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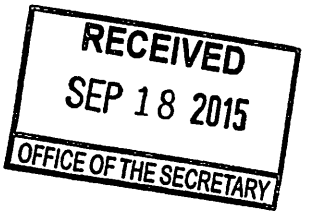
UNITED STATES SECURITIES AND EXCHANGE COMMISSION

Admin. Proc. File No. 3-16518



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 OPPOSITION AND MOTION TO STRIKE THE PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD'S MOTION TO TERMINATE THE STAY

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1. Introduction

The Public Company Accounting Oversight Board ("PCAOB" or "Board") requests that the United States Securities and Exchange Commission ("SEC") "summarily" lift the stay of the Board's sanctions issued against Appellants Kabani & Co., Hamid Kabani, Michael Deutchman, and Karim Khan Muhammad (collectively, "Appellants"), "or pursuant to the expedited process" provided under Rule 401(e)(3) of the SEC's Rules of practice. *See* PCAOB Motion, at p. 1. Importantly, the PCAOB's motion is not an evidentiary motion supported by affidavit or good cause as to why extraordinary emergency measures are warranted on an expedited basis. Instead, the PCAOB's "Motion" is a disguised sur-reply to Appellants' reply regarding their Application for Review of the PCAOB's sanctions. That is, the PCAOB is attempting to do an end run on the SEC's rules enacted to protect procedural and substantive due process, as well as traditional notions of fair play and substantial justice. Indeed, the Federal Courts of Appeal have criticized the filing of improper sur-reply arguments on appeal noting that it "is

unfair to appellants who bear the burden of demonstrating prejudicial error in the decision being appealed and, therefore, are entitled to the last word in both the briefs and at oral argument on their appeal." See *Princess Cruises, Inc. v. U.S.*, 397 F.3d 1358, 1361 (Fed. Cir. 2005).

Under its present Motion, the PCAOB is effectively asking for an expedited *opinion* of Appellants' Application for Review. Indeed, the present Motion argues and reargues some of the same salient points, verbatim, that were raised by Appellants and the PCAOB in their previous briefs. More importantly, the PCAOB fails to raise any new arguments, or point to new facts or circumstances demonstrating a clear and present danger to the public that warrants emergency relief at this late date. To the contrary, the harm faced by Appellants by the lifting of the stay would be irreparable.

2. The Facts and Arguments Arising From the PCAOB's Motion Have Already Been Addressed in the Parties' Briefing

It is well established that a party may seek leave of court to file a sur-reply when the party seeking leave would be unable to contest matters presented to the court for the first time in the opposing party's

reply. See *Lewis v. Rumsfeld*, 154 F.Supp.2d 56, 61 (D.D.C. 2001); *Ben-Kotel v. Howard University*, 319 F.3d 532, 536 (D.C. Cir. 2003). However, sur-replies are generally disfavored and fall within the sole discretion of the court. *Banner Health v. Sebelius*, 905 F.Supp.2d 174, 187 (D.D.C. 2012).

The PCAOB's Motion contains innumerable and improper arguments attacking points raised in Appellants' reply. This practice is improper under the SEC's established rules which only contemplate the filing of a motion, an opposition, and a reply. See SEC Rule 154. Moreover, the PCAOB has not sought leave to file a sur-reply nor has it identified any new points raised in Appellants' reply that justify the filing of a sur-reply.

Accordingly, Appellants incorporate by reference the facts and record citations previously noted by the Parties in their previous briefs. Appellants need not respond to the PCAOB's "sur-reply" to the extent that it argues against the points made in Appellants previous reply memorandum, especially when no new arguments were raised, nor does the PCAOB suggest that Appellants raised new arguments for the first time in Reply. The PCAOB has had an opportunity to respond to

Appellants opening brief under the SEC's Rules of Practice, and Appellants had a similar opportunity to respond to the PCAOB's arguments and opposition in reply. No further briefing is warranted.

To the extent that the PCAOB's present Motion includes arguments in response to Appellants' reply, Appellants request that those arguments be stricken as improper matter for all purposes.

3. The PCAOB Lacks Standing to Seek a Termination of Stay

Under SEC Rule 401(e), "Any person aggrieved by a stay of action by the Board entered in accordance with 15 U.S.C. 7215(e) for which review has been sought pursuant to Rule 440 or which the Commission has taken up on its motion pursuant to Rule 441 may make a motion to lift the stay."

The SEC rules do not define the term "person." However, SEC Rule 101(a)(12) defines "Board" as the Public Company Accounting Oversight Board.

Clearly missing from SEC Rule 401(e) is any express provision authorizing the PCAOB to challenge the stay of its own sanctions during review to the SEC. To interpret "person" to include the PCAOB would render the SEC Rules meaningless, particularly when the

"Board" is specifically mentioned in Rule 401(e). Moreover, allowing the PCAOB to challenge the stay of its own sanctions during SEC review would largely nullify the protections of an automatic stay under 15 U.S.C., § 7215(e) instituted under the Sarbanes Oxley, since known third parties rarely have an interest in the Board's disciplinary action.

4. The PCAOB's Motion Fails To Demonstrate Good Cause For Terminating the Stay

The Sarbanes Oxley Act delegates authority to the SEC to terminate a stay of PCAOB sanctions under 15 U.S.C., § 7215(e). The SEC's Rules of Practice have codified this authority in SEC Rule 401(e). However, Rule 401(e) does not identify what standards the SEC must consider in deciding whether to terminate a stay. Moreover, it is unclear from the rules and the SEC's case precedent whether the termination of a stay can be performed during an application for review, or whether a stay can only be terminated after the Commission issues an order affirming the PCAOB's disciplinary sanctions.

In *Gatley & Associates, LLC*, et al., the SEC, after a complete review of the record, issued an opinion affirming the disciplinary sanctions of the PCAOB. After a request for clarification of the order

regarding the PCAOB sanctions, the SEC issued a separate opinion that terminated the stay of PCAOB sanctions that had been automatically stayed during the pendency of the review. *See Gatley & Associates, LLC, et al.*, SEC Rel. No. 34-63167 (October 22, 2010). Thus, *Gatley* stands for the proposition that the SEC may summarily terminate the stay *after* making a final ruling affirming the PCAOB's sanctions and in accordance with 15 U.S.C., § 7215(e)(1).

To the contrary, the PCAOB relies on *Davis Accounting Group, P.C.*, Admin. Proc. File No. 3-14370 (June 14, 2011), a prior administrative proceeding that dealt exclusively with a PCAOB motion to lift a stay. This opinion appears to be unpublished and unavailable on the SEC's website, which is probably why the case is attached to the PCAOB's Motion. If this case is unpublished, its precedential value is dubious at best. Moreover, the facts in *Davis Accounting Group* are unlike any of the issues presented here, which further devalues its usefulness.

Even more concerning is the four part test adopted in *Davis Accounting Group* which was a test that had been exclusively applied to self-regulatory actions. This test was borrowed from a federal court

standard determining whether to *grant* a motion for stay which the PCAOB attempts to apply inversely to these proceedings to *terminate* the automatic stay. *See Cuomo v. U.S. Nuclear Regulatory Com'n*, 772 F.2d 972 (D.C. Cir. 1985). This standard is nowhere to be found in the SEC's Rules of Practice or the Sarbanes-Oxley Act.

While the Supreme Court has held that executive agencies are entitled to deference of their statutory interpretations, "*Chevron* deference, however, is not accorded merely because the statute is ambiguous and an administrative official is involved." *Gonzales v. Oregon*, 546 U.S. 243, 258 (2006). "To begin with, the rule must be promulgated pursuant to authority Congress has delegated to the official." *Id.* Under *Chevron*, a court need not defer to an agency rule that is "arbitrary or capricious in substance, or manifestly contrary to the statute." *Mayo Foundation for Medical Educ. and Research v. U.S.*, 562 U.S. 44, 54 (2011).

The Sarbanes Oxley Act prescribes an automatic stay whenever an auditor applies for SEC review of PCAOB sanctions. The PCAOB's suggestion that the Act's automatic stay can be reversed in an effort to

expedite the PCAOB's administrative ruling appears manifestly contrary to the Sarbanes Oxley Act.

Although Appellants dispute the applicability of the four factor test offered by the PCAOB, out of an abundance of caution Appellants respond to each factor below. As will be demonstrated in further detail, even applying the PCAOB's four factor test, the PCAOB has failed to demonstrate good cause for lifting the stay or identified an immediate harm to the public that would justify emergency relief.

A. The merits of Appellants' application for review is already briefed and no further argument is warranted

As stated above, the Parties' arguments and legal citations regarding the merits of the underlying review have been fully briefed and no further comment is warranted. Moreover, the PCAOB's attempt to inject new arguments in the present Motion is improper and should be stricken. Were the SEC to lift the stay in response to the PCAOB's Motion, such action would only further support Appellants' previous arguments that they were deprived of due process and that the procedures implemented by the PCAOB were unfair and promoted an impartial and biased forum.

B. Appellants will suffer irreparable harm if the stay is lifted

"Courts have long recognized that licenses which enable one to pursue a profession or earn a livelihood are protected property interests for purposes of a Fourteenth Amendment analysis." *Jones v. City of Modesto*, 408 F.Supp.2d 935, 950 (E.D. Cal. 2005).

"Once licenses are issued, as in petitioner's case, their continued possession may become essential in the pursuit of a livelihood. Suspension of issued licenses thus involves state action that adjudicates important interests of the licensees. In such cases the licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment." *Bell v. Burson*, 402 U.S. 535, 539 (1971).

It is true that Appellants are presently practicing as public auditors while the PCAOB sanctions are stayed. This has not changed since the PCAOB instituted disciplinary proceedings back in June of 2012. If the stay is terminated, and Appellants are prematurely censured, then Appellants entire public auditing practice, which accounts for the bulk of Appellants present earnings, will be irreparably

impaired. Not only will Appellants lose their clients and business, but their reputations in the industry will be forever tarnished. That is, the harm that Appellants would incur would be irreparable even if Appellants were ultimately exonerated by the SEC in their application for review.

In *Davis Accounting Group, supra*, which is offered by the PCAOB in support of its Motion, the SEC addressed this same issue regarding irreparable harm. There, the auditor was not licensed and had been convicted in state court on two counts of unlawful conduct in cases arising out of charges for practicing without a license. (*Id.* at p. 4.) Thus, the SEC did not believe there was irreparable harm in lifting the stay since the auditor was unable to practice and there was concern that he would continue to perform audits without a license.

Conversely, here, Appellants are licensed to practice in California and are lawfully performing public audit work. Appellants are not subject to any state sanctions regarding their professional licenses, nor are any such actions pending. Appellants' ability to maintain the status quo and to protect their reputations in the community, especially when a final determination of the sanctions has not been made, is of

paramount importance. While the PCAOB generally argues that financial detriment does not constitute irreparable harm, the PCAOB does not address future losses or loss of business good will which act as a de facto sanction even if Appellants were to ultimately prevail. For these reasons, this factor weighs substantially in favor of maintaining the stay.

C. There is no risk of harm to others and the public interest will not be served by terminating the present stay

The PCAOB argues that there is a significant risk to the public should Appellants be allowed to continue as public auditors. What the PCAOB does not address is why it waited until *after* the Parties completed their briefs to bring this "emergency" motion, and *after* Appellants' application for review has been pending for nearly 6 months. The PCAOB cannot argue ignorance as it was aware that Appellants audit practice was active during that timeframe. Moreover, the PCAOB has not established or even suggested any specific harm to investors of the issuers that are the subject of the SEC review—the

absence of which gives rise to a reasonable inference that there is no public harm or risk of future harm.

The public interest would not be served by prematurely lifting the stay, nor would it "enhance the important benefits to the public of the SEC's website disclosure of Commission orders and party applications, notices, motions, and briefs in an SEC review proceeding...." PCAOB Motion, at p. 15. To the contrary, Appellants have filed a motion for a protective order requesting that all briefs and orders relating to Appellants' application for review be removed from the SEC's public website which motion is still pending and undecided. Indeed the public interest would truly be served by requiring that that rules contemplated by Congress in enacting the Sarbanes Oxley Act be strictly followed by executive agencies to ensure public trust in these agencies that they are acting within the scope of their delegated authorities.

In light of the PCAOB's inability to demonstrate any public harm beyond mere generalities, and its inability to articulate a public interest for terminating the stay, these factors weigh in Appellants' favor.

5. Conclusion

For the foregoing reasons, Appellants respectfully request that this motion be denied and that the PCAOB's arguments in opposition to Appellants' previously filed reply brief be stricken.

Dated: September 16, 2015 **HORWITZ + ARMSTRONG** LLP

By: _____

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CERTIFICATE OF WORD COUNT

The foregoing opposition complies with the type-volume limitation of Rule 154(c) because this brief contains 2,308 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: September 16, 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 OPPOSITION AND MOTION TO STRIKE THE PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD'S MOTION TO TERMINATE THE STAY** on the 16th day of September, 2015, to the following party by email and Fed Ex overnight mail:

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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 and by facsimile as follows:

United States Securities and Exchange Commission
Office of the Secretary
c/o Brent Fields
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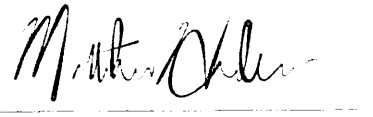

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