UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-20794

In the Matter of	:
	:
Halpern & Associates, LLC	:
and Barbara Halpern, CPA	:
	:
Respondents.	:
	:

DIVISION OF ENFORCEMENT'S PARTIAL OPPOSITION TO RESPONDENTS' MOTION TO STRIKE

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The Division of Enforcement ("Division") of the Securities and Exchange Commission ("Commission") respectfully submits this opposition to Halpern & Associates, LLC ("H&A") and Barbara Halpern's ("Halpern" and collectively "Respondents") June 17, 2022 Motion to Strike ("the Motion").[1] The Order Instituting Proceedings ("OIP") (instituted pursuant to Rule 102(e)(1)(ii) of the Commission's Rules of Practice) alleges that Respondents (an accounting firm and its managing member) failed to live up to their obligations, both procedurally and substantively, in conducting the 2015 and 2016 audits of ACP X, LLP ("ACP X"), a private equity fund. The pending motion requests: (1) that portions of the OIP referencing the fact that Respondents are recidivists and previously lost a litigated administrative proceeding regarding a failed audit of a broker-dealer be stricken; (2) that portions of the Division's Memorandum of Law in Opposition to Respondent's Motion for Judgment on the Pleadings ("the Division's Memorandum") be struck, as the Division's Memorandum provides citations to the prior case; and (3) that a hearing officer (different than the hearing officer that the Commission may appoint to hear this case) be appointed to hear this particular motion.

I. Factual Background of the OIP.

Halpern & Associates, LLC is an accounting firm based in Connecticut. (OIP ¶ 2.) Halpern is its managing member and 90% owner. (OIP ¶ 3.) The OIP alleges that Respondents engaged in improper professional conduct in their 2015 and 2016 audits of private equity fund ACP X, LLP ("ACP X"). (OIP ¶ 1.) In 2019 the Office of the New York Attorney General ("NYAG") charged Laurence Allen, who controlled ACP X, with defrauding investors. (*Id.* fn. 3) Allen had invested at least 20% of ACP X's funds in securities issued by NYPPEX Holdings, LLC ("Holdings"), the owner of a registered broker-dealer that Allen also controlled.

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[1] The Order Instituting Proceedings is hereinafter referred to as "OIP."

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(*Id*.) H&A was ACP X's auditor. (OIP ¶ 8.) Halpern was the engagement partner for the audits of ACP X. (OIP ¶¶ 1 & 8.) As early as 2011, Halpern and other accountants at H&A expressed concern to Allen regarding the grossly inflated estimated revenue projections Allen was using to arrive at his valuation of Holdings. (OIP ¶ 10.) For each audit year, Allen provided Respondents with a one page document called "Fair Valuation Analysis" ("FVA") referencing Holding's past revenues, expenses, and earnings as well as projected future revenues and profits. (*Id*.) However, the OIP specifically alleges that the FVAs "lacked an objective basis, ignored material information (including two decades of Holdings' operating history), and was based on unachievable future revenue and corporate growth." (*Id*.) In connection with ACP X's 2011 audit, although Holding's revenue for the first three quarters of 2011 was $2.3 million, Allen's projected revenue for 2011 in the FVA was $26 million. (OIP ¶ 11.) Allen successfully resisted H&A's efforts to obtain additional audit information to support the revenue projections, suggesting that the request could lead to a termination of the relationship. (OIP ¶ 11.) For example, for the 2014 Audit, although Holding's revenue through September of 2015 were less than $1 million, Allen's projected revenue in the FVA for 2015 was $10.5 million. (OIP ¶ 12.) That year, with the $10.5 million dollar 2015 revenue projection, the FVA valued Holding's shares at $.76 per share. (*Id*.) Allen agreed to adjust 2015 projected revenue, however, he then added an additional two years of revenue, adjusting the metrics to arrive at the same valuation of $.76 per share. (*Id*.) With respect to the 2015 and 2016 audits of ACP X, Allen declined Respondents' request to obtain an independent evaluation of the value of Holdings. (OIP ¶ 13.) Dating back to 2011 audits of ACP X (which were conducted by Respondents), Allen had repeatedly made changes to the valuation formula he utilized in the FVAs, using different holding periods, price/revenue multipliers, and implied investor discounts. (OIP ¶¶ 14 – 16.)

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These inconsistencies continued during the 2015 and 2016 audits. (*Id.*) With respect to the 2015 and 2016 ACP X audit, Allen proffered (and Respondents accepted) FVAs that were "not in line with the actual revenues of the company, other trends in the market, or H&A's own analysis." (OIP ¶ 19.) H&A and Halpern failed to perform additional audit procedures necessary to resolve their doubts about the reliability of the ACP X valuation analysis, including the accuracy of the revenue projections and the calculations used. (OIP ¶ 18.) The 2015 and 2016 audits at issue were completed in 2017 and 2018. (OIP ¶ 8.)

II. Factual Background of the Prior Administrative Proceeding Against Respondents.

In 2015 the Division instituted an administrative proceeding against Respondents. *In the Matter of Halpern & Associates, LLC and Barbara Halpern*, A.P. File No. 3-13699, Ex. Act Rel. No. 74350 (Feb. 23, 2015). The matter went to trial before ALJ Cameron Elliot, and was decided in the Division's favor. *In the Matter of Halpern & Associates, LLC*, Rel. No. 939, 2016 WL 64862 (Jan. 5, 2016) ("the 2016 Decision"). H&A was censured, and Halpern was given 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 under Generally Accepted Accounting Standards ("GAAS"), Respondents caused a registered entity to violate its net capital requirements. *Id.*

III. Applicable Legal Standards.

Respondents point out that Rule 152(f) provides 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." 17 C.F.R. 201.152(f). The Rule "permits an ALJ 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.*, Rel. No. APR-712,

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104 S.E.C. Docket 938, 2012 WL 8704617, *2 (July 13, 2012). However, none of the cases cited by Respondents' provide support for the pending motion to strike. For example, in *Fuchs v. Amstart Corp*., 402 F. Supp. 636, 638 (S.D.N.Y. 1975), the court denied a defendant's motion to strike references in a complaint to a decree in a prior case against defendant. Similarly, in *In the Matter of Egan-Jones Ratings Co*., 2012 WL 8704617 at *4, the court declined to strike filings from a respondent that included "excessively argumentative" statements in an answer, and further contained statements that were irrelevant to the allegations of the initiating order instituting proceedings. *See also, In re: Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig.,* 402 F. Supp. 2d 434, 441 (S.D.N.Y. 2005) (Striking requests for treble damages under California law because plaintiffs did not have standing to file suit under certain statutory provisions.); *Maschmeijer v. Ingram,* 97 F. Supp. 639, 641 (S.D.N.Y 1951) (Denying motion to strike affirmative defenses.); *In the Matter of Christopher M. Gibson*, Rel. No. 1398, 2020 WL 1610855, *2-3 (Mar. 24, 2020) (Denying motions to strike from both Division and Respondent to strike because, as in a federal bench trial, the court was free to ignore irrelevant material in the case of the Division's motion, and in the case of Respondent's motion, deeming underlying evidence relevant.)

IV. The Motion to Strike Part of Paragraph 3 of the OIP Should Be Denied.

Paragraph 3 of the OIP notes that Halpern was suspended from practicing before the Commission for one year pursuant to the 2016 Decision. Respondents argue that this reference is "immaterial, scandalous, and irrelevant to the present proceeding." (Motion at 5.)

The allegation in Paragraph 3 of the OIP goes directly to whether Respondents acted in an unreasonable or highly unreasonable manner. In the present action, the Division must show that Respondents committed at least one act that was highly unreasonable, or multiple acts that

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were unreasonable. Securities Exchange Act of 1934, Sec. 4(C) [15 U.S.C. § 78-3]; Commission Rule of Practice Rule 102(e)(1)(iv)(B) [17 C.F.R. § 201.102(e)(1)(iv)(B)]; (OIP ¶ 17.)

The connection between the 2016 Decision and the present case is simple – the Division has alleged, *inter alia*, that Respondents violated their responsibilities under GAAS by failing to exercise professional judgment in planning and performing an audit, by failing to obtain sufficient appropriate audit evidence, and by failing to maintain an attitude of professional skepticism. (OIP ¶ 18.) Having been put on notice in January 2016 that they had failed to live up to those requirements of GAAS, Respondents in 2017 and 2018 made no attempt to live up to such responsibilities in a different audit. This constitutes unreasonable or highly unreasonable behavior. Plaintiffs' decisions in 2017 and 2018 must be viewed in the light of the prior case, which frames their decision making process in 2017 and 2018.

Ultimately, what Respondents are attempting to do is back-door an evidentiary ruling that Respondents' prior conduct, and their notice of the findings of prior 2016 Decision, are inadmissible through the pending motion to strike. While the Respondents cite to the Federal Rules of Evidence as to what the standards of admissibility are, they provide no case citations to support their argument that Respondents' prior conduct and prior litigation should be deemed effectively inadmissible in this matter. (Motion at 4-5.) Further, while the pending motion is not properly construed as a motion to preclude under Commission Rule 320(a) (through which the Commission looks to the Federal Rules of Evidence), Respondents appear to be arguing that the 2016 Decision is irrelevant pursuant to FRE 401, or in the alternative, more prejudicial than probative pursuant to FRE 403. (Motion at 4-5.) Again, while Respondents provide no citations to case law to support their argument, as an initial matter the Division notes that FRE 404 (which concerns the admissibility of prior bad acts) specifically allows evidence that goes to show a party's absence of mistake or lack of evidence. *See SEC v. Teo*, 746 F.3d 90, 96 (3d Cir. 2014)

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(Holding that Rule 404(b) is to be regarded as inclusionary, unless meaning that "evidence of other wrongful acts [is] admissible so long as it [is] not introduced *solely* to prove criminal propensity." (citation omitted)) The Respondents' pending motion makes no mention or FRE 404(b), nor does it address the issue to whether Respondents acted in a reasonable or highly unreasonably manner after the 2016 Decision. Thus, it should be rejected.

IV. The Motion to Strike the Portions of the Division's Opposition to Respondents' Motion for Judgment on the Pleadings Referring to the 2016 Decision Should be Denied.

Respondents argue that any citation to the 2016 Decision should be stricken, because such citations "impugn the Respondents' character in an obvious attempt to prove that they must have engaged in improper 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 . . ." (Motion at 5.) In the words of Respondents, "there was no need to cite to the 2016 decisions simply for legal principles, which the Division could have found in many other decisions." (Motion at 5.) Respondents however, do not identify the "many other decisions" which the Divisions should have cited to – for reasons that will be made obvious.

As cited repeatedly in the Division's June 3, 2022 Memorandum of Law in Opposition to Respondents' Motion for Judgment on the Pleadings, there are three precedents that are critical to evaluating whether an auditor violated essential principles of GAAS, and which correspond to the underlying facts in this case. *See, In the Matter of Halpern & Associates, LLC and Barbara Halpern*, A.P. File No. 3-13699, Ex. Act Rel. No. 74350 (Feb. 23, 2015); *In the Matter of Oprins*, *CPA, et al*. Rel. No. 411, 2010 WL 5376531 (Dec. 28, 2010); *In the Matter of Barry C. Scutillo*, Rel. No. 1822, 2003 WL 21738818, (July 28, 2003). Respondents seek to delete one of

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the three seminal and on-point cases involving the critical issues of this pending matter, simply because they are recidivists who find their prior regulatory history problematic.

V. The Motion to Appoint a Hearing Officer Solely for Purposes of This Motion Should be Denied.

Respondent's argument that any hearing officer who examines ALJ Elliot's 2016 decision in *In the Matter of Halpern & Associates* will be unduly prejudiced against Respondents in the present matter is without merit. Respondents cite no case law for their argument. Instead, Respondents argue that the Division has violated Rule 3.4(d)(1) of the New York Rules of Professional Conduct by "alluding to any matter the lawyer does not believe is relevant." (Motion at 6.)

Respondents cite no case law to support their position because their argument is directly against fundamental principles of judicial impartiality. As noted in *Meng v. Schwartz*, 97 F. Supp. 2d 56, 57 (D. D.C. 2000):

> "Judges are presumed to be impartial. (citation omitted) Accordingly 'judicial rulings almost never constitute a valid basis for bias or partiality motion.' *Liteky v. United States*, 510 U.S. 540, 555, 114 S.Ct. 1147, 127 L.Ed.2d 474 (1994). To the contrary, 'opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, *or of prior proceedings,* do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make a fair judgment impossible.'"

Respondents' assertion that there is no connection between the 2016 decision by ALJ Elliot and the present case, and that the Division simply intended to smear the Respondents, is also misplaced. First, as explained above, in the view of the Division, that decision is one of the three most on-point decisions explaining the standards for highly unreasonable or unreasonable conduct by an auditor, in particular with regard to GAAS. Second, as further explained above, a critical element of the present matter is whether Respondents acted unreasonably or highly

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unreasonably. The Division's alleging of a background fact that directly impacts an evaluation of Respondents' conduct is not an unnecessary smear – it is evidence.

CONCLUSION

Accordingly, the Division respectfully requests that the Commission deny Respondents' pending motions for: (1) appointment of a hearing officer specifically for this motion; (2) to strike portions of Paragraph 3 of the OIP; and (3) to strike citations to the 2016 Decision from the Division's Opposition to the Motion for the Judgment on the Pleadings.

Dated: June 27, 2022

Respectfully submitted,

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<u>CERTIFICATE OF SERVICE</u>

I hereby certify that I caused true copies of the Division of Enforcement's Opposition to Respondent's Motion to Dismiss the Order Instituting Proceedings to be served on the following on June 27, 2022, via electronic mail:

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