UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-20794

In the Matter of	:	**RESPONDENTS' MOTION FOR RULING ON THE PLEADINGS**
Halpern & Associates, LLC And Barbara Halpern, CPA	:	
	:	**MAY 13, 2022**
Respondents.	:	

Pursuant to Rule 250(a) of the Rules of Practice, Respondents Halpern & Associates, LLC ("H&A") and Barbara Halpern, CPA ("Halpern") (collectively, "Respondents") respectfully submit this Motion for a Ruling on the Pleadings.

The Order Instituting Public Administrative Proceedings dated March 14, 2022 (the "OIP") fails to make any factual allegations about the 2015 and 2016 audits that could give rise to any plausible claim of improper professional conduct under Section 4C of the Securities Exchange Act of 1934 and Rule of Practice 102(e)(1)(ii). Consequently, even accepting all of the non-movant's factual allegations as true and drawing all reasonable inferences in the non-movant's favor, the Respondents are entitled to a dismissal of the OIP as a matter of law.

On April 29, 2022, the Respondents filed their Answer to the OIP.

FACTS ALLEGED CONCERNING THE 2015 AND 2016 AUDITS

The OIP "concerns the following audits for ACP X: . . . ACP X 2015 audited financials completed in March 2017, and ACP X 2016 audited financials completed in May 2018." OIP ¶ 8. H&A provided audit services to ACP X, and Halpern "was either the designated . . .

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engagement partner, or functioned as the engagement partner, for ACP X's 2015 and 2016 audits." *Id.*

Despite alleging that the OIP concerns the 2015 and 2016 audits, the OIP alleges no specific facts tending to show that the Respondents engaged in improper professional conduct with respect to those audits.

Instead, the OIP makes detailed but irrelevant allegations about the 2010 audit (Paragraphs 10 and 11); the 2011, 2012, and 2013 audits (Paragraph 15); and the 2014 audit (Paragraphs 10, 12, and 16). Any claims that Respondents engaged in improper professional conduct with respect to the 2010, 2011, 2012, 2013, and 2014 audits, however, were well beyond the five-year statute of limitations, 28 U.S.C. § 2462, for each of these audits when the OIP issued on March 14, 2022. As a result, the allegations about these old audits are immaterial and cannot be bootstrapped into a claim of improper professional conduct with respect to the 2015 and 2016 audits. Nevertheless, the OIP attempts to do precisely that.

The only allegations about the 2015 and 2016 audits are:

> 10. For the 2014, 2015, and 2016 audit years, Halpern and other H&A accountants expressed concern to Allen regarding the grossly inflated estimated revenue projections Allen was using to arrive at his valuation of Holdings.
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> * * *
>
> 13. Despite knowing that the estimated revenue being used in the FVA had not come close to being met in prior years or would likely not be met, Halpern nevertheless approved the issuance of the audits for years 2015 (which was issued in March 2017), and 2016 (which was issued in May 2018). Each year, Halpern and H&A raised getting an independent valuation with Allen who refused each year.
>
> 14. Halpern was also aware of inconsistencies in the formula Allen was using in the FVA provided to H&A each audit year.
>
> * * *

16. For the 2014, 2015, and 2016 audit years, there were similar inconsistencies in the formulas used in the FVA. Despite knowing that the formula used in the FVA used inconsistent metrics, Halpern nevertheless approved the issuance of the audits for years 2014, 2015, and 2016.

None of these allegations state on their face that Respondents engaged in improper professional conduct. In fact, none of these allegations state that there was anything inaccurate or misleading in the valuations contained in the 2015 or 2016 audits.

In Paragraphs 18-21, under the heading of "Violations," the OIP cites several accounting and auditing standards and makes conclusory allegations, without alleging specific facts, that Respondents failed to adhere to such standards. In Paragraph 20, the OIP alleges that "those failures occurred in the most critical areas of the audit—the valuation of portfolio assets." Once again, however, none of these allegations state that there was anything inaccurate or misleading in the valuations contained in the 2015 or 2016 audits.

ARGUMENT

I. THE OIP FAILS TO STATE IMPROPER PROFESSIONAL CONDUCT AS A MATTER OF LAW

A. Legal Standards

1. Equivalent Motions

Rule 250(a) provides that "[n]o later than 14 days after a respondent's answer has been filed, any party may move for a ruling on the pleadings on one or more claims or defenses, asserting that, even accepting all of the non-movant's factual allegations as true and drawing all reasonable inferences in the non-movant's favor, the movant is entitled to a ruling as a matter of law."

Thus, a motion for a ruling on the pleadings pursuant to Rule 250(a) is equivalent to a motion for judgment on the pleadings under Rule 12(c) of the Federal Rules of Civil Procedure,

which provides that "[a]fter the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings." *Arista Recs. LLC v. Lime Grp. LLC*, No. 06 CV 5936 KMW, 2011 WL 1793310, at *1 (S.D.N.Y. Mar. 14, 2011).

A Rule 12(c) motion for judgment on the pleadings is equivalent to a motion to dismiss for failure to state a claim upon which relief can be granted under Rule 12(b)(6) of the Federal Rules of Civil Procedure. *Lynch v. City of New York*, 952 F.3d 67, 75 (2d Cir. 2020). The difference between a 12(b)(6) motion and a 12(c) motion is timing: a 12(b)(6) motion must be made before filing a pleading, and a 12(c) motion must be made after the pleadings are closed. Aside from timing, the standards for the two motions are the same. *Patel v. Contemp. Classics of Beverly Hills*, 259 F.3d 123, 126 (2d Cir. 2001). Thus, aside from timing, a Rule 250(a) motion is equivalent to a Fed. R. Civ. P. 12(b)(6) motion and the standards of review are the same for the two motions. *In the Matter of Erhc Energy, Inc. & Iddriven Inc.,* S.E.C. Release No. 90517 (Nov. 24, 2020).

2. Motion to Dismiss Standards

In 2007, the United States Supreme Court raised the level required for alleging claims. To survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6), a plaintiff must state a claim for relief that is plausible on its face. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). A plaintiff's "[f]actual allegations must be enough to raise a right to relief above the speculative level on the assumption that all of the complaint's allegations are true." Id. at 545.

A claim is facially plausible if "the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer

possibility that a defendant has acted unlawfully." *Ashcroft v. Iqbal*, 566 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (internal citations omitted). While Rule 8 does not require "detailed factual allegations," a pleading that "offers labels and conclusions or formulaic recitation of the elements of a cause of action will not do . . . . Nor does a complaint suffice if it tenders naked assertion[s] devoid of further factual enhancement." *Id.* (internal quotations omitted).

"In *Iqbal*, the Supreme Court suggested a 'two-pronged approach' to evaluate the sufficiency of a complaint. . . . A court 'can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth.' . . . At the second step, a court should determine whether the 'well-pleaded factual allegations,' assumed to be true, 'plausibly give rise to an entitlement to relief.'" *Hayden v. Paterson*, 594 F.3d 150, 161 (2d Cir. 2010) (quoting *Iqbal*, 556 U.S. at 679) (citations omitted).

In determining whether the plaintiff has met this standard, the Court must accept the allegations in the complaint as true and draw all reasonable inferences in the light most favorable to the non-moving party. *Schupak Group, Inc. v. Travelers Cas. & Sur. Co. of Am.*, 425 F. App'x 23, 24 (2d Cir. 2011).

B. The OIP Fails to State a Claim of Improper Professional Conduct Regarding the 2015 or 2016 Audits

The sparse factual allegations of the OIP, even if true, do not plausibly give rise to a finding or ruling of improper professional conduct.

Taking the two-pronged approach of *Iqbal*, Paragraphs 18-21 contain labels and conclusions lacking factual content. Paragraph 17 simply summarizes and quotes Exchange Act § 4C(a)(2) and Rule 102(e)(1)(ii). Paragraph 22 simply states a conclusion that "Halpern's

improper professional conduct may be attributed to H&A." Consequently, nothing in the entire Violations section is entitled to the presumption of truth.

The allegations in the Factual Allegations section, while slightly more detailed, similarly fail to allege a plausible claim of improper professional conduct. Paragraph 10 alleges:

> 10. For the 2014, 2015, and 2016 audit years, Halpern and other H&A accountants expressed concern to Allen regarding the grossly inflated estimated revenue projections Allen was using to arrive at his valuation of Holdings.

Expressing concern to the client regarding revenue projections is precisely what an auditor is supposed to do and, therefore, does not establish a plausible claim of improper professional conduct. As explained above, the reference to the 2014 audit is immaterial as time-barred.

Paragraph 13 sheds no further light on the plausibility of the SEC's claim. It reads as follows:

> 13. Despite knowing that the estimated revenue being used in the FVA had not come close to being met in prior years or would likely not be met, Halpern nevertheless approved the issuance of the audits for years 2015 (which was issued in March 2017), and 2016 (which was issued in May 2018). Each year, Halpern and H&A raised getting an independent valuation with Allen who refused each year.

The first sentence of Paragraph 13 does not allege that estimated revenue used in FVAs in previous years was a factor in approving the 2015 and 2016 audits or, if it was, that it was the sole factor in approving the 2015 and 2016 audits. The second sentence of Paragraph 13 states "[e]ach year" without specifying which years. To the extent it refers to audit years other than 2015 and 2016, it is an immaterial and time-barred allegation. Furthermore, like the allegation in Paragraph 10, suggesting the use of an independent valuation cannot be the basis for a plausible claim of improper professional conduct.

Paragraph 14 alleges that "Halpern was also aware of inconsistencies in the formula Allen was using in the FVA provided to H&A each audit year." Being aware of

inconsistencies in the FVA formula, however, does not demonstrate a plausible claim of improper professional conduct. "Inconsistencies" from year to year could be the result of refinement and improvement. The bald statement of awareness of inconsistencies, therefore, adds nothing to a claim of improper professional conduct.

Finally, Paragraph 16 alleges as follows:

> 16. For the 2014, 2015, and 2016 audit years, there were similar inconsistencies in the formulas used in the FVA. Despite knowing that the formula used in the FVA used inconsistent metrics, Halpern nevertheless approved the issuance of the audits for years 2014, 2015, and 2016.

Paragraph 16 simply says the same thing as Paragraph 14 and applies the general statement of Paragraph 14 to the 2015 and 2016 audits. As explained above, the reference to the 2014 audit is immaterial as time-barred. As a result, Paragraph 16 does not allege a plausible claim of improper professional conduct for the same reasons Paragraph 14 does not.

Thus, Paragraphs 10, 13, 14, and 16, taken together, allege at most that Respondents expressed concern to their client regarding revenue projections, that estimated revenues in FVAs for years before 2015 were not subsequently achieved, that Respondents suggested an independent valuation, and that there were inconsistencies in the FVA formulas over the years. These allegations merely recite the usual back-and-forth between auditor and client and fail to come close to alleging improper professional conduct.

After these few factual allegations, Paragraph 21 in the Violations section alleges that the Respondents "engaged in improper professional conduct by engaging in at least a single instance of highly unreasonable or, at a minimum, repeated instances of unreasonable conduct within the meaning of Rule 102(e)(1)(iv)(B)." There is no allegation, however, identifying any conduct claimed to be "highly unreasonable conduct." Moreover, Paragraphs 18, 19, and 20 attempt to make it seem there were "repeated instances of unreasonable conduct" but really allege the same

conduct regarding the valuation of ACP X's portfolio assets. Furthermore, the OIP's factual allegations fail to state a plausible claim that the Respondents lack competence to practice before the Commission. Thus, the OIP fails to allege the elements of "improper professional conduct" within the meaning of Rule 102(e)(1)(iv)(B).

Most importantly, there is no allegation that any of these actions by or knowledge on the part of the Respondents somehow resulted in approval of an ACP X financial statement that was inaccurate, defective, or misleading or that somehow harmed any of the investors in ACP X, a nonpublic limited partnership. The lack of an allegation that Respondents' work or approval of the 2015 and 2016 audits contributed to or resulted in inaccurate, defective, or misleading financial statements that harmed any ACP X investor is fatal to a claim of improper professional conduct under Exchange Act § 4C and Rule 102(e). In other words, if the ACP X financial statements for 2015 and 2016 were not inaccurate, defective, or misleading and did not harm any ACP X investors, then there is no plausible claim of improper professional conduct by Respondents.

CONCLUSION

For the foregoing reasons, a ruling on the pleadings should be entered in Respondents' favor as a matter of law, and the OIP and this proceeding should be dismissed.

Dated: May 13, 2022

RESPONDENTS,
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AND BARBARA HALPERN, CPA

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was electronically delivered, pursuant to the parties' agreement to waive paper service and to accept service by email, on May 13, 2022 to:

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