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 REPLY IN SUPPORT OF MOTION TO TERMINATE STAY AND OPPOSITION TO MOTION TO STRIKE

September 22, 2015

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INTRODUCTION

On September 2, 2015, the Public Company Accounting Oversight Board (Board or PCAOB) filed a motion under Section 105(e) of the Sarbanes-Oxley Act of 2002, 15 U.S.C. 7215(e), and Rule of Practice 401(e) of the Securities and Exchange Commission (Commission or SEC), 17 C.F.R. 201.401(e), to lift the stay on the Board's imposition of non-monetary sanctions on Kabani & Company, Hamid Kabani, Michael Deutchman, and Karim Khan Muhammad (Applicants) pending Commission review of the Board's disciplinary action.

Applicants now oppose the Board's motion to lift the stay, with no explanation for why their filing, on September 16, 2015, was five days late. *See* SEC Rules of Practice 154(b) (opposition due "within five days after service of the motion") and 150(d) (service by "a commercial courier or express delivery service is complete upon delivery"), 17 C.F.R. 201.154(b) & 150(d). The opposition is coupled with a "Motion to Strike," rather than a response, to "innumerable" (Opp. & Mot. 3) arguments in the Board's motion. To the extent any reply is necessary to Applicants' untimely and unresponsive filing, we hereby provide one.

In this case decided by the Board on summary affirmance of the hearing officer's initial decision, the Board filed its motion to lift the stay shortly after the close of merits briefing to the SEC, in combination with an opposition to an August 26, 2015 motion by Applicants to "seal[] these [SEC review] proceedings from public view," which raised certain overlapping points. As the Board explained, it did so because of the extraordinarily serious misconduct at issue in this case; the correspondingly great, ongoing risk to investors and public companies from issuer audits by those fundamentally unfit to perform them; Applicants' inability, despite a full opportunity to present their best defense to the SEC, to raise any serious challenge to the violations found and the sanctions ordered by the Board; and the fact that Applicants' merits

briefing and motion highlight the importance of immediate effectiveness of the sanctions to the public interest and investor protection. As movant, the Board, drawing on the full record at the time of its motion, addressed the factors on which the Commission had held that it would base a determination of whether to lift a stay under Sarbanes-Oxley Act Section 105(e).

In opposition, Applicants make a meritless threshold argument (Opp. & Mot. 4-5) that the PCAOB, which imposed the sanctions and is defending them on appeal here, does not have standing to urge their immediate effectiveness. As before in this case, Applicants also hurl baseless accusations that they are being denied "procedural and substantive due process" and "traditional notions of fair play and substantial justice" (*id.* at 1, 8), and avoid delving into the substance of the matter at hand. Should a stay operate if it is plainly unwarranted under the circumstances? To try to cut off that discussion, Applicants interpose their latest process objection. It is based on a mischaracterization of a stay motion—which, under SEC precedent, addresses, in part, whether the party seeking SEC review has a likelihood of success on the merits—as a "sur-reply" "asking for an expedited *opinion*" on whether the party actually succeeds on the merits (*id.* at 2). Their objection collapses with their mischaracterization. There is nothing "improper" (*id.* at 1-4, 8) about making a stay motion under the circumstances of this case, based on the fully developed and focused picture of the arguments on appeal, and there is no justification for immunizing any of the full panoply of Applicants' insubstantial, shifting, flawed, and troubling arguments on appeal from scrutiny in the stay motion, as they seek. Nor, motion aside, does any of this bear on whether the Commission should summarily lift the stay.

Applicants' further claim that it "appears manifestly contrary to the Sarbanes-Oxley Act" for "termination of a stay [to] be performed during an application for review," or that it is "unclear from the rules and the SEC's case precedent" whether that may be done (Opp. & Mot.

5-8), are clearly refuted by the statutory and rule language and SEC precedent. Their cursory contentions about "irreparable harm" to themselves, "no risk of harm to others," and the public interest "not be[ing] served" by lifting the stay (*id.* at 9-12) are unsupported and incorrect. We address all of Applicants' contentions in detail below.

ARGUMENT

I. The PCAOB Has Standing To Seek To Terminate the Stay, and the Commission May, at Any Time, on Its Own Motion, Determine To Lift the Stay.

Applicants' claims that (1) the Board "lacks standing to seek a termination of [the] stay" and (2) it "appears manifestly contrary to the Sarbanes-Oxley Act" for the SEC to be able to lift the stay before it "issues an order affirming the PCAOB's disciplinary sanctions" or that it is "unclear from the rules and the SEC's case precedent" whether the SEC may do so (Opp. & Mot. 4-6, 7-8) are no obstacle to the SEC's ability to determine whether the stay should operate now. Neither argument is correct or would prevent the SEC from lifting the stay on its own accord.

According to Applicants, the Board lacks standing because it is not a "person" under the SEC rule stating who may make a motion to lift the stay. *Id.* at 4-5 (reciting the part of SEC Rule of Practice 401(e) that provides, "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 [SEC Rule of Practice 440] or which the Commission has taken up on its own motion pursuant to [SEC Rule of Practice 441] may make a motion to lift the stay."). To the contrary, the Commission has previously entertained Board motions to lift the stay. *See Davis Accounting Group, P.C.*, Admin. Proc. File No. 3-14370 at 2 (June 14, 2011) (noting that the PCAOB "requests that the Commission lift the stay of the Board's order, which Applicants oppose" and holding that "the request to lift the stay is partially granted"); *S.W. Hatfield, CPA*, SEC Rel. No.

34-69976, 2013 SEC LEXIS 1999, *2 (July 11, 2013) (terminating stay after motion was filed by the PCAOB and noting that the Board filed its motion pursuant to SEC Rule 401(e)).

There is every reason why "person" under Rule 401(e) includes the Board. The broad language of Sarbanes Oxley Act Section 105(e) authorizing the SEC to lift the stay describes a potential movant only in terms of the act of participating in a hearing on the stay, as by written submissions or presentation of oral argument. 15 U.S.C. 7215(e). There is no indication that the use of the word "person" in Rule 401(e) was meant to exclude the PCAOB from making a motion, especially where in other contexts, "person" has generally been broadly construed. *See Clinton v. City of New York City*, 524 U.S. 417, 428 n.13 (1998) ("Although in ordinary usage both 'individual' and 'person' often refer to an individual human being, ... 'person' often has a broader meaning in the law, *see, e.g.,* 1 U.S.C. § 1 ('person' includes "corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals').."). Indeed, securities industry self-regulatory organizations constitute "persons" who may oppose a motion for a stay under Rule of Practice 401(d), 17 C.F.R. 201.401(d). *See, e.g., Gregory Evan Goldstein*, SEC Rel. No. 34-68904, 2013 WL 503416, *3-*4 (Feb. 11, 2013).

Under its statutory mandate, the PCAOB brought this disciplinary proceeding against Applicants for the enforcement of PCAOB rules and standards to protect the interests of investors and further the public interest in the preparation of informative, accurate, and independent audit reports for companies the securities of which are sold to, and held by and for, public investors. *See, e.g.*, Sarbanes-Oxley Act Sections 101(a), 101(c), & 105(c)(4), 15 U.S.C. 7211(a), 7211(c), & 7215(c)(4). The PCAOB found the violations based on all of the facts and circumstances in the record developed in the PCAOB proceeding, determined the sanctions, and is defending the sanctions on review by the Commission. Requesting immediate effectiveness of

PCAOB sanctions on appeal to the SEC when, under the circumstances, the stay should not operate is therefore naturally incident to the PCAOB's enforcement of its rules, professional standards, and the securities laws relating to the preparation and issuance of audit reports and the related obligations and liabilities of accountants. *See Hatfield*, 2013 SEC LEXIS 1999, *3 (considerations of the public interest and protection of investors that inform the appropriateness of the sanctions also inform whether the stay should operate); *see generally, e.g., Schellenbach v. SEC*, 989 F.3d 907, 913 (7th Cir. 1993) ("Securities regulations are designed to protect the general public."); *Allan v. SEC*, 577 F.2d 388, 392 (7th Cir. 1978) ("determining when protection of the investing public requires that a stay of sanctions be denied" calls for administrative body expertise). Realistically, no third party to the SEC review proceeding could be expected to have the outlook, knowledge, and interest the PCAOB would bring to such a motion.

None of Applicants' arguments defeats Board standing. They argue that: (1) "The SEC rules do not define the term 'person.'"; (2) SEC Rule of Practice 101(a)(12) identifies "Board" as an abbreviation for Public Company Accounting Oversight Board; (3) "'Board' is specifically mentioned in Rule 401(e)," so for it to be considered a person "would render the SEC Rules meaningless"; and (4) "allowing the PCAOB to challenge the stay of its own sanctions during SEC review would largely nullify the protections" of the stay, "since known third parties rarely have an interest in the Board's disciplinary action." Opp. & Mot. 4-5. In fact, the absence of a definition of "person" under Rule 401(e) suggests the breadth and lack of technicality of the word, not that it is subject to some unstated, arbitrary exclusion. That Rule 401(e) uses the word "Board" to describe the "action" subject to the stay is no basis for excluding the Board from being a "person" who may challenge the stay. Rule 401(d) uses the term "self-regulatory organization" (SRO) in the same way, but this does not prevent SROs from being "persons" who

may oppose a stay. That the sanctions are the Board's "own" and that no "known third parties" may be likely to invoke the statutory authority to lift the stay, whether the stay is appropriate under the circumstances or not, support, not refute, PCAOB standing. Applicants may take the view that there is some inviolable interest in continuing to participate in issuer audits that the stay should "protect[]" at any cost, that standing analysis should be reverse-engineered to achieve a preconceived result of little or no challenges to stays, and that the SEC should bear the entire burden of addressing stays that may be inappropriate in particular cases by taking them up on its own initiative, but there is no support for that view in the statute, rules, case law, or logic.

In any event, Applicants' objections to the Board's standing do nothing to diminish the Commission's authority to terminate the stay of its own accord. *See* Sarbanes-Oxley Act Section 105(e) (Commission may "summarily" terminate stay); SEC Rule 401(e)(1) (Commission may "on its own motion" determine whether to lift stay) and Rule 401(e)(2) ("The Commission may lift a stay summarily, without notice and opportunity for hearing."); *Gately & Associates, LLC*, SEC Rel. No. 34-63167, 2010 SEC LEXIS 3554, *2 (Oct. 22, 2010) (responding to PCAOB request for clarification as to whether stay was automatically lifted upon issuance of Commission decision and citing Rule 401(e)(1) as authority for lifting the stay on SEC's own motion); *R.E. Bassie & Co.*, SEC Rel. No. 3354, 2012 SEC LEXIS 89, *54 (Jan. 10, 2012) (deciding appeal and ordering that the stay of the Board's sanctions "be, and it hereby is, terminated").

Applicants' further argument that the Commission may not lift a stay under Sarbanes-Oxley Act Section 105(e) before deciding the case on review is plainly incorrect. Section 105(e)(1) places no limitation on when the Commission may order summarily or after notice and opportunity for a hearing that the stay shall not continue to operate, and Section 105(e)(2) specifically directs the Commission to establish an "expedited" procedure for consideration and

determination of the question of "the duration" of a stay "pending review" of Board disciplinary action. 15 U.S.C. 7215(e). SEC Rule 401(e)(1) states that the Commission may, "at any time," on its own motion determine whether to lift the stay, and the Rule places no limitation on when anyone else may make a motion to lift the stay. 17 C.F.R. 201.401(e)(1). In *Davis*, the Commission granted the Board's motion to lift the stay of certain sanctions "pending Commission review of the[] appeal." Admin. Proc. File No. 3-14370 at 4. In doing so, the Commission rejected the argument (*id.* at 3 n.7), rehashed by Applicants here (Opp. & Mot. 5-6), that *Gately* "stands for the proposition that a stay should remain in place until the Commission has issued an opinion," explaining that in *Gately* "the PCAOB did not seek to lift the stay of sanction pending the Commission's consideration of the appeal," so *Gately* "is inapposite."

Thus, Applicants' standing argument and their *Gately* argument are no impediment to the SEC granting the Board's motion to lift the stay or to the SEC acting on its own to lift the stay.

II. The Commission's Four-Factor Test for Deciding a Motion To Lift the Stay Under Sarbanes-Oxley Act Section 105(e) Is Fully Appropriate and Amply Met Here.

Applicants "dispute the applicability of the four factor test" for lifting the stay that was adopted by the Commission in *Davis*, making ineffectual arguments that because "[t]his opinion appears to be unpublished and unavailable on the SEC's website," "its precedential value is dubious at best"; that "[t]his standard is nowhere to be found in the SEC's Rules of Practice or the Sarbanes-Oxley Act"; that it is somehow incorrect to "apply inversely" a standard established in "determining whether to *grant* a motion for stay" to "these proceedings to *terminate* the automatic stay"; and that the test is not "entitled to deference." Opp. & Mot. 5-8. Their further claim that the stay can survive application of the *Davis* test here (*id.* at 8-12) fares no better.

Upon application for SEC review of a sanction ordered by the Board in a disciplinary proceeding, Sarbanes-Oxley Section 105(e) preserves, through an automatic stay of the sanction's effectiveness, the status quo at imposition of the sanction until the Commission has the opportunity to consider and determine whether the status quo should prevail. Essentially, the statute reflects the commonplace fact that "[t]he purpose of a stay is to preserve the status quo ante" (*PalmWorks, Inc.*, SEC Rel. No. 34-43294, 2000 SEC LEXIS 1924, *7 n.8 (Sept. 15, 2000)). Regarding the terms of the Commission's consideration and determination, the statute grants wide latitude to the agency. *See* Sarbanes-Oxley Act Section 3(a), 15 U.S.C. 7202(a) (generally authorizing SEC to "promulgate such rules and regulations, as may be necessary or appropriate in the public interest or for the protection of investors, and in furtherance of this Act"); Section 105(e)(1) (through "unless and until" language in very provision creating stay, making operation of stay entirely dependent upon SEC not ordering its termination and authorizing SEC to lift stay "summarily or after notice and opportunity for hearing"); Section 105(e)(2) (directing SEC to establish "for appropriate cases" an "expedited" procedure for consideration and determination of the question of "the duration" of a stay "pending review" of Board disciplinary action); *see also Allan*, 577 F.2d at 391 ("[a]uthority for the SEC to 'summarily' determine the question of a stay demonstrates the breadth of discretion granted by Congress"). That latitude is reflected in SEC Rule of Practice 401(e), adopted to implement the statutory authority. *See* SEC Rel. No. 34-49412, 2004 WL 503739, *3 (Mar. 12, 2004).

Nothing in the statute (or rule) forecloses the Commission from adopting in this context, in *Davis*, the four-factor test which it has long applied in "evaluating the appropriateness of a stay" (Comment to Rule 401 of SEC's Rules of Practice, SEC Rel. No. 34-35833, 1995 WL 368865, *77 (June 9, 1995)), and with which it has gained extensive experience and expertise in

ruling on stay motions in contexts ranging from sanctions in SRO actions and in its own enforcement actions pending judicial review to rulemakings (*see, e.g., Goldstein*, 2013 WL 503416, *5 (denying stay of FINRA sanctions pending SEC review); *Donald L. Koch*, SEC Rel. No. 34-72443, 2014 WL 2800778, *1 (June 20, 2014) (partial stay pending court review of SEC enforcement matter); *Bd. of Trade of City of Chicago*, SEC Rel. No. 34-18523, 1982 WL 523516, *2 (Mar. 3, 1982) (staying SRO rulemaking)). *See generally City of Arlington v. FCC*, 133 S. Ct. 1863, 1871 (2013); *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001); *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984).[1/]

Indeed, Applicants offer no analysis or suggestion of their own of what the standard is for lifting the stay, simply making a general objection to ever lifting the stay pending SEC review. Opp. & Mot. 5-8. The only case they cite in support of their opposition to *Davis* is *Cuomo v. NRC*, 772 F.2d 972 (D.C. Cir. 1985), which sets out the four-factor test used in federal courts in deciding whether to impose a stay but is silent as to the test's applicability in decisions to lift a stay. Courts have often applied a test identical to the one articulated in *Cuomo* and *Davis* in deciding whether to lift a stay that was already put in place, and in so doing, they have found it appropriate to apply the "traditional standards" for analyzing stays—those articulated in *Cuomo*

[1/] Contrary to Applicants' attempt to dismiss *Davis* as not "entitled to deference" in court (Opp. & Mot. 7), the Commission's reasonable interpretation of the Sarbanes-Oxley Act through promulgation of Rule 401(e) and adoption of the four-factor test in *Davis* is entitled to deference. *See, e.g., Montford v. SEC*, 793 F.3d 76, 81-82 (D.C. Cir. 2015) (affording *Chevron* deference to Commission's interpretation of Exchange Act Section 4E in adjudication and noting that "'[w]ithin traditional agencies...adjudication operates as an appropriate mechanism...for the exercise of delegated lawmaking powers, including lawmaking by interpretation'") (quoting *Martin v. Occupational Safety & Health Rev. Comm'n*, 499 U.S. 144, 152 (1991)); *Kornman v. SEC*, 592 F.3d 173, 181-82 (D.C. Cir. 2010) (affording *Chevron* deference to Commission's application of summary proceedings under SEC Rule of Practice 250 to Advisers Act requirement that the agency provide an "opportunity for hearing").

and *Davis*—to determine whether the "entitlement" to that stay is still deserved under present circumstances without observing any need to construct an inverse standard. *See, e.g., Mohammed v. Reno*, 309 F.3d 95, 100-102 (2d Cir. 2002) (citing *Cuomo* and applying four-factor test in granting motion to lift stay that was put in place pending outcome of habeas petition). The test discussed in *Davis* has been long recognized as flexible and responsive to "the equities and circumstances of the particular case." *Christian Klein & Cogburn, Inc.*, SEC Rel. No. 34-33424, 1994 SEC LEXIS 16, *3 (Jan. 14, 1994). There is no cause to depart from it here.[2/]

Turning to application of the four-factor test to the present case, this is far from an ordinary noncooperation case. The hearing officer found, as summarily affirmed by the Board, that Applicants engaged in a "wide-spread and resource-intensive effort" to—in the words of a Kabani & Co. employee helping to coordinate the task—"cleanup" the firm's Issuer A audit file (all Applicants) and the firm's Issuers B and C audit files (the Applicants other than Khan) by adding, altering, and backdating numerous work papers to "deceive [the] inspectors" about "the deficiencies in the Firm's audit work papers." Index to the Record, Record Document 195. These violations involved extensive improper conduct, were extraordinarily serious, and were

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[2/] Applicants attempt to dismiss *Davis* as lacking "precedential value" because "it appears to be unpublished and unavailable on the SEC's website." Opp. & Mot. 6. *Davis* is a five-page adjudicated order issued by the Commission in adversarial litigation and has been publicly available on the PCAOB's website and was also available to Applicants as an attachment to the Board's stay motion. Commission orders bearing only an administrative proceedings file number are commonly cited by the Commission in deciding stay motions. *See, e.g., Electronic Transaction Clearing Inc.*, SEC Rel. No. 34-73698, 2014 WL 6680112, *1-*2 (Nov. 26, 2014) *Mitchell T. Toland*, SEC Rel. No. 34-71875, 2014 WL 1338145, *2 (Apr. 4, 2014); *Richard L. Sacks*, SEC Rel. No. 34-57028, 2007 WL 4481516, *3 (Dec. 21, 2007); *Whitehall Wellington Investments, Inc.*, SEC Rel. No. 34-43051, 2000 WL 985754, *1 (July 18, 2000). *See also Gregory M. Dearlove, CPA*, SEC Rel. No. 34-57244, 2008 WL 281105, *35 (Jan. 31, 2008) (opinion citing *Philip L. Pascale, CPA*, Admin. Proc. File No. 3-11194 (Nov. 24, 2003)).

engaged in with a highly culpable state of mind, reflecting an unwillingness or inability to comply with fundamental issuer audit requirements, of straightforward application in this case, that are necessary to a proper functioning of the regulatory system. *See, e.g., Mitchell H. Fillet*, SEC Rel. No. 34-75054, 2015 WL 3397780, *15 (Mar. 31, 2014) (finding "backdating" and "providing false documents to FINRA" "exemplifies an ethical breach" and an inability "to comply with regulatory requirements," which is "incompatible with the principles of investor protection") (collecting cases). This is misconduct that puts the public at great risk, depriving it of necessary protections under the Sarbanes-Oxley Act. *See id.; PAZ Sec., Inc.*, SEC Rel. No. 34-57656, 2008 SEC LEXIS 820, *13 (Apr. 11, 2008) (a failure to comply with FINRA information requests "frustrates [FINRA's] ability to detect misconduct, and such inability in turn threatens investors and markets"), *aff'd,* 566 F.3d 1172 (D.C. Cir. 2009). Applicants admittedly continue to audit public companies. On appeal, Applicants advance thinly contrived, shifting, flawed, and troubling arguments, a number of which were already rejected in two levels of PCAOB proceedings and none of which seriously engage the well-reasoned, well-documented findings of violations. As discussed in detail below, under these circumstances, with no likelihood of Applicants' success on the merits and a serious, continuing risk to the public, the SEC should lift the stay of the sanctions that are the subject of the Board's motion.[3/]

[3/] *See, e.g., Associated Sec. Corp. v. SEC*, 283 F.2d 773, 775 (10th Cir. 1960) ("necessity of protection to the public far outweighs any personal detriment"); *Harry W. Hunt*, SEC Rel. No. 34-68755, 2013 WL 325333, *5 (Jan. 29, 2013) (denying stay of SRO sanctions because "the potential harm of allowing [party] to continue practicing in the industry pending his appeal outweighs the potential harm of not staying the bar"); *cf. Bravo Enterprises Ltd.*, SEC Rel. No. 34-75775, 2015 WL 5047983, *2, *13 (Aug. 27, 2015) (finding trading suspension necessary in the public interest and for the protection of investors based on "predictive judgments" and that the potential harm to issuer and its shareholders was outweighed by the "greater harm that could befall prospective investors"; noting that "when Congress directs an agency to consider the

A. Applicants Are Unlikely To Succeed on the Merits.

The first factor under *Davis* is whether there is a strong likelihood that the party seeking SEC review will succeed on the merits. Admin. Proc. File No. 3-14370 at 3. Yet Applicants' only response to the Board's arguments on this point is that "Appellants incorporate by reference the facts and record citations previously noted by the Parties in their previous briefs" and that it is "improper" for the Board to have discussed this point in its motion based on the full state of the parties' briefing in the case because to do so is to "ask[] for an expedited *opinion*" on the merits of Applicants' application for review. Opp. & Mot. 2-4, 8. What the Board is asking for is a ruling on a stay motion, with important implications of its own for the public interest and the protection of investors, based on the full and focused picture of all of Applicants' statements and arguments to date bearing on their positions on the merits. Likelihood of success on the merits is one of the four factors on which the SEC has held it would base a determination to lift the stay under Sarbanes-Oxley Act Section 105(e). And *Davis* also makes clear that "[f]inal resolution" of the case "must await the Commission's determination of the merits of [the] appeal." What is at issue in the stay motion is <u>likelihood</u> of success on the merits, not <u>actual</u> success on the merits.

It is highly pertinent to Applicants' likelihood of success on the merits, not improper, to point out that, far from being "strong," their defenses are not even "substantial." *See, e.g., William Timpinaro*, SEC Rel. No. 34-29927, 1991 SEC LEXIS 2544, *7 (Nov. 12, 1991) (citing *Washington Metropolitan Area Transit Comm. v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1985)). It is thus manifestly appropriate for the Board to discuss that (Stay Mot. 6-12, 14-15):

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public interest, the agency calls upon its expertise, experience, and knowledge"); *mPhase Technologies, Inc.*, SEC Rel. No. 34-74187, 2015 WL 412910, *11 (Feb. 2, 2015) (finding SRO's denial of services to be "a prophylactic measure designed to prevent potential fraud or abuse from occurring").

- Applicants' primary factual defense—the only one applicable to all three issuer audit files in question here—that Saeed was not reviewing final files for deficiencies, but instead was engaging in an internal review exercise using draft files is contradicted by record evidence, far-fetched, and defies their attempt to salvage it from scrutiny.
- Applicants' other main factual defense—which could only apply to the Issuer A audit file and could only address certain of its indicia of alteration—that the difference in metadata had to do with how "unreadable" original audit "files" were produced in some other form to the PCAOB—was contradicted by record evidence, was offered late in litigation, obfuscated the time period and "files" to which it referred (inspection or investigation; Issuer A, B, or C), and was supported only by Issuer-A-related documents of unidentified origin that were abandoned when discredited.
- Additional factual defenses, applicable only to the Issuer A file in any event, were essentially abandoned mid-appeal with no attempt to salvage them from scrutiny, continuing a marked and consistent pattern throughout the litigation.
- Applicants are unable to counter well-reasoned, corroborated credibility determinations and rely heavily on a lie detector test without making any serious challenge to the Board ruling excluding it as untimely and immaterial.
- Applicants complain, based on a misreading of one sentence in the initial decision rejecting one of their ill-founded attacks on the evidence, that the hearing officer "misplaced the burden of proof."
- Applicants' complaint that bias was introduced into the adjudication of this case by a Board settlement with Saeed unraveled on appeal into an illogical, tenuous claim.

- Applicants complain that they were not allowed to switch testifying experts weeks before the hearing, as a change of strategy by new counsel, when they had known for more than six months that an expert would be called against them, numerous accommodations and extensions were made, and, despite having a consulting expert, they have not been able to indicate how an expert would have helped their defense.
- Applicants claim for the first time on appeal that they were denied their rights to a jury trial and a speedy trial but are unable to explain why these claims were not waived, what the basis for them is, and how they apply to the facts of this case.
- Applicants have no answer for why their claim for the first time on appeal that the PCAOB had and breached a duty to create unspecified defenses out of their own files is not waived, unsupported by any authority, and entirely, impermissibly speculative.
- Applicants challenge the sanctions based on these weak defenses to liability, contentions that are contrary to precedent, and attempts to minimize the gravity of the misconduct that only show they do not appreciate their duties as issuer auditors.

Therefore, Applicants have essentially defaulted from engaging the Board's many, valid points about how unlikely they are to succeed on the merits. At a minimum, this *Davis* factor weighs heavily against a stay. Their assertion that "[w]ere 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" (Opp. & Mot. 8) is wholly meritless. It would be "the SEC" that would be lifting the stay, not the Board. *See, e.g., Schellenbach*, 989 F.2d at 912-13. And the SEC would be making its own determination that those "previous arguments" were insufficiently strong to warrant a stay. Applicants are thus trying to leverage or

bootstrap a series of insubstantial arguments with another insubstantial argument. In sum, it is not "improper" conduct by anyone else but the inherent lack of merit to Applicants' own defenses that would contribute to a determination to lift the stay. *See Allan*, 577 F.2d at 391-92.

B. Applicants Will Not Suffer Irreparable Injury.

The Board's motion to lift the stay cited abundant authority that, contrary to Applicants' contentions (Opp. & Mot. 9-11), financial detriment caused by inability to engage in a particular line of business does not rise to the level of irreparable injury warranting a stay. *See* Stay Mot. 13-14; *see also, e.g., Allan*, 577 F.2d at 391; *The Dratel Group, Inc.*, SEC Rel. No. 34-72293, 2014 WL 2448896, *5 (June 2, 2014) (in denying stay of bar from business that provided only source of income, finding no irreparable harm). Brokers, dealers, and their personnel are regularly deregistered or barred pending review of those sanctions by the SEC. *See, e.g., John Edward Mullins*, SEC Rel. No. 34-66373, 2012 SEC LEXIS 464, *86 n.98 (Feb. 10, 2012). Congress was well aware that it had authorized the Board to revoke issuer auditor's registrations and impose associational bars (Sarbanes-Oxley Act Section 105(c)(4)(A) & (B), 15 U.S.C. 7215(c)(4)(A) & (B)) when, in Section 105(e) of the Act, it provided that the stay of Board sanctions operated only "unless and until" the SEC ordered otherwise and granted the SEC broad authority to do so "pending review" of "any" disciplinary action of the Board.

The proposition that "'licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment'" (Opp. & Mot. 9) goes to process, a separate issue discussed above, not to injury under a valid process by which action may be taken. *See generally, e.g., Allan*, 577 F.2d at 392. 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 (2d Cir. 1994); *Miller v. SEC*, 998 F.2d 62, 64 (2d Cir. 1993). The SEC denied a stay, despite a claim of "reputational harm," in *William Scholander*, SEC Rel. No. 34-74437, 2015 WL 904234, *7 (Mar. 4, 2015), for example.

Although Applicants assert, without any specifics or support, that the "bulk" of their "present earnings" would be "impaired" if the stay were lifted, this means that their "public auditing practice" is not their only business. *See* Opp. & Mot. 9-10. As long as there is a continuing line of business subject to the sanctions and any available avenue of appeal, respondents can always broadly and generically argue, as Applicants do (*id.* at 10), that "a final determination of the sanctions has not been made," that they might be "ultimately exonerated," and that, in the absence of a stay, they will lose clients, business, and business good will and will have a "tarnished" "reputation[] in the industry" and "in the community" in the interim or "forever." But that does not establish irreparable harm from immediate effectiveness of sanctions. Nor does it change this fact for Applicants simply to declare such ordinary claimed financial detriment to be "of paramount importance" or to affix the self-styled label "de facto sanction" to it (*id.* at 10-11). The second *Davis* factor thus works against, not for, Applicants.

C. The Stay Is Substantially Harming, and Does Not Serve, the Public Interest.

Undermining the foundational issuer audit requirements of cooperation with PCAOB inspections and compliance with audit documentation standards, thereby delaying discovery of that conduct and thwarting the detection of defects in the audits, through deception, by an elaborate, secret effort to alter and backdate audit work papers, carried out with a highly culpable state of mind, combined with no recognition of the wrongful nature of the conduct, no assurance against further such conduct, and ample opportunity to repeat it, and compounded by markedly insubstantial arguments and troubling statements even in most recent defense of the conduct,

poses an extreme risk of harm to the public interest and the protection of investors. The Board's motion to lift the stay, cross-referencing its merits brief, provided excruciating detail about the seriousness of the subject audit requirements and the egregiousness of the conduct at issue. *E.g.*, Stay Motion 2, 5, 14-15. The motion also pointed out that Applicants had repeatedly, completely failed to recognize that altered, unreliable work papers frustrate the ability to determine whether or not the audit work complied with the rules and standards and that they had gone so far as to state most recently that nothing more is at stake in this case than an inconsequential paperwork technicality, that "there is no dispute that the audits that were performed were accurate," and that their conduct was an "act of grace," "good deed," and "extra effort" that should be "applaud[ed]." *Id.* at 5, 12, 14-15. Such an extreme failure to appreciate fundamental responsibilities of an issuer auditor, only magnified in every subsequent filing in this appeal, combined with repeated confirmation that Applicants continue to audit issuers, highlighted the importance of effectiveness of the sanctions to the public interest. *Id.* at 1, 5, 12, 14-15.

Thus, nothing could be further from the truth than Applicants' claims that the Board's motion did not "demonstrate any public harm beyond mere generalities"; "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"; and "does not address" the timing of the motion (Opp. & Mot. 11-12). They make no claim that any third party would be injured by lifting the stay, nor could such harm be expected to outweigh the injury to the public interest here. *See* Davis, Admin. Proc. File No. 3-14370, at 4 n.10 (citing cases). The motion cited extensive authority for the strong public interest in the immediate effectiveness of the revocation of registration, the associational bars, and the censures ordered by the Board in this case. *See* Stay Motion 15-16; *see also Allan*, 577

F.2d at 392; *cf. Hunter*, 879 F. Supp. at 501-02 ("substantial public interest" in permitting exercise of statutory duties). Although Applicants object to what they call the "late date" of the motion, even as it afforded them every opportunity first to present their best, fullest defense to the SEC (*see* Stay Motion 1, 12-13), they do not explain why a motion to lift a stay is not an option whenever, as now, there is a "clear and present danger to the public" (Opp. & Mot. 2).[4/]

Additionally, the Board's motion explained that lifting the stay would enhance the important benefits to the public of the SEC's website disclosure of Commission orders and party applications, notices, motions, and briefs in SEC review proceedings in Board cases by allowing the Board to report the sanctions to the public. Stay Motion 15. Specifically, as a result of such reporting, investors and public companies, who have relied or might rely on Applicants for issuer audits and thus have a strong interest in considering the information about the case, would have additional access to it (and access to the Board's decision) on the PCAOB's website. In the same way, investors, other auditors, audit committees, lawmakers, and the media would, through an additional source, 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 it determined to be appropriate under the circumstances, and how its enforcement program performed.

In opposition, Applicants argue that there are no such benefits because of their blanket, generic "request[] that all briefs and orders relating to [the] application for review be removed from the SEC's public website" and further argue, in that regard, that "the public interest would truly be served by requiring" that "rules contemplated by Congress in enacting the Sarbanes

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[4/] SEC Rule 401(e) includes no deadline on stay motions; nor do Applicants make any valid claim of prejudice from the timing of the Board's motion. *Cf. Moen v. Rexnord, Inc.*, 659 F. Supp. 988, 989 (D. Minn. 1987); *Gautreaux v. Landrieu*, 523 F. Supp. 684, 689 (E.D. Ill. 1981); *Moyle v. Liberty Mut. Retirement Ben. Plan*, 2011 WL 4102221, *2 (S.D. Cal. Sept. 14, 2011).

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." Opp. & Mot. 12. But, as the Board explained in opposition, Applicants' motion for a protective order misconstrued the authority cited in support of it, overlooked a squarely applicable SEC precedent that foreclosed its primary position, and relied for its alternative position on seriously flawed arguments. There is thus no valid basis for Applicants' claim that the SEC, in disclosing the documents in this review proceeding that it has posted on its website, has failed to "strictly follow[]" any "rules contemplated by Congress" or to "act[] within the scope of [its] delegated authorit[y]," and so the benefits of reporting Board sanctions do exist, as the Board argues. Ordering that the stay shall not continue to operate is squarely within the scope of the Commission's delegated authority, as discussed above. To the extent Applicants "are concerned about preserving the confidentiality of certain 'documents and information' in connection with this proceeding, they may file a motion for a protective order," if they can, that actually complies with SEC Rule of Practice 322, 17 C.F.R. 201.322. *See Davis*, Admin. Proc. File No. 3-14370, at 4 n.9.

The stay is therefore substantially harming, and does not serve, the public interest, which third and fourth *Davis* factors strongly weigh in favor of terminating the stay as well.

III. Applicants' Motion To Strike Has No Merit and Should Be Denied.

There is no valid justification for Applicants' attempt to avoid engaging the merits of the Board's stay motion by moving to strike what they call "new arguments" in the Board's motion (*see* Opp. & Mot. 4, 8, 13). Generally, "motions to strike are viewed with disfavor" because they "are often used as delaying tactics and because of the general policy favoring resolution of cases on the merits." *Lexington Ins. Co. v. Energetic Lath & Plaster, Inc.*, 2015 U.S. Dist. LEXIS 123123, *28 (E.D. Cal. Sept. 14, 2015). SEC Rules of Practice mention striking a filing under

only two specific circumstances: where the filer neglected to sign the document (Rule 153(b)(2)), or where the filing contains "scandalous or impertinent matter" (Rule 152(f)), the former being inapplicable and the latter being so rarely found as to be nearly absent in SEC decisions. *See Michael Lubin*, SEC Rel. No. 34-42904, 2000 SEC LEXIS 1174, *4 n.4 (June 7, 2000) (denying request to strike motion to compel production of evidence and noting it is an "extraordinary" remedy). As discussed above, there was nothing "improper" about the Board's motion. Applicants' motion to strike, on the other hand, lacks any valid basis and should be denied.

CONCLUSION

For the reasons set forth by the Board in support of its motion to lift the stay and in opposition to Applicants' motion to strike, the Commission should order that the stay shall not continue to operate on the revocation of Kabani & Company's registration, on the associational bars against Kabani, Deutchman, and Khan, and on the censure of each Applicant, and the Commission should not strike any portion of the Board's motion papers, all of which are directly pertinent to the matters at issue in the motion.

Dated: September 22, 2015

Respectfully submitted,

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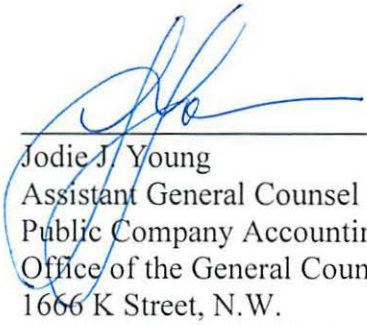
CERTIFICATION OF COMPLIANCE WITH RULE 154(c)

I, Jodie J. Young, certify that the PCAOB's foregoing Reply in Support of Motion To Terminate Stay and Opposition to Motion to Strike complies with the word count limitations set forth in Rule 154(c) of the Commission's Rules of Practice, 17 C.F.R. 201.154(c), and that the foregoing contains 6,827 words, exclusive of pages containing the Table of Contents and Table of Authorities, as counted by the Word Count feature of our Microsoft Word word-processing program used to prepare the document.



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CERTIFICATE OF SERVICE

I hereby certify that on September 22, 2015, I caused to be sent to John R. Armstrong and Matthew S. Henderson via Federal Express a copy of the PCAOB's foregoing Reply in Support of Motion To Terminate Stay and Opposition to Motion to Strike (the original and three copies of which were filed today via hand delivery with the Commission's Office of the Secretary) addressed as follows:

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Matthew S. Henderson
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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.

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