UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-17651

Administrative Law Judge
Cameron Elliot

In the Matter of **ADRIAN D. BEAMISH, CPA** **Respondent.**	**REPLY MEMORANDUM IN FURTHER SUPPORT OF RESPONDENT'S MOTION FOR A MORE DEFINITE STATEMENT**

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Respondent Adrian D. Beamish ("Mr. Beamish") through undersigned counsel respectfully submits this reply memorandum in further support of his motion for a more definite statement of fact pursuant to 17 C.F.R. § 201.220(d).

I. INTRODUCTION

The mandate of an Order Instituting Proceedings ("OIP") is to "set forth the factual and legal basis alleged therefor in such detail as will permit a specific response thereto." *David F. Bandimere*, Admin. Proceeding File No. 3-15124, 105 SEC Docket 2729, Order at 2 (ALJ Feb. 11, 2013) [hereinafter *Bandimere*] (citing 17 C.F.R. § 201.200(b)). After considering the Division's Opposition and the Court's November 29, 2016 Order, Mr. Beamish respectfully submits that the OIP fails to meet this standard, and urges the Court to address the following specific deficiencies in the OIP:

(1) The Division alleges the audits were inadequate because, in hindsight, Mr. Beamish should have done something more, without specifying the audit procedures Mr. Beamish failed to implement;

(2) The Division alleges that the repeated, accurate disclosures of prepayments in question were somehow misleading, without alleging whether any investors were in fact misled;

(3) The Division alleges Mr. Beamish's reliance on representations from multiple members of management was misplaced, without alleging which other individuals or entities, if any, he was required to consult.

These narrower requests do not seek evidence, but only seek the Division's assistance in filling in key blanks in the OIP, allowing Respondent to be "sufficiently informed of the charges against him so that he may adequately prepare his defense." *Thomas R. Delaney II*, Admin. Proceeding File No. 3-15873, 109 SEC Docket 962, Order at 3 (ALJ June 25, 2014).

II. Legal Standard

Although the Commission's newly amended Rules of Practice allow for hearings to begin as late as ten months from the OIP, this hearing is scheduled to begin just six months after service of the OIP – roughly four months from now. 17 C.F.R. § 201.360(a)(2)(ii). In this time, Mr. Beamish must review the thousands of documents in the Division's investigative file, some of which were infected with viruses and have only recently become reviewable, and prepare his defense to the OIP's allegations. (In contrast, the Division had some two and a half years between opening its investigation and instituting these proceedings.) Despite being aware of these constraints, the Division opposes providing Mr. Beamish with some basic information regarding its allegations.

The Division argues that it is under no obligation to provide the information requested. The Court will determine if this is true, but it is important to note that the Division is not always so reluctant to provide further information to the respondent. Take *Houston Am. Energy Corp.*, a case on which the Division relies to show that it is under no obligation to provide further information to Mr. Beamish. The respondent requested that the Division provide "all specific alleged misstatements [], including the exact words used, the date of each statement, and the names of the person who made and/or received the statements" that formed the basis of the OIP. *Houston Am. Energy Corp.*, Admin. Proceeding File No. 3-16000, Order at 1 (ALJ Sept. 30, 2014). The Division filed a response that "identifie[d] 'the dates, settings, and substance of statements.'" *Id.* An unsatisfied respondent nonetheless asked the Division to identify "the portion of each statement that it contends was false and the reason why it is false." *Id.* at 2. The Division then filed a supplemental appendix that "identif[ied] with greater particularity the false and misleading elements of each misstatement," which the court found mooted the need for the motion for more definite statement. *Id.* 2–3. So, while it was true that the ALJ denied the request for a more definite

statement, the denial was expressly based on a reading of the OIP as supplemented by the Division's additional statements.

Indeed, *Houston* is just one example among many cases – all of which the Division relies on in its Opposition to support its claim that is under no obligation to provide further information – where the Division voluntarily provided the information requested, resulting in a denial of the respondent's motion. Here are some examples:

- *Aegis Capital, L.L.C.*, Admin. Proceeding File No. 3-16463, Order at 2 (ALJ May 27, 2015) (finding the Division mooted the motion for more definite statement by giving the respondent additional, clarifying information in the Division's response to the motion);
- *Donald J. Anthony, Jr.*, Admin. Proceeding File 3-15514, 107 SEC Docket 4716, Order at 3–4 (ALJ Dec. 12, 2013) (denying a motion for more definite statement because the Division "provided a great deal more information than what appears to have occurred in [other] cases," by supplying "charts listing every customer and every purchase and sale in every one of the fraudulent offerings made during the period of the fraud; an 11-page narrative that provide[d] further detail on each Respondent's illegal conduct, including misrepresentations and omissions; and lists of every unaccredited customer and the basis for that conclusion.");
- *OptionsXpress, Inc.*, Admin. Proceeding File No. 3-14848, 104 SEC Docket 419, Order at 3 (ALJ July 11, 2012) (denying a motion for more definite statement because the Division had given the respondents access to "non-privileged portions of the investigative file that [were] the basis for the allegations"; had "numerous meetings" with respondents where "presumably,

information ha[d] been transmitted; and the Division, in pleadings in connection with the motions . . . disclosed various of its positions.").

Here, beyond the required production of its investigative file, the Division has not provided Mr. Beamish with any additional information relating to its allegations, making these cases inapposite.

III. DISCUSSION

A. The Division alleges that Mr. Beamish failed to scrutinize the advanced fees appropriately, but omits crucial details as to what audit procedures Mr. Beamish allegedly failed to implement.

Mr. Beamish must be informed of any alleged procedural deficiencies with the relevant audits, and if there were none the Division can identify, must be informed of such as well. This is not a hypothetical request: it is a specific request for the Division to name which Generally Accepted Auditing Standards ("GAAS")-specified audit procedures, if any, Mr. Beamish failed to properly implement.

While the OIP focuses on alleged substantive gaps of the resulting financial statements – such as the purported inadequacy of the disclosures – the OIP gives the respondent inadequate basis to understand what the Division believes he should have done differently. For example, the OIP alleges that Mr. Beamish "took no steps to obtain audit evidence that the payments were properly approved and authorized, even as the balance continued to grow year to year." (OIP at ¶ 23.) Yet the Division recognizes that Burrill Life Sciences Capital Fund III, L.P's ("the Fund" or "Fund III") entire management team was aware of such fees, and the expense had been reported for years to Fund III's limited partners without complaint. Thus, Mr. Beamish is left to guess what specific additional audit procedures were mandated. Demonstrating that Mr. Beamish diligently followed the prescribed process and paid heed to the procedural safeguards is an essential part of his

defense. It is reasonable that the Court require the Division to state clearly the basis on which it contends Mr. Beamish's adherence to audit standards was deficient.

Moreover, Mr. Beamish's fidelity to the procedural requirements of the audits vitiates the Division's claim that Mr. Beamish's audit conduct was reckless or negligent. An audit is a multi-step process: an audit team is formed and the audit planned; the team meets to discuss the scope of the audit and areas of particular risk; the team immerses itself with the entity and reviews procedures and processes, tests for compliance, and evaluates internal controls; and the auditor reviews the entity's financial statements. Each of these steps has its own processes and constituent steps that are followed. The OIP is silent on whether any of these steps were missed or done deficiently.

That silence is likely a result of the fact that Mr. Beamish and his team faithfully followed appropriate audit procedures. They evaluated the related party transaction and concluded there was no risk of material misstatement and planned and performed audit procedures sufficient to address this assessed level of risk. They tested payments and compared them to the provisions of Fund III's limited partnership agreement to validate management's assertion that the payments were appropriately treated as prepaid management fees. They took steps to assess the realizibility of the balance and calculated that sufficient future management fees would be available to offset against these prepayments. And, in 2012, when anticipated future management fees were no longer sufficient to cover the balance of prepayments, Mr. Beamish's team undertook additional steps, including ascertaining that there was adequate value in the General Partner's capital account balance to cover the receivable and ensuring the Fund made further disclosures in its financial statements regarding the transaction.

Just because Mr. Beamish can detail what he and his team actually did, does not relieve the Division of identifying, specifically, what it views is lacking or inadequate. The

Opposition nevertheless argues that the OIP is sufficient "to put respondent on notice of what the Division believes to be the shortcomings of his audits of Fund's year-end 2009, 2010, 2011, and 2012 financial statements." (Div. Opp'n at 9). However, the OIP provides no notice of alleged deficiencies with the audit process as defined above.

If, later in these proceedings, the Division suddenly argues that Mr. Beamish failed to adhere to specific auditing standards or other applicable guidance, Mr. Beamish will be severely prejudiced. As discussed above, this matter is scheduled for its hearing in late April, and Mr. Beamish must know what audit procedures the Division intends to establish he failed to undertake.

B. The Division alleges that the actual disclosures were somehow misleading, but refuses to assert whether any of Fund III's investors were misled or wrongly informed by the disclosures.

The Division must inform Mr. Beamish whether, in its view, investors were misled by the relevant disclosures, and if so, must name those investors it believes were misled and describe how they were misled. This information is necessary context to Mr. Beamish's defense. If the Division intends to demonstrate at trial that investors were misled or thought the disclosures were inaccurate, then Mr. Beamish is entitled to information about these investors so he can defend himself against those allegations. If the Division does not intend to allege that investors were misled or harmed by these disclosures, then it should inform Mr. Beamish of that as well, since it is highly relevant to his defense.

The Division seeks to give the impression that Mr. Beamish engaged in deception without accepting the well-defined pleading responsibilities that come with such an allegation. For example, the OIP alleges that the 2009-2011 financial statements' use of the terms "prepaid expenses" and "receivables," rather than "prepaid management fees," created a "misleading picture" of Fund III's financial statements. (OIP at ¶ 27). But the OIP does not make any mention of who was misled by the disclosures. This is unfair to Mr. Beamish.

If the Division wants the Court to accept its allegation that investors were misled or deceived as a result of this word choice, the Division must clearly allege whether any party was in fact misled or deceived.

The Division attempts to duck their pleading obligation by pointing out that Mr. Beamish has only been accused of improper professional conduct, not fraud. But the OIP bases this allegation on the assertion that the financial statements audited by Mr. Beamish were not accurate – indeed, the very header of the pertinent section of the OIP contends that the "Financial Statements Failed to Disclose Fees Accurately." Given the undisputed fact that the Fund's financial statements, year after year, did in fact disclose millions of dollars in payments from the Fund to the General Partner, the only bone of contention is whether the disclosure was misleading or not. That being the case, the Division should have no qualms about adding allegations about which of the highly sophisticated investors who received these annual disclosures were somehow misled.

The Opposition nevertheless argues that Mr. Beamish's request is inconsistent with the pleading standard for the OIP. (Div. Opp'n at 10). In the Division's view, unless the case alleges fraud, information relating to the alleged victims is irrelevant. Not so. While both *Bandimere* and *J.W. Barclay & Co. Inc.* alleged fraud, there is no basis to conclude that the courts' rulings requiring more detailed information were dependent on these fraud allegations. *See Bandimere*; *J.W. Barclay & Co., Inc.*, Admin. Proceeding File No. 3-10765, Order (ALJ June 13, 2002). In fact, the court in *Bauer* specifically held that the pleading standard for fraud claims was the same as any other claim brought in an OIP. *Alfred M. Bauer*, Admin. Proceeding File No. 3-9034, 68 SEC Docket 2635, Order at 3 (ALJ Jan. 7, 1999). Rather, these cases merely stand for the proposition that courts will require the Division to provide further information when the OIP lacks sufficient detail concerning

possibly aggrieved parties. *See Alfred M. Bauer*, Admin. Proceeding File No. 3-9034, 62 SEC Docket 2273, Order (ALJ Aug. 27, 1996) [hereinafter "*Bauer*"].

Similarly, requiring the Division to provide further detail of alleged misrepresentations is consistent with at least one of this Court's previous rulings. In *Bandimere*, this Court required the Division to provide information showing that "the alleged misrepresentations and omissions were made to investors; and 2) that the alleged 'red flags' were first known to Respondents." *Bandimere*, at 3. Here, Respondent similarly asks that the Court require the Division to state whether investors were misled, which of these investors were misled, and provide details about whether Mr. Beamish had reason to know that these investors were being misled by the disclosures.

In sum, the OIP as pled suggests that Mr. Beamish improperly opined on misleading financial statements, in which case he is entitled to know who was misled in order to prepare his defense. Conversely, if the Division's contention is instead that Mr. Beamish engaged in improper professional conduct and should be removed from the accounting industry simply because his audit client called something an "expense" rather than a "fee," then this, too, should be made clear by the Division.

C. The Division alleges that Mr. Beamish acted inappropriately by failing to make appropriate inquiries, but does not inform Mr. Beamish of whom he should have inquired.

The Division must inform Mr. Beamish of whom it contends he should have made further inquiries to regarding the prepaid expenses. The OIP astutely avoids alleging whether the prepaid fees challenged here were somehow concealed in the financial documents reviewed by the audit team (they were not), whether any of the multiple Fund principals and personnel with whom the audit team discussed these fees suggested any impropriety (they did not), or whether any of the sophisticated Fund III investors or members of the General Partner who received the annual financial statements disclosing the large related party

payments protested (they did not). Instead, the Division offers a blanket proposition that Mr. Beamish simply should have inquired further, while refusing to provide any insight into who else he was obligated to consult regarding these payments.

In lieu of detailed allegations, the Division glibly responds that Mr. Beamish should have asked this question during the audit. But they miss the point: what is at issue in this motion is not Mr. Beamish's basis for concluding that the financial statements were fairly stated, but rather the Division's basis for alleging they were not.

According to the Division, Mr. Beamish's alleged failure to inquire is the crux of this matter. On no fewer than eight occasions, the OIP states that Mr. Beamish failed to inquire, question, or scrutinize. (OIP at ¶¶ 2, 20, 24, 25, 36, 40.) But there is no mention of the receiving party to whom Mr. Beamish should have directed his inquiries, or how Mr. Beamish should have navigated the interplay between the various Burrill entities. If Mr. Beamish needed further information relating to his audit work, to what entity or person should Mr. Beamish have gone for assurances? What authority did Mr. Beamish and PwC have to analyze the books of the non-Fund III Burrill entities, such as the General Partner? These deficient allegations will crucially undermine Mr. Beamish's preparation of his defense.

As described in Respondent's Motion, there was a complex web of relationships among the various Burrill entities, with Burrill & Company CEO Steven Burrill at the center. The OIP alleges no basis for Mr. Beamish to question Mr. Burrill's authority to commit the General Partner's capital account towards repayment of the prepaid expenses. PwC had audited Fund III for multiple years and at all times, and in all respects, recognized Mr. Burrill and his management team as the appropriate representatives of the General Partner. The same individuals who represented that the General Partner would repay the prepaid expenses – Steven Burrill, Chief Legal Officer Victor Hebert, and Chief Financial Officer Helena Sen

– were the authorized representatives of the General Partner in all other respects. Mr. Burrill was the sole signatory of Fund III's Limited Partnership Agreement on behalf of the General Partner; Mr. Hebert was the officer who engaged PwC to perform the audit of the Fund on behalf of the General Partner in FY 2012. They, along with CFO Ms. Sen, signed the management representation letter certifying that the General Partner's capital account was available to repay Fund III. Moreover, in each year prior to 2012, the financial statements reported that prepaid expenses were paid to the General Partner, yet at no time did any other members of the General Partner (some of whom were consulted by PwC as part of the audits) suggest that they were unaware of this repayment.

If the Division now challenges the sources of information on which Mr. Beamish's audit was in part based, then it should clearly allege in the OIP the alternatives it contends were required under GAAS. Providing this information does not require the Division to engage in hypotheticals or counterfactuals; it is a factual question relating to the sources of authority within Fund III and the Burrill enterprise.

Ironically, the Division bemoans the use of supposed counterfactuals and hypotheticals in Mr. Beamish's Motion, arguing against their use at the pleading stage, even as it fails to recognize that hypotheticals and counterfactuals form the basis of the OIP. This entire matter boils down to the question of what Mr. Beamish supposedly "should have done" with the benefit of hindsight, and if the OIP is based on such hypothetical questions, it is obligated to provide sufficient facts for Mr. Beamish to answer them.

Finally, the Division's argument that a ruling in favor of Mr. Beamish on this issue would be unprecedented misstates the authority. Even the case the Division cites in support of calling this request "unprecedented," *BioElectronics*, is supportive of requiring the Division to offer more detailed allegations. Though the Court in *Bioelectronics* denied some of the respondent's requests, it also granted a significant request, requiring the Division to

identify "each transaction it believes supports its Section 5 claims by the date of the transaction and the buyer and seller." *BioElectronics Corp.*, Admin. Proceeding File No. 3-17104, Order at 3 (ALJ Apr. 4, 2016) . In fact, the *BioElectronics* court never called or even suggested that any of the respondent's request were unprecedented. Rather, the Court simply noted the governing rule: "In determining whether the OIP provides adequate notice of the charges, 'the question is whether the respondent understood the issue and was afforded full opportunity to justify [his or her] conduct during the course of the proceeding.'" *Id.* at 2 (citing *David F. Bandimere*, Admin. Proceeding File No. 3-15124, Order at 22 (Oct. 29, 2015)).

Mr. Beamish's request is consistent with this statement of the legal standard governing this motion. Rather than relying on Mr. Beamish to defend his contemporaneous actions and understandings in a vacuum, the Division should allege with specificity what steps it contends should have been taken and its factual basis for such allegations.

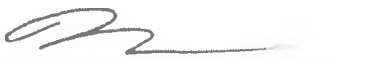
IV. CONCLUSION

Respectfully, the Court should require the Division to fill in the gaps – to provide the logical, contextual allegations – necessary for Mr. Beamish to conduct his defense, given the stakes here. This request is not extraordinary: courts routinely grant motions for a more definite statement in circumstances, such as these, where a lack of specificity in the OIP means the respondent is not "sufficiently informed . . . so that he may adequately prepare his defense." *Bauer*, at 1.

Dated: December 14, 2016

Respectfully submitted,

Gibson Dunn & Crutcher LLP



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Certificate of Service

On December 14, 2016, the foregoing "Reply Memorandum in Support of Adrian D. Beamish's Motion for a More Definite Statement" was sent to the following parties and other persons entitled to notice as follows:

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