

PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD

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)	PCAOB File No. 105-2009-004
In the Matter of Davis Accounting)	
Group, P.C. and Edwin R. Davis, Jr.,)	
CPA,)	FINAL DECISION
)	
Respondents.)	
)	March 29, 2011
_____)	

Appearances

Richard G. Jacobus, Esq., Noah A. Berlin, Esq., Joel D. Schwartz, Esq.,
Washington DC, for the Division of Enforcement and Investigations.

Brent R. Baker, Esq., Elliott N. Taylor, Esq., Parsons Behle & Latimer, Salt Lake
City, UT, for Respondents.

I.

Davis Accounting Group, P.C. ("DAG"),^{1/} a registered public accounting firm, and Edwin R. Davis ("Davis") appeal from a hearing officer's decision permanently revoking DAG's registration with the Board, permanently barring Davis from association with any registered public accounting firm, and imposing a \$25,000 civil money penalty on Davis and DAG, jointly and severally, for failing to cooperate in a PCAOB investigation. The hearing officer issued his decision after granting summary disposition in favor of the Division of Enforcement and Investigations (the "Division") as to Respondents' liability and holding a hearing as to sanctions. We base our findings on a *de novo* review of the record, except as to those findings not challenged on appeal. We find that Respondents engaged in conduct constituting noncooperation with an investigation.

^{1/} On December 14, 2010, the Respondent firm filed a Form 3 with the Board reporting that it had changed its name, effective October 1, 2010, to Etania Audit Group P.C. This decision refers to the Respondent firm as Davis Accounting Group or DAG.

Because of that conduct, we permanently revoke the registration of DAG, permanently bar Davis from association with a registered public accounting firm, and impose a civil money penalty of \$75,000 on Davis.

II.

DAG is a Utah professional corporation with offices in Cedar City, Utah. Davis is the president and sole owner of DAG. DAG has been registered with the PCAOB pursuant to Section 102 of the Sarbanes-Oxley Act of 2002 (the "Act") since November 2004, and, at all relevant times, Davis has been an associated person of a registered public accounting firm as defined in Section 2(a)(9) of the Act and Rule 1001(p)(i).

A. Facts Established on Summary Disposition Concerning Liability

In November 2007, in the course of an informal inquiry pursuant to Rule 5100, the Division began requesting information from Respondents concerning DAG's audits of three issuers. Although Respondents repeatedly advised the Division that they were in the process of complying, and requested extensions of time to do so, Respondents did not provide the requested documents.

On April 23, 2008, the Board issued an Order of Formal Investigation ("OFI") pursuant to Rule 5101(a)(1) authorizing an investigation of DAG and its associated persons. The OFI stated that the Board had received information from its staff indicating that DAG and one or more of its associated persons might have violated PCAOB rules and standards in various respects in connection with DAG's audits for the same three issuer clients referred to in the Division's November 2007 informal request. The OFI authorized the Division to conduct a formal investigation and to issue Accounting Board Demands ("ABDs") to obtain information relevant to the matters described in the OFI.

On May 2, 2008, pursuant to the OFI and Rule 5103, the Division sent ABDs to DAG and Davis. Although each Respondent was sent a separate ABD, the ABDs were identical in substance, and required Respondents to produce documents relating to DAG's audits of the three issuers, as well as documents relating to DAG's internal operations, such as the firm's document retention policy. The document demands set forth in the ABDs were similar to the requests set forth in the Division's November 2007 informal request.

The ABDs required Respondents to produce the requested documents by May 16, 2008, but Respondents did not produce any documents or otherwise respond to the ABDs by that date. On July 22, 2008, having received no response to the ABDs from Respondents, the Division sent Davis a letter reminding him of Respondents' obligation to provide the documents. The letter also extended the time for Respondents to produce the documents until July 25, 2008.

Respondents did not produce any documents by the July 25, 2008, deadline. Instead, on that date, they sent a letter signed by Davis to the Division, by facsimile. In the letter, Davis stated that he had "been contacted by the Division of Professional Licensing of the State of Utah for resolution of this matter," and that he was "currently preparing documents . . . for delivery to them, as instructed." The letter concluded: "If you wish to alter this procedure for handling this matter, please advise. Otherwise, I will proceed to complete the review of the documents and audit evidence on a local level with the State people."

The Division responded on the same day with a letter, sent by facsimile and FedEx, advising Respondents that they were required to send the documents called for by the ABDs to the Division at the PCAOB's Washington, DC, offices, and could "not satisfy the requirements of the ABD[s] by sending the demanded documents to any another [sic] address or agency." The letter reaffirmed the ABDs and stated that production of responsive documents was expected by July 30, 2008.

Instead of producing the documents, on July 31, 2008, Respondents sent the Division a letter signed by Davis, by facsimile. In the letter, Davis represented that the documents called for by the ABDs "have not been completely processed into the Summation format [called for by the ABDs] at this time, and I anticipate that I will receive them back next week. I will forward them to your office as soon as they are in-hand in the proper format that you have requested." In addition, Davis stated that he had failed to provide the documents earlier because his father had suffered serious injuries, and he had needed to take care of "certain family matters." He also stated that his mother-in-law would be undergoing life-threatening surgery and that he would be "with my family for the next few days while we see to her recovery and long-term outcome." Based on those circumstances, the letter requested that the deadline for providing the documents called for by the ABDs be extended until August 15, 2008. On August 6, 2008, the Division sent Respondents a letter, by facsimile and U.S. mail, extending the deadline to August 15.

Once again, Respondents failed to produce the documents by the deadline. Instead, on August 15, 2008, Respondents sent the Division, by facsimile, a letter signed by Davis stating that he was "still in a severe bereavement situation with my family," and requesting "a final extension of time to September 5, 2008, to provide the information in the format indicated." This time, the Division responded on August 22, 2008, with a letter, sent by facsimile and FedEx, in which the Division summarized the correspondence between the Division and Respondents. Instead of extending the deadline once again, the letter advised Davis: "Failure by you or your firm to produce the documents required under the ABD by September 5, 2008 will be considered by [the Division] in any determination it makes as to whether non-cooperation proceedings should be initiated against you or your firm."

Respondents did not produce the documents by September 5. Accordingly, on October 17, 2008, the Division sent Respondents a letter expressing the Division's intention to recommend that the Board commence a disciplinary proceeding against Respondents for their failure to comply with the ABDs. The letter advised Respondents that, in accordance with Rule 5109(d), they could submit a statement of position to the Board addressing whether the Board should commence a disciplinary proceeding.

On October 31, 2008, Respondents responded with a letter, signed by Davis, stating that they had "not, in any way or circumstance, deliberately or intentionally failed to comply with the PCAOB's demand for documents." The letter stated that Davis had been "in a position of personal bereavement" and "a state of depression for which I am now under my physician's care and prescribed medication." Davis represented that "all of the resources that I have at my disposal . . . will be brought to bear in the next two weeks to provide the information requested." He concluded: "I will contact [Division staff] with the notification of time for delivery [of the documents] in the near future."

The Division responded on the same day with a letter indicating that the Division "is awaiting production of the demanded documents." The Division advised Respondents that it had taken Davis's personal and family situations into account, and would take into consideration Respondents' production of documents, if that occurred, but still intended to recommend that the Board commence a disciplinary proceeding.

In January 2009, Respondents, through counsel, represented initially that they expected to produce the documents by January 23, 2009, and subsequently that they

would "likely" produce them on January 26, 2009, but they did not do so.^{2/} The Division's summary disposition papers established that as of January 21, 2010, Respondents had still not produced any documents to the Division in response to the ABDs.

The Division's summary disposition papers and prior filings also included uncontroverted evidence that while Respondents were failing to produce any documents in response to the ABDs, they were continuing to issue audit reports for issuers that were included in the issuers' public filings with the SEC. Over the entire period from the issuance of the ABDs in May 2008 through the filing of the Division's motion for summary disposition, DAG issued more than 30 audit reports for issuers.

B. Additional Facts Established at the Hearing on Sanctions

In mid-2007, after Davis's father suffered a serious injury and a young neighbor child was killed in an accident, Davis "found [himself] to be extremely lethargic, ineffective." In October 2007, he consulted his family physician. According to the physician's contemporaneous records, Davis said that he felt like he had "a low grade fever the past [month]"; that he had "[occasional] weakness, diarrhea, [and] depression"; and that he was "having problems concentrating . . . and staying on task." The physician diagnosed "dysthymia"—a form of depression—and prescribed an antidepressant.

On December 10, 2008, Davis saw his personal physician for the second time concerning his depression. According to his physician's contemporaneous records, Davis reported that he had been "doing well" on the antidepressant that had been prescribed "until just recently, when he started dysthymic symptoms." The physician diagnosed "dysthymia with seasonal worsening," increased the antidepressant dosage, and scheduled a one-month follow-up appointment.

As planned, Davis saw his physician on January 8, 2009. According to the physician's records, on that occasion Davis reported that, on his own, he had tried one dose of a different antidepressant medication "and felt a lot better," with "more energy," but that he "hadn't seen much response" from the higher dosage of the antidepressant that the physician had prescribed in December 2008. The physician changed Davis's

^{2/} The record evidence on this point incorrectly states that the first of these communications was in January 2008, but it is clear from the context and other materials that it was in January 2009.

medication to the other antidepressant and indicated that Davis should return for a follow-up appointment in two months.

In April 2009, Davis received a grand jury subpoena to DAG requiring production of documents relating to several DAG audit clients and individuals associated with those clients. In July 2009, Davis received a subpoena from the SEC for documents relating to a client.^{3/}

Although the physician's notes from Davis's January 2009 appointment indicate a two-month follow-up, Davis did not see his physician again until November 2009. The physician's notes indicate that at that appointment Davis advised that his "[d]epression symptoms [were] better," and that he had gone off the antidepressant medication on his own. The notes indicate that the treatment plan for Davis was to continue off the antidepressant. Davis testified, however, and his prescription records confirm, that he resumed taking the antidepressant in December 2009.

Respondents finally produced some documents to the Division in response to the ABDs in February 2010. In a February 22, 2010, letter to the Division, counsel for Respondents stated that they were sending approximately 2,800 pages as "the first tranche of a rolling production" Respondents offered no evidence, however, that, as of the April 6 hearing date, they had submitted any additional documents.

Davis has never been hospitalized for depression, and he has not sought, nor has his physician prescribed, any form of treatment other than antidepressants. Davis testified that, from the outset of his symptoms on, he has experienced good and bad days. During the good days, Davis testified, he has been able to work effectively, sometimes well into the night, and has continued to operate his business, including performing and signing off on audits. In 2008, when the ABDs were served, he had a small and inexperienced staff, but by the time of the hearing, his staff included an accounting manager, who supervises a staff of four; a tax manager, who supervises a staff of one; an audit manager, who is responsible for DAG's activities in China^{4/} and

^{3/} In January 2010, Respondents produced approximately 1618 pages in response to the SEC subpoena, and in February 2010 they produced approximately 2,139 pages in response to the grand jury subpoena.

^{4/} In June 2008, the month after the Division issued the ABDs to Respondents, Davis traveled to China for a week to negotiate an agreement with a Chinese accounting firm.

India; another CPA, who supervises a staff of one; and an administrative assistant, a receptionist, and a computer person. Davis oversees the activities of DAG's staff, and, in particular, has retained exclusive authority to issue audit reports, sign checks, generate payroll, and take on certain types of assignments.

During the period of noncooperation, DAG continued to issue audit reports. Although Davis testified that, because of his depression, he could not manage "the stretch" that was required for him to respond to the ABDs, he also conceded that he made a choice to use his good days to issue audit reports and do other DAG work rather than to gather and submit the documents sought by the ABDs.

C. Procedural History

On February 10, 2009, the Board issued an Order Instituting Disciplinary Proceedings ("OIP") against Respondents. The OIP alleged that, by reason of their refusal to cooperate with the investigation, Respondents were subject to disciplinary sanctions pursuant to Section 105(b)(3) of the Act and PCAOB Rule 5300(b).

On March 9, 2009, the hearing officer issued an order holding Respondents in default for failing to file a timely Answer to the OIP. The hearing officer denied Respondents' motion to set aside the default on March 24, 2009 and denied Respondents' renewed motion on April 2, 2009. On April 9, 2009, the hearing officer issued an Initial Decision in which he found that Respondents had refused to cooperate with a Board investigation, and, as authorized by Section 105(b)(3) and Rule 5300(b), revoked DAG's registration and barred Davis from association with any registered public accounting firm.

On April 20, 2009, Respondents filed a petition for Board review of the Initial Decision. On December 17, 2009, the Board issued an order setting aside Respondents' default and remanding the proceeding to the hearing officer for further proceedings. In its order, the Board stated that it was "reluctant, at this point and on the record before us, to foreclose any possibility that Respondents could make out a defense based on 'emotional trauma,' or that Davis's emotional state could be a mitigating factor for purposes of imposing sanctions on Respondents in the event their liability is established."

On January 7, 2010, Respondents filed an Answer to the OIP. On January 25, 2010, the Division filed a motion for summary disposition. On February 16, 2010, Respondents filed their opposition to the Division's motion.

On February 24, 2010, the hearing officer issued an order granting the Division's motion as to liability, but denying it as to sanctions. The hearing officer advised the parties that a hearing would be held to receive such additional evidence as the parties might wish to offer on the issue of sanctions. The hearing was held on April 6, 2010. Davis was the only witness.

On May 13, 2010, the hearing officer issued an initial decision imposing sanctions on Respondents for their noncooperation with the investigation. DAG's registration was revoked, Davis was permanently barred from association with a registered public accounting firm, and a civil money penalty of \$25,000 was assessed against Respondents jointly and severally.

On May 26, 2010, two days after the filing deadline prescribed by Rule 5460(a)(2)(ii), Respondents petitioned the Board for review of the initial decision. Although we denied the petition as untimely, on June 10, 2010 we ordered Board review of the initial decision on our own initiative. Respondents filed their opening brief on July 20, 2010. On August 19, 2010, the Division filed its brief in opposition. Respondents' reply brief was filed on September 2, 2010.

III.

A. Summary Disposition Standard

Rule 5427 provides that "[t]he hearing officer shall promptly grant a motion for summary disposition if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a disposition as a matter of law." This rule, in substance, parallels Rule 56 of the Federal Rules of Civil Procedure, as well as Rule 250 of the SEC Rules of Practice. Under these provisions, the ultimate question is whether the record as a whole demonstrates the existence of any factual disputes that must be resolved through a hearing. "[A] party seeking summary judgment [must] make a preliminary showing that no genuine issue of material fact exists. Once the movant has made this showing, the nonmovant must contradict the showing by pointing to specific facts demonstrating that there is, indeed, a trialworthy issue."^{5/}

^{5/} National Amusements, Inc. v. Town of Dedham, 43 F.3d 731, 735 (1st Cir. 1995).

To preclude summary disposition, any unresolved factual issues must be both genuine and material—"the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact."^{6/} In considering a motion for summary disposition, the record will be viewed most favorably to the nonmoving party, but "we need not credit purely conclusory allegations, indulge in rank speculation, or draw improbable inferences."^{7/} "Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'"^{8/}

B. Noncooperation with the Investigation

Section 105(b)(3) of the Act authorizes the Board to impose sanctions on any registered public accounting firm or associated person thereof who refuses to cooperate with the Board in connection with an investigation pursuant to Section 105.^{9/} The Board issued an OFI on April 23, 2008, authorizing the Division to conduct an investigation of DAG and its associated persons, one of whom is Davis. As authorized by the OFI, the Division issued ABDs to Respondents on May 2, 2008, calling for the production of documents. Yet Respondents provided none of the documents or information called for by the ABDs for over 20 months.

^{6/} Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986) (emphasis in original).

^{7/} National Amusements, 43 F.3d at 735.

^{8/} Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986) (quoting Fed. R. Civ. P. 56(e)).

^{9/} Section 105(b)(1) of the Act authorizes the PCAOB to "conduct an investigation of any act or practice, or omission to act, by a registered public accounting firm, any associated person of such firm, or both, that may violate" the Act, the Board's rules, the securities laws relating to the preparation and issuance of audit reports and the obligations and liabilities of accountants with respect thereto, or professional standards. Section 105(b)(2) authorizes the PCAOB to "require the production of audit work papers and any other document or information in the possession of a registered public accounting firm or any associated person thereof, wherever domiciled, that the Board considers relevant or material to the investigation"

Respondents do not dispute these facts. Rather, they argue on appeal that "Davis established the existence of a genuine issue of material fact as to liability based upon the effect of Davis's debilitating illness which prevented him from complying at a rate of which a healthier individual might be able to accomplish." According to Respondents, "the testimony and documentary evidence offered by Davis supported a finding that Davis was disabled, often incapacitated, and frequently unable to comply with the ABDs, but nevertheless did comply to the best of his diminished ability."^{10/}

Respondents, however, offered no evidence that could support a finding that Davis's illness was so severe that it prevented him from producing any documents in response to the ABDs for more than 20 months.^{11/} At the time of summary disposition, the only evidence in the record regarding Davis's medical condition consisted of Davis's March 2009 affidavit, submitted in support of Respondents' renewed motion to set aside their default, and a doctor's note he submitted as an exhibit to his affidavit. In his affidavit, Davis represented that there had been a number of events, beginning in May 2007 and continuing into 2008, involving serious health issues for his father, his mother-in-law, and his step-daughter, as well as the death of a neighbor's young child in an accident. As a result of this, Davis said, he was under a doctor's care for depression, which:

renders me listless, without the ability to focus, or even if a specific task is in front of me, my mind just 'tunes out the world' for an extended period of time. I have only been able to barely manage the tasks of my practice (and sometimes not even to that level) because of a great staff and audit personnel that can take over and handle multiple client assignments. As indicated by my Doctor, I am currently on a strong prescription drug that is having some (but not always) positive results on my condition.

In his two-sentence note, dated March 30, 2009, Davis's doctor confirmed that Davis had been under treatment for depression since 2007 and had recently been switched to

^{10/} Although Respondents' reply brief argues that a material fact is in dispute regarding "the degree to which Respondents timely complied with the Board's investigational demands," Respondents have not disputed that they provided no documents in response to the ABDs for over 20 months.

^{11/} Indeed, Respondents' brief on appeal states that Davis was "*often* incapacitated, and *frequently* unable to comply with the ABDs" (emphasis added).

a new medication, but he did not express an opinion that the depression had prevented or impeded Davis from complying with the ABDs.

Davis's affidavit and his doctor's note do not establish a genuine issue of fact as to Davis's capacity to comply with the ABDs.^{12/} The doctor's note did not indicate that, even as of March 2009, Davis was incapable of responding to the ABDs, and Davis, himself, said that he had "a great staff and audit personnel that can take over and handle multiple client assignments." Respondents have failed to explain why that staff and audit personnel could not also have gathered documents responsive to the ABDs even if Davis himself was incapable of doing so, or why Davis was capable of issuing audit opinions but, at the same time, incapable of complying with the ABDs.

Similarly, none of the evidence introduced at the hearing on sanctions suggests that Davis could not have complied with the ABDs, or that an additional hearing would add in any meaningful way to the record. Davis's doctor's contemporaneous notes show that Davis was diagnosed with dysthymia and prescribed medication but do not indicate that Respondents were incapable of producing documents in response to the ABDs. Moreover, Davis conceded at the hearing that he made a choice to use his "good days" to issue audit reports and do other DAG work, rather than to gather and submit the documents sought by the ABDs.

Respondents also argue that "there were genuine issues as to [Davis's] ability to comply despite the burdens imposed by" a grand jury subpoena and a subpoena from the SEC.^{13/} Davis did not even receive the first of these subpoenas, however, until March 2009—10 months after Respondents received the ABDs, and a month after the Board instituted this proceeding. Under those circumstances, no rational finder of fact could conclude that any burden imposed by the subpoenas prevented Respondents from complying with the requirement to cooperate with the Board.

^{12/} If we were to determine otherwise—that there was a genuine issue concerning Respondents' capacity to comply—we would then need to determine whether that issue was material to the question of Respondents' liability. Because we find there is no genuine issue concerning capacity, we do not address that materiality question.

^{13/} The only exhibits attached to Respondents' opposition to summary disposition were an SEC subpoena, a grand jury subpoena, and emails between Respondents' counsel and SEC and Department of Justice staff regarding Respondents' responses to those subpoenas.

Notwithstanding the undisputed facts described above, Respondents argue that "the Division has failed to produce any evidentiary support that Respondents engaged in conduct amounting to a complete failure or refusal to comply." Although section 105(b)(3) of the Act authorizes the Board to impose sanctions for noncooperation with an investigation if a registered firm or associated person "refuses" to cooperate, we do not understand that provision to limit our sanctioning authority to cases involving an express refusal. To hold otherwise would render section 105(b)(3) a dead letter, since any noncooperating registered firm or associated person could then avoid section 105(b)(3) sanctions merely by refraining from expressly articulating a refusal to cooperate.

In this case, Respondents received repeated demands to comply with the ABDs and were advised of the risk of sanctions for failing to comply. Though we have determined that Respondents were not incapable of complying, Respondents produced no documents for over 20 months, despite requesting, and being granted, a number of extensions. Instead of cooperating with the Board, Davis continued to issue audit reports. These circumstances represent a "refusal" to cooperate for which we may impose sanctions pursuant to Section 105(b)(3). They also, of course, represent a "failure" to cooperate for purposes of Rule 5300(b).

Because there was no genuine issue of material fact as to Respondents' liability, summary disposition was appropriate based on the record developed at that stage of the proceeding. Moreover, the facts established at the hearing on sanctions, which confirm the relevant aspects of the summary disposition record, reinforce our conclusion that further proceedings on Respondents' liability are unnecessary.

IV.

For noncooperation with an investigation, the Board is authorized to revoke or suspend a firm's registration, to bar or suspend an individual from association with any registered public accounting firm, or to impose certain lesser sanctions as the Board considers appropriate and as specified by rule of the Board.^{14/} We find that the

^{14/} See Section 105(b) of the Act and Rule 5300(b). Respondents appear to argue that Section 105(c)(5) of the Act requires the Board to establish that Respondents engaged in intentional or knowing conduct, including reckless conduct, or repeated instances of negligent conduct in order to impose certain sanctions. That is incorrect. The limitation in Section 105(c)(5) applies only to "[t]he sanctions and penalties described in subparagraphs (A) through (C) and (D)(ii) of paragraph [105(c)](4)" that the

appropriate sanctions for Respondents' failures to produce documents in response to the ABDs are revocation of DAG's registration, a bar against Davis being associated with any registered public accounting firm, and a \$75,000 civil money penalty against Davis.

A. Revocation and Bar

The Board's power to investigate possible violations and to impose appropriate sanctions^{15/} is fundamental to its ability to "protect the interests of investors and further the public interest in the preparation of informative, accurate, and independent audit reports."^{16/} Conducting investigations in an appropriate and timely manner depends upon registered firms' and associated persons' compliance with demands for documents and testimony made pursuant to the Board's authority under the Act. Noncooperation frustrates the oversight system by impeding the Board's ability to determine whether violations have occurred for which sanctions should be imposed, including sanctions that would protect investors from further violations, and thus deprives investors of an important protection that the Act was intended to provide.^{17/}

In this case, Respondents did not produce a single document in response to the ABDs for more than 20 months. Respondents argue that sanctions are not warranted for their noncooperation "because the evidence established that Davis was previously unable to cooperate with the investigation because of his disability, but that as a result

Board may impose upon finding a violation of the Act, the rules of the Board, certain provisions of the securities laws, or professional standards. Sanctions imposed for a failure to cooperate with a Board investigation are imposed not pursuant to Section 105(c)(4) but pursuant to Section 105(b)(3)(A), which provides the Board with independent authority to impose sanctions for a "refus[al] to testify, produce documents, or otherwise cooperate with the Board in connection with an investigation" In any event, however, the facts described above demonstrate that Respondents' conduct in this case was at least reckless.

^{15/} See Sections 101(c)(4), 105(b)(1), and 105(c)(4) of the Act.

^{16/} Section 101(a) of the Act.

^{17/} Cf. Gately & Associates, LLC, Exchange Act Rel. No. 62656, at 22-23, 2010 WL 3071900, at *15 (August 5, 2010) (recognizing seriousness of failure to cooperate in PCAOB inspection designed, among other things, to uncover misconduct).

of the treatment he received, he will continue his compliance efforts." We have, however, already rejected Respondents' contention that they were unable to cooperate with the investigation.^{18/}

Moreover, the facts established at the hearing served only to undermine Respondents' contention that Davis's condition mitigated their failure to cooperate. Davis testified that, from the outset of his symptoms on, he has experienced good and bad days and that during the good days he has been able to work effectively, sometimes well into the night. As he himself conceded, Davis chose to use his good days to operate and develop his business rather than to comply with regulatory requirements. Among other things, Davis traveled to China for a week to negotiate an agreement with a Chinese accounting firm in the month after receiving the ABDs and signed off on Respondents' issuance of more than 30 audit reports during the period in which they did not produce a single document called for by the ABDs. Under these circumstances, Davis's contention that his depression was so incapacitating as to mitigate Respondents' failure to cooperate is entitled to no weight.

Respondents' production of some documents in February 2010 is also not a mitigating factor. That production came more than 20 months after Respondents received the ABDs and a year after the Board instituted these proceedings. Accordingly, we do not credit it for purposes of our determination of the appropriate sanctions.^{19/}

We find that Respondents' conduct warrants revocation of DAG's registration and a bar on Davis's association with any registered public accounting firm. In a Board investigation, Respondents received document production demands in response to which they produced none of the demanded documents until more than a year after these proceedings were instituted. They continued not to produce the demanded

^{18/} Respondents argue that Davis "was denied the opportunity to produce post-hearing submissions which would have contained additional evidence of the affects [sic] of his medical condition." Respondents, however, had ample opportunity to present any such evidence in opposition to summary disposition and at the hearing.

^{19/} Cf. Gately & Associates, LLC, Exchange Act Rel. No. 62656, at 23, 2010 WL 3071900, at *15 ("In the context of SRO requests for information, we have long held that the institution of disciplinary proceedings should not be required in order to compel compliance with such requests, and we think the same principles should apply to PCAOB Rule 4006 requests.") (footnote omitted).

documents despite the Division's warnings that such noncooperation could result in disciplinary sanctions. At the same time as they refused to cooperate with the Board, they continued to develop their business and issue audit reports. Davis acknowledged that he made a choice to do these things rather than comply with regulatory requirements.

This type of noncooperation undermines the Board's ability to protect investors and advance the public interest by identifying and addressing misconduct in connection with the audits of public companies' financial statements. In the absence of any mitigating circumstances, such noncooperation indicates a lack of sufficient regard for Board processes and authority designed by statute to protect investors. If DAG were to remain a registered firm and Davis an associated person, they would have opportunities to similarly undermine those processes, and the related investor protection, in the future.^{20/}

^{20/} On October 25, 2010, the Division filed a Motion to Adduce Additional Evidence that the Division contends is relevant to sanctions because it is additional evidence of the risk Respondents pose if permitted to continue auditing public companies. Specifically, through the October 25 motion and a November 4, 2010 supplement proffering certified copies of certain Utah state court documents, the Division seeks to introduce evidence that in September 2010 Davis was convicted on two counts of unlawful professional conduct in a case arising out of, as Davis acknowledges in his opposition to the Division's motion, "charges for practicing without a license." Respondents' Opposition to the Division of Enforcement and Investigations' Motion to Adduce Additional Evidence, at 2 (Oct. 29, 2010). Respondents do not dispute the fact of the convictions. Citing the requirements of Rules 5441 and 5464 concerning the admission of evidence, however, they oppose the Division's motion on the grounds that the charge "has no bearing on the Board's analysis," and that the Division's motion does not show with particularity that the evidence is material to the case and that there were reasonable grounds for the failure to make the motion sooner than four weeks after the convictions were entered. *Id.* at 3. The latter argument, concerning the timing of the motion, borders on being frivolous and is not a basis for rejecting the Division's motion. The relevant timing point is that the Division could not have presented the evidence in the proceeding before the Hearing Officer because the convictions had not occurred at that time, and the four weeks between the convictions and the motion does not otherwise constitute such a delay as to require explanation. The argument concerning materiality presents a closer question, given that we would reach the conclusion described in the text even in the absence of this additional evidence. We agree with the Division, however, that the conviction is further evidence

B. Civil Money Penalties

We also find that Respondents' conduct warrants the imposition of a civil money penalty. Section 105(c)(4) of the Act authorizes the Board to impose such "disciplinary or remedial sanctions as it determines appropriate" for violations of certain laws, rules, and standards, and specifies that those sanctions may include civil money penalties up to specified maximum amounts. Although that provision is separate from section 105(b)(3)'s provision authorizing sanctions for noncooperation with an investigation, section 105(b)(3) authorizes the Board to impose "such other lesser sanctions" (in addition to bars, revocations, and suspensions) as the Board specifies by rule, and the Board's rules implementing that authority incorporate, as such lesser sanctions, the civil money penalty provisions found in section 105(c)(4).^{21/}

In considering whether a civil money penalty is an appropriate disciplinary or remedial sanction, we are guided by the statutorily prescribed objectives of any exercise of our sanctioning authority: the protection of investors and the public interest.^{22/} We are also cognizant that the Commission, in reviewing any contested sanctions that we impose, is called upon to do so with "due regard for the public interest and the protection of investors."^{23/}

that Respondents pose the risk described above. Cf. Joseph Ricupero, Exchange Act Rel. No. 62891 at 11, 2010 WL 3523186 at *7-8 (September 10, 2010) (sustaining bar on individual's association with any National Association of Securities Dealer member because of individual's failure to respond to information requests, and noting that individual's prior disciplinary history is "further evidence" that individual posed risk to investing public should he re-enter securities industry). We therefore grant the Division's motion and allow the additional evidence into the record.

^{21/} See PCAOB Rule 5300(b)(1) (incorporating sanctions described in Rule 5300(a)(4)).

^{22/} See section 101(a) of the Act (Board established "to protect the interests of investors and further the public interest in the preparation of informative, accurate, and independent audit reports"); section 101(c)(5) (Board to perform duties or functions as the Board determines necessary "to carry out this Act, in order to protect investors, or to further the public interest").

^{23/} Section 107(c)(3) of the Act.

For guidance, we also look to the factors enumerated in, and the Commission's application of, a somewhat comparable statutory authorization in the Securities Exchange Act of 1934 ("Exchange Act"). Like the authorization to the Board in the Act, section 21B of the Exchange Act authorizes the Commission to impose civil money penalties in administrative proceedings, up to specified maximum amounts, if the Commission finds that "such penalty is in the public interest."^{24/} Unlike the Act, however, Exchange Act section 21B provides guidance regarding relevant factors "[i]n considering under this section whether a penalty is in the public interest."^{25/} The factors specified in section 21B(c) include (1) whether the conduct for which a penalty is assessed involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement; (2) harm to other persons resulting directly or indirectly from the conduct; (3) the extent to which any person was unjustly enriched; (4) whether the person against whom a penalty is assessed has previously been found by the Commission, another appropriate regulatory agency, or self-regulatory organization ("SRO") to have violated federal securities laws, state securities laws, or SRO rules, or has been enjoined from such violations or convicted of certain offenses; (5) the need to deter such person and other persons from such conduct; and (6) such other matters as justice may require.

Section 21B does not require that all of these factors be present as a condition to imposing a penalty, but sets them out as factors to be considered.^{26/} The Commission has imposed civil money penalties under section 21B on numerous occasions, emphasizing various of these factors, including in cases in which the Commission imposed a bar in addition to the civil money penalty.^{27/}

^{24/} Section 21B(a) of the Exchange Act.

^{25/} Section 21B(c) of the Exchange Act.

^{26/} See Next Financial Group, Inc., 93 SEC Docket 1369, 2008 WL 2444775 at *49 (June 18, 2008) (Initial Decision) ("Not all factors may be relevant in a given case, and the factors need not all carry equal weight").

^{27/} See, e.g., VFinance Investments Inc., Exchange Act Rel. No. 62448, at 27-28, 2010 WL 2674858, at * 18 (July 2, 2010) (barring individual from association with any broker or dealer in principal or supervisory capacity and imposing \$30,000 civil money penalty described as "warranted to create a monetary incentive for Respondents and other industry participants to fulfill their recordkeeping obligations and cooperate with regulatory inquiries – particularly when, as in this case, such person is aware that

The courts have recognized that Commission sanctions involving bars and section 21B civil money penalties are appropriate, and should be upheld absent a "gross abuse of discretion," given that "Congress has charged the Commission with protecting the investing public," and the question of appropriate remedies is "peculiarly a matter for administrative competence."^{28/} The Board, too, is charged to exercise its sanctioning authority "as the Board considers appropriate"^{29/} (subject to Commission review) to protect the investing public. Looking to the Exchange Act section 21B factors

compliance may reveal regulatory violations potentially resulting in disgorgement or monetary penalties"); Gregory O. Trautman, Exchange Act Rel. No. 61167A, at 42, 44, 2009 WL 4828994, at *22-23 (December 15, 2009) (barring individual from association with any broker or dealer and imposing a \$120,000 civil money penalty as "necessary to deter others" from such conduct, and in light of fact that conduct involved deception causing harm to others and resulting in enrichment of individual's firm); Guy P. Riordan, Exchange Act Rel. No. 61153, at 38-39, 2009 WL 4731397, at *21-22 (December 11, 2009) (barring individual from association with any broker or dealer and imposing separate \$100,000 civil money penalties for each of five violations in light of fact that conduct involved fraud, deceit, manipulation or deliberate or reckless disregard of a regulatory requirement and resulted in substantial pecuniary gain), pet. denied, 627 F.3d 1230 (D.C. Cir. 2010); Joseph John VanCook, Exchange Act Rel. No. 61039A, at 31-32, 2009 WL 4005083, at *18 (November 20, 2009) (barring individual from association with any broker or dealer and imposing \$100,000 civil money penalty described as "an amount necessary to deter VanCook from future misconduct" and that "will also have a remedial effect of deterring others from engaging in the same misconduct"). Trautman, Riordan, and VanCook all involved financial harm to investors that the Commission orders addressed through substantial disgorgement remedies (more than \$600,000 in Trautman, more than \$900,000 in Riordan, and more than \$500,000 in VanCook), underscoring that the separate civil money penalty is imposed for a purpose distinct from making a financially harmed victim whole.

^{28/} Rizek v. SEC, 215 F.3d 157, 160 (1st Cir. 2000) (upholding bar on individual's association with any broker, dealer, member of a national securities exchange, or member of a registered securities association and imposition of \$100,000 civil money penalty) (quoting A.J. White & Co. v. SEC, 556 F.2d 619, 624 (1st Cir. 1977), and Butz v. Glover Livestock Comm'n Co., 411 U.S. 182, 185 (1973)).

^{29/} Section 105(b)(3)(A)(iii) of the Act; see also Section 105(c)(4) of the Act ("Board may impose such disciplinary or remedial sanctions as it determines appropriate").

and precedent for guidance on protecting investors and advancing the public interest through civil money penalties,^{30/} we conclude that a civil money penalty is appropriate in this case.

In response to the ABDs, Respondents disregarded their obligation to cooperate with the Board's investigation. On the record, as described above, it is clear that this disregard was deliberate or reckless. Despite receiving extensions of the deadline for producing documents, follow-up demands, warnings about disciplinary action, and notice of the institution of disciplinary proceedings, Respondents produced none of the demanded documents for over 20 months.

We also conclude that Respondents' conduct caused at least indirect harm to others. Investors and markets are put at risk, and perhaps harmed in ways that never become known, when a regulatory investigation is improperly thwarted by a regulated person's refusal to provide information. Such noncooperation undermines the Board's ability to protect investors and advance the public interest by identifying and addressing misconduct in connection with the audits of public companies' financial statements. The undermining of this protection is a harm to investors and markets that factors into a sanctions analysis.^{31/}

We have also considered together the section 21B factors concerning whether any person was unjustly enriched and whether there is a need to deter such person and other persons from similar noncooperation. The obligation of registered firms and associated persons to cooperate with the Board is a fundamental aspect of PCAOB

^{30/} Relevant, and similar, guidance is also provided by the courts even outside of the section 21B context. See McCarthy v. SEC, 406 F.3d 179, 190 (2d Cir. 2005) (factors relevant in deciding whether a sanction is appropriately remedial include "[t]he seriousness of the offense, the corresponding harm to the trading public, the potential gain to the [offender] for disobeying the rules, the potential for repetition in light of the current regulatory and enforcement regime, and the deterrent value to the [offender] and others").

^{31/} Cf. Gately, Exchange Act Rel. No. 62656, at 19, 2010 WL 3071900, at *13 (recognizing as obvious the risk to investors and markets posed by a failure to produce information in a Board inspection).

registration status.^{32/} Yet, under the processes set out in the Act and the Board's rules, it necessarily takes some time before Board disciplinary sanctions in response to noncooperation are imposed and take effect. During that time, nothing prevents the firm or person from continuing to reap financial benefits from performing audit services for issuers, all the while ignoring the corresponding cooperation obligation that is essential to the Board's ability to protect investors in those issuers.

In short, in the absence of a civil money penalty, noncooperation with the Board might seem to certain kinds of individuals – who fear that cooperation will provide information that would lead to sanctions for violations of laws, rules, or standards – to be the course most likely to prolong the period of their registration and allow them to maximize their income from issuer audit work before being sanctioned. A civil money penalty for noncooperation is appropriate both as a deterrent to that kind of reasoning and conduct,^{33/} and, where applicable, to take account of the fact that financial gains from continuing to perform issuer audit work while not fulfilling the responsibilities that accompany PCAOB registration status might fairly be viewed as similar to unjust enrichment. In this case, Davis acknowledged in his testimony that Respondents continued to perform issuer audit work, and issue audit reports, during the period that they were not responding to the ABDs.^{34/}

^{32/} Section 105(b)(3) is only one of the statutory provisions reflecting the importance of such cooperation. See also section 102(b)(3) of the Act (requiring registration applicants to consent to cooperate with Board requests for testimony and production of documents, to agree to secure and enforce similar consents from their associated persons, and to acknowledge and agree that such cooperation is a condition to the continuing effectiveness of the firm's registration with the Board); cf. Gately, Exchange Act Rel. No. 62656, at 20, 2010 WL 3071900, at *13 (noting with reference to section 102 that Act "makes it clear" that failure to comply with obligation to cooperate "presumptively disqualifies a firm from conducting public company audits").

^{33/} See VFinance Investments, Inc., Exchange Act Rel. No. 62448, at 27-28, 2010 WL 2674858, at * 18 (civil money penalty warranted to create incentive for respondents and other industry participants to cooperate with regulatory inquiries, particularly when aware that compliance may reveal regulatory violations potentially resulting in disgorgement or monetary penalties).

^{34/} Davis's hearing testimony did not specify the volume of such work performed while not responding to the ABDs, but the Division introduced evidence of 34 audit reports issued by DAG for issuers during that period, and Respondents have not

We have also considered a factor analogous to the section 21B factor concerning whether a person has previously been found by another appropriate regulatory agency or an SRO to have violated relevant federal or state laws or SRO rules. We view findings in a state disciplinary proceeding as a potentially relevant factor in this analysis.^{35/} As discussed above, Davis was convicted on two misdemeanor counts of unlawful professional conduct in a case arising out of charges for practicing public accounting without a license. We cite this evidence only as additional information consistent with, but not essential to, a determination to impose a civil money penalty in this case.

In light of the factors described above, we have determined to impose a civil money penalty. We turn now to consideration of the amount of the penalty. The Act specifies maximum penalty amounts, and those specified amounts are from time to time subject to penalty inflation adjustments published in the Code of Federal Regulations. For conduct occurring after February 14, 2005 but before March 3, 2009 (the period during which the misconduct leading up to the institution of this proceeding occurred and this proceeding was instituted), the Act, as adjusted, authorizes the Board to impose a civil money penalty of up to \$800,000 for a natural person and up to \$15.825 million for other persons in cases involving intentional or knowing conduct, including reckless conduct, or repeated instances of negligent conduct.^{36/}

disputed the point. The evidence consists of issuers' SEC filings containing what purport to be audit reports issued by DAG after the May 16, 2008 deadline for responding to the ABDs.

^{35/} Section 21B's term "appropriate regulatory agency" is defined in the Exchange Act and includes only certain federal regulators. We proceed here by analogy to, not by application of, Section 21B.

^{36/} See Sections 105(c)(4)(D) and 105(c)(5) of the Act; 17 C.F.R. § 201.1003 Table III; see also PCAOB Rules 5300(b)(1) and 5300(a)(4). For sanctionable conduct in that same period that does not involve intentional or knowing (including reckless) conduct or repeated instances of negligent conduct, the Act, as adjusted, authorizes the Board to impose a civil money penalty of up to \$110,000 for a natural person and \$2.1 million for other persons.

In this case we have determined to impose a civil money penalty of \$75,000 on Davis.^{37/} While this is well below the maximum penalty that we could impose, it nonetheless reflects the seriousness of the noncooperation, including the harm to investors from the possibility that such noncooperation may have prevented the Board from uncovering evidence that would have revealed failures or violations warranting an even steeper penalty. We also view it as sufficient to deter similar noncooperation by others.

V.

For the reasons described above, we conclude that, in order to protect the interests of investors and to further the public interest, DAG's PCAOB registration should be permanently revoked, Davis should be permanently barred from associating with any registered public accounting firm, and a civil money penalty of \$75,000 should be imposed against Davis.^{38/}

An appropriate order will issue.^{39/}

By the Board.

^{37/} Because DAG is a professional corporation of which Davis is the sole owner, we conclude that, in these circumstances, no additional purpose would be served by imposing a separate civil money penalty on DAG.

^{38/} All funds collected by the Board as a result of the assessment of civil money penalties shall be used in accordance with Section 109(c)(2) of the Act.

^{39/} We have considered all of the parties' contentions. We have rejected or sustained them to the extent that they are inconsistent or in accord with the views expressed in this opinion.

PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD

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In the Matter of Davis Accounting)	PCAOB File No. 105-2009-004
Group, P.C. and Edwin R. Davis, Jr.,)	
CPA,)	ORDER IMPOSING SANCTIONS
)	
Respondents.)	
)	March 29, 2011
)	

On the basis of the Board's opinion issued this day it is

ORDERED that Edwin R. Davis, Jr. is permanently barred from associating with any registered public accounting firm; and it is further

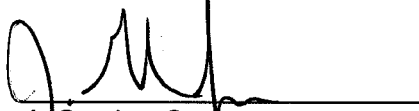
ORDERED that the registration of Etania Audit Group P.C. (formerly known as Davis Accounting Group, P.C.) is permanently revoked; and it is further

ORDERED that Edwin R. Davis, Jr. shall pay a civil money penalty in the amount of \$75,000 by (a) United States postal money order, certified check, bank cashier's check, or bank money order, (b) made payable to the Public Company Accounting Oversight Board, (c) delivered to the Controller, Public Company Accounting Oversight Board, 1666 K Street, N.W., Washington, D.C. 20006 within 30 days after the effective date, described below, and (d) submitted under a cover letter which identifies Edwin R. Davis, Jr. as a respondent in these proceedings, sets forth the title and PCAOB File Number of these proceedings, and states that payment is made pursuant to this Order, a copy of which cover letter and money order or check shall be sent to Office of the Secretary, Attention: J. Gordon Seymour, General Counsel and Secretary, Public Company Accounting Oversight Board, 1666 K Street, N.W., Washington, D.C. 20006.

Effective Date: If a respondent does not file an application for review by the Securities and Exchange Commission ("Commission") and the Commission does not order review of sanctions ordered against a respondent on its own motion, the effective date of the sanctions shall be the later of the expiration of the time period for filing an application for Commission review or the expiration of the time period for the

Commission to order review. If a respondent files an application for review by the Commission or the Commission orders review of sanctions ordered against a respondent, the effective date of the sanctions ordered against that respondent shall be the date the Commission lifts the stay imposed by Section 105(e) of the Sarbanes-Oxley Act of 2002. *

By the Board,



J. Gordon Seymour
Secretary

March 29, 2011

* Pursuant to Commission actions lifting the stay imposed by Section 105(e), the bar and revocation became effective on June 14, 2011, and the civil money penalty became effective on October 18, 2011.