IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JOHN DOE CORPORATION, *Plaintiff*, v. PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD, *Defendant*.	No.: 4:24-cv-1103

PLAINTIFF'S MOTION FOR LEAVE TO LITIGATE THIS CASE PSEUDONYMOUSLY AND BRIEF IN SUPPORT THEREOF

Plaintiff, a corporation, respectfully moves for leave to litigate this action under the pseudonym "John Doe Corporation" rather than in its actual name.[1] As explained below, three arguments support this motion: (1) Plaintiff's lawsuit challenges the enormous prosecutorial power being wielded against it by a quasi-governmental regulator purporting to act under federal statutory law; (2) public revelation of Plaintiff's true identity would contravene statutory confidentiality protections enacted by Congress in the Sarbanes-Oxley Act of 2002 ("Sarbanes-Oxley") and subject Plaintiff to severe and immediate reputational harm; and (3) allowing Plaintiff to proceed pseudonymously would in no way prejudice or disadvantage the Defendant—which already knows Plaintiff's true identity—or the public at large.

[1] Pursuant to Local Rule 7.1(D), undersigned counsel state that because this motion is being filed contemporaneously with the filing of the complaint, no counsel has yet filed an appearance on behalf of the defendant. Thus, we were unable to confer with such counsel to determine whether the relief requested in this motion is opposed.

BACKGROUND

This action seeks declaratory and injunctive relief to stop defendant Public Company Accounting Oversight Board (the "Board") from enforcing an excessively intrusive and burdensome investigative "Accounting Board Demand" ("ABD") ostensibly authorized by Sarbanes-Oxley. The Board is a nominally private, nonprofit corporation empowered by Congress to regulate and punish accountants and accounting firms that audit financial statements of publicly traded companies and broker-dealers. *See generally* 15 U.S.C. § 7211. Punishment for violating Board rules can be severe, including loss of livelihood and civil penalties up to $1 million per violation for natural persons. *Id.* § 7215(c)(4) and (c)(5) (as adjusted for inflation pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (codified at 28 U.S.C. § 2461 note). A willful violation of Board rules also can lead to million-dollar criminal fines and incarceration for up to 20 years. *See id.* §§ 78ff(a), 7202(b)(1).

Fortunately for Plaintiff, its individual partners, and others subjected to the Board's investigations, Congress put confidentiality limits in place to protect the personal privacy and reputations of targeted parties unless and until the Board's disciplinary process has run its full course and a comparatively accountable governmental body—specifically, the Securities and Exchange Commission ("SEC")—determines that public disclosure of the allegations is appropriate. *See* 15 U.S.C. § 7215(b)(5)(a) and (c)(2). Plaintiff should not be required to sacrifice those protections as a pre-condition to challenging the constitutionality of the Board's processes.

ARGUMENT

Although plaintiffs ordinarily are required to use their real names when litigating in federal court, the Fifth Circuit and other courts have allowed plaintiffs to litigate pseudonymously in appropriate circumstances. *See, e.g., Doe v. Stegall*, 653 F.2d 180, 184-86 (5th Cir. 1981); *Doe v.*

Univ. of Miss., 2018 U.S. Dist. LEXIS 28836 at *2-5 (S.D. Miss. 2018). This exercise of judicial discretion requires "a balancing of considerations calling for maintenance of a party's privacy against the customary and constitutionally-embedded presumption of openness in judicial proceedings." *Stegall*, 653 F.2d at 186. Here, that balancing weighs decidedly in favor of pseudonymity.

I. Fifth Circuit Precedent Supports Pseudonymity.

The Fifth Circuit has eschewed any "hard and fast formula" for determining when a plaintiff may proceed pseudonymously, but has identified a non-exhaustive list of three circumstances that weigh in favor of protecting a plaintiff's anonymity: (1) when a plaintiff sues to challenge governmental activity; (2) when prosecution of the suit compels a plaintiff to disclose information "of the utmost intimacy"; or (3) when a plaintiff is compelled to admit its intention to engage in illegal conduct, thereby risking criminal prosecution. *Id*. at 185 (citing *S. Methodist Univ. Ass'n of Women Law Students v. Wynne & Jaffe*, 599 F.2d 707 (5th Cir. 1979)).

Plaintiff here fits squarely into the first circumstance. This case presents purely legal challenges to the constitutionality of the investigative and disciplinary process being deployed against Plaintiff by Defendant Board, which is acting essentially as an arm of the federal government under powers ostensibly granted by Congress in Sarbanes-Oxley. The Fifth Circuit recognizes that such cases do not present the same concerns about potential reputational injury to the defendant resulting from pseudonymous plaintiffs as do suits against purely private parties, particularly private individuals. *See S. Methodist Univ. Ass'n of Women Law Students*, 599 F.2d at 713; *E.B. v. Landry*, No. 19-862-JWD-SDJ, 2020 WL 5775148, at *2 (M.D. La. Sept. 28, 2020) (observing that cases "largely legal in nature" and those involving the "constitutional validity of government activity" support anonymity and collecting cases); *Rose v. Beaumont Indep. Sch. Dist.*,

240 F.R.D. 264, 266-67 (E.D. Tex. 2007) ("[G]overnmental bodies do not share the concerns about reputation that private individuals have when they are publicly charged with wrongdoing" (internal quotation marks omitted)). Because the Board exercises governmental or quasi-governmental powers including regulation and enforcement, cases against the Board should be subject to the same analysis. *See Free Enterprise Fund v. PCAOB*, 561 U.S. 477, 486 (2010) (holding "the Board is 'part of the Government' for constitutional purposes") citing *Lebron v. National Railroad Passenger Corp*., 513 U.S. 374, 397 (1995).

II. Pseudonymity Would Preserve Personal Privacy and Reputational Protections as Legislated by Congress in the Sarbanes-Oxley Act, and Would Incentivize Challenges to Abuses of Executive Power.

In *Doe v. MIT*, 46 F.4th 61 (1st Cir. 2022), the First Circuit recently offered its own thoughtful and comprehensive insights into the kinds of "paradigm" cases where parties should be permitted to litigate pseudonymously. This case fits squarely into two of those paradigms. One includes "suits that are bound up with a prior proceeding made confidential by law." *Id.* at 71–72. As the court explained, "[t]his concern manifests itself when denying anonymity in the new suit would significantly undermine the interest served by that confidentiality." *Id.*

That is precisely the case here. In Sarbanes-Oxley, Congress balanced the critical personal privacy and reputational interests of Board-accused accountants and firms against the competing interest of public transparency, and in doing so made the deliberate legislative choice to favor confidentiality, unless and until the Board completes its proceedings, imposes any sanctions, and thereby enables the accused to appeal the case to SEC. *See* 15 U.S.C. § 7215(b)(5)(a) and (c)(2). But if, to challenge the constitutionality of the Board's enforcement and disciplinary process, Plaintiff were required to publicly reveal Plaintiff's true identity before the point at which

Congress determined such public revelation to be appropriate, then the personal privacy of the firm and its personnel, and the reputational protections served by Sarbanes-Oxley, would be nullified.

Allowing Plaintiff to proceed pseudonymously also comports with a related paradigm the First Circuit identified as favoring pseudonymity: "cases in which anonymity is necessary to forestall a chilling effect on future litigants who may be similarly situated." *Doe*, 46 F.4th at 71. Plaintiff is aware of two other pending cases in other federal district courts that are challenging the constitutionality of related aspects of the Board's enforcement process. Both litigants filed similar motions to prosecute their cases pseudonymously. In one, per the parties' stipulation, that motion has been held in abeyance until the court's decision on a pending motion to dismiss the case. *See Doe v. PCAOB*, No. 1:24-cv-00708, ECF No. 13 (D.D.C. Joint Case Management Stipulation filed Feb. 17, 2023). In the other case filed recently, the pseudonymity has not yet been addressed. *See Doe v. PCAOB*, No. 3:24-cv-00254 (M.D. Tenn. Complaint filed Mar. 5, 2024). If these two—now three—litigants are denied leave to litigate their cases pseudonymously, then they likely will be the last to file such proactive challenges against the Board's process. Such a consequence is foreseeable because few, if any, Board-accused accountants or firms have the capacity to fight back at all, much less the rare fortitude required to fight that battle in a public forum years before—if ever—the Board's accusations might otherwise become a matter of public record.

In the alternative, theoretically, a Board respondent, like Plaintiff, could persevere through the Board's entire multi-year disciplinary gauntlet, in the hope of becoming a rare (and perhaps the first ever) unicorn who eventually prevails in that tribunal. Due to the Board's notorious secrecy, a successful defense before the Board prevents any public revelation of the proceeding. (For this reason, it is impossible for Plaintiff or any other Board respondent to determine whether

any of the Board's hundreds of prior enforcement targets over the past two decades has ever prevailed before the Board; the public is informed only about those who lost before the Board.)

For the overwhelming majority of Board respondents—those who lose before the Board—they then must persevere through at least another year or two of appellate proceedings before the SEC, *see* 15 U.S.C. § 7217(c) (as a result of which the case would become public), and then eventually can challenge the constitutionality of the Board's process in a federal court of appeals, *see* 15 U.S.C. § 78y(a). But that alternative option is largely illusory given its ruinously prolonged and expensive course. Since its creation in 2002, the Board has completed several hundred formal disciplinary proceedings, many of which accused multiple respondents. Yet according to the limited information available on the Board's public website,[2] respondents in only 12 Board enforcement cases have ever appealed their sanction even to the Board members (much less to the SEC or a federal court), and the last time the Board members decided such an appeal on the merits was more than six years ago (in December 2017). All of the Board's hundreds of other disciplinary cases were resolved through settlements or defaults in which the respondents capitulated to the Board's demands and sanctions without mounting a defense, much less raising constitutional challenges to the process itself. And of the 12 Board-adjudicated appeals, only nine appear to have ever been further appealed to SEC, with only two of those nine cases (*i.e.*, approximately one-half of one percent of the hundreds of Board disciplinary proceedings completed over the Board's first 22 years in existence) ever being heard by an Article III court.

Given these disquieting statistics (and the economic realities they reflect), opportunities for meaningful judicial oversight of the Board's secretive disciplinary process are likely to remain few and far between—especially if proactive litigants like Plaintiff are required to "out" themselves

[2] *Enforcement Actions*, PCAOB, pcaobus.org/oversight/enforcement/enforcement-actions (last visited March 4, 2024).

prematurely to challenge the process. Courts should instead welcome such challenges wherever possible to ensure timely judicial scrutiny of prosecutorial processes that are alleged to violate the constitutional separation of powers and individual constitutional rights. After all, as the Supreme Court has repeatedly emphasized, it is "the claims of individuals—not of Government departments—[that] have been the principal source of judicial decisions concerning separation of powers and checks and balances," *Bond v. United States*, 564 U.S. 211, 222 (2011), such that courts should avoid "creat[ing] a disincentive" to bringing such claims, *Ryder v. United States*, 515 U.S. 177, 182–83 (1995); *accord Lucia v. SEC*, 138 S. Ct. 2044, 2055 n.5 (2018) (quoting *Ryder* in noting that courts should "create '[]incentive[s]'" for litigants to raise Appointments Clause challenges against executive action).

Allowing court challengers to remain protected by the statutory confidentiality provisions of Sarbanes-Oxley undoubtedly would incentivize more Board-accused accountants to seek prompt judicial decisions on the constitutionality of the Board's disciplinary processes and tactics. Conversely, forcing challengers to make public prematurely the Board's accusations against them would strongly disincentivize such challenges and have an obvious chilling effect on would-be challengers, thereby allowing a constitutionally dubious prosecutorial scheme to continue in the shadows unchecked for an indeterminate period of additional years. As the First Circuit recognized in *Doe*, this alone should tip the balance heavily in favor of allowing pseudonymity. 46 F.4th at 71.

III. Pseudonymity Would Not Prejudice the Board's Defense or the Public's Right to Know.

Courts are rightly concerned when a plaintiff alleges wrongdoing against a defendant—especially a private party defendant—yet refuses to allow the defendant to learn the plaintiff's true identity, especially under circumstances that might prejudice the defendant's ability to mount an

effective defense. But that is not the case here. The Defendant Board already knows Plaintiff's identity and in the midst of an intrusive multi-year investigation against Plaintiff and its professionals. For this reason, there would be no conceivable prejudice to the Board in allowing Plaintiff to litigate this case pseudonymously, and doing so would in no way impair the Board's ability to defend itself.

Nor is Plaintiff's identity of any particular interest to the public at large. Plaintiff is raising purely legal and constitutional objections to a quasi-governmental process over which Plaintiff has no meaningful control, and which Congress has determined should remain nonpublic at this stage. Indeed, there are no nonpublic facts that would render Plaintiff's constitutional objections any more or less meritorious if revealed in this matter. For purposes of this case, the only relevant fact about Plaintiff is that Plaintiff, like hundreds of other registered accounting firms before and sure to follow, is being secretly investigated by the Board—a fact already made clear in the Complaint.

CONCLUSION

For the foregoing reasons, Plaintiff should be granted leave to litigate this case pseudonymously.

Dated: March 27, 2024

Respectfully submitted,

By: */s/John R. Nelson*

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Counsel for Plaintiff John Doe Corporation

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CERTIFICATE OF SERVICE

On this 27th day of March 2024, I served a copy of the foregoing document on the following Defendant (which has not yet answered) via Certified Mail and a courtesy copy via email.

A copy will also be served by personal service at a later date once summonses are issued.

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Attn: James A. Cappoli, Esq., General Counsel
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/s/ John R. Nelson

John R. Nelson

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HOUSTON DIVISION

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Plaintiff,	:	
v.	:	Case No: 4:24-cv-1103
PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD,	:	
Defendant.	:	

[PROPOSED] ORDER GRANTING PLAINTIFF'S MOTION FOR
LEAVE TO LITIGATE THIS CASE PSEUDONYMOUSLY

This matter came before the Court on Plaintiff's Motion for Leave to Litigate this Case Pseudonymously. After consideration of Plaintiff's Motion and any related filings, the Court is of the Opinion that the Motion should be GRANTED.

It is hereby ORDERED that Plaintiff is GRANTED leave to be allowed to litigate this action under the pseudonym "John Doe Corporation."

SIGNED this _______ day of ___________________, 2024.

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UNITED STATES DISTRICT JUDGE