BEFORE THE
SECURITIES AND EXCHANGE COMMISSION
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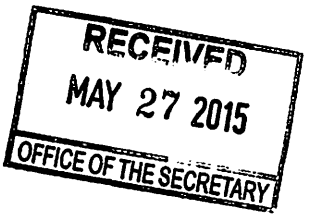

In the Matter of the Application of

MARK E. LACCETTI, CPA

For Review of Disciplinary Action Taken By

PUBLIC COMPANY ACCOUNTING
OVERSIGHT BOARD

PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD'S BRIEF IN OPPOSITION TO LACCETTI'S MOTION FOR SUBMISSION OF ADDITIONAL EVIDENCE

May 26, 2015

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The Public Company Accounting Oversight Board (Board or PCAOB) hereby responds to Mark E. Laccetti's motion to submit extra-record materials under SEC Rule of Practice 452, 17 C.F.R. 201.452, accompanying the principal brief in his appeal to the Securities and Exchange Commission (Commission or SEC) from a PCAOB disciplinary proceeding.

Laccetti has been represented by the same well-qualified team of counsel from the start of this disciplinary proceeding. He now seeks to enlarge a record amassed by the parties with the oversight of a hearing officer, which already includes nearly 3,000 pages of hearing testimony, more than 800 pages by Laccetti; over 1,000 pages of carefully designated investigative testimony of his former colleagues at Ernst & Young and others with whom he communicated about the audit in question; and over 100 hearing exhibits specifically admitted by or against him. The new exhibits he seeks to add, totaling over 1,000 pages, go back to the investigative stage of the case and have been in his possession since before the nine-day, mid-2010 hearing in this case. They are offered in support of an affirmative defense asserted in his answer to the Order Instituting Disciplinary Proceedings (OIP), then briefed to the hearing officer and the Board, and rejected by both for clearly stated and well-apparent reasons. Laccetti asserts that the proffered materials are "narrow in scope" and "uncontroversial," describing them as certain documents authored by the PCAOB's Division of Enforcement and Investigations (Division) and transcripts of certain investigative testimony. Yet he failed to seek leave to admit these materials until he filed his principal merits brief in this appeal, without any valid reason for waiting until then. The materials provide an incomplete and inadequate basis for addressing topics and propositions that, as he tries to use them to recast his arguments for purposes of this appeal, are anything but narrow and uncontroversial, such as how "prominently" his investigative testimony "featured" in the investigation and institution of the case. At the same time, he does not specify

why the proffered extra-record exhibits are genuinely material to his arguments on appeal. As Laccetti's motion to supplement the record does not satisfy either of Rule 452's requirements or provide a proper basis for the exercise of Commission discretion under the circumstances, the Board urges the Commission to deny the motion and decline to add the exhibits to the record.

BACKGROUND

On January 26, 2015, the Board issued lengthy, separate final decisions in this disciplinary proceeding against Laccetti and another individual, following de novo review of the large case record, extensive briefing, and oral argument. Laccetti was the auditor with final responsibility, or engagement partner, for Ernst & Young's audit of the 2004 financial information of a United States subsidiary (Taro USA) that drove the financial results of a foreign private issuer traded on the NASDAQ National Market. Ernst & Young, through Laccetti, rendered an unqualified audit opinion on Taro USA's 2004 financial data to another audit firm, which used that audit work and report in auditing the parent company's consolidated financial statements. The parent company later restated its financial statements for 2004 and other periods, principally due to Taro USA's erroneously low estimates of a major sales incentive called chargebacks, which had caused multi-million-dollar overstatements of net sales and related receivables. The OIP charged Laccetti with violating numerous PCAOB auditing standards in his audit work on Taro USA's 2004 sales adjustments and related reserves in total, and for chargebacks specifically. Index to the Record, Record Document (R.D.) 1.

In a 103-page final decision (R.D. 220) addressing a wide range of issues raised by Laccetti and the Division on appeal from the PCAOB hearing officer's initial decision in the case, the Board found that Laccetti had violated multiple PCAOB auditing standards and that his violations formed a pattern of conduct that was "fundamentally at odds with the role of the

independent auditor." The Board's detailed findings, based on extensive analysis and evidence, showed that he had "disregard[ed] [ ] some of the most basic auditing principles," such as exercising due professional care, including maintaining an attitude of professional skepticism; obtaining sufficient competent audit evidence to afford a reasonable basis for an opinion; and performing audit procedures that are appropriate for the risks of material misstatement. Determining that Laccetti had acted recklessly, or least engaged in numerous, serious instances of negligent conduct, the Board barred him from associating with a registered public accounting firm, with leave to petition to associate after two years, and ordered him to pay an $85,000 civil money penalty, to protect investors and further important public interests in issuer audits.

On May 15, 2015, Laccetti filed both his Motion for Submission of Additional Evidence (Mtn.) and his Brief in Support of His Application for Commission Review (Br.). In this appeal, he does not challenge the merits of any of the Board's findings of violations or sanctions determinations, nor the Board's resolution of any but two other matters: (1) whether the Board violated his "right to counsel" by denying his counsel's request to have an Ernst & Young accountant, in addition to himself, attend his investigative testimony; and (2) whether *Free Enterprise Fund v. PCAOB*, 561 U.S. 477 (2010) compels dismissal of this proceeding. *See* Br. 3. Before the SEC, Laccetti shifts focus away from the disciplinary proceeding, about which he now says practically nothing, and almost entirely to the investigation and initiation of the case, arguing that certain circumstances at those early stages require dismissal of the case. Br. 7-31. Having failed during any prior stage of the case to develop all the evidence and arguments he now wishes to use for this reconfigured second appeal, he seeks to add extra-record materials.

In his motion, Laccetti proffers five items: (A) a formal order of investigation in the matter; (B) an accounting board demand seeking documents and testimony from him; (C) four

volumes of investigative testimony by Laccetti and a several-page errata sheet he prepared after reviewing the transcripts; (D) certain pages from a former Ernst & Young colleague's investigative testimony in the matter; and (E) a Division letter to Laccetti's counsel stating its intention to recommend the Board commence a disciplinary proceeding against him. *See* Mtn. 1-2. Laccetti seeks to draw broad inferences from some or all of these items in an effort to support his right to counsel defense, while adding new arguments, as well as a new claim that two more constitutional provisions were violated. *See, e.g.*, Mtn. 2-4, 5 n.2; Br. 5-6, 18, 20, 26-28, 31-32.

ARGUMENT

Commission Rule of Practice 452 requires that a motion to adduce additional evidence "show with particularity" both: (1) that the proposed evidence "is material" and (2) that "there were reasonable grounds for failure to adduce such evidence previously." Laccetti's motion does neither. Nor does Laccetti provide a basis for the Commission to forgive these deficiencies and "accept the proffered materials" as an "exercise [of] its discretion" (Mtn. 5 n.2).

I. Laccetti Has Not Shown Reasonable Grounds for Waiting To Adduce the Materials.

The most immediately apparent problem with Laccetti's motion is that it does not show with particularity any reasonable ground for his failure to adduce previously the extra-record materials he has known about for years. *See, e.g., Scott E. Wiard*, SEC Rel. No. 34-50393, 2004 WL 2076190 at *2 n.16 (Sept. 16, 2004) (rejecting request to adduce additional evidence where applicant failed to sufficiently explain why he did not offer the materials in the proceeding below); Proposed Ex. C-5 at 1; R.D. 54c. Laccetti asserts a two-part justification for waiting until this late and inappropriate stage of second-level appellate review to offer the materials. First, he claims he was not aware of the significance of his Proposed Exhibits A, B, C, and E until the Board, in "finding that Mr. Laccetti's right to counsel was not violated" by "excluding

[his] expert consultant from his investigative testimony" (Mtn. 4), stated: "This defense is moot because we need not and do not rely on his investigative testimony, but on other (and ample) record evidence." (R.D. 220 at 74). Second, Laccetti claims he was not aware of the significance of his Proposed Exhibits C and D until supposedly "evolving rationalizations" appeared in the Board's decision about the "purported justification" for excluding the consultant. Mtn. 4 (citing R.D. 220 at 74, 76). Neither withstands scrutiny as a ground under Rule 452.

Both of these points—one purporting to show that this disciplinary proceeding was "tainted," and that Laccetti was harmed, by the denial of the request that the proposed non-attorney consultant be present during his investigative testimony; the other about the reason for the denial—relate to an affirmative defense asserted by Laccetti in his December 7, 2009 answer to the OIP. *See* Mtn. 2-4; Br. 3, 5-6, 18, 20, 26, 27, 28. Specifically, his answer alleged, "The PCAOB did not permit a technical expert consultant to attend Mr. Laccetti's initial testimony by the Staff, violating Mr. Laccetti's rights to counsel and to due process of law." R.D. 10 at 11. Under PCAOB Rule 5204(a), Laccetti bore the burden of proving an affirmative defense by a preponderance of the evidence. Thus, long before the Board's final decision issued, he knew about this purported right to counsel defense—a defense of claimed constitutional magnitude—and of his responsibility to present all necessary evidence to establish it.[1/] Moreover, Laccetti's affirmative defense was briefed before the hearing officer (R.D. 180 at 107-112; R.D. 182 at 44-

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1/ *FCS Sec.*, SEC Rel. No. 34-64852, 2011 WL 2680699 at *8-*9 (Dec. 10, 2010) (rejecting Applicants' argument that they "had no reason to foresee" FINRA Enforcement's position until closing arguments, noting to the contrary that Applicants bore the burden of establishing that they were exempt from certain requirements of the Exchange Act, and as a result, finding that they "should have foreseen that these transactions would be a subject of scrutiny at the hearing, and they should have introduced evidence that would have supported their assertions about the transactions, including whatever background information was necessary to understand the transactions"), *pet. denied, sub nom. Kleinser v. SEC*, 539 Fed. Appx. 7 (2d Cir. 2013) (unpub.).

47), was rejected by the hearing officer (R.D. 197 at 86-88), and was briefed on appeal to the Board (R.D. 204 at 12-16; R.D. 205 at 51-53; R.D. 210 at 23), all before the Board's decision.

It was clear that harm was at issue. Laccetti asserted before the hearing officer that he had suffered a "prejudicial restriction of his right to counsel" (R.D. 180 at 112) and that it was "not correct" that "there was no prejudice to Mr. Laccetti" (R.D. 185 at 3268). His opening brief to the Board asserted that exclusion of the proposed consultant from the testimony room was "prejudicial." R.D. 204 at 15. A ground on which the Division challenged Laccetti's affirmative defense was that he had not suffered any harm. R.D. 182 at 47 (arguing to hearing officer that Laccetti "has failed to identify any prejudice from the exclusion of another E&Y US accountant [than himself] from his testimony"); R.D. 205 at 52 n.34 (arguing same to Board). In his reply brief to the Board, Laccetti stated that "[t]he Division's comment that 'Laccetti experienced no prejudice from the exclusion' of the technical expert rings hollow," in his view. R.D. 210 at 23.

The briefing also addressed why the Division had not allowed the non-attorney consultant to attend the investigative testimony. R.D. 182 at 45; R.D. 205 at 52. This refutes Laccetti's current claim (Mtn. at 4) to have somehow been surprised by the discussion of that issue in the Board's decision. Indeed, the hearing officer's decision contained a detailed discussion and finding of fact (R.D. 197 at 88) that foreshadowed the exact resolution of this issue by the Board:

> I also note that, unlike the SEC procedures that were at issue in [a case cited by Laccetti], the PCAOB's rules do not preclude all non-lawyers from attending investigative proceedings. Instead, the Board has stated that:
>
> > [Rule 5102] provides sufficient flexibility for the staff to permit a technical consultant to be present during investigative testimony, and we expect the staff to allow that presence in appropriate circumstances and on appropriate terms, including, for example, that the consultant not be a partner or employee of the firm with which the witness is associated. We expect the staff to be accommodating, but we also expect the staff to be vigilant about not permitting a firm's internal personnel effectively to monitor an investigation by sitting in on testimony of all firm personnel.

> PCAOB Rel. No. 2003-015 at A2-18-A2-19. The Division asserts that under this standard, it was justified in precluding the particular technical consultant identified by Laccetti from attending his investigative testimony, because that consultant was a non-lawyer accountant who was employed in the General Counsel's office of E&Y US. [R.D. 182 at 45.] The Division's assertion appears to be confirmed by the September 26, 2007, letter from the Division submitted by Laccetti as Exhibit 1 to his post-hearing submission. Thus, as a factual matter, the Division did not preclude Laccetti's counsel from having any technical consultant attend Laccetti's investigative testimony, but rather prohibited only the attendance of a specific individual, in accordance with the Board's policy as set forth above.

Yet, despite ample opportunity to offer evidence to prove his affirmative defense, even to make a motion to the Board to supplement the record (*see* PCAOB Rule 5464), Laccetti simply chose throughout the disciplinary proceeding to engage only minimally on the issue of prejudice and not at all on the reason the consultant was not allowed to attend his investigative testimony.

The only case Laccetti cites (Mtn. 4) to try to show his compliance with Rule 452 is *Ralph W. LeBlanc*, SEC Rel. No. 34-48254, 2003 WL 21755845 at *6 n.23 (July 30, 2003). Laccetti seems to suggest that he and LeBlanc are similarly situated. Not so. In a follow-on proceeding after entry of a consent injunctive order, LeBlanc, proceeding *pro se*, alleged that the law judge conducted an off-the-record bench conference during the hearing regarding sanctions, during which the law judge allegedly led LeBlanc to believe that he would not impose a bar. The Commission admitted evidence of the off-the-record colloquy, on the view that LeBlanc could not have known the significance of evidence of the alleged representation until the law judge allegedly reneged on it when issuing the initial decision barring LeBlanc.

By contrast, Laccetti's counsel could have, and should have, foreseen the need to introduce all necessary evidence to prove his affirmative defense. Indeed, his motion is much more akin to LeBlanc's other attempt to introduce evidence in the follow-on proceeding, which Laccetti ignores. LeBlanc, arguing that the consent order was obtained improperly because the

SEC did not advise him the order would not resolve all of its possible claims against him, tried to adduce evidence on appeal purportedly demonstrating his belief at the time the consent order was entered that all claims would be resolved. *Id.* at *5 n.20. The Commission rejected LeBlanc's claim that "the significance of the materials was not made clear to him until the law judge rendered a decision that was plainly unfair to him," where LeBlanc should have been aware that the SEC had taken a contrary position at least as early as when the OIP was issued, but LeBlanc failed inexcusably to adduce the new evidence until well after the initial decision was issued. *Id.* Nor is there any valid excuse for Laccetti's delay.[2/]

Making matters worse, Laccetti waited to seek to adduce the materials until May 15, 2015—the date he filed his principal merits brief on appeal, already incorporating the citations and propositions from the extra-record materials he only asked that day to be admitted, with the 30-day clock running on the deadline for the Board to file its responsive merits brief. *See* SEC Rule of Practice 450(b), 17 C.F.R. 201.450(b), *Contents of Briefs* (exceptions to decision on review "shall be supported by citation to the relevant portions of the record") (emphasis added); *cf. United States v. Anderson*, 481 F.2d 685, 702 n.19 (4th Cir. 1973) ("Any reference to material not in the agreed record for appeal, much less its inclusion in a brief filed with the Court, is both improper and censurable."). Although, importantly, his merits brief does identify the extra-record materials integrated into it as subject to his Rule 452 motion, he asserts they are "narrow

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2/ *See, e.g., S.W. Hatfield, CPA*, SEC Rel. No. 34-69930, 2013 WL 3339647 at *5 n.38 (July 3, 2013) (rejecting belated proffer of evidence where "Applicants should have been well aware" of the basis upon which they claimed to need the evidence and therefore had ample opportunity to introduce the evidence earlier); *optionsXpress, Inc.*, SEC Rel. No. 34-70698, 2013 WL 5635987 at *10 (Oct. 16, 2013) (rejecting newly offered items because Respondents "had a full opportunity to present evidence and argument," noting it was their "obligation to marshal all the evidence in [their] defense" and "if they believed that additional evidence or testimony pertaining to [a certain investigation] would have been helpful, they could and should have introduced it at the hearing") (emphasis in original; internal quotations and citations omitted).

in scope" and "in no way controversial or burdensome" (Mtn. 1, 4). These descriptions do not apply to topics and propositions for which he seeks to use the materials to try to support his right to counsel defense (not his distinct separations of powers defense), such as: a "full[ ] grasp" of "the circumstances of the investigation" (Mtn. 5 n.2); the "investigatory process" (Mtn. 3); "the role that [his] investigative testimony played, including with respect to the Board's decision to initiate proceedings against [him]" (*id.*); and the "prominent[ ]" way that testimony supposedly "featured" as "information in support of the Division's allegations" and "in the evidence considered by the Board when determining to initiate proceedings" against him *(id.*; Br. 3).[3/]

Despite this subject matter, despite suggesting the investigation was "exhaustive," "wide-ranging," and "extraordinarily complex" (Br. 16), and despite stating that prosecutorial decisions were "[b]ased on the investigative record" as a whole (Br. 28), Laccetti seeks, on May 15, 2015, to introduce "certain" selective documents "related to the investigative process" (Mtn. 3) for the purpose of drawing broad inferences about that process and the Board's deliberations on the OIP. He does so without making any pretense of reconstructing a complete "investigative record" relevant to the topics for which he seeks to use the proposed exhibits, or providing any analysis of particular detailed evidence, from which a historically accurate and fair conclusion might be drawn about the process and how "prominent[ ]" his investigative testimony actually was in it.

3/ *See, e.g., SEC v. Legi-Tech*, 75 F.3d 704, 709 (D.C. Cir. 1996) (court cannot "examine the internal deliberations of the Commission, at least absent a contention that one or more of the Commissioners were actually biased"); *see also, e.g., Hartman v. Moore*, 547 U.S. 250, 262-63 (2006) ("to the factual difficulty of divining the influence of an investigator or other law enforcement officer upon the prosecutor's mind, there is an added legal obstacle in the longstanding presumption of regularity accorded to prosecutorial decisionmaking") (collecting cases); *Wayte v. United States*, 470 U.S. 598, 607 (1985) ("the decision to prosecute is particularly ill-suited to judicial review"); *Angov v. Holder*, 736 F.3d 1263, 1280 (9th Cir. 2013) ("presumption of regularity" applies to trained administrative agency investigators).

For example, Laccetti's Proposed Exhibit E is a 12-page letter from the Division to his counsel stating an intention to recommend that the Board commence a disciplinary proceeding against Laccetti. Without analysis, Laccetti points to six propositions, supported by seven citations to his investigative testimony, out of a total of more than 40 citations in the letter's footnotes, as his only support for his claim that his investigative testimony "featured prominently as information in support of the Division's allegations." Mtn. 3, Br. 3 & n.5, 28 & n.20 (all citing only Proposed Ex. E). Yet he nowhere discusses the fact that these propositions are readily supported by other evidence from the investigation, such as the audit work papers, *see, e.g.*, Hearing Exs. J-29 at 6, 8, D-72 at 6, & L-1 at 3, 6, R.D. 168 at 119 (citations), Proposed Ex. E at 7-8 & n.27, 8 & n.30; investigative testimony of other witnesses, such as Laccetti's subordinate on the 2004 audit, *see, e.g.*, Hearing Ex. D-303 at 53-54, 57-58, 105, Proposed Ex. E at 8 & n.30, 10 & n.38; or, as with some other propositions in the letter, by the auditing standards themselves, *see, e.g.*, Proposed Ex. E at 5 & n.16, 7-8 & n.27, 9-10 & n.37.

Although the record index for this matter may "begin[ ] with" the OIP, the content of the "existing record" is by no means limited to items that "begin[ ] with" the OIP (Mtn. 3). Rather, the case record—compiled through an orderly, painstaking process involving submissions by the parties at the appropriate time, with sufficient opportunity for their representatives most knowledgeable about the matter to respond, and rulings by the hearing officer—contains carefully designated investigative testimony and documents. These include exhibits to post-hearing submissions by the parties relating to the exact issue of attendance of Laccetti's proposed consultant at his investigative testimony. R.D. 180b; Ex. A to R.D. 182. Indeed, aside from the extra-record materials, Laccetti also makes use of pre-OIP record evidence in his merits brief. *See, e.g.*, Br. 4, 5, 6 nn.10, 11, & 12, 24. Nothing more is appropriate. If the record "does not

include certain evidence related to the investigative process leading up to the decision to initiate proceedings" (Mtn. 3), then that is the result of the considered judgments, at the proper time, of the highly qualified litigators, with knowledge of the investigative files, case record, and claims and arguments of the parties, who represented the parties in the disciplinary proceeding itself.

Throughout the case, Laccetti has defined his affirmative defense as a violation of his claimed right to counsel "during the investigative stage" (*see, e.g.*, R.D. 29 at 13, R.D. 180 at 107, 112, R.D. 204 at 12-15, R.D. 210 at 23, R.D. 217 at 101; Mtn. 2-3), "when the Division excluded [his] technical expert consultant from his investigative testimony" (R.D. 199 at 19). Long before his complete abandonment, in this appeal, of any arguments about whether, based on the actual case record, he committed serious violations of PCAOB auditing standards warranting strong sanctions, and his concurrent shift to all but exclusive concentration on selective items of "the investigative record," he was fully aware of the relationship of the investigative phase to his affirmative defense. *See FCS Sec.*, 2011 WL 2680699 at *8-9.[4/]

Lacetti has shown no good reason for waiting until now to proffer his new exhibits. Thus, his motion does not meet that independent requirement of Rule 452 and should be denied.

[4/] *See also, e.g., Sidney C. Eng*, SEC Rel. No. 34-40297, 1998 WL 433050 at *7 & n.17 (Aug. 3, 1998) (denying motion to adduce additional evidence and noting that "'a respondent cannot be permitted to gamble on one course of action and, upon an unfavorable decision, to try another course of action") (quoting *David T. Fleischman*, SEC Rel. No. 34-8187, 1967 WL 87757 at *2 (Nov. 1, 1967)); *cf. Milano v. Bowen*, 809 F.2d 763, 767 (11th Cir. 1987) (holding that the requirement in 42 U.S.C. 405(g) that a reviewing court order an agency to consider new evidence in a proceeding to determine benefits only where there was "good cause" for failing to introduce the evidence earlier was designed to prevent claimants from strategizing to "obtain[ ] another bite of the apple"' if they lost their cases) (quoting *Szubak v. Secretary of Health and Human Services*, 745 F.2d 831, 834 (3d Cir. 1984)); *P&G v. Paragon Trade Brands*, 15 F. Supp. 2d 406, 415 (D. Del. 1998) (rejecting request to vacate court order and reopen discovery under Federal Rules of Civil Procedure 59 and 60 and noting that those rules do not "permit a party to sandbag its adversary with evidence or arguments available prior to trial in an effort to needlessly prolong the litigation or in a vain attempt to salvage a victory already lost").

II. Laccetti Has Not Shown That His Proffered New Exhibits Are Material.

Laccetti asserts that his Proposed Exhibits A, B, C, and E are material to showing that this disciplinary proceeding was "tainted," and that he was harmed, by the Division's decision not to allow the proposed non-attorney consultant to attend his investigative testimony, which Laccetti alleges violated his claimed right to counsel. *See, e.g.*, Mtn. 3; Br. at 3, 6, 18, 20, 28. In addition, Laccetti asserts that his Proposed Exhibits C and D are material to his contention that the "purported justification" for the Division's decision was not "relevant or applicable here" because these two exhibits show that outside counsel, representing Ernst & Young, Laccetti, and a former Ernst & Young colleague, attended the investigative testimony of Laccetti and the ex-colleague, along with an Ernst & Young in-house attorney. *See, e.g.*, Br. at 24-27. Laccetti fails to show, however, how these propositions are material to resolution of his appeal.

According to Laccetti's motion (Mtn. 3), the proposition about taint and harm counters the statement in the Board's decision that Laccetti's affirmative defense "is moot because we need not and do not rely on his investigative testimony, but on other (and ample) record evidence" (R.D. 220 at 74). To begin with, Laccetti's brief notes that this Board statement represents an "alternative finding." Br. 27. Indeed, the Board's decision contains a separate holding on the affirmative defense. Specifically, the Board held that Laccetti "has no sound basis for his claim of right" in the first place because there is no general constitutional or statutory right to counsel in an investigation and because PCAOB Rule 5109, subject to PCAOB Rule 5102(c)(3)—as approved by the Commission, SEC Rel. No. 34-49704 (May 14, 2004)—grants no more than a qualified right to counsel. *See* R.D. 220 at 74-78.

Laccetti argues that this holding is contrary to Rule 5109, on its face, and to broad principles of law. *See, e.g.*, Br. 16-17, 18-19. Particular circumstances of this case he tries to

show by use of the proposed new exhibits (*see, e.g.,* Br. 3, 6, 18, 20, 26, 27) therefore do not matter to that argument. If his argument is incorrect, then his claimed right to counsel does not exist and his defense fails. If his argument is correct, then the question becomes whether he was deprived of the claimed right. If he is arguing that he had an absolute right to the attendance of the particular proposed consultant, then again the circumstances the five new exhibits are purportedly adduced to show, and thus the exhibits themselves, would not matter, because it is undisputed that this individual was not allowed to attend. If instead Laccetti is arguing that he had a right to the attendance of some technical consultant, and if the Commission were to find, as the Division argued and the hearing officer and Board determined, that the Division had valid grounds for denying, and denied only, the attendance of the Ernst & Young accounting and auditing partner who was actually proposed, then Laccetti brought any claimed harm on himself by "his own decision not to seek out another expert in the two months before his scheduled examination" (R.D. 220 at 76). And the extra-record documents would not be material to the Commission's finding about whether valid grounds existed, if it would make the same finding regardless of the existence of the circumstances Laccetti cites those documents to show. *See, e.g., Maria T. Giesige*, SEC Rel. No. 34-60000, 2009 WL 1507584 at *7-*8 (May 29, 2009).[5/]

[5/] As noted, we have been unable to find any place in the record where Laccetti discussed why the proposal that a particular non-attorney consultant be allowed to attend his investigative testimony was denied, despite the fact that Laccetti bore the burden of proving his affirmative defense and that the Division and initial decision did address the subject. Instead, Laccetti has developed arguments on this point only in his appeal to the Commission. For example, he professes to find it remarkable that a rule titled "Right to Counsel" and an explanatory release identifying a certain matter of concern to the information-gathering purpose of an investigation might suggest that attorneys and non-attorneys could be treated differently while still responding to that concern and that when Division lawyers have the relatively limited opportunity of an investigative interview to question the audit firm partner who led the audit in question and who is represented by a team of lawyers, about issues of what he understood and did at the time of the audit that are potentially "marked by 'extraordinary complexity,'" the staff lawyers would be

As far as appears from Laccetti's cursory motion, any basis that might remain for his claim that the new proposed exhibits are material is disposed of by returning to the Board's holding, referenced earlier, that even if a violation of right had occurred, he was not prejudiced by it. He declares that holding "legally irrelevant" because "the denial of the right to counsel is a structural error that does not require a showing of harm." Br. 27. But he fails to address why the proffered exhibits would not likewise be irrelevant, if his brief were correct about "structural error," that is, if Laccetti's claimed right exists and a denial of it must be analyzed under a line of cases involving identity of the attorney, rather than performance of the attorney. *Compare, e.g., United States v. Gonzalez-Lopez*, 548 U.S. 140, 150 (2006) (cited at Br. 27) *with Strickland v. Washington*, 466 U.S. 668, 694 (1984) (cited in R.D. 220 at 76).

If instead Laccetti were incorrect on this structural error point, then he offers no other reason why refraining from relying on his investigative testimony and relying exclusively on other (and ample) record evidence in adjudicating the case, on de novo review (PCAOB Rule 5460(c)), would not serve as a fully sufficient remedy for the claimed violation. *See* R.D. 220 at 76 (citing cases). Indeed, the Commission has repeatedly held that a perceived error in an earlier stage of a matter does not taint a later decision in the matter if there is no evidence that it factored into that decision and there is sufficient evidence to support the decision.[6/]

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accompanied by staff auditors. Br. 17-18, 20, 24, 25-26. In short, the Board's finding on the reason for the denial is readily explainable in response to Laccetti's new arguments.

6/ *See, e.g., Richard G. Cody*, SEC Rel. No. 34-64565, 2011 WL 2098202 at *19 (May 27, 2011) (rejecting claim of selective prosecution and noting that subsequent de novo review "cures whatever bias, if any, that may have existed [below]"), *aff'd*, 693 F.3d 251 (1st Cir. 2012); *mPhase Technologies, Inc.*, SEC Rel. No. 34-74187, 2015 WL 412910 at *8 (Feb. 2, 2015) (rejecting claim that a FINRA examiner's consideration of objectionable evidence was reversible error because there was no evidence FINRA's appellate body considered the evidence and ample, other evidence supported the action); *Robert Tretiak*, SEC Rel. No. 34-47534, 2003 WL 1339182 at *10 (Mar. 19, 2003) (rejecting claim that NASD's enforcement counsel acted

Prior to the Board's decision, the only prejudice Laccetti claimed to have suffered from the exclusion of the other Ernst & Young accounting and auditing partner from the room during Laccetti's investigative testimony was, as the Board noted (R.D. 220 at 74), the alleged use of that testimony against him in the disciplinary proceeding. *See* R.D. 210 at 23. Although on appeal here Laccetti now purports to give four reasons why he was harmed (Br. 28), the first and third (that he was charged following the investigation) are redundant and so general as to seem to restate the structural error theory advanced (also for the first time) in his SEC appeal brief. The second reason is based on the citation, in Proposed Exhibit E, of his investigative testimony for the six propositions discussed at page 10 above. But he testified to the same points at the hearing, he admitted them in his answer, and they are established by documentary evidence. *See, e.g.*, R.D. 10 at 7 ¶ 45; R.D. 135 at 265, 275-77, 283-84, 286, 318-20, 366, 383-84, 388; R.D. 139a at 952-53; p. 10, *supra*.[7/] Finally, the fourth reason why Laccetti contends he was harmed

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improperly at the hearing and noting that in any event the enforcement attorneys were not the final decision makers on the charges, rather the hearing panels and subsequently NASD's appellate body were, and that the Commission's "de novo review dissipates even the possibility of unfairness"); *Frank J. Custable*, SEC Rel. No. 34-33324, 1993 WL 522322 at *6 (Dec. 10, 1993) (rejecting argument that NASD staff improperly influenced the initial decision maker and holding that subsequent de novo review by NASD's appellate panel and the Commission "dissipates any harm" that may have resulted from any staff irregularities below); *Stephen Russell Boadt*, SEC Rel. No. 34-32095, 1993 WL 365355 at *1 (Sept. 15, 1993) (rejecting claim that "the sanction [imposed by NASD] is the result of a vendetta against [applicant] by the Regional Counsel" because "even if we were to find that Regional Counsel were biased, that would not suggest that the fairness of the hearing itself was compromised" because "[a]s we have noted many times, the NASD staff is not responsible for the NASD's decision [on the charges]," citing *Dillon Sec., Inc.*, SEC Rel. No. 34-31573, 1992 WL 383783 at *7 n.29 (Dec. 8, 1992) (collecting cases)).

[7/] Similarly, Laccetti fails to specify the materiality of Proposed Exhibits A and B. His merits brief never cites them in the Argument, instead relying on unqualified generalizations about the breadth or complexity of PCAOB investigations. *See, e.g.*, Br. 16-18. To the extent he wants to use them to make a basic point about this case that he believes he cannot make by using the existing record, including designated investigative testimony and the OIP, but requires going

is demonstrably incorrect.[8/] Thus, regardless of whether, contrary to the Board's decision, his claimed "right to counsel" were valid and violated, and of whether, as he now argues, this was structural error, the exhibits are not material. His motion should be denied for this reason, too.

III. Discretionary Acceptance of the Materials Would Not Be Appropriate in This Case.

Citing three cases, Laccetti urges the Commission to admit his new proposed exhibits as "an exercise of discretion" even if his motion does not meet the requirements of Rule 452. Mtn. at 5 n.2 (citing *Leslie A. Arouh*, SEC Rel. No. 34-62898, 2010 WL 3554584 (Sept 13, 2010); *Enron Corp.*, SEC Rel. No. 35-27782, 2003 WL 2302379 (Dec. 29, 2003); and *Raghavan Sathianathan*, SEC Rel. No. 34-54722, 2006 WL 3228694 (Nov. 6, 2006)). But the prior discussion shows that the circumstances of this case are very different from the cases Laccetti cites and that discretionary acceptance of the materials would not be appropriate here.

For example, unlike the applicants in *Arouh* and *Enron*, Laccetti has not met either of the requirements of Rule 452. *See Arouh*, 2010 WL 3554584 at *14 n.69 (evidence was material);

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to the lengths of seeking to add new materials to the record at this late stage of second-level appeal, this only again highlights his inexcusable failure to adduce them at the proper time.

8/ Several times, the Board made clear in its decision that "we do not rely on [Laccetti's] investigative testimony in deciding this case." R.D. 220 at 2 n.1, 74. Nonetheless, Laccetti claims (Br. 28) to have found one "instance" in the 103-page, densely annotated Board decision in which the Board cited it. He errs. At issue are two pages of Laccetti's hearing testimony cited on page 10 of the decision, along with several other pages of that testimony and a letter, for this proposition: "Indeed, on January 26, 2005, Laccetti had reviewed and included in the audit work papers a December 17, 2004 letter to SEC staff from Taro USA's parent company which stressed subjectivity in the estimates of accounts receivable allowances and indicated limitations on access to information about the wholesale customers' inventory levels." Of the two cited pages referred to by Laccetti's brief, the first confirms that he had read the letter. The questioning in that line is then interrupted by a very different inquiry ("And at the time you read it, you were not aware of what management did to assess whether its accruals and reserves were, in fact, historically adequate; is that correct?"), followed by Laccetti's disagreement with that question, and the reading by the Division attorney to him of part of his investigative testimony. Then the second cited page returned to the line of questioning, without any reference to investigative testimony, for which the Board cited the page, on which Laccetti was asked whether the letter "was included in the 2004 work papers" and he answered, "Yes, it was." R.D. 135 at 266-67.

Enron, 2003 WL 2302379 at *13-15 & n.70 (evidence did not exist until after the issuance of the initial decision). Nor is a *pro se* litigant involved, as in *Sathianathan*; rather, Laccetti has been represented by a team of attorneys throughout the investigation and litigation of this case. Nor did the other motions implicate the full gamut of information obtained in the investigation of the applicant that preceded the institution of the proceeding against him, which is yet another reason not to exercise discretion to admit Laccetti's newly offered materials. *See, e.g., David Henry Disraeli*, SEC Rel. No. 34-56045, 2007 WL 2011036 at *1-*2 (July 11, 2007) (rejecting motion to compel and adduce new evidence about investigative testimony, as the "[t]he initial decision [on appeal] was not based on the investigation but on the evidence adduced at the hearing").

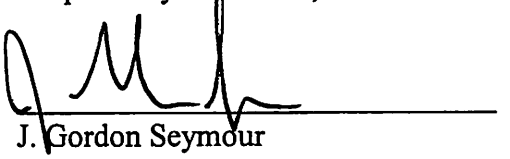
Therefore, Laccetti has failed to show that it would be a proper exercise of discretion to admit these extra-record materials, proffered in this manner, under these circumstances.

CONCLUSION

For the foregoing reasons, the Commission should deny Laccetti's motion and should not include his belated, extraneous new exhibits in a record he already had every chance to develop.

Dated: May 26, 2015

Respectfully submitted,



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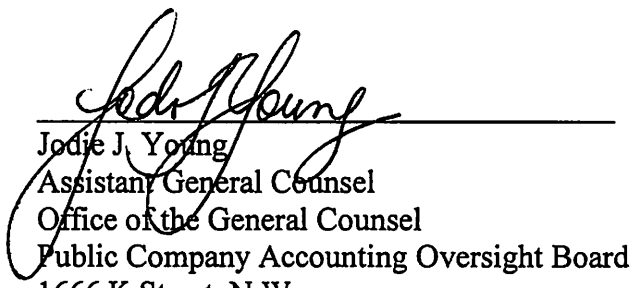
CERTIFICATION OF COMPLIANCE WITH RULE 154(c)

I, Jodie J. Young, certify that the foregoing Public Company Accounting Oversight Board's Brief in Opposition to Laccetti's Motion for Submission of Additional Evidence complies with the word count limitations set forth in Rule 154(c) of the Commission's Rules of Practice, 17 C.F.R. 201.154(c), and that the foregoing brief contains 6,406 words, exclusive of pages containing the Table of Contents and Table of Authorities, as counted by the Word Count feature of our Microsoft Word word-processing program used to prepare the brief.



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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

PUBLIC COMPANY ACCOUNTING
OVERSIGHT BOARD

NOTICE OF APPEARANCE

Pursuant to Rule 102 of the Commission's Rules of Practice, J. Gordon Seymour, Luis de la Torre, and Jodie J. Young enter their appearances in the above-entitled matter representing the Public Company Accounting Oversight Board and hereby request that notice or other written communication in this proceeding be served upon them at the following mail address and email addresses below:

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CERTIFICATE OF SERVICE

I hereby certify that on the 26th of May 2015, 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 Brief in Opposition to Laccetti's Motion for Submission of Additional Evidence" and "Notice of Appearance" addressed as follows:

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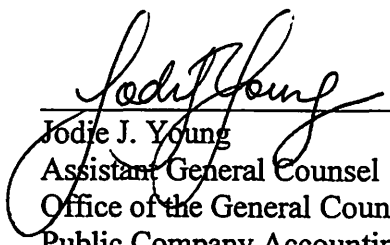
Mr. Zweifach and Ms. Harris are being served via Federal Express, with courtesy copy by electronic mail, rather than by hand delivery, because they are located in New York.



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