

ADD

UNITED STATES SECURITIES AND EXCHANGE COMMISSION

Admin. Proc. File No. 3-16518

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 In the Matter of Application of : :
 : :
 Kabani & Company, Inc., Hamid Kabani, CPA, Michael : :
 Deutchman, CPA, and Karim Khan Muhammad, CPA : :
 : :
 For Review of Action Taken by : :
 : :
 PCAOB : :
 : :
 -----: :

KABANI & COMPANY, INC., HAMID KABANI, CPA, MICHAEL DEUTCHMAN, CPA, AND KARIM KHAN MUHAMMAD, CPA'S EMERGENCY NOTICE OF MOTION AND MOTION FOR PROTECTIVE ORDER TO PROTECT PRIVACY AS REQUIRED BY SARBANES-OXLEY ACT AND PCAOB/SEC RULES

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TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT Appellants Kabani & Co., Hamid Kabani, Michael Deutchman, and Karim Khan Muhammad (collectively, “Appellants”) will and hereby do move for an emergency protective order under Rule 322 of the United States Securities and Exchange Commission’s Rules of Practice requiring that all documents filed in this Administrative Proceeding to be filed under seal and unavailable from public view and access.

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The grounds for this Emergency Motion is made and based on Title 15 U.S.C. § 7215(c)(2), which provides that disciplinary proceedings before the Public Company Accounting Oversight Board must be private and confidential unless good cause has been shown to transform the proceedings into a public forum or until after an adverse ruling on appeal to the United States Securities Exchange Commission, neither of which have happened as of the time of filing this Emergency Motion.

Dated: August 25, 2015

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Memorandum

1. Introduction

The Sarbanes Oxley Act (the “Act”) authorizes the Public Company Accounting Oversight Board (“PCAOB” or “Board”) to conduct investigations of registered public accounting firms and associated persons of such firms and to implement rules and procedures for initiating disciplinary proceedings for violations of the Act or professional standards. While the Act provides the PCAOB with some discretion for developing its own administrative procedures and protocols, the Act expressly commands that those proceedings must remain private unless good cause warrants that the proceedings be made public, such as the U.S. Securities Exchange Commission’s affirmance of a sanction order by the PCAOB as the final administrative appeal.

Here, the record below shows that the PCAOB issued sanctions against Appellants, including temporary and lifetime bars of their practice before the PCAOB. Appellants, however, timely moved for both PCAOB and then SEC review of the sanction orders. The timely filing of the application for review operated as a stay of the PCAOB sanctions,

and so Appellants continue to practice as public auditors while the sanctions are under review as expressly authorized by law. See 15 U.S.C., §7215(e). Appellants have also filed briefs in support of their review of the PCAOB sanctions, and the PCAOB has filed its opposition to those briefs.

In violation of the Sarbanes-Oxley Act and the PCAOB's/SEC's rules recognizing the confidentiality of such auditor disciplinary proceedings, the SEC published Appellants' supporting briefs on the SEC's website, as well as the PCAOB's opposing brief, and other related documents thereby notifying the public of the pendency of this review, thus resulting in Appellants' clients being able to find this non-public information by doing "Google" searches of the Kabani firm and of the individuals appeal the discipline orders.

The public dissemination of these documents violates both the Sarbanes-Oxley Act and PCAOB rules that require that the PCAOB proceedings must remain confidential until after an adverse ruling by the full U.S. Securities Exchange's review of the sanctions.

Since Appellants have sought review of the PCAOB sanctions, and those sanctions are stayed pending this review, the confidentiality of

these proceedings continue. However, the U.S. Securities Exchange has publicly published Appellants' Opening Appellant Brief with the U.S. Securities Commission in violation of Appellants' statutory and other privacy rights.

Accordingly, Appellants bring this motion for a protective order sealing all the briefs and everything about and related to these proceedings related to Appellants' application for review to the Securities and Exchange Commission ("SEC") until such time as the SEC issues its final order. If the SEC refuses to seal these filings, and Appellants are later absolved of any wrong doing, then Appellants will have been irreparably harmed and their professional reputations tainted without any justification whatsoever. That is, a damage remedy against the Government under § 1983 would be insufficient compensation to the public defamation and damage to Appellants' professional reputations pre-hearing.

Moreover, while the Sarbanes-Oxley Act does not provide an express remedy for violations of its privacy protections, it is an ancient axiom of law that for every wrong, there is a remedy, and the most

appropriate remedy here would be an order sealing these proceedings from public view.

2. The SEC is Authorized to Issue a Protective Order to Prevent Public Dissemination of the Parties' Administrative Filings

The SEC's Rules of Practice state that "In any proceeding as defined in Rule 101(a) [which includes an application for review of a PCAOB sanction], a party ...may file a motion requesting a protective order to limit from disclosure to other parties or to the public documents or testimony that contain confidential information." Further, "A motion for a protective order shall be granted only upon a finding that the harm resulting from disclosure would outweigh the benefits of disclosure." *See* SEC Rules of Practice, Rule 322(b).

Here, the documents sought from public disclosure include the parties' administrative filings, and any preliminary orders or notices filed by the SEC in this matter.

3. There is a Presumption of Confidentiality Since the PCAOB Record and Administrative Hearing Was Shielded From Public Disclosure as Provided Under Dodd Frank

Most courts recognize a presumption of public access to court records based upon common law and First Amendment grounds. *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597 (1978); *Globe Newspaper Co. v. Superior Court for Norfolk County*, 457 U.S. 596, 603 (1982). This is consistent with the SEC's Rules of Practice, which express that "documents and testimony introduced in a public hearing are presumed to be public." See SEC Rules of Practice, Rule 322(b).

However, every court has inherent, supervisory powers over its own records and access may be denied where the court determines that disclosure of the materials could result in improper use of the material for scandalous or libelous purposes. *Nixon, supra*, 435 U.S. at 598; *Hagestad v. Tragesser*, 49 F.3d 1430, 1434 (9th Cir. 1995).

Conversely, the public's right of access *does not* apply to documents that were filed under seal pursuant to a valid protective order. *Phillips ex rel. Estates of Byrd v. General Motors Corp.*, 307 F.3d 1206, 1213 (9th Cir. 2002); *United States v. Corbitt*, 879 F.2d 224, 228

(7th Cir. 1989). Because good cause has already been determined to protect the information from public disclosure by Congressional Mandate and by the SEC's/PCAOB's own rules to carry out Congress's mandate that these proceedings be kept confidential until certain contingent events occur that have not occurred as of the time of filing this Motion, the burden is on the party seeking access to show "sufficiently compelling reasons" why the sealed information should be released. *Id.* To hold otherwise would surely undermine, and possibly eviscerate, the broad power of the courts to fashion protective orders. *Philips ex rel. Estates of Byrd, supra*, 307 F.3d at 1213. No court order or other hearing has been had to determine that Appellants' private disciplinary hearings should be made public.

Under Title 15 U.S.C. § 7215(c)(2), administrative hearings before the PCAOB are deemed confidential unless otherwise ordered by the Board for good cause shown. See also PCAOB Rule 5203. Consequently, the disciplinary proceedings initiated against the Kabani Firm, and its associated persons, were private, as were all of the documents and testimony provided during the proceedings. That is, the public has no ability to request or petition the PCAOB for disclosure of any

documents filed in the proceeding, nor could anyone seek a copy of any testimony provided on direct and cross examination. Thus, the entire proceeding was effectively “sealed” as intended by Congress.

Appellants have learned that despite this preference of confidentiality, the SEC published Appellants’ briefs in support of Appellants application for review of the PCAOB’s sanctions against them, as well as the PCAOB’s responsive brief, and administrative orders and schedules filed by the SEC. Appellants contend that the public filing of these documents on the SEC’s website, which is accessible by anyone with a computer and internet connection, violates the Act which requires that the PCAOB proceedings remain private with limited exception. As these documents discuss the nature of the PCAOB proceedings, the charges against Appellants, the evidence relied upon by the Hearing Officer, and the testimony elicited, these documents summarize the entire proceedings and should be sealed until the SEC issues a ruling on Appellants’ application for review.

4. The Harm Resulting From Disclosure *Outweighs* the Benefits of Disclosure

As mentioned above, the SEC's Rules of Practice require that a party moving for a protective order show that the harm resulting from the disclosure outweighs the benefits of disclosure. Rule 322(b). That being said, as an initial matter, Appellants contend that the private and confidential nature of the PCAOB proceedings, as provided by Congressional *order*, operate in the same vein as would a protective order ordering that judicial records be sealed. Thus, all materials relating to or arising from the PCAOB proceeding should have already been sealed and treated as sealed during this review without having to make a separate application with the Commission to ensure that the Commission complied with Sarbanes-Oxley and its and the PCAOB's own rules—especially since the PCAOB sanctions are not in effect and remain non-public as of the time of the filing of this Motion.

Should the SEC disagree with this position, Appellants believe they are still entitled to a protective order even after weighing the harm faced by Appellants against the benefits provided by disclosure. In

determining what movants must show in support of a motion for a protective order, federal case law is of some guidance.

The federal courts have generally held that in order to limit public access to *judicial records*, the party seeking to limit this disclosure must show that “compelling reasons supported by specific factual findings...outweigh...the public policies favoring disclosure.” *Pintos v. Pacific Creditors Ass’n*, 605 F.3d 665, 678 (9th Cir. 2009). This is known as the “compelling reasons” standard and is typically a high standard to meet. Further, in applying the “compelling reasons” standard, a court must weigh relevant factors such as the “public interest in understanding the judicial process and whether disclosure of the material could result in improper use....” *Id.* at 679, fn. 6.

A different standard applies to “private materials unearthed during discovery,’ as such documents are not part of the judicial record.” *Pintos, supra*, 605 F.3d at 678. For these documents, the relevant standard is whether “good cause’ exists to protect the information from being disclosed to the public by balancing the needs for discovery against the need for confidentiality.” *Id.* Moreover, “The good cause

standard presents a lower burden for the party wishing to seal documents than the ‘compelling reasons’ standard.” *Id.*

Here, the public’s access to these documents presents significant harm to Appellants in that their reputation in the community and among their clients and potential clients is negatively affected by the PCAOB sanctions. Indeed, that the public is made aware that there was a PCAOB investigation, even without the relative sanctions, is itself damning to Appellants’ business good will, and Appellants have already experienced the negative impact this public disclosure has caused their business. That is, Appellants have already been irreparably harmed by this public disclosure which will endure even if Appellants are ultimately exonerated by the SEC.

Conversely, the potential benefit of this public disclosure is insignificant since the conduct that is in question occurred more than 7 years ago and is limited to administrative sanctions regarding Appellants work papers, not the audit opinions themselves, or the conclusions reached by the auditors. In other words, the public, including investors of the issuers that were inspected, will not benefit from access to the parties’ briefs and arguments for review to the SEC

because it does not touch upon or affect the financial statements disclosed by the issuers, or suggest any wrongful conduct committed by the issuers themselves.

Additionally, the briefs and administrative documents available on the SEC's website are not "judicial records" in the plain sense of the term since they relate exclusively to a private, administrative proceeding and were not filed in a public court. See *Foltz v. State Farm Mut. Auto Ins. Co.*, 331 F.3d 1122, 1134 (9th Cir. 2003) [holding that once a document is filed with the court, its status changes]. Accordingly, the "good cause" standard is most analogous to the present situation since these are not "judicial records," which is a lower standard for Appellants to meet than the "compelling reasons" standard. Moreover, even if there were some slight public benefit from disclosure of the parties' briefs (there is not), most of it would be useless without the accompanying administrative record which gives many of the parties' arguments context. None of these documents are available for public access.

In sum, the limited benefit to be derived from public disclosure of Appellants' review to the SEC is substantially outweighed by the harm Applicants have suffered to their professional reputation and business, and will continue to suffer so long as the public is able to access these records through the SEC's website.

5. Any Order Issued Granting This Motion Should Require That the Appellants Identities Be Redacted

Under SEC Rule 322(d), "Pending a determination of a motion under this rule, the documents as to which confidential treatment is sought and any other documents that would reveal the confidential information in those documents shall be maintained under seal and shall be disclosed only in accordance with orders of the Commission or the hearing officer. Any order issued in connection with a motion under this rule shall be public unless the order would disclose information as to which a protective order has been granted, in which case that portion of the order that would reveal the protected information shall be nonpublic." SEC Rules of Practice, Rule 322(d).

Upon the filing of this motion, Appellants request that all documents filed by the SEC that relate to this Administrative Proceeding be sealed and shielded from public dissemination. Should the SEC ultimately grant Appellants request and issue a protective order consistent with this motion, then Appellants request that their identities be redacted within any order issued granting this motion and docketed for public view.

6. Conclusion

For the foregoing reasons, Appellants respectfully request that this motion be granted and that a protective order be issued consistent with this Emergency Motion as required by the Sarbanes-Oxley Act and the PCOAB's and the U.S. Securities Exchange Commission's own Rules.

Dated: August 25, 2015

HORWITZ + ARMSTRONG ^{LLP}

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CERTIFICATE OF WORD COUNT

This motion complies with the type-volume limitation of Rule 154(c) because this brief contains 2,525 words excluding the parts of the brief exempted by subdivision (c), as counted by the Microsoft Word® word-processing program used to generate this motion.

Dated: August 25, 2015



Matthew Henderson

CERTIFICATE OF SERVICE

I hereby certify that I caused to be served the foregoing **KABANI & COMPANY, INC., HAMID KABANI, CPA, MICHAEL DEUTCHMAN, CPA, AND KARIM KHAN MUHAMMAD, CPA'S EMERGENCY NOTICE OF MOTION AND MOTION FOR PROTECTIVE ORDER TO PROTECT PRIVACY AS REQUIRED BY SARBANES-OXLEY ACT AND PCAOB/SEC RULES** on this 25th day of August, 2015, to the following party by Fed Ex overnight mail:

PCAOB
c/o Phoebe W. Brown, Esq.
1666 K. Street, N.W.
Washington, DC 20006

An original and three copies of this motion will be delivered by Fed Ex overnight mail to the Office of the Secretary of the SEC in accordance with its Rules of Practice as follows:

United States Securities and Exchange Commission
Office of the Secretary
c/o Brent Fields
100 F Street, NE
Washington, DC 20549



Matthew Henderson