

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934

Release No. 80403 / April 7, 2017

Admin. Proc. File No. 3-16518

In the Matter of the Application of

KABANI & COMPANY, INC., HAMID KABANI,
CPA, MICHAEL DEUTCHMAN, CPA, and
KARIM KHAN MUHAMMAD, CPA

For Review of Action Taken by the

PCAOB

PARTIAL STAY ORDER

On March 10, 2017, the Commission sustained Public Company Accounting Oversight Board (“PCAOB”) disciplinary action against movants Kabani & Company, Inc. (“K&C”), a firm registered with the PCAOB, and Hamid Kabani, CPA, Michael Deutchman, CPA, and Karim Khan Muhammad, CPA, all persons associated with K&C.¹ The Commission found that movants “violated PCAOB rules by engaging in a ‘wide-spread and resource-intensive effort’ to conceal documentation deficiencies in three issuer audit files from PCAOB inspectors.” Finding that movants “engaged in an egregious attempt to deceive the PCAOB,” the Commission sustained the PCAOB’s sanctions censuring movants, revoking K&C’s registration, and barring the individual movants from association with a registered public accounting firm (subject to certain reapplication provisions) and ordering them to pay civil penalties.

Movants now seek a stay pending appeal of the PCAOB sanctions sustained in the March 10, 2017 Commission opinion. The PCAOB opposes the motion.

¹ *Kabani & Co.*, Exchange Act Release No. 80201, 2017 WL 947229 (Mar. 10, 2017), *petition for review filed*, No. 17-70786 (9th Cir. Mar. 20, 2017).

In determining whether to grant a stay motion under Rule of Practice 401,² the Commission considers whether (i) there is a strong likelihood that the moving party will succeed on the merits of its appeal; (ii) the moving party will suffer irreparable harm without a stay; (iii) any person will suffer substantial harm as a result of a stay; and (iv) a stay is likely to serve the public interest.³ The party seeking a stay has the burden of establishing that relief is warranted.⁴ All four factors weigh against granting movants' stay request.

First, movants have failed to establish a strong likelihood of success on the merits. The Commission found that movants engaged in serious and substantial misconduct. They "added or falsified hundreds of audit documents; intentionally reset internal computer clocks to conceal that the alterations were made before applicable deadlines; and backdated their signatures on relevant work papers." This "course of misconduct" was "troubling on its face," and movants offered "changing, conflicting, and patently unbelievable testimony [that] 'accentuate[d] the gravity of the misconduct.'" Indeed, movants "went to considerable lengths to conceal their actions," and the Commission determined that substantial evidence established that movants "intentionally and knowingly violated the PCAOB's rules."

In their brief, movants merely summarize arguments that the Commission considered and rejected in its opinion and state that they "disagree mightily" with the Commission's conclusions sustaining the PCAOB's action. But because movants make no attempt to explain why they believe that the Commission rejected their arguments erroneously or why they believe they have a likelihood of success on the merits that "should be strongly considered [by] the Commission [sic]," they fail to present any basis to conclude that they are likely to succeed in their appeal.⁵ Given the gravity of their misconduct, this factor weighs heavily against movants.

Second, movants fail to establish that they will be irreparably harmed in the absence of a stay. To demonstrate irreparable harm, movants "must show an injury that is 'both certain and great' and 'actual and not theoretical.'"⁶ "A stay 'will not be granted [based on] something merely feared as liable to occur at some indefinite time.'"⁷ Movants predict that, if relief is not

² 17 C.F.R. § 201.401.

³ *Bernerd E. Young*, Exchange Act Release No. 78440, 2016 WL 4060106, at *1 (July 29, 2016).

⁴ *Id.* at *1.

⁵ *See Mohammed Riad*, Exchange Act Release No. 78272, 2016 WL 3648316, at *1 (July 8, 2016) (concluding that because movants' "stay motion merely asserts, in conclusory fashion, that there are errors in the Commission's analysis," movants necessarily failed to make a strong showing that they are likely to succeed on the merits of their appeal).

⁶ *Kenny A. Akindemowo*, Exchange Act Release No. 78352, 2016 WL 3877888, at *2 (July 18, 2016) (quoting *Donald L. Koch*, Exchange Act Release No. 72443, 2014 WL 2800778, at *2 (June 20, 2014)); *accord Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985).

⁷ *Akindemowo*, 2016 WL 3877888, at *2 (quoting *Koch*, 2014 WL 2800778, at *2); *accord Wis. Gas Co.*, 758 F.2d at 674.

granted, their “business will cease operations and they will be saddled with cash flow problems which may inhibit their ability to retain legal counsel to oppose the PCAOB/SEC sanctions.” But movants provide no evidentiary support for this prediction.⁸ And “[t]he Commission has generally refused to grant stays based on . . . claims that [a self-regulatory organization’s] decision will negatively affect, or even close, a business.”⁹ That “an applicant may suffer financial detriment does not rise to the level of irreparable injury warranting issuance of a stay.”¹⁰ Because movants have failed to provide an evidentiary basis on which to conclude that they will suffer irreparable injury, this factor weighs against them.

Third, movants have not demonstrated that others will suffer substantial harm in the absence of a stay. Movants assert that their “clients will be forced to retain new auditors and may incur additional fees and costs for work that was recently performed, but now may not be relied upon.” But the Commission concluded that movants “were experienced auditors who knowingly, intentionally, and recklessly subverted basic regulatory standards, thus demonstrating an extreme disregard for regulatory authority over a prolonged period.” The Commission concluded further that “[a]llowing K&C to remain registered and Kabani, Deutchman, and Khan to remain associated persons would give them future opportunities to undermine the PCAOB’s regulatory processes.” Any detriment to their clients from the need to engage new auditors is outweighed by the substantial risk to movants’ clients, and others, if the revocation of K&C’s registration and the bars from association imposed against movants are stayed.¹¹

Fourth, we reject movants’ assertion that the public interest “weighs incredibly” in their favor. According to movants, if the Commission considered them to present a danger to the public it would have issued its opinion sooner than 18 months after briefing on their appeal closed. Movants provide no support for the notion that the time the Commission took to carefully consider the record and the parties’ arguments undermines the Commission’s determination in resolving the appeal that movants “each pose a continuing danger to the investing public, and that the revocation and bars are in the public interest.” And having sustained the PCAOB’s conclusions, the Commission on its own motion immediately lifted the stay of the PCAOB’s sanctions that resulted from movants’ appeal to the Commission, thereby

⁸ Rule of Practice 401(a), 17 C.F.R. § 201.401(a) (“[I]f the facts are subject to dispute, [a stay] motion shall be supported by affidavits or other sworn statements or copies thereof.”).

⁹ *Meyers Assocs., L.P.*, Exchange Act Release No. 77994, 2016 WL 3124674, at *4 (June 3, 2016).

¹⁰ *Robert J. Prager*, Exchange Act Release No. 50634, 2004 WL 2480717, at *1 (Nov. 4, 2004); *see also William Timpinaro*, Exchange Act Release No. 29927, 1991 WL 288326, at *3 (Nov. 12, 1991) (recognizing that “[m]ere injuries, however substantial, in terms of money, time, and energy necessarily expended in the absence of a stay, are not enough” to constitute irreparable harm) (quoting *Va. Petroleum Jobbers Ass’n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958)).

¹¹ *Meyers Assocs.*, 2016 WL 3124674, at *4 (denying stay motion where “[t]he alleged harm to Applicants’ customers and employees is outweighed by the risk of allowing Meyers’s continued participation in the securities industry”).

rendering them effective.¹² This factor, like the others, also weighs against movants' stay request.

Accordingly, none of the four factors militates in favor of a stay. Nonetheless, the Commission has at times stayed monetary sanctions pending appeal without reference to the applicant's likelihood of success on the merits or the other components of the four-factor test.¹³ Under the circumstances and as a matter of discretion, we elect to stay the civil penalties.¹⁴

Accordingly, IT IS ORDERED that, until the Court of Appeals issues its mandate, the Commission's March 10, 2017 order sustaining the PCAOB's findings and sanctions against movants is stayed to the extent that it renders effective the PCAOB's imposition of civil money penalties on Kabani, Deutchman, and Khan. The order remains effective in all other respects.

For the Commission, by the Office of the General Counsel, pursuant to delegated authority.

Brent J. Fields
Secretary

¹² Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 105(e)(1), 116 Stat. 745 (2002), 15 U.S.C. § 7251(e)(1) ("Application to the Commission for review, or the institution by the Commission of review, of any disciplinary action of the Board shall operate as a stay of any such disciplinary action, unless and until the Commission orders . . . that no such stay shall continue to operate."); *see also* Rule of Practice 401(e)(1), 17 C.F.R. § 201.401(e)(1) ("The Commission may, at any time, on its own motion determine whether to lift the automatic stay.").

¹³ *Young*, 2016 WL 4060106, at *1 (quoting *Raymond J. Lucia Cos.*, Exchange Act Release No. 76241, 2015 WL 6352089, at *1 n.7 (Oct. 22, 2015)).

¹⁴ *See Raymond J. Lucia Cos.*, 2015 WL 6352089, at *1 n.7.