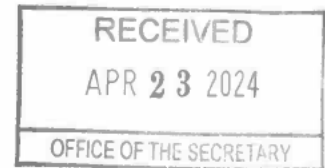


PCAOB

In the matter of Ahmed Mohiddin, CPA and George Weinbaum, CPA  
Respondents



PCAOB No. 105-2019-007

Hearing Officer -- Mark B. Dorfman (MBD)

Response to PCAOB Review of Initial Decision

PCAOB Rule 5460(a)

Date: July 27, 2023

George Weinbaum



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This is a table of issuers by market capitalization (MC) (trillions) and number:

Year	MC	Number	Source
2018	\$43.2	7,659	<i>Strategic-2018</i> , page 3.
2019	\$42.2	7,402	<i>Strategic-2019</i> , page 4.
2019	\$45.5	7,339	<i>Annual-2019</i> , page iii.
2020	\$46.7	7,396	<i>Strategic-2020</i> , page 4.
2020	\$54.3	7,493	<i>Annual-2020</i> , page 3.
2021	\$64.9	8,626	<i>Annual-2021</i> , page 5.
2022	\$50.9		Estimated below.

Standard & Poor's total market index was 4908.07 on 12/31/21 and 3849.28 on 12/31/22,  $3849.28 / 4908.07 = .78428$ ;  $.78428 \times \$64.9 = \$50.9$ . MC was **not** disclosed in *Annual-2022*. On November 3, 2022, "TCC whose [MC] was, at one point, approximately \$12 billion, reported in its post-merger financial statements that it held more than eleven different crypto currencies, which were significant to its assets and revenue", *Hall*, page 5.

On June 20 I ran my numbers again. The SEC registrant numbers above average 7,652.5 per year. Multiplying by 20 PCAOB years, I get 153,050 estimated SEC registrant years during the PCAOB's existence. The PCAOB lists 370 settled enforcement actions on its website. I updated my work and found 80 actions against the Big Four (BF), BF partners, BF overseas affiliates and their partners and 286 other actions, 366 in total. I apparently missed four items. Now using my previously estimated .4425 ratio for BF firm audits, my "magic" *Keisan-2023* is: on the order of magnitude of E-19! Wow! More to come.

On December 11, 2017, TCC had 19,385,097 shares outstanding (SO), its share price reached \$642, with 5,700 shares traded, *CRCW*, a \$12.445 billion **intra-day** MC. Even if each of the 5,700 shares traded was at \$642, that's \$3,659,400, not much. The PCAOB found no error in TCC's financials. The PCAOB found Price guilty of some "process crime", "Price directly and

substantially contributed to the Firm's violations of PCAOB rules", *Hall*, page 11. Price got a \$25,000 CMP, *Hall*, page 12. The PCAOB did **not** suspend Price for even one day, but he got a two-year limitation, *Hall*, page 14.

Hall's TCC opinion date was April, 2, 2018, *TCC-2017*, page F-2. Its share price was \$52, with 20,458,945 SO and **no** shares traded, *CRCW*, a \$1.064 billion MC. I do **not** see the relevance of TCC's **highest** MC, unless the PCAOB was trying to show it was protecting investors from something big and bad. TCC had 12/31/17 assets of \$11,971,485, equity of \$11,273,076 and 2017 revenues of \$787,373, *TCC-2017*, page F-3. A miniscule entity in my opinion. That for part of a day TCC's MC was 1,104X its' equity (\$12.445 billion / \$11.27 million) means what? Using your \$12 billion number and Adamant's relevant MC: \$12.445 billion / \$1.34 million = 9,287; two years is 730 days or 17,520 hours,  $17,520 / 9,287 = 1.89$  hours. If the PCAOB wants to suspend me for 1.89 hours, fine. When will it start **and** end?  $\$25,000 / 9,287 = \$3$ . I will send you \$3 whenever you want in settlement. Why not have whoever calculated the \$12 billion hold a class for your enforcement personnel on calculating MC. "We are committed to further developing the many talents of our people so that we can improve our oversight and operations", *Annual-2018*, page ii, also at *Annual-2019*, page ii, *Annual-2020*, page 2 and *Annual-2021*, page 3. Does this "development" include proficiency with fourth-grade math?

"As a result of the revelations about Enron, WorldCom and others, we lost almost \$8 trillion of market cap--almost \$8 trillion'," Mike Oxley in *Annual-2015*, page 2. Which firms auditees **even** have \$8 trillion in MC?

"Operate the PCAOB in manner that recognizes its public mission and responsibility to exercise careful stewardship over its resources", *Strategic-2007*, page 4. Also at *Strategic-*

2008, pages 4 and 18. Similar statement at *Strategic-2009*, pages 4 and 23, *Strategic-2010*, page 3, *Strategic-2014*, page 7 and *Strategic-2015*, page 7. "The PCAOB is focused on the careful stewardship of its resources", *Annual-2015*, page 29. "We manage our resources effectively and efficiently", *Annual-2021*, page 3. By looking at say, Smartheat?

"The Board recognizes that the PCAOB is primarily supported by fees from public companies and understands its responsibility to manage resources effectively and efficiently. ... In exercising its regulatory and enforcement authority, the PCAOB is committed to treating registered public accounting firms and associated persons in a **fair, impartial and consistent manner**", my emphasis, *Strategic-2007*, page 5, also at *Strategic-2008*, page 5, *Strategic-2009*, page 5 and *Annual-2007*, page 4. "Maintain **fair** and efficient procedures for investigations and disciplinary procedures", my emphasis, *Strategic-2009*, page 17. Also at *Strategic-2010*, page 21. "In exercising its oversight authority, the PCAOB strives to treat registered public accounting firms and associated persons in a **fair, impartial and consistent manner**", my emphasis, *Strategic-2010*, page 5. Strives, not does. "In exercising our oversight authority, the PCAOB strives to treat registered public accounting firms and associated persons in a **fair, impartial and consistent manner**", my emphasis, *Strategic-2013*, page 9. Also at *Strategic-2014*, page 7, *Strategic-2015*, page 7, *Strategic-2016*, page 7 and *Strategic-2017*, page 8. "Strive to conduct investigations and disciplinary proceedings ... to enhance **deterrence and accountability, maintaining high standards of thoroughness and fairness**", my emphasis, *Strategic-2017*, page 14. "We adhere to the highest standards of ethical and professional conduct. **We engage internally and externally in a manner that is consistent, honest and fair**", my emphasis, *Strategic-2018*, page 4. Also at *Strategic-2019*, page 5 and *Strategic-2020*, page 5. "In

exercising its regulatory and enforcement authority, the PCAOB is committed to treating registered public accounting firms and associated persons in a **fair, impartial and consistent manner**", my emphasis, *Annual-2009*, page 4. "We adhere to the highest standards of ethical and professional conduct. We engage internally and externally in a manner that is **consistent, honest and fair**", my emphasis, *Annual-2018*, page ii, also at *Annual-2019*, page ii, *Annual-2020*, page 2 and *Annual-2021*, page 3. That's 21 times for fairness, impartiality or consistency.

"In another enforcement first, the PCAOB in April 2022 sanctioned the former Vice Chair of Audit at a major firm, fining him \$100,000 ... and censuring him for supervisory failures ... The PCAOB's order found that the individual failed to reasonably supervise firm personnel", *Annual-2022*, page 11. "The Board is imposing these sanctions on the basis of its finding that, pursuant to Section 105(c)(6) of the Sarbanes-Oxley Act of 2002, as amended (the 'Act'), Marcello failed to reasonably supervise associated persons of KPMG LLP (KPMG) ... in violation of PCAOB rules", *Marcello*, page 1. "Pursuant to Section 105(c)(6) of the Act, Marcello, as a supervisory person of KPMG, failed to take sufficient and appropriate steps to reasonably supervise his subordinates, with a view to preventing their misconduct", *Marcello*, page 2. Have we a PCAOB "failure to supervise"? Is the PCAOB: impartial, consistent, honest and fair?

"The Board uses its investigative authority to address serious audit deficiencies that pose significant risks to investors. The Board uses its disciplinary authority to demonstrate that auditors who run afoul of their professional obligations will face real consequences", *Annual-2012*, page 23, also at *Annual-2013*, page 18 and *Annual-2014*, page 15. Similar statement at *Annual-2016*, page 1 and *Annual-2017*, pages 1 and 14. Even for BF partners or BF firms? "The PCAOB's enforcement and investigative efforts are prioritized in a manner that addresses those

issues that pose the greatest risk to investors and are most likely to deter improper conduct. In 2019, we continued to emphasize investigating significant audit failures", *Annual-2019*, page 5.

What MJF audit failure? "The PCAOB's enforcement program protects investors by holding accountable those who put investors at risk by violating PCAOB rules and standards and other related laws and rules", *Annual-2022*, page 11. Did anything I did or failed to do put **any** investor at risk? "The PCAOB's oversight helps to **protect more than \$40 trillion in investor exposure**. And we take our job of investor protection very seriously", my emphasis, *Williams-728*, page 4. Is \$40 trillion important? If so, why look at Adamant with 1 / 32 million of total MC? "We know our standards are only as effective as our ability to enforce them. **Removing bad actors from the profession** and punishing wrongdoing protects investors and promotes deterrence. **We will not hesitate to hold wrongdoers accountable** for breaking the rules", my emphasis, *Williams-0728*, page 8. Were D&T's Leadership Opportunity Committee (LOC) members "wrongdoers" who broke the rules? Are LOC members treated differently than other CPAs? "We intend to use every tool in our enforcement toolbox and impose significant sanctions, including substantial penalties, to ensure there will be consequences for putting investors at risk", *Williams-728*, page 9. Again: what investor did I put at risk? How?

A higher authority can reconcile PCAOB treatment of D&T's LOC's and myself. Higher than the Supreme Court (SC)? After all, he sat on a high wall and SC Justices sit on a bench. Now Law Lord, Privy Counsellor Humpty Dumpty (HD), wearer of the garter, explain please. "'When I use a word', Humpty Dumpty said, in a rather scornful tone, 'it means just what I choose it to mean--neither more nor less.' 'The question is', said Alice, 'whether you can make words mean so many different things'. 'The question is', said Humpty Dumpty, 'which is

to be master-that's all'." Despite privy counsellor and law lord HD saying this 158 years ago, is it still good law? Yes! Cited at *Meyer*, footnote 2 and *Lopez*, page 630. Thank you Justice Souter.

"Identify situations in which registered public accounting firms and associated persons have failed to conduct audits of the required quality, investigate where needed and take appropriate action. ... Use enforcement authority in supporting the supervisory model, to focus on **serious violations** of PCAOB standards or securities laws by auditors", my emphasis, *Strategic-2007*, page 9, also at *Strategic-2008*, page 13.

"The Board and the staff of the PCAOB accept responsibility for their actions and decisions", *Annual-2007*, page 4. Who decided **not** to name E&Y in the Synchronoss and Taro matters? Who left \$57 million on the table in the Synchronoss case? As a practice the PCAOB does not name its investigators or prosecutors in its enforcement actions. Why?

"Prioritize matters involving independence violations or elevated risk of harm to investors or Board processes, such as when a firm has issued an unsupported audit opinion, altered documents and/or failed to cooperate with the PCAOB", *Strategic-2016*, page 12. "We will prioritize our enforcement efforts to address those issues that pose the greatest risk to investors and are most likely to deter improper conduct", *Strategic-2018*, page 8. Did Smart-heat's existence or non-existence, pose **more** risk to investors than E&Y's Synchronoss actions? "We have placed a renewed emphasis on investigating **significant audit failures** and have issued settled orders in numerous significant matters, covering violations related to **substantive audit violations**, auditor independence, document alteration, and non-cooperation", my emphasis, *Strategic-2019*, page 2. While not an exclusive list, the PCAOB wants to sanction me

for an unlisted item. "We continue to prioritize those enforcement actions likely to have the greatest benefit to investors, including **substantive audit failure cases**", my emphasis, *Strategic-2020*, page 1. Similar statement at *Strategic-2020*, page 7. "The PCAOB's enforcement function serves to address and deter poor performance of audit work and other deficiencies in audit practices", *Annual-2008*, page 12. Even for the BF and its partners?

"Continue to enhance and effectively employ economic analysis and tools throughout the PCAOB's programs ... developing empirical tools for use in PCAOB oversight programs", *Strategic-2015*, page 10. Have PCAOB enforcement operations **any** such tools? If so, will it produce them? "Continue to support the data aggregation and analysis efforts of the Office of Research and Analysis ... to enhance quantitative and qualitative analysis to support the PCAOB's inspection, enforcement and standard-setting operations", *Strategic-2015*, page 10. Have PCAOB enforcement operations **any** quantitative analysis of its efforts beyond counting the number of actions taken and total dollars of penalties levied? "Apply economic and statistical analysis to measure the effectiveness and efficiency of the PCAOB's critical processes", *Strategic-2017*, page 16. By looking at an entity of one-ten billionth the MC of all SEC registrants? "The PCAOB's enforcement matters have involved audits of all sizes", *Annual-2009*, page 5. The PCAOB has **no** enforcement action involving an auditee with a MC over \$6.6 billion. "The Board makes an effort to allocate appropriate and adequate resources to matters involving the risk of significant investor harm, such as misconduct in audits related to large public companies", *Annual-2009*, page 16. Does the PCAOB define large? Was Adamant "large"? It was 309X as large as Smartheat (\$1,340,000 / \$4,342). But small compared to Coke. "How's your wife? Compared to what?", *Henny*. "Nevertheless, the PCAOB cannot ignore the harm to

investors that can be perpetrated at the other end of the financial spectrum", *Annual-2009*, page 16. The PCAOB found no fault in **any** of the nine MJF audits it reviewed. Does PCAOB focus on "the other end of the spectrum" let it ignore deficiencies in "large" audits? Let the Keisan hypergeometric calculator speak? Does the PCAOB **avoid** large audits? The MCs from 2018-2022 total about \$248 trillion. If those from 2002-2017 total even \$176 trillion that's \$424 trillion. I call this "dollars subject to audit" (DSTA). The PCAOB estimated the BF audit 97% of SEC registrants by MC, giving us \$411 trillion DSTA. With 80 enforcement actions against the BF, BF partners and overseas affiliates, Keisan has a problem: it handles populations up to 99.9 trillion. What to do? I input populations as follows with results as follows:

Population	DSTA	Approximate E-Value
10,000	9,700	-457
1,000,000	970,000	-355
100,000,000	97,000,000	-355
10,000,000,000	9,700,000,000	-355
Binomial		-355

As the population size increases, the hypergeometric distribution approaches the binomial. For comparison, current estimates are there are only E24 stars in the universe.

"In addition, the PCAOB faces certain challenges due to the concentration of the audit market. According to the January 2008 report of the Government Accountability Office ('GAO'), the four largest accounting firms audit 98 percent of the more than 1,500 largest companies (i.e., those companies with annual revenues of more than \$1 billion. In contrast, midsize and smaller audit firms audit almost 80 percent of the more than 3,600 smallest companies (i.e, those companies with revenues of less than \$100 million", *Strategic-2008*, page 8. Do these "challenges" necessitate treating the BF and other CPA firms differently? How does

the PCAOB respond to these challenges? "Through its inspection and remediation processes, the PCAOB aims to protect investors from the **risks associated with a significant and abrupt change in the availability of audit services**" my emphasis, *Strategic- 2008*, page 9. Does this mean the PCAOB can take no substantial action against a BF firm? "In particular, through its inspection and remediation processes, the PCAOB aims to **protect investors from the risk of a significant and abrupt change in the availability of audit services due to a firm's demise**", my emphasis, *Strategic-2009*, page 13, also at *Strategic-2010*, page 15. Only BF firms? Which prevails, this statement or on page 12, following? In 20 years, the PCAOB had **no** adjudicated case involving a BF firm and just one against a BF partner, *Lacetti*.

"For example, although more than 2,000 firms have registered with the PCAOB, four very large firms audit 97.8 percent of the global market capitalization of public companies whose securities trade on U.S. exchanges. ... The PCAOB's mission **is not to protect any individual firm from demise**, whether related to the firm's audit practice, another business line or otherwise", my emphasis, *Strategic-2009*, page 12. Similar statement at *Strategic-2010*, page 15. While this may not be the PCAOB's mission, the PCAOB apparently functions as if its mission is to protect the BF.

"Potential for catastrophic risk within the audit industry, including risks relating to the provision of audit and non-audit services", *Strategic-2017*, page 10. Does the PCAOB ameliorate this risk by never taking a significant action against a BF firm? Would barring Gerge Weinbaum from practice be a "catatrophic risk within the audit industry"? Why not?

"The NCAA submits that a rule of reason analysis is inappropriate for still another reason--because the NCAA and its member schools are not 'commercial enterprises' and

instead oversee intercollegiate athletics 'as an integral part of the undergraduate experience'," *NCAA*, page 2158. Does the PCAOB "oversee" anything? "[T]he Sherman Act had already been applied to other nonprofit organizations. ... To be sure, this Court once dallied with something that looks like an antitrust exemption for professional baseball. ... But this Court has refused to extend *Federal Baseball's* reasoning to other sports leagues--and have even acknowledged criticisms of the decision as 'unrealistic; and 'aberrational'," *NCAA*, page 2159. How might the PCAOB facilitate running the BF's cartel? Raise small CPA firms costs compared to the BF.

"Moreover, in light of public accounting firms' for-profit nature, changes in the economic environment may exacerbate certain pressures on auditors", *Strategic-2009*, page 6. Also at *Strategic-2010*, page 12. MJF was **not** unique amongst CPAs in billing for its services.

"We are committed to quality and continued learning in an environment that demands the highest personal and professional conduct **exercised in a consistent, equitable and balanced manner**", my emphasis *Strategic-2011*, page 7. Even mine and D&T's LOC?

"Our standard-setting, inspection and enforcement programs **require that we gather an array of U.S. public company information from public sources**", my emphasis, *Strategic-2011*, page 11. Including tax court cases?

"Assess and respond to audit deficiencies as appropriate, by conducting investigations and disciplinary proceedings **to achieve deterrence**, accountability, and remediation", my emphasis, *Strategic-2013*, page 15. Deterrence, for the BF? "Strive to conduct investigations and disciplinary proceedings ... **to enhance deterrence** and accountability, maintaining high standards of **thoroughness and fairness**", my emphasis, *Strategic-2015*, page 13, also at *Strategic-2016*, page 12. How thorough?

"Economics provides a framework for that critical thinking. It prompts us to consider alternatives, and enhances our consideration of the efficiency of our actions. We have been considering economic impacts, including costs and benefits, for some time, of course", *Strategic-2014*, page 4. How? By raising small CPA firms costs relative to the BF? "Prioritize matters involving elevated potential risk of harm to investors or Board processes", *Strategic-2014*, page 13. "The Center is intended to render advice on how economic theory and analysis can be used and further developed to enhance the effectiveness of PCAOB programs", *Annual-2014*, page 9. Does the Center think SEC registrant MC affects investor risk? "The Center's activities include ... developing empirical tools for use in PCAOB oversight programs", *Annual-2015*, page 12. Will the PCAOB release these tools? The Center for Economic Analysis ... develops empirical tools to enhance the effectiveness of PCAOB oversight programs", *Annual-2016*, page 10.

"Enhance the PCAOB's processes and systems to improve analysis and effectiveness of PCAOB regulatory actions, including **by conducting analyses across firms over time**, in order to better understand the state of audit quality and **better inform the PCAOB's regulatory activities and initiatives**", my emphasis, *Strategic-2014*, page 15. I use fractions and percentages, fourth and fifth grade math. "Ensure that regulatory decisions ... are **informed by rigorous economic analysis. ... Apply economic and statistical analysis to measure the effectiveness of PCAOB oversight activities**", my emphasis, *Strategic-2016*, page 14. Similar statement at *Annual-2015*, page 13.

"I view the following as priority projects for 2016 ... further integration of economic analysis into the PCAOB's programs", *Strategic-2015*, page 3. Can we see any such integration?

"In 2008 the Company contracted with Ernst & Young (E&Y) to analyze the services provided by ServCos to Export", *USTC*, page 51.

E&Y concluded in these documents that the cost-plus compensation outlined in the ServCo agreements was within arm's-length range. ... At trial an E&Y partner testified that all of these transfer pricing reports 'were written based on the [ServCo] contract[s] and the cost-plus nature of the service provided by the ServCos. which he described as 'the exact standard required [under the] transfer pricing analysis paradigm in effect in every country at the time', *USTC*, page 52.

"The method for allocating ServCo fees and DME to supply points is not explained in any document. Petitioner's witnesses testified that allocations were based on 'the matching principle'," *USTC*, page 56. "The IRS selected petitioner's 2007-2009 returns for examination. It determined that the 10-50-50 method did not reflect arm's-length pricing because that method overcompensated the supply points and undercompensated TCCC for the use of its intangible property", *USTC*, pages 78-79. "We emphasized the statute authorizes the Commissioner to make an allocation of income or deductions 'if he determines that such ... allocation is necessary'," *USTC*, page 87. "These data prompt two obvious questions: Why are the supply points, engaged as they are in routine contract manufacturing, the most profitable food and beverage companies in the world? And why does their profitability dwarf that of TCCC, which owns the intangibles upon which the Company's profitability depends?," *USTC*, page 113. "Petitioner offered no clear explanation as to how the allocation methodology actually worked. ... We find no support for petitioner's argument in law, fact, economic theory, or common sense", *USTC*, page 152. Any more than PCAOB penalties are just arbitrary. "Finally, we regard Dr. Cragg's methodology as unreliable because it produces absurd results",

*USTC*, page 206. Like PCAOB BF and non-BF firm penalties. Coke's total deficiencies were \$3.305 billion, *USTC*, page 6.

Did the PCAOB investigate E&Y's Coke actions? That's secret. The deficiency was 1,836X (\$3,305 / \$1.8) Adamant's restatement. On February 25, 2016, E&Y's Coke 2015 financials opinion date, Coke had 4,324 million net shares outstanding, *Coke 2016 Form 10-K*, page 77. Coke's share price was \$43.14, *YF*, for \$186.5 billion MC, divide by \$1.34 million, Adamant's MC is 139,179X. Which audit does the PCAOB think puts investors more at risk? The PCAOB produces **nothing like tax court opinions**. *Lacetti* had **no** numerical findings. I think E&Y swallowed a Coke elephant. Adamant restated its financials in **24 days**. I commend Tax Court Judge Lauber for an excellent job. "The PCAOB's investigations arise from a number of sources, including ... news reports", *Strategic-2014*, page 42. Also at *Strategic-2016*, page 39 and *Strategic-2017*, page 44. "Inquiries and investigations arise from a number of sources, including ... news reports", *Annual-2007*, page 12 and *Annual-2008*, page 13. Does the PCAOB read the *Wall Street Journal*? The Coke story was reported there, *Rubin*.

"But the Corps maintains that it has no obligation to provide jurisdictional determinations, ... and it has already begun announcing exceptions to the legal effect of some previous determinations. ... And even then, a landowner's chances of success are low, as the EPA admits that the Corps finds jurisdiction 75% of the time. ... If the landowner is among the vast majority who receive adverse jurisdictional determinations, what then?", *Sackett*, page 13. "The letter stated that 'the staff cannot provide legal advice or advise whether any particular future conduct by Mr. Cordovano, the Firm, or any other person would be consistent with PCAOB Rules or Standards or with a bar'," *Cordovano*, page 6. "The jurisdictional determination could

be challenged in court, but only after the delay and expense required to exhaust the administrative appeals process", *Sackett*, pages 13-14. "And once in court, the landowner would face an uphill battle under the deferential standards of review that the agencies employ. ... But that process can take years and cost an exorbitant amount of money", *Sackett*, page 14. "Second the EPA's interpretation gives rise to serious vagueness concerns in light of the CWA's criminal penalties. Due process requires Congress to define penal statutes 'with sufficient definiteness that ordinary people can understand what conduct is prohibited', and in **a manner that does not encourage arbitrary and discriminatory enforcement**,'" my emphasis, *Sackett*, page 24. While PCAOB CMPs are not criminal, based on *BMW*, page 574, I think this concept applies.

"Reviewing Plaintiffs' complaint under these standards, we find that they have not pled facts giving rise to a strong inference that Defendants intentionally or recklessly failed to disclose the pending litigation in a manner that would give rise to liability for securities fraud", *Philadelphia*, page 1249. "Recklessness, defined as 'conduct that is an extreme departure from the standards of ordinary care, and which presents a danger of misleading buyers or sellers that is **either known to the defendant or is so obvious that the actor must have been aware of it**,'" my emphasis, *Philadelphia*, page 1258. Well Mark Dorfman (MBD)? "Recklessness is much harder to define adequately ... Courts have been cautious about imposing liability for securities fraud based on reckless conduct. ... Plaintiffs should **not be allowed to proceed with allegations of 'fraud by hindsight**,'" my emphasis, *Philadelphia*, page 1260. Did MBD find recklessness by hindsight? Nothing I did, or failed to do was any departure from the "standards of ordinary care" based on D&T's LOC. Now I let the SC weigh in on recklessness.

"The Fair Credit Reporting Act (FCRA or Act) requires notice to any consumer subjected to 'adverse action ... based in whole or in part on any information contained in a consumer [credit] report'. ... We hold that reckless action is covered, that GEICO did not violate the statute, and that while Safeco might have, it did not act recklessly," *Safeco*, page 2205. "The Ninth Circuit also held that an insurer 'willfully' fails to comply with FCRA if it acts with 'reckless disregard' of a consumer's rights under the Act. ... It explained that a company would not be acting recklessly if it 'diligently and in good faith attempted to fulfill its statutory obligations; and came to a 'tenable, albeit erroneous, interpretation of the statute'," *Safeco*, page 2207.

"While 'the term recklessness is not self-defining,' the common law has generally understood it in the sphere of civil liability as conduct violating an objective standard: action entailing 'an unjustifiably high risk of harm that is either known or so obvious that it should be known'.... Here, there is no need to pinpoint the negligence/recklessness line, for Safeco's reading of the statute, albeit erroneous, was not objectively unreasonable," *Safeco*, page 2215.

"This is not a case in which the business subject to the Act had the benefit of guidance from the courts of appeals or the Federal Trade Commission (FTC) that might have warned it away from the view it took. Before these cases, **no court of appeals had spoken on the issue, and no authoritative guidance has yet come from the FTC** ... for the provisions in question", my emphasis, *Safeco*, page 2216. In *Cordovano* and *D&T*, we have PCAOB "authoritative guidance". Don't you agree MBD? Mr. Collings will say "irrelevant". The FCRA is not a PCAOB rule". I respond: if the reason is the same, the rule is the same. "Given this dearth of guidance and the less-than-pellucid statutory text, Safeco's reading was not objectively unreasonable, and so falls well short of raising the 'unjustifiably high risk' of violating the statute

necessary for reckless liability", *Safeco*, page 2216. I say the D&T LOC's actions exceeded mine and "the greater exceeds the lesser". What say you MBD? "Where, as here, the statutory text and relevant court and agency guidance **allow for more than one reasonable interpretation**, it would defy history and current thinking to treat a defendant who merely adopts one such interpretation as a knowing or reckless violator", my emphasis, *Safeco*, footnote 20. David Souter, who wrote this also went to Harvard Law School.

"To be actionable, of course, a statement must also be misleading. Silence, absent a duty to disclose, is not misleading under Rule 10b-5. 'No comment' statements are generally the functional equivalent of silence", *Basic*, footnote 17. What duty MBD?

"'Please your Majesty,' said the Knave, 'I didn't write it, and they can't prove I did: there's no name signed at the end.' 'If you didn't sign it,' said the King. 'that only makes the matter worse. You MUST have meant some mischief, or else you'd have signed your name like an honest man.' There was a general clapping of hands at this: it was the first really clever thing the King had said that day. 'That PROVES his guilt,' said the Queen. 'It proves nothing of the sort,' said Alice", *Evidence*, page 89. I thought *Alice in Wonderland* a spoof. Apparently MBD saw it as a "controlling precedent".

"People want to know under what circumstances and how far they will run the risk of coming against what is so much stronger than themselves, and hence it becomes a business to find out when this danger is to be feared. The object of our study, then, is the prediction of the incidence of the public force through the instrumentality of the courts", *Path*, page 457. This is impossible if the PCAOB behaves as it did in *Cordovano*. "The reason why a lawyer does not mention that his client wore a white hat when he made a contract, while Mrs. Quickly

would be sure to dwell upon it along with the parcel gilt goblet and the seal-coal fire, is that he foresees that the public force will **act in the same way** whatever his client had upon his head", my emphasis, *Path*, page 458. Well PCAOB, is whether or not a firm is a BF firm, unlike Holmes white hat example? "If you want to know the law and nothing else, **you must look at it as a bad man, who cares only for the material consequences** which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience", my emphasis, *Path*, page 459. Even for the BF and BF partners? "But if we take the view of our friend the bad man we shall find that he does not care two straws for the axioms or deductions, but that he does want to know what the Massachusetts or English courts are likely to do in fact. I am much of his mind. The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law", *Path*, pages 460-461. How much "discretion" have PCAOB enforcement personnel? Enough to run a cartel for the BF? Are PCAOB enforcement personnel 126 years out of date?

For the rational study of the law the black-letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics. It is revolting to have no better reason for a rule of law than that it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from the blind imitation of the past, *Path*, page 469.

What might Holmes say about PCAOB lawyers?

I look forward to a time when the part played by history in the explanation of dogma shall be very small, and instead of ingenious research we shall spend our energy on a study of the ends sought to be attained and the reasons for desiring them. As a step toward that ideal it seems to me that every lawyer ought to seek an understanding of economics. ... We learn that **for everything we have to give up something else, and we are taught to set the advantage we gain against the other advantage we lose and to know what we are doing when we elect**, my emphasis, *Path*, page 474.

If we elect to spend time on Smarthead, we do not have it for E&Y over Coke. Is our "election" a result of ignorance or design? "If a man goes into law it pays to be a master of it, and to be a master of it means to look straight through all the dramatic incidents and to discern the true basis for prophecy", *Path*, page 475. Is the "true basis for prophecy" about the PCAOB: the BF are **not** subject to same rules as other CPAs?

"Here are some of the skills that I believe are important for lawyers to acquire, and that are most readily acquired in a university setting rather than on-the-job training. ... First, lawyers ought to know the principles of statistical inference. Law deals with probabilities rather than certainties", *Posner*, page 420. "The relation to statistics lies in the fact that persons unacquainted with statistical principles tend to make serious mistakes in dealing with unfamiliar or low-probability events", *Posner*, page 421. "Eighth, law students should have a working knowledge of the theory of finance", *Posner*, page 422. Amen!

"But the boundary between a 'significant' and an insignificant nexus is far from clear. And to add to the uncertainty, the test introduces another vague concept--'similarly situated' waters--and then assesses the aggregate effect of that group based on a variety of open-ended factors that evolve as scientific understandings change. This freewheeling inquiry provides little notice to landowners of their obligations under the CWA. Facing severe criminal sanctions for even negligent violations, property owners are left to feel their way on a case-by-case basis'," *Sackett*, pages 24-25. How much "discretion" has the PCAOB?

"Our standards will **continue to be clear** and scalable to account for differences in the complexities and sizes of audit firms and the public companies and broker-dealers they audit", my emphasis, *Williams-728*, page 7. Clear? Did the PCAOB respond in *Cordovano*?

"PCAOB standards define professional skepticism as an attitude that includes a questioning mind and a critical assessment of audit evidence. ... While professional skepticism is important in all aspects of the audit, it is particularly important in those areas of the audit that involve significant management judgments, or transactions outside of the normal course of business", *Annual-2012*, page 18. Do I exhibit sufficient professional skepticism of the PCAOB itself? Did I make a "critical assessment of 'audit' evidence"?

"The [Lacetti] matter was the first PCAOB disciplinary proceeding against a Big Four audit partner to proceed through an appeal to the Commission. ... The Board uses its disciplinary authority to demonstrate that auditors who run afoul of their professional obligations will face real consequences", *Annual-2016*, page 16. What about E&Y?

"In fact, during the FY 2004 audit Respondent was aware of materially contradictory evidence as to the collection rates of IMergent's EPTAs, but failed to obtain reasonable assurance regarding the actual rates in light of the contradictory evidence. ... At the time of the FY 2004 audit, Respondent was aware that during FY 2004, IMergent's management adopted a new methodology for estimating its allowance for doubtful accounts. Under the new methodology the allowance as a percentage of gross trade receivables decreased from 47% as of June 30, 2003 to 32% as of June 30, 2004", *Westergard*, page 3. "Customers with credit scores of 630 or higher were categorized as 'A' customers and those with credit scores below 630 were categorized as 'B' customers. ... Respondent was aware that during FY 2004 Imergent sold portions of its EPTA receivables at a discount. ... IMergent developed an allowance for 'B' customers representing a significantly lower estimated rate of collections than for 'A' customers. In making certain of its revenue recognition decisions, however, Imergent relied on the cumu-

lative collection rate of all EPTA sales", *Westergard*, page 6. If IMergent's doing this it was improper, isn't PCAOB differential treatment of BF and other firms? "After IMergent's revenue recognition conclusions were questioned by the staff of the SEC's Division of Corporation Finance in May 2005, Imergent announced on August 19, 2005 that ... it would 'correct its historical revenue recognition policy to the cash basis from the accrual basis for fiscal years 2002, 2003, 2004 and the first three quarters of fiscal 2005", my emphasis, *Westergard*, page 7. IMergent restated its financials **after** an SEC inquiry. Admant had **no** SEC inquiry.

"The Ratio Analysis contradicted Imergent's assertion that its EPTA sales were probable of collection and put Respondent on notice that IMergent's recent collection history did not support its asserted collection rates", *Westergard*, page 11. Ratio analysis also contradicts the PCAOB's claims of "fair, impartial and consistent" treatment of CPAs and their firms. The legal principle: "What's sauce for the goose is sauce for the gander". Or rephrasing Johnnie Cochran's phrase in the OJ case, "if the glove ... fit[s]" you must convict. "Respondent failed to ensure that the engagement team took steps to determine how in light of the representations in the Ratio Analysis, IMergent maintained its assertion that all EPTA sales were probable of collection", *Westergard*, page 11. "'In developing his or her opinion the auditor should consider relevant evidential matter regardless of whether it appears to corroborate or to contradict the assertions'," *Westergard*, footnote 12. AU 326.05 under ACIPA rules.

"This section establishes requirements regarding the use of substantive analytical procedures in an audit", 2305.01. "Analytical procedures are an important part of the audit process and consist of evaluations of financial information made by a study of plausible relationships among both financial and nonfinancial data. Analytical procedures range from simple

comparisons to the use of complex models involving many relationships and elements of data", 2305.02. Here's a comparison: five years is **more** than two years. Now a more complex model: if the BF audit 47% of all SEC registrants, we expect, or at least I expect 47% of PCAOB enforcement actions will be against the BF. "A basic premise underlying the application of analytical procedures is that plausible relationships among data may reasonably be expected to exist and continue in the absence of known conditions to the contrary", 2305.02. "Analytical procedures are used as a substantive test to obtain evidential matter about particular assertions related to account balances or classes of transactions", 2305.04. Are PCAOB enforcement actions "classes of transactions"? Is the PCAOB's claim it is "fair, impartial and consistent" an assertion? The available evidence, requires I reject this assertion. "Analytical procedures involve comparisons of recorded amounts, or ratios developed from recorded amounts, to expectations developed by the auditor. The auditor develops such expectations by identifying and using plausible relationships that are reasonably expected to exist based on the auditor's understanding of the client and the industry in which the client operates", 2305.05. I think a reasonable expectation is: PCAOB CMPs should be proportionate to auditee MC. They aren't. Another basis for my adverse opinion on PCAOB enforcement activities. "In addition, the presence of an unexpected relationship can provide important evidence when appropriately scrutinized", 2305.13. "In planning the analytical procedures as a substantive test, the auditor should consider the amount of the difference from the expectation that can be accepted without further investigation", 2305.20. The likelihood of any of my findings resulting from chance is:  $p < .001$ . "In those cases where an explanation for the difference cannot be obtained, the auditor should obtain sufficient evidence about the assertion by performing other audit procedures to satisfy

himself as to whether the difference is a mistatement", 2305.21. I see this step as unnecessary as the PCAOB enforcement action universe is known.

"The Department of Biology has developed ten learning goals for majors in the department, outlined below and detailed on the Department web site. ... The learning goals are ... 3. Represent and interpret data in quantitative and statistically meaningful forms", *Biology*, page 3. Quoted without comment.

"Our economic and risk analysis team continues to increase the use of advanced statistical techniques ... to support risk analysis ... and case analysis identification for enforcement. ... Our enforcement staff are working to better leverage data and technology including new analytics, case management, and forensic software tools. These efforts will improve the efficiency and effectiveness of investigations, **lead to the most effective deployment of our resources**, and allow us to better ensure and communicate results", my emphasis, *Annual-2018*, page 6. How?

"The [SEC] is dismissing 42 enforcement cases after finding that some of its employees improperly accessed legal records that should have been walled off from them, the agency said Friday. ... One of the dismissals is a seven-year-old enforcement lawsuit against Michelle Cochran, who successfully challenged the constitutionality of the SEC's special tribunal before the Supreme Court. ... The move was made to conserve resources, the SEC said. ... Cochran's attorneys at the New Civil Liberties Alliance said Friday the dismissals were unprecedented and reflected the SEC's worries about defendants using the Supreme Court's decision to attack the SEC's court system", *Michaels*. "On April 5, 2022, the Commission issued a Statement Relating to Certain Administrative Adjudications ... describing a control deficiency related to the

separation of enforcement and adjudicatory functions within our system for administrative adjudication", *Administrative*, pages 1-2. "We find that taking this action is appropriate to preserve the Commission's resources. In doing so, we take no view on the merits of Enforcement's allegations and claims or defenses raised by the respondents", *Pending*, page 3. Now the facts. The SEC's statement was on April 5, 2022, 15 months ago. The SEC likely read Justice Gorsuch's concurring opinion of April 14, 2023 and **seven weeks later** dismissed its Cochran case. Is the SEC lying about **why** it did what it did? "Temporal proximity" indicates so to me.

Commissioner DesParte, do me a favor. "Before joining Exelon, he was a partner at Deloitte for nine months after a long career at Arthur Andersen [AA]. He worked at [AA] from 1985-2002, rising to partner", *DeParte*, page 2. My favor: take your PCAOB hat off, put your AA hat on and look at my work. Ignore the PCAOB's lawyers, which seem innumerate and economically illiterate. If you do and send me some "review notes", I will look at them. I owe you that. I realize you left AA 21 years ago, but believe you can still recognize analytic review when you see it. As one professional to another. "We adhere to the highest standards of ethical and professional conduct", *Annual-2018*, page ii, also at *Annual-2019*, page ii, *Annual-2020*, page 2 and *Annual-2021*, page 3. Does the PCAOB still "adhere to the ...", as I did not find this phrase in *Annual-2022*?

"To appropriately calibrate our enforcement program, we must spend our limited resources wisely. We cannot bring an enforcement action every time we discover a violation, nor should we. ... We cannot bring every case under the sun, but must focus on the cases that will actually make a difference. This careful approach to enforcement is what we owe

taxpayers, investors, and all the participants in our capital markets", *Rocky*, page 5. "By holding up raw numbers as the measure of success, the broken-windows-era SEC felt pressure to exceed its previous year's enforcement actions", *Rocky*, page 6. "Deregistering delinquent filers is important, but giving these types of matters the same weight as a complex accounting fraud in a count of enforcement actions is misleading", *Rocky*, page 6. Yes maam! "Second, an enforcement-first approach **sends the message to regulated entities and others that picking up the telephone to ask the SEC a question about how to comply is risky; why draw attention to yourself by asking a compliance question of an agency** that thinks every foot fault is enforcement-worthy", my emphasis, *Rocky*, page 8. Yes, MBD?

"As the SEC's canons of ethics put it: 'The power to investigate carries with it the power to defame and destroy'. The price is too high for violations that are minor. The SEC must do its job, but we should save our enforcement program--with the great weight it carries--for violations of a sufficiently serious nature to warrant the expense to us and to those whom we pursue. ... Our goal is not to investigate for the sake of investigating, but to protect the capital markets by focusing our efforts on the enforcement actions with the biggest impact", *Rocky*, page 9. Does this apply to the PCAOB too? "Due process considerations also play an important role in informing how I vote on enforcement recommendations", *Rocky*, page 11.

"Given the power and reach of the Commission, due process is of paramount importance. The rules should be clear, so that individuals **know in advance** the actions that constitute violations **in enforcing the rules the SEC should be even-handed and sensible**", my emphasis, *Rocky*, page 12. Would Yale Law School graduate Commissioner Pierce think George Weinbaum and D&T's LOC should be subject to the same rules? "Following due process princi-

ples is rarely costless, comfortable, or convenient for a regulator, but doing so speaks volumes of the agency's integrity. ... As tempting as it can be, it is wrong to try to do an end run around the APA by using the enforcement process to make policy", *Rocky*, page 12. Integrity? Even for the PCAOB? Would the PCAOB use the enforcement process this way?

"However, the decision made by that party about whether to accede to an SEC's proposed order can have far-reaching effects. Settlements--whether appropriately or not--become precedent for future enforcement actions and are cited within and outside the Commission as a purported basis for the state of the law", *Rocky*, page 13, Even PCAOB settled cases, like *D&T*? Well Mr. Collings?

"Closing an investigation that does not uncover a substantial violation without bringing an enforcement action is sometimes viewed as a failure instead of the right result", *Rocky*, page 14. Even PCAOB actions?

"In the criminal context, the law generally must afford 'ordinary people ... fair notice of the conduct it punishes'. ... and it is hard to see how the Due Process Clause might often require any less than that in the civil context", *Sessions*, page 1210. "The void-for-vagueness doctrine, as we have called it, guarantees that **ordinary people** have 'fair notice' of the conduct a statute proscribes. ... And the doctrine guards against arbitrary or discriminatory law enforcement by insisting that a statute provide safeguards to govern the actions of police officers, prosecutors, juries and judges", my emphasis, *Sessions*, page 1212. Not just extraordinary people like the members of D&T's LOC? "Today's vague laws may not be as invidious, but they can invite the exercise of arbitrary power all the same--by leaving people in the dark

about what the law demands and allowing prosecutors and courts to make it up", *Sessions*, pages 1223-1224.

Judicial "power does not license judges to craft new laws to govern future conduct, but only to 'discer[n] the course presecr[ibed] by law' as it currently exists and to 'follow it' in resolving disputes between the people over past events", *Sessions*, page 1227. Does this apply to PCAOB HOs too? "And I cannot see how the Due Process Clause might often require any less than that in the civil context either. Fair notice of the law's demands, as we've seen, is 'the essential of due process'," *Sessions*, page, 1228. "So the happin[st]ance that a law is found in the civil or criminal part of the stature books cannot be dispositive. ... Today's 'civil' penalties include confiscatory rather than compensatory fines, ... remedies that strip persons of their professional licenses and livelihoods", *Sessions*, page 1229.

On June 16, 2023 *Lobsterman's* was released. It deals with biology. I will quote at length. Collings, enjoy. "The ESA and implementing regulations call for an empirical judgment about what is 'likely'. The Service's role as an expert is undermined, not furthered, when it distorts that scientific judgment by indulging a worst-case scenario and pessimistic assumptions to benefit a favored side", *Lobsterman's*, page 3. All my statistical assumptions **favored** the PCAOB. "The North American right whale has been listed as endangered for almost as long as the Government has kept lists", *Lobsterman's*, page 4. "Whether and to what extent the federal lobster fishery is responsible for hampering the right whale population is the question at heart of the scientific controversy giving rise to this litigation", *Lobsterman's*, page 6. "In a typical consultation, an agency proposes an action and the Service prepares a 'biological opinion' documenting the effects of the action. ... If the Service finds the action will likely 'jeopardize' a

protected species by appreciably reducing its chances for surviving, then the Service proposes 'reasonable and prudent alternatives', if there are any, that reduce the increased risk of extinction", *Lobsterman's*, page 7.

"In the biological opinion, the Service's first task was to describe the 'reasonably certain' effects of the fisheries on the right whale. ... 'When appropriate in those cases, the uncertainty is resolved in favor of the species. ... We generally select the value that would lead to conclusions of higher, rather than lower, risk to endangered or threatened species. This approach provides the 'benefit of the doubt' to threatened and endangered species'," *Lobsterman's*, page 8. "The Service faced the unenviable task of dealing with these known unknowns. To do so, the Service made certain disputed assumptions about the unknown data and the unseen deaths", *Lobsterman's*, page 9. The universe of PCAOB actions is known.

"The Act provides the phase one rule 'shall be deemed sufficient' to ensure the lobster fishery's compliance with the ESA and MMPA until 2029. The Service concedes 'sufficient' does not usually mean 'necessary'. Rather, the ordinary meaning of 'sufficient; here is 'adequate' for complying with the ESA and MMPA", *Lobsterman's*, page 17. I raised this issue with respect to *D&T*: was Andersen's being compensated sufficient to make him a *D&T* "associated person"? Well? "The action agency must ensure that an action 'is not likely to jeopardize the continued existence of' a protected species. ... A key term limiting this duty is 'likely'," *Lobsterman's*, page 20. "In so doing, the action agency must 'use the best scientific and commercial data available'. ... This empirical mandate ensures the law is not 'implemented haphazardly, on the basis of speculation or surmise', and thus 'avoids needless economic dislocation produced by agency officials zealously but unintelligently pursuing their environmental objectives'," *Lob-*

*sterman's*, page 21. While the PCAOB lacks such **mandate**, it claims to use economic analysis. Claims. "The Service's role is thus a limited one. The Service must lend expert assistance to the action agency, make a prediction about the effects and, if the agency **cannot reject the null hypothesis** (no jeopardy) as unlikely, then grant a license", my emphasis, *Lobsterman's*, page 21. Judge Ginsburg apparently knows some math. He got a University of Chicago Law School J.D. and studied under Mr. Law and Economics himself, Richard Posner, *Remarks*, page 2. "Under this absolute veto, agencies had to 'prevent the loss of any endangered species, regardless of the cost'. ... A 'newly discovered species of water spider or amoeba' could spell the end of any public or private action touched by the hand of the federal government. ... More to the point, under an absolute negative, scientific uncertainty could paralyze government, or force industry 'to spend billions to save one more fish'," *Lobsterman's*, page 22. Smarthead?

"On appeal, the Service argues the 'relevant text says nothing about how an agency must handle uncertainties in the data', and this silence means the **Service had the discretion to do what it did here**. What is not prohibited, the Service reasons, is permitted; the only limitation being the highly deferential arbitrary and capricious standard of review for agency predictions 'at the frontiers of science'. ... We have seen this line of argument before. Without mentioning the case, **the agency is in substance, asking us to adopt an 'aggressive reading of Chevron [that] has more or less fallen into desuetude'**," my emphasis, *Lobsterman's*, page 23.

"Second, no deference to the Service's view of the Congress's allegedly eloquent 'silence' is appropriate because the agency has oscillated between one view and its opposite", *Lobsterman's*, page 26. How did the PCAOB define "associated person" in *D&T* and this case? "Agencies are', of course, 'free to change their existing policies as long as they provide a reasoned explana-

ntion for the change'," *Lobsterman's*, page 27. Did the PCAOB give a "reasoned explanation" for its change in associated person policy?

"In this case, though, the **Service displayed no awareness of its own flip flop. This was 'arbitrary and capricious', and so the agency's interpretation was 'unlawful' and 'receives no *Chevron* deference'**," my emphasis, *Lobsterman's*, page 27. Is the PCOAB unaware its D&T LOC treatment and mine are **not consistent**? "We cannot ignore the words the Service used. It is--again--a 'foundational principle of administrative law that a court may only uphold agency action only on the grounds that the agency invoked when it took the action'," *Lobsterman's*, page 30. Which is: PCAOB prosecutorial discretion. Isn't it?

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George Weinbaum

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