initial Decision Makes Erroneous Findings Regarding What Remus Knew and/or Should Have Known Regarding Amundsen's Commission Bar 12

2. Remus Transparently Sought Guidance of Regulators with Respect to His Retention of Amundsen 13

C. Suspension is Not Required to Protect Investors 13

D. Remus Is Sincere In His Assurance Against Future Violations and Has Recognized That His Conduct Was Wrongful 14

E. The Initial Decision's Recommended Suspension of Remus Is Not Supported by Precedent 15

IV. SUSPENDING REMUS WOULD BE INEQUITABLE AND INCONSISTENT WITH SANCTIONS PREVIOUSLY ISSUED TO OTHER PARTIES FOR VIOLATIONS OF THE INDEPENDENCE REQUIREMENT 19

V. CONCLUSION 21

TABLE OF AUTHORITIES

Cases **Page(s)**

Barry C. Scutillo,
Exchange Act Release No. 48238, 2003 SEC LEXIS 1777 (July 28, 2003) 17

Bill R. Thomas,
Accounting and Auditing Enforcement Release No. 192, 1988 SEC LEXIS 1119 (May 27, 1988) 17

Brace & Assocs., PLLC,
Exchange Act Release No. 73772, 2014 SEC LEXIS 4708 (Dec. 8, 2014) 20

Checkosky v. SEC,
139 F.3d 221 (D.C. Cir. 1998) 12

Checkosky v. SEC,
23 F.3d 452 (D.C. Cir. 1994) 19

Ernst & Ernst,
Accounting Series Release No. 248, 1978 SEC LEXIS 1451 (May 31, 1978) 17, 18

Gregory M. Dearlove, CPA,
Exchange Act Release No. 57244, 2008 SEC LEXIS 223 (Jan. 31, 2008) 16

Horton & Co.,
Initial Decisions Release No. 208, 2002 SEC LEXIS 1712 (July 2, 2002) 21

Howard F. Rubin,
Exchange Act Release No. 35,179, 1994 SEC LEXIS 4203 (Dec. 30, 1994) 14

Jack Schaefer,
Exchange Act Release No. 11767, 1975 SEC LEXIS 524 (Oct. 24, 1975) 10

Johnson v. SEC,
87 F.3d 484 (D.C. Cir. 1996) 6, 14

Joseph Yafeh CPA, Inc.,
Exchange Act Release No. 73770, 2014 SEC LEXIS 4706 (Dec. 8, 2014) 20

KPMG, LLP v. SEC,
289 F.3d 109 (D.C. Cir. 2002) 20

Larry D. Liberfarb, PC,
Exchange Act Release No. 76401, 2015 SEC LEXIS 4627 (Nov. 9, 2015) 21

Marshall E. Melton,
Exchange Act Release No. 48228, 56 S.E.C. 695 (July 25, 2003) 7

McCarthy v. SEC,
406 F.3d 179 (2d Cir. 2005) 14, 15, 21

PAZ Sec., Inc. v. SEC,
494 F.3d 1059 (D.C. Cir. 2007) 7

Peter Siris,
Exchange Act Release No. 71068, 2013 SEC LEXIS 3924 (Dec. 12, 2013), *pet. denied*, 773 F.3d 89 (D.C. Cir. 2014) 17

Pricewaterhouse Coopers LLP,
Exchange Act Release No. 87052, 2019 SEC LEXIS 3064 (Sept. 23, 2019) 20

Robert D. Potts, CPA,
Exchange Act Release No. 39126, 1997 SEC LEXIS 2005 (Sept. 24, 1997), *aff'd*, 151 F.3d 810 (8th Cir. 1998) 18

RSM US LLP (f/k/a McGladrey LLP),
Exchange Act Release No. 86770, 2019 SEC LEXIS 2248 (Aug. 27, 2019) 20

Russell G. Davy,
Accounting and Auditing Enforcement Release No. 53, 1985 SEC LEXIS 1748 (Apr. 15, 1985) 16

Russell Ponce,
Exchange Act Release No. 43235, 2000 SEC LEXIS 1814 (Aug. 31, 2000) 17

Schield Mgmt. Co.,
Exchange Act Release No. 53201, 2006 SEC LEXIS 195 (Jan. 31, 2006) 7

Saad v. SEC,
718 F.3d 904 (D.C. Cir. 2013) 7

SEC v. Prince,
942 F. Supp. 2d 108 (D.D.C. 2013) 11

Steadman v. SEC,
603 F.2d 1126 (5th Cir. 1979), *aff'd on other grounds*, 450 U.S. 91 (1981) 1, 7, 12

Wendy McNeely, CPA,
Exchange Act Release No. 68431, 2012 SEC LEXIS 3880 (Dec. 13, 2012) 16

Securities and Exchange Commission Rules and Regulations

SEC Rule of Practice 102(e)....6, 10, 11

SEC Rule of Practice 360(d)....19

SEC Rule of Practice 410....1

SEC Rule of Practice 411....1

SEC Rule of Practice 450....1

Other Authorities

Amendment to Rule 102(e),
Exchange Act Release No. 33-7593, 63 Fed. Reg. 57,164 (Oct. 26, 1998)....7, 10, 11

Broker-Dealer Reports,
Exchange Act Release No. 70073, 2013 SEC LEXIS 2239 (July 30, 2013) 4, 8

Auditing Standard No. 7,
Public Company Accounting Board Release No. 2009-004 (July 28, 2009)....4

Pursuant to Commission Rules of Practice 410, 411 and 450, Respondents Michael T. Remus, CPA and Michael Remus CPA (collectively, "Remus") hereby file this Opening Brief in support of their Petition for Review of the sanctions on Remus recommended by Administrative Law Judge ("ALJ") Carol Fox Foelak in the Initial Decision in this matter dated December 5, 2019 (Initial Decision Release No. 1391 (the "Initial Decision")).

I. PRELIMINARY STATEMENT

Remus respectfully requests that the Commission review and reverse the sanctions recommended in the Initial Decision, including a one-year ban from practicing before the Commission and disgorgement of $56,227. Such a proposed suspension, as well as the proposed monetary penalty, arises from the mischaracterization of and failure to credit material facts and mitigating factors, and further is premised upon erroneous conclusions of law. Additionally, the proposed sanctions constitute an abuse of discretion that is unsupported by and inconsistent with historical sanctions given for violations of the auditor independence requirement, which is the issue presented in the instant matter. None of the at-issue audit statements contained inaccurate figures or material misstatements, and the existence of this proceeding, combined with the Initial Decision's cease and desist order, is more than sufficient to deter future violations.[1] Imposing the proposed sanctions on Remus, a solo practitioner with a previously unblemished 31-year career, from practice would have a crippling effect on his career, would be punitive rather than remedial, and is therefore inappropriate. Moreover, the public interest factors set forth in *Steadman v. SEC*, 603 F.2d 1126 (5th Cir. 1979), weigh heavily against such sanctions, including the imposition of

[1] Remus does not challenge the finding that he violated auditor independence requirements or the Initial's Decision's cease and desist order.

a suspension. Accordingly, it is respectfully submitted that the Commission decline to impose the suspension of Remus and the disgorgement provided in the Initial Decision.

II. BACKGROUND

A. Remus' Long Career Has Been Spotless Prior to This Proceeding

Michael T. Remus is a 62-year-old professional who has owned and conducted his own business, Michael Remus CPA, for over 30 years. (Tr. 141.) He is an auditor, accountant and tax preparer with a Certified Professional Accountant license which he has held uninterrupted and in good standing since obtaining the license in 1988. (Tr. 140.)[2] Remus has serviced approximately 400 to 500 public broker-dealers and tax clients during his career. (Tr. 143.) With regard to his auditing business, Remus serves public companies, private companies, non-profit organizations and employee benefit plans. (Tr. 142.)

Remus had never been disciplined or suspended by any regulatory authority until the instant proceeding. (Tr. 140-41.) Remus likewise has never been the subject of a re-audit or forced to engage in a restatement of any statement or audit he has prepared, including for the broker-dealers for which the audits giving rise to this proceeding were performed. (Tr. 164.) In sum, Remus has never had any sort of black mark on his reputation or career until this matter.

B. Remus Was Introduced to Amundsen While Amundsen Served as FINOP of Thomas P. Reynolds

Remus was hired to serve as the auditor of Thomas P. Reynolds Securities, Ltd. ("Reynolds") in approximately 1990. (Tr. 148-9.) At some point later, Reynolds hired Respondent Joseph S. Amundsen ("Amundsen") as its Financial and Operations Principal ("FINOP"). (Tr.

---

[2] Citations to "Tr." refer to pages of the Trial Transcript, with witnesses indicated in parentheses where appropriate. Citations to exhibits offered by Remus are noted as "Remus Ex. __".

149.) Remus had no role in Reynolds hiring Amundsen, and he did not know Amundsen before Amundsen became Reynolds' FINOP. (Tr. 149.)

As the FINOP, Amundsen fulfilled the typical FINOP duties of being the auditor's point person at the company, as well as being the person responsible for supervising and maintaining the company's books and records, reconciling brokerage statements, preparing reports and making net capital computations. (Tr. 150; Tr. 325-30.) Remus and Amundsen interacted in that professional capacity for over five years. (Tr. 150-51.) The relationship between Remus and Amundsen was purely professional, and they did not have, and never have had, a social relationship. (Tr. 151.)

During the time they interacted at Reynolds, Remus developed a favorable professional opinion of Amundsen. (Tr. 150.) Remus testified that he found Amundsen to be responsive, thorough, efficient and accurate in his workmanship. (Tr. 150.)

In approximately 2010 or 2011, Ken Brennan, the owner of Reynolds, telephoned Remus to inform him that the Financial Industry Regulatory Authority ("FINRA") had barred Amundsen from performing FINOP work. (Tr. 55-56; Tr. 151.) Both Brennan and Remus were surprised and upset. (Tr. 152.) Brennan only informed Remus that Amundsen was barred by FINRA, and made no mention of – and presumably did not know about – a bar the Securities and Exchange Commission (the "Commission" or the "SEC") issued. Remus had no idea that Amundsen had been barred in 1983 from performing work before the Commission. (Tr. 55.) Indeed, Remus did not even learn about the 1983 bar until testifying in 2017 before the Public Company Accounting Oversight Board ("PCAOB") as part of the instant matter. (*Id.*)

After informing Remus that FINRA had barred Amundsen, Brennan hired Stephanie Amundsen Murray ("Murray") to replace Amundsen as Reynolds' FINOP. (Tr. 151-52.) Murray

is Amundsen's daughter; she is an adult and nondependent with respect to Amundsen. (Tr. 285.) Remus interacted professionally with Murray for years as a result of her role at Reynolds, and he found her to be professional and satisfactory in her performance. (Tr. 152.)

C. Remus Hired Amundsen as an EQR in Response to the Commission's Adoption of the PCAOB's Engagement Quality Review Requirement

Under PCAOB Auditing Standard 7 ("AS 7"), an engagement quality reviewer ("EQR") must review and provide a concurring approval of issuance for audits of public companies. PCAOB Release No. 2009-004 (July 28, 2009). While the auditor must retain an EQR, the EQR does not participate in "actually doing the audit work." (Tr. 416.)

In June 2014, amendments to Rule 17a-5 under the Securities Exchange Act of 1934 (the "Exchange Act") took effect that required broker-dealer audits to be conducted in accordance with the standards of the PCAOB, including AS 7. *Broker-Dealer Reports*, Exchange Act Rel. No. 70073, 2013 SEC LEXIS 2239 (July 30, 2013). This rule change required Remus for the first time to hire an EQR for broker-dealer audits. Remus hired Amundsen as an EQR in 2014 in order to satisfy this new requirement. (Tr. 153.) As a sole practitioner, Remus had a limited universe of people from whom to select an EQR. (*Id.*) Based on his work with Amundsen while auditing Reynolds, Remus believed that Amundsen was knowledgeable and qualified. (*Id.*)

However, Remus was concerned by FINRA's bar against Amundsen serving as a FINOP. (Tr. 153-54.) In response to such concerns, he contacted Kristyn Obsuth, a FINRA representative, to confirm that he would not be violating applicable rules and regulations if he hired Amundsen as his EQR. (Tr. 154; Remus Ex. 20.)[3] Specifically, he asked, both orally and in writing, whether a person barred from being associated with a FINRA member firm was prohibited from performing

[3] As Remus testified, he contacted FINRA because it was the FINRA bar of Amundsen of which he was aware. (Tr. 154.) He was unaware of any bar by the Commission.

an engagement quality review as a "concurring partner" in accordance with AS 7. (Tr. 154-59; Remus Ex. 20.) Obsuth, who was aware that Remus was referring to Amundsen (Tr. 154-55), responded that, because a concurring partner does not constitute an "associated person" pursuant to FINRA by-laws, such retention would not be prohibited. (Remus Ex. 20.) Indeed, Obsuth explicitly said that Remus could retain Amundsen as his EQR. (Tr. 157.) While Obsuth gratuitously suggested that Remus not do what he was entitled to do in that regard, Remus, acting with knowledge that hiring Amundsen was not forbidden, determined that Amundsen was qualified and able to do the work. (Tr. 154-59.) Remus believed this inquiry had satisfied his professional responsibilities. (Tr. 158.)

Over a two-year period, Amundsen worked as Remus' EQR for a number of clients, including but not limited to seven clients where Murray served as FINOP. (Tr. 159.) With respect to those seven clients where Murray was the FINOP, Remus performed 14 audits over a two-year period using Amundsen as his EQR (*i.e.,* one audit per year for each of the seven clients). Remus paid Amundsen $500 per audit. (Tr. 159.) None of the 14 at-issue audits is alleged to have contained inaccurate figures or material misstatements, and none has been the subject of any regulatory directive to restate, re-audit or adjust. (Tr. 164; Tr. 390.) Remus found Amundsen to be diligent and his work product to be satisfactory in his capacity as an EQR. (Tr. 160.) Moreover, Obsuth continued to be involved as the field representative for one of the other clients for which Remus retained Amundsen as an EQR following his inquiry to her, and she did not question or challenge the relationship between Remus and Amundsen. (Tr. 158-59.)

None of the audits or clients for which Amundsen served as EQR on Remus' behalf were compromised. No regulator ever requested a re-audit, review, recalculation or resubmission of any of the audits Remus performed, including any audits in which Amundsen served as his EQR

and Murray served as the broker-dealer client's FINOP. Remus retained a different EQR in 2016. The Commission proceeding was instituted three years later, in 2019.

Remus clearly does not minimize the importance of the independence rule or shy away from his responsibility to follow the rules, and sincerely regrets his decision to hire Amundsen as an EQR for the clients where Murray served as a FINOP (Tr. 167; *see also* Tr. 116 ("I understand the Rules better today ... and I regret it to this day").) He thoroughly cooperated with the Commission's investigation and enforcement of this matter, testified on three occasions and indisputably has been compliant in producing documents. He also has learned the importance of being absolutely familiar with all relevant rules and regulations. (*Id.*; Tr. 143-44, 147-48.)

Remus has testified that any prohibition from conducting public audits would essentially destroy his career (Tr. 167-68.)

III. THE INITIAL DECISION ERRONEOUSLY DISCOUNTS NUMEROUS MITIGATING FACTORS AND MISAPPLIES RULE 102(e) IN ITS IMPOSITION OF SANCTIONS FOR REMUS

The sanctions imposed on Remus in the Initial Decision are unwarranted and do not serve a remedial purpose. Accordingly, the Initial Decision's proposed sanctions, including a one-year suspension against Remus, are excessive and an abuse of discretion, and the Commission should decline to impose them.[4]

Sanctions under Rule 102(e) may be imposed for remedial purposes only and are not intended to punish. *Johnson v. SEC,* 87 F.3d 484, 490-91 (D.C. Cir. 1996). A sanction must be necessary to ensure that the Commission's "processes continue to be protected, and that the

[4] The significant disgorgement likewise would be a difficult obstacle for Remus, whose business and income are modest, to overcome. However, Remus is primarily focused in this Petition on salvaging his career. As with all remedies, the Commission exercises its discretion regarding the size, if any, of the financial penalty.

investing public continues to have confidence in the integrity of the financial reporting process," *Amendment to Rule 102(e) of the Commission's Rules of Practice*, Exchange Act Release No. 33-7593, 63 Fed. Reg. 57,164, 57,164 (Oct. 26, 1998), but must not exceed that standard.

In determining whether to assess remedial sanctions (and the appropriate degree of such sanctions), the Commission consistently considers the public interest factors set forth in *Steadman v. SEC,* which are cited in the Initial Decision (Initial Decision at 11). The *Steadman* factors include: (1) the egregiousness of the respondent's actions; (2) the isolated or recurrent nature of the infraction; (3) the degree of scienter involved; (4) the sincerity of the respondent's assurances against future violations; (5) the respondent's recognition of the wrongful nature of his or her conduct; and (6) the likelihood that the respondent's occupation will present opportunities for future violations. *Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979), *aff'd on other grounds*, 450 U.S. 91 (1981). The Commission also considers factors including the age of the violation, the degree of harm to investors and the marketplace resulting from the violation, and the extent to which the sanction will have a deterrent effect. *See Marshall E. Melton*, Exchange Act Release No. 48228, 56 S.E.C. 695, 698 (July 25, 2003); *Schield Mgmt. Co.*, Exchange Act Release No. 53201, 2006 SEC LEXIS 195, at *35 n.46 (Jan. 31, 2006).

In determining sanctions, the Commission "must be particularly careful to address potentially mitigating factors." *PAZ Sec., Inc. v. SEC*, 494 F.3d 1059, 1065 (D.C. Cir. 2007) (the Commission abused its discretion by failing to address certain mitigating factors and by failing to identify any remedial purpose for the sanctions it approved). Blanket or conclusory dismissals of potential mitigating factors are inappropriate; rather, the ALJ is required to "carefully and thoughtfully address each potentially mitigating factor supported by the record." *Saad v. SEC*,

718 F.3d 904, 914 (D.C. Cir. 2013). The adjudicator's failure to address potential mitigating factors in sufficient detail constitutes a reversible abuse of discretion. *Id.* ("The Commission cannot use a blanket statement to disregard potentially mitigating factors. ... Because the SEC failed to address potentially mitigating factors with support in the record, it abused its discretion by failing to consider an important aspect of the problem.") (Citation omitted.)

The Initial Decision imposes a one-year suspension for Remus that could, quite literally, be the death-knell for Remus' career. Moreover, in reaching the conclusion to suspend Remus, the Initial Decision improperly discounts or ignores the mitigating factors in the record and fails to explain their impact on the proposed sanctions. As set forth below, a proper analysis of the *Steadman* factors, including the numerous mitigating factors, supports the conclusion that no suspension need be or should be imposed against Remus.

A. Remus' Wrongful Conduct Was Isolated in the Context of His Previously Spotless Career and None of the At-Issue Audits Was Alleged to Contain Inaccurate Values

This proceeding arises from Remus' efforts to comply with – and not to avoid, as counsel for the Division of Enforcement (the "Division") argued at the Hearing – new Commission rules regarding public company audits in 2014, and, in particular, the requirement that he retain an EQR. Remus was seeking an EQR for public company audits, as the 2014 Rules required. *See Broker-Dealer Reports*, 2013 SEC LEXIS 2239. He retained Amundsen as an EQR on audits for a number of clients, including seven clients for which Amundsen's non-dependent child served as a FINOP. Remus does not contest, and consistently has acknowledged during this matter, that he violated the PCAOB standards which the Commission adopted for auditor independence.

However, the violation does not justify the severe and potentially ruinous sanction of a one-year suspension. Despite the numerous mitigating factors set forth in the record and recognized by the ALJ, the Initial Decision finds, without citation, that Remus' failure to comply

with the new Commission rule was "egregious" and "recurrent" such that a suspension is appropriate. (Initial Decision at 12.)

As a preliminary matter, the conduct for which Remus is being subjected to possible sanction, at its core, constitutes a single, not a recurrent, act: namely, his retention of Amundsen as EQR for a two-year period beginning in 2014, the outset of the Commission's requirement that he retain an EQR for public company audits. (*See Id.* at 5, 12.)

Second, the Initial Decision failed to view Remus' decision to retain Amundsen as an EQR in the context of the more than 400 broker clients Remus has audited over his career (for instance, he served 35 clients in 2017, with no allegation of wrongdoing for any audits). (Tr. 143.) For two years during a 31-year career, for a relatively minor portion of his practice that has included hundreds of public audits, and unaware of the relevant prohibition, Remus violated the independence rule. While auditor independence is indisputably an important principle in accounting and financial reporting, Remus' failure to abide by the independence rule as it applied to his EQR and the EQR's grown, independent (in real life although not with regard to the relevant regulatory rules) daughter does not rise to the level of egregiousness for which suspension is appropriate.

Third, Remus' independence rule violation did not result in Remus compromising his work product in any way. There is absolutely no evidence that any of the at-issue audits contained any errors of any sort or that Remus compromised the audits that he performed. Indeed, *none* of the audits in which Amundsen was the engagement quality reviewer for Remus has been the subject of any negative review, directive to restate or re-audit. (Tr. 390) (noting no issuance of material misstatements with regard to at-issue audits or directive to restate audits).)

Fourth, the Initial Decision fails to give appropriate consideration as a mitigating factor to Remus' otherwise spotless record in a long career of auditing. While the Initial Decision acknowledges in cursory fashion that Remus' thirty-one-year career in auditing heretofore has been unblemished (Initial Decision at 12), it provides no analysis as to how his violation was "egregious" or renders him susceptible to committing future violations that would pose a threat to the investing public or the Commission's processes. *See Jack Schaefer*, Exchange Act Release No. 11767, 1975 SEC LEXIS 524 (Oct. 24, 1975) (the fact that respondent "has been in the securities business for over 20 years, with a previously unblemished record" is "relevant in assessing the quantum of remedial action called for by the public interest" and assessing a 30-day suspension); *Amendment to Rule 102(e)*, 63 Fed. Reg. at 57,166 ("two isolated violations of applicable professional standards ... may not pose a threat to the Commission's processes").

Remus has learned his lesson, has readily accepted his responsibility to know and understand the rules, and has acknowledged that he failed that responsibility in 2014 and 2015. His wrongdoing was isolated rather than "recurrent," must be evaluated in the context of his otherwise unblemished career, resulted in no errors in the audits at issue, and no remedial purpose would be served by suspending Remus.

B. The Evidence Does Not Support the Initial Decision's Finding that Remus Acted with Knowledge or with a "Reckless Degree of Scienter"

Rule 102(e)(1)(iv)(A) defines "improper professional conduct" which is sanctionable under Rule 102(e)(1)(ii) as "intentional or knowing conduct, including reckless conduct, that results in a violation of applicable professional standards." 17 C.F.R. § 201.102(e)(1)(iv)(A).

As an initial matter, the record is clear that Remus[5] did not ***know*** that Amundsen was not independent under the PCAOB's nondependent child rule with respect to the fourteen at-issue audits of entities for which Murray was a FINOP. (*See, e.g.*, Tr. 100-01.) He undeniably failed to consider that rule and, as a result, he committed a violation. While there is no argument that he committed a violation of the Rule, there is no evidence whatsoever that Remus committed any violation "knowingly," and, to the extent the Initial Decision concludes that Remus "knew" of his violation of the auditor independence requirement (Initial Decision at 12), that conclusion is plainly contravened by the record.

The record also does support the Initial Decision's conclusion in the alternative that Remus acted with a "reckless degree of scienter." (*See id.*) The Initial Decision correctly notes, but then seemingly ignores, that violations of auditing standards cannot in and of themselves support a finding of recklessness or knowledge that constitutes improper professional conduct. (Initial Decision at 10) (citing *Chill v. Gen. Elec.*, 101 F.3d 263, 270 (2d Cir. 1996)). Indeed, the Initial Decision concludes without analysis that Remus' conduct was "reckless" and is devoid of any explanation for the conclusion that Remus' conduct rose beyond the level of negligence to recklessness.

A finding that an accountant engaged in "improper professional conduct" pursuant to Rule 102(e)(ii) must be clearly articulated and supported, as "[r]ecklessness" in this context is "not merely a heightened form of ordinary negligence" but rather a "lesser form of intent." *Amendment to Rule 102(e)*, 63 Fed. Reg. at 57167; *see also SEC v. Prince*, 942 F. Supp. 2d 108, 138 (D.D.C. 2013) (to establish scienter to prove violation of antifraud requirements, Commission must prove

[5] This brief discusses the state of mind of Michael T. Remus, as the Initial Decision notes that "Michael T. Remus' state of mind was attributed to the Remus firm." (*See* Initial Decision at 11.)

not just that defendant's conduct was negligent but that it constituted "an extreme departure from the standards of ordinary care"). The ALJ's failure to provide any reasoning as to how Remus acted with a "reckless degree of scienter" (as opposed to mere negligence) in retaining Amundsen as an EQR renders the "recklessness" finding arbitrary and capricious, and cannot support the suspension recommended in the Initial Decision. *See Checkosky v. SEC*, 139 F.3d 221, 226 (D.C. Cir. 1998) ("An agency's failure to state its reasoning or to adopt an intelligible decisional standard is so glaring that we can declare with confidence that the agency action was arbitrary and capricious").

As noted in *Steadman*, "the respondent's state of mind is highly relevant in determining the remedy to impose." *Steadman*, 603 F.2d at 1141. Here, the Initial Decision's lack of basis to support and justify the determination regarding Remus' state of mind in connection with retaining Amundsen as an EQR requires rejection of that conclusion.

1. *The Initial Decision Makes Erroneous Findings Regarding What Remus Knew and/or Should Have Known Regarding Amundsen's Commission Bar*

The Initial Decision erroneously concludes that Remus was aware in 2011 that Amundsen had been barred from practicing before the Commission (Initial Decision at 5). The evidence instead shows that Remus did not learn of Amundsen's Commission bar until he testified before the PCAOB in 2017 as part of the instant matter. (Tr. 55) ("I never understood that there was an SEC injunction or SEC bar ... until I testified at PCAOB").)

Remus also was not reckless in not knowing of Amundsen's Commission bar earlier. While Brennan informed Remus in approximately 2011 that Amundsen had been barred by FINRA from performing FINOP work, that information did not include that the Commission also had barred Amundsen. Further, when Obsuth told Remus in 2014 that he could retain Amundsen as an EQR, Obsuth, a FINRA representative, apparently also was unaware of the Commission bar.

FINRA and the Commission are different agencies and serve different purposes (*e.g.*, non-governmental versus governmental), and it is not surprising that information provided by FINRA regarding Amundsen's issues did not include his issues with the Commission.

The Initial Decision offers no support for the conclusion that Remus knew or should have known that the Commission had barred Amundsen. To everyone's apparent detriment, neither the Commission nor PCAOB disseminated notice of Amundsen's Commission bar sufficiently to warn people in the industry and, evidently, no regulator had any concern that Amundsen was serving as Reynolds' FINOP for over five years following the Commission bar. (Tr. 384-86.)

2. Remus Transparently Sought Guidance of Regulators with Respect to His Retention of Amundsen

In imposing a one-year suspension on Remus, the Initial Decision ignores that Remus had sought permission from FINRA as to whether he could hire Amundsen as his EQR and that FINRA not only failed to inform Remus that he could not do so but, rather, told him that he could hire Amundsen. (Tr. 157-58.)

By telling Remus that he was permitted to engage Amundsen as an EQR, Obsuth apparently also was unaware of the Commission bar. Tellingly, Obsuth remained involved with performing FINRA work relating to Remus' client GW Brokerage, an audit for which Amundsen was the EQR. Obsuth clearly knew that Amundsen was working as Remus' EQR on the GW Brokerage audit and never challenged that engagement or even mentioned the matter. (Tr. 159.)

C. Suspension is Not Required to Protect Investors.

The Initial Decision does not address or analyze how a one-year suspension of Remus would serve the remedial purpose of protecting the market or deterring against future violations. It is well established that, in issuing a suspension or bar, the Commission's "foremost consideration" must be whether such sanction "protects the trading public from further harm."

McCarthy v. SEC, 406 F.3d 179, 188 (2d Cir. 2005); *see also Howard F. Rubin*, Exchange Act Release No. 35,179, 1994 SEC LEXIS 4203, at *2 (Dec. 30, 1994) ("It is well-settled that such administrative proceedings are not punitive but remedial. When we suspend or bar a person, it is to protect the public from future harm at his or her hands.").

Here, the Initial Decision made no findings and provides no explanation regarding the protective interests to be served by suspending Remus. Indeed, the SEC obviously was so lacking in concern that it did not seek a review of any of the audits involved in this matter. (Tr. 386-87.) The expert witness presented by the Division, Douglas Carmichael, testified that in his review of documents related to this case, he did not identify a single word, notice, letter or warning from the SEC, FINRA or PCAOB regarding the integrity of the audits of any of the broker-dealers at issue in this matter. (Tr. 387-88.) Moreover, the SEC allowed multiple years to pass before the Division instituted proceedings against Remus (in February 2019), evidencing that Remus is not credibly regarded as a threat for future violations and that the SEC did not view him as an ongoing threat. *See Johnson*, 87 F.3d at 490 n.9 ("If the SEC really viewed Johnson as a clear and present danger to the public, it is inexplicable why it waited more than five years to begin the proceedings to suspend her").

D. Remus Is Sincere In His Assurance Against Future Violations and Has Recognized That His Conduct Was Wrongful

Remus is a solo practitioner who works hard at his craft and has been candid about his violation throughout this proceeding once he became aware of the nondependent child rule and its application to the present situation. He openly acknowledges the violation of the Rule and has made sincere assurances against future violations. The Initial Decision accurately notes his sincere and honest admission of wrongdoing (Initial Decision at 12), but nevertheless states that his

occupation "may provide opportunities for future violations." This finding is unsupported by the record and fails as a matter of law.

The Commission has relied upon deterrence as an additional rationale for the imposition of sanctions. *See McCarthy,* 406 F.3d at 188-89. Here, no further sanction is required for such purposes. Remus has spent countless hours and a significant amount of money in defending the instant enforcement action and explaining his role. The reputational damage and financial repercussions he already has suffered are more than sufficient to instill in him the required caution and sensitivity to avoid future violations. Remus is a proud professional who hopes to restore his reputation to the extent possible, and this proceeding has reinforced that he will not make such a mistake again. Remus has learned his lesson without the aid of a suspension.

To the extent the Initial Decision's proposed suspension of Remus is intended as deterrence for other parties, the financial and reputational toll this matter has taken on Remus is readily apparent to the public and is more than adequate to serve any broader deterrent purpose. Moreover, while a strict liability standard applies to a broker-dealer's responsibility to adhere to all Commission rules and regulations, the Commission did not impose any warning, discipline or sanction upon any broker-dealer which submitted an audit Remus performed while employing Amundsen as his EQR and while the broker-dealer making the submission employed Murray as its FINOP. (Tr. 384-88, 399.) Likewise – appropriately – no regulator disciplined Murray for the situation created when Amundsen served as EQR for audits of companies for which Murray performed FINOP services. (Tr. 390.) It would thus be manifestly unjust for Remus to bear such a disproportionately severe sanction for his role.

E. The Initial Decision's Recommended Suspension of Remus Is Not Supported by Precedent

The Initial Decision's recommendation to impose a one-year suspension, in addition to the

other sanctions Remus faces, is supported by a lone sentence devoid of analysis,[6] followed by a long string of cases without explanation or analysis of how those cases are analogous or relevant. (*See* Initial Decision at 13, n.18.) The cited cases, in fact, are neither analogous nor relevant.

First, almost none of the proceedings cited concern violations of the auditor independence requirements with respect to EQRs or concurring partners, and, moreover, many do not focus on auditor independence requirements. (*See Id.*) Instead, many involve auditors' violations of antifraud provisions in which the auditors' improper professional conduct resulted in the misreporting of financial information and hiding of company officers' fraud and embezzlement. *See, e.g., Gregory M. Dearlove, CPA*, Exchange Act Release No. 57244, 2008 SEC LEXIS 223, at *109 (Jan. 31, 2008) (in connection with Adelphia Communications fraud that resulted in company's bankruptcy, CPA improperly accepted management representations as to billions of dollars of related party payables, receivables, and contingent debt despite "the clear need for heightened scrutiny"); *Wendy McNeely, CPA*, Exchange Act Release No. 68431, 2012 SEC LEXIS 3880, at *55 (Dec. 13, 2012) (suspending for six months CPA who ignored numerous red flags regarding transfers, resulting in the audit misstating purported related party transactions that were actually misappropriations from the company); *Russell G. Davy*, Accounting and Auditing Enforcement Release No. 53, 1985 SEC LEXIS 1748, at *10 (Apr. 15, 1985) (CPA violated antifraud provisions when he certified company's "income statement showing substantial sales when he knew that the company had no business operations" and "simply ignored information that he received both before and after his audit" indicating that company's financial statements

[6] That sentence states, in whole, that "[a] one-year suspension of Remus is an appropriate sanction combined with the other sanctions ordered and consistent with Commission precedent." (Initial Decision at 13.)

contained materially false information).[7] These cases are inapposite, and there is no "consistency" in suspending Remus here. *Cf. Peter Siris*, Exchange Act Release No. 71068, 2013 SEC LEXIS 3924, at *24 (Dec. 12, 2013) (Commission considers violations of the antifraud provisions to be "especially serious"), *pet. denied*, 773 F.3d 89 (D.C. Cir. 2014).

Second, even for the cases cited that did involve violations of the auditor independence rule, numerous other violations, such as violations of the antifraud provisions, supported the imposition of a suspension. *See, e.g., Bill R. Thomas,* Accounting and Auditing Enforcement Release No. 192, 1988 SEC LEXIS 1119, at *14-15, 18 (May 27, 1988) (barring CPA with prior disciplinary history who violated antifraud provisions, owned stock in firm he audited and knowingly concealed this from his employer). Here, by contrast, there is no finding or even allegation that Remus violated the Exchange Act's antifraud provisions, Rule 10b-5 or Section 10(b), or any other rules. In *Russell Ponce*, cited by the ALJ, the CPA was found to have violated the antifraud provisions by inflating a company's asset values and capitalizing the company's expenses based solely on unsupported management representations. Exchange Act Release No. 43235, 2000 SEC LEXIS 1814, at *37-38 (Aug. 31, 2000). The CPA also was found to have lacked independence because he received stock in the company due to unpaid fees for previous audits, creating an incentive for the CPA to make subjective conclusions regarding the company's financial condition. *Id.* at *41-42. In *Ernst & Ernst*, the auditors were found not to have been independent and were respectively suspended for three months and one year because they improperly relied on management's unsupported and questionable representations regarding

[7] *See also Barry C. Scutillo*, Exchange Act Release No. 48238, 2003 SEC LEXIS 1777 (July 28, 2003) (CPA failed to seek support for a purported mining company's valuation of its assets consisting of Russian CDs and mining properties, where company officers were later discovered to be engaged in fraud).

transactions and ignored evidence of the true nature of the transactions. *See* Accounting Series Release No. 248, 1978 SEC LEXIS 1451, at *96, 98 (May 31, 1978). The relevant financial statements in that case contained numerous fraudulent misstatements as a result of the auditor's lack of diligence, and the company's officers were criminally prosecuted, convicted and sentenced to prison terms. *Id.* at *5.[8]

Here, by contrast, the only requirement or provision Remus violated was the independence requirement, and the Division's own expert agreed that there is no evidence that Remus compromised any of the audits at issue or defrauded or misled any regulatory authority. (Tr. at 402.)

Because the Initial Decision fails to provide support as a matter of law for its recommended suspension of Remus, such a sanction is arbitrary and capricious. The *Steadman* factors weigh against imposition of a suspension, and this proceeding alone, especially when combined with the cease-and-desist penalty (and further if any disgorgement amount is imposed), creates more than sufficient remedial measures to assure against any future violations.

---

[8] The Initial Decision also cites one decision from the Commission regarding a concurring partner (the precursor to the EQR requirement implemented by AS 7 and subsequently adopted by the Commission). In *Robert D. Potts, CPA*, the Commission suspended a concurring partner for accepting the engagement partner's oral assurances and failing to request documentary evidence to support a company's financial statements where the company was subsequently found to have improperly deferred recognition of operating losses and materially misstated income. *See* Exchange Act Release No. 39126, 1997 SEC LEXIS 2005, at *24 (Sept. 24, 1997), *aff'd*, 151 F.3d 810 (8th Cir. 1998). The proceeding did not involve the nondependent child rule or other similar provision, and the Commission's decision in that case did not concern any sanction to be imposed on the engagement partner. *Id.*

IV. SUSPENDING REMUS WOULD BE INEQUITABLE AND INCONSISTENT WITH SANCTIONS PREVIOUSLY ISSUED TO OTHER PARTIES FOR VIOLATIONS OF THE INDEPENDENCE REQUIREMENT

"The effect of a Commission suspension order should not be underestimated. A proceeding under [Rule 102(e)] threatens to deprive a person of a way of life to which he has devoted years of preparation and on which he and his family have come to rely." *Checkosky v. SEC*, 23 F.3d 452, 479 (D.C. Cir. 1994).

Remus has suffered considerable professional damage as a result of his error and this proceeding. In addition to the obvious reputational harm associated with being the subject of a public administrative proceeding before the Commission, other regulatory agencies have already taken action (prematurely) against Remus, purportedly in response to the Initial Decision, further compromising Remus' reputation and business. Shortly after the Initial Decision was issued on December 5, 2019, FINRA wrongly communicated to Remus' clients that his suspension was in effect and that FINRA would not accept audits Remus prepared starting on December 5, 2019, meaning that Remus would not be able to prepare audits for the end of 2019 or the first quarter of 2020. (*See* Exhibit A annexed hereto, with client information redacted.)

FINRA's communications were inappropriate and factually wrong. SEC Rule of Practice 360(d) and the Initial Decision itself both are clear that no sanctions recommended by the ALJ are effective unless and until the Commission enters an order of finality (which obviously has not occurred). *See* 17 CFR § 201.360(d); *see also* Initial Decision at 15. These inaccurate communications unjustly imperiled Mr. Remus' career.[9] Remus' clients cannot unhear these

[9] After learning of such communications, Remus' counsel wrote to FINRA to object to such communications. While FINRA responded with a letter acknowledging that its communications were in error and that no sanctions were currently in place against Remus, this incident underscores that Remus already has paid a considerable price for his error in retaining Amundsen as an EQR.

communications, and these communications have effectively served as a public censure and likely will cost him clients this year.[10] Remus respectfully submits that the Commission should take these communications into account when determining the extent to which additional sanctions, such as a suspension, are necessary.

Finally, imposing a one-year suspension upon Remus would be disparate with other, similarly-situated auditors and audit companies in like circumstances, and especially unjust in light of the lack of similar sanctions imposed upon larger accounting firms for similar violations of independence requirements. As a matter of public policy, Remus should not be sanctioned more severely than other auditors and audit firms that have been sanctioned for independence violations. *See, e.g.*, *KPMG, LLP v. SEC*, 289 F.3d 109, 122 (D.C. Cir. 2002) (no suspension for KPMG following independence requirement violation); *RSM US LLP (f/k/a McGladrey LLP)*, Exchange Act Release No. 86770, 2019 SEC LEXIS 2248, at *3-5, 30-31 (Aug. 27, 2019) (no bar sought or imposed against RSM for violations of independence requirements); *Pricewaterhouse Coopers LLP*, Exchange Act Release No. 87052, 2019 SEC LEXIS 3064, at *3-5, 38-39 (Sept. 23, 2019) (no bar sought or imposed against PwC for violations of independence requirements); *Joseph Yafeh CPA, Inc.*, Exchange Act Release No. 73770, 2014 SEC LEXIS 4706, at *3, 18 (Dec. 8, 2014) (agreeing that no suspension would be imposed against solo practitioner for violations of independence requirements in connection with audits for approximately 22 broker-dealer clients over a three-year period); *Brace & Assocs., PLLC*, Exchange Act Release No. 73772, 2014 SEC LEXIS 4708, at *5-13, 16-17 (Dec. 8, 2014) (no suspension imposed against solo practitioner for violations of independence requirements on multiple audits over three year period); *Larry D.*

[10] The damage to Remus' business is real, as the first quarter is when many companies release their annual reports and is thus the busiest period of the year for Remus.

Liberfarb, PC, Exchange Act Release No. 76401, 2015 SEC LEXIS 4627, at *5, 17 (Nov. 9, 2015) (no suspension imposed against auditor for independence violations in connection with at least 20 broker-dealer client audits over 2-year period).[11]

Remus' business should not be further compromised because of an error in judgment that spanned two years in a 31-year career and applied to seven clients among hundreds. It is respectfully submitted that justice dictates that no suspension should be imposed upon Remus. *See McCarthy*, 406 F.3d at 190 (vacating Commission's imposition of suspension and noting that two-year suspension could destroy the brokerage practice that respondent "had built during several years of rule-abiding trading").

V. CONCLUSION

For the reasons set forth above, Remus respectfully submits that he should not be suspended from appearing or practicing before the Commission and that the Commission should reassess the financial penalty imposed by the Initial Decision. Accordingly, the Commission should eliminate the one-year suspension imposed on Michael T. Remus, CPA and Michael Remus CPA and further decline to impose any disgorgement penalty.

Dated: February 18, 2020
New York, New York

Respectfully submitted,

SULLIVAN & WORCESTER LLP

By:______________________
Peter R. Ginsberg, Esq.

---

[11] By contrast, Judge Fox Foelak also recommended a one-year suspension for auditors who conducted an audit of a company for which they also provided bookkeeping services during the audit period, meaning that the auditors were auditing their own work. *See Horton & Co.*, Initial Decisions Release No. 208, 2002 SEC LEXIS 1712, at *5, 46 (July 2, 2002). While Remus clearly recognizes at this point the importance of EQR independence, it is arbitrary and capricious for Remus to receive the same penalty for having a non-independent EQR (who did not actually conduct the audit) as the auditors who literally audited their own books.

Christopher K. Shields, Esq.
1633 Broadway, 32nd Floor
New York, New York 10019
Tel: (212) 660-3059
Fax: (212) 660-3001
prginsberg@sullivanlaw.com
cshields@sullivanlaw.com

Attorneys for *Respondents Michael T. Remus, CPA and Michael Remus CPA*

CERTIFICATE OF SERVICE

I hereby certify that on February 18, 2020, I caused to be served a copy of the foregoing **OPENING BRIEF IN SUPPORT OF PETITION FOR REVIEW OF RESPONDENTS MICHAEL T. REMUS, CPA AND MICHAEL REMUS CPA**, as follows:

Via facsimile transmission and overnight mail delivery (original and three copies):
Vanessa Countryman, Secretary
Office of the Secretary
Securities and Exchange Commission
100 F Street, N.E., Mail Stop 1090
Washington, DC 20549
Fax: (202) 772 9324

Via email and via overnight mail delivery:
The Honorable Carol Fox Foelak
Office of Administrative Law Judges
Securities and Exchange Commission
100 F Street, N.E., Mail Stop 2557
Washington, D.C. 20549

Richard G. Primoff
Alix Biel
Attorneys for the Division of Enforcement
Securities and Exchange Commission
New York Regional Office
Brookfield Place, 20 Vesey Street
New York, NY 10281
PrimoffR@sec.gov
BielA@sec.gov

Joseph Amundsen
3537 Chain Dam Road
Easton, PA 18045
jamundsencpa@gmail.com

Peter R. Ginsberg
Sullivan & Worcester, LLP
1633 Broadway, 32nd Floor
New York, New York, 10019
Phone: (212) 660-3059
prginsberg@sullivanlaw.com

Exhibit A

Redacted

From: Carillo, Anthony <Redacted @finra.org>
Sent: Monday, December 9, 2019 12:51 PM
To: Redacted
Subject: Replacement of Auditor - Michael T. Remus

Hi Redacted -

A decision was reached by the SEC on 12/5/19 sanctioning auditor Michael T. Remus for one year. Any FINRA member firms who have Remus as the auditor of record should be going through the process of engaging another PCAOB registered independent auditor for fiscal year end 12/31/19 audits. FINRA will not accept an annual report with an audit opinion from Remus starting on 12/5/19.

As a reminder, when a replacement auditor has been selected, the firm is required to file a Financial Notification – Replacement of Accountant in accordance with SEA Rule 17a-5(f)(3).

Best regards,

Anthony Carillo
Principal Regulatory Coordinator
Financial Industry Regulatory Authority
Redacted
Redacted
www.finra.org

Confidentiality Notice:: This email, including attachments, may include non-public, proprietary, confidential or legally privileged information. If you are not an intended recipient or an authorized agent of an intended recipient, you are hereby notified that any dissemination, distribution or copying of the information contained in or transmitted with this e-mail is unauthorized and strictly prohibited. If you have received this email in error, please notify the sender by replying to this message and permanently delete this e-mail, its attachments, and any copies of it immediately. You should not retain, copy or use this e-mail or any attachment for any purpose, nor disclose all or any part of the contents to any other person. Thank you.