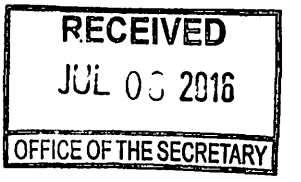
UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINITRATIVE PROCEEDINGS
File No. 3-17228



In the Matter of

David S. Hall, P.C., d/b/a The Hall Group CPAs,
David S. Hall, CPA,
Michelle L. Helterbran Cochran, CPA,
and
Susan A. Cisneros

Respondents.

HALL RESPONDENTS' BRIEF IN SUPPORT OF MOTION FOR SUMMARY DISPOSITION

Respondents, David S. Hall, P.C., d/b/a The Hall Group CPAs (the "Hall Group") and David S. Hall, CPA, ("Mr. Hall") (collectively the "Hall Respondents"), by and through their undersigned attorneys, hereby submits the following brief in support of their motion for summary disposition pursuant to 17 C.F.R. §§ 201.250 and 201.154, to dismiss this action under the doctrines of claim preclusion and issue preclusion, because the Public Company Accounting Oversight Board ("PCAOB" or "Board") already raised, litigated and settled the same issues presented in this case.

STATEMENT OF THE CASE

On April 26, 2016, the PCAOB, after extensive investigation entered an Order censuring the Hall Respondents. ("PCAOB Order"). That very same day the Securities and Exchange Commission ("Commission") entered an Order Instituting Public Administrative and Cease-and-Desist Proceedings ("OIP") pursuant to Sections 4C and 21C of the Securities Exchange Act of 1934 and Rule 102(e) of the Commission's Rules of Practice.

The Commission appoints and removes the PCAOB's directors, has oversight and enforcement authority over the PCAOB, approves funding and budgets of the PCAOB, reviews and approves all rules promulgated by the PCAOB, and has de novo authority to review all PCAOB disciplinary actions, including the power to enhance, modify, cancel, reduce or require remission of sanctions imposed by the Board. Further, the Board has to notify the Commission of all investigations and may refer its investigations to the Commission. The Board must coordinate its investigations with the Commission and may share with the Commission confidential information obtained in the course of an investigation and the Board must submit an annual report and audited financial statements to the Commission.

As a result of these powers and obligations, the PCAOB and the Commission are in privity with each other so the acts, enforcement actions and decisions of the PCAOB constitute the acts of the Commission. The claims asserted in the OIP relating to violations of the standards of the PCAOB were the subject of the PCAOB investigation and enforcement action that was settled. Consequently the assertion in the OIP of the same claims that were or could have been asserted by the PCAOB are barred in whole or in part by the doctrines of res judicata (claim preclusion), collateral estoppel (issue preclusion) and accord and satisfaction and settlement.

ARGUMENT

I. Legal Standards

The Commission may grant a motion for summary disposition under Rule 250 of the Commission's Rules of Practice, 17 C.F.R. §201.250 and Rule 154, 17 C.F.R. §201.154. For purposes of the motion, the facts of the pleading of the party against whom summary disposition is sought "shall be taken as true, except as modified by stipulations or admissions made by that

party, by uncontested affidavits, or by facts officially noted pursuant to Rule 323."[1] Rule 250(a).[2] The motion can be granted if there is no genuine issue as to a material fact and the party making the motion is entitled to a summary disposition as a matter of law. Rule 250(b).[3]

II. The Doctrines of Claim Preclusion and Issue Preclusion Bar the SEC's Claims against the Hall Respondents.

The doctrines of claim preclusion and issue preclusion protect against "the expense and vexation attending multiple lawsuits, conserv[e] judicial resources, and foste[r] reliance on judicial action by minimizing the possibility of inconsistent decisions." *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008) (quoting *Montana v. United States*, 440 U.S. 147, 153-54 (1979)).

The Commission's self-professed power to impose additional administrative sanctions on accounting professionals already punished by the PCAOB violates the clear terms of the Sarbanes-Oxley Act of 2002 ("Sarbanes-Oxley" or the "Act") and principles of claim preclusion (res judicata) and issue preclusion (collateral estoppel).

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[1] "Official notice may be taken of any material fact which might be judicially noticed by a district court of the United States, any matter in the public official records of the Commission, or any matter which is peculiarly within the knowledge of the Commission as an expert body. If official notice is requested or taken of a material fact not appearing in the evidence in the record, the parties, upon timely request, shall be afforded an opportunity to establish the contrary." 17 C.F.R. § 201.323

[2] "(a) After a respondent's answer has been filed and, in an enforcement or a disciplinary proceeding, documents have been made available to that respondent for inspection and copying pursuant to § 201.230, the respondent, or the interested division may make a motion for summary disposition of any or all allegations of the order instituting proceedings with respect to that respondent. If the interested division has not completed presentation of its case in chief, a motion for summary disposition shall be made only with leave of the hearing officer. The facts of the pleadings of the party against whom the motion is made shall be taken as true, except as modified by stipulations or admissions made by that party, by uncontested affidavits, or by facts officially noted pursuant to § 201.323." 17 C.F.R. § 201.250(a)

[3] (b) The hearing officer shall promptly grant or deny the motion for summary disposition or shall defer decision on the motion. The hearing officer may grant the motion for summary disposition if there is no genuine issue with regard to any material fact and the party making the motion is entitled to a summary disposition as a matter of law. If it appears that a party, for good cause shown, cannot present by affidavit prior to hearing facts essential to justify opposition to the motion, the hearing officer shall deny or defer the motion. A hearing officer's decision to deny leave to file a motion for summary disposition is not subject to interlocutory appeal."17 C.F.R. § 201.250

A. Claim Preclusion[4] (res judicata)

The doctrine of "claim preclusion" bars "successive litigation of the very same claim, whether or not re-litigation of the claim raises the same issues as the earlier suit." *Taylor*, 553 U.S. at 892 (quoting *New Hampshire v. Maine*, 532 U.S. 742, 748-49 (2001)); *see also Dept. of Enf't. v. Candace Jean Lee*, 2015 WL 9596076, at *1 (N.A.S.D.R. Oct. 1, 2015) (Decision of FINRA's National Adjudicatory Council ("NAC") in former litigation precluded disciplinary proceeding by FINRA's Department of Enforcement on the basis of collateral estoppel) .[5] Under federal res judicata law "a final judgment on the merits bars further claims by parties or their privies based on the same cause of action." *Montana,* 440 U.S. at 153. For a prior judgment to bar an action on the basis of res judicata, four elements must be met: (1) the same cause of action must be involved in both suits; (2) the parties in both suits must be identical or in privity with each other; (3) the prior judgment must have been rendered by a court of competent jurisdiction; and (4) the decision in the prior proceeding must have been a final judgment on the merits. *See Russell v. SunAmerica Securities, Inc.*, 962 F.2d 1169, 1172-73 (5th Cir.1992); *Nilsen v. City of Moss Point*, 701 F.2d 556, 559 (5th Cir.1983). Res judicata "bars litigation of any claim for relief that was available in a prior suit between parties or their privies, whether or not the claim was actually litigated." *Transaero, Inc. v. La Fuenza Aerea Boliviana*, 162 F.3d 724, 731 (2d Cir. 1998) (internal quotation marks and citation omitted); *see also Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326-27 n.5 (1979).

(1) The PCAOB Order reflects the Same Action as the Present Commission Proceeding.

[4] Claim preclusion describes the rules formerly known as "merger" and "bar." *Taylor*, 553 U.S. at 892, n.5. (2008).
[5] The Commission may argue that *Jones v. S.E.C.*, 115 F.3d 1173 (4th Cir. 1997) governs, however, Jones involved interpretation of the Maloney Act, not the Sarbanes-Oxley Act which is significantly different. *See* argument under II.A.2, *infra.*

The Fifth Circuit applies a transactional test to determine whether two suits involve the same cause of action. *Ellis v. Amex Life Ins. Co.*, 211 F.3d 935, 938 (5th Cir.2000). "[T]he critical issue is not the relief requested or the theory asserted but whether plaintiff bases the two actions on the same nucleus of operative facts." *Howe v. Vaughan*, 913 F.2d 1138, 1144 (5th Cir.1990). "[The] transaction may be single despite different harms, substantive theories, measure or kind of relief." *Nilsen*, 701 F.2d at 560 n. 6. As such, "[t]he final judgment puts an end to the cause of action, which cannot again be brought into litigation between the parties upon any ground whatever." *Nevada v. United States*, 463 U.S. 110, 130 (1983) (internal quotations omitted). Therefore, res judicata "bars all claims that were or could have been advanced in support of the cause of action on the occasion of its former adjudication, . . . not merely those that were adjudicated." *Nilsen*, 701 F.2d at 560.

This action by the Commission is based on the same nucleus of operative facts as the action by the PCAOB. The nature of the statutory scheme of the Sarbanes–Oxley Act and the relationships between the parties under it reveal that the PCAOB's enforcement action was the same cause of action as the Commission's current enforcement action.

(2) The PCAOB is in Privity with the Commission. Congress Delegated Certain Disciplinary Power to the PCAOB as the Commission's Closely-Supervised Representative.

The Sarbanes-Oxley Act of 2002 (or Act) was enacted in the wake of the massive accounting and corporate governance scandals at Enron, WorldCom, and other public companies. It vested the PCAOB with broad governmental powers and responsibilities. *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 484 (2010). Through this 2002 legislation the PCAOB was born. The Supreme Court explained that the PCAOB differs from other "self-regulatory organizations" because it is "a Government-created, Government-

appointed entity, with expansive powers to govern an entire industry. *Id.* at 485. The extensive powers of the PCAOB outlined by the Court include:

> The Board is charged with enforcing the Sarbanes–Oxley Act, the securities laws, the Commission's rules, its own rules, and professional accounting standards. §§ 7215(b)(1),(c) (4). To this end, the Board may regulate every detail of an accounting firm's practice, including hiring and professional development, promotion, supervision of audit work, the acceptance of new business and the continuation of old, internal inspection procedures, professional ethics rules, and "such other requirements as the Board may prescribe." § 7213(a)(2)(B).
>
> The Board promulgates auditing and ethics standards, performs routine inspections of all accounting firms, demands documents and testimony, and initiates formal investigations and disciplinary proceedings. §§ 7213–7215 (2006 ed. and Supp. II). The willful violation of any Board rule is treated as a willful violation of the Securities Exchange Act of 1934, 48 Stat. 881, 15 U.S.C. § 78a et seq.—a federal crime punishable by up to 20 years' imprisonment or $25 million in fines ($5 million for a natural person). §§ 78ff(a), 7202(b)(1) (2006 ed.). And the Board itself can issue severe sanctions in its disciplinary proceedings, up to and including the permanent revocation of a firm's registration, a permanent ban on a person's associating with any registered firm, and money penalties of $15 million ($750,000 for a natural person). § 7215(c)(4). Despite the provisions specifying that Board members are not Government officials for statutory purposes, the parties agree that the Board is "part of the Government" for constitutional purposes, *Lebron v. National Railroad Passenger Corporation*, 513 U.S. 374, 397, 115 S.Ct. 961, 130 L.Ed.2d 902 (1995), and that its members are "'Officers of the United States' " who "exercis[e] significant authority pursuant to the laws of the United States," *Buckley v. Valeo*, 424 U.S. 1, 125–126, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976) (per curiam) (quoting Art. II, § 2, cl. 2). . . .

Id. at 485-86. *See also* 15 U.S.C. §§ 7211(c) (Duties of Board).

The Commission exercises broad powers of review over PCAOB activities. The Act empowers the Commission to review any Board rule or sanction. See 15 U.S.C. §§ 7217(b)(2)-(4), (c)(2). Not only are PCAOB disciplinary decisions directly appealable to the Commission, but the Commission has the power to review them on its own motion. 15 U.S.C. § 7217(c)(2)(A). Once the Commission has acted, an appeal lies with the appropriate United States Court of Appeal.

The Board is "a heavily controlled component" of the Commission. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 537 F.3d 667, 680 (D.C. Cir. 2008), *aff'd in part, rev'd in part and remanded*, 561 U.S. 477(2010). "No Board rule is promulgated and no Board sanction is imposed without the Commission's stamp of approval. Indeed, any policy decision made by the Board is subject to being overruled by the Commission." *Id.* The Board's exercise of its statutory duties is "subject to check by the Commission at every significant step." *Id.* at 673. "[B]y statutory design the Board is composed of inferior officers who are entirely subordinate to the Commission and whose powers are governed by the Commission." *Id.* at 680, n.9. "The Commission's authority over the Board is explicit . . . comprehensive . . . . [and] extraordinary" *Id.* at 669 (citing 15 U.S.C. § 7217, 7218). The Act ensures that all Board functions are "subject to pervasive Commission control . . . ." *Id.* at 681.

"Privity is a legal conclusion designating a person so identified in interest with a party to former litigation that he represents precisely the same right in respect to the subject matter involved." *Headwaters Inc. v. U.S. Forest Serv.*, 399 F.3d 1047, 1053 (9th Cir. 2005) (internal punctuation omitted) (quoting *Sw. Airlines Co. v. Tex. Int'l Airlines, Inc.*, 546 F.2d 84, 94 (5th Cir. 1977)). Given the Commission's total domination and control of the PCAOB, the Commission is in privity with the PCAOB. *Estevez v. Nabers*, 219 F.2d 321, 322 (5th Cir.1955) ("the government, its officers, and its agencies are regarded as being in privity for [res judicata] purposes").

a. The PCAOB is in effect a disciplinary arm or agent of the SEC.

The Act gives the Board "the power to adopt rules and standards 'relating to the preparation of audit reports'; to adjudicate disciplinary proceedings involving accounting firms that fail to follow [Board] rules; to impose sanctions; and to engage in other related activities, such as conducting inspections of accounting firms registered as the law requires and

investigations to monitor compliance with the rules and related legal obligations." *Free Enterprise*, 561 U.S. at 528 (citing 15 U.S.C. §§ 7211–7216). The following statutes exemplify the extent to which the PCAOB acts as an agent and disciplinary arm of the SEC:

- "No Accounting Board rule takes effect unless and until the Commission approves it," *id.* (citing § 7217(b)(2));

- "The Commission may 'abrogat[e], delet[e] or ad[d] to' any rule or any portion of a rule promulgated by the Accounting Board whenever, in the Commission's view, doing so 'further[s] the purposes' of the securities and accounting-oversight laws," *id.* (citing § 7217(b)(5);

- "The Commission may review any sanction the Board imposes and 'enhance, modify, cancel, reduce, or require the remission of' that sanction if it find's the Board's action not 'appropriate,'" *id.* (citing §§ 7215(e), 7217(c)(3));

- "*The Commission may promulgate rules restricting or directing the Accounting Board's conduct of all inspections and investigations*," *id.* (citing §§ 7211(c)(3), 7214(h), 7215(b)(1)-(4)) (emphasis in original);

- "*The Commission may itself initiate any investigation or promulgate any rule within the Accounting Board's purview*," *id.* (citing § 7202), "and may also *remove any Accounting Board member who has unreasonably 'failed to enforce compliance with' the relevant 'rule[s], or any professional standard*,'" *id.* (citing § 7217(d)(3)(C)) (emphasis in original);

- "*The Commission may at any time 'relieve the Board of any responsibility to enforce compliance with any provision' of the Act, the rules, or professional standards if, in the Commission's view, doing so is in 'the public interest*,'" *id.* (citing § 7217(d)(1)) (emphasis in original).

- "[T]he Commission has general supervisory powers over the Accounting Board itself: It controls the Board's budget, *id.* at 529 (citing §§ 7219(b), (d)(1));

- "[The Commission] can assign to the Board any 'duties or functions' that it 'determines are necessary or appropriate,'" *id.* (citing § 7211(c)(5));

- "[The Commission] has full 'oversight and enforcement authority over the Board,'" *id.* (citing § 7217(a)), "*including the authority to inspect the Board's activities whenever it believes it 'appropriate' to do so*," *id.* (citing § 7217(d)(2)) (emphasis in original).

- "[The Commission] can censure the Board or its members, as well as remove the members from office, if the members, for example, fail to enforce the Act, violate any provisions of the Act, or abuse the authority granted to them under the Act," *id.* (citing § 7217(d)(3)).

These statutory provisions "make clear . . . . the Commission's control over the Board's investigatory and legal functions is *virtually absolute*." *Id.* (emphasis added).

(3) The PCAOB Order was rendered by a court of competent jurisdiction

The PCAOB had proper jurisdiction. The PCAOB "is charged with enforcing the Sarbanes-Oxley Act, the securities laws, the Commission's rules, its own rules and professional accounting standards." *Free Enterprise*, 561 U.S. at 485 (citing §§7215(b)(1), (c)(4)). It "demands documents and testimony, and initiates formal investigations and disciplinary proceedings." *Id.* (citing 15 U.S.C. §§ 7213-7215).

(4) The PCAOB Order operated as a valid and final judgment.

Although the PCAOB's five members are appointed by the SEC, "some-but not all-of the PCAOB's regulatory actions require[] SEC approval in the form of a final Commission order." *Tilton v. SEC*, _ F.3d _, 2016 WL 3084795, *4 (2d Cir., June 1, 2016). The Supreme Court noted that the Act "empowers the Commission to review any Board . . . sanction," but does not require it. *Free Enterprise*, 561 U.S. at 489 (citing 15 U.S.C. §§ 7217(b)(2)-(4), (c)(2)[6]).

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[6] Section 7217(c)(2) provides:
(2) Review of sanctions
The provisions of sections 78s(d)(2) and 78s(e)(1) of this title shall govern the review by the Commission of **final disciplinary sanctions imposed by the Board** (including sanctions imposed under section 7215(b)(3) of this title for noncooperation in an investigation of the Board), as fully as if the Board were a self-regulatory organization and the Commission were the appropriate regulatory agency for such organization for purposes of those sections 78s(d)(2) and 78s(e)(1) of this title, except that, for purposes of this paragraph—
. . . .
(B) references in that section 78s(e)(1) of this title to "members" of such an organization shall be deemed to be references to registered public accounting firms;
(C) the phrase "consistent with the purposes of this chapter" in that section 78s(e)(1) of this title shall be deemed to read "consistent with the purposes of this chapter and title I of the Sarbanes-Oxley Act of 2002";
(D) references to rules of the Municipal Securities Rulemaking Board in that section 78s(e)(1) of this title shall not apply; and

PCAOB Rule 5204(d) governs when determinations in disciplinary proceedings are final, providing:

> (1) An initial decision as to a party shall become the final decision of the Board as to that party upon issuance of a notice of finality by the Secretary[7].
>
> (2) Subject to subparagraph (3) of this paragraph, the Secretary shall issue a notice of finality no later than 20 days after the lapsing of the time period for filing a petition for review of the initial decision.
>
> (3) The Secretary shall not issue a notice of finality as to any party
>
> (i) who has filed a timely petition for review; or
> (ii) with respect to whom the Board has ordered review of the initial decision pursuant to Rule 5460(b).

(Effective pursuant to SEC Release No. 34-49704, File No. PCAOB-2003-07 (May 14, 2004); and SEC Release No. 34-72087, File No. PCAOB-2013-03 (May 2, 2014)).

a. PCAOB discipline of its members precludes disciplinary action by the SEC, because it was final.

The April 26, 2016 PCAOB Order imposed final disciplinary sanctions. Sections 78s(d)(2)[8] and 78s(e)(1)[9] of Title 15 govern the review by the Commission of final-disciplinary

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. . . .
15 U.S.C.A. § 7217(c)(2)(B)-(D) (2016)(emphasis added).

[7] The term "Secretary" means the Secretary of the Board. PCAOB Rule 1001(s)(vi). (Effective pursuant to SEC Release No. 34-49704, File No. PCAOB-2003-07 (May 14, 2004); and SEC Release No. 34-72087, File No. PCAOB-2013-03 (May 2, 2014)).

[8] Section 78s(d)(2) provides:

(2) Any action with respect to which a self-regulatory organization is required by paragraph (1) of this subsection to file notice **shall be subject to review by the appropriate regulatory agency for such member, participant, applicant, or other person, on its own motion, or upon application by any person aggrieved** thereby filed within thirty days after the date such notice was filed with such appropriate regulatory agency and received by such aggrieved person, or within such longer period as such appropriate regulatory agency may determine. **Application to such appropriate regulatory agency for review, or the institution of review by such appropriate regulatory agency on its own motion,** shall not operate as a stay of such action unless such appropriate regulatory agency otherwise orders . . . .

15 U.S.C.A. § 78s(d)(2) (2016)(emphasis added).

[9] Section 78s(e)(1)(A) provides:

(e) Disposition of review; cancellation, reduction, or remission of sanction

(1) In any proceeding to review a **final disciplinary sanction imposed by a self-regulatory organization** on a [registered public accounting firm] . . . or participant therein or a person associated with such a [registered public accounting firm] . . . , after notice and opportunity for hearing (which hearing may consist solely of consideration of

sanctions imposed by the Board. There is no evidence that the PCAOB applied to the SEC for review; nor was it required to do so. 15 U.S.C.A. § 78s(d)(2). There is no evidence that the SEC on its own motion sought to review the April 26, 2016 Order; nor was it required to do so. 15 U.S.C.A. § 78s(e)(1)(A).

The Commission enjoyed the same rights as the PCOAB during the PCOAB proceedings. The Commission had a right to join the PCAOB proceeding and seek the remedy the Commission is trying to impose here, and did not. The PCAOB Order made no mention of the possibility of future proceedings such as this one. Each of the prerequisites for issue preclusion is present and the OIP must be dismissed.

B. Issue Preclusion[10] (Collateral Estoppel)

The doctrine of issue preclusion bars "'successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment,' even if the issue recurs in the context of a different claim." *Taylor,* 553 U.S. 880, 892 (quoting *New Hampshire,* 532 U.S. at 748-49). *See also Parklane,* 439 U.S. at 326. "'Under the doctrine of issue preclusion, a right, question, or fact distinctly put in issue, and directly determined by a court of competent jurisdiction' cannot be again litigated in a subsequent proceeding." *Dept. of*

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the **record before the self-regulatory organization** and opportunity for the presentation of supporting reasons to affirm, modify, or set aside the sanction)—
(A) if the appropriate regulatory agency for such [registered public accounting firm]. . . participant, or person associated with a [registered public accounting firm] . . . finds that such [registered public accounting firm] . . . participant, or person associated with a [registered public accounting firm] . . . has engaged in such acts or practices, or has omitted such acts, as the self-regulatory organization has found him to have engaged in or omitted, that such acts or practices, or omissions to act, are in violation of such provisions of this chapter, the rules or regulations thereunder, the rules of the self-regulatory organization, or, in the case of a registered securities association . . . as have been specified in the determination of the self-regulatory organization, and that such provisions are, and were applied in a manner, consistent with the purposes of this chapter [and title I of the Sarbanes-Oxley Act of 2002], such appropriate regulatory agency, by order, shall so declare and, as appropriate, affirm the sanction imposed by the self-regulatory organization, modify the sanction in accordance with paragraph (2) of this subsection, or remand to the self-regulatory organization for further proceedings; or

. . . .

15 U.S.C.A. § 78s(e)(1)(A) (2016)(emphasis added; reflects changes set forth in 15 U.S.C.A. § 7217(c)(2) (B)-(D)).

[10] Issue preclusion encompasses the doctrines once known as "collateral estoppel" and "direct estoppel." *Taylor,* 553 U.S. at 892, n.5 (citing *Migra v. Warren City School Dist. Bd. of Ed.*, 465 U.S. 75, 77, n. 1 (1984)).

Enf't. v. Candace Jean Lee, 2015 WL 9596076, at *7 (N.A.S.D.R. Oct. 1, 2015) (quoting 18 James Wm. Moore et al., Moore's Federal Practice 132.02[2][a] (3d ed. 2014)). Generally, courts prohibit relitigation of facts and issues "where (1) the issue was actually litigated; (2) was determined by a valid, final judgment on the merits; (3) after a full and fair opportunity for litigation by the party; (4) under circumstances where the determination was essential to the judgment." *Id.* (citing *Brewer v. District of Columbia*, 105 F.Supp. 3d 74, 87 (D.C. 2015). *See also Boguslavsky v. Kaplan*, 159 F.3d 715, 720 (2d Cir. 1998) (same).

(1) The issues were actually litigated.

First, the issues pursued by the SEC in this action are virtually identical to those in the PCAOB enforcement action in that the PCAOB extensively reviewed the Hall Group's compliance with its rules and regulations for audits and services performed from 2010 through 2014 and determined to pursue three audits as to which it claimed violations occurred. The PCAOB determined the appropriate sanction and imposed them on the Hall Respondents. Now, in the present action the SEC seeks to re-litigate the same three audits raised in the PCAOB proceeding and add 13 additional audits and 35 review engagements to the matters already reviewed and/or resolved by the PCAOB. *Compare* PCAOB Order (April 26, 2016) *with* OIP (April 26, 2016).

(2) The issues were determined by a valid, final judgment on the merits.

Second, the issue was actually litigated and decided in the previous proceeding. "[F]or purposes of issue preclusion ... 'final judgment' includes any prior adjudication of an issue in another action that is determined to be sufficiently firm to be accorded conclusive effect." *In the Matter of Jonathan Carman*, S.E.C. Release No. 343 (Jan. 25, 2008) (quoting Restatement (Second) of Judgments § 13 (1982))(concluding that a permanent injunction order was entitled to

collateral estoppel). *See also In re Bridgestone/Firestone, Inc., Tires Prods. Liability Litig.*, 333 F.3d 763, 767 (7th Cir. 2003) ("Although claim preclusion (res judicata) depends on a final judgment, issue preclusion (collateral estoppel) does not."); *Miller Brewing Co. v. Jos. Schlitz Brewing Co.*, 605 F.2d 990, 996 (7th Cir. 1979) (holding that a decision need not be "final" in the strict sense of 28 U.S.C. § 1291 in order to prevent the involved parties from relitigating contested issues); *Zdanok v. Glidden Co., Durkee Famous Foods Div.*, 327 F.2d 944, 955 (2d Cir. 1964) (holding that collateral estoppel does not require a judgment that ends the litigation; once liability has been established, the mere fact that damages have not yet been fixed does not deprive the liability determination of any preclusive effect it might otherwise have

To the extent that the SEC seeks to re-litigate the issues that the PCAOB has already adjudicated and resolved, the SEC is barred from doing so. This does not mean that the prior decision must have been explicit. "If by necessary implication it is contained in that which has been explicitly decided, it will be the basis for collateral estoppel." *Norris v. Grosvenor* Mktg. Ltd., 803 F.2d 1281, 1285 (2d Cir. 1986) (citations omitted).

(3) Privity provided a full and fair opportunity for litigation.

Third, the SEC had a 'full and fair opportunity' to litigate the issue the issues were before the PCAOB because the SEC and PCAOB were in privity. *See* discussion at II.A.(3) *supra*. If the SEC were dissatisfied with the PCAOB proceeding in any fashion, including its scope or the sanctions imposed, the SEC had the power to intervene in the proceeding and/or modify the sanctions imposed at the conclusion of the matter.

(4) The issues determined were essential to the judgment.

Finally, the PCAOB raised and litigated the factual allegations asserted in the OIP, and the PCAOB made detailed findings. As are the SEC's allegations in this proceeding, the issue of

whether the Hall Respondents violated the Act and the PCAOB's audit standards promulgated thereunder was the principal focus of the prior proceeding. The PCAOB hinged its April 26, 2016 Order, in large measure, on the very same violations asserted by the SEC in the OIP, thereby making the determination of these issues essential to the PCAOB's final decision. The PCAOB/SEC had a full and fair opportunity to litigate the issues now raised in the present SEC proceeding. The determination of these issues were necessary to the result reached by the Board on the merits. *Boguslavsky*, 159 F.3d at 720; *Candace Jean Lee*, 2015 WL 9596076 at *8; *Univ. of Tenn. v. Elliott*, 478 U.S. 788, 799 (1986). Each of the prerequisites for issue preclusion is present. The PCAOB determined there was a violation of its rules and the Act and assessed an appropriate penalty. The penalty has now been litigated and the SEC may not seek an additional penalty for the same violations.

CONCLUSION

The SEC was fully aware of the nature and ramifications of the PCAOB proceedings, had the opportunity through its wholly-controlled sub-agency, the PCAOB, to present evidence and testimony, and had access to fully develop the evidentiary record. In fact, the SEC's OIP was entered the very same day as the Board's Order (April 26, 2016). The PCAOB's decision in the former litigation precludes this disciplinary action before the SEC under both claim preclusion and issue preclusion; and this enforcement action must therefore be dismissed.

Dated: July 1, 2016

Respectfully Submitted,

JONES & KELLER, P.C.

By: s/ Stuart N. Bennett
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CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of July, 2016, a true and correct copy of the foregoing HALL RESPONDENTS' BRIEF IN SUPPORT OF MOTION FOR SUMMARY DISPOSITION was served on the following as indicated:

Via Regular U.S. Mail (Original & 3 copies) to:

US Securities & Exchange Commission
Attn: Brent J. Fields, Secretary
Office of the Secretary
100 F. Street NE, Mail Stop 1090
Washington, DC 20549

Via Email to:

The Honorable Cameron Elliot
Administrative Law Judge
Securities & Exchange Commission
alj@sec.gov

Via Regular Mail and Email:

Michele Helterbran Cochran
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s/ Tammy Harris
Tammy Harris