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.**	**RESPONDENT ADRIAN D. BEAMISH'S REPLY TO THE DIVISION'S OPPOSITION TO RESPONDENT'S MOTION FOR JUDGMENT ON THE PLEADINGS**

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I. INTRODUCTION

Instead of addressing the serious deficiencies outlined in Respondent Adrian D. Beamish's ("Mr. Beamish") Motion for Judgment on the Pleadings, the Securities and Exchange Commission, Division of Enforcement ("Division"), taking positions unsupported by the very case law it cites, asks this Court to (1) permit an enforcement action that was never contemplated by either the terms, structure, or intent of 17 C.F.R. § 201.102(e)(1)(ii) ("Rule 102(e)(1)(ii)"), (2) penalize Respondent based on stale and time-barred allegations, and (3) sanction Respondent based on a theory that the Fund failed to disclose information that was in fact disclosed.

First, the Division's improper attempts to stretch Rule 102(e)(1)(ii) to the audits of private companies should be rejected. The Division's only support for its contention that Rule 102(e)(1)(ii) enables the Securities and Exchange Commission ("Commission") to sanction accountants for purportedly improper professional conduct in connection with work unrelated to practicing before the Commission is (1) the fact that the Commission has previously brought two such cases in which respondents did not actually challenge the Commission's jurisdiction, and (2) *dicta* in two federal cases in which the courts expressly found that the defendant *had* practiced before the the Commission. The Division's nevertheless undaunted attempts to draw a highly attenuated "factual nexus" between and among Mr. Beamish, the Burrill Life Sciences Capital Fund III, L.P. ("Fund III" or "Fund"), and the Commission's processes only further demonstrates that neither the text nor prior interpretations of Rule 102(e)(1)(ii) support such a position.

Second, the Division's allegations based on the 2009 and 2010 audits are clearly time-barred because the sanctions it seeks are penal. The Division relies weakly again on case law from other circuits that cannot, as a matter of law, end up controlling the process here and *post hoc* and unsupported efforts in its Opposition to add allegations relating to

Mr. Beamish's current fitness to practice before the Commission. These tactics do not change the fact that the relief the Division seeks cannot be remedial when it would not prevent Mr. Beamish from engaging in the precise conduct it challenges. Indeed, it would serve only to punish him through the reputational damage the Division seeks to inflict. Insofar as the Order Instituting Proceedings' ("OIP") charge that Mr. Beamish engaged in "repeated instances" of purported misconduct relies on actions outside the statute of limitations, such charge must be rejected. (OIP ¶ 48).

Third, the Division has failed to state a claim under Rule 102(e)(1)(ii) because Mr. Beamish cannot be found to have acted negligently, much less highly unreasonably, based on an allegation that he failed to ensure his audit client's financial statements disclosed information which they indisputably disclosed. The Division's allegations that the disclosures in the financial statements were inexplicably *inadequate* (though indisputably present in black and white) are insufficient as a matter of law to demonstrate that Mr. Beamish engaged in improper professional conduct within the meaning of Rule 102(e)(1)(ii). The Division's recitation of the same insufficient allegations from the OIP does not change this fact.

II. ARGUMENT

A. The Division Attempts to Stretch Rule 102(e)(1)(ii) Beyond Its Permissible Scope.

In an attempt to bring Mr. Beamish within the bounds of its authority under Rule 102(e)(1)(ii), the Division stretches the meaning of that rule beyond its widest reaches, adopting a position that is unsupported by case law and that would set a troubling precedent. The Division acknowledges that Fund III was not a publicly reporting entity whose financial statements were filed with the SEC or available to the investing public. It is beyond dispute that, in auditing the Fund, Mr. Beamish was in no way making an appearance before the Commission. The Division's claim that the Commission nonetheless has the legal authority

to define the standards for this audit work and punish Mr. Beamish for allegedly failing to satisfy such standards is without any support in the text or the law.

1. The Text of Rule 102(e) Does Not Support the Division's Interpretation.

As an initial matter, the Division's textual argument that the structure of Rule 102(e) somehow supports the Division's interpretation of the rule falls flat. Importantly, the Division fails to recognize that the sub-parts of Rule 102(e) are distinct. Each form of conduct that falls under the scope of the rule varies in its legal requirements and must therefore be considered separately in assessing the Commission's jurisdiction.

Generally, Rule 102(e)(1) provides for three circumstances in which the Commission may "censure a person or deny, temporarily or permanently, the privilege of appearing or practicing before it in any way." 17 C.F.R. § 201.102(e)(1). The Commission may act if it finds that a person (i) does not "possess the requisite qualifications to represent others," (ii) is "lacking in character or integrity or [has] engaged in unethical or improper professional conduct," or (iii) has "willfully violated, or willfully aided and abetted the violation of any provision of the Federal securities laws." *Id.* Additionally, pursuant to Rule 102(e)(2):

> Any attorney who has been suspended or disbarred by a court of the United States or of any State; or any person whose license to practice as an accountant, engineer, or other professional or expert has been revoked or suspended in any State; or any person who has been convicted of a felony or a misdemeanor involving moral turpitude shall be forthwith suspended from appearing or practicing before the Commission.

17 C.F.R. § 201.102(e)(2).

Of these four scenarios, only the sub-part at issue here, Rule 102(e)(1)(ii), requires the Commission to encroach on the territory of professional organizations and make independent determinations about a professional's substantive performance and fitness to appear before it. If the Commission acts under Rule 102(e)(2), another governing body (*e.g.*, a state bar association or a state court) has already concluded that a professional's conduct justified curtailing his or her ability to practice that profession. The Commission makes no further

determination but only states that the person "shall" also be prevented from appearing or practicing before it. 17 C.F.R. § 201.102(e)(2). Rule 102(e)(1)(i), though rarely, if ever, invoked by the Commission, would similarly appear to be a basic licensing provision. If the Commission acts under Rule 102(e)(1)(iii), it must determine whether a person has violated the federal securities laws, which again does not require a substantive assessment of the professional's compliance with accounting standards.

When the Commission acts pursuant to Rule 102(e)(1)(ii), however, it must assess whether a person is "lacking in character or integrity or [has] engaged in unethical or improper professional conduct." 17 C.F.R. § 201.102(e)(1)(ii). Rule 102(e)(1)(iv) clarifies that, for accountants, "improper professional conduct" must "result[] in a violation of applicable professional standards." 17 C.F.R. § 201.102(e)(1)(iv). In contrast with the other provisions of Rule 102(e), subsection (1)(ii) requires the Commission to assess the professional performance of an accountant practicing before it. 17 C.F.R. § 201.102(e)(1)(ii). Nothing in the text or history of the Rule suggests that the Commission was granted *carte blanche* authority to serve as a regulator of the accounting profession and evaluate the performance of any accountant, anywhere.

To the contrary, Rule 102(e)(1)(ii) is far narrower. In the 1998 release amending this component of the Rule, the Commission emphasized:

> Accountants play many roles in the Commission's system of securities regulation. One of the most significant roles is in auditing financial statements filed with the Commission. This release focuses particular attention upon the role of auditors in the securities registration and reporting processes under the federal securities laws. The amendment, however, covers all accountants who appear or practice before the Commission.

Amendment to Rule 102(e) of the Commission's Rules of Practice, 63 Fed. Reg. 57164, 57165 (Oct. 26, 1998) (codified at 17 C.F.R. pt. 201). The release went on to explain that "[c]orporate financial statements are one of the primary sources of information available to guide the decisions of the investing public," that "[i]nvestors have come to rely on the

accuracy of the financial statements of public companies," and because the Commission lacks the resources to scrutinize every financial statement, the Commission must rely on the competence of the auditors who certify such statements. *Id.* Nowhere did the Commission, in promulgating the amended Rule 102(e)(1)(ii), suggest that it has the same interest in substantively evaluating and regulating the performance of accountants outside of the public company context.

While the Commission does have an interest in protecting its processes, as the Division notes (Div. Opp'n at 9), it has no authority to go in search of purported violations of professional standards wholly outside its own turf. As discussed further below, the fact that the Division is not able to point to any cases in which a court found an action under Rule 102(e)(1)(ii) appropriate when the professional in question was not appearing or practicing before the Commission confirms this reading.

2. Relevant Precedent Does Not Support the Division's Interpretation.

Despite the Division's protestations, it is a simple truth that no court has ever upheld the application of Rule 102(e)(1)(ii) to purportedly improper professional conduct that occurred during the audit of a purely private entity. The cases cited by the Division are inapposite. *Alpha Titans LLC*, Admin. Proceeding File No. 3-16520, Order (Apr. 29, 2015), was a settled matter and therefore never adjudicated the issue. *Wendy McNeeley, CPA*, Admin. Proceeding File No. 3-13797, 105 SEC Docket 655, Order (Dec. 13, 2012) [hereinafter *McNeeley*] is a Commission opinion, not a federal court ruling. The opinion makes no mention of the scope of the Commission's authority under Rule 102(e) and nothing in the Commission's opinion suggests that the respondent challenged the applicability of the Rule.[1]

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[1] Notably, the *McNeeley* case involved the audit of both a private fund and a registered investment adviser. In Mr. Beamish's case, PricewaterhouseCoopers ("PwC") did not audit Burrill Capital Management, LLC ("BCM"), the investment adviser to Fund III.

Further, the Division fails to support its broader claim that improper professional conduct need not be connected to "appearing or practicing before the Commission" to implicate Rule 102(e)(1)(ii). *Robert W. Armstrong III*, Admin. Proceeding File No. 3-9793, 85 SEC Docket 2321, Order at 20–21 (June 24, 2005) [hereinafter *Armstrong*], does contain *dicta* (repeated in *Steven Altman, Esq.*, Admin. Proceeding File No. 3-12944, 99 SEC Docket 2744, Order at 25 (Nov. 10, 2010) [hereinafter *Altman*], both of which the Division cites) to that effect. But the Commission's ruling rested on the fact that the accountant in that case *was* "practicing before the Commission" when he prepared but did not sign a document filed with the Commission. *Armstrong* at 21.[2] Other cases cited by the Division similarly involve defendants who *were* "practicing before the Commission." *See SEC v. Prince*, 942 F. Supp. 2d 108, 145–147 (D.D.C. 2013) (applying the definition contained in Rule 102(f) and finding that "practicing before the Commission" includes "[t]he preparation of any statement, opinion or other paper filed with the Commission"); *Altman* at 25 (finding that attorney was "appearing or practicing before the Commission" by representing a witness during an SEC investigation). The Division, by pointing to Mr. Beamish's prior public company audits—audits that it does not allege were in any way improper—appears to suggest that having once practiced before the Commission brings all future (unrelated) professional conduct within the Commission's purview. (Div. Opp'n at 12–13). Yet, in all of the cases the Division cites, the defendants engaged in the allegedly improper conduct *while practicing* before the Commission.

[2] Moreover, reliance on the Commission's *dicta* in *Armstrong* is also misplaced because the matter did not involve a determination of whether the accountant engaged in improper professional conduct under Rule 102(e)(1)(ii). *Armstrong* at 1. Rather, the respondent was charged with committing securities fraud, with Rule 102(e) relief sought under subsection (iii)—indeed, the Division in that case did not appeal the ALJ's dismissal of claims under subsection (ii). *Id.* at 2, 3 n. 9. The Commission thus stated in its *dicta* only that discipline may be appropriate for individuals who were not appearing before the Commission "while committing wilful violations of the securities laws." *Id.* at 24. Again, as discussed above, Respondent here does not challenge the Commission's ability to sanction professionals who are found to violate the federal securities laws, only its authority to punish accountants based on the SEC's substantive evaluation of their professional conduct while not practicing before the Commission.

3. The Division Fails to Draw a "Factual Nexus" Between the Fund III Audits and the Commission's Own Process.

In perhaps a last-ditch effort to assert the Commission's authority over Mr. Beamish, the Division makes a half-hearted attempt to allege "factual nexuses between [Mr. Beamish's] audits of the Fund and the Commission's processes." (Div. Opp'n at 15). The fact that the Fund's management company, Burrill Capital Management, LLC ("BCM"), which Mr. Beamish crucially did *not* audit, is an exempt reporting adviser which filed a Form ADV disclosing that PricewaterhouseCoopers ("PwC") audited *the Fund* is a red herring. The ADV does not include the Fund's financial statements; to the contrary, it requests that the management company confirm that the Fund's financial statements were provided directly to the Fund's investors. Given that the management company was not required to (and did not) file financial statements with the Commission, and members of the investing public accessing the Form ADV could not obtain the Fund's financial statements (let alone the audit opinion), it is difficult to fathom how Respondent's audit of the Fund's financial statements bears any relationship to the Commission's processes.

The fact that the Fund's investors included public companies is even more tenuous and nonsensical. The Division does not even bother explaining how this relates to the Commission's processes, much less cite to any authority for the proposition that having a public company as in investor subjects a private firm's audit professionals to scrutiny under Rule 102(e)(1)(ii). The Division's reliance on such highly tenuous "factual nexus[es]" only further demonstrates that none, in fact, exist.

B. PwC's 2009 and 2010 Audits Cannot Form the Basis for Rule 102(e)(1)(ii) Enforcement Because Any Such Enforcement Constitutes Penalties Barred by the Statute of Limitations.

The Division concedes that 28 U.S.C. § 2462 ("Section 2462") prohibits it from seeking "the enforcement of any civil fine, penalty, or forfeiture" more than five years after the date when the claim first accrued, and that PwC's 2009 and 2010 audits fall outside that

period. 28 U.S.C. § 2462. However, the Division argues that Section 2462 should not apply to its allegations because the sanctions it seeks are "remedial in nature." (Div. Opp'n at 16–18). Yet the Division fails to establish how the relief it seeks will do anything more than penalize Mr. Beamish. The authority the Division cites to attempt to escape this ineluctable conclusion fares no better than with regard to Rule 102(e)(1)(ii)'s scope.

1. The Sanctions the Division Seeks Against Mr. Beamish Are "Penalties" Within the Meaning of Section 2462, Regardless of Whether the Division Has Some "Remedial" Purpose for Imposing Them.

In its Opposition, the Division argues for the first time, without any supporting allegations in its OIP, that the sanctions it seeks are "remedial in nature" because the Division's aim is to "protect the investing public and the Commission's process from future harm arising from Respondent's improper and negligent professional conduct." (Div. Opp'n at 16–17).

First, the Division's assertion that "Section 2462 would not apply to any bar issued here because it is remedial in nature" is without merit. (Div. Opp'n at 16).[3] In interpreting whether the government's imposition of a sanction is penal, "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

[3] The Division misleadingly cites to *Meeker v. Lehigh Valley R.R. Co.*, 236 U.S. 412, 423 (1915), for the proposition that that [t]he terms 'civil fine, penalty, or forfeiture' in Section 2462 refer to relief 'imposed in a punitive way." However, *Meeker* was a civil suit between two private parties. In fact, the Supreme Court in *Meeker* specifically contrasted private actions to those brought by the government in finding the action was not penal. *Id.* ("The words 'penalty or forfeiture' in this section refer to something imposed in a punitive way for an infraction of a public law, and do not include a liability imposed solely for the purpose of redressing a private injury, even though the wrongful act be a public offense, and punishable as such.") In *Gabelli v. SEC*, 133 S. Ct. 1216, 1223 (2013), also cited by the Division, the Supreme Court held that the remedy was penal precisely because it was being imposed by the government and not private plaintiffs. ("In a civil penalty action, the Government is not only a different kind of plaintiff, it seeks a different kind of relief. . . . But this case involves penalties, which go beyond compensation, are intended to punish, and label defendants wrongdoers.") The *Gabelli* decision further explained the particular fairness of strictly applying statues of limitations to the government. *Id.* at 1222. ("The SEC, for example, is not like an individual victim who relies on apparent injury to learn of a wrong. Rather, a central 'mission' of the Commission is to 'investigate potential violations of the federal securities laws.' Unlike the private party who has no reason to suspect fraud, the SEC's very purpose is to root it out, and it has many legal tools at hand to aid in that pursuit. It can demand that securities brokers and dealers submit detailed trading information. It can require investment advisers to turn over their comprehensive books and records at any time. And even without filing suit, it can subpoena any documents and witnesses it deems relevant or material to an investigation.") (internal citations omitted).

proscribed conduct, going beyond compensation of the wronged party." *Johnson v. SEC*, 87 F.3d 484, 491 (D.C. Cir. 1996). Thus, "[i]t is clearly possible for a sanction to be 'remedial' in the sense that its purpose is to protect the public, yet *not* be 'remedial' because it imposes a punishment going beyond the harm inflicted by the defendant." *Id.* at 491 n. 11 (emphasis added) (citing *In re Ruffalo*, 390 U.S. 544, 550 (1968)); *Proffitt v. F.D.I.C.*, 200 F.3d 855, 860–62 (D.C. Cir. 2000) (holding that although the defendant's "expulsion . . . from the banking industry had the dual effect of protecting the public from a dishonest banker and punishing [the defendant] for his misconduct," it was a penalty for purposes of section 2462 because "its punitive purpose plainly goes beyond compensation of the wronged party") (citations and quotations omitted).

As explained in Respondent's opening brief, the sanctions here go beyond any remedial purposes. (Resp't Mot. at 12–16). In its Opposition, the Division does not explain how censuring or denying Mr. Beamish the privilege of appearing or practicing before the Commission would in any way remedy the alleged past harm caused by Mr. Beamish's alleged wrongdoing or prevent the same purported misconduct from recurring. Because the audit of a private entity's financial statements does not constitute practicing before the Commission—a fact on which the parties agree—a suspension or bar under Rule 102(e) would pose no legal limitation on Respondent's ability to engage in the exact same conduct alleged in the OIP (*i.e.*, purportedly deficient audits of private investment funds). Absent any remedial benefit of this proceeding, the Division brazenly counts on the punitive nature of this proceeding to "protect" such investors, namely, the reputational damage that will as a practical matter preclude Mr. Beamish from working in the private fund industry, even though Rule 102(e) imposes no legal prohibition.

The Division attempts to bolster its contention that Mr. Beamish poses a present risk to the public and displays current unfitness to serve the investing public with case law that

only further demonstrates that the sanctions sought here are penalties. (Div. Opp'n at 17). In support of its argument that it need not properly plead that Mr. Beamish is a present danger, the Division cites to cases where the respondent was accused of securities law violations requiring proof of recklessness, intent or knowledge and therefore have literally no resemblance to its allegations here. *Meadows v. SEC*, 119 F.3d 1219, 1227 (5th Cir. 1997) (holding that a temporary bar imposed under Rule 10b-5 was warranted given that the defendant "engaged in a continual pattern of culpable behavior with severe recklessness and with almost no thought to those he would harm"); *SEC v. Quinlan*, 373 F. App'x 581, 587–88 (6th Cir. 2010) (holding officer and director bar was remedial where there was overwhelming evidence that the defendant posed a significant risk to the investing public, including that defendant had been criminally convicted of knowing violation of various securities law and sought to return to the investment industry upon his release from prison). Here, unlike *Meadows* and *Quinlan*, the Division does not allege that Mr. Beamish knowingly, recklessly, or intentionally violated the securities laws, but rather alleges that he engaged in "improper professional conduct." (OIP ¶¶ 47–49). Even if the Division were successful in proving all of the allegations in the OIP, it would not come close to demonstrating the risk respondents posed in *Meadows* and *Quinlan*.

The Division's argument that Respondent's reliance on *Johnson* is "unfounded" and that "Section 2462's limitations period generally 'applies only to penalties sought by the SEC, not its request for injunctive relief,'" is misplaced. (Div. Opp'n at 16–17) (citing *SEC v. Tambone*, 550 F.3d 106 (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)). The Commission has acknowledged that this enforcement action is appealable to the D.C. Circuit, and *Johnson* is the "controlling rule" for determining what "constitute[s] a penalty for purposes of Section 2462." *Timbervest, LLC*, Admin. Proceeding

File No. 3-15519, Order at 25 n. 71 (Sept. 17, 2015). For this very reason, the Commission *itself* has acknowledged (in a case that the Division cites in its opposition) that it does not always "express[] the view that Section 2462 is categorically inapplicable to bars." *Id.* The Division's unabashed disagreement with the *Johnson* court does not make its reliance on distinguishable and non-controlling precedent in First, Fifth and Sixth Circuits availing in this case.

The Division's last ditch effort to save its 2009 and 2010 allegations is to argue that such stale conduct is "relevant to understanding subsequent events" and thus that the statute of limitations should be sidestepped as "inconsequential." (Div. Opp'n at 16, 18). But this misses the point. The OIP charges Mr. Beamish with engaging in "repeated instances of unreasonable conduct." (OIP ¶ 48). Insofar as several of the "instances" on which the charge is predicated fall outside the statute of limitations, the Division cannot state a claim under this provision of Rule 102(e), and must instead establish that Respondent engaged in "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" (Rule 102(e)(1)(iv)(1))—a much higher burden for the Division to meet. As a legal matter, retaining allegations of wrongdoing outside the statute of limitations has a significant impact on the Division's burden and the Respondent's defenses and cannot simply be shirked off dismissively, as the Division attempts to do here.

C. The Division Fails to Explain How Respondent Acted Unreasonably, Much Less Highly Unreasonably, When the Financial Statements Disclosed the Information Purportedly Concealed From Investors.

The Division does not challenge that each of the Fund III financial statements at issue in this case disclosed the following facts regarding the prepaid management fees: (1) the fees were related party transactions, (2) the parties to the transactions were the Fund and the General Partner, (3) they were prepaid expenses, and (4) they were receivables due back to

the Fund from the General Partner. (Div. Opp'n at 18–20). Nor is there any dispute that the dollar amount of these payments were accurately calculated and disclosed in both the Fund's balance sheet and related party footnote. All of these concessions can be found within the four corners of the OIP itself.

As explained in Respondent's opening brief, the Division has failed to state a claim under Rule 102(e) because Mr. Beamish cannot, as a matter of law, be found to meet either of Rule 102(e)'s *scienter* requirements where there was actual disclosure of the transaction at issue. (Resp't Mot. at 17–18). The Division's Opposition fails to address this argument, merely parroting its legally insufficient allegation that the OIP "states a claim for inadequate disclosure." (Div. Opp'n at 19; OIP §§ II(E)-(H)). Notwithstanding headers in the OIP trumpeting that the Fund's "Financial Statements Failed to Disclose Fees Accurately," the OIP *itself* explains that the millions of dollars in payments to the General Partner were calculatedly correctly, disclosed in the financial statements, and accompanied by the explanation that these were related party payments from the Fund to its General Partner. (OIP § II(G)). On its face, the OIP fails to state a claim that Respondent's review of financial statements with such disclosures was unreasonable or highly unreasonable.[4]

Tellingly, the Division does not cite to a single case in its Opposition in which a court found negligence despite the fact that the financial statements actually disclosed the

[4] The Division is simply incorrect that Respondent's motion failed to address its allegation that the disclosures failed to comply with applicable professional standards. (Div. Opp'n at 19–20). As Respondent clearly stated in his motion, "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 [Generally Accepted Auditing Principles ("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." (Resp't Mot. at 3 n. 1). Respondent's motion did not explicate the multitude of ways in which the Division has tried to re-write the professional standards in this case because his response was limited to the facts asserted in the pleadings. Respondent will present evidence at trial demonstrating that his audit and the financial statements were in compliance with Generally Accepted Auditing Standards ("GAAS") and GAAP.

transaction at issue. The Division's reassertion that these actual disclosures were somehow inadequate does not save its pleading from dismissal.

D. The Record Is Incomplete and This Court Should Not Convert Respondent's Motion for Judgment on the Pleadings Into a Motion for Summary Disposition.

In its December 9, 2016 Order, this Court ordered the parties to address "whether and to what extent standards Federal Rule of Civil Procedure 12, in particular 12(d), should be considered in construing Respondent's motion." *Adrian D. Beamish*, Admin. Proceeding File No. 3-17651, Order at 1 (ALJ Dec. 9, 2016). Under Federal Rule of Civil Procedure 12(d), if a Motion for Judgment on the Pleadings presents matters outside the pleadings, the court may either exclude those matters from its determination or must treat the motion as one for summary judgment. Fed. R. Civ. P. 12(d). If the Court converts the motion to a motion for summary judgment, "all parties must be given a reasonable opportunity to present all the material that is pertinent to the motion." *Id.* Courts are provided considerable discretion in deciding whether to convert a motion. *Colbert v. Potter*, 471 F.3d 158, 164–65 (D.C. Cir. 2006). However, in using this discretion, "the reviewing court must assure itself that summary judgment treatment would be fair to both parties." *Tele-Commc'ns of Key W., Inc. v. United States*, 757 F.2d 1330, 1334 (D.C. Cir. 1985). For this reason, courts will generally decline to convert a motion to dismiss to a motion for summary judgment as premature unless the parties have been given a full opportunity to conduct discovery. *Ryan-White v. Blank*, 922 F. Supp. 2d 19, 24–25 (D.D.C. 2013); *McGowan v. Cty. of Kern*, No. 115-cv-01365 DAD, 2016 WL 2770663, at *3 (E.D. Cal. May 13, 2016).

In his Motion for Judgment on the Pleadings, Respondent referenced information that Respondent provided to the Division during its investigation. (Resp't Mot. at 5 n. 2) (citing to Exhibit A. to Declaration of Thad A. Davis). Respondent maintains that Rule 102(e)(1)(ii) is limited to allegations of unprofessional conduct in connection with an appearance before the Commission and therefore, as a matter of law, does not extend to Mr. Beamish's audit of

a private fund that does not file reports with the Commission. (Resp't Mot. at 8–11). This Court need only look to the terms and intent of Rule 102(e)(1)(ii) and the Division's OIP, which only allege wrongdoing with respect to Mr. Beamish's audit of a private fund to conclude that, as a matter of law, this enforcement action is outside the Commission's jurisdiction.

However, if the Court accepts the Division's contention that it has properly pleaded that Mr. Beamish practiced before the Commission Respondent agrees with the Division that this Court should not convert this motion to a motion for summary judgment. (Div. Opp'n at 12).

As the Division itself notes, the record on these issues is not complete. (Div. Opp'n at 21 n. 13). In its Opposition, the Division has introduced still more issues that are suitable for fact and expert testimony and Respondent respectfully submits that these issues cannot be fully considered by this Court by converting this motion. Should Respondent decide to file a Motion for Summary Disposition following the termination of fact and expert discovery, he will seek leave to do so as required under 17 C.F.R. § 201.250(c), as the parties' jointly submitted schedule (which includes discovery efforts by the parties specifically directed to these issues) reflects.[5]

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[5] The Division misleadingly cites to *Kenneth Alderman, CPA*, Admin. Proceeding File No. 3-15127, 105 SEC Docket 2508, Order (ALJ Feb. 1, 2013) [hereinafter *Alderman*] for the proposition that a court will deny a motion to dismiss and treat it as a motion for summary disposition despite respondent's failure to seek leave to file where the issues "presented are straightforward and it is judicially efficient to decide the [motion] now rather than later." (Div. Opp'n at 22). However, in *Alderman*, the court decided to "construe the Motion to Dismiss as motion for summary disposition" because the Commission's Rules of Practice at that time did not contain a provision "even remotely analogous" to the federal rules permitting the respondent to move for dismissal. *Alderman* at 4. Here, as the Division correctly notes, the amended Rules explicitly provide for such a motion. 17 C.F.R. § 201.250(a); Div. Opp'n at 8. The quotation to which the Division points was in fact the court's rationale for denying the Division leave to file a motion for summary disposition in response prior to deciding the motion. *Alderman* at 4. ("As the Division correctly notes, the Rules require my leave before filing a motion for summary disposition. However, the issues presented are straightforward and it is judicially efficient to decide the Motion to Dismiss now rather than later, so I will not deny the Motion to Dismiss on that basis.") (citations omitted).

III. CONCLUSION

For the foregoing reasons, the Respondent respectfully requests that the Court grant Respondent's Motion for Judgment on the Pleadings in its entirety. While Mr. Beamish does regret this proceeding and the consumption of the parties' resources and very much regrets that the investors experienced troubled waters, he respectfully submits that this proceeding is nevertheless a "bridge too far" for the Division and requests this action be dismissed accordingly.

Dated: December 23, 2016

Respectfully submitted,

Thad Davis /L.D.

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 23, 2016, the foregoing "Respondent Adrian D. Beamish's Reply to the Division's Opposition to Respondent's Motion for Judgment on the Pleadings" 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 hand delivery)

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 UPS)

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
(Courtesy copy by electronic mail and U.S. Postal Service)

By: _____
Lauren D. Dansey