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In the Matter of Application of :

Kabani & Company, Inc., Hamid Kabani, CPA, Michael :
Deutchman, CPA, and Karim Khan Muhammad, CPA :

Application for
Review

For Review of Action Taken by :

PCAOB
-----:

**KABANI & COMPANY, INC., HAMID KABANI, CPA, MICHAEL
DEUTCHMAN, CPA, AND KARIM KHAN MUHAMMAD, CPA'S REPLY
BRIEF IN SUPPORT OF THEIR APPLICATION FOR REVIEW**

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1. Introduction

The simple fact here is that the Kabani Firm performed its subject audit work consisted with the standards of the Public Company Accounting Oversight Board (“PCAOB”). That should have been the end of the PCAOB’s investigation once it made that determination, and certainly after it determined that the originally and contemporaneously kept audit files had become corrupted through no fault of the Kabani Firm.

In an effort to assist the PCAOB of its review taking place *years after the subject work was done*, the Kabani firm tried to reconstruct its files since its original files had been become corrupted and, according to the PCAOB, unopenable.

Instead of applauding this extra effort, the PCAOB changed the focus of its investigation from whether the Kabani firm adequately performed its audit to the assumption that the Kabani firm intended to deceive the PCAOB. According to the PCAOB disciplinary order that Appellants now appeal, the PCAOB’s primary basis for imposing such severe sanctions as a lifetime bar to Hamid Kabani and his company, as well as substantial monetary sanctions and bar orders to all involved

was the difference in the computer metadata from the reconstructed files and the computer data found on ex-Kabani & Co. employee Saeed's laptop, that was provided to the PCAOB on a disk. Surprisingly, the PCAOB never inspected Saeed's laptop. The PCAOB's computer expert did not try to forensically save the originally and contemporaneously kept Kabani audit files, but merely compared the metadata from the reconstructed files and Saeed's file, and determined that the reconstructed files metadata was "newer," and so opined that the "only" reason he could think of why the metadata in the reconstructed files would be newer would be if Appellants were intentionally trying to deceive the PCAOB.

Recognizing the inherent weakness in the foundation of the PCAOB's computer's expert's report that its hearing officer relied on, the PCAOB now instead cites various inconsistencies in the evidence as the basis for justifying the PCAOB's hearing officer's sanctions, suggesting that inconsistencies regarding questions about an audit conducted years ago is the functional equivalent of the specific intent necessary to deceive the PCAOB to warrant the severest sanctions, such as Mr. Kabani's *lifetime bar*.

Kabani and the other Appellants appeal however because they expect the Government to do no less than the U.S. Constitution *requires* the Government to do, namely, to hold hearings and impose sanctions consistent with due process of law—something the Government failed to do on this record. As set out below, aside from changing the grounds upon which the original sanction order was based as the PCAOB conveniently did in its Respondent’s Opening Brief, the record below shows that Kabani and Company and its members and employees did not get a fair and impartial hearing, which due process of law requires.

Here, somewhat like Kafka’s *The Trial*, the Government’s initial inspection began in 2008, which investigation led to an administrative proceeding that has endured for the better part of *5 years* during which time Appellants *and* the PCAOB have had different attorneys substitute in as counsel.

At no time did any of the Appellants waive the right to a speedy trial, which is not only guaranteed under the U.S. Constitution, but also expressly guaranteed under PCAOB Rule 5400. This inquiry has been an exhaustive process that began with numerous Accounting Board demands (“ABDs”) that required Appellants produce millions of work

paper documents, and led to an administrative record totaling more than 30,000 pages. Review and commentary of these documents required countless hours of preliminary testimony, 6 days of hearing testimony, as well as expert witness testimony and voluminous expert reports. Given the time and effort that was dedicated to this investigation, one might think that Appellants were believed to have perpetrated a fraud upon investors or conspired with others to do so. Surprisingly, that is not the case.

Instead, the violations that are the subject of this review allege that Appellants created, altered, and back-dated work papers, as well as failed to cooperate with a PCAOB investigation under Rule 4006.

After 5 years of investigation, the PCAOB is forced to admit that its case has uncovered no direct evidence to support these claims. Indeed, the Kabani defendants do not dispute that because its originally stored electronic files were corrupted, they had to recreate their audit work to show the PCAOB what they had done *well after the audits were done*. The PCAOB however claims that this admission is tantamount to an admission of Appellants' specific intent to defraud the PCAOB—ignoring that Kabani's original files were corrupted and could not be

opened, so that Kabani had to re-create its audit work from back up files and other documents—which, not surprisingly, had different metadata from the files ex-Kabani employee Saeed had on his laptop. Truly, no good deed goes unpunished.

For its part, the PCAOB's Opposition attempts to ameliorate this shortfall with selected documents and testimony offering an amalgam of tortuous explanations why Appellants should have been found to have acted with the *specific intent to defraud* the PCAOB. But while circumstantial evidence is typically sufficient to prove conforming conduct, the evidence from which it is based must be scrutinized like any other piece of evidence in order to verify the evidence's authenticity and reliability.

During the administrative hearing, the PCAOB relied upon the supposition that the files and work papers in Raheen Saeed's possession were the final work papers—a fact that was not established during the hearing and which Saeed could not verify himself. Consequently, the PCAOB is relying on documents from Saeed that were not proven to be the final work papers, and, as such, comparing those documents to Applicants' version of the work papers is inherently flawed.

Additionally, Appellants could not produce their original, final work papers since the file they initially provided the PCAOB was corrupt. Thus, Appellants admittedly produced replacement files, which the PCAOB argued contains backdated files and manipulated work papers. The PCAOB refuses to acknowledge that Appellants produced a “replacement” file despite evidence from its IT that these were not the originals. In hindsight, Appellants would have been better off to have provided *less* cooperation by producing only the corrupted, unopenable files. The onus would then have been on the PCAOB to forensically salvage those files to compare with ex-Kabani employee Saeed’s laptop, which likely would have resulted in the PCAOB having no evidence upon which to make any claim at all against Kabani & Company or its employees. The disconnect likely resulted from the fact that the PCAOB used several different investigators and hearing officers over the ridiculously long time that it investigated and persecuted Kabani & Company and its employees.

2. The Sanctions Are Improper and Contrary to the Purpose of the PCAOB

The Sarbanes Oxley Act of 2002 (the “Act”) established the PCAOB. The Act provides that as part of its duties, the PCAOB is to perform such duties or functions that are necessary or appropriate to promote high professional standards among, and improve the quality of audit services offered by, registered public accounting firms and other associated persons. 15 U.S.C., § 7211(c)(5). Additionally, the Act authorized the PCAOB to establish rules and procedures for initiating disciplinary investigations and sanctions if warranted. 15 U.S.C., § 7215.

However, this newly created authority was not absolute. The Act also provides the SEC with oversight and enforcement authority over the Board to ensure that the Board’s actions are justified and consistent with the principles of the Act. 15 U.S.C., § 7217.

To that end, “The Commission may enhance, modify, cancel, reduce or require the remission of a sanction imposed by the Board upon a registered public accounting firm or associated person thereof, if the Commission, having due regard for the public interest and the

protection of investors, finds, after a proceeding in accordance with this subsection, that the sanction—

(A) is not necessary or appropriate in furtherance of this Act or the securities laws; or

(B) is excessive, oppressive, inadequate, or otherwise not appropriate to the finding or the basis on which the sanction was imposed.”

15 U.S.C., § 7217(c)(3).

Of particular significance here, the Act also provides that the Board may not issue a temporary or permanent suspension or bar *unless* the Board finds that a violation was the product of intentional or knowing conduct, including reckless conduct. 15 U.S.C., 7215(c)(5)(A). In other words, establishing an actor’s mental state, i.e. scienter, is a prerequisite to issuing sanctions that affects one’s right to practice before the Board.

Scienter is defined as: “A degree of knowledge that makes a person legally responsible for the consequences of his or her act or omission; the fact of an act’s having been done knowingly, esp. as a ground for civil damages or criminal punishment. SCIENTER, Black's

Law Dictionary (10th ed. 2014). That is, there has to be convincing evidence that someone *knowingly* and *intentionally* deceived or tried to deceive the PCAOB—speculative, conjectural, or equivocal evidence fail to meet this high burden to impose criminal or quasi-criminal sanctions. See *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 323-24, 127 S. Ct. 2499, 2510, 168 L. Ed. 2d 179 (2007) [holding that facts supporting scienter must compellingly support inference of fraud].

Interestingly, the PCAOB argues that violation of PCAOB Rule 4006 does not require that Appellants acted with a particular state of mind. Opp., at p. 39. Were that true, however, then the sanctions enumerated under Section 105 of the Act would unconstitutionally violate both the Due Process Clauses of the 5th and 14th Amendments and the 8th Amendment's Excessive Fines Clause since the Statute that authorizes the imposition of sanctions expressly requires proof Appellants exhibited a particular mental state to justify a temporary or permanent bar. See 15 U.S.C., § 7215(c)(5)(A); see *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 476, 112 S.Ct. 2589, 120 L.Ed.2d 379 (1992); see also *Brown v. Gardner*, 513 U.S. 115, 122, 115 S.Ct. 552, 130 L.Ed.2d 462 (1994) (“A regulation’s age is no antidote to clear

inconsistency with a statute....”)

In sum, while generally a court gives deference to an agency’s interpretation of a statute it is tasked to enforce, that agency’s interpretation is to be disregarded if it conflicts with the express terms of the statute its tasked with enforcing.

Furthermore, the PCAOB takes issue with Applicants’ case law and their references to scienter in arguing that they do not apply with any rigor to the definition of reckless conduct, which the PCAOB argues does not include the fraud-based elements of intent. *Opp.*, at pp. 39-40. That is, the PCAOB disputes that the standard of “deliberate recklessness” that is typically found in the securities fraud context does not apply to issuing discipline to auditors. *Id.* Assuming for sake of argument only this was correct (it is not), the argument collapses upon itself since the Hearing Officer expressly proclaimed that Appellants were guilty of *intentional* misconduct, and stated that he believed Appellants’ conduct was deceptive and involved “a high degree of scienter.” *Ex. 195*, at p. 79. The only cited basis for this finding was the difference in metadata on documents Appellants admitted that they had to re-create, i.e. restore without any modification, so that the PCAOB

could review its earlier audit work since the original files were corrupted. Thus, the PCAOB arguments concerning reckless conduct are mere surplusage and should be disregarded.

Although the parties dispute the allegation that Appellants modified work papers in violation of PCAOB rules—especially since the PCAOB never reviewed and admittedly could not review the original Kabani audit files, there is no dispute that the audits that were performed were accurate. That is, no facts have been raised by the PCAOB that the issuers involved in this review committed fraud, misrepresented financial performance, or that the public was harmed by the alleged violations. Nevertheless, the PCAOB believes a lifetime bar for Kabani and the firm, and temporary suspensions as to Deutchman and Khan are warranted. This reasoning lacks support in the citations submitted by the PCAOB. Nor does prior precedent or common sense support such Draconian sanctions.

If sanctions were warranted (they are not) because Kabani's original files were corrupted without having a sufficient system in place to have identical backup files, the Hearing Officer's sanctions are far too heavy-handed in light of the allegations made. Especially given the lack

of direct evidence supporting the fraud charges, and equivocality of the indirect evidence to prove the charges—namely, Kabani’s efforts to provide all the documentation it could re-create once it determined that its original audit files were corrupted.

The evidentiary problems apparent from the record as well as the corrupted audit file, and the lack of precedent for issuing a lifetime/temporary suspension for similar conduct show that the present sanctions are too much. For these reasons, Appellants request, at a minimum, the sanctions should be lessened if not vacated consistent with the Act and PCAOB Rule 5300. Such lesser and arguably appropriate sanctions would include and require proof of additional education and training in the maintenance and storage of original audit files and proper procedures for assisting the PCAOB with its after-the-fact investigations. Such sanctions would be sufficient and consistent with the fundamental principle of the Act to improve the quality of the audit profession.

3. Saeed's Review of Non-Final Work Papers Effectively Ends the PCAOB's Liability Theories

In support of its claim that Saeed reviewed final work papers, the PCAOB does not provide any direct evidence that the work papers were non-final, e.g. testimony from Saeed, an email that the work papers were final, or any other type of corroborating evidence. Instead, the PCAOB argues that Appellants failed to provide evidence that the work papers were non-final, and so the absence of such evidence is enough for one to *infer* that Saeed must have been reviewing final work papers, simply because the PCAOB contends that it has not been provided a sufficient explanation for why Saeed was reviewing non-final work papers—especially since the final work papers were all stored electronically on files that had become corrupted and unopenable—facts no one disputes.

Nevertheless, Kabani testified at the hearing that there were *several* purposes for Saeed performing an internal inspection that did not necessarily require review of final work papers. In particular, the Firm had been subject to a PCAOB inspection in 2006 and was complying with the quality control improvements recommended in

response to that inspection. Ex. 165, at p. 1650. This quality control exercise did not require review of final work papers provided that the review was able to identify weaknesses to the Firm's quality control and would improve staff training. *Id.* at 1651.

In opposition, the PCAOB points to several pieces of evidence that fail to support a rational basis that Saeed was reviewing final work papers. Moreover, the PCAOB's arguments fail to demonstrate any chain of custody that would adequately support an inference that Kabani, or some other employee of Kabani, provided Saeed with final work papers. Even the emails produced by Saeed show that the files Saeed reviewed were not final. The PCAOB also suggests that the fact that the final work papers had not been transferred to Engagement Manager, the Firm's audit and engagement management software, somehow establishes that Saeed was provided final work papers—a conclusion that is not borne out of the evidence. *Opp.*, at p. 20. Rather, the PCAOB has by its own *ipse dixit* shifted the burdens of proof and persuasion from itself and imposed the burden on Appellants that they are guilty until they can prove their innocence otherwise. This not only fundamentally violates Appellants federal constitutional due process

rights, it also violates the PCAOB's own rules regarding its having the burden of proof and persuasion as to all its claims against the auditors it regulates. See PCAOB Rule 5204(a).

Additionally, the PCAOB's attempts to piece together isolated words from Applicants' investigative testimony and hearing testimony purportedly to contradict and impeach Applicants' credibility and prove that Saeed was provided with the final audit work papers for review. Again, this is not supported by the evidence and is speculative in that there is no clear indication that Saeed was provided final work papers. The PCAOB's theory also fails in that Saeed's quality control exercise included issuers that were not a part of the PCAOB investigation. Ex. 26, Ex. C attached thereto. Thus, it would be a complete waste of time for Saeed to review issuers that were not a part of the PCAOB review if the intent was to modify and alter work papers before the inspection, especially given the volume of work at the Kabani Firm during that time.

Furthermore, the PCAOB misrepresents Kabani's investigation testimony at Ex. KR-102 at 7, which fails to clarify what files were provided from the N drive (the *backup* drive), the amount of files that

were sent, and whether those files involve the issuers that were under PCAOB review.

4. The PCAOB Acknowledges That Appellants Produced a Replacement File of Their Final Audit Papers That Were Performed Three Years Earlier Once It Was Found That the Original Filed Were Corrupted and Unopenable

PCAOB Rule 4006 states that “Every registered public accounting firm, and every associated person of a registered public accounting firm, shall cooperate with the Board in the performance of any Board inspection. Cooperation shall include, but is not limited to, cooperating and complying with any request, made in furtherance of the Board’s authority and responsibilities under the Act, to –

(a) provide access to, and the ability to copy, any record in the possession, custody, or control of such firm or person, and

(b) provide information by oral interviews, written responses, or otherwise.”

Appellants complied with PCAOB Rule 4006 in that they provided the PCAOB with access to all of their files and provided copies of audit files upon request. In fact, there is no contention that Appellants failed

to produce any documents for inspection or failed to provide oral testimony in response to the Board's investigation.

Although not obligated to do so, Appellants provided a replacement electronic file to the PCAOB reflecting the work papers to the Issuer A audit, which admittedly were not the original or final audit files but files containing information regarding the same audit that were not "locked down" to prevent changes to their metadata, such as when the files were accessed.

The PCAOB *acknowledged* that the original file produced was *corrupt* and *unopenable* so the PCAOB requested Appellants to provide it copies or files it could access to conduct an audit review.

Nevertheless, the PCAOB argues that the metadata to the replacement file shows dates that do not comport with what should have been the original creation and modification dates of the original and final work papers, Ex. 195, at pp. 29-31. But the change in the metadata *is* consistent with what would be found in a replacement file if Appellants converted their documents in an effort to replace other files to ensure that the PCAOB could review *something* regarding the subject audit. The PCAOB and its computer expert viewed this act of grace as an act

of sinister motive, without just cause.

The PCAOB takes issue that Appellants did not more “clearly” advise the PCAOB that it was being given replacement files—even though the Issuer A audit file was, in fact, a “replacement” file even though it was clearly implied given that neither the PCAOB nor Appellants could access the initial audit file that was produced, which was understood by everyone at that time.

Appellants provided the replacement file in good faith as it was their intent to assist the Board in any way possible. But had Appellants known that the PCAOB would use the metadata of a replacement file as evidence of back dating and altering work papers, Appellants would have never gone beyond what was required of them under Rule 4006, namely, producing their original audit files in their natural, corrupted state.

Importantly, the PCAOB sanction sets a dangerous precedent that affects other auditors in complying with PCAOB investigations, which investigations appear to be rooted in justifying the destruction of audit firms and professional reputations of auditors rather than improving audit performance and the profession.

PCAOB investigations typically encompass several years of review before disciplinary charges are raised, in which time firms may change audit software, may transfer files to other servers, or, as was seen in this case, files may become corrupted and difficult to access. Thus, should these sanctions not be overturned, auditors will be forewarned of the dangers of assisting the PCAOB in their investigation as the PCAOB apparently views any help as specific evidence of the auditor's specific intent to defraud or interfere with the PCAOB's investigation.

5. The PCAOB Gave Unreasonable Deference to Saeed's Speculative Testimony to Reach Its Pre-Hearing Decision to Convict Appellants

The PCAOB defers to Saeed's testimony even after recognizing the inherent problems associated with his credibility. Namely, the PCAOB admittedly was unmoved by the fact that Saeed is an admitted liar who held a grudge against Kabani and who settled with the PCAOB on the condition that he would provide testimony against Applicants. Ex. 195, at pp. 54-55. That is, the PCAOB bought his testimony in exchange for leniency, and then fully credited anything he had to say against his former employer who he admittedly did not like or get along with and

had left *before* the PCAOB started its investigation.

The Hearing Officer recognized how problematic it was to rely on Saeed's testimony, but ignored those complications for convenience since Saeed's testimony was critical to the PCAOB's case.

Indeed, without Saeed's testimony, regardless of whatever weight was applied thereto, the PCAOB would not have been able to support its theory that Saeed was reviewing final work papers. While Appellants maintain that Saeed's testimony did not establish that he was reviewing final work papers, the Hearing Officer relied on Saeed's testimony that Saeed believed he was reviewing the final versions even though he admitted that he had no direct knowledge that he was in fact reviewing the final versions. Ex. 195, at p. 55. That is, the Hearing Officer relied on Saeed's speculation over Appellants' objection, despite that such evidence is neither admissible, credible, or reliable.

With respect to Kabani's polygraph test, this test ultimately proved that Appellants did not alter, modify, or add to the final work papers, nor did Appellants advise staff that it was okay to alter work papers. Ex. 203, Ex. A attached thereto. The PCAOB (not the Hearing Officer) denied Applicants' request to supplement the record with this

test since considering the results would cause a shift in weight to Applicants' credibility. Moreover, the PCAOB's argument that a respondent cannot wait until an unfavorable decision to introduce material evidence misses the point as Kabani had already presented testimony at the hearing defending his innocence, which the Hearing Officer apparently did not believe. Kabani's introduction of the polygraph evidence was intended to further support evidence *already* admitted to support its veracity.

6. The PCAOB Cannot Overcome That the Hearing Officer Misplaced the Burdens of Proof and Persuasion and so Attempt to Rewrite the Amended Initial Decision Being Reviewed

The PCAOB argues that Appellants have misread or mischaracterized the Amended Initial Decision with respect to Appellants contention that the Hearing Officer misplaced the burden of proof. Opp., at pp. 28-29. However, the argument is not based upon an inference or one-sided opinion, but is referenced verbatim in the opinion itself which states:

“Central to the Kabani Respondents’ defense is their claim that Saeed reviewed non-final audit work papers in connection with an internal quality control inspection. **They [the Kabani Respondents] never proved, however, either that he was reviewing the documents solely for quality control purposes or that he was reviewing non-final versions of the audit work papers.**”

In sum, the PCAOB hearing *shifted* the burden of proof and persuasion from the PCAOB and put the burden on Appellants to prove their innocence in violation of Appellants constitutional due process rights and in violation of PCAOB Rule 5204(a), which imposes a presumption of *innocence* in favor of the accused until the PCAOB can prove its case relying on admissible, credible, reliable evidence.

In response, the PCAOB declares that the “totality of the decision” supports the Hearing Officer’s ruling—again citing to Saeed’s testimony and documents that he authenticated, as well as the “weight of the evidence.” But this argument does not make up for the procedural shortcomings clearly stated in the Hearing Officer’s decision. In fact, it is emblematic of the entire process, which, from the beginning was a mission to convict Appellants based upon innuendo and conjecture.

7. The PCAOB Has Failed to Overcome Applicants'

Procedural Arguments

In addition to the evidentiary problems that encompassed the hearing below, there were significant due process violations that ensured Appellants would not be afforded a fair and impartial hearing.

A. The PCAOB's bias was established once they *published* the Saeed settlement *before* Appellants administrative hearing for all the world to see

The PCAOB's argument as to this issue is unavailing. To clarify, the prejudice that was committed against Appellants was not that the PCAOB settled with Saeed, but rather that the PCAOB *publicly published* the settlement just days before Applicants' hearing. There was no pressing need to *publish* the settlement *before* the hearing relating to the same audit, and the PCAOB has not offered any explanation to suggest otherwise.

This violated Appellants constitutionally protected due process rights and violated the PCAOB's own rules in that PCAOB Rule 5400 regarding "Hearings," expressly provides that, "Hearings for the purpose of taking evidence shall be held only upon order of the Board.

All hearings shall be conducted in a fair, impartial, expeditious and orderly manner.” [Bold added.]

That is, even though the PCAOB is conducting an administrative hearing, as an agent of the federal government, it must conduct itself in accordance with the Constitution and its own rules. The administrative hearing is intended to be an *expedited* proceeding—not five years of hellish torture—that allows the PCAOB to choose an *impartial* Hearing Officer. Appellants have no opportunity or ability to participate in that process. Thus, for all intents and purposes, the administrative hearing is a PCAOB forum.

Before the hearing, the PCAOB published a settlement with Saeed that made conclusions and findings regarding the firm’s audits of HartCourt and NetSol, even though Appellants disputed those findings and opposed those findings at the hearing. However, in the mind of the PCAOB these were already established and *uncontroverted* facts despite that there was no earlier hearing establishing these facts—other than Saeed’s admissions in exchange for his deal of leniency with the PCAOB so it could prosecute Appellants. Ultimately, this tainted the proceeding, as well as the neutrality of the forum and Hearing Officer

appointed by the PCAOB.

Additionally, the settlement violated PCAOB Rule 5204 since it publicly disclosed a Board proceeding that had not yet resolved.

Appellants were subject to the same claims upon which Saeed settled and the firm and its clients were mentioned by name in the settlement decision. The PCAOB offers no reasoning for why it believes this public disclosure does not violate the rule other than its self-serving contention.

B. The PCAOB fails to identify the prejudice it would have faced had Appellants been allowed to present expert testimony

As referenced in its opening brief, amendments to pretrial orders should generally be allowed if:

- (1) no substantial injury will be occasioned to the opposing party,
- (2) refusal to allow the amendment might result in injustice to the movant, and
- (3) the inconvenience to the court is slight.

Amarel v. Connell, 102 F.3d 1494, 1515 (9th Cir. 1996)

For the reasons stated in the opening brief, the Hearing Officer's

decision to deny Applicants' rebuttal expert was without substantial justification.

In response, the PCAOB does not identify any prejudice or injury it would have suffered had Appellants been allowed to present their expert. Instead, the PCAOB simply relies on the notion that a hearing officer enjoys "wide latitude in regulating the court of a hearing." Opp., at p. 31. Interestingly, the only appellate case offered by the PCAOB to support denying expert testimony, *Geiserman v. MacDonald*, 893 F.2d 787 (5th Cir. 1990), contains facts unlike the issues pertaining to this review. Importantly, in *Gieserman* the Court of Appeals affirmed the trial court's exclusion of a party's untimely expert witness designation for which no good cause was provided at all. *Id.* at 790-792. That is, there was not even a contention why the expert opinion testimony would have been relevant and helpful to the trier of fact.

Conversely, here, Appellants *timely* designated their expert, but later learned that their expert could not appear at the hearing shortly before the hearing. To correct this problem, Appellants immediately sought to provide a substitute rebuttal expert, but were denied by the Hearing Officer despite the absence of prejudice to PCAOB.

C. Appellants 6th and 7th Amendment arguments were not waived as Appellants were required to exhaust their administrative remedies before the PCAOB

“Due Process’ is an elusive concept. Its exact boundaries are undefineable, and its content varies according to specific factual contexts. Thus, when governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process.” *Hannah v. Larche*, 363 U.S. 420, 442 (1960).

“The Sixth Amendment’s guarantee of a speedy trial gives recognition to an accused’s significant stakes psychological, physical and financial in the prompt termination of a proceeding which may ultimately deprive him of life, liberty, *or property*.” *U.S. v. Roberts*, 515 F.2d 642, 645 (2d Cir. 1975) (Italics added).

Appellants acknowledge that the Seventh Amendment guarantee of right to trial by jury is generally inapplicable in administrative proceedings. *Curtis v. Loether*, 415 U.S. 189, 194 (1974). For that reason alone, it cannot be said that Appellants waived their right to a jury

trial.

The doctrine of exhaustion of administrative remedies provides “that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.” *Woodford v. Ngo*, 548 U.S. 81, 89 (2006). Oftentimes, “a party challenging the legality of the very proceeding or forum in which she is litigating must ‘endure’ those proceedings before obtaining vindication.” *Tilton v. S.E.C.*, No. 15-CV-2472 RA, 2015 WL 4006165, at *5 (S.D.N.Y. June 30, 2015).

Appellants contend that their right to a jury trial was violated based upon the penalties issued by the Hearing Officer and the fundamentally biased forum in which Appellants were forced to proceed. Additionally, Appellants contend that their right to a speedy trial was violated since the charges raised were quasi-criminal and resulted in the deprivation of Appellants constitutionally protected property rights.

Appellants were not required to raise these arguments before the PCAOB as they were simply participating in the forum required under the Act, nor do Appellants believe that the Hearing Officer was

authorized or even competent to decide Constitutional issues.

In an administrative hearing before the PCAOB, the hearing officer serves as the finder of both fact and law and the Federal Rules of Civil Procedure do not apply. That is, generally accepted rules designed to protect constitutionally protected due process rights while not binding do or should give direction to executive agencies as to how to conduct trials.

Perhaps the most important difference between the PCAOB hearing from a federal court action are the timetable and the opportunity for defendants to take discovery. During the pre-charge inspection, the PCAOB has the opportunity to—and often does—take years to pursue documents and take witness testimony, while the subject of the investigation has no right of access or participation. Once the PCAOB brings charges and initiates an administrative enforcement proceeding, however, the timeline to take limited discovery and prepare for hearing are limited for the defendant—a significant disadvantage considering the PCAOB has already completed their investigation.

In this case, the PCAOB waited nearly *5 years* to bring charges

against Appellants for their 2007 audits, which by definition violates PCAOB Rule 5400's requirement that the PCAOB conduct expeditious disciplinary proceedings—especially when the longstanding livelihood of several auditors are to be stripped by the PCAOB.

Given the long delays, employees of the Kabani firm who could have offered helpful evidence had moved on to other employment opportunities, and memories of the work that was performed had faded, and, as a result, Appellants were prejudiced in making their defense.

Additionally, Appellants were subjected to sanctions by the PCAOB based on an unconstitutional framework. That is, in establishing the PCAOB, Congress assigned executive power to the Board without sufficient executive oversight, accountability, or allegiance. This allowed the Board to shield its investigations and hearings from appropriate executive scrutiny.

D. The PCAOB refused to review the original, final audit files to determine whether they were modified

Contrary to the authorities submitted by the PCAOB, the SEC and thus, the PCAOB, have an obligation to produce exculpatory evidence to the respondents. See *U.S. v. Gupta*, 848 F.Supp.2d 491, 493-

496 (S.D.N.Y. 2012) [holding *Brady* discovery proper in criminal *and* civil enforcement proceedings]. Even assuming that *Brady* did not apply to these administrative proceedings, the “due process clause does insure the fundamental fairness of the administrative hearing.” *Silverman v. Commodity Futures Trading Commission*, 549 F.2d 28, 33 (7th Cir. 1977). Consequently, “discovery must be granted if in the particular situation a refusal to do so would prejudice a party as to deny him due process.” *McClelland v. Andrus*, 606 F.2d 1278, 1286 (D.C. Cir. 1979).

Appellants provided the PCAOB with the final audit file which the PCAOB later learned was corrupted. To Appellants knowledge, the PCAOB has not taken any further efforts to examine that original file or to determine whether it would be possible to extract the documents from that file or generally access that information. Ex. 101b, at Ex. D-220 p. 6. Moreover, it appears that the PCAOB has not even ventured to determine the cost of disseminating that information.

The fact that the original file was corrupt does not create an obligation on the part of Appellants to pursue alternative ways of repairing the electronic data—even after providing a replacement file that the PCAOB is using to convict them. Indeed, the PCAOB, as the


government agency prosecuting Applicants, has an affirmative duty to at least attempt to disseminate the information that was provided in the original file since that information may run contrary to the PCAOB's findings.

8. Conclusion

For the foregoing reasons, Appellants respectfully request that the SEC vacate the sanctions and reorder an impartial hearing, or, at a minimum, reduce the sanctions issued by the PCAOB as the evidence relied upon fails to justify the Hearing Officer's decision and the PCAOB's subsequent affirmance.

Dated: August 19, 2015

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CERTIFICATE OF WORD COUNT

This brief complies with the type-volume limitation of 17 CFR § 201.450(c) because this brief contains 5,856 words excluding the parts of the brief exempted by subdivision (c), as counted by the Microsoft Word® word-processing program used to generate this brief.

Dated: August 19, 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 REPLY BRIEF IN SUPPORT OF THEIR APPLICATION FOR REVIEW** on this 19th day of August, 2015, to the following party by Fed Ex overnight mail:

PCAOB *(via Fed Ex Overnight)*
c/o Phoebe W. Brown, Esq.
1666 K. Street, N.W.
Washington, DC 20006

An original and three copies of this brief will be sent via Fed Ex overnight delivery to the Office of the Secretary of the SEC in accordance with its Rules of Practice. Additionally, I caused a copy of this brief to be faxed to the SEC.



Matthew Henderson