UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-17651

Administrative Law Judge
Cameron Elliot

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| In the Matter of<br><br>ADRIAN D. BEAMISH, CPA,<br><br>Respondent. | MEMORANDUM AND POINTS OF AUTHORITIES IN SUPPORT OF RESPONDENT ADRIAN D. BEAMISH'S MOTION FOR JUDGMENT ON THE PLEADINGS |

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

Page(s)

**Cases**

**Statutes**



**Other Authorities**



**Rules**



**Regulations**

Respondent Adrian D. Beamish ("Mr. Beamish"), through counsel, respectfully moves for dismissal of this proceeding as a matter of law, pursuant to 17 C.F.R. § 201.250(a) ("Rule 250(a)").

## I. INTRODUCTION

Respondent Mr. Beamish, a partner at PricewaterhouseCoopers LLP ("PwC"), is a diligent, experienced, and respected audit professional with a spotless career record. The matter at hand involves PwC's audits of venture capital fund Burrill Life Sciences Capital Fund III, LP ("Fund III" or the "Fund"), a private fund whose financial statements were provided exclusively to its highly sophisticated investors and were never filed with the SEC or made available to the investing public. Despite the absence of any connection whatsoever between these private fund audits and the SEC's processes, the Division of Enforcement (the "Division") is pursuing career-ending sanctions against Mr. Beamish through 17 C.F.R. § 201.102(e) ("Rule 102(e)"). The proceeding is an untimely, procedurally improper attempt to penalize Mr. Beamish for the acts of the Fund's principals G. Steven Burrill, Victor Hebert, and Helena Sen. The proceeding is all the more ill-considered given that the payments at the core of the Division's case – the prepayment of management fees from the Fund to the General Partner – were in fact disclosed in the Fund's audited financial statements year after year, without any questions asked by the Fund's sophisticated limited partners or other members of the Fund's General Partner who were privy to the financial disclosures. This case should therefore be dismissed for at least the following reasons:

1. Rule 102(e) does not apply to the conduct of private fund audits, by its terms and intent. Rule 102(e) is limited to allegations of unprofessional conduct in connection with an appearance before the Commission, and thus does not extend to audits of private funds that do *not* file reports with the Commission and thus have no investors relying on the Commission's processes to obtain financial information;

2. The prepaid management fees at the foundation of the Division's claims were actually disclosed, repeatedly, over a course of many years and therefore Mr. Beamish's conduct as pled cannot meet either Rule 102(e)'s negligence or

recklessness standards required for a finding of improper professional conduct; and

3. Much of the complained of conduct here is time-barred. As explained below, the relief sought by the Division under Rule 102(e) would not be remedial, but rather wholly punitive, and thus the applicable statute of limitations operates to bar much of the conduct from forming the basis of the Division's claims.

The Order Instituting Public Administrative Proceedings ("OIP") against Mr. Beamish challenges Mr. Beamish's work concerning a *single, actually disclosed* item in private Fund III's financial statements: prepaid management fees from the Fund to its General Partner. The Division does not dispute that both the fact and amount of payments made to the General Partner by the Fund were accurately disclosed in the financial statements audited by PwC. (Indeed, even after the Fund's management hired a new auditor, BDO Seidman, after PwC's resignation from the engagement, the Fund's financial statements were never restated.) It also does not dispute that nothing in Fund III's governing and/or organizational documents prohibits the payment of such fees, or that Mr. Beamish sought, and received, additional assurances regarding the fees, including representations from multiple members of the Fund's management regarding those fees.

This case should be dismissed in its entirety because it stretches Rule 102(e) beyond its permissible boundaries. The Division has no authority to use private fund audit work to discipline Mr. Beamish where there is no allegation that he has ever engaged in improper conduct that harms or threatens to harm the SEC's processes or the interests of public investors. The very application of Rule 102(e) proceedings to these circumstances is unwarranted.

The scope of Rule 102(e) is narrow. Rule 102(e) authorizes the Commission to sanction professionals such as accountants for improper professional conduct only where the purported wrongful conduct undermines the Commission's own processes and places public investors at risk. It does not extend, and was never intended to extend, to audit work

performed in connection with the financial statements of a private investment fund, financial statements which were provided only to the Fund's highly sophisticated investors and never filed with the Commission or otherwise publicly disseminated. The Fund did not use any Commission process in connection with the preparation or dissemination of the Fund's statements: the Commission does not have any authority to review or approve those statements, and so those statements have no bearing on the Commission's processes.

The application of Rule 102(e) is likewise questionable here given that the Division is aware that (1) Mr. Beamish at no point either directly or indirectly practiced before the Commission with respect to his Fund III work, and his general practice over the years has consisted almost entirely of audits of private entities like Fund III; and (2) the Fund's highly sophisticated investors have already engaged in self-help to recover the payments made to Mr. Burrill, confirming that this is an entirely private dispute. This action will only deprive Mr. Beamish of a career *altogether* in both the public and private auditing space – something that Rule 102(e) was never intended to achieve.

The Division has further failed to state a claim under Rule 102(e) because the prepaid fees at issue were indisputably disclosed, repeatedly, over a course of many years. Even if the disclosures of the prepaid fees at issue fell short of applicable professional standards[1] – which they did not – the Division does not dispute that there was *actual* and accurate disclosure of the fact and amount of payments made to the General Partner by the Fund in each of the financial statements' related party footnotes. (OIP ¶¶ 18, 30). Mr. Beamish's

[1] The applicable professional standards require disclosure, and the prepaid fees at issue were indisputably disclosed, repeatedly, over a course of many years. The Division's allegations that the prepaid management fees were not disclosed in compliance with GAAP are based on either overstatements or misapplications of the requirements for related party transactions. As a matter of law, the Fund III audited financial statements accurately presented the amounts of the prepaid management fees in compliance with applicable accounting principles and therefore Mr. Beamish's audit of these financial statements cannot form the basis of a Rule 102(e) enforcement action.

conduct as pled therefore cannot meet either Rule 102(e)'s negligence or recklessness standards required for a finding of "improper professional conduct."

In the event the case is not dismissed in its entirety, broad swaths of the OIP must be dismissed as barred by the statute of limitations: specifically, the Division's claims based on the 2009 and 2010 audits must be dismissed as time–barred. It is well settled that 28 U.S.C. § 2462 prohibits the Division from seeking penalties for claims that accrued more than five years before it filed the OIP on October 31, 2016. Despite this fact, the Division improperly added allegations relating to PwC's 2009 and 2010 fiscal year audits to the OIP, even though Mr. Beamish certified PwC's audit reports for those years well before October 31, 2011. The Division is prohibited from seeking sanctions that would have devastating and long-term consequences for Mr. Beamish based on audits that were completed more than five years before filing its OIP. Thus, all allegations and claims based on the 2009 and 2010 audits must be dismissed.

In sum, the OIP should be dismissed in its entirety as an impermissible application of Rule 102(e). Furthermore, the Division is not permitted to bolster an improper case that has no nexus to the Commission's own process with claims relating to audits that are barred by the statute of limitations.

## II. FACTS AND PROCEDURAL HISTORY

On October 31, 2016, the Securities and Exchange Commission ("Commission") issued an OIP against Mr. Beamish pursuant to Section 4C of the Securities Exchange Act of 1934 ("Exchange Act") and Rule 102(e)(1)(ii) of the Commission's Rules of Practice. The principal allegation is that Mr. Beamish failed to ensure that Fund III's Year-End 2009, 2010, 2011 and 2012 financial statements contained adequate disclosures regarding advanced management fees taken by the General Partner. Notably, the Division has failed to allege what the disclosures *should* have been.

### A. Adrian Beamish

Mr. Beamish, 45, lives in Northern California with his wife and [redacted]. He has had an exemplary career as an accountant for over 24 years. Mr. Beamish has worked as an accountant at PwC for over 20 years and has been a partner at PwC for over 10 years. (OIP ¶ 4). He is a California Certified Public Accountant and an active member in good standing of both the American Institute of Certified Public Accountants and the Institute of Chartered Accountants in England and Wales. In the relevant period, Mr. Breamish's practice consisted almost exclusively of audits of private companies which did not file their financial statements with the Commission, or otherwise utilize the Commission's processes to disseminate audit financial statements to the investing public.[2] Mr. Beamish currently does no audit work at all for either public or private clients.

### B. The Burrill Funds

The Division alleges that Burrill Life Sciences Capital Fund III, L.P. was formed in 2006 for the purpose of making venture capital investments in privately-held biotechnology corporations. (OIP ¶ 7). It was managed by G. Steven Burrill, a successful venture capital investor in Silicon Valley, who founded financial services company Burrill & Company LLC ("Burrill & Company") in 1994. Burrill Capital Management, doing business as Burrill & Company, served as registered investment adviser for the Fund. (OIP ¶ 6). At the time of PwC's engagement by the Fund, Mr. Burrill was a well-known venture capitalist in Silicon Valley and the Fund's principals had an excellent reputation in the region. Mr. Burrill, prior to launching his venture capital business, was an Ernst & Young partner and an auditor at that firm for 28 years.

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[2] Mr. Beamish provided detailed figures on his clients to the Division. A copy of that production and the accompanying correspondence is attached hereto as Exhibit A to Declaration of Thad A. Davis. Mr. Beamish estimates that from fiscal year 2010 to fiscal year 2014 he was the signing partner on 66 private engagements and only 5 public engagements. None of those public engagements are pled or implicated here.

Fund III was one of many private funds managed by Mr. Burrill's affiliated management companies. The Fund raised over $280 million in capital commitments. (OIP ¶ 7). Fund III was structured as a limited partnership governed by a limited partnership agreement. (OIP ¶ 11). The Fund's limited partners were sophisticated institutional investors, including large companies, funds of funds, and state pension funds. (OIP ¶ 11). Under Fund III's Second Amended and Restated Limited Partnership Agreement, dated September 15, 2006 (the "LPA"), Burrill Life Sciences Capital Fund III Partners, L.P. (the "General Partner") served as the general partner of Fund III. (OIP ¶ 11). Under the LPA, the General Partner or its designee was entitled to fees for managing the Fund. (OIP ¶ 12).

### C. Fund III Audits

PwC began serving as the auditor for Fund III in connection with its first year-end audit in FY 2006. (OIP ¶ 14). Mr. Beamish served as the engagement partner for each of the Fund III audits. (OIP ¶ 14). At no time did PwC perform audits for any of the Fund's General Partner or management company entities.

#### 1. FY 2009 - 2011 Audits

During the course of PwC's audits, Fund III management disclosed to PwC that it had advanced management fees to the General Partner. (OIP ¶¶ 16–18). Mr. Beamish and his team confirmed the amounts of advanced management fees reported by Fund III management and tested and confirmed that the amounts were accurately disclosed in the Fund's financial statements and in the Related Party footnote. (OIP ¶¶ 18, 27).

#### 2. FY 2012 Audit

During the 2012 audit, Mr. Beamish and the PwC audit team determined that Fund III had advanced management fees in excess of the fees that the General Partner would likely earn under the LPA over the lifetime of the Fund. (OIP ¶¶ 29–30). As a result, the PwC audit team performed additional procedures to confirm that the General Partner had the

financial ability to repay these advanced expenses. (OIP ¶ 35). Mr. Beamish and his team also insisted that the financial statements disclose that the Management Company "intends to pay" the receivable "from future distributions to the General Partner [and] . . . Management Company Funds." (OIP ¶¶ 34, 36). The Division does not dispute that this additional disclosure was approved by multiple individuals including Management Company employees – not Mr. Burrill alone.

## III. LEGAL STANDARD

### A. Commission Rule of Practice 250(a)

Under Rule 250(a),[3] "no later than 14 days after a respondent's answer has been filed, any party may move for a ruling on the pleadings on one or more claims or defenses, asserting that, even accepting all of the non-movant's factual allegations as true and drawing all reasonable inferences in the non-movant's favor, the movant is entitled to a ruling as a matter of law." 17 C.F.R. § 201.250.[4]

### B. Rule 102(e)(1)(ii)

The severity of a Rule 102(e) sanction "should not be underestimated." *Checkosky v. SEC*, 23 F.3d 452, 479 (D.C. Cir. 1994). A finding against Mr. Beamish, a 45-year-old with a spotless career, could deprive him of "a way of life to which he has devoted years of preparation" and threatens his "entire livelihood." *Id.* (citation omitted).

In recognition of these grave consequences, the Commission itself has confirmed that Rule 102(e) was "not intended to cover all forms of professional conduct" (emphasis added) or "to add an additional weapon to its enforcement arsenal," but rather to address egregious lapses in professionalism that threaten the Commission's mission "to protect the integrity and

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[3] The Commission adopted amendments to its Rules of Practice effective September 27, 2016. Amendments to the Commission's Rules of Practice, 81 Fed. Reg. 50212 (July 29, 2016) (codified at 17 CFR pt. 201).

[4] The SEC has noted that a dispositive motion under Rule 250(a) is "analogous" to the Federal Rules of Civil Procedure Rules 12(b)(6) (failure to state a claim upon which relief can be granted) and 12(c) (judgment on the pleadings). *Id.* at 50 n.110.

quality of its system of securities regulation and, by extension, the interests of the investing public." Amendment to Rule 102(e) of the Commission's Rules of Practice, 63 Fed. Reg. 57164, 57165–66 (Oct. 26, 1998) (codified at 17 C.F.R. pt. 201). Indeed, the Commission has acknowledged that Rule 102(e) "imposes no new professional standards on accountants," *id.* at 57166, and no language in the Rule operates to apply the Rule beyond the Commission's own processes.

## IV. ARGUMENT

### A. Rule 102(e) Does Not Apply To Mr. Beamish's Audit of A Private Fund.

Rule 102(e) permits the Commission to "deny, temporarily or permanently, the privilege of appearing or practicing before it . . . to any person who is found . . . to have engaged in unethical or improper professional conduct." 17 C.F.R. § 201.102(e)(ii). 17 C.F.R. § 201.102(f) ("Rule 102(f)") defines "practicing before the Commission" to include "[t]he preparation of any statement, opinion, or other paper" filed with the Commission.

The Commission's authority to sanction professionals under Rule 102(e) is limited to "protect[ing] the integrity of the *Commission's own processes*." *Marrie v. SEC*, 374 F.3d 1196, 1200–01 (D.C. Cir. 2004) (emphasis added); *Touche Ross & Co. v. SEC*, 609 F.2d 570, 579 (2d Cir. 1979) (holding that the SEC may use Rule 102(e) "to preserve the integrity of its own procedures, by assuring the fitness of those professionals who represent others *before the Commission*") (emphasis added). Thus, courts have upheld imposing sanctions under Rule 102(e) only in cases that implicate the Commission's own processes. No court has ever upheld the application of Rule 102(e)(ii) to a case such as this, involving purportedly improper professional conduct in the audit of purely private entities where no financial statements were filed with the Commission, or the interests of public investors implicated.

This is not surprising. Case law of multiple circuits confirms this limited reading and application of Rule 102(e). In *Touche Ross*, the Second Circuit relied on limiting arguments

made by the Commission when it upheld the Commission's authority to discipline accountants based on audits of two public company financial statements filed with the Commission. The Second Circuit held that Rule 102(e) represents a valid exercise of the Commission's rule making power on the grounds that the Rule "is merely attempting to preserve the integrity *of its own procedures*, by assuring the fitness of those professionals who represent others *before the Commission*." 609 F.2d at 579 (emphases added). Importantly, the Second Circuit relied on the Commission's own representation that "its intent in promulgating Rule [10]2(e) was not to utilize the rule as an additional weapon in its enforcement arsenal, *but rather* to determine whether a person's professional qualifications, including his character and integrity, are such that he is fit to appear and practice *before the Commission*." *Id.* (emphases added) (citing to the Amendment of Rule [10]2(e) of the Rules of Practice, Exchange Act Release No. 5088, 1970 WL 9826 at *1 (Sept. 24, 1970)).

Similarly, in *Marrie*, the D.C. Circuit examined the application of Rule 102(e) sanctions to accountants based on their year-end audit of a public company's financial statements included in the company's 10-K filing with the Commission. 374 F.3d at 1198. The D.C. Circuit, in addressing the 1998 Rule 102(e) amendments (but holding them to have been improperly applied retroactively), noted that the Commission's amendments "[r]ecogniz[ed] the particularly important role played by accountants in preparing and certifying the accuracy of financial statements of *public companies* that are so heavily relied upon *by the public* in making investment decisions." *Id.* at 1200–1201. (emphases added).

Here, the Division impermissibly attempts to stretch Rule 102(e)(ii) to fit the audit of what it acknowledges in its pleadings is a purely private fund with highly sophisticated investors, and a fund that never filed its financial statements with the Commission or made use of the Commission's processes. Thus, Mr. Beamish did not participate in the preparation of any statement filed with the Commission either directly or indirectly. Limiting Mr.

Beamish from appearing before the Commission based on his audit of those financial statements would not in any way "preserve the integrity" of the Commission's own processes, the integrity of which highly sophisticated investors of Fund III never sought or relied on. Thus, the Division is engaged in an impermissible overreach that runs contrary to previous representations made by the Commission regarding the scope of administrative proceedings and the Rule.[5]

That the Commission's authority to discipline professionals under Rule 102(e) is limited to cases that implicate the Commission's own procedures is consistent with the very structure and logic of the rule. The Commission's only remedy under Rule 102(e) is to sanction professionals by preventing them from "practicing *before the Commission.*" 17 C.F.R. § 201.102(f) (emphasis added). Although courts have interpreted what constitutes "practicing before the Commission" broadly, those same courts uniformly require some nexus between the allegedly infringing conduct and materials filed with the Commission. *SEC v. Prince*, 942 F. Supp. 2d 108, 145–47 (D.D.C. 2013) (holding that an employee who prepared data to be included in a public company's filing with the Commission practiced before the Commission). For example, in *Armstrong*, the SEC held that an accountant who helped prepare, but did not sign, a public company's financial statements could nonetheless be sanctioned under Rule 102(e), reasoning that "[t]he reliability of the disclosure process is equally impaired if such accountants are permitted to participate in the preparation of financial statements certified and filed with the Commission." *Robert W. Armstrong III*, Admin. Proceeding File No. 3-9793, 85 SEC Docket 2321, Order, 22 (June 24, 2005). In this

[5] In briefing in multiple cases the Division has stated that the "purpose of these Commission proceedings, as reflected in the statutory public interest requirement, is to protect the public from persons who are presently unfit." *See, e.g.*, Brief of the Securities and Exchange Commission, *Johnson v. SEC*, 87 F.3d 484 (D.C. Cir. 1996), 1996 WL 33662495, at *11. But the Division's allegations concern *private* investors and Mr. Beamish's client list is almost exclusively private rather than public corporations. The Division has failed to allege facts relating to how public investors require protection from Mr. Beamish, or how Mr. Beamish is *currently* unfit to practice, especially given the staleness of the allegations.

case, of course, Mr. Beamish neither helped prepare nor signed any public company financial statements that were filed with the Commission, in any fashion.

Thus, even under the Commission's own and the D.C. Circuit's liberal readings of Rule 102(f), Mr. Beamish's audit of Fund III does not qualify as a "practicing before the Commission." Indeed, even if a Rule 102(e) bar were to be imposed here, Mr. Beamish would be free to continue auditing private funds, confirming that such relief would in no way protect the SEC's processes, or public investors, from the very conduct about which it complains. (At least as a legal matter; as a practical matter, the sanction would undoubtedly be the death-knell for Mr. Beamish's career, confirming the punitive nature of Rule 102(e) relief, as discussed further below in connection with the statute of limitations.) Further, as discussed below, Mr. Beamish's auditing practice is almost entirely limited to private companies like Fund III and therefore he does not pose a threat to *public* investors. Rule 102(e) does not, as a matter of law, permit the Division to impose a penalty based on an *entirely* hypothetical threat to the Commission's processes.[6]

### B. The 2009 And 2010 PwC Audit-Based Allegations Are Barred By The Statute Of Limitations.

[6] To be sure, the Commission may place limitations on accountants found "to have to have willfully violated, or willfully aided and abetted the violation of any provision of the Federal securities laws." Rule 102(e)(iii). But where, as here, the Division institutes proceedings under Rule 102(e)(ii) alleging improper professional conduct, such conduct must be somehow related to the accountant's appearance before the agency or otherwise threaten the SEC's processes. Nothing in the history or intent of Rule 102(e)(ii) provides the Commission with untethered blanket authority to define the standards governing all accountants and to penalize them for failing to live up to the SEC's standards. Absent some relationship to the SEC's practices, nothing would prevent the Division from, for example, suing the bookkeeper for the local mini-mart for being a bad accountant out of concern that he or she might one day audit the financial statements of a public company. Indeed, the D.C. Circuit Court of Appeals recently rejected an attempt by the Internal Revenue Service to pursue a similarly expansive reading of its ability to regulate the professional competence of tax preparers under an analogous statute authorizing the IRS to regulate the practice of persons appearing before it. *See Loving v. IRS*, 742 F.3d 1013, 1020 (D.C. Cir. 2014) (holding that the IRS had exceeded its statutory authority to regulate "practice ... before the Department of Treasury" by setting professional competence requirements for tax return preparers, reasoning that "[i]f we were to accept the IRS's interpretation of Section 330, the IRS would be empowered for the first time to regulate hundreds of thousands of individuals in the multibillion dollar tax-preparation industry. Yet nothing in the statute's text or the legislative record contemplates that vast expansion of the IRS's authority.")

The general statute of limitations at 28 U.S.C. § 2462 bars the Division from relying on allegations that accrued more than five years before it filed the OIP on October 31, 2016. 28 U.S.C. § 2462; *Johnson v. SEC*, 87 F.3d 484, 488 (D.C. Cir. 1996); *3M Company v. Browner*, 17 F.3d 1453 (D.C. Cir. 1994) (holding that the five-year statute of limitations of 28 U.S.C. § 2462 applies to administrative proceedings). Section 2462 provides that any "proceeding for the enforcement of any civil fine, penalty, or forfeiture" must be commenced "within five years from the date when the claim first accrued." 28 U.S.C. § 2462. Here, the Division is attempting to penalize Mr. Beamish by, in practice, ending his career. Thus, the Division is barred from seeking any penalty for claims that accrued prior to October 31, 2011.

### 1. Sanctions Under Rule 102(e) Are Penalties Within The Meaning Of 28 U.S.C. § 2462.

Section 2462 applies to any relief sought by the SEC that is a penalty. 28 U.S.C. § 2462. A "'penalty,' as the term is used by Section 2462, is a form of punishment imposed by the government for unlawful or proscribed conduct, which goes beyond remedying the damage caused to the harmed parties by the defendant's action." *Johnson*, 87 F.3d at 488; *SEC v. Microtune, Inc.*, 783 F. Supp. 2d 867, 883–84 (N.D. Tex. 2011), *aff'd sub nom. SEC v. Bartek*, 484 F. App'x 949 (5th Cir. 2012). In determining whether a particular sanction constitutes a penalty under Section 2462, courts must look both to "the degree and extent of the consequences to the subject of the sanction" as well as the extent to which the relief sought focuses on remedying the damage caused by a defendant's past conduct or preventing future harm. *Johnson*, 87 F.3d at 488–90.

Applying this test, the *Johnson* court held that the Commission's censure and six-month disciplinary suspension of a securities industry supervisor were penalties within the meaning of Section 2462. *Id.* at 485. The court explicitly rejected the Commission's argument that a suspension is "remedial" because the "intent . . . [was] to protect the public

from future harm at [the defendant's] hands," *id.* at 486–87, reasoning that "[i]n interpreting § 2462, . . . the court's concern is not whether Congress legislated the sanction as part of a regulatory scheme to protect the public, but rather whether the *sanction is itself* a form of punishment of the individual for unlawful or proscribed conduct, going beyond compensation of the wronged party." *Id.* at 491 (emphasis added). The D.C. Circuit found that a censure and suspension "clearly resemble a punishment in the ordinary sense of the word" because they are "not directed toward correcting or undoing the effects" of the defendant's conduct or preventing future harm. *Id.* at 488–89; 491–92. Rather, the Commission's OIP "justifies the sanction solely in view of [the defendant's] past misconduct" rather than "her current competence or risk to the public" and therefore was punitive rather than remedial. *Id.* at 489–90. The court further reasoned that the collateral consequences of the censure and suspension "suggest its punishment-like qualities," noting that the suspension would not only restrict the defendant's ability to earn a living during the suspension, but "also was likely to have longer-lasting repercussions on her ability to pursue her vocation." *Id.* at 488–89.

Under the *Johnson* test, courts have found that even equitable relief may constitute a penalty subject to Section 2462. In *Bartek*, the Fifth Circuit upheld a finding that injunctive relief and officer-and-director bars are penalties as a matter of law subject to Section 2462's statute of limitations. 484 F. App'x at 957. The court agreed with the lower court's determination that officer-and-director bars and injunctions are penalties on the grounds that such sanctions "have a stigmatizing effect and long-lasting repercussions," do not "address[] past harm allegedly caused by the Defendants," and do not "address the prevention of future harm in light of the minimal likelihood of similar conduct in the future." *Id.* Given the significant collateral consequences, the Fifth Circuit upheld the district court's finding that these remedies are punitive, and are thus subject to Section 2462's time limitation. *Id.*

Here, the Division seeks that Mr. Beamish "be censured or denied, temporarily or permanently, the privilege of appearing or practicing before the Commission as an accountant." (OIP at 12). The Division's requested relief and the fact of the OIP itself, have already had substantial collateral consequences for Mr. Beamish to a degree that can only be considered penal. Like the sanctions in *Johnson* and *Bartek*, the potential sanctions here would "become[ ] part of [his] permanent public file," creating "long[ ] – lasting repercussions" to his reputation and career, *Johnson*, 87 F.3d at 489, and effectively "stigmatizing" him for the rest of his career. *Bartek.* 484 F. App'x at 957.

As an initial matter, Mr. Beamish is licensed as a Certified Public Accountant in California and is a Chartered Accountant in England and Wales. (OIP ¶ 2). California requires auditors to affirmatively disclose "[t]he cancellation, revocation, or suspension of the right to practice as a certified public accountant or a public accountant before any governmental body or agency" to the California Board of Accountancy ("CBA"). Cal. Bus. & Prof. Code § 5063. Once the CBA learns of an SEC enforcement action, it is able to open its own investigation and has the authority to revoke or suspend auditors' CPA licenses, even where the SEC sanctions did not involve practice bars. Cal. Bus. & Prof. Code § 5100(h). State boards often revoke or suspend an auditor's CPA license for periods at least equal to any SEC's practice bar. *John V. Cracchiolo*, Admin. Proceeding File No. 3-1339, 95 S.E.C. Docket 138, Order (Jan. 26, 2009); *John V. Cracchiolo*, No. AC-2009-36 (Cal. Bd. of Accountancy May 20, 2010). Since a CPA is licensed to practice by individual states, an auditor's loss of ability to practice as a CPA can effectively prolong the length of any practice bar because a current CPA license is often a prerequisite to reinstatement to practice before

the SEC. Cal. Bus. & Prof. Code § 5100; Michael Y. Scudder & Andrew J. Fuchs, How SEC Settlements Affect Auditors' Careers, Law360 (Mar. 18, 2016).[7]

Practitioners have noted that even a *settlement* with the Commission under Rule 102(c) can "effectively operate as a permanent bar on the auditor's practice" since "most audit firms and auditors would consider it a best practice (if not a duty) to bring a [Rule 102(e) enforcement action] to the attention of the audit committees of the sanctioned individual's existing or potential clients," and audit committees generally will not accept an auditor with any negative record. Scudder & Fuchs, *supra.* Hence, a Rule 102(e) enforcement action effectively acts as a career-ending scarlet letter on even a well-respected auditor's record.

In addition, as noted above, a sanction preventing Mr. Beamish from practicing before the Commission does not and could not remedy the damages allegedly caused by Mr. Beamish's alleged conduct or prevent future harm of the nature alleged in the OIP. Analyzing a professional sanction similar to that imposed by Rule 102(e), the D.C. Circuit in *Johnson* held that the suspension of a professional license was punitive within the meaning of § 2462 where it is "not directed toward correcting or undoing the effects of [the defendant's] allegedly faulty supervision." 87 F.3d at 491–92. Here, a sanction preventing Mr. Beamish from practicing before the Commission would not remedy the effects of Mr. Beamish's alleged failure to properly scrutinize private Fund III's advanced management fees. In fact, the highly sophisticated investors allegedly harmed by Fund III's alleged misreporting have already recovered the prepaid management fees from the General Partner's capital account through their own private action – demonstrating that they do not require the Commission to step into what is entirely a private dispute.

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[7] Available at https://www.skadden.com/sites/default/files/publications/How%20SEC%20Settlements%20Affect%20Auditors'%20Careers.pdf.

Neither has the Division alleged that Mr. Beamish poses a risk of harm to the public. The Division has not alleged that Mr. Beamish has engaged in any misconduct since PwC's 2012 audit of Fund III and there is no suggestion, much less any evidence, that he is likely to do so in the future. Tellingly, as in *Johnson* and *Bartek*, the Commission's allegations focus entirely on Mr. Beamish's past alleged misconduct rather than any risk of future misconduct. *See Johnson*, 87 F.3d at 489; *Bartek*, 484 F. App'x at 957; *see also SEC v. Jones*, 476 F. Supp. 2d 374, 384 (S.D.N.Y. 2007). Moreover, there is no allegation that Mr. Beamish has ever engaged in any misconduct with respect to any public company audit involving the SEC's procedures.

In fact, imposition of a sanction here *could not* prevent the harm the Division alleges since a sanction under Rule 102(e) can *only* apply to practice before the Commission. 17 C.F.R. § 201.102(f). As noted above, a restriction on practicing before the Commission under Rule 102(e) would not have precluded Mr. Beamish from auditing Fund III, nor will it (at least as a literal, legal matter) prevent him from auditing private funds in the future. Hence, the sanction bears no relationship to remedying the purported misconduct alleged by the Division. The only limitation on Mr. Beamish's ability to perform the private fund audits at issue here will be the reputational damage inflicted by this proceeding, confirming that the Division is improperly seeking to punish Mr. Beamish for alleged wrongdoing. Under these circumstances, an appearance bar is punitive and § 2462 controls.

**2. The 2009 And 2010 PwC Audits Accrued Prior To October 31, 2011 And Pleading Them Is Barred By The Statute Of Limitations.**

Under Section 2462, a claim accrues on the date on which the underlying violation occurred. *See United States v. Core Labs., Inc.*, 759 F.2d 480, 482 (5th Cir. 1985) (gathering cases that "clearly demonstrate[] that the date of the underlying violation has been accepted without question as the date when the claim first accrued, and therefore, as the date on which the statute began to run."). In the case of an allegedly misleading or purportedly fraudulent

audit report, the date on which claims related to that report accrue is the date on which an audit report is certified. *See Michael J. Marrie*, Admin. Proceeding File No. 3-9966, 75 SEC Docket 2149, Order, 22–23 (ALJ Sept. 21, 2001) (SEC administrative proceeding under Rule 102(e) holding that the "appropriate date to commence the running of any limitations period is the date the auditor certifies his report"), *rev'd on other grounds*, 80 SEC Docket 2163 (Jul. 29, 2003), *rev'd*, 374 F.3d 1196 (D.C. Cir. 2004).

The Division alleges that Mr. Beamish engaged in improper professional conduct within the meaning of Section 4C(a)(2) of the Exchange Act and Rule 102(e) of the Commission's Rules of Practice in connection with PwC's audits of Fund III financial statements for fiscal years 2009, 2010, 2011, and 2012. The dates of the PwC audit letters for year-end 2009 and 2010 were April 2010 and April 2011, respectively, both over five years before the Commission instituted the OIP in this matter and therefore are on their face time-barred. All allegations related to the 2009 and 2010 audits therefore cannot form the basis for the OIP.

### C. The Division Has Failed To State A Claim Under Rule 102(e) Because The Financial Statements Contained Actual Disclosure Of The Payments At Issue.

#### 1. The Commission Has Failed To Allege That Mr. Beamish Was "Negligent" Under Rule 102(e), And Cannot Plead Negligence Because There Was Actual Disclosure.

Pursuant to Rule 102(e)(1)(iv)(B), "improper professional conduct" encompasses two types of scienter: (1) a single instance of highly unreasonable conduct in circumstances for which heightened scrutiny is warranted; or (2) repeated instances of unreasonable conduct that indicate a lack of competence. Courts have recognized, however, that individuals cannot be found negligent where there was actual disclosure in the financial statements. For example, in *Geotek*, the SEC alleged that an auditing firm and four of its auditors had improperly certified the financial statements of two companies that had taken "advance

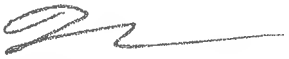
disbursements" or "disbursements in excess of the actual expenditures." *SEC v. Geotek*, 426 F. Supp. 715, 738 (N.D. Cal. 1976), *aff'd sub nom. SEC v. Arthur Young & Co.*, 590 F.2d 785 (9th Cir. 1979). The Ninth Circuit upheld the lower court's dismissal of the case on the grounds that auditors were not negligent because even if the 'advance disbursements' were not authorized by any company agreement, "the fact that they had been made was adequately disclosed in the . . . financial statements." *Id.* at 739. Similarly, the court in *Clayton* dismissed the plaintiff's claim that the defendants "negligently misrepresented the [investment] fund's financial condition and status to her" because the defendants had "actually disclosed the information" regarding the plaintiff's investment value. *Clayton v. Landsing Pac. Fund, Inc.*, No. C 01-03110 WHA, 2002 WL 1058247, at *7 (N.D. Cal. May 9, 2002), *aff'd,* 56 F. App'x 379 (9th Cir. 2003). Just like the auditors in *Geotek* and the managers of the investment fund in *Clayton*, Mr. Beamish was not negligent because he confirmed that the Fund's financial statements adequately disclosed the financial information to investors. As described, *supra*, every Fund III financial statement specifically identified that the prepaid expenses were a related party transaction between the Fund and the General Partner, accurately disclosed the amount of the payments, and clearly described the payments as prepaid expenses receivable from the General Partner. Because the OIP cannot, as a matter of law, support a claim that Mr. Beamish acted negligently in failing to ensure the financial statements disclosed transactions which were in fact adequately disclosed, the claims must be dismissed.

## V. CONCLUSION

For the foregoing reasons, the Commission's Rule 102(e) enforcement action against Mr. Beamish should be dismissed with prejudice.

Dated: December 7, 2016

Respectfully submitted,



Thad A. Davis
Marc J. Fagel
Monica K. Loseman
Nicola M. Paterson
Trial Counsel for Adrian D. Beamish
(415) 393-8251 (Davis)
(415) 393-8332 (Fagel)
(303) 298-5784 (Loseman)
(415) 393-8347 (Paterson)
tdavis@gibsondunn.com
mfagel@gibsondunn.com
mloseman@gibsondunn.com
npaterson@gibsondunn.com

Certificate of Service

On December 7, 2016, the foregoing: Respondent Adrian D. Beamish's Motion for Judgment on the Pleadings, Memorandum and Points of Authorities in Support of Respondent Adrian D. Beamish's Motion for Judgment on the Pleadings, Declaration of Thad A. Davis in Support of Respondent Adrian D. Beamish's Motion for Judgment on the Pleadings and Exhibit A, was sent to the following parties and other persons entitled to notice as follows:

Securities and Exchange Commission
Brent Fields, Secretary
100 F Street, NE
Mail Stop 1090
Washington, D.C. 20549
(Original and three copies by courier)

Honorable Cameron Elliot
Administrative Law Judge
100 F Street, NE
Mail Stop 2557
Washington, D.C. 20549
(ALJ@sec.gov)
(Courtesy copy by electronic mail and U.P.S.)

E. Barrett Atwood, Esq.
Robert L. Tashjian, Esq.
Securities and Exchange Commission
San Francisco Regional Office
44 Montgomery Street, Suite 2800
San Francisco, CA 94104
Atwoode@sec.gov
Tashjianr@sec.gov
(By electronic mail and U.P.S.)

By: _____
Elizabeth S. Steinfeld