UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
AT KANSAS CITY

CORA E. BENNETT, Individually and On Behalf of All Others Similarly Situated, Plaintiffs, vs. SPRINT NEXTEL CORPORATION, et al., Defendants.	No. 11-mc-9014 (ODS)

SUGGESTIONS OF *AMICUS CURIAE* CENTER FOR AUDIT QUALITY
IN SUPPORT OF KPMG LLP

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The Center for Audit Quality ("CAQ") respectfully submits these suggestions as *Amicus Curiae* to non-party KPMG, LLP's ("KPMG") opposition to Plaintiffs' Second Motion to Compel the Production of Documents from KPMG. Plaintiffs' motion seeks the production of documents and information relating to a confidential inspection by the Public Company Accounting Oversight Board ("PCAOB" or the "Board").

STATEMENT OF INTEREST

The CAQ is a public policy organization that commenced operations in January 2007. The mission of the CAQ is to seek to foster confidence in the audit process and to aid investors and the capital markets by advancing constructive suggestions for change that are rooted in the profession's core values of integrity, objectivity, honesty, and trust. The CAQ also seeks to improve the reliability of public company audits. The CAQ is led by a governing board that comprises leaders from public company auditing firms and the American Institute of Certified Public Accountants ("AICPA"), as well as public board members who bring an outside perspective to the CAQ's agenda and activities.

Any U.S. accounting firm registered with the PCAOB may join the CAQ. The CAQ is affiliated with the AICPA, and has approximately 750 U.S. public company auditing firms as members,[1] representing tens of thousands of professionals dedicated to audit quality. The CAQ has a strong interest in the issues raised by this motion because of the potentially serious implications that granting the motion could have for the effectiveness of the PCAOB in fostering audit quality and reliability.

INTRODUCTION

In 2002, as part of the Sarbanes-Oxley Act (the "Act"), Congress created the PCAOB "to provide for more effective oversight of the part of the nation's accounting industry that audits

[1] KPMG is a member of the CAQ.

public companies."[2] A key element of the PCAOB's oversight is its inspection program, pursuant to which it assesses the performance of audit firms against the laws, rules and standards promulgated by Congress, regulators and the accounting profession.

In establishing the PCAOB, Congress created a supervisory model of regulation designed to encourage a "constructive dialogue" between the PCAOB and the audit firms it regulates.[3] Congress recognized that the success of this model depended on the confidentiality of the PCAOB's inspection process. That recognition is primarily embodied in Section 105(b)(5)(A) of the Act, which shields PCAOB inspection-related material from civil discovery.

Through their motion, Plaintiffs seek to obtain documents and information reflecting the substance of a PCAOB inspection, information that is protected by the Act. Plaintiffs argue that such material falls outside the scope of the evidentiary privilege created by Section 105(b)(5)(A). To adopt such a reading would destroy the confidentiality that is a prerequisite to the open and constructive regulatory regime designed by Congress and implemented by the PCAOB. The CAQ urges this Court to deny the motion to compel, thereby preserving the integrity and confidentiality of the PCAOB inspection process.

STATEMENT

In the wake of the collapse of Enron and other major Fortune 500 companies, Congress sought to address serious questions that had been raised regarding "the integrity of certified financial audits; appropriate accounting principles and auditing standards; the effectiveness of the accounting regulatory oversight system; [and] the impact of auditor independence on the

[2] S. Rep. No. 107-205, at 4 (July 3, 2002).

[3] PCAOB Release 104-2006-077, at 2 (March 21, 2006).

quality of audits…."[4] The result was the Sarbanes-Oxley Act of 2002, which comprehensively addressed these issues.

Auditor Oversight and the Need for Confidentiality

Congress was particularly concerned about the weaknesses of the then-current system of regulation of audit firms that audited public companies, a system that was subject to "a bewildering array of monitoring groups."[5] The Public Oversight Board ("POB"), one of the several entities that provided oversight to auditors, was particularly criticized for being "slow and ineffective."[6] The POB itself recognized its deficiencies and agreed with the criticism, citing its inability to protect information from litigants as a major cause of its ineffectiveness:

> One reason for the delay in the current system stems from the fact that those charged with administering the system lack privilege to ascertain facts. Privilege would give the investigative entity the authority to protect information it uncovers from outside demands until any enforcement action is concluded. At present, firms will not disclose documents or other information that is likely to wind up in the hands of litigants in legal proceedings.[7]

The POB's inability to protect information affected not only its disciplinary functions, but also its ability to provide broader regulatory oversight. When asked by the SEC to review issues relating to auditor independence, the POB's efforts were stymied because it could not enter into effective confidentiality agreements with the audit firms from which it sought information.[8]

At Congressional hearings investigating the prior system, witnesses testified repeatedly to the need for confidential treatment of inspection-related material in the hands of both the auditing firms and their regulator. Shaun F. O'Malley, former Chairman of the Panel on Audit

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[4] *See Accounting Reform and Investor Protection: Hearing on S. 2763 Before the S. Comm. on Banking, Housing, and Urban Affairs*, 107th Cong. 723 (February 2002) (Opening Statement of Senator Sarbanes).

[5] S. Rep. No. 107-205 at 4 (July 3, 2002).

[6] *Id*. at 5.

[7] *The Road to Reform*: A White Paper from the Public Oversight Board on Legislation to Create a New Private Sector Regulatory Structure for the Accounting Profession (March 19, 2002).

[8] *Id*.

Effectiveness, testified that oversight by the POB was "hampered by distrust and by concerns that the *materials developed were not protected.*"[9] He went on to state that "[p]roviding confidentiality will expedite and vastly improve the review, investigatory, and disciplinary processes."[10] John Biggs, the CEO of TIAA-CREF, a major user of financial statements who also served on the POB testified that:

> the investigative authority of a new accounting regulatory body needs to be clear-cut and not simply a derivative of the SEC. Accounting firms must know that they cannot refuse to open their books or prevent their staff from cooperating with this new agency. *Of course, it must have the ability to keep the information gathered out of the hands of the litigating lawyers*.[11]

Congress Created the PCAOB to Engage in a Supervisory, Non-Adversarial Regulatory Scheme Protected by a Civil Discovery Exemption for Inspection-Related Material

Congress created the PCAOB to "establish, adopt or modify auditing, quality control, ethics, and independence standards for public company audits, inspect accounting firms, investigate potential violations of applicable rules relating to audits, and impose sanctions if those violations are established."[12] In structuring the PCAOB's investigative and inspection functions, Congress carefully addressed the confidentiality concerns that plagued the POB by enacting, among other provisions, Section 105(b)(5)(A) of the Act, which states:

> CONFIDENTIALITY—Except as provided in subparagraphs (B) and (C), all documents and information prepared or received by or specifically for the Board, and deliberations of the Board and its employees and agents, in connection with an inspection under section 104 or with an investigation under this section, shall be confidential and privileged as an evidentiary matter (and shall not be subject to civil discovery or other legal process) in any proceeding in any Federal or State court or administrative agency, and shall be exempt from disclosure, in the hands of an agency or establishment of the Federal Government, under the Freedom of Information Act (5 U.S.C. 522a), or otherwise, unless and until presented in connection with a public proceeding or released in accordance with subsection (c).[13]

[9] 107th Cong. 723 (emphasis added).

[10] *Id*.

[11] *Id*. (emphasis added).

[12] S. Rep. No. 107-205 at 4 (July 3, 2002).

[13] 15 U.S.C. §7215(b)(5)(A).

The legislative history of this provision shows Congress's intent to protect the confidentiality of documents and information relating to Board inspections so as to create a regulatory model that encourages cooperation and dialogue, and discourages adversarial confrontation.[14] Section 105(b)(5)(A) explicitly keeps the inspection-related information "out of the hands of litigating lawyers."[15] The provision creates an evidentiary privilege available to the Board, and to auditing firms,[16] which exempts inspection materials from discovery in civil proceedings. Moreover, Section 105(b)(5)(A) goes even further to preserve confidentiality by providing an explicit exemption from the Freedom of Information Act should the PCAOB decide to share such materials with a federal agency.

By enacting the confidentiality provisions of the Act, Congress eschewed an adversarial regulatory model that would rely solely on the power to coerce production of information through a combination of subpoenas and sanctions. Instead, Congress encouraged a cooperative relationship between the Board and the audit firms it regulates by incentivizing firms to work with the Board to identify potential areas of improvement in audit processes. Absent the confidentiality provisions of the Act, audit firms would likely take a narrower approach in responding to Board information requests, being mindful of the enhanced liability risk that a more cooperative approach would likely entail. The benefit of confidentiality under the Act has allowed the PCAOB to implement a cooperative, supervisory approach. As the Board has stated:

> [T]he Act reflects a legislative policy choice favoring the correction of quality control problems over the exposure of them. Accordingly, the Board takes a

[14] S. Rep. No. 107-205 at 10 (July 3, 2002).

[15] 107th Cong. 723 (Testimony of John H. Biggs).

[16] *See, e.g.*, *Silverman v. Motorola, Inc.*, 07-C-4507 (AJS), 2010 WL 4659535 at *4 n.2 (June 29, 2010 N.D. Ill.) (rejecting the argument that the privilege belongs to the PCAOB and not to the accounting firms).

> supervisory approach to oversight and seeks through constructive dialogue to encourage firms to improve their practices and procedures.[17]

The supervisory model of regulation created by Sarbanes-Oxley and implemented by the PCAOB has thus far worked well and has improved the quality and reliability of audits of public companies. It has worked to the satisfaction of the Board and the regulated community. In March 2006, the Board published a release containing its initial observations as to the success of the supervisory model:

> The Board's initial experience with the 12-month remediation process generally validates the premise of the approach set out by Congress in Section 104(g)(2) of the Act.[18] That legislative approach rested on the hypothesis that firms could be genuinely motivated by the prospect of keeping the Board's quality control criticism confidential. The Board's initial experience with the larger firms supports that hypothesis. Moreover, the firms were responsive to the Board's supervisory model, taking the initiative to engage constructively with the staff in an ongoing dialogue toward a result satisfactory to the Board, rather than emphasizing points of disagreement and taking an adversarial approach.
>
> As a result of the process, the Board believes that those firms have crafted and undertaken important steps that, if conscientiously implemented, will have beneficial effects on audit quality.[19]

ARGUMENT

In the present litigation, Plaintiffs have subpoenaed KPMG, a non-party, for documents Plaintiffs believe are relevant to their claims. The subpoena seeks audit workpapers and other information relating to professional services KPMG performed for a client. As we understand it, KPMG has agreed to produce such documents. The subpoena also seeks the production of all documents and communications with the PCAOB concerning KPMG's audit client arising from a PCAOB inspection. Relying on Section 105(b)(5)(A), KPMG has claimed that such material is

[17] PCAOB Release 104-2006-077, at 2.

[18] Section 104(g)(2) of the Act provides for confidentiality of PCAOB inspection reports. *See* 15 U.S.C. §7214(g)(2). Although that provision is not directly at issue in this matter, it further reflects the importance of confidentiality to the regulatory structure created by the Act.

[19] PCAOB Release 104-2006-078, at 2-3 (March 21, 2006).

privileged. Because the production of such materials would disclose precisely the kind of information that Congress intended to protect from civil discovery when it designed the PCAOB regulatory process, the CAQ supports KPMG's position.

Plaintiffs have put forward several arguments seeking to overcome the privilege: (1) that the privilege can only be asserted by the PCAOB; (2) that the scope of the privilege should be narrowly construed to cover only materials specifically communicated to the Board itself, excluding the Board's staff and employees; (3) that the privilege does not cover any internal KPMG materials, and (4) that KPMG waived the protections under the Act by discussing with one of its clients a portion of the PCAOB inspection involving an aspect of that client's audit. [20] Adopting the narrow statutory interpretation that Plaintiffs urge on the Court would eviscerate the protections afforded by Section 105(b)(5)(A), which in turn would seriously threaten the public interest benefits of the Act's carefully constructed supervisory model.

A. The Statutory Privilege Applies to Audit Firms

Section 105(b)(5)(A) states that "all documents and information prepared or received by or specifically for the Board, and deliberations of the Board and its employees and agents, in connection with an inspection … shall be confidential and privileged as an evidentiary matter (and shall not be subject to civil discovery or other legal process) in any proceeding…."[21] Nothing in the language limits this protection to only those documents in the hands of the PCAOB. This view is supported in the one case to date in which Section 105(b)(5)(A) has been construed. In *Silverman v. Motorola*, the court rejected a virtually identical attempt to advance

[20] The CAQ has only viewed a redacted version of Plaintiffs' memorandum in support of this motion, in accordance with a protective order the CAQ understands is in place. The CAQ therefore responds only to those arguments by Plaintiffs it was able to view.

[21] 15 U.S.C. § 7215(b)(5)(A).

the same interpretation that Plaintiffs urge here, holding that such a view is "not supported by the plain language of the statute."[22]

When interpreting statutory language, one must give effect to every clause and word to avoid rendering any portion of the statute superfluous.[23] To that end, when considering the Act's protection of documents and information "prepared or received by or specifically for the Board," the phrase "specifically for the Board" must cover a category of documents and information that is different from documents and information "prepared or received by" the Board. Here, information prepared "specifically for the Board" clearly means information prepared by audit firms with the intent of either passing the information on to the Board, or to use in connection with the PCAOB inspection. In addition, the purpose of Section 105(b)(5)(A) is to keep protected material "out of the hands of the litigating lawyers" in order to foster a cooperative approach between the PCAOB and the audit firms it regulates. Yet under the reading of the statute that Plaintiffs urge on the Court, that is exactly where information that the statute intended to keep confidential would end up. Responsible audit firms must retain copies of information prepared "specifically for the Board" and that reflect the deliberations of the Board and its staff. To hold that such material is privileged only in the hands of the Board would render the protection afforded under the provision a nullity.

B. The Privilege Covers All Documents and Information Relating To an Inspection

A critical question before this Court is the meaning of the language in Section 105(b)(5)(A) that affords protection to" all documents and information prepared or received by or specifically for the Board, and deliberations of the Board and its employees and agents, in connection with an inspection." Plaintiffs have urged a narrow interpretation that would

[22] *Silverman v. Motorola, Inc.*, 07-C-4507 (AJS), 2010 WL 4659535 at *4 n. 2 (June 29, 2010 N.D. Ill.).

[23] *See Astoria Fed. Sav. & Loan Assoc. v. Solimino*, 501 U.S. 104, 112 (1991).

undercut the policy objectives of the Act. In order to better understand why this is so, it is important to focus on the normal course of a PCAOB inspection.

1. *The Nature of the PCAOB Inspection*

A PCAOB inspection is an iterative process. Typically, an inspection commences with PCAOB staff reviewing materials and engaging in substantive dialogue with members of the audit firm engagement team and firm professional practice and management personnel on questions or issues the staff has identified regarding specific engagements and with respect to the audit firm's internal quality systems and controls.

In responding to inquiries from PCAOB inspectors, the audit firm's client engagement team may consult internally with other experts within the firm to formulate responses to the inspection team – communications necessarily involving discussion of the inspectors' observations and statements, thus reflecting deliberations of the Board employees. These discussions help clarify matters for the inspection staff, and may eliminate certain issues, thereby making the rest of the inspection process more efficient and effective.

Thereafter, the PCAOB staff will prepare specific written comments which must be reviewed, analyzed, and assessed by the inspected firm. The audit firm then prepares written responses, which are reviewed internally before being communicated to the inspection team – a process which also reflects the observations, comments or criticisms prepared by, and received from, the PCAOB inspectors. Next, the PCAOB provides a draft of its inspection report to the audit firm. The firm then has an opportunity to review the draft report and address its findings in writing with a view to satisfying any issues or concerns, a process that involves additional internal communications reflecting the inspectors' deliberations.

After considering the responses of the audit firm, the PCAOB will make public portions of the report that do not deal with the firm's quality control systems.[24] Under this structure, audit firms understand that they can interact with their regulator confidentially, and make appropriate enhancements to audit methodology, procedures and internal practices without subjecting all of the documents and information created during the process to discovery.

2. *The Privilege Covers All Documents Created During the Course of an Inspection*

The collaborative process just described necessarily requires audit firms and their personnel to engage in extensive internal and external communications. The purpose of this effort is clear – to provide a focused and coherent response the PCAOB's requests. As such, there can be little doubt that documents or information "prepared . . . in connection with an inspection" are prepared "specifically for the Board" because, absent the inspection, they would never have been created. The internal material will also often reflect the "deliberations of the Board and its employees and agents," because they record, summarize or reflect the substance of questions, comments or criticisms communicated by PCAOB inspectors to the audit firms. Accordingly, the CAQ believes that all documents created during the course of an inspection are covered by the privilege.

Plaintiffs' urge a narrow interpretation of the statute, and rely on the Northern District of Illinois decision in *Motorola*. In *Motorola*, in which the CAQ also appeared as amicus, the court declined to interpret the Act to protect all documents that "related to" or "concerned" the PCAOB inspection process.[25] Instead, the court defaulted to one clause of the statutory

[24] Even with respect to those portions of the inspection reports that are made public, the identities of audit clients are kept confidential.

[25] *Motorola*, 2010 WL 4659535 at *4.

language, ordering the production of all documents not "prepared ... specifically for the Board."[26] The court did not further clarify how this language was to be applied to various types of documents generated in connection with an inspection; nor did it address the application of the "deliberations" clause of the privilege.

The CAQ respectfully submits that, while Congress' intent to protect inspection-related information is clear, the specific language used is less than "exceedingly clear." [27] The interpretation the CAQ urges, that all documents created during the course of an inspection be protected, is consistent with the purpose of the Act, would provide certainty and ease of administration to courts, avoiding the necessity for a document-by-document review, and ease the undue burden on audit firms that are often, as in this case, third-party witnesses that have been asked to provide information that is of limited, if any, relevance to the underlying issues. We urge the Court to accept this clear and objective test.

Even should the Court choose to read the statute more narrowly, the language makes clear that, at a minimum, documents which disclose information (a) prepared by the inspectors, (b) received by the inspectors, (c) prepared by the audit firm for the inspectors or about the inspection, or (d) would reveal the deliberations of the inspectors as they perform an inspection, are protected. Firm managers are often informed and consulted with respect to the inspection and questions raised by the inspectors. In addition to the audit team personnel, many audit firms rely on specifically assigned quality control personnel to interact with and respond to PCAOB inspection teams. The function of such personnel is to assess the issues raised by the inspection team; to evaluate the issues and assist the engagement personnel in providing a complete response to the PCAOB inquiries; to assess the audit firm's practices and procedures in relation

[26] *Id.* at *6.

[27] *Contra*, *id.* at *3.

to the inspection team's observations, suggestions or criticisms; and to determine whether the firm will perform additional audit procedures in response to observations relating to a specific engagement, or modify existing firm audit practices in response to such comments or to enhance audit quality.

Congress recognized that in order for such work to be done properly, there must be complete and candid internal communication about the work performed on the engagements inspected and the firm quality control systems inspected, the questions and issues raised by inspectors, the information assembled to respond to inspector inquiries, and whether the firm should accept specific observations, comments or critiques of the inspectors (whether it agrees with them or not), including whether it will undertake supplemental or remedial actions or process improvements. Such communications are a necessary component of the 'open dialogue' supervisory model Congress created in the Act. Documents reflecting and revealing that dialogue will, of necessity, reveal the substance of the inspection and the deliberations of the inspectors, and forcing their disclosure here should be expected to chill the inspection process at many, if not all, audit firms in the future. Accordingly, we urge the Court to protect, at the very least, all any audit firm documents which reveal the substance of the inspection process.

3. *The "Board" Includes Inspection Staff*

Plaintiffs would have the Court construe the term "Board" as used in Section 105(b)(5)(A) to refer only to the five appointed members of the Governing Board and not to inspection staff of the PCAOB. The result would be absurd. As already explained (*see* Section B.1), a PCAOB inspection is planned and conducted by its staff. It is the PCAOB staff that reviews the inspected firm's audit work and, in the first instance, determines whether or not the audit has suffered from any deficiencies. The PCAOB has made it clear that:

> "[w]ith respect to every deficiency described in the public portion of a [PCAOB] inspection report, *the inspection staff will have formed its conclusion after a rigorous process* …[that] involves opportunities for the firm to respond in detail to the initial assessment *made by the team that performed the inspection procedures*. That *inspection team and other inspection staff carefully consider* all evidence presented by the firm that may bear on the matter. [28]

When an audit firm communicates with the PCAOB regarding an inspection, its communications are, in most instances, directed to the staff. With respect to the day-to-day execution of an inspection, almost all of the documentation and information "received by" the Board is, in the first instance, received by the inspection staff. To rule as plaintiffs argue would be to deny privilege to information received by the staff but not transmitted to the five members of the Board. Construing the statute to deny protection to inspection information received by the inspection team would, in essence, give no protection at all to the inspection process, rendering the privilege a nullity and defeating Congress' intent. Such an absurd result must be rejected.[29]

C. Audit Firms' Discussions with Their Audit Clients Regarding PCAOB Inspections Do Not Constitute a Waiver of the Statutory Privilege

Plaintiffs argue that any discussions between an audit firm and its client regarding a PCAOB inspection that includes client-specific issues opens up discovery to those discussions, as well as to all documents and information held by the audit firm relating to the inspection. The CAQ believes that Plaintiffs' position is not sound law, and is most certainly not sound policy.

With respect to the law, Section 105(b)(5)(A) provides inspection material with protection from civil discovery. Nothing in the statutory language suggests non-waiver as an element of this protection.[30] To the extent non-waiver is a condition to the Act's protection,

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[28] PCAOB Release No. 2012-003, at 4 (Aug. 1, 2012) (emphasis added).

[29] *See Public Citizen v. Dep't of Justice*, 491 U.S. 440, 454 (1989) (courts should reject statutory constructions that produce absurd results).

[30] This would distinguish the Act's protection from other protections such as the attorney-client privilege, whose federal common-law elements are: (1) the seeking of legal advice of any kind; (2) from a professional legal advisor; (3)in his or her capacity as such; (3) where the communications relate to that purpose; (4) are made in confidence;

there is no reason to vitiate the privilege as to both the information disclosed to the audit client, and to the undisclosed material as well. For example, under Federal Rule of Evidence 502(a), disclosure of privileged material leads to a full subject matter waiver only when the disclosed communication and the undisclosed information "ought in fairness to be considered together."[31] The advisory committee notes to Rule 502 also state that "a subject-matter waiver (of either privilege or work product) is reserved for those unusual situations in which fairness requires a further disclosure or related, protected information, in order to prevent a selective and misleading presentation of evidence to the disadvantage of the adversary."[32] It does not appear that the audit firm's discussion of the PCAOB inspection with its client in any way constituted an attempt by the audit firm to gain any tactical advantage in this or any other litigation. It appears instead that the audit firm was responsibly keeping its client informed with respect to matters that related to the audit of the client's financial statements.

Section 301 of the Act makes audit committees "directly responsible for the appointment, compensation, and oversight of the work of any registered public accounting firm employed by that issuer … for the purpose of issuing an audit report…."[33] As a policy matter, and in advancement of this rule, the PCAOB supports and encourages communication between auditors and their clients, and in particular with their client's audit committees:

> In the Board's view, an audit firm's candid discussion of its PCAOB inspection results with an audit committee can have value for an audit committee not only in relation to the audit committee's oversight and evaluation of the audit engagement

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(5) by the client; (6) are at his instance permanently protected; (7) from disclosure by himself or by the legal advisor, (8) *except if the protection be waived*. *See* 8 Wigmore, *Evidence in Trials at Common Law* § 2292 (McNaughton rev. 1961) (emphasis added). Indeed, Section 105 makes clear that not only are such materials privileged, but they are "not subject to civil discovery."

[31] FED. R. EVID. 502(a). Though Rule 502(a) applies to disclosures made "in a federal proceeding or to a federal office or agency," *id.*, the CAQ believes that the underlying questions of fairness would be equally applicable here.

[32] FED. R. EVID. 502 advisory committee's note.

[33] 15 U.S.C. §78j-1.

> generally, but also in relation to the audit committee's role in the oversight of the company's financial reporting process.[34]

The CAQ fully supports candid communication between and audit client and its audit firm with respect to PCAOB inspections. The CAQ believes that such communication will lead to better quality audits, in turn leading to better and more accurate financial statements to the ultimate benefit of auditors, public companies and the investing public. To determine that they constitute a full waiver of the protections afforded by the Act, would only serve to chill these communications, removing these important benefits specifically contemplated under the Act.

The law, fairness, and good public policy all lead to the conclusion that this Court ought to reject Plaintiffs' waiver argument in this case.

CONCLUSION

For the foregoing reasons, we request that the Court deny Plaintiffs' Motion.

Dated: September 10, 2012

Respectfully submitted,

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[34] *See* PCAOB Release No. 2012-003, at 4.

CERTIFICATE OF SERVICE

I certify that on September 10, 2012, I electronically filed the foregoing with the Clerk of the Court who shall use the CM/ECF system to send notification of such filing to counsel of record in this matter who are registered on the CM/ECF.

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