UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION
December 16, 2016

ADMINISTRATIVE PROCEEDING
File No. 3-17651

In the Matter of	
ADRIAN D. BEAMISH, CPA	**Administrative Law Judge Cameron Elliot**
Respondent.	

The Division of Enforcement's Opposition to Respondent's Motion for Judgment on the Pleadings

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Pursuant to the Court's Order dated November 30, 2016, Respondent filed his Motion for Judgment on the Pleadings on December 7, 2016, along with a Memorandum and Points of Authorities in Support ("Motion"), and the Declaration of Thad A. Davis in Support of Respondent's Motion attaching Exhibit A.[1] On December 9, 2016, the Court granted in part the parties' joint request to extend the briefing schedule. Pursuant to that order, the Division hereby files its Opposition.

INTRODUCTION

Respondent Adrian D. Beamish engaged in negligent professional conduct for a period of years while conducting the audits of a private fund with investors consisting of public companies, pension funds, and institutional investors. As described in the well-pled Order Instituting Proceedings ("OIP"), his conduct fell woefully short of the applicable accounting standards, representing highly unreasonable conduct in circumstances for which heightened scrutiny is warranted, as well as repeated instances of unreasonable conduct that indicate a lack of competence. Thus, proceedings to determine whether he should be permitted to appear or practice before the Commission are fully warranted and appropriate in order to protect the Commission's processes and the investing public.

Respondent attempts to evade the Commission's authority to regulate his professional conduct by arguing that the Commission has no authority to protect itself and the investing public. He hangs his hat on the assertion that his negligent conduct auditing private funds should be ignored when determining whether he is presently fit to appear or practice before the Commission. Respondent further argues that not only were his audits conducted properly, but that the applicable professional standards should somehow be relaxed because the impacted

[1] All citations herein to the Motion refer to Respondent's Memorandum and Points of Authorities in Support of his Motion for Judgment on the Pleadings.

investors were "sophisticated." Respondent's danger to the Commission's processes is clear and present. He is without remorse; he demands to continue his auditing work; and he points the finger at others for his professional shortcomings.[2]

His arguments are gravely misplaced. The Commission is authorized by 17 C.F.R. § 201.102(e) ("Rule 102(e)")[3] to protect its processes and the investing public from accountants who show themselves unfit to appear or practice before it, especially since the Commission relies heavily on such professionals to preserve the integrity of the markets. The Commission's authority to deny accountants the privilege of practicing or appearing before it is grounded in these principles. Such relief is remedial, aimed at preventing future harm and regulating future professional conduct by those who appear before the Commission.

Contrary to Respondent's protestations, this is not a case where there is simply no connection between Respondent and the Commission. As the OIP alleges (and Respondent readily, if improperly, affirms), his practice at PricewaterhouseCoopers LLP, where he remains, has involved repeated public company engagements. The threat to the Commission's processes and the investing public is apparent.

Respondent further argues that his conduct during the fiscal year 2009 and 2010 audits of the private fund should be excluded from this proceeding as somehow time-barred by 28 U.S.C. § 2462. Respondent argues that under Section 2462, inclusion of this conduct would be punitive. Contrary to Respondent's arguments, this proceeding is forward-looking and remedial.

Finally, Respondent makes a half-hearted attempt to argue the merits, and in so doing further calls into question his professional fitness. He asserts that the half-truths and misleading

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[2] *See also* Respondent's Mot. for a More Definite Statement at 12.

[3] "Rule" or "Rules of Practice" as used herein refer to the Commission's Rules of Practice, codified at 17 C.F.R. Part 201, Subpart D.

statements made by his client "adequately disclosed" the millions of "advanced" management fees taken by members of the fund's management company. Yet, nowhere in the financial statements does any reference appear to the terms he uses: "prepaid management fees" or "advanced management fees." As the OIP fully describes, and as will the evidence at hearing will resoundingly show, the fund failed to adequately disclose the millions improperly taken and Respondent failed to adhere to professional standards while conducting the audits. Investors were damaged by the alleged fraud occurring beneath Respondent's nose for years while he authorized the issuance of unqualified audit opinions purportedly made in accordance with applicable accounting standards.

For these reasons and those discussed below, Respondent's Motion for Judgment on the Pleadings should be denied in its entirety.

SUMMARY OF ALLEGATIONS

The Order Instituting Proceedings alleges the bases for this proceeding in a concise statement and those most salient to the present Motion are summarized here.

PricewaterhouseCoopers LLP ("PwC") was retained by a San Francisco-based venture capital fund, Burrill Life Sciences Capital Fund III, L.P. (the "Fund"), which was structured as a limited partnership consisting of investors including public companies, pension funds, and institutional investors. OIP ¶¶ 1, 7, 10, 11. The Fund engaged PwC to conduct annual audits of the Fund's financial statements beginning with the Fund's fiscal year 2006 audit. *Id.* ¶ 1. PwC continued auditing the Fund through PwC's resignation months after the completion of its audit for fiscal year 2012, when the Fund's investors discovered that millions of dollars were missing from the Fund and "advanced" to the Fund's management company. *Id.* ¶¶ 1-3, 11, 42-45.

The Fund's offering materials committed to using a major financial accounting firm—such as PwC—to issue a report on the Fund's financial statements. *Id.* ¶¶ 10, 13. The Fund's

governing document for the limited partner investors, the Limited Partnership Agreement, stipulated that the Fund would issue financial statements in accordance with Generally Accepted Accounting Principles ("GAAP"), and be audited by a public accountant of recognized national standing. OIP ¶¶ 4, 12, 13. Respondent purportedly fit that description. Respondent was certified as a Chartered Accountant in England and Wales in 1995, became licensed as a CPA in California in 2004, and became an audit partner at PwC in 2006, specializing in the pharmaceutical life sciences and venture capital industries. *Id.* ¶ 4. Respondent also regularly conducts audits of both public and private entities in the course of his employment at PwC. *Id.*

Respondent was PwC's engagement partner at all relevant times, including the audits for fiscal years 2009 through 2012, when he failed to comply with the relevant professional standards at issue here. *Id.* ¶¶ 1-4, 10, 11, 14, 15; *see also, e.g., id.* ¶¶ 19-20, 22, 25-27, 33-40 (citing applicable professional standards and alleging Respondent's failures under each). As the engagement partner, Respondent directed and supervised the audits at issue and was responsible for the audit reports issued by PwC on the Fund's financial statements. *Id.* ¶ 14. Despite his breadth of experience, for fiscal years 2009 through 2012, Respondent improperly authorized PwC to issue audit reports with unqualified opinions. *Id.* ¶ 15. Respondent failed to satisfy the applicable professional standards by authorizing reports claiming that the Fund's financial statements were presented fairly, in all material respects, in accordance with GAAP and that the audits were conducted in accordance with Generally Accepted Auditing Standards ("GAAS"). OIP ¶ 15.

Respondent's professional shortcomings had significant consequences. According to the Division, G. Steven Burrill, the founder of the Fund's adviser and affiliated management company, began taking cash from the Fund in 2007 to pay expenses at his other companies,

justifying the withdrawals as "advance on management fees." *Id.* ¶ 16.[4] The amount of these advanced fees grew in 2008 and in every subsequent year. *Id.* ¶ 17. By the end of 2009, the balance of the "advanced" fees totaled more than $4.9 million; by the end of 2010, the amount totaled more than $9.2 million; and by the end of 2011, the amount grew to more than $13.3 million. *Id.* ¶ 18. Respondent himself recognized that the "advanced" management fees were unusual in the industry, and the amounts at issue surpassed each of the relevant audit's thresholds for materiality as determined by PwC. *Id.* ¶ 19.

Despite recognizing these and other red flags, Respondent continued to authorize PwC to issue unqualified opinions and inaccurate audit reports for fiscal years 2009 through 2012. *See generally id.* §§ (F)-(H) (describing Respondent's conduct and failures to satisfy professional standards for audits conducted for fiscal years 2009 through 2012). Respondent's professional failures were extensive and far from reasonable. *See generally id.* §§ II(F), (G) (describing audit failures for each fiscal year at issue). For example, Respondent did not seek to obtain appropriate evidence that the "advanced" management fees were properly approved and authorized, despite acknowledging their growing balance and unusual nature. *Id.* ¶¶ 19, 23. And during the 2012 audit, Respondent and the audit team he directed calculated that the growing balance of "advanced" management fees exceeded the amount of fees that could be contractually obligated during the entire lifetime of the Fund.[5] *Id.* ¶¶ 23, 24. In response, Respondent failed to exercise appropriate professional skepticism and seek appropriate evidence that the "advanced" fees could even be repaid. *Id.* ¶ 24. Respondent's failures here are compounded by the fact that the

[4] Burrill, his management company, its chief legal officer, and its controller previously resolved claims against them. *See Burrill Capital Mgmt., LLC*, Admin. Proc. File No. 3-17186, 2016 SEC LEXIS 1168, at *2 (Mar. 30, 2016) (accepting offer of settlement).

[5] Unbeknownst to Respondent until the underlying investigation of this matter arose, he was unaware that his audit team's calculation of the amount of fees that could be contractually obligated was calculated inaccurately during the 2011 audit. OIP ¶ 24.

purportedly authorized transactions were between related parties, yet Respondent did not seek appropriate audit evidence required for such transactions. *Id.* ¶¶ 21, 22.

Further compounding these failures, Respondent also did not satisfy the professional standards applicable to related party transactions when auditing the Fund's financial disclosures for fiscal years 2009 through 2011. *See generally id.* § II(G) (describing disclosure failures for audits for fiscal years 2009-2011). Instead, the Fund's financial statements vaguely referred to the "advanced" fees throughout the years as a "prepaid expense," as "prepaid expenses and other receivables," and as a "receivable from the General Partner." *See* OIP ¶ 27 (describing varying references in balance sheets and footnotes). The financial statements never adequately disclosed that the "prepaid" fees were in fact millions of dollars of management fees "advanced" to Burrill or his affiliated companies—not even in the footnote dedicated to disclosure of the management fees paid by the Fund. *Id.*[6]

Respondent's professional failures culminated in his fiscal year 2012 audit. *See generally id.* § II(H) (describing numerous audit and disclosure failures relating to the 2012 audit). By this time, Respondent's audit team calculated that the amount of "advanced" management fees totaled almost $18 million—an amount, by the audit team's calculation, to be approximately $7 million in excess of the amount of management fees than what the Fund could ever be contractually obligated to pay. *Id.* ¶ 29. Respondent's audit team proposed disclosing this fact in the Fund's 2012 financial statements—while still failing to accurately describe this amount as "advanced" management fees and vaguely characterizing it as "[p]repaid expenses and other receivables." *Id.* ¶ 30; *see also id.* ¶¶ 32-40 (describing additional professional failures including

[6] As discussed above, the Fund's financial statements never once used the phrase "prepaid management fees," as Respondent repeatedly asserts both in the present Motion and his Motion for a More Definite Statement. Respondent's post-hoc description should be rejected as after-the-fact invention for purposes of litigation.

the inadequate disclosures on the Fund's balance sheet, related party footnote, and management fee footnote, and Respondent's failure to obtain appropriate audit evidence relating to an undocumented, related party loan or management's representations). But Burrill and members of his management company resisted this disclosure. Respondent readily cratered without exercising appropriate professional skepticism, making no inquiry into the rationale for taking "advanced" fees, or whether they were even authorized to be taken in advance or in excess of what the Fund could be contractually obligated to pay. *Id.* ¶¶ 30, 39, 40.

Respondent's professional failures, compounded over the years, failed to provide sufficient notice to the Fund's investors that millions of dollars were missing from the Fund. *See generally* OIP § II(I) (describing events occurring in 2013). With approximately $18 million of "advanced" fees taken from the Fund—$7 million of which was in excess of what the Fund could ever be obligated to pay (according to the audit team's calculation)—by the end of 2012, inadequate disclosures made in the financial statements, insufficient demands for appropriate audit evidence, and an unsatisfactory level of professional skepticism exercised by Respondent, Burrill continued "advancing" fees through July 2013. *Id.* ¶ 41. Prior to the issuance of the audited financial statements on April 4, 2013, Burrill "advanced" fees of $3.2 million, and then proceeded to take an additional $1.15 million in "advanced" fees through July 2013. *Id.* It was not until August 2013 when the Fund's investment committee discovered that nearly all of the Fund's committed capital was exhausted, resulting in emergency meetings, and the eventual discovery weeks later that the Fund had paid approximately $18 million in "advanced" management fees. *Id.* ¶ 42.

In the ensuing months, Burrill was removed from control of the Fund; Respondent was made aware of the dispute between the Fund's management and its investors; and on November 11, 2013, PwC resigned as the Fund's auditor. *Id.* ¶¶ 42-45. In order to salvage the

Fund, in 2014, the investors agreed to reinvest their distribution payments from the Fund in lieu of receiving their investment proceeds. *Id.* ¶ 46. The "recycled" payments were used to continue the Fund's operations and meet its financial commitments to its portfolio companies. *Id.*

Respondent's failures reflect improper professional conduct, including repeated instances of unreasonable conduct and at least a single instance of highly unreasonable conduct in circumstances for which heightened scrutiny was warranted, demonstrating that due to a lack of competence, he is presently unfit to appear or practice before the Commission. *Id.* ¶¶ 47-49.

ARGUMENT

Respondent brings his motion pursuant to Rule of Practice 250(a), which by its terms is premised on "accepting all of the non-movant's factual allegations [as] true and drawing all reasonable inferences in the non-movant's favor." 17 C.F.R. § 201.250(a); *see* Mot. at 7 (citing to and quoting from Rule 250(a)).

A. Rule 102(e) is Applicable to Respondent and the Court Should Consider his Many Failures when Auditing a Private Fund to Evaluate his Professional Conduct.

Under Rule 102(e), the "Commission may censure a person or deny, temporarily or permanently, the privilege of appearing or practicing before it in any way to any person who is found by the Commission … [t]o be lacking in character or integrity or to have engaged in unethical or improper professional conduct." Rule 102(e)(1)(ii). For purposes of this proceeding against an accountant,

> "improper professional conduct" … means … [e]ither of the following two types of negligent conduct:
>
> (1) A single instance of highly unreasonable conduct that results in a violation of applicable professional standards in circumstances in which an accountant knows, or should know, that heightened scrutiny is warranted.
>
> (2) Repeated instances of unreasonable conduct, each resulting in a violation of applicable professional standards, that indicate a lack of competence to practice before the Commission.

Rule 102(e)(1)(iv); *accord* Mot. at 17; OIP ¶ 48.

Respondent, however, argues that the Commission lacks authority to bring the present proceeding because his professional failures occurred during the course of audits of a private fund. Mot. at 8-11. According to Respondent, if his professional failures did not occur while he was "practicing before the Commission," the Commission should turn a blind eye to improper professional conduct and permit him to practice and appear before the Commission. *Id.* Respondent is mistaken.

1. Rule 102(e) proceedings protect the Commission's processes for securities regulation and serve the interests of the investing public.

As an initial matter, and as Respondent agrees, Rule 102(e) intends to "protect[] the integrity of the Commission's own processes." *Marrie v. SEC*, 374 F.3d 1196, 1200-01 (D.C. Cir. 2004) (quoted by Mot. at 8). Notably, the Commission relies on accountants to protect its processes, which, in turn, protects the investing public. *See John J. Aesoph, CPA & Darren M. Bennett, CPA*, Rel. No. 78490, 2016 WL 4176930, at *17 (Aug. 5, 2016) (the Commission adopted Rule 102(e) "to ensure the Commission's 'processes continue to be protected, and that the investing public continues to have confidence in the integrity of the financial reporting process'" and to ensure its processes, the Commission "'rel[ies] heavily on accountants to assure corporate compliance with federal securities law and disclosure of accurate and reliable financial information'") (quoting *Gregory M. Dearlove, CPA*, Exchange Act Rel. No. 57244, 2008 WL 281105, at *29 (Jan. 31, 2008), *petition denied*, 573 F.3d 801 (D.C. Cir. 2009); Amendment to Rule 102(e), 63 Fed. Reg. at 57,164, 1998 WL 729201, at *4 (Oct. 19, 1998)); *Robert W. Armstrong, III*, Exchange Act Rel. No. 51920, 2005 WL 1498425, at *48 (June 24, 2005) ("disciplining accountants pursuant to Rule 102(e) … furthers the Rule's remedial purpose of protecting the integrity of the Commission's processes"); *Touche Ross & Co. v. SEC*, 609 F.2d 570, 579 (2d Cir. 1979) (holding that Rule 102(e) serves "to preserve the integrity of [the

Commission's] own procedures, by assuring the fitness of those professionals who represent others before the Commission") (cited by Mot. at 8).

Moreover, Rule 102(e) is forward-looking and remedial in nature, as it allows the Commission to place limitations on persons practicing before the Commission in the future.[7] *See McCurdy v. SEC*, 396 F.3d 1258, 1264-65 (D.C. Cir. 2005) (holding that Rule 102(e) serves to protect the public and encourage more rigorous compliance with GAAS in the future, not to punish); *see also Brownson v. SEC*, 66 Fed. App'x 687, 688 (9th Cir. 2003) (holding that the Commission's "goal of protecting the public is remedial, not punitive") (citing *United States v. Merriam*, 108 F.3d 1162, 1165 n.3 (9th Cir. 1997)); *Meadows v. SEC*, 119 F.3d 1219, 1228 (5th Cir. 1997) (holding that an associational bar is "an appropriate remedy designed to protect the public from future misconduct").

In keeping with this appropriate use of the Rule, the Commission has previously instituted proceedings pursuant to Rule 102(e) involving auditors who were alleged to have engaged in improper professional conduct in connection with audits of private funds. *See, e.g., Wendy McNeeley, CPA*, Exchange Act Rel. No. 68341, 2012 WL 6457291 (Dec. 13, 2012), (former audit manager at Ernst & Young denied the privilege of appearing or practicing before the Commission for six months in proceeding describing audit of registered investment adviser and private equity fund); *see also, e.g., Alpha Titans LLC*, Commission Rel. No. 74828, 2015 WL 1927183 (Apr. 29, 2015) (accepting offers of settlement relating to violations arising from audit of private fund).

[7] The Commission in 1998 stated that Rule 102(e) covers "a range of conduct that demonstrates a professional is a future threat to the Commission's processes… Accountants who engage in certain specified types of negligent conduct [] can pose such a future threat." Amendment to Rule 102(e), 63 Fed. Reg. 57,166 (Oct. 26, 1998). "[T]he purpose served and the relief provided by the rule are forward-looking." *Id.* at 57,165.

Further, as Respondent acknowledges, "appearing or practicing" before the Commission is a concept that is construed broadly. *See Armstrong*, 2005 WL 1498425, at *11-*12 (reversing Initial Decision) (cited by Mot. at 10-11). For example, in *Armstrong*, an accountant who was the controller of a subsidiary of a public company argued that he not was "appearing or practicing" before the Commission in preparing the subsidiary's financial statements, as those statements were not themselves filed with the Commission. *Robert W. Armstrong III*, Rel. No. 248, 2004 WL 737067, at *15 (Apr. 6, 2004) (Initial Decision). The Commission summarily rejected this argument. *Armstrong*, 2005 WL 1498425, at *11; *see also SEC v. Prince*, 942 F. Supp. 2d 108, 145-47 (D.D.C. 2013) (holding that employee that prepared data included in a public company's filing practiced before the Commission) (cited by Mot. at 10).

The Commission has made clear that the conduct at issue in an administrative proceeding need not have occurred while the respondent was "appearing or practicing" before it. *Steven Altman, Esq.*, Exchange Act Rel. No. 63306, 2010 WL 5092725, at *15 (Nov. 10, 2010) (citing *Armstrong*), *aff'd*, *Altman v. SEC*, 666 F.3d 1322 (D.C. Cir. 2011). In *Altman*, the Commission emphasized that "appearing or practicing" should be interpreted broadly. *Id.* at *15-*16. There, the Commission found that an attorney's representation of a prospective witness in a Division investigation constituted "appearing or practicing" before the Commission. *Id.* Put simply, there is "'no requirement that a person must be appearing or practicing before the Commission at the time of the conduct on which the Commission's findings are based.'" *Id.* at *15 (quoting *Armstrong*).

Respondent's theory that the Commission is somehow prohibited from applying Rule 102(e) in situations where the respondent's underlying conduct was not itself "appearing or practicing" before the Commission is entirely inconsistent with the structure of the Rule. Indeed, Rule 102(e)(1) provides numerous bases on which the Commission may institute proceedings to

determine whether an accountant's privilege to appear or practice should be limited. For instance, such proceedings may be brought against an accountant based on conduct showing that he or she is "lacking in character or integrity" (Rule 102(e)(1)(ii)); or because he or she violated any provision of the Federal securities laws or rules (Rule 102(e)(1)(iii)). Similarly, any accountant who's license has been revoked, or who has been convicted of a crime involving moral turpitude may be suspending from appearing or practicing before the Commission, pursuant to Rule 102(e)(2). None of these subparts of Rule 102(e) explicitly state that the underlying moral turpitude, lack of character or integrity, or breaches of the securities laws must have themselves involved an accountant "appearing or practicing" before the Commission. And the Commission has not so interpreted the Rule. Respondent's attempt to engraft a further requirement on one subpart of the Rule thus should be rejected.

2. Respondent is subject to this Rule 102(e) proceeding because he appears or practices before the Commission.

Faced with this undisputed precedent, Respondent tries to sweep under the rug his repeated practice before the Commission. *See*, *e.g.*, Mot. at 10 n.5 (Respondent's "client list is *almost* exclusively private rather than public corporations") (emphasis supplied); *id.* at 11 (Respondent's "auditing practice is *almost* entirely limited to private companies like [the Fund]") (emphasis supplied). But, as pled in the OIP, Respondent does have public clients and conducts public audits (OIP ¶ 4), and has thus repeatedly and undisputedly appeared and practiced before the Commission as an accountant.[8] Respondent's own argument suggests that a relationship with

[8] Respondent's own improperly submitted evidence confirms this and suggests that Respondent has a significant public company practice. *See* Ex. A at PWC53596 (identifying Respondent as the engagement partner for five public companies between 2010 and 2014, during which time he completed 12 of their audits), PWC53606 (identifying Respondent as the quality review partner for nine public companies between 2010 and 2014, totaling 24 engagements); *but see* Answer ¶ 4 (Respondent denying that he conducts public audits).

the Commission's practices should suffice for it to exercise its authority to institute proceedings to determine if Respondent should be permitted to continue appearing and practicing before it. *Cf.* Mot. at 11 n.6 ("Absent some relationship to the SEC's practices…"). While the Division's allegations suffice at this stage and present at least "some relationship," Respondent's own materials would only appear to confirm it.

Respondent's analogy that this proceeding is akin to the Commission attempting to bar a "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" misses the mark. Mot. at 11 n.6. First, this proceeding will determine what, if any, remedial relief should be issued. Second, the Division alleges Respondent conducts public audits at an internationally recognized accounting firm and repeatedly conducted negligent audits of a private fund. This matter is not some Socratic hypothetical testing the limit of the Commission's authority.[9]

Further, Respondent's implied argument that he is beyond the scope of the Commission's authority because he purportedly does not appear or practice before the Commission *now*, is without merit. *See*, *e.g.*, Mot. at 5 (Respondent "*currently* does not audit work at all for either public or private clients") (emphasis supplied); *see also* Answer ¶ 4 ("Mr. Beamish further states that he *currently* does no audit work at all for any public or private clients.") (emphasis supplied).

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[9] Respondent's reliance on *Loving v. IRS*, 742 F.3d 1013, 1020 (D.C. Cir. 2014), is also misplaced. Mot. at 11 n.6. As with Respondent's above hyperbolic analogy, the facts in *Loving* are inapposite. In *Loving*, the D.C. Circuit considered a challenge to a new rule by the IRS promulgated in 2011 which required persons who had never before been subject to oversight by the IRS–persons who help other taxpayers prepare returns–to register with the IRS, pay a fee, attend education, and pass an exam in order to continue in their field. *Id.* at 1015. Importantly, Rule 102(e) does not establish the type of regulatory regime, nor any type of reversal of policy, which were at issue in *Loving*.

First, to the extent his claim is contrary to the Division's allegations, the Division's allegations control at this stage. OIP ¶ 4. Second, if a Respondent's choice to halt work on audits—whether public or private—prior to litigation could neuter the Commission's authority under Rule 102(e), it would be nearly impossible for the Commission to bring any Rule 102(e) action. Any potential respondent would simply assert a self-imposed "timeout," without any enforcement or testing of the merits of his assertion. Attempts to evade such processes by respondents in analogous situations have been rejected. *See, e.g., First Commodity Corp. of Boston*, 1987 WL 106851, at *6 (C.F.T.C. May 29, 1987) (argument that member should have been permitted to withdraw from exchange to escape disciplinary process rejected as it "would only encourage quick resignations and convert them into grants of immunity"). It would work an injustice to thwart the Commission's authority by such gamesmanship. Third, Respondent's entire Motion is replete with pleas that he be permitted to continue his career with PwC and continue (or resume) his public company practice; notably absent is any suggestion by Respondent that he has no intention to cease any public-company audits in the future.

A finding here that Respondent repeatedly failed to satisfy professional accounting standards—as the Division alleges—is a basis to find that Respondent is presently unfit to appear before the Commission. *See Tzemach David Netzer Korem*, Exchange Act Rel. No. 70044, 2013 WL 3864511, at *6 n.50 (July 26, 2013) (The Commission holds that "the existence of a violation raises an inference that" future violations will occur") (internal quotation omitted); *see also Mitchell T. Toland*, Rel. No. 71875, 2014 WL 1338145, at *3 n.17 (Apr. 4, 2014) (noting that the securities industry is rife with a great many opportunities for abuse and it depends heavily on the integrity of its participants) (citations and quotations omitted).[10]

[10] Indeed, in determining whether to impose a remedy here, the Court may consider: (1) the egregiousness of respondent's actions; (2) the isolated or recurrent nature of his misconduct; (3)
(continued on next page)

Although the foregoing establishes the Commission's authority to institute and pursue the present action, there are two additional factual nexuses between Respondent's audits of the Fund and the Commission's processes. First, the Fund's management company was an exempt reporting adviser ("ERA") (OIP ¶ 6) and under the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, it was required to file a Form ADV Part I with the Commission. In the Form ADV, the ERA was required to identify, among other things, the Fund's auditing firm and whether the audit report contained an unqualified opinion. It is thus not accurate to characterize Respondent's audit of a private fund in this case as somehow wholly unrelated to the Commission's processes. Second, Respondent ignores the fact that many of the Fund's investors are themselves public companies. OIP ¶ 11. Respondent makes no argument or allegation that his audit of a private fund with public investors could not implicate the Commission's processes and the investing public.

Finally, Respondent argues, incorrectly, that if he was barred, he 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." Mot. at 11.[11] To the contrary, a bar instituted at the conclusion of proceedings against an accountant from appearing or practicing before the Commission helps to preserve the integrity of the Commission's processes and protects the investing public. *John J. Aesoph, CPA & Darren M.*

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the degree of scienter involved; (4) the sincerity of any assurance against future violations; (5) his recognition of the wrongful nature of his conduct; and importantly, (6) *the likelihood of future violations*. *SEC v. Steadman*, 603 F.2d 1126, 1140 (5th Cir. 1979), *aff'd on other grounds*, 450 U.S. 91 (1981); *see also Thomas D. Melvin, CPA*, Exchange Act Rel. No. 75844, 2015 SEC LEXIS 3624, at *8 (Sept. 4, 2015) (citations omitted) (describing the *Steadman* factors to be considered when issuing remedial relief against an accountant in a Rule 102(e) proceeding).

[11] While Respondent argues against the proceeding because a bar would not "as a legal matter" prevent him from conducting audits of private entities, he nevertheless suggests it would have that practical effect. *Id.* at 11.

Bennett, CPA, Rel. No. 78490, 2016 WL 4176930, at *18 (Aug. 5, 2016). The Commission states it well: "[a]n incompetent or unethical practitioner has the ability to inflict substantial damage to the Commission's processes, and thus the investing public, and to the level of trust and confidence in our capital markets." *Id.* (quoting *McNeeley*, 2012 WL 6457291, at *19). "[W]here such individuals engage in professional misconduct which impairs the integrity of the Commission's processes, the Commission has an obligation to respond through the application of" Rule 102(e). *Id.* (quoting *McNeeley*, 2012 WL 6457291, at *19).

B. Respondent's Audit Failures in 2009 and 2010 are Timely for Consideration.

Respondent equates a remedial, forward-looking bar to a career-ending penalty subject to 28 U.S.C. § 2462's statute of limitations. Mot. at 11-16. He therefore argues that all allegations related to the 2009 and 2010 audits cannot form the basis for the OIP because those audits are outside the five-year limitations period. *Id.* Respondent's argument is without merit and also likely to be inconsequential to this proceeding.

Section 2462 would not apply to any bar issued here because it is remedial in nature. *Timbervest, LLC*, Advisers Act Rel. No. 4197, 2015 WL 5472520, at *15-*16 (Sept. 17, 2015). The terms "civil fine, penalty, or forfeiture" in Section 2462 refer to relief "imposed in a punitive way." *Meeker v. Lehigh Valley R.R. Co.*, 236 U.S. 412, 423 (1915); *see also Gabelli v. SEC*, 133 S. Ct. 1216, 1223 (2013). "[T]he test for whether a sanction is sufficiently punitive to constitute a 'penalty' within the meaning of § 2462 is an objective one, not measured from the subjective perspective of the accused (which would render virtually every sanction a penalty)." *Johnson v. SEC*, 87 F.3d 484, 488 (D.C. Cir. 1996). Thus, Section 2462's limitations period generally "applies only to penalties sought by the SEC, not its request for injunctive relief." *SEC v. Tambone*, 550 F.3d 106, 148 (1st Cir. 2008), *reh'g en banc granted, opinion withdrawn on other grounds*, 573 F.3d 54 (1st Cir. 2009), *opinion reinstated in part on reh'g*, 597 F.3d 436 (1st Cir.

2010). This is especially true when considering a bar because it is "an appropriate remedy designed to protect the public from future misconduct." *Meadows*, 119 F.3d at 1228; *accord McCurdy*, 396 F.3d at 1264-65 (Rule 102(e) serves to encourage more compliance with GAAS in the future, not to punish); *see also Meadows*, 119 F.3d at 1228 n.21 (noting that a temporary bar is not necessarily a "death knell" for a stockbroker's career); Rule 102(e)(5)(i) (providing procedure for reinstatement after a bar).

Further, Respondent's heavy reliance on *Johnson*, 87 F.3d 484, is unfounded. Mot. at 12-16. *Johnson* found that a temporary bar was punitive based on the findings of that particular case; in issuing the bar, the administrative judge based its findings on the penal nature of the relief and a lack of findings supporting the degree of risk the respondent posed to the public and demonstrating unfitness to serve the investing public. *See Meadows*, 119 F.3d at 1228 n.20 (distinguishing *Johnson* and holding that the bar before the court of appeals was not punitive, and thus the action timely, because it was issued after finding the respondent a risk to the public and unfit to serve in the securities industry); *SEC v. Quinlan*, 373 Fed. App'x 581, 587-88 (6th Cir. 2010) (distinguishing *Johnson* based on the findings in the record showing that the bar was issued as remedial, not punitive, relief and thus Section 2462 did not apply).[12] *See also Timbervest*, 2015 WL 5472520, at *15 n.71 (discussing *Johnson* and rejecting its reasoning).

The entire thrust of the present case is to protect the investing public and the Commission's processes from future harm arising from Respondent's improper and negligent professional conduct. Respondent has demonstrated his present unfitness to serve and remedial

[12] *Accord SEC v. Brown*, 740 F. Supp. 2d 148, 157 (D.D.C. 2010) (district court distinguishing *Johnson*'s binding precedent due to its specific findings that the administrative judge "focused on Johnson's wrongful conduct, and not the likelihood of future harm.") (quoting *Johnson*, 87 F.3d at 489-90). "As the Court explained, '[t]his sanction would less resemble punishment if the SEC had focused on Johnson's current competence or the degree of risk she posed to the public.'" *Id.* (quoting *Johnson*, 87 F.3d at 489).

relief may be warranted after a hearing on the merits. Respondent's focus on the past tense of his actions does not circumvent these allegations. *See Siegel v. SEC.*, 592 F.3d 147, 158 (D.C. Cir. 2010) (noting that there is no rigid rule against considering past actions "because '[i]t is difficult to imagine how *any* suspension, remedial or not, could be based on anything but past actions'") (quoting *McCurdy,* 396 F.3d at 1264). The Court should therefore hold that such potential relief is remedial in nature, obviating the application of Section 2462.

Regardless, even if it were the case that Section 2462 acted as a bar against holding Respondent accountable for negligent professional conduct during the audits of the Fund's 2009 and 2010 fiscal years, such an outcome would be of minimal consequence to this proceeding. Respondent's actions during those audits remains relevant to understanding subsequent events (especially the growing balance of "advanced" management fees), and relevant evidence should be admissible at hearing. *See generally Birkelbach v. SEC*, 751 F.3d 472, 481-82 (7th Cir. 2014) (recognizing that the Commission may consider "conduct outside the five-year time frame" in crafting a sanction because it may be pertinent to, among other things, the "possibility of future violations"); *see also Timbervest*, 2015 WL 5472520, at *15 n.71 (recognizing that a respondent's conduct outside Section's 2462 five-year limitations period "may shed light on the respondent's current competence or future risk to the public"). And because Respondent's professional shortcomings span multiple years, audits, and events undisputedly within the five-year period before this proceeding was instituted, there is ample basis to find that Respondent engaged in improper professional conduct under Rule 102(e).

C. The Division States a Proper Claim for Audit Failures and Inadequate Disclosures.

Respondent attempts to show that the Division fails to state a claim under Rule 102(e) because there was "actual disclosure" in the Fund's financial statements. Mot. at 17-18. Respondent's argument mischaracterizes the Division's allegations—and his underlying

actions—and ignores his multiple audit failures. Respondent's argument should be rejected accordingly.

Respondent did not confirm that the Fund's financial statements adequately disclosed that the Fund's management was taking "advanced" fees for years, much less in excess of the amount of fees the Fund could ever be contractually obligated to pay. *See generally* OIP §§ II(E)-(H). Respondent does not even dispute this; rather, he asserts that the "prepaid expenses were a related party transaction between the Fund and the General Partner," and the amount of these payments were "accurately disclosed" and described "as prepaid expenses receivable from the General Partner." Mot. at 18. Notably, in this argument, Respondent fails to repeat his false refrain that the financial statements disclosed the "prepaid management fees" (*see, e.g.*, Mot. at 1-2); because they never did.

Instead, Respondent seems to believe that if a number appears on a financial statement without adequate description that is an adequate disclosure. This is contrary to the two cases he cites—neither of which concern related party transactions like the case here. *See 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) (basing its finding in part on fact that the financial statements described the transactions as "advance disbursements" or "disbursements in excess of the actual expenditures," which Respondent did not do) (cited by Mot. at 17-18); *Clayton v. Landsing Pac. Fund, Inc.*, No. 01-03110, 2002 WL 1058247, at *7 (N.D. Cal. May 9, 2002), *aff'd* 56 Fed. App'x 379 (9th Cir. 2003) (rejecting claim of fraudulent concealment because transaction was discussed "in detail," again something Respondent did not do) (cited by Mot. at 18). The Division plainly states a claim for inadequate disclosure. *See generally* OIP § II(G), (H).

Respondent's failure to address in his Motion the applicable professional standards for related party transactions is telling. He simply did not adhere to them. *See, e.g.*, AU § 334

(detailing auditor responsibility regarding adequacy of disclosure, including the auditor's responsibility to ensure that the description of the related party transaction and the terms and manner of settlement were disclosed in the financial statements) (cited by OIP *passim*); ASC 850-10-50-1 (disclosures of related party transactions must include (1) the nature of the relationships involved; (2) a description of the transactions and other such information deemed necessary to an understanding of the effects of the transactions on the financial statements; and (3) the terms and manner of settlement) (cited by OIP ¶¶ 26, 27, 33). More telling, when Respondent and his audit team finally thought the Fund should disclose the growing balance of the "prepaid expenses" during the 2012 audit and suggested disclosure language describing that this balance exceeded "the expected future management fee expenses for the remaining contractual life of the fund," Respondent and his audit team immediately caved to management's resistance. OIP ¶¶ 29-30. The proposed language never saw the light of day.

Finally, Respondent's argument ignores his multiple, recurring, and highly unreasonable audit failures. *See generally* OIP §§ (F), (H). These failures alone provide a basis for a Rule 102(e) proceeding.

D. Judgment on the Pleadings Should Exclude Extra-Pleading Materials.

Despite his reliance on Rule 250(a), Respondent attached extraneous factual material to the Declaration of Thad A. Davis, filed with his Motion. *See* Ex. A (letter from Respondent's counsel sent to the Division during the underlying investigation, attaching spreadsheets identifying Respondent's engagements at PwC in 2011 through 2014).

On December 9, 2016, the Court granted in part the parties' joint request for a revised briefing schedule, noting that Respondent attached evidence to his Motion "which appears to be outside of the order instituting proceedings." Order dated Dec. 9, 2016. The Parties were then ordered to address in their respective briefing "whether and to what extent standards of Federal

Rule of Civil Procedure 12, in particular Rule 12(d), should be considered in construing Respondent's motion." *Id.*

The Court should not consider Respondent's extra-pleading material or convert the motion to one for summary disposition under Rule 250(c). The analogous Federal Rule of Civil Procedure 12(d) provides that "[i]f ... matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under [Fed. R. Civ. P.] 56." *See* Mot. at 7 n.4 (describing federal rule as "analogous"). Thus, district courts are typically afforded discretion to exclude the evidence or convert the motion to one for summary judgment. *See, e.g.*, 35A C.J.S. Fed. Civ. P. § 463 ("It is within the district court's discretion whether to accept extra-pleading matter on a motion for judgment on the pleadings and treat it as one for summary judgment or to reject it and maintain the character of the motion for judgment on the pleadings"). However, if the extra-pleading evidence is accepted and the motion is converted to one for summary judgment, the plaintiff must be provided reasonable opportunity to submit additional materials. *Id.*; *see also* Fed. R. Civ. P. 12(d) ("All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion."). Using the federal rule as an analogy, this Court should exercise its discretion to exclude the evidence at issue (Exhibit A). Alternatively, if the extra-pleading material in Exhibit A is considered, the Division should be given a "reasonable opportunity to present all the material that is pertinent to the motion." Fed. R. Civ. P. 12(d).[13]

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[13] The submitted material does not negate any of the Division's allegations in the OIP. Indeed, both describe the fact that Respondent conducts audits of both public and private entities. *Compare* OIP ¶ 4 *with* Ex. A. If, as Respondent suggests (and the Division disagrees), there were some theoretical percentage threshold of public-company auditing work that an accountant must conduct in order for Rule 102(e) to apply to his or her conduct, then the Division would expect to be afforded the reasonable opportunity to present evidence of Respondent's public-company auditing duties, including for the period 2014 through the present, before any motion for summary disposition were considered. While the Division has no reason to doubt the reliability

(continued on next page)

There is an additional reason why the Court should not consider the extra-pleading material in this motion. The Court previously ordered that if Respondent seeks to file a motion for summary disposition pursuant to Rule 250(c), he may only do so by first obtaining leave from the Court. *See* Order dated Nov. 30, 2016 ("if Respondent intends to file a motion for summary disposition under 17 C.F.R. § 201.250(c), he must seek leave to do so"). Respondent should not be permitted to conduct an end-run around this procedural requirement simply by attaching extra-pleading material to his Motion.

The Court should therefore exclude the extra-pleading material and treat the present Motion as one for judgment on the pleadings under Rule 250(a). The Court may also treat the Motion as one for summary disposition and deny it on the bases discussed above because there is sufficient authorization for this proceeding due to Respondent regularly "appearing or practicing" before the Commission. *Cf. J. Kenneth Alderman, CPA, et al.*, Rel. No. 744, 2013 WL 10967607, at *4 (Feb. 1, 2013) (Elliot, J.) (denying "motion to dismiss" and treating it as a motion for summary disposition despite failure to seek leave to file, because "the issues presented are straightforward and it is judicially efficient to decide the [motion] now rather than later").

CONCLUSION

For the foregoing reasons, the Division respectfully requests that the Court deny Respondent's Motion for Judgment on the Pleadings.

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of the summary materials, it has not obtained any evidentiary support for the representations made by counsel.

Dated: December 16, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Eric Pease, hereby certify that an original and three copies of **The Division of Enforcement's Opposition to Respondent's Motion for a More Definite Statement** were filed with the Securities and Exchange Commission, Office of the Secretary, 100 F Street, N.E., Mailstop 1090, Washington, D.C. 20549, and that a true and correct copy of the foregoing has been served by U.P.S. Delivery, marked for next day delivery on December 16, 2016, and electronic mail on the following persons entitled to notice:

Honorable Cameron Elliot
Administrative Law Judge
Securities and Exchange Commission
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Mailstop 2557
Washington, DC 20549-2557
(By U.P.S. and electronic mail to ALJ@sec.gov)

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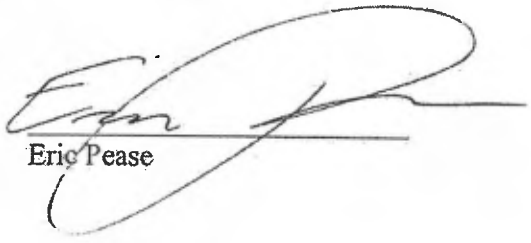

Eric Pease