UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE DIVISION

ADMINISTRATIVE PROCEEDING
File No. 3-20794

In the Matter of	:	
	:	
Halpern & Associates, LLC	:	**JUNE 17, 2022**
And Barbara Halpern, CPA	:	
	:	
Respondents.	:	

RESPONDENTS' MOTION TO STRIKE
AND MEMORANDUM OF LAW
IN SUPPORT OF THE MOTION TO STRIKE

Pursuant to Rule 152(f) of the Rules of Practice and Rule 12(f) of the Federal Rules of Civil Procedure, Respondents Halpern & Associates, LLC ("H&A") and Barbara Halpern, CPA ("Halpern") (collectively, "Respondents") respectfully move to strike portions of the Order Instituting Public Administrative Proceedings (the "OIP") dated March 14, 2022 and of the Division of Enforcement's (the "Division") Opposition to Respondents' Motion for Judgment [*sic*] on the Pleadings dated June 3, 2022 (the "Opposition" or "Opp.").

The Division attempts to smear Respondents' character and reputation in the OIP and the Opposition. Consequently, Respondents request that all citations and discussions in the OIP and Opposition pertaining to the prior unrelated administrative proceeding involving Respondents be stricken because they serve no legitimate purpose and are irrelevant, immaterial, impertinent, scandalous, and unfairly prejudicial to the Respondents.

Additionally, Respondents respectfully request that after resolution of this Motion to Strike, a new hearing officer be appointed to address the Respondents' Motion for Ruling on the

Pleadings dated May 13, 2022 and to preside over the proceeding on the grounds that addressing this Motion to Strike will unfairly influence and prejudice future decisions.

MEMORANDUM OF LAW

I. BACKGROUND

On May 13, 2022, Respondents filed its Motion for Ruling on the Pleadings contending that the OIP failed to state a plausible claim for improper professional conduct.

On June 3, 2022, the Division filed its Opposition. On page 5 of the Opposition, the Division quoted from and cited to a previous, unrelated decision against Respondents, *In the Matter of Halpern & Associates, LLC,* Rel. No. 939, 2016 WL 64862 (Jan. 5, 2016) (the "2016 decision"). Such a citation was needless because the essence of the quotation appeared immediately before in the Division's discussion of the "highly unreasonable standard" under Rule 102(e)(1)(iv)(B)(1). Also, the Division surely could have found authority for the same proposition and for the proposition in the sentence following the citation in countless other decisions.

The Division then compounded the prejudice of citing the 2016 decision by stating in its footnote 2 on pages 5-6:

> Respondents have been previously found to have been highly unreasonable in committing violations of GAAS. H&A was censured, and Halpern received a one year suspension from practicing before the Commission. *Id.* at *23, 34-35. The prior matter dealt with whether, in conducting a faulty audit, Respondents caused a registered entity to violate its net capital requirements.

The Division does not point out that the conduct that was the subject of the 2016 decision pertained to an H&A client unrelated to the ones involved in the present proceeding.

The Division referenced this unrelated 2016 decision two more times on pages 7 and 9 of the Opposition.

While there is an allusion to the 2016 decision in Paragraph 3 of the OIP, there is no further mention of it in the OIP or any connection made between the present allegations and the 2016 decision.

II. ARGUMENT

A. Legal Standards for Motion to Strike

Rule 152(f) states that "[a]ny scandalous or impertinent matter contained in any brief or pleading or in connection with any oral presentation in a proceeding may be stricken on order of the Commission or the hearing officer."

Rule 152(f) is:

> mirrored, in part, by Rule 12(f) of the Federal Rules of Civil Procedure. In the federal court context, scandalous material unnecessarily reflects on the moral character of an individual, such as a party or other person, or contains repulsive language that detracts from the dignity of the court. Impertinent matter consists of statements that do not pertain, and are not necessary, to the issues in question.

In the Matter of Christopher M. Gibson, Release No. 1398, 2-3 (Mar. 24, 2020).

Rule 152(f) permits the hearing officer to strike "matter which 'improperly casts a derogatory light on someone, usually a party to the action,' as well as matter that is 'not responsive or relevant to the issues involved.'" *In the Matter of Egan-Jones Ratings Co. & Sean Egan*, Release No. APR-712, at *2 (July 13, 2012).

Pursuant to Fed. R. Civ. P. 12(f), the court "may strike from a pleading . . . any redundant, immaterial, impertinent, or scandalous matter." Although "allegations in a complaint which supply background or historical material or which are of an evidentiary quality will not be stricken," they may be if they are "unduly prejudicial to defendant." *Fuchs Sugars & Syrups,*

Inc. v. Amstar Corp., 402 F. Supp. 636, 637-38 (S.D.N.Y. 1975). An "'[i]mmaterial' matter is that which has no essential or important relationship to the claim for relief, and 'impertinent' material consists of statements that do not pertain to, and are not necessary to resolve, the disputed issues." *In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig.,* 402 F. Supp. 2d 434, 436 (S.D.N.Y. 2005). "A scandalous allegation is one that reflects unnecessarily on the defendant's moral character, or uses repulsive language that detracts from the dignity of the court." *Cabble v. Rollieson,* No. 04–CV–9413, 2006 WL 464078, at *11 (S.D.N.Y. Feb. 27, 2006). The movant of a motion to strike "should show that he will be prejudiced if the attacked allegations are left in the pleading." *Maschmeijer v. Ingram*, 97 F. Supp. 639, 641 (S.D.N.Y. 1951).

B. Legal Standards Regarding Admissibility of Evidence

Rule 320(a) provides that "the Commission or the hearing officer may receive relevant evidence and shall exclude all evidence that is irrelevant, immaterial, unduly repetitious, or unreliable." The Commission looks to the Federal Rules of Evidence for guidance on evidentiary issues. *See, e.g., In the Matter of Miguel A. Ferrer & Carlos J. Ortiz*, Release No. APR-730, at *3 n. 1 (Nov. 2, 2012).

Federal Rules of Evidence 401 provides that evidence is relevant if it "has any tendency to make a fact more or less probable than it would be without the evidence" and "the fact is of consequence in determining the action." Conversely, "irrelevant evidence is not admissible." Fed. R. Evid. 402.

Even if evidence is relevant, the court may exclude it "if its probative value is substantially outweighed by the danger of . . . unfair prejudice . . . ." Fed. R. Evid. 403. "'Unfair prejudice' within [the] context [of Rule 403] means an undue tendency to suggest decision on an

improper basis, commonly, though not necessarily, an emotional one." Fed. R. Evid. 403, Advisory Committee Notes.

Finally, evidence of a "person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait." Fed. R. Evid. 404(a)(1).

C. THE DIVISION'S CITATION AND DISCUSSION OF THE 2016 DECISION INVOLVING RESPONDENTS IS IMMATERIAL, SCANDALOUS, AND IRRELEVANT TO THE PRESENT PROCEEDING

The Division first alluded to the 2016 decision unnecessarily in Paragraph 3 of the OIP. Then, it compounded the unfair prejudice to the Respondents by unnecessarily citing to it three times in the Opposition and describing its holding against the Respondents in footnote 2.

The Division had no legitimate purpose for any of these references and citations. The facts described in Paragraph 3 of the OIP and footnote 2 of the Opposition have absolutely no relevance to the current proceeding, and the Division did not even make a pretense of a connection between the two matters in the OIP or the Opposition. The mere, repeated mention of the 2016 decision, however, impugns the Respondents' character in an obvious attempt to prove that they must have engaged in improper professional conduct with respect to the ACP X audits at issue here because they were found to have done so with respect to unrelated audits for unrelated clients in the 2016 decision, all in contravention of Fed. R. Evid. 404(a)(1).

Additionally, there was no need to cite to the 2016 decision simply for legal principles, which the Division could have found in many other decisions. Also, citing to the 2016 decision has the additional problem of inviting the hearing officer to read the decision and learn even more about the facts than appears in footnote 2.

Under these circumstances, there is a high likelihood that any hearing officer reading the OIP or the Opposition will be prone to viewing Respondents adversely because they naturally will associate the Respondents' conduct in the 2016 decision with the allegations in the present OIP.

Given that the Division made no connection between the 2016 decision and this proceeding, these references to the 2016 decision appear to violate Rule 3.4(d)(1) of the New York Rules of Professional Conduct, which mandates that a "lawyer shall not . . . in appearing before a tribunal on behalf of a client: (1) state or allude to any matter that the lawyer does not reasonably believe is relevant . . . ." In essence, the discussions of and citations to the 2016 decision serve no legitimate, substantive purpose in the OIP or the Opposition. Rather, it seems that the sole purpose was to smear the Respondents by inviting the hearing officer to draw inferences adverse to the Respondents from the 2016 decision and apply them to the present OIP and proceeding.

Consequently, none of the references to the 2016 decision in the OIP and the Opposition are admissible under Rule 320(a) and under Rules 401, 402, 403, and 404(a)(1) of the Federal Rules of Evidence and should be stricken under Rule 152(f) and Fed. R. Civ. P. 12(f) on the grounds that they are irrelevant, immaterial, impertinent, scandalous, and unfairly prejudicial to the Respondents.

Once all references to the 2016 decision are ordered stricken from the OIP and the Opposition, the Division should be directed to file replacements for the OIP and the Opposition with redactions of such references. Moreover, a new hearing officer should be appointed to rule on the Respondents' Motion for Ruling on the Pleadings dated May 13, 2022 and to continue presiding over the proceeding. After all, the hearing officer who rules on this Motion to Strike

will necessarily be influenced by the references to the 2016 decision in making other decisions, and the Respondents are entitled to a hearing officer whose judgment is not so influenced. As the sayings go, you can't unring a bell or put a genie back in the bottle.

CONCLUSION

For the foregoing reasons, the references to the 2016 decision should be stricken from the OIP and the Opposition, and the Division should be directed to revise the OIP and the Opposition to remove all such references. Then, a new hearing officer should be appointed to rule on the Respondents' Motion for Ruling on the Pleadings dated May 13, 2022 and to continue presiding over the proceeding.

Dated: June 17, 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 June 17, 2022 to:

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