UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION
April 21, 2017

ADMINISTRATIVE PROCEEDING
File No. 3-17651

In the Matter of **ADRIAN D. BEAMISH, CPA** **Respondent.**	**Administrative Law Judge** **Cameron Elliot**

THE DIVISION OF ENFORCEMENT'S PREHEARING BRIEF

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Pursuant to the Court's December 29, 2016 Scheduling and General Prehearing Order, and Rule 222(a)(1) and (2) of the U.S. Securities and Exchange Commission's ("Commission") Rules of Practice, the Division of Enforcement (the "Division") respectfully submits this Prehearing Brief.[1]

INTRODUCTION

Over a period of years, Respondent Adrian D. Beamish directed a team of auditors who failed to ask essential questions about millions of dollars taken from investors in a San Francisco-based venture capital investment fund. The Beamish audit team documented a dramatic increase in a series of cash transfers withdrawn from the investment fund beginning in 2009. The amount of the cash withdrawals far exceeded any amount of management fees due in 2009 and in the following three years. Despite the significant and admittedly unusual transfers, Mr. Beamish simply accepted the fund management's claim that the cash withdrawals represented the "prepayment" of management fees—even when the balance of the so-called "prepaid" management fees continued to grow year after year, and even though the plain terms of the contract with the fund's investors should have raised questions about whether such payments were permitted. Instead of pressing management about the rationale for the cash transfers, Mr. Beamish repeatedly signed off on financial statements that did not inform the fund's investors that the fund was paying management fees years in advance or disclose the nature of those related party transactions.

In his audit of the fund's year-end 2011 financial statements, Mr. Beamish's team knew enough to check whether the fund's adviser could work off the balance of the "prepaid" fees by the scheduled end of the fund's life in early 2016. Notwithstanding, Mr. Beamish failed to

[1] "Rule" or "Rules of Practice" as used herein refer to the Commission's Rules of Practice, codified at 17 C.F.R. § 201, Subpart D.

express the required professional skepticism about the prepayments, neglected to ask whether such prepayments were permitted, and continued to accept fund management's representations that the cash withdrawals were properly authorized. By the end of 2012, the balance of the cash transfers out of the fund exceeded the amount of fees that could ever be earned by management by at least $7 million—even by the Beamish audit team's conservative calculation. Incredibly, however, Mr. Beamish acceded to management's desire to obfuscate the true nature of these related party transactions in the fund's financial statements and did little more than accept management's word that it would repay any amount owed the fund.

Mr. Beamish's conduct fell woefully short of the applicable professional standards, representing highly unreasonable conduct in circumstances for which heightened scrutiny is warranted, as well as repeated instances of unreasonable conduct that indicate a lack of competence. Thus, proceedings to determine whether Respondent should be permitted to appear or practice before the Commission are fully warranted and appropriate to protect the Commission's processes and the investing public. Based on the evidence that will be presented at hearing, the Division supports the issuance of a permanent remedial bar.

STATEMENT OF FACTS

A. Beamish's Engagement to Audit the Burrill Funds

Respondent Adrian D. Beamish is a senior auditor and partner at the firm of PricewaterhouseCoopers LLP ("PwC"). In 1995, Mr. Beamish was licensed as a chartered accountant in England and Wales and he has been licensed certified public accountant in the United States since 2004. Joint Stip. of Facts ("Jt. Stip.") ¶¶ 1-2. Mr. Beamish worked for PwC's affiliate in the United Kingdom beginning in 1995 before joining PwC in its San Jose, California office in 1998. *Id.* ¶ 1-2. He became an audit partner in 2006 and has specialized in audits of companies in the pharmaceutical and venture capital industries. *Id.* ¶¶ 2-3. Mr. Beamish has served as the leader of the firm's Life Sciences and Venture Capital Market Team in San Jose, California. In that role, Mr. Beamish managed an estimated 100 to 120 employees at PwC.

Mr. Beamish audits both public and private companies, including venture capital funds. His public company clients include medical device companies, such as Align Technology, Inc. and Conceptus, Inc., and pharmaceutical companies, such as Diadexus, Inc. While engaged to audit many private companies and investment funds, the majority of Mr. Beamish's time is spent on audits of public companies. For example, according to his time records at PwC from 2004 through 2016, nearly 60 percent of his time was associated with working for public company clients.

As early as 2006, Mr. Beamish served as the PwC engagement partner for the firm's audits of venture capital funds affiliated with Burrill & Company, LLC ("Burrill & Co."), an enterprise formed by G. Steven Burrill. Mr. Burrill and his partners had enjoyed a modicum of success raising capital and investing in the life sciences and biotechnology industry through funds bearing the Burrill name. Mr. Burrill also launched other businesses under the Burrill & Co. umbrella, including a media group and merchant bank. Between 2006 and 2012, Mr. Beamish and his team of PwC auditors were engaged to audit more than 40 year-end financial statements issued by various funds affiliated with Burrill & Co. *See* Jt. Stip. ¶ 39 (chart).

Among these funds was Burrill Life Sciences Capital Fund III, L.P. ("Fund III" or the "Fund"), which focused on investing in start-up companies in the life sciences industry. The Fund was formed pursuant to a limited partnership agreement (or "LPA") entered into on December 31, 2005. *See* Jt. Stip. ¶ 7 (as amended and restated). The Fund's offering materials, including the limited partnership agreement, provided that the Fund would issue financial statements in accordance with Generally Accepted Accounting Principles ("GAAP"), and would be audited by a public accountant of recognized national standing. *See* Exs. 200 (LPA), 205. Formed with a contractual life span of ten years, the Fund raised $283 million in capital commitments from approximately 20 investors, sometimes referred to as limited partners. *See* Jt. Stip. ¶¶ 9-10; Ex. 200. The Fund's investors included public companies, pension funds, and institutional investors, such as Celgene Corporation, the State Treasurer of North Carolina, and Northwestern Mutual Capital. *See* Jt. Stip. ¶ 9. The Division expects to present testimony at hearing showing that these investors took comfort in the fact that the Fund would be audited by a national firm such as PwC.

The Fund had a general partner, Burrill Life Sciences Capital Fund III Partners, L.P. (the "General Partner"). Unlike the other venture capital funds typically audited by Mr. Beamish and those on his team—and unlike other venture funds under the Burrill & Co. umbrella audited by Mr. Beamish at that time—the Fund's General Partner also had a general partner, Burrill Life Sciences Capital Fund III Management, LLC (the "Top-Level GP").[2] *See* Jt. Stip. ¶ 16. In 2012 and 2013, the Top-Level GP consisted of five members: Mr. Burrill, Bryant Fong, Ann Hanham, Victor Hebert, and Roger Wyse, each of whom owned a percentage of the General Partner. These five members of the Top-Level GP, as bound by the terms of their partnership agreements, controlled the decisions of the Fund's General Partner.[3] *See* Jt. Stip. ¶ 14; Ex. 214.

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[2] According to Mr. Beamish and his audit team, most venture capital funds typically have a structure where the general partner has exclusive control of the fund. This was the case with Burrill Life Sciences Capital Fund II, L.P. ("Fund II"), also audited by Mr. Beamish. Control of Fund II was vested with Mr. Burrill. By 2005, however, Mr. Burrill's partners wanted a greater return on their investment and shared control over their investment vehicles. Thus, when Mr. Burrill and his partners set out to form Fund III, his partners negotiated accordingly.

[3] The Beamish audit team never requested the relevant governing documents, including the General Partner's partnership agreement (Ex. 214) or the Top-Level GP's partnership agreement (Ex. 219). Indeed, Mr. Beamish did not recall seeing these documents at any point prior to his February 28, 2017 deposition in this proceeding.

B. The Beamish Audit Team Documented a Dramatic Increase in Cash Taken Out of Fund III by Burrill Management Beginning in 2009

The Fund, which was up and running by February 2006, operated relatively normally for more than two years. However, the situation began to change in late 2008 when Mr. Burrill encountered financial difficulties at companies he owned and operated under the Burrill & Co. umbrella. Helena Sen, the Burrill & Co. controller and the central finance person at Fund III, has testified that these other Burrill entities were hemorrhaging cash and Mr. Burrill was having trouble making payroll and paying expenses, including those of his own often lavish lifestyle. To plug these business and personal shortfalls, Mr. Burrill directed Ms. Sen to begin taking cash from Fund III to pay to the Fund's investment adviser, Burrill Capital Management, Inc. (alternately referred to as "BCM," "BCMI," or the "Adviser"). *See* Exs. 235, 236 (Forms ADV). These cash transfers were recorded in the Fund's books as "prepaid management fees." On October 1, 2008, at Mr. Burrill's direction, the Fund "prepaid" its first quarter 2009 (that is, the January to March 2009 quarter) management fee, a sum of about $1.4 million.

Beginning in January 2009, the frequency and amounts of the cash transfers out of the Fund to its Adviser's bank accounts increased significantly. At Mr. Burrill's direction—and without the knowledge or approval of other members of the General Partner—Ms. Sen initiated approximately 30 cash transfers out of the Fund, far more than in previous years. *See* Ex. 33 (recompute management fee workpaper). The transfers usually occurred just before the fifteen of each month and just before the end of each month, consistent with the payroll needs of the other Burrill enterprises. The amount of cash taken each quarter far exceeded the amount of the management fee due to the General Partner for its services in managing the Fund. By the end of 2009, more than $9 million in cash had been taken from the Fund, or nearly $4 million more than the $5 million annual management fee payable under the terms of the LPA.

The Beamish audit team arrived on site in the early months of 2010 to conduct its audit of the Fund's year-end 2009 financial statements. The audit team documented the cash transfers out of the Fund in its workpapers—as well as the Fund's stated reason for the transfers: that it was "pre-paying" its management fees. *See* Ex. 33. Pursuant to the Fund's governing document, and the investors' understanding, the General Partner was entitled to earn management fees payable one quarter in advance. *See* Ex. 200 (LPA) § 5.1(a) (setting forth the method for calculating management fees and stating that are payable one quarter in advance). This interpretation was also set forth in the Fund's financial statements disclosures regarding management fees: the "fee is payable quarterly in advance." Ex. 39 at PWC 20046.

The prepayment of management fees by a venture capital fund was unusual for a fund affiliated with Burrill & Co. Indeed, in sworn testimony, Mr. Beamish admitted that he had "not seen prepaid management fees" in his professional experience auditing other venture capital clients prior to the audit of Fund III. *See* Ex. 1 (Beamish Inv. Tr.) at 45:14-46:17.

The reason that prepayment of management fees is unusual is not difficult to understand. Venture capital funds typically receive investment commitments from their investors—in the case of Fund III, $283 million in capital commitments. Instead of requesting all of the committed capital at the outset, Fund III "called" capital in smaller increments as the companies in the fund's investment portfolio required money. Until their capital was called, Fund investors held onto their money, using it for their own purposes or for investments outside of the Fund. By using capital calls to "prepay" management fees, the Fund: (1) took cash out of the pockets of its investors and (2) used it for the Adviser's own purposes—instead of (3) using it to generate returns for investors by investing in the Fund's portfolio companies.

Despite the unusual nature of the cash transfers, the Beamish audit team failed to inquire into the rationale for the so-called prepayments. In conducting their initial review, the team noted that during the first six months of 2009, the Fund had recorded a "prepaid" expense for management fees, which represented a significant and unusual change. *See* Ex. 37 (describing an accumulated prepaid expense of approximately $2.9 million for the first six months of 2009, representing an unusual 65 percent increase over the prior year). Accordingly, the auditors determined to undertake testing around this item. *Id.* However, to "test" these prepaid fees, the Beamish audit team simply confirmed that the "prepaid expenses" were paid from the Fund's bank accounts to accounts associated with the Adviser. In short, the auditors recomputed the "management fee" and tied it to bank statements. *See* Exs. 32, 33.

What the Beamish audit team did *not* do, however, was to attempt to document or understand why the excessive cash transfers had been made during 2009. Mr. Beamish also did not inquire of management what the business purpose was for the transfers. And, despite recognizing that these "prepaid" expenses also constituted a "related party" transaction between the Fund and its General Partner, Mr. Beamish and his team failed to identify these transactions as part of the fraud risk or risk of material misstatement, as the generally accepted auditing standards ("GAAS") (as established by the American Institute of Certified Public Accountants) would warrant.[4]

Nor did the Beamish audit team seek to understand why the Adviser acted as though the advancement of fees well beyond the periods earned was consistent with the terms of the limited partnership agreement, which permitted payments of one quarter's fees on the first day of the quarter. *See* Ex. 200 (LPA) § 5.1(a). Nothing in the LPA permitted for advances beyond the end of a quarter. In explaining his thinking at the time, Mr. Beamish testified that PwC did not know

[4] *See, e.g.*, AU 314 (and for 2012 audit, AU-C 315) ("Understanding the Entity and Its Environment and Assessing the Risk of Material Misstatement"), which requires an auditor to assess and understand "significant risks," including significant transactions with related parties and significant, non-routine transactions that are outside an entity's normal course of business.

of any particular prohibition in the LPA against the Adviser paying itself fees from the Fund well in advance of earning them. This contrasts with the Fund's financial statements disclosures regarding management fees, which plainly state that the "fee is payable *quarterly* in advance." *See, e.g.*, Ex. 39 at PWC 20046 (emphasis added).

Despite this, the Fund's year-end 2009 financial statements described "related party" transactions in footnotes that did not sufficiently disclose any of the anomalies that the Beamish audit team recognized. Missing, for instance, was any disclosure that the Fund had "prepaid" purported "future" management fees to the tune of $4.9 million or when or how the amounts would be returned to the Fund.[5] Further, each line item and each footnote that was supposed to account for or describe the advanced fees appeared unrelated to the other such items and notes, making it unlikely that a person without access to the underlying information that Mr. Beamish had would piece together the fact that the Adviser was withdrawing such excessive, advanced fees from the Fund. For example, the financial statements' management fee footnote only disclosed the amount of fees that the Fund was to pay annually and contained no mention of the millions more taken under the guise of prepaid fees. *See* Ex. 39 at PWC 20046 (the "total management fee for the year ended December 31, 2009 was $5,265,948"). The Division expects at hearing to present testimony from a limited partner investor who will state that he did not understand that this had happened at the time—and that even after the revelations in late 2013 about so-called advanced fees, he could not determine whether the entries in the financial statements disclosed advanced management fees.

[5] *See* ASC 850-10-50-1 ("Related Party Disclosures), which requires a description of transactions between related parties and the "terms and manner of settlement" if not otherwise apparent.

C. Beamish Continued to Ignore Red Flags in the Year-End 2010 and 2011 Audits

At the outset of the 2010 and 2011 audits, Mr. Beamish and his audit team again noted in its audit planning workpapers that the accumulated balance of "prepaid expenses" from 2009 had not amortized, but had instead grown substantially. This was counter to the intent of management and the prior understanding of members of the Beamish audit team. Instead of the "prepaid" fees being reduced the following year by management earning off the advanced fees, they simply grew.

Instead of raising red flags, for the 2010 audit, Mr. Beamish and his team identified that once again fees were transferred from the Fund in amounts far in excess of the fees it was to pay during the year. Fund management then added those fees to the prior accumulation of "prepaid expenses;" the balance at the end of 2010 had grown to approximately $9.2 million. Ex. 41. The situation repeated itself for the 2011 audit with the accumulated balance growing substantially, again contrary to management's prior representation that the "prepaid" balance would be earned off. However, by the end of 2011, the balance had grown to approximately $13.3 million. Ex. 52.

As was true for 2009, the financial statements for 2010 and 2011 again did not identify the large accumulated balance as "prepaid management fees," even though this was how the Beamish audit team characterized the amounts in their workpapers as they subjected them to "testing." Exs. 41, 52. Instead, the financial statements interchangeably referred to the balance of transfers as "prepaid expenses" and as "receivables"—two very different accounting concepts. *See, e.g.*, Ex. 300 (Devor Expert Report) ¶¶ 53-56, 189-90. Also similar to the prior years, the Beamish team's "testing" of the amount proved woefully inadequate. Even with additional red flags—including, most poignantly, the year-after-year growth of the so-called "prepaid expense," Mr. Beamish never inquired to understand the business purposes for the transfers, whether the "advanced" fees were permissible, or whether the other partners—both the investors in the Fund or the other members of the Fund's governing entities—were aware that Mr. Burrill was directing such transfers to other business entities.

Even when Mr. Beamish's audit team did conduct additional testing, the auditors made serious errors. For the 2011 audit, Mr. Beamish directed his team to conduct a "runway" test to determine the extent to which the Adviser had burned through its entitlement to future fees through the "prepayment" of management fees. *See* Ex. 52. In conducting the test, however, Mr. Beamish and his team failed to consult the appropriate provisions in the LPA and made erroneous assumptions about how management fees should be calculated, resulting in a significant overestimate of the fees to which the Adviser might be entitled over the life of the Fund. *See* Ex. 300 (Devor Expert Report) ¶¶ 193-97.[6] Due in part to those errors, Mr. Beamish missed the fact that by the time he signed the 2011 audit opinion, the Adviser was at risk of surpassing the limit of fees that could be permissibly taken during the entire life of the Fund—in other words, the Fund had no more runway. *See id.* at Exhibit 6. Consequently, Mr. Beamish also never asked what management's plans were to pay its employees and to operate the Fund for the next four years (the remaining contractual lifetime of Fund III), as its entitlement to fees had evaporated.

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[6] In the 2011 audit, Mr. Beamish's audit team—using an admittedly incorrect calculation—estimated that the Adviser could be paid up to \$23.6 million in fees until the date of termination of the Fund in February 2016. After subtracting the \$13.4 million accumulated balance of "advanced fees" already taken, Mr. Beamish and his team concluded that an additional \$10.2 million remained, *i.e.*, the "runway." After correcting the audit team's errors, the Division's expert has determined that conceivably only \$3.9 million remained that could be earned in fees as of December 31, 2011. *See* Ex. 300 ¶ 198. By the time Mr. Beamish signed the 2011 audit opinion, moreover, the Adviser had already taken another \$2 million out of the Fund. No "runway" remained—instead, by mid-April 2012, the Adviser had already taken as much as \$1.6 million more than it would be entitled to during the remaining life of the Fund. *See* Ex. 300 at Exhibit 6; *cf.* Ex. 1133 ¶ 64 (Respondent-retained expert acknowledging "flaw" in calculation).

Finally, even as the auditors' workpapers reveal the increasing red flags, the Fund's financial statements continued to describe the "advance fees" as a "receivable," or "prepaid expenses," never explaining the true situation. Mr. Beamish nevertheless signed the unqualified opinions on behalf of PwC for each audit.

D. Even When Burrill Took Millions in Excess of the Maximum Amount of Management Fees, Beamish Only Relied on Management Promise to Repay Money

By December 31, 2012, as the Beamish audit team's own workpapers acknowledge, the balance of the account into which the excess fee payments was recorded had grown to approximately $17.9 million. *See* Ex. 61 (prepaid expenses testing workpaper). The significant size of the amount previously described as either a "prepaid expense" or a "receivable" now became glaring even to the Beamish auditors. The magnitude laid bare the need to finally "test" the collectability of this massive and growing "receivable," work they never considered doing in the prior audit years.

According to the Beamish audit team's own calculations, of the approximate $8.7 million transferred out of the Fund during 2012 under the guise of prepaid expenses, only approximately $5.6 million could be justified as fees earned during that period; the remainder was merely added to the large and growing "receivable." *Id.* Although the Beamish audit team's workpaper acknowledges the client's method of recording the transfers and the accumulating balance as a "prepaid expense" was fully in keeping with practices known to them during prior audit years, for the first time the auditors appear to have accepted that the accumulated balance was actually "an amount due" from Burrill Capital, LLC to the Fund. In other words, for years, the Adviser had effectively been "loaning" itself money from the Fund, but without any provisions for when or how the money would be paid back, let alone any interest. Accordingly, Mr. Beamish and his team finally recognized that they needed to "test" how, when, and whether, the money might be paid back.

As in 2011, Mr. Beamish and his team again conducted a "runway" calculation of the $17.9 million "receivable," in their words: "Testing the reasonability of the prepaid expense i.e. does [sic] future management fees cover and justify the current amounts due from Management Company." The calculation corrected one error the Beamish team made during the 2011 audit, but again overstated the amount of fees that could be earned during the remaining life of the Fund. Even this calculation, however, resulted in the Beamish team concluding that the amount already exceeded the amount of fees the Adviser would be entitled to charge the Fund during its remaining life by more than $7 million. After correcting for the Beamish audit team's error in calculating the fees to which the Adviser would be entitled, and adjusting for its failure to take into account an additional $3.2 million that the Fund paid to the Adviser from January 2013 until Mr. Beamish signed his audit opinion on behalf of PwC in April 2013, the payments in excess of management fees to which the Adviser had any claim grew to as much as $12.6 million. *See* Ex. 300 (Devor Expert Report) ¶¶ 242-45, Exhibit 7.[7]

Despite the fact that their own "runway" calculation showed that Fund had made at least $7 million in excess payments to the Adviser, Mr. Beamish and his team nevertheless concluded that there were "[n]o issues arising" from the excessive payments. The auditors based their conclusion on their limited "testing," which suggested to them that the "recoverability of this amount does not appear doubtful." As their workpapers reveal, however, the audit team's

[7] Specifically, the workpaper—reviewed personally by Mr. Beamish during the audit—described a "Management fee receivable" of $17,922,059. *See* Ex. 61. Though acknowledged as a "management fee receivable" in the workpaper, it was never so succinctly or straightforwardly cast in the Fund's audited financial statements. The Beamish team calculated (overly generously) that the Adviser was entitled to earn fees of $10,900,091 from January 1, 2013, through February 28, 2016 (the Fund's contractual termination date). However, the Beamish team presumed that the Fund would not liquidate any of its portfolio companies, which would have resulted in a lower basis from which fees were calculated. The Division's expert recalculated the fees the Adviser would be entitled to by applying a ratable decrease in the cost basis of securities held. *See* Ex. 300 (Devor Expert Report) ¶ 244, Exhibit 7.

"testing" was limited to speaking with Fund management, specifically Mr. Hebert and two employees, Ms. Sen and Jean Yang.[8] As the Division's expert points out, however, reliance by an auditor on the representations of management as a "test" for the recoverability of a debt involving a related party demonstrates a lack of professional skepticism, contrary to GAAS. *See* Ex. 300 (Devor Expert Report) ¶¶ 226, 227, 248-51.

Indeed, any actual skepticism might have exposed the speciousness of management's representations. To begin with, Mr. Beamish failed to consider the possibility that management of the Fund, including Burrill, might not be able to repay the amounts owed to the Fund. The Beamish audit team did not ask to see the books and records of the Burrill Management Company. Had they reviewed those Management Company's balance sheet, they would have seen that the Management Company had only about $1,500 in cash on hand. *See* Ex. 212.1.

Instead, Mr. Beamish relied on the balance of the General Partner's capital account, which was valued at year-end 2012 at approximately $15.3 million—an amount greater than the $7 million that the audit team calculated had been taken in "excess" management fees. The Beamish audit team learned during the 2012 audit, however, that the General Partner had failed to make all of its required capital contributions in 2012. In addition, the General Partner had failed to make approximately $1.75 million in its required capital contributions dating back to

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[8] According to the workpapers, the auditors were told: "The GP intends to: (a) offset the excess of this prepayment with future distributions to GP which does not seem unreasonable since GP's capital account was $15.3 million as of 12/31/2012 due to allocation of carry interest, or b) repay the amount to the Fund. As confirmed by management, the Management Company has the intent and ability to repay this amount. This was also included in the management representation letter. The GP also has the ability to waive payment of future management fees to offset the prepayment in the event that the capital account balance does not fully cover the outstanding payable. The foregoing was confirmed in discussion with Vic Hebert. As such, recoverability of this amount does not appear doubtful. As confirmed by management and included in rep. letter, no promissory notes or similar instruments were outstanding for this amount at December 31, 2012 or April 4, 2013. Further investigation waived." *See* Ex. 61.

2007. Under the terms of the LPA, that failure was grounds for termination of the General Partner's right to distributions from its capital account—the very source that the Adviser claimed as the means for recovering the $17.9 million receivable. *See* Ex. 200 (LPA), § 7.12.

Other evidence the Beamish audit team possessed rendered unreasonable their ready acceptance of management's representations about forgoing future management fees—even the "intent" of the General Partner to repay the debt. For instance, the Beamish team did not ask how the Adviser would operate if it "waived" future fees, particularly if Burrill & Co. relied on the regular payments just to make payroll and pay other expenses. Similarly, even though the auditors were aware that Mr. Burrill and Mr. Hebert were not the only member of the General Partner, they assumed—without ever inquiring of the other members—that Mr. Burrill and Mr. Hebert could commit the General Partner to repay the large and growing debt from its capital account. Nor did the auditors review the legal agreements governing the rights of each of the members of the General Partner because they never asked for General Partner's limited partnership agreement or the Top-Level GP agreement.

Mr. Beamish went along with management's weak explanations despite additional red flags that should have led a reasonable auditor to question the "intent" of the Adviser to pay its debt to the Fund. Thus, despite the notation in the workpapers that "no promissory notes or similar instruments were outstanding for this amount at December 31, 2012 or April 4, 2013."

However, Mr. Beamish learned during the 2012 audit of a phantom promissory note from Burrill Capital, LLC to the Fund to account for the glaring deficit on the Fund's books. In particular, on April 3, 2013 (just one day before signing the 2012 audit opinion), Mr. Beamish received a copy of an "Unsecured Promissory Note" in the amount of $18,041,779 (consisting of $17,922,059 in principal and $119,720 in interest), dated as of December 31, 2012, forwarded to

Mr. Beamish from Ms. Sen via Nahum Lan, one of Mr. Beamish's co-managers on the 2012 audit. *See* Ex. 81.

The unsecured promissory note, signed by Mr. Burrill as Manager of Burrill Capital, LLC, and dated December 31, 2012, should have raised concerns with Mr. Beamish and his audit team. *See* Ex. 81; *see also* Ex. 300 (Devor Expert Report) ¶¶ 290-98 (detailing Mr. Beamish's knowledge of the promissory note and his related failures to exercise professional due care and skepticism). Most problematic was that the face of the note stated that Burrill Capital, LLC had received a "series of loans" from Fund III "from 2007 through 2012," of which "a cumulative total of $17,922.059.00 in principal remains unpaid." *See* Ex. 81 at PWC 50300. Notably, none of the Fund's financial statements prior to the 2012 audit mentioned any loan or receivable due from Burrill Capital, LLC, a related party. Further, this "unpaid" amount equaled the amount of the "prepaid expenses and other receivables" in the draft financial statements sent from Mr. Beamish's audit team to Fund III on April 1, 2013. *See* Ex. 76 at PWC 50142, PWC 50146. Recasting the balance of the "prepaid" management fees as a "series of loans" due from Burrill Capital, LLC, contradicted the Beamish team's audit procedures regarding the "testing" of prepaid expenses in the prior years' audits.

In response to receiving the note, Mr. Beamish and his audit team prepared a draft disclosure for the financial statement.[9] In preparing the disclosure, the Beamish team did not

[9] The proposed footnote, excerpted from Exhibit 82, reads in full:

> Prepaid expenses and other receivables from related party at December 31, 2012, include $17,922,059 receivable from Burrill Capital, LLC. Burrill Capital, LLC is the management company of the General Partner (the "Management Company"). The Management Company intends to pay this amount to the Partnership from future distributions to the General Partner and from Management Company funds. Subsequent to December 31, 2012 the Management Company executed an unsecured promissory note agreement whereby this amount became due and payable at the earlier of a) December 30, 2015 or b) the date of termination of the Fund. All or any portion of the note may be

(continued on next page)

inquire why the promissory note was due from Burrill Capital, LLC and not the General Partner. Mr. Beamish and his team also did not inquire whether the "series of loans" were authorized or whether the General Partner or the Fund investors were aware of these loans. Notably, the LPA strictly forbids non-arm's length transactions—such as these "series of loans" between related parties bearing interest at an "annual rate of 0.24%" (Ex. 81 at PWC 50300)—without proper authorization. Ex. 200, § 7.9(d). Yet, Mr. Beamish and his team never considered this issue or inquired of any relevant party besides Mr. Hebert or Ms. Sen, i.e., management.

The day after Mr. Beamish and his team provided the draft disclosure to the Fund's management (*see* Ex. 82), Ms. Sen informed Mr. Beamish that Mr. Burrill "strongly feels that he does not want the footnote as currently worded to be included in the financials." *See* Ex. 83. She further stated: "As it appears that with the prom[issory] note, you must include the terms of the note, the management company Burrill Capital has now withdrawn the note." *Id.* She then asked that the portions of the footnote referencing the promissory note be deleted. *Id.* Mr. Beamish acquiesced with the client's request without even obtaining an understanding of why Mr. Burrill did not want the proposed footnote. Mr. Beamish also ignored the fact that the Fund's management had just notified him that the interest on the "series of loans" was merely "withdrawn" and the interest (or any related amount) was never disclosed in the financial statements. Ultimately, the 2012 financial statements made no mention of any promissory note or "series of loans," and certainly not "prepaid management fees" or that those "prepaid" fees exceeded the amount that could ever be earned by the Adviser over the lifetime of the Fund.

Instead, the management fee footnote to the final 2012 financial statements—with an unqualified audit opinion authorized by Mr. Beamish—merely stated that the "total net

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repaid at any time without penalty. The note will carry interest at an annual rate of 0.24% compounded semi-annually.

management fee for the year ended December 31, 2012 was $5,630,594." *See* Ex. 63 at PWC 34465. This contrasts starkly with the approximate $8.6 million in "fees" that Mr. Burrill directed be taken from the Fund during 2012 (not to mention those taken in 2013 before Mr. Beamish finished his audit). Exs. 61, 213. The related parties footnote opaquely disclosed that the "[p]repaid expenses and other receivables" included a "$17,922,059 receivable from Burrill Capital, LLC," and that receivable would be repaid "from future distributions to the General Partner and from [Burrill Capital, LLC's] fund." Ex. 63 at PWC 34465.

This footnote was inaccurate, misleading, and incomplete. *See* Ex. 300 (Devor Expert Report) ¶¶ 304-313. The financial statements never previously discussed Burrill Capital, LLC, nor was there any discussion—even in the 2012 financial statements—of any designee for the receipt of management fees. There was no discussion of how the Fund came to loan funds to Burrill Capital, LLC, or the terms of any purported loan or accumulated interest. The related parties footnote did not explain the business purpose of the purported receivable, contrary to applicable professional standards, how they were tethered to management fees (if at all), and the terms of the underlying transaction (e.g., the "series of loans").

E. PricewaterhouseCoopers Resigned as Auditor After Investors Learned of Cash Payments Taken by Burrill

Ultimately, the revelation in late 2013 that Mr. Burrill had taken—without authorization by investors—vast sums from the Fund under the guise of "prepaid expenses" caused the removal of Messrs. Burrill and Hebert from management of the Fund. As all of the $283 million in "committed capital" had been called, investors had to forgo their distributions from the Fund to "recycle" those monies to make the Fund's required investments in portfolio companies. Emergency meetings by the Fund's investment committee—which included persons other than Mr. Burrill who had been unaware of the advance fee payments—were convened over a period of weeks beginning in September 2013, and Mr. Burrill was confronted and responded in a series of written correspondence.[10] Shortly after receiving copies of this correspondence, Mr. Beamish notified the Fund of PwC's resignation as auditor of the Fund on November 11, 2013.

ARGUMENT

A. Legal Standards Under Rule 102(e)

Under Rule 102(e), the "Commission may censure a person or deny, temporarily or permanently, the privilege of appearing or practicing before it in any way to any person who is found by the Commission ... [t]o be lacking in character or integrity or to have engaged in unethical or improper professional conduct." Rule 102(e)(1)(ii). For purposes of this proceeding against an accountant,

> "improper professional conduct" ... means ... [e]ither of the following two types of negligent conduct:
>
> (1) A single instance of 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.
>
> (2) Repeated instances of unreasonable conduct, each resulting in a violation of applicable professional standards, that indicate a lack of competence to practice before the Commission.

See Rule 102(e)(1)(iv). Rule 102(e) intends to "protect the integrity of the Commission's own processes." *Marrie v. SEC*, 374 F.3d 1196, 1200-01 (D.C. Cir. 2004). The Commission relies on accountants to protect its processes, which, in turn, protects the investing public. *See John J. Aesoph, CPA & Darren M. Bennett, CPA*, Rel. No. 78490, 2016 WL 4176930, at *17 (Aug. 5, 2016) (the Commission adopted Rule 102(e) "to ensure the Commission's 'processes continue to be protected, and that the investing public continues to have confidence in the integrity of the financial reporting process'" and to ensure its processes, the Commission relies "'rely heavily on

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[10] Mr. Burrill, Mr. Hebert, the Adviser, and its controller, Helena Sen, previously resolved claims against them alleging that they improperly used investor money. *See Burrill Capital Mgmt., LLC*, Admin. Proc. File No. 3-17186, 2016 SEC LEXIS 1168, at *2 (Mar. 30, 2016) (accepting offer of settlement).

accountants to assure corporate compliance with federal securities law and disclosure of accurate and reliable financial information'") (quoting *Gregory M. Dearlove, CPA*, Exchange Act Rel. No. 57244, 2008 WL 281105, *29 (Jan. 31, 2008), *petition denied*, 573 F.3d 801 (D.C. Cir. 2009); Amendment to Rule 102(e), 63 Fed. Reg. at 57,164, 1998 WL 729201, at *4 (Oct. 26, 1998)); *Robert W. Armstrong, III*, Exchange Act Rel. No. 51920, 2005 SEC LEXIS 1497, at *48 (June 24, 2005) ("disciplining accountants pursuant to Rule 102(e) ... furthers the Rule's remedial purpose of protecting the integrity of the Commission's processes"); *Touche Ross & Co. v. SEC*, 609 F.2d 570, 579 (2d Cir. 1979) (holding that Rule 102(e) serves "to preserve the integrity of [the Commission's] own procedures, by assuring the fitness of those professionals who represent others before the Commission").

B. The Central GAAS and GAAP Provisions at Issue

The following are the central GAAS and GAAP provisions that apply in analyzing Mr. Beamish's conduct and the reasons why Mr. Beamish's professional conduct failed to adhere to them:

<u>Requirement that auditor exercise professional skepticism</u>: Statement on Auditing Standards ("AU") 316 / AU-C 240 (*Consideration of Fraud in a Financial Statement Audit*).[11] This standard particularly requires the auditor to obtain objective audit evidence, to consider that evidence, and to address audit and fraud risks.

Mr. Beamish failed to adequately consider the risk of fraud associated with significant and unusual cash transfers to a related party. When faced with the fact that Fund management was unable to cease taking millions of dollars in excessive fees per year, for several consecutive years, and Fund's management's resistance of adequate disclosure of the transfers, Mr. Beamish failed to sufficiently evaluate the business rationale and potential improprieties of the transfers.

[11] The "AU" standards apply to the 2009, 2010, and 2011 audits, while the "AU-C" standards apply to the 2012 audit.

Requirement that auditor understand the risk of material misstatements: AU 314 / AU-C 315 (*Understanding the Entity and Its Environment and Assessing the Risk of Material Misstatement*). This standard requires the auditor to assess which areas require special audit consideration because they present "significant risks." Significant transactions with related parties, and non-routine transactions outside the normal course of business for the entity would fall within such "significant risks."

Mr. Beamish identified management override of controls as a significant risk and transactions with related parties were a topic included in the audit team's discussion of the risk of material misstatement. However, Mr. Beamish failed to give special audit consideration to the significant, unusual transfers to a related party. Specifically, Mr. Beamish failed to adequately evaluate the apparent conflict of the transfers with the LPA and Fund management's rationale for taking several years' worth of management fees in advance.

Requirements that auditor obtain objective audit evidence, beyond management discussions: AU 326 / AU-C 500 (*Audit Evidence*); AU 333 (*Management Representations*); and AU-C 580 (*Written Representations*). These standards require auditors to look to objective evidence; corroborate certain management representations; and respond appropriately when management has been inconsistent with other audit evidence.

Throughout the 2009-2011 audits, Mr. Beamish's audit team simply obtained an understanding from Fund management that it was prepaying management fees and agreed those payments to bank statements. Mr. Beamish failed to adequately evaluate the apparent conflict of the transfers with the LPA and Fund management's rationale for taking several years' worth of management fees in advance. In the 2012 audit, when it became clear to Mr. Beamish that the transfers no longer represented a prepaid asset, Mr. Beamish simply accepted Fund management's representation that it intended to repay the fund primarily from future distributions to the General Partner. Mr. Beamish failed to sufficiently obtain evidence to understand the financial condition of the General Partner or Burrill Capital, LLC (the entity behind the phantom promissory note). Mr. Beamish also failed to understand the structure of the General Partner entity and if several of its members consented to using their future distributions to repay the Fund.

Requirement that auditor understand the business purpose for related party transactions: AU 334 / AU-C 550 (*Related Parties*). Since such transactions are a risky area, auditors are required to understand the business purpose and ensure that such transactions are properly disclosed in the financial statements.

Mr. Beamish failed to identify that related party transactions were not sufficiently disclosed consistent with GAAP.

GAAP relevant to accounting for significant related party transactions: Accounting Standards Codification ("ASC") 850 (*Related Party Disclosures*); ASC 946 (*Financial Services — Investment Companies*). These accounting principles require, among other things, that the nature and amounts of transactions with "related parties" be disclosed in the financial statements; and for investment companies, that receivables from related parties be listed separately on the balance sheet.

Mr. Beamish failed to identify that related party transcations were not adequately disclosed. Specifically, the Fund never disclosed a description of the transaction, or its terms, to allow a reader of the financial statements to understand what the cash transfers out of the Fund truly represented.

Additional, applicable and important auditing standards (*e.g.*, AU 230 Due Professional Care in the Performance of Work (AU 230 / AU-C 200)) are raised and discussed in the report of the Division's expert witness, Mr. Devor.

C. Respondent's Professional Conduct Failed to Meet Relevant Auditing Standards

At hearing, most of the above facts are likely to be presented in the Division's case during the testimony of auditors, including Mr. Beamish, employees of the Adviser such Ms. Sen, the partners of Messrs. Burrill and Hebert such as Mr. Wyse, and investors in the Fund.[12] Similarly, the Division also expects to present the documentary record—including the auditors' workpapers, and the relevant partnership agreements, and communications between PwC and its

[12] Messrs. Burrill and Hebert have asserted their privileges against self-incrimination under the Fifth Amendment each time they have been asked questions about the issues involved in this case. Accordingly, the Division does not expect either of them to testify substantively.

client—during the testimony of these witnesses. In addition, the Division believes that expert testimony will be very important in considering Mr. Beamish's conduct in light of the applicable professional standards.

Mr. Beamish failed his obligations under these standards. During each audit, Mr. Beamish approved of accounting by the Fund that interchangeably described the amounts that had been taken from the Fund as a "receivable" or a "prepaid expense," two inconsistent concepts, and inappropriately lumped the amounts owed by the Adviser to the Fund with other "receivables." He also signed clean audit opinions for financial statements that failed to provide meaningful disclosure regarding the amounts taken from the Fund, and the accumulated debt that resulted. Indeed, Mr. Beamish failed to educate himself as to why those funds were taken and instead relied on his own presumptions, and shallow explanations from management. When confronted with the client's stated discomfort in revealing the existence of the debt to investors, Mr. Beamish simply went along with the client's preferences, shedding any doubts or professional skepticism.

The facts demonstrate that Mr. Beamish failed to meet the applicable auditing standards. And those facts are buttressed by the expert opinion of Mr. Devor. The Division retained Mr. Devor, a Certified Public Accountant, to review the workpapers of the Beamish audit team and other pertinent records from the Division's investigation. In his report filed with the Court (Ex. 300), Mr. Devor provides an analysis of Mr. Beamish's audits of the Fund III financial statements. In Mr. Devor's opinion, Mr. Beamish failed to direct and conduct the audits in accordance with GAAS. Mr. Devor describes how Mr. Beamish failed to exercise due care and professional skepticism with respect to the millions of dollars in cash transfers from the Fund to the Adviser and related entities—the frequency of which increased sharply beginning in January 2009 and in amounts that far exceeded the annual management fee authorized by the Fund's investors. Mr. Devor will testify about the relevant auditing standards as well as Mr. Beamish's failure to ensure that the Fund's financial statements properly disclosed the cash transfers, as required by GAAP.

In his defense, Mr. Beamish submits the reports of four expert witnesses: William Holder, Gary Goolsby, John Riley, and Howard Scheck. Mr. Beamish relies principally on the opinion of Mr. Holder, who maintains that the Fund III financial statements "provided the information GAAP required to fulfill its objective of providing information . . . that is useful to financial statement users[.]" Ex. 1131 ¶ 68 (concerning 2009, 2010, and 2011 financial statements); *see id.* ¶ 78 (concerning 2012 financial statements). Mr. Holder is incorrect. His opinion rests on inferences that he alone draws from his analysis of the financial statements—inferences that are contrary to the explicit directives codified in ASC 850, the provision of GAAP concerning related party disclosures. These directives require the preparers of financial statements to provide a "description of the transactions . . . and such other information deemed necessary to an understanding of the effects of the transactions," and "if not otherwise apparent, the terms and manner of settlement" of the transactions. *See id.* ¶ 38 (quoting elements of ASC 850-10-50-1). Nowhere in the year-end 2009, 2010, 2011, or 2012 financial statements did the Fund provide a description of the cash transfers from the Fund to the General Partner, not explain how or when the Fund would recover the growing balance from the affiliated Burrill enterprises.[13]

[13] Contrary to Mr. Holder's assertion, the Related Party footnotes to the Fund III financial statements *did not* expressly "disclose[] that the Fund had made prepayments of management fees to the General Partner." *See* Ex. 1131 ¶ 63. Mr. Holder acknowledged the error in deposition. *See* Ex. 314 (Holder Dep. Tr.) at 82:11-86:4 (reviewing 2009, 2010, and 2011 financial statements).

Mr. Beamish retained Mr. Goolsby, a former partner at Arthur Andersen, to excuse his failure to exercise due care and professional skepticism in his audits of the Fund III financial statements. In his report, Mr. Goolsby takes a cramped view of the applicable standards to arrive at his conclusion that Mr. Beamish complied with GAAS. Most notably, Mr. Goolsby asserts that the advanced payment of management fees were "routine," and did not present a "significant risk" for Fund III. *See* Ex. 1133 ¶ 56 (citing AU 314). Mr. Goolsby ignores that the frequency and amounts of the cash transfers from the Fund spiked beginning in January 2009, departing from the Fund's normal course of business in its first three years of operations. The so-called "prepayment" of management fees was unusual, not only for Fund III, but for any of the Burrill venture funds audited by Mr. Beamish, who testified in the Division's pre-filing investigation that he had not seen the prepayment of management fees in his experience in the industry. These are the kind of factors explicitly contemplated by the auditing standards as deserving extra consideration by an auditor. *See, e.g.*, AU 314.111 (defining "significant risk" to include "significant transactions with related parties" and "significant nonroutine transactions that are outside the normal course of business for the entity, or otherwise appear to be unusual").

For their part, Messrs. Riley and Scheck appear to have been retained by Mr. Beamish in large part to provide legal argument under the guise of expert opinion. Both experts provide "opinions" on the law and Commission policy in arguing that the Court should not find that Mr. Beamish's conduct was improper under Rule 102(e). For example, in his report (Ex. 1129 at 13-16), Mr. Scheck "opines" on the application of the *Steadman* factors to Mr. Beamish's conduct in a blatant attempt to usurp the Court's role. Mr. Riley offers similar legal arguments under the guise of his "opinion." For example, he "opines" that an enforcement action here is inappropriate because it purportedly expands the scope of the Division's authority over audits of a private entity—based on, *inter alia*, his experience working at the Commission from 1984 through 1995. *See, e.g.*, Ex. 1130 (Riley Expert Report) ¶¶ 8, 15, 50-53. This argument was raised by Respondent in his motion for judgment on the pleadings—and rightly rejected by the Court (*see* Order dated Jan. 6, 2017, at 2-3) because Mr. Beamish appears and practices before the Commission—and is clearly a legal opinion. Further, the relevance of Mr. Riley's experience at the Commission over a decade prior to the conduct at issue, involving a venture capital fund, is unimaginable. The Division expects that it will be filing a motion in limine to strike and exclude these legal and irrelevant opinions. *See* Order on Joint Mot. for Add'l Deps. and Related Relief (Feb. 3, 2017) at 2 n.2 (citing prior decisions in which Court "accorded no weight to expert opinions on purely legal issues.")[14]

D. Respondent's Legal Arguments are Without Merit

Respondent's Answer takes a shotgun approach to asserting affirmative defenses, identifying 17 in total with the seventeenth attempting to preserve all available defenses. *See* Answer, Affirmative Defenses ¶¶ 1-17. Only five of these appear to be actually pursued by Mr. Beamish, four of which the Court has already addressed. The Court previously rejected Mr. Beamish's first affirmative defense, failure to state a claim. *See* Order dated Jan. 6, 2017, at 3 (rejecting Respondent's argument made in his motion for judgment on the pleadings that the Division failed to state a claim because the Fund's financial statements disclosed the "payments" at issue). The Court has also previously rejected his thirteenth (statute of limitations), fifteenth (lack of jurisdiction), and sixteenth affirmative defenses (lack of jurisdiction). *See id.* at 2-3. To the extent these rulings depended on the allegations in the OIP, such as the fact that Mr. Beamish does indeed practice or appear before the Commission, the Division will present evidence at hearing proving those allegations.

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[14] The parties are scheduled to meet and confer on motions in limine after this brief's filing deadline.

Mr. Beamish's ninth affirmative defense, "audit interference," appears to be the sole defense that may be factually disputed. Mr. Beamish alleges in his Answer that the Fund management and employees actively misled the auditors by presenting misleading evidence. However, throughout the Division's underlying litigation and in depositions to date, Mr. Beamish and his audit team have testified that they received all of the audit evidence they sought and had full cooperation from the Fund's management. The problem is that Mr. Beamish's improper professional conduct swirls around his failures to exercise professional skepticism and seek competent audit evidence. If anything, Mr. Beamish's "audit interference" defense is better characterized as his failure to adhere to professional standards.

To the extent Mr. Beamish pursues his other myriad of affirmative defenses at hearing or in briefing, the Division reserves its right to respond accordingly.

E. A Remedial Bar is Warranted to Protect the Commission's Processes

It is the Division's position that Mr. Beamish's repeated failures to live up to professional standards strongly suggests the propriety of a permanent remedial bar against his appearing or practicing as an accountant before the Commission. The legal basis for such a bar as redress for his conduct is clear. *See Tzemach David Netzer Korem*, Exchange Act Rel. No. 70044, 2013 WL 3864511, *6 n.50 (July 26, 2013) (holding that the existence of a violation raises an inference that future violations will occur); *In the Matter of David S. Hall, P.C. et al.*, Rel. No. 1114, 2017 WL 894965, *27 (Mar. 7, 2017) (recognizing that "the purpose of [Rule 102(e)] is to guard against future harmful conduct"); *see also Mitchell T. Toland*, Rel. No. 71875, 2014 WL 1338145, *3 n.17 (Apr. 4, 2014) (noting that the securities industry is rife with a great many opportunities for abuse and it depends heavily on the integrity of its participants); *see also SEC v. Steadman*, 603 F.2d 1126, 1140 (5th Cir. 1979), *aff'd on other grounds*, 450 U.S. 91 (1981); *Thomas D. Melvin, CPA*, Exchange Act Rel. No. 75844, 2015 SEC LEXIS 3624, *8 (Sept. 4,

2015) (describing the *Steadman* factors to be considered for remedial sanctions against an accountant in a Rule 102(e) proceeding).

Mr. Beamish has regularly conducted audits and similar work over the past years that constitutes appearing or practicing as an accountant before the Commission. Without such a bar, he would be free to embark on such work without ever recognizing the harm his conduct has caused or the importance of his work as a gatekeeper for Commission processes and investor protection. The *Steadman* test further confirms that Mr. Beamish's improper professional conduct warrants a bar against practicing before the Commission, with at least five of the six *Steadman* factors weighing heavily in favor of significant remedial measures:

(1) *The egregiousness of Respondent's actions*: In *Dearlove*, the Commission recognized that "a negligent auditor can do just as much harm to the Commission's processes as one who acts with an improper motive," and "that under some circumstances, unreasonable conduct is not necessarily a less egregious disciplinary matter than either intentional or reckless conduct." *Gregory M. Dearlove, CPA*, Exchange Act Rel. No. 57244, 2008 WL 281105, at *30 (Jan. 31, 2008), *petition denied*, 573 F.3d 801 (D.C. Cir. 2009); *see also John J. Aesoph, CPA & Darren M. Bennett, CPA*, Rel. No. 78490, 2016 WL 4176930, at *18 (Aug. 5, 2016) ("An incompetent or unethical practitioner has the ability to inflict substantial damage to the Commission's processes, and thus the investing public, and to the level of trust and confidence in our capital markets."). Mr. Beamish's negligent conduct allowed the unauthorized transfer of millions of dollars from the Fund, far exceeding the amount of fees the Fund could ever owe, to continue for years. Ultimately, upon discovery of these transfers when the Fund no longer had investment capital, the Fund's investors were forced to forgo their distributions in order to salvage the Fund, in addition to replacing management and engaging in litigation against the removed members of management and PwC itself. Mr. Beamish's conduct is egregious;

(2) *The isolated or recurrent nature of his misconduct*: Mr. Beamish repeated the same mistakes, year after year, in the Fund III audits for 2009 through 2012. And he and his team compounded those many mistakes in the 2012 audit;

(3) *The degree of scienter involved*: the Division does not currently intend to argue that Mr. Beamish willfully failed to meet professional accounting standards; however, his actions in the 2012 audit certainly rise to the degree of gross negligence;

(4) *The sincerity of any assurance against future violations*: Mr. Beamish has never given any such assurance. Instead, he has defended his audits and their opaque disclosures, arguing that his audience was "sophisticated" and that they should be able to decipher the financial statements without the benefit of the full picture provided Mr. Beamish and his team during the audits. Even with the benefit of hindsight, the Division expects to present testimony at hearing that the investors still cannot determine from the financial statements at issue that Mr. Burrill was taking prepaid management fees. Further, Mr. Beamish has argued stridently in this litigation that his audit of a private client should not be held to the same professional standards as that of a public client, strongly indicating that he will continue to shirk his professional duties;

(5) *His recognition of the wrongful nature of his conduct*: again, Mr. Beamish admits no wrongdoing and repeatedly argues in this proceeding that his audit work met professional accounting standards and fully disclosed the unauthorized "prepaid management fees"; and

(6) *The likelihood of future violations*: throughout the Division's underlying investigation and this proceeding, Mr. Beamish has indicated his desire to remain an auditor at PwC and to continue audits of public companies providing ample opportunity for future violations. Moreover, the Commission has held that past violations may be indicative of future violations. *See Tzemach David Netzer Korem*, Exchange Act Rel. No. 70044, 2013 WL 3864511, at *6 n.50 (July 26, 2013) (The Commission holds that "the existence of a violation raises an inference

that" future violations will occur") (internal quotation omitted), and given the repeated conduct and unrepentant attitude of Mr. Beamish, a future violation is likely.[15]

CONCLUSION

For the foregoing reasons, and in light of the additional factual showings to be made at hearing, the Court should find that that Respondent Adrian D. Beamish, CPA engaged in negligent professional conduct, representing highly unreasonable conduct in circumstances for which heightened scrutiny is warranted, as well as repeated instances of unreasonable conduct that indicate a lack of competence. Accordingly, the Court should impose a remedial bar pursuant to Rule 102(e).

Dated: April 21, 2017

Respectfully submitted,

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[15] *See also Mitchell T. Toland*, Rel. No. 71875, 2014 WL 1338145, at *3 n.17 (Apr. 4, 2014) (noting that the securities industry is rife with a great many opportunities for abuse and it depends heavily on the integrity of its participants) (citations and quotations omitted).

CERTIFICATE OF SERVICE

I, Janet Bukowski, hereby certify that an original and three copies of **The Division of Enforcement's Prehearing Brief** were filed with the Securities and Exchange Commission, Office of the Secretary, 100 F Street, N.E., Mailstop 1090, Washington, D.C. 20549, and that a true and correct copy of the foregoing has been served by U.P.S. Delivery, marked for next day delivery on April 25, 2017 and electronic mail on the following persons entitled to notice:

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