ORIGINAL

BEFORE THE
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C.

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 Disciplinary Action Taken By the

PUBLIC COMPANY ACCOUNTING
OVERSIGHT BOARD

PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD'S RESPONSE TO APPLICANTS' MOTION FOR PROTECTIVE ORDER

September 2, 2015

J. Gordon Seymour
Luis de la Torre
Jodie J. Young
Office of the General Counsel
Public Company Accounting Oversight Board
1666 K Street, N.W.
Washington, D.C. 20006
202-207-9100 (phone)
202-862-8435 (facsimile)
seymourg@pcaobus.org
delatorrel@pcaobus.org
youngj1@pcaobus.org

On April 27, 2015, Kabani & Company, Inc., Hamid Kabani, Michael Deutchman, and Karim Khan Muhammad (Applicants) applied for review by the Securities and Exchange Commission (SEC or Commission) of disciplinary action taken by the Public Company Accounting Oversight Board (PCAOB or Board). On June 3, 2015, the SEC issued a briefing schedule order, and the parties completed briefing on August 19, 2015. As each of these documents was filed with the SEC, it was posted on the Commission's public website. On August 26, 2015, Applicants filed with the SEC a motion for a protective order.

Applicants' motion asserts that the "publish[ing]" of the application for review, briefing schedule order, and appeal briefs on the SEC website "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 [SEC] review of the sanctions" and, in the alternative, that the posting of these materials on the SEC website is contrary to the application of the ordinary standards for issuance of protective orders. Mtn. at 4, 10-14. Applicants seek from the Commission a broad order, with "their identities [to] be redacted," "sealing all the briefs and everything about and related to these proceedings related to Appellants' application" for SEC review "until such time as the SEC issues its final order." Mtn. at 5, 15.

Should the Commission grant the Board's motion to lift the stay on the sanctions against Applicants, filed at the same time as this Response, Applicants' motion becomes moot. This is because the lifting of the stay would trigger a statutory requirement that the Board report the sanctions to the public, which would reveal the existence, and the Board's resolution of, the disciplinary proceeding. In any event, Applicants' motion misconstrues the authority cited in support of it, overlooks a squarely applicable Commission precedent that contradicts their primary position, and relies for their alternative position on seriously flawed arguments.

1. As support for Applicants' position that everything about the Board disciplinary proceeding must be "sealed" on Commission review, they cite two sub-sections of the Sarbanes-Oxley Act: Section 105(c)(2), 15 U.S.C. 7215(c)(2), which states, "*Public Hearings*. Hearings under this section shall not be public, unless otherwise ordered by the Board for good cause shown, with the consent of the parties to such hearing."; and Section 105(e), 15 U.S.C. 7215(e), "*Stay of Sanctions*," which states, "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 (summarily or after notice and opportunity for hearing on the question of a stay, which hearing may consist solely of the submission of affidavits or presentation of oral arguments) that no such stay shall continue to operate," and further provides, "The Commission shall establish for appropriate cases an expedited procedure for consideration and determination of the question of the duration of a stay pending review of any disciplinary action of the Board under this subsection." Mtn. 2, 4, 8.

2. The section of the statute containing these provisions, however, focuses on: (1) PCAOB activities, such as disciplinary hearings before the PCAOB; (2) the Board's obligation to report any disciplinary sanction it imposes, "once any stay on the imposition of such sanction has been lifted"; and (3) the stay, and the SEC's authority to lift the stay, on the imposition of such sanction. *See, e.g.,* Sarbanes-Oxley Act Section 105(a), (b)(5), (c)(1)&(2), (d)(1)(C), (e), 15 U.S.C. 7215(a), (b)(5), (c)(1)&(2), (d)(1)(C), (e). The provisions cited by Applicants do not define the basic nature of Commission review proceedings in Board disciplinary cases as public or non-public. Furthermore, the SEC's authority to "summarily" lift the stay and the requirement for an "expedited procedure" for lifting the stay "pending review" of Board action refutes

Applicants' claim that all information about the PCAOB proceeding "must remain confidential until after an adverse ruling by the full [SEC] review of the sanctions" (Mtn. 4).

3. Indeed, the Commission has already held that "its review of PCAOB disciplinary actions under section 107(c) of the [Sarbanes-Oxley] Act, and [its] administrative proceedings, with limited exceptions not at issue here, are public unless otherwise ordered." *Gately & Associates, LLC*, Admin. Proc. File No. 3-13535, 2009 SEC LEXIS 4387, *1-*2 (Oct. 23, 2009) (citing SEC Rule of Practice 440). In *Gately*, the first appeal of a Board disciplinary sanction, the Commission disagreed with the respondents that "our review of the PCAOB disciplinary action should be non-public." *Id.* at *1. *Gately* makes clear that respondents, instead of urging broad, generic claims of statutory entitlement to blanket confidentiality of the entire review proceeding, should seek a protective order for "certain information" based on a particularized showing that "clearly identif[ies] which information [they] seek to protect" and explains "why the harm resulting from [its] disclosure would outweigh the benefits of disclosure." *Id.* at *3; *see also Gately & Associates, LLC*, SEC Rel. No. 34-62656, 2010 SEC LEXIS 2535, *5 n.7 (Aug. 5, 2010); SEC Rule of Practice 322, 17 C.F.R. 201.322.

4. Applicants' claim (*e.g.*, Mtn. 3-6, 10) that the SEC's entire review proceeding is non-public under the Sarbanes-Oxley Act is thus foreclosed by *Gately*. In the alternative, they argue that, "[s]hould the SEC disagree" with their statutory argument, "they are still entitled to a protective order" against the public disclosure of any information about the review proceeding under a traditional "weighing [of] the harm faced by Appellants against the benefits provided by disclosure" (Mtn. 10). Applicants' alternative argument, based not on a particularized showing that exceptional relief should be afforded to protect "certain information" but on generic,

conclusory claims that all information about a pending SEC review proceeding in a Board case should automatically be "sealed" "from public view" (Mtn. 6, 15), is seriously flawed.

5. Although Applicants attempt to support their alternative argument with references to concerns about "improper use" of the items posted on the SEC website, such as "for scandalous or libelous purposes," their motion fails to link any such concerns to those actual materials, especially the bare-bones "administrative orders and schedules filed by the SEC." *See, e.g.*, Mtn. 7, 9, 11. They also complain about a supposed lack of "context" for the materials, but admit that the website, which is "accessible by anyone with a computer and internet connection," provides the full filings showing that Applicants have sought "SEC review of the sanction orders" and have "filed briefs in support of" that application and that "the PCAOB has filed its opposition to those briefs." Mtn. 3-4, 9, 13. The SEC's apparent practice is to post only SEC orders and party applications, notices, motions, and briefs on the website.

6. Furthermore, Applicants' alternative argument relies on the same fallacious attempt they make in their merits briefing to minimize the gravity of the misconduct at issue. Specifically, their motion claims that "the potential benefit of this public disclosure" by the SEC during the course of the review proceeding is "insignificant" because "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," such that "it does not touch upon or affect the financial statements disclosed by the issuers, or suggest any wrongful conduct committed by the issuers themselves." Mtn. 12-13.

7. Contrary to these contentions, Applicants undermined requirements on which the quality and integrity of an issuer audit largely depend, which are fundamental to performing issuers audits, and which are "'pivotal to the Board's ability to enhance investor protection and

the accuracy of issuer auditor reports through its oversight of registered accounting firms,'" as the Board's merits brief (Opp.) discussed. *See, e.g.*, Opp. 38-39 (quoting *Gately*, 2010 SEC LEXIS 2535, *3). Applicants did so in an egregious manner, through deception, altering and backdating audit work papers, and thereby delaying discovery of the misconduct, rendering the audit documentation utterly unreliable, and thwarting the detection of defects in what Applicants call "the audit opinions themselves" and the audit "conclusions" purportedly "reached." *See, e.g.*, Opp. 4-17, 35, 40-41. Applicants "acted with a highly culpable state of mind, have shown no recognition of the wrongful nature of their conduct, have provided no assurances that they would not engage in further violations, and have the opportunity to engage in such violations." Opp. 39. They state that they "continue to practice as public auditors while the sanctions are under review." Mtn. 4. Yet they seek to keep investors and public companies, who might rely on Applicants for issuer audits and thus have a strong interest in considering the SEC website information, entirely in the dark about the proceeding on review—a proceeding that, under *Gately* and their alternative argument, became public when their application for review was filed.

8. Indeed, Applicants' sweeping proposition, based on broad, generic arguments, and in contravention of *Gately*, that, in essence, any SEC review proceeding in a Board disciplinary case must be entirely confidential would have the effect of keeping a wide range of potentially interested parties in the dark. No investor, no other auditor, no audit committee, no lawmaker, and no member of the media would be allowed to know, for example, what conduct the Board considers to merit discipline, who has been charged, what issues are being litigated, the sanctions the Board determined to be appropriate under the circumstances, and how its enforcement program performed in the still-"sealed" cases. Moreover, as long as all information about a Board disciplinary proceeding—including its very existence—remains "sealed,"

respondents in the case have an incentive to litigate, regardless of whether they believe they will ultimately prevail. This risks consuming considerable PCAOB and SEC resources on meritless appeals that could be devoted to pursuit and resolution of other matters. *See Disciplinary Proceedings Involving Professionals Appearing or Practicing Before the Commission*, SEC Rel. No. 34-25893, 1998 WL 1000021, *2-*4, *13 (July 7, 1988) (discussing the "presumption in favor of public proceedings" before the SEC and the importance of "the public's right of access to [its] decisionmaking processes" and noting that respondents "have an incentive to delay private proceedings more than public ones" and that the latter place all respondents on an "equal footing" and as a general matter "are more favored in the law than closed proceedings").

9. Finally, despite the important benefits of not "sealing these [SEC review] proceedings from public view" (Mtn. 6), Applicants argue that any benefits are "substantially outweighed" based on non-specific, unsubstantiated assertions of harm. Mtn. 12-14. According to Applicants, "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," this is a harm they "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" and "have already experienced," in the form of "the negative impact this public disclosure has caused their business," and it is "damning to [their] business good will." *Id.*

10. Applicants' claims of cognizable harm are especially suspect given their contention, also unsupported, in their July 6, 2015 Opening Brief In Support of Their Application for SEC Review (at 10-11, 33) that what "cast Appellants in a negative light thereby tarnishing their reputation in the community" and caused Kabani & Co.'s "total number of audit clients" to "decline[] from over 50" to "about 5 currently" was a May 21, 2013 published Board

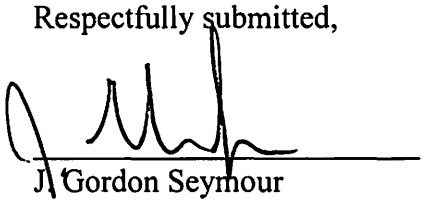
order (PCAOB Rel. No. 105-2013-004) settling the charges against a co-respondent of Applicants in the PCAOB disciplinary proceeding—an order that did not mention Applicants, except Kabani & Co., as the firm for which the settling party worked as an employee or independent contractor; that did not refer to any disciplinary proceeding against Applicants; that did not involve the issuer audits at issue in this appeal; and that expressly stated that the order's findings other than as to jurisdiction were neither admitted nor denied and "are not binding on any other person or entity in this or any other proceeding."

Moreover, while claiming that the SEC website postings in this appeal that "made [the public] aware that there was a PCAOB investigation" of Applicants and aware of "the PCAOB sanctions" against them have caused, and continue to cause, Applicants significant harm, their motion provides no information about how and when they "learned" that documents from this proceeding on review initiated four months ago were publicly accessible and whether they moved for a protective order with an urgency consistent with the harm they assert. *See* Mtn. 9, 12, 14. Furthermore, there is no general right "not to be injured in one's reputation or business prospects" by the fact of investigative or disciplinary actions that are authorized by Congress. *See, e.g., Hunter v. SEC*, 879 F. Supp. 494, 501 (E.D. Pa. 1995) (citing cases); *see also, e.g., Markowski v. SEC*, 34 F.3d 99, 105 (2^{d} Cir. 1994); *Miller v. SEC*, 998 F.2d 62, 64 (2^{d} Cir. 1993).

For the foregoing reasons, Applicants' motion for the requested protective order should be denied.

Dated: September 2, 2015

Respectfully submitted,



J. Gordon Seymour
General Counsel

Luis de la Torre
Associate General Counsel

Jodie J. Young
Assistant General Counsel

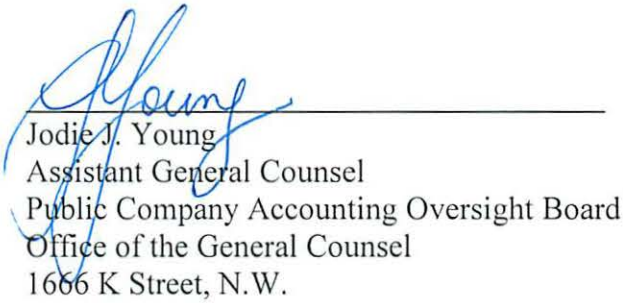
Public Company Accounting Oversight Board
1666 K St., NW
Washington, DC 20006
202-207-9100 (phone)
202-862-8435 (facsimile)

CERTIFICATE OF SERVICE

I hereby certify that on September 2, 2015, I caused to be sent to John R. Armstrong and Matthew S. Henderson via Federal Express a copy of the PCAOB's foregoing response to Applicants' Motion for Protective Order (the original and three copies of which were filed today via hand delivery with the Commission's Office of the Secretary) addressed as follows:

John R. Armstrong
Matthew S. Henderson
Horwitz + Armstrong, LLP
26475 Rancho Parkway South
Lake Forest, CA 92630

I am also transmitting today courtesy copies of the PCAOB's response to the above-named counsel at jarmstrong@horwitzarmstrong.com and mhenderson@horwitzarmstrong.com.



Jodie J. Young
Assistant General Counsel
Public Company Accounting Oversight Board
Office of the General Counsel
1666 K Street, N.W.
Washington, D.C. 20006