BEFORE THE
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C.

Admin. Proc. File No. 3-16430

In the Matter of the Application of

MARK E. LACCETTI, CPA

For Review of Disciplinary Action Taken By the

PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD

PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD'S REPLY IN SUPPORT OF MOTION TO TERMINATE STAY OF BOARD DISCIPLINARY ACTION

September 16, 2016

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The Public Company Accounting Oversight Board ("Board") submits this reply in further support of its request that the Commission terminate the statutory stay, provided by Section 105(e)(1) of the Sarbanes-Oxley Act of 2002 ("the Act"), of the Board disciplinary action that the Commission sustained in its September 2, 2016 order in this proceeding.

In opposing the Board's motion, Applicant contends that the statutory stay "should remain in effect" for some untold period of time—"at least through the 60-day period" within which he may "seek review of the [Commission's] order in a federal court of appeals" and, if he seeks such review, "through the pendency of the appeal." Opp. 1, 3. Applicant's opposition fails to address in any detail the statutory language or structure pertinent to the Sarbanes-Oxley Act stay or the standards for a Securities Exchange Act stay pending judicial review. As a consequence, the four grounds offered in opposition to the motion lack support and provide no basis for distinguishing the three previous cases in which the Commission sustained Board sanctions and terminated the Sarbanes-Oxley Act stay.

Accordingly, the Board respectfully requests that the Commission lift, summarily or on the basis of the motion papers, the Sarbanes-Oxley Act stay that operates on the Board's imposition and public reporting of the sanctions against Applicant, leaving Applicant to seek, if he wishes to and can do so, a properly supported stay, under the proper standards and the proper procedure, of the Commission's September 2, 2016 order pending judicial review.

1. Applicant concedes (Opp. 2) that in the three prior cases sustaining Board sanctions, the Commission terminated the Section 105(e)(1) stay either upon issuance of its decision or soon after in response to a Board motion, with no suggestion that the Commission's order first needed to become final. *See S.W. Hatfield, CPA*, SEC Rel. No. 34-69976, 2013 SEC LEXIS 1999 (July 11, 2013); *R.E. Bassie & Co.*, SEC Rel. No. 3354, 2012 SEC LEXIS 89, *54

(Jan. 10, 2012); *Gately & Associates, LLC*, SEC Rel. No. 34-63167, 2010 SEC LEXIS 3554 (Oct. 22, 2010). The orders in all three cases referred to the stay as "the automatic stay of the Board sanctions imposed on Applicants pending the Commission's review" (emphasis added).

2. For good and abundant reasons, the Commission should follow its precedent in the present case. Sarbanes-Oxley Act Section 105(e)(1) provides, in part, that "[a]pplication to the Commission for review" of any disciplinary action of the Board "shall operate as a stay of any such disciplinary action, unless and until the Commission orders" that "no stay shall continue to operate." 15 U.S.C. 7215(e)(1). It is a stay "on the imposition of such sanction," which also suspends the statutory command that the Board "shall report the sanction" to "the public," the statute only allowing the Board to do so "once" the stay "has been lifted." Section 105(d)(1)(C) of the Act, 15 U.S.C. 7215(d)(1)(C). The stay is a function of the Commission's oversight of the Board. *See* Section 107(a) & (c)(2)(A) of the Act, 15 U.S.C. 7217(a) & (c)(2)(A); *see generally Free Enterprise Fund v. PCAOB*, 561 U.S. 477, 486 (2010) (describing the Sarbanes-Oxley Act as "plac[ing] the Board under the SEC's oversight, particularly with respect to the issuance of rules or the imposition of sanctions (both of which are subject to Commission approval and alteration)"). The Commission has wide latitude to terminate the stay. It may lift the stay "summarily," as well as "after notice and opportunity for hearing," and it may, before concluding its review of the Board's disciplinary action, consider and determine the question of "the duration" of the stay "pending review." *See* Section 105(e)(1) & (2) of the Act, 15 U.S.C. 7215(e)(1) & (2); *see also* Section 3(a) of the Act, 15 U.S.C. 7202(a) (generally authorizing SEC to "promulgate such rules and regulations, as may be necessary or appropriate in the public interest or for the protection of investors, and in furtherance of this Act"); *see generally Allan v. SEC*, 577 F.2d 388, 391 (7th Cir. 1978) ("[a]uthority for the SEC to

'summarily' determine the question of a stay demonstrates the breadth of discretion granted by Congress"); *cf. SEC v. Sloan*, 436 U.S. 103, 112 (1978) (describing authority to "summarily" act in another context). Under SEC Rule of Practice 401(e), implementing the statutory authority, the Commission "may, at any time, on its own motion," determine whether to lift the automatic stay, may lift the stay "summarily, without notice and opportunity for hearing," and may lift the stay on consideration, which may be expedited, of a motion by "[a]ny person aggrieved" by the stay. 17 C.F.R. 201.401(e); *see* SEC Rel. No. 34-49412, 2004 WL 503739, *3 (Mar. 12, 2004).

When, as in this case, the Commission sustains the disciplinary action taken by the Board, the Commission acts on the application for review, which had triggered the Sarbanes-Oxley Act stay, and completes its oversight function with respect to the sanctions. The Board's imposition of the sanctions is no longer on review; it is the Commission's order sustaining the sanctions that would be subject to further review. Securities Exchange Act Section 25(a)(1), 15 U.S.C. 78y(a)(1); *see, e.g., Eichler v. SEC*, 757 F.2d 1066, 1069 n.2 (9th Cir. 1985) (noting court has "jurisdiction to review the SEC's order" sustaining NASD's disciplinary action, but that underlying NASD decisions "are not before" the court). It is the Securities Exchange Act and SEC Rule of Practice 401(c)—not the Sarbanes-Oxley Act and SEC Rule of Practice 401(e)—that address a stay "pending judicial review." 15 U.S.C. 78y(c)(2); 17 C.F.R. 201.401(c); *see* SEC Rel. No. 34-35833, 1995 WL 368865, *78 (June 9, 1995). To maintain the Sarbanes-Oxley Act stay after the Commission has decided the case against the applicant would have the perverse effect both of (1) precluding the Board from reporting its sanctions to the public (*see* Section 105(d)(1)(C) of the Act), despite the fact that the Commission has publicly issued its own decision in the case, a subject which we discuss in greater detail on pages 5-7 and 8-9 below; and (2) precluding from taking effect sanctions the Commission has sustained, here

finding no basis for concluding the sanctions were not "in furtherance of Sarbanes-Oxley and the securities laws" (SEC Rel. No. 34-78764, 2016 SEC LEXIS 3334, *13-*18 (Sept. 2, 2016); *see* R.D. 220 at 88, 93 (Board decision, determining that the Act "call[ed] on" the Board to impose the sanctions "'to protect the interests of investors and further the public interest in the preparation of informative, accurate, and independent [issuer] audit reports'")).

3. Against these overwhelming reasons for lifting the Sarbanes-Oxley Act stay at this time, Applicant merely asserts that the stay is "not mutually exclusive" with other "avenues to pursue a stay" and claims that "the unique facts here" give rise to four reasons to deny the Board's motion. Opp. 1-2, 3 n.1. None of the four reasons is a ground for distinguishing *Gately*, *Bassie*, and *Hatfield* or a basis for leaving the Section 105(e)(1) stay in place here. All of them fail because what matters to whether the Sarbanes-Oxley Act stay should continue to operate is that the Commission has had the opportunity to exercise oversight over the Board with respect to the imposition of the sanctions, through completion of its review of the sanctions or through consideration and determination of whether the stay should continue to operate pending that review. But the four reasons also do not hold up even on their own terms, as discussed below.

4. Applicant's first argument—that lifting the stay would "irreparabl[y] harm" his reputation by "signaling that the Board's findings and sanctions," which the Board would report to the public, "are final and conclusive"—fails for numerous reasons. It depends on the premise that reporting an adjudication decision to the public signals that it is final and conclusive. Not only is that notion unheard of generally, but there is no basis for it under the Sarbanes-Oxley Act or SEC rules or practice. As noted, the Act authorizes the SEC to lift the Section 105(e)(1) stay "pending review" of the Board's imposition of sanctions, and SEC Rule of Practice 401(e)(1) provides that the Commission may, "at any time," determine whether to lift the stay on its own

motion. Contrary to Applicant's position, the Commission has lifted the stay long before the time for appeal to court had run, as ordered in *Bassie* and *Hatfield*. Even before the SEC's proceedings against accountants and other professionals under the predecessor to its current Rule 102(e) ceased to be non-public in 1988, the SEC would publish, upon issuance, the initial decisions of its administrative law judges, which clearly were not final. SEC Rel. No. 34-11274, 1975 WL 160471, *1 (Mar. 4, 1975); *see Bill R. Thomas*, SEC Rel. No. AAE 192, 1988 SEC LEXIS 1119, *17-*18 (May 27, 1988) (citing 1975 policy statement in rejecting argument that "the law judge's initial decision was improperly made public before [respondent's] appeal was determined"). There are also examples in the context of SEC rulemakings. *See, e.g., Options Clearing Corp.*, SEC Rel. No. 34-75886, 2015 WL 5305989, *1 (Sept. 10, 2015) (Commission order discontinuing automatic stay, under 17 C.F.R. 201.431(e), of action taken by delegated authority by operating division approving rulemaking while the Commission reviewed the staff action); *Institutional Networks Corp.*, SEC Rel. No. 34-25039, 1987 WL 756909, *1 (Oct. 15, 1987) (Commission order lifting automatic stay triggered by party's challenge to staff-approved rulemaking). Thus, Applicant's argument is circular. Reporting of the Board's decision to the public would "signal[]" that it was "final and conclusive" only by assuming the very point in dispute here: that the stay is not to be lifted until all appeals have been exhausted.

Furthermore, Applicant, in arguing that his reputation will be harmed if the Board is allowed to report its decision to the public, takes no account of the fact that the Commission's 30-page decision already has been published. It includes discussion of the Board's findings of violations and imposition of sanctions, notes that Applicant "does not challenge" them, and rejects the "one procedural and two constitutional arguments" he does make. *See, e.g.*, 2016 SEC LEXIS 3334, *3-*17, *18-*73. Applicant's claim of reputational harm is further attenuated

by the fact that, consistent with Commission precedent that its review of a PCAOB disciplinary proceeding is a public proceeding, *see Kabani & Co., Inc.*, SEC Rel. No. 34-76266, 2015 WL 6447449, *1 (Oct. 26, 2015); *Gately & Associates, LLC*, Admin. Proc. File No. 3-13535, 2009 SEC LEXIS 4387, *1-*2 (Oct. 23, 2009),[1/] the Board's decision was posted on the SEC's website docket for this case, along with the application for review, filed some 18 months ago. There is no general right, for Applicant to invoke in support of prolonging the Sarbanes-Oxley Act stay, "not to be injured in one's reputation or business prospects as a consequence of" an administrative body "exercis[ing] its statutory duties," and there is "a substantial public interest in permitting" such exercise. *See, e.g., Hunter v. SEC*, 879 F. Supp. 494, 501 (E.D. Pa. 1995) (citing cases); *see also, e.g., Markowski v. SEC*, 34 F.3d 99, 105 (2d Cir. 1994); *Miller v. SEC*, 998 F.2d 62, 64 (2d Cir. 1993). Nor does Applicant make any attempt to reconcile his claim of irreparable harm from the Board publicly reporting its decision with his assertion about having permanently left the practice of auditing public companies many years ago (Opp. 2).

Allowing the Board to report its decision to the public militates powerfully in favor of lifting the Sarbanes-Oxley Act stay. *See generally, e.g., General Bond & Share Co.*, Admin. Proc. File No. 3-7666, 1992 SEC LEXIS 3490, *3 (May 15, 1992) (denying stay of publication of NASD decision while on appeal because, in part, "[t]o keep the public unaware of NASD determinations at this stage would frustrate the public interest that the Securities Exchange Act was designed to foster"; adding that such an "extraordinary... measure" would be "disfavored");

1/ *See generally Disciplinary Proceedings Involving Professionals Appearing of Practicing Before the Commission,* SEC Rel. No. 34-25893, 1988 WL 1000021, *2-*4, *12 (July 7, 1988) (discussing "the presumption in favor of public proceedings" before the SEC and the importance of "the public's right of access to [its] decisionmaking processes" and noting that respondents "have an incentive to delay private proceedings more than public ones" and that the latter place all respondents on an "equal footing" and as a general matter "are more favored in the law than closed proceedings").

Robert N. Kerfoot, SEC Rel. No. 34-31690, 1993 SEC LEXIS 8, *7-*8 (Jan. 6, 1993) ("see[ing] no impropriety" in an exchange's publication of the results of its disciplinary proceedings against respondent and stating that "the policy of the Exchange Act is served by the publication of the sanctions imposed on [respondent] and the findings of misconduct that gave rise to those sanctions"); *Robert A. Amato*, SEC Rel. No. 34-31974, 1993 WL 71123, *3 & n.21 (Mar. 10, 1993) (finding NASD acted properly by "publicizing the results of its proceedings," which "was consistent with longstanding policy"); *David D. Esco, Jr.*, SEC Rel. No. 34-14716, 1978 WL 207895, *3 (Apr. 28, 1978) (finding "no unfairness" in NASD's practice of "publiciz[ing] the sanctions it imposes...whether or not those sanctions are appealed to this Commission").

5. Applicant's second argument—that lifting the stay "would not serve the public interest or protect investors" (Opp. 2)—is also based on a faulty premise. He made the same argument about "not perform[ing] audits for public companies anymore," having "no intention to do so in the future," and that "the last audit of a public company on which [he] worked" was the audit at issue in this case (*id.*), in opposing the imposition of sanctions in the first place. The Board rejected those arguments, determining that "[f]or violations such as those found here, the Sarbanes-Oxley Act calls on the Board" to impose the sanctions it did. R.D. 220 at 93. For example, the Board explained that "[w]e cannot assume, as Laccetti essentially asks us to do, that despite the type of conduct in which he engaged, he poses no continuing risk of harm to those who trust to the reliability of issuer audit reports"; and pointed out that his "'current intentions are not enforceable,' and his 'occupation provides him with ample opportunity to commit future violations, as he remains a CPA, employed by a registered public accounting firm, with many more years of practice ahead of him'"; that "[p]reviously in his career, he returned to an audit practice after devoting several years to the same kind of work he says he has done since leaving

Ernst & Young"; that he "has shown no recognition of the wrongful nature of his conduct, and we have no assurance that he would respond differently if faced with similar circumstances in a future issuer audit"; and that, by his own account, "he has no track record" of auditing issuers since his violative conduct. *Id.* at 95.[2/] Applicant did not "challenge the Board's underlying findings of violations or imposition of sanctions," and the Commission "agree[d] with" the Board's "extensive factual findings" and its "legal analysis supporting its findings of violations and sanctions." 2016 SEC LEXIS 3334, *3, *13-*14, *15 n.14. Thus, there is no basis for Applicant to claim now that "allowing the two-year bar to go into effect would have no practical impact in terms of the public interest or the protection of investors" (Opp. 2).

Furthermore, Applicant completely ignores the important benefits to the public that would flow from the Board's reporting of its decision on its own website, where members of the public interested in the PCAOB's activities would naturally look for such matters. This would enhance the public's access to the Board decision's "extensive factual findings," application of multiple PCAOB auditing standards, and "legal analysis supporting its findings of violations and sanctions," none of which were challenged by Applicant (*see* 2016 SEC LEXIS 3334, *12-*13, *15 n.14) and none of which would be altered by an ultimate ruling in Applicant's favor on his procedural and constitutional challenges. Decisions can have substantial value even if the appellate process has not run its course and even if they are ultimately vacated or reversed on

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[2/] *See, e.g.*, *Michael C. Pattison, CPA*, SEC Rel. No. 34-67900, 2012 WL 4320146, *10 (Sept. 20, 2012) (rejecting claim that respondent who "remains licensed as a CPA" but was employed by a private company was precluded from opportunities for future violations); *cf. James E. Franklin*, SEC Rel. No. 34-56649, 2007 WL 2974200, *8 (Oct. 12, 2007) (rejecting respondent's argument that penny stock bar was unnecessary given his claim he could no longer work in the industry because "absent a bar, there would be no obstacle to [his] participation in a penny stock offering in the future"); *Conrad P. Seghers*, SEC Rel. No. 2656, 2007 WL 2790633, *8 & n.48 (Sept. 26, 2007) ("A bar is necessary to protect the public interest because, absent a bar, there would be nothing to prevent Seghers from becoming an investment adviser to the Funds' investors or others in the future."), *petition denied*, 548 F.3d 129 (D.C. Cir. 2008).

other grounds.[3/] Moreover, investors, other auditors, audit committees, lawmakers, and the media would, through direct access to the Board's decision on its website, be allowed to know, for example, precisely what conduct the Board considers to merit discipline, what issues were litigated, and how its enforcement program performed.

6. Applicant's third argument essentially repeats his faulty second argument about the Board lacking "any stake" in "furthering the public interest through enforcement of the bar" and adds two other contentions to it: (1) that it is a matter of no consequence to the Board whether the Sarbanes-Oxley Act stay on the civil money penalty is lifted at this time; and (2) that the Board cannot be interested in whether the stay is lifted now on any of the sanctions because of the length of time it took to investigate, litigate, and decide the Board's disciplinary proceeding. Opp. 2. As to the latter contention, the length of time was a function of the case and the way it was litigated. As to the former, in *Bassie*, the Commission lifted the Section 105(e)(1) stay of Board sanctions that included a civil money penalty, with no suggestion that "keeping the stay intact [would] impede [the Board's] ability to ultimately collect the civil penalty from [the applicant]" (Opp. 2). The Board's decision in the present case discussed the importance of the civil money penalty, imposed in tandem with the associational bar, "to protect against Laccetti's demonstrated capacity for the conduct at issue here," to "impress on him the seriousness of his violations," and to "encourage more rigorous compliance by him and others" with certain

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3/ *See generally, e.g., John J. Aesoph*, SEC Rel. No. 34-78490, 2016 WL 4176930, *9 n.38 (Aug. 5, 2016) (citing *Michael J. Marrie*, SEC Rel. No. 34-48246, 2003 WL 21741785 (July 29, 2003), *rev'd on other grounds*, 374 F.3d 1196 (D.C. Cir. 2004)); *Dennis J. Malouf*, SEC Rel. No. 34-78429, 2016 WL 4035575, *5 n.12 (July 27, 2016) (citing *John P. Flannery*, SEC Rel. No. 34-73840, 2014 WL 7145625, *9-*19 (Dec. 15, 2014), *vacated on other grounds*, 810 F.3d 1 (1st Cir. 2015)); *David R. Wulf*, SEC Rel. No. 34-77411, 2016 WL 1085661, *5 n.24 (Mar. 21, 2016) (citing three cases on appeal); *Edward S. Brokaw*, SEC Rel. No. 34-70883, 2013 SEC LEXIS 3583, *76 n.152 (Nov. 15, 2013) (citing *Robert D. Tucker*, SEC Rel. No. 34-68210, 2012 SEC LEXIS 3496, *64 (Nov. 9, 2012), *appeal filed*, No. 13-31 (2d Cir. Jan. 8, 2013)).

fundamental auditing principles (R.D. 220 at 94, 96), and the Commission sustained the sanctions. That the Commission had the opportunity to exercise oversight over the Board with respect to the imposition of the sanctions is what matters to whether the Section 105(e)(1) stay should continue to operate, not collectability of a penalty.

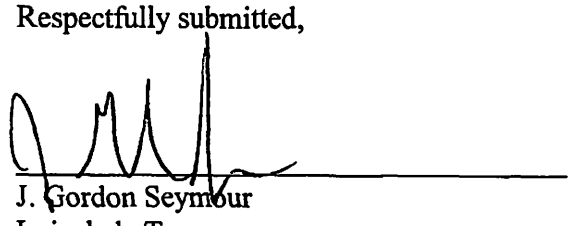
7. Applicant's fourth argument harks back to his first, in that, without any justification and contrary to the points already made above, it assumes that a decision must be "final" before the Sarbanes-Oxley stay may be lifted. Applicant cites a case holding only that, when a litigant files a premature appeal whose defect is later cured while the premature appeal was still pending, the appellate court has jurisdiction to entertain the formerly premature appeal. Opp. 2. Even if that case stood for the proposition, as stated by Applicant, that "for some purposes, an order or judgment is not final until the time to appeal has run," there is no reason why finality is the touchstone for lifting the Sarbanes-Oxley Act stay.

In sum, Applicant's opposition identifies no "unique facts" that warrant disregarding the Commission's precedent and prolonging the automatic stay in effect even after having already sustained the Board's sanctions. If Applicant wants a stay pending judicial review, then he needs to provide the proper support under the proper standards and the proper procedure, not try to co-opt the Section 105(e)(1) stay in an opposition to the Board's motion.[4/]

[4/] Applicant's opposition does not even attempt to do the former. First, the opposition does not constitute "a motion," which is a requirement for a stay pending judicial review. 17 C.F.R. 201.401(c). Second, the undeveloped points raised in the opposition do not come close to demonstrating the extraordinary circumstances necessary to warrant a stay pending judicial review under the standards traditionally applied under SEC Rule 401(c). *See William Timpinaro*, SEC Rel. No. 34-29809, 1991 WL 288326, *2 (Nov. 12, 1991) (describing the imposition of such a stay as "an extraordinary and drastic remedy"), *cited in Kenny A. Akindemowo*, SEC Rel. No. 34-78352, 2016 WL 3877888, *2 n.9 (July 18, 2016). The Commission's consideration of a stay request pending a court appeal "is governed by the traditional, four-factor standard—namely, (1) whether the stay applicant has made a strong showing that he or she is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3)

For the foregoing reasons and those set forth in the Board's September 6, 2016 motion, the Board respectfully requests that at this time the Commission terminate the Sarbanes-Oxley Act Section 105(e)(1) stay of the Board's disciplinary action against Applicant.

Respectfully submitted,



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whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Mohammed Riad*, SEC Rel. No. 34-78272, 2016 WL 3648316, *1 (July 8, 2016) (collecting cases). The opposition makes no attempt to satisfy these "stringent standards." *See Marrie v. SEC*, 2003 WL 22971922, *1 (D.C. Cir. Dec. 12, 2003). For example, Applicant does not even claim, much less make a "strong showing," that he is likely to succeed on the merits in any appeal of the Commission's order. To the extent that, irrespective of the four-factor test, some aspect of the Commission's order sustaining the Board's sanctions might be susceptible to a stay pending judicial review under Rule 401(c) purely as a matter of the Commission's discretion, then that, too, should be decided separately from whether the Sarbanes-Oxley Act stay should continue to operate.

CERTIFICATE OF SERVICE

I hereby certify that on the 16th of September 2016, I caused to be sent to Lawrence J. Zweifach and Darcy C. Harris (via Federal Express, with courtesy copy by electronic mail to DHarris@gibsondunn.com) and to Michael J. Scanlon and Jacob T. Spencer (via hand delivery) copies of "Public Company Accounting Oversight Board's Motion to Terminate Stay of Board Disciplinary Action" (the original and three copies of which were filed via hand delivery with the Office of the Secretary today) addressed as follows:

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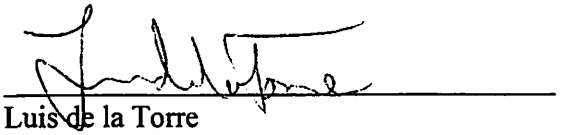
202-467-0539 (facsimile)

Mr. Zweifach and Ms. Harris are being served via Federal Express, with courtesy copy by electronic mail, rather than by hand delivery, because they are located in New York.



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