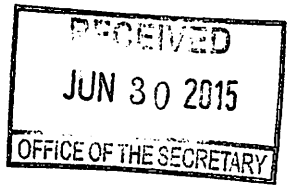
UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

Admin. Proc. File No. 3-16430

In the Matter of the Application of

MARK E. LACCETTI

For Review of Action Taken by PCAOB



REPLY BRIEF OF MARK E. LACCETTI IN FURTHER SUPPORT OF HIS APPLICATION FOR COMMISSION REVIEW

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PRELIMINARY STATEMENT

When it established the Public Company Accounting Oversight Board ("PCAOB" or "Board"), Congress directed it to establish "fair procedures for the *investigation* and disciplining" of registered firms "and associated persons of such firms." 15 U.S.C. § 7215(a) (emphasis added). While impermissibly wielding executive power without executive oversight, the Board took formal acts against Mark Laccetti, including investigating and instituting disciplinary proceedings against him. Moreover, during Mr. Laccetti's investigative testimony, the Board's Division of Enforcement and Investigations ("Division") refused to allow his counsel the assistance of any technical expert consultant, even as the Division's attorneys were assisted by two expert accountants who questioned him directly and extensively. It is undisputed that the Board's structure violated the Constitution, and it is plain that the Division violated Mr. Laccetti's right to counsel. Those errors tainted all subsequent proceedings in this case, including the Board's Decision and Order Imposing Sanctions (the "Decision").

The Board's Opposition ("Opp.") responds that it somehow does not matter whether the Board was unconstitutional or used unfair procedures when it investigated and instituted disciplinary proceedings against Mr. Laccetti. In the Board's view, it cured any errors in those actions by imposing sanctions following *de novo* review. That is incorrect. The Board's unconstitutional structure and the Division's denial of Mr. Laccetti's right to counsel are structural errors that require reversal and dismissal of these proceedings. They were not and could not have been cured by the Board's review, which would never have come about if not for the Board's invalid and tainted prior actions. And even at that time of the Decision, the Board lacked authority to impose sanctions on Mr. Laccetti because Board members have never satisfied the constitutional prerequisites for wielding the authority of the United States. The Board's repeated refrain that there is no dispute about the underlying audit issues, *e.g.*, Opp. 4, 5,

13, 18, 41, is entirely irrelevant. Mr. Laccetti has every right to challenge the Board's constitutional, statutory, and rule-based errors. As explained below and in Mr. Laccetti's Opening Brief ("Br."), these errors necessitate that the Commission reverse the Board's Decision and dismiss these proceedings.

ARGUMENT

I. The PCAOB's Unconstitutional Structure Requires That These Proceedings Be Dismissed.

A. The Board's Unconstitutional Structure When It Investigated And Initiated Proceedings Against Mr. Laccetti Tainted Its Enforcement Proceedings.

The Board does not dispute, and it is indisputable, that the Board impermissibly wielded executive power without executive oversight when it investigated and initiated disciplinary proceedings against Mr. Laccetti. Opp. 5-6; *see also Free Enterprise Fund v. PCAOB*, 561 U.S. 477, 498 (2010) ("*FEF*"). Instead, it contends that those formal acts—which compelled Mr. Laccetti to give four days of sworn testimony, to produce reams of documents, and to prepare for an administrative hearing—are not legally cognizable, because they supposedly caused no "legally cognizable injury" to Mr. Laccetti. Opp. 5-9. But the Board misconstrues controlling precedent, relies on inapposite cases, and suggests that the subjects of administrative proceedings must bypass orderly agency procedures to secure their constitutional rights.

Mr. Laccetti suffered a legally cognizable injury when he was "subject" to an enforcement action "by a constitutional agency" that was not "accountable to the Executive." *FEF*, 561 U.S. at 513. The Board's enforcement action is not reducible to its final decision to impose sanctions. The Supreme Court made clear that, notwithstanding the Commission's authority to "amend Board sanctions," the Board was unconstitutionally "empowered to take significant enforcement actions ... largely independently of the Commission." *Id.* at 504. That scheme was unconstitutional because it "nowhere [gave] the Commission effective power to

start, stop, or alter individual Board investigations," and the Commission could not "govern and direct the Board's daily exercise of prosecutorial discretion." *Id.* Such "significant enforcement actions" are thus legally cognizable, and provide settled and valid grounds for the relief Mr. Laccetti seeks.

Mr. Laccetti could, and did, contest the Board's ability to "interven[e] in the affairs of regulated firms" and to interfere with his life and livelihood, *FEF*, 561 U.S. at 505, at the beginning of these proceedings, when the Board was demonstrably unconstitutional, R.D. 10 at 13. If the accounting firm in *FEF* could sue based on an enforcement action that *did not* result in sanctions, *see* 561 U.S. at 490, Mr. Laccetti is surely entitled to a remedy for enforcement actions by an unconstitutional board that *did* result in sanctions.

Moreover, the Board's argument that nothing prior to its ultimate Decision is legally cognizable would lead to absurd results. The Commission itself exercises *de novo* review over the Board's sanctions (15 U.S.C. § 78s(e)(1)); if the Board's argument is correct, then even the Board's sanctions would not impart legally cognizable harm, as any set of errors would be "corrected" by the Commission's ultimate review.

Mr. Laccetti's constitutional claim is not "vitiate[d]" merely because the Board was no longer unconstitutionally structured when it imposed sanctions on him. Opp. 6. In *Landry v. FDIC*, for example, the court recognized that constitutional defects in preliminary agency actions can *invalidate* final agency actions. 204 F.3d 1125, 1132 (D.C. Cir. 2000). That case concerned a constitutional challenge to the FDIC's method for appointing administrative law judges ("ALJs"). *Id.* at 1130. Even though the FDIC, which was not itself unconstitutionally structured, had "determined Landry's responsibility after reviewing the ALJ's recommended decision de novo," his claim was still legally cognizable. *Id.*

The court in *Landry* relied on a series of similar decisions. *First*, convictions by constitutionally composed petit juries do not cleanse unconstitutionally structured grand juries. 204 F.3d at 1131 (citing *Vasquez v. Hillery*, 474 U.S. 254 (1986) and *Ballard v. United States*, 329 U.S. 187 (1946)). *Second*, in *Freytag v. Commissioner*, 501 U.S. 868 (1991), the Supreme Court "was ready to throw out the Tax Court's decision simply on the ground that special trial judges ('STJs') held what it viewed as clearly the powers of an 'inferior officer' ... even though the STJ had not exercised any power to make final decisions in Freytag's case." *Landry*, 204 F.3d at 1131-32. And, *third*, the Supreme Court noted in *United States v. L.A. Tucker Truck Lines*, 344 U.S. 33 (1952), "that a defect in the appointment of an 'examiner' (precursor of today's ALJ) was, if properly raised, 'an irregularity *which would invalidate a resulting order.*'" *Landry*, 204 F.3d at 1132 (emphasis added).

The Board attempts to dismiss *Landry* as a "discussion" about "standing." Opp. 8; *see also id.* at 20. But *Landry* was not about standing; indeed, it never even *mentions* standing. *See generally* 204 F.3d 1125. In fact, the court analyzed whether later *de novo* review could cure prior unconstitutional agency actions in the context of rejecting "a preliminary objection"—identical to the Board's argument here—"that Landry ha[d] shown no prejudice from any Appointments Clause violation that may have occurred." *Id.* at 1130. The court rejected that argument because an improperly appointed officer with "purely recommendatory powers" would be "enough to taint the [agency's] ultimate judgment." *Id.* at 1132. Similarly, here, the unconstitutionally structured Board's decisions to investigate and institute disciplinary proceedings against Mr. Laccetti tainted its ultimate imposition of sanctions.

The Board's reliance (Opp. 6) on *Andrade v. Regnery*, 824 F.2d 1253 (D.C. Cir. 1987), is misplaced. In *Andrade*, several government employees brought a constitutional challenge after

being fired or demoted as part of a reduction in force program. *Id.* at 1254. That challenge failed because the supervisor responsible for firing or demoting them "had been properly appointed" by the date they lost their jobs. *Id.* at 1256-57. The court held that it made no difference that the reduction in force was planned by supervisors who might have been improperly appointed: The employees' legally cognizable injury was "the loss of their jobs, not the mere fact that the government initiated plans that could have resulted in their demotion or termination." *Id.* at 1257. Here, the unconstitutional Board did much more than *plan* to investigate Mr. Laccetti. Rather, it took formal enforcement actions, authorizing an investigation and instituting disciplinary proceedings against him.

Tellingly, the Board does not argue that actions such as launching investigations and initiating disciplinary proceedings are *never* legally cognizable, but only that they are not legally cognizable "in a challenge to the validity of sanctions imposed by a constitutional body." Opp. 7. Instead, the Board suggests, Mr. Laccetti should have "challenged PCAOB action in court." Opp. 6. Ironically, although the government argued in *FEF* that the district court had no jurisdiction to entertain a constitutional challenge to the Board's structure, 561 U.S. at 489-90, the Board now contends that was the only available route for Mr. Laccetti to gain a forum for his claims. *See* Opp. 6-9. But Mr. Laccetti is not "seek[ing] to benefit" from the Board's unconstitutional structure. Opp. 9. He has consistently raised challenges to that structure from the very beginning of these proceedings—before *FEF*. R.D. 10 at 13. To accept the Board's argument is to invite "premature interruption of the administrative process" and "piecemeal appeals of agency actions." *First Jersey Sec., Inc. v. Bergen*, 605 F.2d 690, 695 (3d Cir. 1979) (citation omitted). Although Mr. Laccetti may have been *permitted* to bypass the usual process of administrative and appellate review, *see, e.g.*, *Merrill Lynch v. NASD*, 616 F.2d 1363, 1370-71

(5th Cir. 1980) (exception to exhaustion requirement for "clear and unambiguous" constitutional violations), there is no basis for the Board to assert that he was *required* to do so to obtain ultimate review of his claims.

B. The Board's Unconstitutional Acts Against Mr. Laccetti Are Invalid.

In *FEF*, the Supreme Court held that the petitioners were "entitled to declaratory relief sufficient to ensure that the reporting requirements and auditing standards to which they are subject will be enforced only by a constitutional agency accountable to the Executive." 561 U.S. at 513. As the Board's Decision noted, the for-cause removal restrictions for Board members were "unconstitutional in all applications." R.D. 220 at 81-82. That necessarily renders invalid the enforcement actions the Board took when it was unconstitutionally unaccountable, including its investigation and institution of disciplinary proceedings against Mr. Laccetti. *See Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 97 (1993) ("When [the Supreme Court] applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule.").

The Board protests that *FEF* did not invalidate these enforcement actions, but relies only on a series of statements from that decision involving challenges Mr. Laccetti does not bring. Opp. 9-10. Mr. Laccetti does not challenge the Board members' valid appointments, the continued existence of the Board, or—on removal grounds—Board actions that post-dated *FEF*, except insofar as those activities in relation to this matter were tainted by prior unconstitutional actions. *See* Br. 12. He does not seeks "broad injunctive relief against the Board's *continued* operations," *FEF*, 561 U.S. at 513 (emphasis added); instead, he seeks narrow relief sufficient to cure the Board's past, indisputably unconstitutional actions against him. The plaintiffs in *FEF* did not seek retrospective relief, so the Court did not grant them retrospective relief. But there is

no theory of constitutional law that "would permit [a court] to declare [an agency's] structure unconstitutional without providing relief" to a challenger who "raise[s] the constitutional challenge as a defense to an enforcement action." *FEC v. NRA Political Victory Fund*, 6 F.3d 821, 828 (D.C. Cir. 1993).[1]

Moreover, *Intercollegiate Broadcasting System v. Copyright Royalty Board* squarely refutes the Board's position. 684 F.3d 1332 (D.C. Cir. 2012). When the court remanded that case, it had—following *FEF*—already severed the unconstitutional removal provision so that "no constitutional problem remain[ed]." *Id.* at 1334. But, "[b]ecause the Board's structure was unconstitutional at the time it issued its determination," the court "vacate[d] and remand[ed] the determination challenged" by Intercollegiate. *Id.* at 1334, 1342. To be sure, the court did not invalidate the Copyright Board's initiation of ratemaking proceedings, Opp. 12, but Intercollegiate voluntarily participated in those proceedings, *see* 684 F.3d at 1335. The key point, however, is that *Intercollegiate* confirms that severing unconstitutional removal provisions does not cleanse actions taken while an agency was unconstitutionally structured. *Id.* at 1342.

Nor does Mr. Laccetti require the Commission to assume that *all* of the Board's "past actions taken under the statute in question are invalid." Opp. 12 (citing *Buckley v. Valeo*, 424 U.S. 1, 142 (1976)). In *Buckley*, the Court granted "*de facto* validity" to the FEC's past "administrative actions." 424 U.S. at 142. But the FEC's "administrative powers" were "more legislative and judicial in nature than" its "enforcement powers," and the Court held they would

[1] It is similarly irrelevant that "two successive administrations" defended the constitutionality of the Board's structure, Opp. 11—"the separation of powers does not depend on the views of individual Presidents." *FEF*, 561 U.S. at 497. As for the Commission's ability to "have appointed a new Board majority," because of vacancies, Opp. 11—it did not do so. Moreover, the Supreme Court found that the Commission's ability to appoint Board members did not give it constitutionally sufficient control over Board actions prior to *FEF*. 561 U.S. at 484, 504.

be accorded validity to the same extent as "legislative acts performed by legislators." *Id.* at 140-42. Because Mr. Laccetti does not challenge the Board's rules or regulations, or any of the Board's work other than the specific enforcement actions it brought against him, *Buckley* is irrelevant. Indeed, in *Ryder v. United States*, the Supreme Court noted that it had not "invoked the *de facto* officer doctrine to deny relief to the party before it," and it refused to "extend" *Buckley* "beyond [its] facts." 515 U.S. 177, 184 & n.3 (1995).

C. The Only Appropriate Remedy Is Reversal And Dismissal.

Because the Board's structure was unconstitutional when it investigated and initiated disciplinary proceedings against Mr. Laccetti, he is entitled to a remedy sufficient to cure the constitutional violations. Br. 11-13. Mr. Laccetti objected from the beginning of these proceedings that the Board's structure was unconstitutional, yet the Board never "took corrective steps to cure the statutory defect." *FEC v. Club for Growth, Inc.*, 432 F. Supp. 2d 87, 94 (D.D.C. 2006) (citing *A.L. Pharma, Inc. v. Shalala*, 62 F.3d 1484, 1489 (D.C. Cir. 1995)). Instead, the Board has continued to pursue its investigatory and disciplinary process, labelling that very process a "cure." Opp. 18-19. This position defies law, logic, and fundamental fairness.

According to the Board, it cured the separation of powers violation by "devot[ing] substantial resources to *de novo* consideration of the evidentiary record and parties' arguments" before issuing "a final decision" imposing sanctions. Opp. 18. In making this statement, the Board concedes that it never ratified the decisions it made and the actions it took while unconstitutionally structured.

In *Landry*, the D.C. Circuit rejected the very argument the Board makes here. Before deciding Landry's constitutional challenge, the court considered the FDIC's objection that because the FDIC reviewed the ALJ's decision *de novo*, Landry could not show any prejudice from any constitutional violation in the ALJ's appointment. 204 F.3d at 1130-31; *see supra* I.A.

But the court held Landry was not required to show prejudice: "Issues of separation of powers (including Appointments Clause matters)" are "structural" errors "and thus subject to automatic reversal." 204 F.3d at 1131 (quoting *Neder v. United States*, 527 U.S. 1 (1999)). Indeed, "separation of powers" is not merely "structural in the sense that it derives from the constitutional structure" but is "a *structural safeguard* rather than a remedy to be applied only when specific harm, or risk of specific harm, can be identified." *Id.* at 1131-32 (quoting *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 239 (1995)).

Drawing an analogy to structural errors in the make-up of grand juries, the court held that even "de novo review following the decision of the (arguably) unlawfully designated official" would be *insufficient* to cleanse a structural constitutional violation. 204 F.3d at 1131 (citing *Vasquez*, 474 U.S. 254; *Ballard*, 329 U.S. 187); *see also id.* at 1132 ("If the process of final de novo review could cleanse the violation of its harmful impact, then all such arrangements [could] escape judicial review.").

Once again, the Board responds by asserting that *Landry* was a case about standing. Opp. 20. It was not. *See supra* I.A.; *see also Landry*, 204 F.3d at 1144 (Randolph, J., concurring). The Board also points out that none of the separation of powers cases on which *Landry* relied involved *de novo* review. Opp. 20. But *Landry* itself did. *See* 204 F.3d at 1131 (majority opinion).

FEC v. Legi-Tech, Inc., 75 F.3d 704 (D.C. Cir. 1996), which pre-dates *Landry*, does not help the Board. While unconstitutionally structured, the FEC had "found probable cause to believe Legi-Tech had violated" a statute and "filed a civil enforcement action." *Id.* at 706. After the D.C. Circuit severed the unconstitutional provision, the "reconstituted FEC" again "voted to find probable cause that Legi-Tech had violated [the statute] and to authorize the

General Counsel to continue th[e] litigation." *Id.* The court exercised its discretion "to take the FEC's post-reconstitution ratification of its prior decisions at face value and treat it as an adequate remedy." *Id.* at 709. But the court did so because it was "virtually inconceivable" that the FEC's decisions would have differed had the agency been forced to start over—"[a]fter all, there had been no significant change in the membership" of the FEC. *Id.* at 708-09.

Here, the Board never reissued an order of formal investigation, PCAOB Rule 5101(a)(1), and never voted to recommence disciplinary proceedings against Mr. Laccetti, PCAOB Rule 5200(a)(1). The Board's opposition nowhere says that it took such actions. The Board thus concedes that it never formally ratified its prior unconstitutional actions. *See* Opp. 18-19 & n.3. Moreover, none of the current Board members was in office when the Board began its investigation of Mr. Laccetti, and only one was in office when the Board instituted proceedings against him. *See* PCAOB, The Board, available at http://pcaobus.org/About/Board/Pages/default.aspx. Given the long-stale facts of this case, it is not "inconceivable" that the current Board, approaching the issue anew and without prejudice, would decline to investigate or institute disciplinary proceedings against Mr. Laccetti.[2]

In the end, the Board relies exclusively on one case—*Doolin Security Savings Bank, F.S.B. v. OTS*, 139 F.3d 203 (D.C. Cir. 1998)—for its argument that *de novo* review can somehow *implicitly* "ratify" prior invalid acts. Opp. 4, 16-17. But the Board concedes that *Landry* "discuss[ed] and distinguish[ed]" *Doolin*. Opp. 20 n.4. Whereas *Landry* involved structural constitutional error, *Doolin* concerned a statutory challenge subject to harmless error review. *Landry*, 204 F.3d at 1132 (distinguishing *Doolin* because it "relied on [*United States v.*]

[2] Moreover, if the Board were to amend the order instituting proceedings, it could not rely on the original hearing, which was also tainted by the Board's unconstitutional structure.

Mechanik," 475 U.S. 66 (1986), a rules-based challenge to a grand jury proceeding). Because the Board was unconstitutionally structured when it investigated and initiated disciplinary proceedings against Mr. Laccetti, the Board's *de novo* imposition of sanctions did not cure the constitutional violation. At this stage, the only appropriate remedy is reversal and dismissal. Br. 13-15.

II. The Division Also Violated Mr. Laccetti's Right To Counsel.

The Division violated Mr. Laccetti's right to counsel when it refused to permit his attorney to bring any technical expert consultant into his investigative testimony. Br. 15-31. Mr. Laccetti claims the right to have his attorney assisted by an expert during his testimony, not "an unqualified right to the attendance at his investigative hearing of any non-lawyer technical consultant *of his choice*." Opp. 20 (emphasis added). Because the Board's misguided response at best torches a straw man, *see*, *e.g.*, Opp. 20, 21, 22, 23, 24, it fails to refute Mr. Laccetti's claim. Mr. Laccetti was entitled by statute to "fair procedures," 15 U.S.C. § 7215(a), and by the Board's own rules to the right to counsel, PCAOB Rule 5109(b). The Division unfairly denied him that right.

A. Mr. Laccetti Was Entitled To Meaningful Representation, Which Required The Division To Allow His Counsel To Be Accompanied By A Technical Expert Consultant.

The Board relentlessly attacks an argument Mr. Laccetti does not make, and fails entirely to address his actual argument. Mr. Laccetti nowhere claims "an absolute right to have his attorney bring *his choice* of consultant into the testimony." Opp. 24 (emphasis added). Rather, he claims a rule-based right, grounded in the statutory guarantee of "fair procedures," to have a technical consultant present to make his right to counsel meaningful. Br. 17-20.

Although the Board's Opposition places scare quotes around the "'right to counsel,'" Opp. 21, the Board's own rules expressly grant that right in broad terms borrowed from the

Administrative Procedure Act, PCAOB Rule 5109(b) ("Right to Counsel"). To be sure, the rules exclude "a person other than the witness who has been or is reasonably likely to be examined in the investigation." PCAOB Rule 5102(c)(3). But nothing in the Board's rules permits the Board to deprive a witness of a meaningful right to counsel by excluding *any and every* technical expert consultant for counsel. The Board's rules cannot be interpreted to give the Division discretion to do so.[3]

The Board suggests that principles underlying the Sixth Amendment right to counsel do not apply to Board proceedings because it would "eviscerate Fifth Amendment due process precedent that squarely rejects any right to counsel in administrative investigations." Opp. 24-25. It is unclear whether the Board objects so vehemently to the right to counsel of choice, or to the right to the effective assistance of counsel. Both are inherent in the right to "be accompanied, represented and advised by counsel," PCAOB Rule 5109(b), and both are mandated by Congress's requirement of "fair procedures," 15 U.S.C. § 7215(a).

The Board also attempts to evade *SEC v. Whitman*, 613 F. Supp. 48 (D.D.C. Cir. 1985), by noting that the contours of the right to counsel in that case were established by the APA. Opp. 25. The Board errs twice. *First*, the reasoning *Whitman* used in defining the right to counsel provision at issue there applies just as fully to the right to counsel granted by the Board's rules. "Granting permission to the witness' attorney to bring an expert of his own choosing to the agency proceedings as an extension of himself (as an assistant)," the court reasoned, "is a

[3] Contrary to the Board's assertion, Opp. 23, it is not entitled to deference in interpreting its rules, which do not "become effective without prior approval of the Commission," 15 U.S.C. § 7217(b)(2). The Board's rules are not a "contract between the members." *Moses v. Burgin*, 445 F.2d 369, 382 (1st Cir. 1971), *cited in Heath v. SEC*, 586 F.3d 122, 139 (2d. Cir. 2009), and *Shultz v. SEC*, 614 F.2d 561, 571 (2d. Cir. 1980). And the Board has no explicit or implicit authority to give them conclusive interpretations. *See id.* at 382 n.20.

simple and expedient way to give veritable meaning to the witness' right to counsel." *Whitman*, 613 F. Supp. at 50. That is true regardless of whether the right derives from the APA or, as here, the Board's rules. Moreover, in highly technical proceedings, "a witness' established right to his counsel's *representation and advice* (not merely presence) at agency proceedings, calls for some means of narrowing the gap between his counsel's and the questioner's technical expertise." *Id.* (citation omitted). Rule 5109, just like the APA's right to counsel provision, establishes a witness's right to his counsel's representation and advice, not merely his counsel's presence.

Second, the Board is subject to *Whitman* in any event because it is a "representative" of the Commission. 5 U.S.C. § 555(b); *see also* Br. 29-30.[4] The Commission has not found, contrary to the Board's assertion, that self-regulatory organizations are "not subject to Section 555(b)." Opp. 25. Instead, the Commission has concluded that the APA categorically "does not apply to proceedings before the NASD, as it is not a federal *agency*." *First Choice Sec. Corp.*, SEC Rel. No. 34-31089, 1992 WL 216697, at *4 & n.18 (Aug. 25, 1992) (emphasis added). That conclusion was based on *United States v. Bloom*, which held that "the NASD is not part of the government." 450 F. Supp. 323, 330 (E.D. Pa. 1978). Mr. Laccetti does not contend that the Board is a federal agency under the APA—but the Board cannot deny that it is part of the government.

The Board concedes that a "representative" is "[s]omeone who stands for or acts on behalf of another," or "[s]omeone who is authorized to act for or in place of another." Opp. 26 (quoting Black's Law Dictionary 75, 1494 (10th ed. 2014)). Exactly so. In *NASD v. SEC*, the court noted that the "statutory scheme governing NASD actions parallels the Commission's

[4] The Board offers no response to Mr. Laccetti's argument that the Commission cannot, consistent with *Whitman*, approve the use of procedures by the Board that the Commission itself is barred from employing. Br. 30; *see* Opp. 25-26.

rule approved by the Commission—expressed concern over a firm's internal personnel *monitoring* "an investigation by sitting in on testimony of *all firm personnel*." PCAOB Release No. 2003-15 at A2-19 (emphasis added). Yet attorneys from E&Y's general counsel's office—indisputably "firm internal personnel"—actually attended all investigative testimony in this case. Br. 5-6 & n.10. The Board's absurd response does not explain how E&Y could have monitored the investigation any more effectively had an accountant from the general counsel's office also attended all testimony. Opp. 30-32.

None of the Board's purported concerns—if ever legitimate—would have justified excluding the proposed technical consultant here. Opp. 30. *First*, the consultant was not identified as a potential witness, *see* R.D. 180b at 2 (noting that "E&Y counsel was aware of the identity of witnesses whose testimony [the Division] intended to take"), and, in fact, he was never questioned in this case. Thus, his testimony could not have been influenced by other witnesses. *Second*, the exclusion did not satisfy the Board's purported concern: E&Y could have obtained all of the witness's accounts and "a road map of the investigation," Opp. 30, from its attorneys; it did not need an accountant present for that. And, *third*, it is unclear how the presence of one additional person from E&Y's general counsel's office could have unduly influenced Mr. Laccetti's testimony.[5]

5. The Board erroneously asserts that Mr. Laccetti "took no exception" to the hearing officer's "factual finding" that the Division excluded only one E&Y partner from

[5] The Board cites two cases where the court excluded a plaintiff-employee's supervisor from the plaintiff's deposition based on the plaintiff's fear of intimidation. *See* Opp. 31 (citing *Monroe v. Sisters of Saint Francis Health Servs.*, 2010 WL 4876743, at *3 (N.D. Ind. Nov. 23, 2010) and *Adams v. Shell Oil Co.*, 136 F.R.D. 615, 617 (E.D. La. 1991)). Neither case suggests that the expert consultant *whom Mr. Laccetti wanted present* to assist his counsel would have intimidated him.

assisting Mr. Laccetti's counsel. Opp. 28. In fact, Mr. Laccetti objected to the hearing officer's conclusion that the Division did not violate his right to counsel by excluding a technical expert consultant. "[I]t was improper and prejudicial," he argued, "for the Division to deny Mr. Laccetti's counsel the assistance of a technical expert while he testified as to subject matter beyond the able counsel's expertise." R.D. 204 at 15 (quotation marks omitted). He contended that the Board's rules required "that counsel have access to technical expertise," *id.* at 14, and criticized the "Division's decision not to permit counsel for Mr. Laccetti to consult an accounting expert during his testimony," *id.* at 13. Mr. Laccetti did not "gamble on one course of action and, upon an unfavorable decision," "try another course of action." *Mayer A. Amsel*, SEC Rel. No. 34-37092, 1996 WL 169430, at *5 (Apr. 10, 1996); *see* Opp. 28 (citing *Amsel*). Thus, there is no justification for the draconian forfeiture argument advanced by the Board.

C. The Board Erred By Deeming The Exclusion Of Mr. Laccetti's Expert Consultant Harmless.

Even if the Board did not rely on Mr. Laccetti's investigative testimony in imposing sanctions on him, the Board's *de novo* review was not a sufficient remedy—or any remedy at all—for the violation of his right to counsel. Br. 27-28. Denial of the right to counsel is a structural error that does not require a showing of harm, *id.* at 27, and in any case, Mr. Laccetti was harmed, *id.* at 28.

Relying on *Strickland v. Washington*, 466 U.S. 668 (1984), the Board contends that Mr. Laccetti was required to show prejudice in order to make out what it deems an "effective assistance of counsel" claim. Opp. 34; *see also* R.D. 220 at 76. But *Strickland*, the Supreme Court has explained, involved "actual ineffectiveness," that is, "whether *counsel's* legal assistance to his client was so inadequate that it effectively deprived" him of his right to counsel. *Perry v. Leeke*, 488 U.S. 272, 279 (1989) (citation omitted; emphasis added). The Court in

Strickland "expressly noted" that direct "interference with the right to counsel is a different matter." *Id.* And the Court in *Strickland* cited *Geders v. United States*, 425 U.S. 80 (1976), to "make clear" that "actual or constructive denial of the assistance of counsel ... is not subject to the kind of prejudice analysis that is appropriate in determining whether the quality of a lawyer's performance" was ineffective. *Perry*, 488 U.S. at 280 (quotation marks, citation, and alteration omitted); *see also Geders*, 425 U.S. at 91 (reversing defendant's conviction without considering prejudice). Because the Division denied Mr. Laccetti a meaningful right to counsel, he does not need to demonstrate any "actual prejudice" from that error. *Perry*, 488 U.S. at 279; *see also United States v. Gonzalez-Lopez*, 548 U.S. 140, 150 (2006).

The Board's reliance on *United States v. Morrison*, 449 U.S. 361 (1981), is similarly misplaced. Opp. 33. In that case, the Supreme Court held that dismissal of an indictment was not necessary "to denying the prosecution the fruits" of a post-indictment right to counsel violation where the violation did not affect the quality of legal representation, have an "adverse impact on [the defendant's] legal position," or help the prosecutor build a "stronger case against" the defendant. *Morrison*, 449 U.S. at 362-63, 366. Here, the Division not only denied Mr. Laccetti a meaningful right to counsel, it used Mr. Laccetti's investigative testimony when recommending that the Board order disciplinary proceedings, *see* Ex. E to Rule 452 Motion, at 7-10, and thus dismissal of these proceedings is (under *Morrison*) the only appropriate remedy.

Even if the right to counsel were not a structural error—which it is—the Board would have the burden of demonstrating that the error was harmless. *See Chapman v. California*, 386 U.S. 18, 24 (1967). Yet the Board does not dispute that it instituted disciplinary proceedings against Mr. Laccetti based on the investigative record, which included his investigative testimony. *See* Opp. 34-35. Instead, the Board quibbles with how "prominent" his testimony

was in the Division's letter regarding its recommendation to the Board. Opp. 35. This is not sufficient for the Board to carry its burden. Indeed, the Board cites no authority hinting that it can violate the right to counsel, order a disciplinary proceeding based on any evidence resulting from that violation, and then cure the violation by *de novo* review on appeal. *See* Opp. 33 & n.10 (citing Commission cases about "bias, selective prosecution, or investigative or procedural misconduct," not the right to counsel).

Because the Division violated Mr. Laccetti's right to counsel and deprived Mr. Laccetti of statutorily required fair procedures, the Commission should set aside the Board's sanction and dismiss these proceedings. Br. 30-31.

III. The Board Lacked Authority To Impose Sanctions Because Board Members Are Inferior Officers Under The Constitution Who Neither Swore An Oath Of Office Nor Received A Presidential Commission.

The Board does not dispute that its members have never taken an oath of office or received a commission from the President. *See* Opp. 36-41. Because its members did not satisfy those constitutional prerequisites for exercising authority as inferior officers of the United States, they had no power to impose sanctions on Mr. Laccetti. *See Dep't of Transp. v. Ass'n of Am. R.R.s*, 135 S. Ct. 1225, 1234-35 (2015) (Alito, J., concurring).

Before assuming an office of the United States, an officer is constitutionally required to swear an oath. U.S. Const. art. VI, cl. 3; *see also* 14 Op. Att'y Gen. 406, 408 (1874) ("[A] Representative ... does not become a member of the House until he takes the oath of office."); 15 Op. Att'y Gen. 280, 281 (1877) (similar); 12 Op. O.L.C. 18, 29 (1988) (those representing the government in court must "be appointed as officers of the United States and take the requisite oath of office"); *Humphrey's Ex'r v. United States*, 295 U.S. 602, 618 (1935) (Humphrey, "after taking the required oath of office, entered upon his duties."); *cf. Illinois v. Krull*, 480 U.S. 340,

350 (1987) ("Before assuming office, state legislators are required to take an oath to support the Federal Constitution." (citing U.S. Const. art. VI, cl. 3.)).

The Board's citations are not to the contrary. Opp. 38. In *Vaccari v. Maxwell*, 28 F. Cas. 862, 865 (C.C.S.D.N.Y. 1855) (No. 16,810), for example, the court held that the oath was "mandatory" and "that the acts of [the officer], done without the sanction of an oath, [we]re both irregular and void." And the First Congress—at the same time that it enacted the required oath and allowed a one-month grace period for officers appointed before a certain date—also directed that all later-appointed officers "shall, *before they proceed to execute the duties of their respective offices*, take the foregoing oath." Act of June 1, 1789, § 3, 1 Stat. 23, 23-24 (1789).

Similarly, an officer's appointment is not "complete" until the officer's "commission has been signed by the President, and the seal of the United States affixed thereto." *United States v. Le Baron*, 60 U.S. (19 How.) 73, 78 (1855); *see also* 5 U.S.C. § 2902(b) (for certain inferior officers, "[t]he departmental seal may not be affixed to the commission before the commission has been signed by the President"). It is only *delivery* of the commission that is not required, as it "is but evidence of those acts of appointment and qualification." *Le Baron*, 60 U.S. at 78; *see also Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). Disregarding the Constitution's command that the President "shall Commission all the Officers of the United States," U.S. Const. art. II, § 3, the Board contends that an SEC press release is the functional equivalent of a presidential commission. Opp. 40. But the Board premises that far-fetched argument on a case about "an employee of a CIA proprietary" entity, not a putative officer of the United States. *Watts v. OPM*, 814 F.2d 1576, 1578 (Fed. Cir. 1987).

The Board erroneously asserts that Mr. Laccetti forfeited and failed to exhaust his Oath and Commission Clause challenges. Opp. 37. Without fulfilling those constitutional

requirements, however, the Board members lacked authority to impose sanctions on Mr. Laccetti. He can therefore raise his challenges now, regardless of whether he raised them before the Board. *See, e.g., R.R. Yardmasters of Am. v. Harris*, 721 F.2d 1332, 1338 (D.C. Cir. 1983) ("This challenge presents a question of power or jurisdiction and is open to the appellee even if not initially asserted before the [National Mediation] Board."). Furthermore, the purposes of the exhaustion doctrine do not apply here: "Resolution of th[ese] issue[s] does not require the development of a factual record, the application of agency expertise, or the exercise of administrative discretion." *Id.* at 1338-39.

Finally, the *de facto* officer doctrine, Opp. 40-41, ensures that the past actions of "a person acting with color of authority ... cannot be *collaterally attacked*." *Ryder*, 515 U.S. at 182 (citation omitted; emphasis added). That doctrine does not apply where "appellants raise [a] constitutional challenge as a defense to an enforcement action." *NRA*, 6 F.3d at 828.

CONCLUSION

For the reasons set forth above and in the Mr. Laccetti's opening brief, the Commission should reverse the Board's Final Decision and Order Imposing Sanctions and dismiss this proceeding.

June 29, 2015

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to SEC Rule of Practice 450(d), I certify that this Reply Brief Of Mark E. Laccetti In Further Support Of His Application For Commission Review complies with the length limitation set forth in Rule 450(c). Exclusive of the portions exempted by Rule 450(c), this brief contains 6,990 words. This certificate was prepared in reliance on the word-count function of the word-processing system used to prepare this brief.

June 29, 2015

Michael J. Scanlon

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of June, 2015, I caused a copy of the foregoing Reply Brief of Mark E. Laccetti in Further Support of His Application for Commission Review to be served upon J. Gordon Seymour, Luis de la Torre, and Jodie J. Young, counsel for the Public Company Accounting Oversight Board, via hand delivery and electronic mail addressed as follows:

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