

IN THE
SUPREME COURT OF THE UNITED STATES

No. 18A482

KABANI & COMPANY, INC.; MICHAEL DEUTCHMAN, CPA;
KARIM KHAN MUHAMMAD, CPA; and HAMID KABANI, CPA,

Applicants,

v.

U.S. SECURITIES & EXCHANGE COMMISSION,

Respondent.

**APPLICATION TO THE HON. ELENA KAGAN
FOR A SECOND EXTENSION OF TIME WITHIN WHICH TO FILE
A PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

Pursuant to Supreme Court Rule 13(5), Applicants Kabani & Company, Inc., Michael Deutchman, Karim Khan Muhammad, and Hamid Kabani hereby move for an additional extension of time of 30 days, to and including February 22, 2019, for the filing of a petition for a writ of certiorari. Unless an extension is granted, the deadline for filing the petition for certiorari will be January 23, 2019.

In support of this request, Applicants state as follows:

1. A panel of the U.S. Court of Appeals for the Ninth Circuit rendered its memorandum opinion on August 13, 2018 (Exhibit 1), and denied a timely motion for reconsideration, which it also construed as a petition for panel rehearing, on September 25, 2018 and stated that no further petitions for rehearing would be accepted (Exhibit 2). This Court has jurisdiction under 28 U.S.C. §1254(1).

2. The original deadline for filing a petition for certiorari was December 24, 2018. On November 5, 2018, Applicants moved for a 30-day extension of time to and including January 23, 2019. Justice Kagan granted that application, extending the time for filing a petition to and including January 23, 2019.

3. This case involves important legal questions concerning the proper interpretation and application of this Court’s decisions in *Lucia v. SEC*, 138 S. Ct. 2044 (2018), and *Free Enterprise Fund v. PCAOB*, 561 U.S. 477 (2010), the Appointments Clause, and fundamental principles of constitutional due process. The Securities and Exchange Commission (“SEC”) deferred to a Public Company Accounting Oversight Board (“PCAOB”) hearing officer’s decision to impose penalties on Applicants for purportedly violating PCAOB Accounting Standard No. 3. After briefing in the Ninth Circuit on Applicants’ petition for review of the SEC decision was complete, this Court released its opinion in *Lucia*. Applicants provided the Ninth Circuit with a prompt notice of supplemental authority, to which the government responded, but the Ninth Circuit thereafter decided to cancel the already-scheduled oral argument, submitted the case on the briefs without hearing oral argument, and denied Applicants’ petition without addressing Applicants’ Appointments Clause claim as to the propriety of the PCAOB hearing officer. Applicants moved for reconsideration, urging the Ninth Circuit to apply *Lucia*’s logic regarding SEC administrative law judges to PCAOB hearing officers, but the Ninth Circuit perfunctorily denied that motion and refused to reconsider its initial decision. The Ninth Circuit’s failure to address (let alone distinguish) *Lucia* thus injects needless

uncertainty into the post-*Lucia* world and has potential consequences far beyond the PCAOB hearing officers at issue in this case.

4. Applicants' Counsel of Record, George W. Hicks, Jr., is also counsel of record in *Herrera v. Wyoming*, No. 17-532. On November 28, 2018, this Court set oral argument in *Herrera* for January 8, 2019. In light of that impending oral argument and other professional responsibilities, as well as the upcoming Christmas and New Year's holiday period, counsel requires an additional 30 days in which to prepare a petition in this case that fully addresses the important issues raised by the decision below and frames those issues in a manner that will be most helpful to the Court.

WHEREFORE, for the foregoing reasons, Applicants request that an extension of time to and including February 22, 2019, be granted within which Applicants may file a petition for a writ of certiorari.

Respectfully submitted,



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December 17, 2018

EXHIBIT 1

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AUG 13 2018

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

KABANI & COMPANY, INC.; MICHAEL
DEUTCHMAN, CPA; KARIM KHAN
MUHAMMAD, CPA; HAMID KABANI,
CPA,

Petitioners,

v.

U.S. SECURITIES & EXCHANGE
COMMISSION,

Respondent.

No. 17-70786

SEC No. 3-16518

MEMORANDUM*

On Petition for Review of an Order of the
Securities & Exchange Commission

Submitted August 9, 2018**
Pasadena, California

Before: CALLAHAN and NGUYEN, Circuit Judges, and EZRA,*** District
Judge.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See Fed. R. App. P. 34(a)(2).*

*** The Honorable David A. Ezra, United States District Judge for the District of Hawaii, sitting by designation.

Kabani & Company, Michael Deutchman, Karim Khan Muhammad, and Hamid Kabani petition for review of the SEC’s order sustaining sanctions imposed by the Public Company Accounting Oversight Board (“PCAOB”). We have jurisdiction under 15 U.S.C. § 78y(a)(1). Reviewing the SEC’s scienter determination and other factual findings for substantial evidence and its legal conclusions *de novo*, *see Gebhart v. SEC*, 595 F.3d 1034, 1040, 1043 (9th Cir. 2010), we deny the petition for review.

1. Substantial evidence supports the SEC’s finding that petitioners violated PCAOB Accounting Standard No. 3 (“AS3”) with the requisite scienter. The indications of an attempted cover-up—the backdated sign-off dates, the altered metadata, and petitioners’ failure during the inspection to disclose the changes made after the documentation completion deadlines—all strongly support an inference of knowledge and intent.

2. The PCAOB proceedings comported with procedural due process. The PCAOB timely commenced disciplinary proceedings, and substantial evidence supports the hearing officer’s finding that petitioners lacked good cause to designate a substitute expert after the deadline had passed. Petitioners’ concealment of auditing violations and multiple requests for time extensions caused most of the delays in the proceedings, and petitioners fail to show prejudice from the other delays. Petitioners also fail to show prejudice from the publication

of the SEC’s settlement with Rehan Saeed, which concerns audits of issuers not at issue here and does not raise an inference of wrongdoing by petitioners. A showing of prejudice is essential to their due process claims. *See* 5 U.S.C. § 706; *NLRB v. Heath TEC Div./S.F.*, 566 F.2d 1367, 1371 (9th Cir. 1978); *cf. United States v. Talbot*, 51 F.3d 183, 185 (9th Cir. 1995) (explaining that to establish due process claim based on delay in filing criminal charges, defendant “must prove actual, non-speculative prejudice from the delay”).

Petitioners’ other procedural complaints are meritless. The PCAOB did not “suppress” evidence in the audit files that petitioners themselves provided. Petitioners were not entitled to a jury because the Seventh Amendment does not apply to administrative proceedings. *See Tull v. United States*, 481 U.S. 412, 418 n.4 (1987). And the SEC considered all relevant circumstances, including the appropriateness of less severe remedies, when upholding the PCAOB’s sanctions.

The hearing officer did not improperly place the burden on petitioners to prove that they did not violate AS3. The burden of establishing a fact-based defense to liability falls on the party asserting it, *see Olin Corp. v. FTC*, 986 F.2d 1295, 1307 (9th Cir. 1993), and defendants failed to meet their burden of proving that Saeed was reviewing non-final versions of the audit work papers. Petitioners cite neither record evidence nor legal authority for their argument that the hearing officer was inexperienced, unfamiliar with their case, and improperly deferential to

the agency. This argument is therefore deemed waived. *See United States v. Graf*, 610 F.3d 1148, 1166 (9th Cir. 2010). Likewise, petitioners forfeited their Appointments Clause claim by failing to raise it in their briefs or before the agency. *Cf. Lucia v. SEC*, 138 S. Ct. 2044, 2055 (2018) (“[O]ne who makes a timely challenge to the constitutional validity of the appointment of an officer who adjudicates his case’ is entitled to relief.”).

PETITION FOR REVIEW DENIED.

EXHIBIT 2

FILED

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SEP 25 2018

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U.S. COURT OF APPEALS

KABANI & COMPANY, INC.; MICHAEL
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No. 17-70786

SEC No. 3-16518

ORDER

Before: CALLAHAN and NGUYEN, Circuit Judges, and EZRA,* District Judge.

Petitioners' motion for reconsideration (docket entry no. 67) is denied. We also construe the motion as a petition for panel rehearing and deny the petition. No further petitions for rehearing will be accepted in this case.

* The Honorable David A. Ezra, United States District Judge for the District of Hawaii, sitting by designation.