



**UNITED STATES OF AMERICA  
Before the  
SECURITIES AND EXCHANGE COMMISSION**

Admin. Proc. File No. 3-16430

In the Matter of the Application of

MARK E. LACCETTI

For Review of Action Taken by PCAOB

**REPLY IN FURTHER SUPPORT OF MOTION FOR  
SUBMISSION OF ADDITIONAL EVIDENCE**

May 29, 2015

GIBSON, DUNN & CRUTCHER LLP

Lawrence J. Zweifach  
Darcy C. Harris  
200 Park Avenue  
New York, N.Y. 10166  
Tel: (212) 351-4000  
Fax: (212) 351-4035

Michael J. Scanlon  
Jacob T. Spencer  
1050 Connecticut Avenue, N.W.  
Washington, D.C. 20036  
Tel: (202) 955-8500  
Fax: (202) 467-0539

*Attorneys for Respondent-Petitioner  
Mark E. Laccetti*

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As discussed below and in Mr. Laccetti's Motion and Supporting Brief for Submission of Additional Evidence ("Motion"), the Commission should grant Mr. Laccetti's Motion and consider the five exhibits attached to the Motion (the "Proffered Evidence") in connection with this proceeding for Commission review of the Final Decision and Order Imposing Sanctions ("Decision") issued by the Public Company Accounting Oversight Board ("PCAOB" or "Board").

### **PRELIMINARY STATEMENT**

As explained in the Motion and in his opening brief in support of his application for Commission review, Mr. Laccetti has applied for Commission review of, among other things, the Board's decision that the Division of Enforcement and Investigations ("Division") did not violate Mr. Laccetti's right to the assistance of counsel during the Division's investigation of this matter when the Division refused to permit a technical expert consultant—an accountant—to assist Mr. Laccetti's counsel during his investigative testimony. Mr. Laccetti moved for the submission of the Proffered Evidence to provide the Commission and any further reviewing Court with the context in which the violation of Mr. Laccetti's right to counsel occurred in order to respond to and rebut new findings and conclusions made by the Board in its Decision. The Board's Opposition, in addition to being untimely, does nothing to disturb the conclusions that there are reasonable grounds for Mr. Laccetti's failure to adduce the Proffered Evidence previously, and that the Proffered Evidence is material. *See* Rule 452 of the Commission's Rules of Practice. Accordingly, the Commission should grant the Motion and consider the Proffered Evidence.

### **ARGUMENT**

#### **I. The PCAOB's Opposition Is Untimely.**

Rule 154(b) of the Commission's Rules of Practice states that an opposition to a motion "shall be filed within five days after service of the motion." Rule 151 of the Commission's Rules of Practice requires that, if the method of service on a party is different from the method for filing

with the Commission, the certificate of service “shall state why a different means of service was used.” And Rule 150(a) of the Commission’s Rules of Practice requires that the Motion be served on counsel for the PCAOB by delivering a copy of the Motion.<sup>1</sup> Mr. Laccetti filed his Motion for Submission of Additional Evidence with the Commission via personal service on May 15, 2015, and he served the Motion on the Board the same day via electronic mail to Secretary@pcaobus.org. PCAOB Rule 5405(b) states that “filing of papers with the Board shall be made by electronically filing them with the Secretary,” and in a voicemail to Darcy Harris on May 12, 2015, Phoebe W. Brown, Secretary for the PCAOB, confirmed that she would accept service on behalf of the PCAOB. As stated in the Certificate of Service accompanying the Motion, the Board was thus served via electronic mail on May 15, 2015. The Office of the Secretary for the PCAOB in turn sent a “read receipt,” acknowledging that the electronic mail transmission had been received on May 15, 2015.<sup>2</sup>

Accordingly, because the Board was served on May 15, 2015, the Board’s opposition was due on May 22, 2015. *See* Rules 154(b) and 160(b) of the Commission’s Rules of Practice. Nonetheless, the Board filed its Brief in Opposition (“Opposition” or “Opp.”) on May 26, 2015. Due to this untimely filing, the Commission should disregard the Board’s Opposition and grant Mr. Laccetti’s Motion for Submission of Additional Evidence.

**II. There Are Reasonable Grounds For The Failure To Adduce The Proffered Evidence Previously.**

A motion pursuant to Rule 452 of the Commission’s Rules of Practice can be made “at any time prior to issuance of a decision by the Commission,” and must show, among other things, “that there were reasonable grounds for the failure to adduce such evidence previously.” Rule 452

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<sup>1</sup> Rule 150(b) and (c) of the Commission’s Rules of Practice specify the means of service where counsel has filed a notice of appearance pursuant to Rule 102.

<sup>2</sup> *See* Exhibit 1, attached hereto.

of the Commission's Rules of Practice. In accordance with this rule, Mr. Laccetti moved on May 15, 2015 for the submission of the Proffered Evidence to aid the Commission's review of the Board's determinations. Contrary to the Board's suggestion, *see* Opp. at 4-7, Mr. Laccetti made this motion in direct response to new assessments and determinations made by the Board for the first time following its review of the record.

First, in rejecting Mr. Laccetti's argument that the Division violated his right to counsel during his investigative testimony in this matter, the Board disclaimed any reliance on Mr. Laccetti's investigative testimony and held the defense was thus moot. *See* R.D. 220 at 74 ("This defense is moot because we need not and do not rely on [Mr. Laccetti's] investigative testimony[.]"). At no point prior to the issuance of the Decision had any suggestion been made that the Board would or could "remedy" the violation of Mr. Laccetti's right to counsel in this manner. Indeed, the Hearing Officer's Initial Decision specifically held that, "[i]nsofar as Laccetti's testimony at the hearing was inconsistent with his investigative testimony . . . I credited the investigative testimony." R.D. 197 at 9. Similarly, on appeal to the Board, nowhere did the Division argue that the Board should disclaim any reliance on Mr. Laccetti's investigative testimony; in fact, it stressed that the Board should consider Mr. Laccetti's investigative testimony in assessing both his credibility and liability. *See, e.g.*, R.D. 215 at 4-5 (arguing inconsistencies between investigative and hearing testimony demonstrated that "the Hearing Officer's finding that Mr. Laccetti was credible was unsupportable"); R.D. 205 at 24-25 (arguing inconsistencies between investigative and hearing testimony proved the Hearing Officer "erred to the extent that he based his conclusions on liability or sanctions on a finding that Mr. Laccetti was credible").<sup>3</sup>

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<sup>3</sup> Although the Board's litany of arguments concerning Mr. Laccetti's failure to adduce the Proffered Evidence previously are unclear, to the extent that it is arguing that Mr. Laccetti should have anticipated that the Board would disclaim reliance on his investigative testimony

Against this backdrop, the Board's new "remedy" of disclaiming reliance on Mr. Laccetti's investigative testimony in the Decision could not have been anticipated, and was not known until the Board issued the Decision. This provides reasonable grounds for Mr. Laccetti's failure to adduce the Proffered Evidence previously.

Second, the Board stated that, even if the violation of Mr. Laccetti's right to counsel "were accepted, he has not shown that he would be entitled to any further relief than he is, in effect, receiving—. . . that impermissibly obtained evidence is excluded." R.D. 220 at 76 (internal quotations and citations omitted). At no point prior to this statement had Mr. Laccetti been on notice that he needed to demonstrate that he was entitled to something more than a remedy that he had never requested, and which had never been advanced previously. This also provides reasonable grounds for Mr. Laccetti's failure to adduce the Proffered Evidence previously.

In addition, the Board concluded that the Division excluded Mr. Laccetti's expert consultant from Mr. Laccetti's investigative testimony because the staff identified the expert's attendance "as inappropriate based on his employment by Ernst & Young." R.D. 220 at 76. Rather than being foreshadowed by the Hearing Officer's Initial Decision (*see* Opp. at 6-7 (quoting R.D. 197 at 88)), this was a further rationalization for the exclusion of Mr. Laccetti's expert consultant—mere employment by Ernst & Young. This likewise provides reasonable grounds for not having adduced the Proffered Evidence previously; to rebut this additional (and erroneous) justification, it is appropriate for Mr. Laccetti to offer evidence regarding other Ernst & Young employees who were permitted to attend not only Mr. Laccetti's investigative testimony, but the investigative testimony of other Ernst & Young personnel.<sup>4</sup>

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because he raised his right to counsel argument as an affirmative defense, this argument makes no sense. *See* Opp. at 5-6.

<sup>4</sup> *See* Exs. C and E to the Motion.

Mr. Laccetti is simply submitting the Proffered Evidence to rebut the Board's new rationalizations and conclusions<sup>5</sup> so that—for purposes of this *de novo* review by a second appellate body that is completely separate and removed from the underlying proceedings that took place before the Board, as well as any further review—the questions at issue regarding the violation of Mr. Laccetti's right to counsel can be assessed in context.

### **III. The Proffered Evidence Is Material.**

Mr. Laccetti seeks to provide appropriate context for the questions at issue on appeal through a small number of exhibits which are narrow in scope and which should be viewed as uncontroversial. Exhibits A, B, and E to the Motion are standard documents authored by the Board and/or the Division in the course of their investigation in this matter. Exhibit A is a one-page cover letter from the Director of the Division to Mr. Laccetti's counsel attaching a two-page Order of Formal Investigation that governed the Division's investigation in this matter. Exhibit B is a three-page letter from the Division to Mr. Laccetti attaching a standard, one-page accounting board demand and its accompanying three- and four-page standardized forms. And Exhibit E is a one-page fax cover sheet attaching a twelve-page letter from the Division to Mr. Laccetti's counsel detailing the allegations upon which the "Division intends to recommend commencement of a disciplinary proceeding," as provided for in PCAOB Rule 5109(d). Ex. E at 3. Exhibits C and D are simply official transcripts of testimony taken by the Division in this matter. Exhibit C contains the transcript of Mr. Laccetti's investigative testimony and the errata he provided, and Exhibit D contains a nine-page excerpt of the investigative testimony of another individual

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<sup>5</sup> See *In re Ralph W. LeBlanc*, 80 SEC Docket 2207, Release No. 34-48254, 2003 WL 21755845, at \*6 n.23 (Jul. 30, 2003) (accepting evidence submitted under Rule 452 where respondent "was not aware of the significance" of the evidence "until the law judge's decision issued").

associated with Ernst & Young indicating the people who were present at that individual's investigative testimony.

These documents provide important context regarding the investigative proceedings that took place prior to the Board instituting disciplinary proceedings against Mr. Laccetti. Indeed, the fact that the Board engages on these five exhibits for seventeen pages in its Opposition demonstrates their relevance and materiality to the questions at issue.<sup>6</sup> In addition, the Proffered Evidence is straightforward and simply provides the procedural and factual context for questions regarding Mr. Laccetti's right to counsel at issue here. Determining how the Board and the Division investigated Mr. Laccetti,<sup>7</sup> how the Division took Mr. Laccetti's investigative testimony,<sup>8</sup> and who the Division permitted to be present at the investigative testimony of others in the same investigation<sup>9</sup> is both material to an assessment of the questions at issue, and self-evident from the Proffered Evidence.

In its effort to distinguish the Proffered Evidence, the Board confuses evidence and argument: that the Board disagrees with Mr. Laccetti's arguments does not mean that the evidence cited in support of those arguments is immaterial. Quite the opposite—it is perfectly appropriate to offer uncontroversial *evidence* in support or arguments that, in the Board's view, “draw broad inferences from some or all of [the Proffered Evidence].” Opp. at 4. The fact that the Proffered Evidence supports Mr. Laccetti's inferences only underscores the evidence's materiality.

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<sup>6</sup> See, e.g., Opp. at 9-10 (Board providing an analysis of the number of citations to Mr. Laccetti's investigative testimony contained in Exhibit E to the Motion in order to argue what conclusion “might be drawn about the process and how ‘prominent’ [Mr. Laccetti's] investigative testimony actually was in it.”).

<sup>7</sup> See Exs. A, B, and E to the Motion.

<sup>8</sup> See Ex. C to the Motion.

<sup>9</sup> See Ex. D to the Motion.



Contrary to the Board's argument that Mr. Laccetti "offers no other reason why refraining from relying on his investigative testimony . . . would not serve as a fully sufficient remedy" (Opp. at 14)—a position that was never advanced until the Board did so in its Decision—Mr. Laccetti is submitting the Proffered Evidence precisely to demonstrate the taint that the investigative testimony had on these proceedings.

#### **IV. Discretionary Acceptance Of The Proffered Evidence Is Also Appropriate.**

Because the Proffered Evidence is plainly material to the issues the Commission will be reviewing *de novo*, even if the Commission does agree that there are reasonable grounds for Mr. Laccetti's failure to adduce the Proffered Evidence previously, it should nonetheless exercise its discretion and consider the Proffered Evidence. *Cf. In re Leslie A. Arouh*, 99 SEC Docket 1094, Release No. 34-62898, 2010 WL 3554584, at \*14 n.69 (Sept. 13, 2010) (admitting evidence offered under Rule 452 as an exercise of discretion where the evidence was material).

#### **CONCLUSION**

For the reasons set forth above, the Commission should grant the Motion and consider the additional evidence offered by Mr. Laccetti.

May 29, 2015

Respectfully submitted,



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GIBSON, DUNN & CRUTCHER LLP

Lawrence J. Zweifach  
Darcy C. Harris  
200 Park Avenue  
New York, N.Y. 10166  
Tel: (212) 351-4000  
Fax: (212) 351-4035

Michael J. Scanlon  
Jacob T. Spencer  
1050 Connecticut Avenue, N.W.  
Washington, D.C. 20036  
Tel: (202) 955-8500  
Fax: (202) 467-0539

*Attorneys for Mark E. Laccetti*

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**From:** Office of the Secretary <Secretary@pcaobus.org>  
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**Sent:** Friday, May 15, 2015 5:20 PM  
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**CERTIFICATE OF SERVICE**

I hereby certify that on this 29th day of May, 2015, I caused a copy of the foregoing Reply in Further Support of Motion for Submission of Additional Evidence and attached exhibit to be served upon J. Gordon Seymour, Luis de la Torre, and Jodie J. Young, counsel for the Public Company Accounting Oversight Board, via hand delivery and electronic mail addressed as follows:

J. Gordon Seymour  
Luis de la Torre  
Jodie J. Young  
Office of the General Counsel  
Public Company Accounting Oversight Board  
1666 K Street, N.W.  
Washington, D.C. 20006  
seymourg@pcaobus.org  
delatorrel@pcaobus.org  
youngj1@pcaobus.org

  
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Darcy Harris