UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-20794

In the Matter of	:	**RESPONDENTS' REPLY**
	:	**MEMORANDUM IN FURTHER**
Halpern & Associates, LLC	:	**SUPPORT OF THEIR MOTION FOR**
And Barbara Halpern, CPA	:	**RULING ON THE PLEADINGS**
	:	
Respondents.	:	
		JUNE 17, 2022

Pursuant to Rule 250(f) of the Rules of Practice, Respondents Halpern & Associates, LLC ("H&A") and Barbara Halpern, CPA ("Halpern") (collectively, "Respondents") respectfully submit this reply memorandum in further support of their Motion for a Ruling on the Pleadings dated May 13, 2022 (the "Motion") and in response to the Division of Enforcement's (the "Division") opposition dated June 3, 2022 (the "Opposition" or "Opp."). By Order dated May 26, 2022, the Respondents' deadline to file this reply was extended to June 17, 2022.

The Division's Opposition shows it is grasping at straws to come up with a plausible claim. The Opposition does not counter the Respondents' argument that the Order Instituting Public Administrative Proceedings dated March 14, 2022 (the "OIP") fails to state all the essential elements of a negligence claim. Moreover, the Division dredges up and focuses on irrelevant matters to compensate for its lack of factual allegations. This questionable tactic cannot hide the OIP's failure to state a plausible claim of improper professional conduct against the Respondents.

ARGUMENT

I. THE OIP FAILS TO STATE A PLAUSIBLE CLAIM OF "UNREASONABLE CONDUCT" OR "HIGHLY UNREASONABLE CONDUCT" ON THE PART OF RESPONDENTS BECAUSE IT LACKS ALLEGATIONS OF HARM CAUSED BY THE 2015 AND 2016 AUDITS, CAUSATION, AND BREACH OF DUTY

Paragraph 17 of the OIP alleges that the Respondents engaged in "improper professional conduct" under Rule 102(e)(1)(ii), which, in turn, is defined in Rule 102(e)(1)(iv)(B) to mean for accountants "[e]ither of the following two types of **negligent conduct** . . . ." Emphasis added. The two types of negligent conduct are "highly unreasonable conduct" and "unreasonable conduct." Rule 102(e)(1)(iv)(B)(1) and (2).

On page 5 of the Opposition, the Division relies on the *Amendment to Rule 102(e) of the Commission's Rules of Practice*, Securities Act Release No. 7593 (Oct. 19, 1998) (the Rule 102(e) Release"), for the definition of "highly unreasonable conduct" and "unreasonable conduct" within the meaning of Rule 102(e)(1)(iv)(B)(1) and (2). The Rule 102(e) Release defines "unreasonable" as "an ordinary or simple negligence standard" and defines "highly reasonable" as "an intermediate standard, higher than ordinary negligence but lower than the traditional definition of recklessness." It is clear from Rule 102(e)(1)(iv)(B) that both "highly unreasonable conduct" and "unreasonable conduct" describe different degrees of negligent conduct.

Accordingly, in order to allege a plausible claim that the Respondents engaged in "improper professional conduct" under Rule 102(e)(1)(ii), the OIP must allege all the elements of negligence.

In Connecticut, where the Respondents practice and performed the 2015 and 2016 audits, "[a] cause of action in negligence is comprised of four elements: duty; breach of that duty;

causation; **and actual injury**." *Ruiz v. Victory Properties, LLC*, 315 Conn. 320, 328 (2015) (emphasis added).[1]

On page 8 of the Respondents' Motion, we argued: "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."

On pages 9-10 of the Opposition, the Division argued that harm to the investors is irrelevant because "Respondents are not charged with causing the fraud perpetrated by Allen. The relevant question is whether Respondents acted highly unreasonably or unreasonably in conducting the audits of ACP X."

The Division missed the Respondents' point. The Respondents did not say that the OIP needed to allege their work on the 2015 and 2016 audits caused "the fraud perpetrated by Allen." Rather, the Respondents argued that the OIP fails to allege any harm whatsoever to the ACP X investors and, as a result, fails to allege an essential element of a negligence claim and, *a fortiori*, of "improper professional conduct," which, as explained above, is defined as "negligent conduct."

[1] It is not necessary at this point to determine whether Connecticut or New York law controls because the essential elements of negligence are the same in both states. *See, e.g., Pasternack v. Lab'y Corp. of Am. Holdings*, 27 N.Y.3d 817, 825 (2016) ("In order to prevail on a negligence claim, 'a plaintiff must demonstrate (1) a duty owed by the defendant to the plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom' . . . .").

In other words, the Respondents agree with the Division's statement that "[t]he relevant question is whether Respondents acted highly unreasonably or unreasonably in conducting the audits of ACP X." The Division, however, in stating that the lack of an allegation of harm is irrelevant, fails to recognize that to allege a plausible claim of "highly unreasonable conduct" and "unreasonable conduct," the OIP must allege some harm to the investors proximately caused by the Respondents as essential elements of a negligence claim, whether related to Allen's conduct or not. Because the OIP fails to allege harm, then, as in basketball, no harm, no foul.

The other prong to Respondents' argument on page 8 of their Motion is that the OIP does not allege that any conduct of the Respondents "resulted in approval of an ACP X financial statement that was inaccurate, defective, or misleading." The Division does not contest this argument. Thus, the OIP does not allege another essential element of a negligence claim, namely, that the Respondents breached a duty.

Additionally, there is no allegation in the OIP stating what the true valuation of ACP X's stock in NYPPEX Holdings, LLC was or should have been for the 2015 and 2016 audits. Even in discussing the valuation of $.76 per share for the irrelevant 2014 audit in OIP ¶ 12, the OIP does not allege that that valuation was inaccurate or what the true valuation was. Without any allegations about the accuracy of the valuations for the 2015 and 2016 audits and what the true valuations were, the OIP fails to state a plausible claim for improper professional conduct.

In sum, the OIP does not allege three of the essential elements of a negligence claim, namely, breach of duty, causation, and harm. As a result, the OIP fails to state a plausible claim for improper professional conduct.

II. REFERENCES AND ALLUSIONS TO IRRELEVANT MATTERS DO NOT STATE A PLAUSIBLE CLAIM AGAINST RESPONDENTS

A. Laurence Allen

On pages 2, 4, and 10 of its Opposition, the Division harps on its allegation in Paragraph 1 and footnote 3 of the OIP that Laurence Allen was found to have invested ACP X funds in NYPPEX Holdings, LLC and made distributions to himself of carried interest. There are no allegations in the OIP, however, that Respondents were involved in such conduct by Allen, that his conduct affected the valuation of ACP X, that his conduct even occurred during 2015 or 2016 (the audit years at issue here), or that his actions are the basis for the charge of improper professional conduct.

On the contrary, the Division keeps repeating that the improper professional conduct it is trying to allege is based on Allen's failure to follow the Respondents' suggestion of obtaining an independent valuation, changes in the valuation formula, and valuations that were "not in line with the actual revenues of the company, other trends in the marker, or H&A's own analysis." Opp. 3, 6, 7, 8, 9.

Consequently, it is ridiculous for the Division to state that "Respondents' motion is devoid of any mention that the OIP specifically alleges that there has already been a finding in New York State" about Allen's conduct. Opp. 4. Needless to say, Respondents did not mention his conduct because it has nothing to do with the claim of improper professional conduct asserted against the Respondents and, therefore, should not have even been alleged in the OIP. In fact, the Division admits that "Respondents are not charged with causing the fraud perpetrated by Allen." Opp. 10. Then, if that is the case, there was no reason to make any allegations about Allen's conduct in the OIP, and the Division's insistence on repeating these irrelevant allegations

in its Opposition can only be viewed as an attempt to besmirch the Respondents with immaterial, inflammatory, and unfairly prejudicial material.

Such a tactic is highly questionable and would appear to violate Rule 3.4(d)(1) of the New York Rules of Professional Conduct ("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 . . . .").

B. References to Another Proceeding

In footnote 2 on pages 5-6 of the Opposition, the Division describes a previous proceeding against the Respondents that has nothing to do with this proceeding. This footnote and the Division's repeated citation to the decision in that proceeding for legal principles that it could have easily found in many other decisions, Opp. 5, 7, 9, show yet again the Division's propensity for stigmatizing the Respondents in an attempt to bolster its weak case.

The Respondents are moving separately to strike footnote 2 and the citations to the earlier proceeding.

III. IMMATERIAL ALLEGATIONS OF FACT DO NOT STATE A PLAUSIBLE CLAIM OF IMPROPER PROFESSIONAL CONDUCT

The Division makes several factual allegations that are immaterial and, as a result, do not provide a basis for a claim of improper professional conduct, no matter how many times the Division repeats them.

The Division points out that the OIP alleges that Respondents requested that Allen obtain "an independent evaluation of the value of Holdings." Opp. 3, 6, 9. Nowhere does the OIP allege, however, that GAAS required an independent valuation of ACP X for purposes of the 2015 and 2016 audits. As a result, the fact that Allen did not obtain an independent valuation is immaterial as to the propriety of the Respondents' professional conduct. Moreover, the

Division's reliance on this allegation is perplexing. Basically, it is condemning the Respondents for recommending an independent valuation that was not required and then blaming the Respondents when their client declined to take a step that was suggested but not required.

Another allegation that the Division keeps repeating is that the Fair Valuation Analyses ("FVA") that Allen provided for the 2015 and 2016 audits were "'not in line with the actual revenues of the company, other trends in the market, or H&A's own analysis.'" Opp. 3, 6, 7, 8, 9 (quoting OIP ¶ 19). This appears to be the OIP's primary factual allegation. Yet, the only basis for this allegation that the OIP provides is that revenues for 2011 did not reach the figure projected in the 2010 audit. OIP ¶ 11. The OIP, without alleging the failure to achieve revenues projected in any other FVA for any other specific year, then takes a dramatic leap of five and six years to make the conclusory allegation that "[d]espite 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 . . . and 2016 . . . ." Opp. ¶ 13.

Additionally, the allegation in Paragraph 19 that the 2015 and 2016 audits were "not in line with . . ." is vague and indefinite and lacks any meaning.

Clearly, the allegation that the FVAs for the 2015 and 2016 audits "were not in line with the actual revenues of the company, other trends in the market [whatever that means], or H&A's own analysis" lacks any factual bases and, consequently, does not support a plausible claim for improper professional conduct.

CONCLUSION

For the foregoing reasons and for the reasons presented in the Motion, 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: June 17, 2022

RESPONDENTS,
HALPERN & ASSOCIATES, LLC
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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