

PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD

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)	PCAOB File No. 105-2008-001
In the Matter of Gately & Associates,)	
LLC and James P. Gately, CPA,)	
)	FINAL DECISION
)	
Respondents.)	
)	June 4, 2009
_____)	

Appearances

William F. Ryan, Esq., Washington DC, for the Division of Enforcement and Investigations.

Roddy B. Lanigan, Esq., Lanigan & Lanigan, PL, Winter Park, FL, for Respondents.

I.

Gately and Associates, LLC ("Gately LLC"), a registered public accounting firm, and James P. Gately ("Gately") appeal from a hearing officer's decision permanently revoking Gately LLC's registration with the Board and permanently barring Gately from association with any registered public accounting firm for failing to cooperate in a PCAOB inspection in violation of Rule 4006. The hearing officer disposed of all matters in the case by granting a motion for summary disposition filed by the Division of Enforcement and Investigations ("Enforcement"). We base our findings on a *de novo* review of the record. We find that Respondents failed to cooperate in a PCAOB inspection in violation of Rule 4006, and that it is in the public interest to permanently revoke the registration of Gately LLC and to permanently bar Gately from association with a registered public accounting firm.

II.

Gately LLC is a public accounting firm licensed under Florida law to engage in the practice of public accounting. It has been registered with the PCAOB pursuant to Section 102 of the Sarbanes-Oxley Act of 2002 (the "Act") since November 2003. Gately is a certified public accountant also licensed in Florida. At all relevant times, Gately has been the managing member, sole owner, president and sole employee of Gately LLC, and 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. Inspection Efforts

In February 2007, the PCAOB Division of Registration and Inspections ("Inspections") began efforts to conduct an inspection of Gately LLC, in accordance with Section 104 of the Act and Rules 4000 and 4001. On February 15, February 23, and March 9, 2007, Inspections staff left voice mail messages on Gately's cell phone requesting that he contact Inspections to provide information concerning Gately LLC, updated to reflect events that had occurred since the prior inspection of Gately LLC in 2004. Gately does not recall receiving any of those messages, and he did not respond to them.

On May 23, June 4, and June 7, 2007, more than two months later, Inspections staff again left messages for Gately on his cell phone, this time informing him that Inspections staff planned to begin the field work for its inspection of Gately LLC on August 13, 2007, and asking Gately once more to contact Inspections to provide updated information regarding Gately LLC.

On June 11, 2007, Gately contacted Inspections staff and explained that he was in a 90-day alcohol rehabilitation program and would not be available for an inspection of Gately LLC on August 13. Inspections staff agreed to reschedule the inspection. Inspections subsequently decided to schedule the inspection field work to begin on October 1, 2007, and notified Gately of that date on July 10, through a voice mail message.

On September 12, 2007, Gately spoke to Inspections staff by telephone. Although there is disagreement as to the precise content of the call, it is undisputed that Gately advised Inspections that he would have to travel to obtain the files needed for the inspection and that Inspections again agreed to postpone the inspection. Inspections rescheduled the inspection for November 5, 2007.

Also on September 12, Inspections staff sent Gately, by email, an Issuer Information Form ("IIF"), which sought information concerning Gately LLC's public company audit clients. The information sought ranged from the very basic, such as the name, location, and industry of Gately LLC's audit clients, to the more detailed, such as the release date of Gately LLC's audit reports.

In the September 12 email, Inspections staff requested that Gately complete the IIF and provide it to Inspections as soon as possible and no later than September 20, 2007. Inspections staff also informed Gately that once it received the completed IIF, "we will try to let you know which engagements we have selected as soon as possible so that you will have plenty of time before the November 5, 2007 planned inspection date to retrieve the work papers from storage." Inspections staff also informed Gately that "it is not likely that we will be able to accommodate a request to move the inspection to a date any later in the year."

Respondents did not complete and submit the IIF. During October 2007, Inspections staff left Gately five voice mail messages and sent him four emails and three letters requesting that he complete and return the IIF. It is unclear whether Gately received any of these communications, other than the October 31 letter discussed below, which Gately acknowledged.

In the last of the letters, sent on October 31, 2007, Inspections staff advised Gately:

failure on your part either to provide all the information requested of you or to allow the inspection team to commence field work of the inspection of your firm on Monday November 5, 2007 may result in this matter being referred to the PCAOB's Division of Enforcement and Investigations. This could result in disciplinary action for failure to cooperate with an inspection as required by PCAOB Rule 4006, even if you later permit the inspection.

On October 31, 2007, even though Respondents had not completed and returned the IIF, Inspections staff also sent Gately an email advising him that Inspections had selected two specifically-identified Gately LLC audit engagements for review, and that at the November 5 inspection meeting, "you will need to provide to us all your workpapers for the engagements identified . . . and during this meeting we will discuss your firm's quality control policies and practices and work with you to schedule interviews/meetings related to each engagement to be inspected." Gately subsequently indicated, in a November 3, 2007 email, that he had not received notice of the two

engagements that Inspections wanted to review, and, in a November 5 email response, Inspections staff again identified the two engagements.

On November 2, 2007, one business day before the field work was to begin, Gately sent Inspections staff an email stating, "Notice of not confirming the inspection and will be preparing a deregistration form sometime next week." In the email, Gately said:

When I first spoke with [an Inspections staff member] I was going to deregister from the PCAOB as I was in rehab and would be spending months there and not able to participate in an inspection. I then contacted [the staff member] later to see if she would give me a chance to have files collected for me and if it did not work out for the timetables I would deregister.

In the email, Gately also explained that he "would have to travel to get to files and fill out the paperwork," and stated that in order to travel he "need[ed] travel permission from [his] probation officer which will not be timely." The email concluded, "Given your letter I am going to fill out the form to deregister."^{1/}

In response, Inspections staff sent Gately a letter dated November 2, 2007, indicating that, based on his November 2 email, Inspections understood that Gately LLC intended to file a Form 1-WD, Request for Leave to Withdraw from Registration, pursuant to Rule 2107. Inspections stated that it would postpone the field work for the inspection until November 26, 2007, so that Gately LLC would have time to do that, and that Inspections would further postpone the inspection if Gately LLC filed a Form 1-WD by that date. But the letter also warned that if Gately LLC did not file a Form 1-WD by November 26:

we will commence the inspection field work on that date. In that event, you should have the issuer information form and all of the other information we have requested available for us on November 26, 2007, as well as audit engagement file(s) for the two engagements previously communicated to you, including the audit work papers, permanent files and report files and any other relevant documentation supporting the firm's audit opinion.

^{1/} "Your letter" appears to refer to the October 31, 2007 letter from Inspections staff.

The letter again warned that failure to provide all requested information or to allow the inspection to begin on November 26 might result in the matter being referred to Enforcement, which could lead to disciplinary action.

On November 5, 2007, Gately advised Inspections staff, by email, "If you are willing, I can go to Orlando to search the storage units for the files and give you an answer on withdrawal a week from today if the files are easily accessible." Inspections staff responded, in an email dated November 7, 2007, that "PCAOB is not in a position to advise you whether to go to Orlando, to withdraw from registration or to take any other course of action," but reminded Gately that if Gately LLC did not file a Form 1-WD to withdraw from registration by November 26, 2007:

the inspection will commence on that date and you should have the issuer information form and all the other information we have requested available for us on November 26, 2007, as well as audit engagement file(s) for the two engagements previously communicated to you, including the audit work papers, permanent files and report files and any other relevant documentation supporting the firm's audit opinion

In response, Gately sent Inspections staff an email on November 7, 2007, stating, "Got it. Going to Orlando to pick up the files."

On November 19, 2007, Inspections staff sent Gately an email asking him to either confirm the November 26 inspection field work date or indicate that Gately LLC intended to request leave to withdraw from registration. Gately responded the same day with an email stating, "My intention is to have the two companies available on the 26th. I returned with them from Orlando this past Saturday. I will complete the listing of all companies on the template" Gately also provided a new residential mailing address.

On November 22, 2007, however, Gately emailed Inspections staff, stating that he would "not be available for the inspection," because "[w]hen arriving back to the Miami area I was confronted with . . . the old house having had fire damage." In a subsequent email, also on November 22, Gately advised Inspections staff that "unfortunately my stuff is in the old house." Inspections staff responded with an email expressing sympathy and asking Gately to call the next day, Friday, November 23, "so we can discuss how to proceed."

On Monday, November 26, the day the inspection was to have begun, Inspections staff sent Gately an email stating that they "did not hear from you on

Friday," and again asking Gately to call "so we can discuss your situation." To this email, Gately responded on November 26, "I will call." According to Gately, however, he had limited communication ability and was completely preoccupied with finding a new home; in any event, he did not call Inspections staff.

On November 27, 2007, Inspections staff sent Gately another letter stating that it was "imperative" that he call Inspections no later than the close of business on November 28, 2007, so that the field work for the inspection of Gately LLC could be rescheduled. The letter warned Gately that failure to contact Inspections staff by that deadline could result in a disciplinary action for failure to cooperate with an inspection.

Gately called Inspections staff on November 28 and Inspections agreed to reschedule its field work for the inspection to December 10, 2007. Inspections also agreed to conduct a "PCAOB-based inspection," which allowed Respondents to send all requested materials to the PCAOB's offices in Atlanta and participate in telephone interviews, rather than appearing in person.

On November 29, 2007, Inspections staff sent Respondents a letter confirming the December 10 inspection date and again requesting that they complete and return the IIF. In order to allow Inspections to proceed on December 10, the letter also requested that Respondents provide to Inspections by December 7, 2007: (a) copies of the audit engagement files for the two engagements that Inspections had selected for review; and (b) other documents and information described in a "Data Request" form enclosed with the letter. The Data Request sought both basic and detailed information about Gately LLC and its operations and personnel.

Inspections staff followed up the November 29 letter with voice mail messages for Gately on December 4 and 6, 2007, and an email to Gately on December 7, 2007. The email noted that Inspections had "not yet received the copies of your audit work papers and the other requested information, which were due to us today."

Inspections heard nothing more from Gately until December 10, 2007, the date scheduled for the inspection. On that day, Gately sent Inspections staff an email stating that he "[j]ust saw your message"; that there had been an "[u]nexpected slow up on my side"; and that he would call Inspections staff and provide an update.

Gately did not call Inspections staff or provide an update. On December 20, 2007, Inspections sent Respondents another letter, which recounted the history of Inspections' efforts to schedule an inspection of Gately LLC; reiterated that it "is imperative that you submit the requested information, including copies of the audit

engagement files for the two engagements the staff selected and other information the staff requested in its November 29 letter . . . as soon as possible," with a December 28, 2007 deadline; and warned that Respondents' failure to meet the deadline "will result in this matter being referred to" Enforcement and could lead to disciplinary proceedings for failure to cooperate with an inspection, "even if you later provide such copies of the audit engagement files and the other requested information."

Respondents did not respond to the December 20 letter until January 2, 2008, when Gately sent Inspections staff an email in which he stated that he had moved from the address to which the December 20 letter was sent; that "someone else" signed for the letter at that address; and that "[s]ince I found out about this deadline letter today I . . . request . . . to change the date and work with the inspection team. My intention was to cooperate with the team." Gately included with his email an Expedia.com airline itinerary showing that he had traveled to Chicago, Illinois during the period December 21-30, 2007.

On January 3, 2008, Inspections staff sent Gately an email with an attached letter advising Respondents that Inspections'

demand for the requested materials (including the copies of the audit engagement files for the two engagements the staff selected and the other information that the staff had requested from you) still stands, and we encourage you to provide the materials and permit the inspection as soon as possible. However, for purposes of the timeliness of your compliance we will not revise the deadline described in our December 20, 2007 letter, and our position remains as stated in that letter.

Gately later confirmed that he had received the email and was able to open the letter.

On April 4, 2008, the Board instituted this proceeding, alleging that Respondents violated Rule 4006 during 2007 and 2008. As of that date, Respondents had not provided any of the information requested by Inspections. On August 15, 2008, Respondents provided Inspections with an IIF.^{2/} According to a cover letter from

^{2/} Respondents did not notify the hearing officer about the submission of the IIF, and raise the fact that they provided it for the first time in their reply brief on appeal.

Respondents' attorney, the IIF was provided in response to a request from Inspections via e-mail "on June 5."^{3/}

B. Respondents' Circumstances During the Relevant Time Period

Gately is Gately LLC's only employee. From April 18, 2007 to April 24, 2007, Gately was undergoing initial treatment for alcoholism in a detoxification facility. From April 25, 2007 to July 19, 2007, Gately was in an in-patient residential detoxification clinic in the Miami area, where he was treated for severe alcoholism.

After his in-patient treatment, Gately was in out-patient treatment from July 20, 2007 until February 29, 2008. His treatment included weekly interaction at a clinic, a monitored dietary and exercise regimen, and assigned reading. He was also required to attend daily Alcoholics Anonymous meetings and bi-weekly therapy sessions.

During his time in out-patient therapy, Gately lived in a "three-quarters way" house, as recommended by Gately's psychotherapists. Such houses have live-in monitors who oversee the patient's day-to-day living environment. In February 2008, Gately reached a level of health at which his psychotherapist recommended that he was ready to move out of the "three-quarters way" house.

In late August 2007, against the advice of his therapists, Gately traveled to Orlando, Florida in an attempt to retrieve his work files, which were in storage at the home of one of Gately's colleagues. Gately relapsed during his trip and the colleague refused to release the files on account of Gately's noticeable intoxication. The police were called and Gately was arrested.

On September 27, 2007, Gately was placed on two years probation by a Florida state court, apparently for an alcohol-related motor vehicle violation. The probation conditions required Gately to obtain the permission of his probation officer to travel outside his county of residence, and the procedure to obtain permission usually required a minimum of two weeks notice for travel out of state and one to two weeks notice for in-state travel outside his county of residence. As noted above, Gately's files were in storage in Orlando, which was outside his county of residence.

^{3/} Other than this reference in a letter attached to Respondents' reply brief on appeal, there is no evidence in the record concerning what, if anything, Inspections communicated to Respondents on June 5, 2008 concerning the request for the IIF.

In November 2007, Gately apparently obtained the required permission and again traveled to Orlando, where he retrieved at least some of his files. Subsequently, however, there was a fire in one of Gately's residences and he lost files for the two audit clients Inspections had identified. According to Gately, he then began planning another trip to Orlando to obtain materials to supplement and complete his now incomplete set, and this was the "unexpected slow up" referred to in his December 10, 2007 email to Inspections.

Gately did not respond to Inspections' December 20, 2007 letter until January 2, 2008 because he was in Chicago visiting family and contemplating a move back home. Gately asserted that after receiving Inspections' January 3, 2008 letter, he "understood that [the] matter would further be handled by the PCAOB's enforcement division given that the deadline of December 28 had already [passed]."

C. Gately LLC's Audit Work During the Relevant Time Period

Gately LLC issued audit reports for public company clients dated August 18, 2007, November 21, 2007, and December 6, 2007, and the clients included those audit reports in filings they submitted to the Securities and Exchange Commission. Gately LLC also issued 11 audit reports for public company clients between January 1, 2008 and April 4, 2008, including two audit reports dated January 24, 2008, an audit report dated January 30, 2008, two audit reports dated February 1, 2008, two audit reports dated February 20, 2008, and four audit reports dated February 25, 2008. Again, the clients included those reports in SEC filings. Two of the audit reports concerned the audit clients for which Inspections had requested engagement files as part of its effort to inspect Gately LLC.

In opposing summary disposition, Respondents asserted:

As to any audits performed during this period by [Gately LLC], [Gately LLC] only accepted audits of non-active clients in which the financial statements were prepared by an external accountant who had prepared such statements for several years prior. . . . All information and back-up documentation with complete financial statements were provided by the external accountant to [Gately LLC]. The audits did not require that any information be kept by [Gately LLC] in storage after work was completed.

Further, "all of the information required in the audit could be provided at [Gately's] residence with a minimal amount of work on his part. None of the audit reports required traveling from the Miami area as did the PCAOB inspections process." The exception

was an audit for "an active client" that "was conducted after [Gately] finished his rehabilitation." Gately "only conducted the 2008 audit of [the client] so the company would pay for him to visit the company's site in Africa, where he would be able to retrieve the company's 2006 [financial] information which had been requested by the PCAOB but had been destroyed in the fire."

D. Procedural History

The Board issued its Order Instituting Disciplinary Proceedings on April 4, 2008. On May 19, 2008, Respondents filed their Answer and Affirmative Defenses, in which they admitted nearly all of the factual allegations in the Order but denied that they violated Rule 4006, claiming as an affirmative defense that they

cooperated with the PCAOB inspection process to the fullest extent possible under the circumstances. Lack of cooperation implies intentional or reckless disregard of one's responsibilities. Such an allegation is inapplicable when performance is not negligently disregarded but made impossible due to alcoholism, treatment thereof, and court mandated probation.

On July 1, 2008, Enforcement filed a Motion for Summary Disposition pursuant to Rule 5427. Respondents filed their opposition to the motion on September 3, 2008, and, on September 11, 2008, filed the Affidavit of Bradley P. Kerschensteiner as additional support. Noting that the affidavit was untimely and that Respondents had neither moved for leave to supplement their response nor offered any purported good cause for the untimely filing, the hearing officer disregarded it. The Initial Decision noted that "[i]n any event, the Affidavit merely provides details of Gately's treatment for alcoholism that are also set forth in Respondents' Verified Statement of Additional Material Facts and Response to PCAOB's Alleged Undisputed Facts and discussed [in the Initial Decision]."

On October 20, 2008, the hearing officer granted summary disposition in favor of Enforcement. As sanctions for the violations of Rule 4006, the hearing officer permanently revoked Gately LLC's registration with the Board and permanently barred Gately from association with a registered public accounting firm. Respondents timely petitioned for review of the Initial Decision pursuant to Rule 5460.

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 case presents the first application of this rule, which, 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."^{4/}

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."^{5/} In considering a motion for summary disposition, the record will be viewed most favorably to the non-moving party, but "we need not credit purely conclusory allegations, indulge in rank speculation, or draw improbable inferences."^{6/} "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.'"^{7/} Finally, in a non-jury proceeding such as this, it may be appropriate, in

^{4/} National Amusements, Inc. v. Town of Dedham, 43 F.3d 731, 735 (1st Cir. 1995).

^{5/} Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986) (emphasis in original).

^{6/} National Amusements, 43 F.3d at 735.

^{7/} Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986) (quoting Fed. R. Civ. P. 56(e)).

evaluating the entire record, to draw inferences from undisputed facts so long as those inferences do not depend on the evaluation of witness credibility.^{8/}

B. Summary Disposition was Appropriate as to Respondents' Failure to Cooperate

Captioned "Duty to Cooperate with Inspectors," Rule 4006 provides:

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.

Thus, both Gately LLC and Gately were required to cooperate with Inspections in its effort to conduct an inspection of Gately LLC.

Inspections began its efforts to conduct an inspection of Gately LLC in early 2007. It is unclear, however, whether Gately received the February 2007 voice mails left by Inspections staff, and, by the time of Inspections' May and June 2007 communications, Gately was undergoing in-patient treatment for alcoholism. Acknowledging this, after initially attempting to schedule the inspection field work on August 13, 2007, Inspections postponed the inspection until October 1, 2007 to accommodate Gately's treatment. Similarly, in September 2007, Inspections postponed the inspection and rescheduled it for November 5, 2007, in response to Gately's representation that he needed time to retrieve his files from storage. Respondents

^{8/} See Ramallo v. Reno, 931 F. Supp. 884, 888 (D.D.C. 1996); see also Fox v. Johnson & Wimsatt, Inc., 127 F.2d 729, 737 (D.C. Cir. 1942) ("Conflict concerning the ultimate and decisive conclusion to be drawn from undisputed facts does not prevent rendition of a summary judgment, when that conclusion is one to be drawn by the court.").

cannot be found to have failed to cooperate where Inspections agreed to these postponements based on truthful representations from Gately.

Instead, Respondents' lack of cooperation began with their failure to complete and submit the IIF that Inspections sent Gately on September 12, 2007. The IIF required Respondents to provide a range of information regarding Gately LLC's public company audit clients—from their names, locations, and industries to the release date of the audit reports Gately LLC had issued for each client—all of which was highly relevant to the inspections process. Inspections set an initial deadline of September 20, 2007 for Respondents to complete and submit the IIF. Respondents missed that deadline, as well as later deadlines set by Inspections for submission of the IIF, and had not submitted the IIF when disciplinary proceedings were instituted on April 4, 2008.^{9/}

When Respondents failed to submit a completed IIF, Inspections identified two known Gately LLC audit clients for review, and asked for the audit engagement files. Once again, Inspections set several deadlines for Respondents to produce or submit those files, but Respondents missed every deadline, had not produced the engagement files as of the time disciplinary proceedings were instituted, and, as far as the record shows, have not submitted engagement files any time thereafter.^{10/}

On November 29, 2007, Inspections sent Respondents a Data Request form seeking information regarding Gately LLC, and set a deadline of December 7 for Respondents to complete and submit the Data Request form. Respondents missed that deadline, as well as the December 28 deadline subsequently set by Inspections, had not submitted the Data Request form as of the time disciplinary proceedings were instituted, and, as far as the record shows, have not submitted the Data Request form any time thereafter.

^{9/} On August 15, 2008—eleven months after it was requested and four months after this proceeding was instituted—Respondents provided Inspections with the IIF.

^{10/} In their reply brief before the Board, Respondents assert that on June 5, 2008 they "received a communication from PCAOB Inspections stating that the PCAOB would now be choosing new audit files as opposed to those originally selected for Inspection." For purposes of our decision, we need not consider whether the original request for the audit files was superseded on June 5, 2008. The relevant point is that Respondents never complied with the request described here, which was one of the grounds for instituting disciplinary proceedings on April 4, 2008.

Respondents assert that cooperation was made impossible by Gately's physical and mental impairment due to alcoholism and his treatment for that condition. They concede in their brief on appeal that "[w]hen viewed in a vacuum, Gately did not comply with Inspections demands," but argue that summary disposition was inappropriate because there was a genuine issue of material fact "as to the Respondent's mental abilities and capabilities during the very time in which the [hearing officer] unilaterally concludes that the Respondent had no impediment to cooperation." For the reasons described below, however, we find that Respondents have not demonstrated a genuine issue of fact about whether Gately was so incapacitated throughout the period in question as to be unable to provide any of the requested information.^{11/}

Inspections' efforts to obtain information needed to conduct an inspection of Gately LLC can be divided into two stages for purposes of considering Respondents' capacity to cooperate. The first stage runs from September 12, 2007, when Inspections sent the IIF to Respondents, through the end of 2007.^{12/} Respondents contend that during this period Gately's ability to cooperate in the inspection was constrained by his treatment, the restrictions on his travel, and his loss of certain files in a fire. But while these circumstances may have made it more difficult for Respondents to cooperate with Inspections, the evidence does not demonstrate a genuine issue of fact about whether Respondents were incapable of any cooperation. The record establishes beyond dispute that, during this stage, Inspections persisted in its efforts to obtain information from Respondents in order to conduct its inspection of Gately LLC. Respondents, however, failed to provide any of the requested information.

^{11/} 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 the existence of a Rule 4006 violation and, even if not material to that question, separately assess whether that issue was material to the appropriateness of the sanctions imposed. Because we find there is no genuine issue concerning capacity, we do not address those materiality questions.

^{12/} Prior to that time, from April 25 through July 19, 2007, Gately was undergoing in-patient treatment for alcoholism. We have no need to consider whether this rendered Respondents incapable of providing any of the requested information because, as explained above, Respondents cannot be found to have failed to cooperate during a period in which Inspections agreed to postponements based on truthful representations from Gately.

First, Respondents failed to complete and return the IIF, which sought information about Gately LLC's audit clients. To attempt to justify this failure, Respondents say they needed information from files that were stored in Orlando, and that Gately traveled there twice to obtain files. The first time, in August 2007, he relapsed, was arrested, and did not succeed in obtaining any files; the second time, in November 2007, he did obtain files, some of which were later destroyed in a fire. Viewed in the light most favorable to Respondents, this may have made it difficult or even impossible to complete the IIF in full. It is not, however, evidence that Respondents were prevented from providing all of the information requested in the IIF. On the contrary, it is undisputed that Gately LLC issued one audit opinion in August, another in November, and a third in December, 2007; Respondents have offered no justification for their prolonged failure to complete the IIF at least as to those clients.

Second, Respondents provided none of the audit engagement files Inspections requested. Respondents rely on the fact that some of the files for the two engagements selected by Inspections were lost in a fire, but they do not contend that all the files were lost, and they were required at least to provide whatever files remained.

Third, Respondents failed to complete and submit the Data Request form, which requested information about Gately LLC and its operations and staff. Respondents have offered no evidence that they were unable to provide any of the information requested in the Data Request, including a list of "individuals who manage the Firm, an indication of their primary responsibilities, and their biographies," "all [the Firm's] affiliation arrangements," "[s]upport for the Firm's legal name (e.g., partnership agreement, shareholders' agreement)," and the Firm's practice areas.

On appeal, Respondents argue that the hearing officer erred by excluding the affidavit of Bradley P. Kerschensteiner, a therapist who participated in the treatment of Mr. Gately during 2007. The Kerschensteiner affidavit, they assert, would have established a genuine issue of material fact about Gately's state of mind and ability to perform. As described above, although the hearing officer stated that the affidavit would be disregarded, he noted in the Initial Decision that "[i]n any event, the Affidavit merely provides details of Gately's treatment for alcoholism that are also set forth in Respondents' Verified Statement of Additional Material Facts and Response to PCAOB's Alleged Undisputed Facts and discussed [in the Initial Decision]."

The Kerschensteiner affidavit describes Gately's treatment and concludes that Gately suffered from chemical dependence, post-traumatic stress disorder, and depression throughout 2007, resulting "in a general inability to function in otherwise normal business circumstances, an inability to maintain focus, and an avoidance pattern

when presented with stressful circumstances." Viewed in the light most favorable to Respondents, the affidavit does not demonstrate that there is a genuine issue of fact about Gately's capacity to cooperate with Inspections. During this period, Respondents provided none of the information Inspections requested. At the same time, Gately LLC issued two audit opinions—one in November and one in December 2007.^{13/} If it was possible for Gately LLC to opine on the financial statements of public companies, no rational finder of fact could find that Respondents were incapable of providing at least some of the requested information.

The second stage of Inspections' efforts to obtain information began with Inspections' letter to Respondents on January 3, 2008, in response to Gately's January 2, 2008 email. In the letter, which was attached to an email sent to Gately, Inspections refused to set yet another deadline for Respondents to provide the information Inspections had requested, but clearly explained that Inspections' "demand for the requested materials . . . still stands" In a subsequent email on January 4, 2008, Gately acknowledged that he was able to open the letter. Nevertheless, Respondents have offered no representation or evidence that they made any effort to comply with Inspections' requests between January 3, 2008 and well after the date this proceeding was instituted.^{14/}

In opposing summary disposition, Gately asserted that after receiving Inspections' January 3, 2008 letter, he "understood that [the] matter would further be handled by the PCAOB's enforcement division given that the deadline of December 28 had already [passed]." In light of the clear statement in Inspections' January 3 letter that that the demand for the information "still stands," this is not a tenable excuse for Respondents' failure to cooperate.

Moreover, Respondents' own actions preclude any claim that Gately was so incapacitated during this stage that Respondents could provide none of the requested information. According to Respondents, Gately was so fully recovered as of February 2008 that he moved out of the "three-quarters way" house in which he had been living,

^{13/} Gately LLC also issued an audit opinion in August 2007.

^{14/} We need not decide for purposes of this opinion whether any of Inspections' pending requests were superseded on June 5, 2008. See supra Note 10.

and, by the end of February, Gately LLC had issued 11 audit reports in 2008, one of which apparently required a trip to Africa.^{15/}

Therefore, even viewing the record most favorably to Respondents, there is an absence of evidence to support Respondents' claim that Gately was so incapacitated as to be unable to cooperate with the inspection of Gately LLC. As a result, based on undisputed facts, no rational finder of fact could find in Respondents' favor on the issue of their liability. Accordingly, summary disposition is appropriate on that issue, and we find that Respondents violated Rule 4006.

C. Summary Disposition was Appropriate as to Sanctions

Section 105(c)(4) of the Act authorizes us to impose, subject to Section 105(c)(5), "such disciplinary or remedial sanctions as [the Board] determines appropriate," for violations of the rules of the Board. Section 105(c)(5) provides that if the violation resulted from intentional or knowing conduct, including reckless conduct, the sanctions we may impose include revocation of PCAOB registration and a bar from association with a registered public accounting firm.^{16/} The hearing officer found that based on the undisputed facts, any rational finder of fact would have to conclude that Respondents' failure to cooperate in violation of Rule 4006 was at least reckless.

Gately argues that the hearing officer erred by failing to treat the question of whether Respondents' violations resulted from intentional or knowing conduct, including reckless conduct, as a genuine issue of material fact that required a hearing. We disagree.

As described in detail above, Inspections repeatedly requested information and cooperation from Respondents over an extended period of time. When Respondents did not cooperate, Inspections warned them that noncompliance could result in disciplinary action. Gately has not argued, and could not reasonably argue, that he did not know that he was failing to provide Inspections with any of the information that they repeatedly requested. Indeed, Gately's email communications to Inspections demonstrate his awareness of Inspections' requests and warnings. Respondents,

^{15/} The Kerschensteiner affidavit does not address Gately's ability to cooperate in 2008.

^{16/} The Board may also impose these sanctions for repeated instances of negligent conduct, each resulting in a violation. Section 105(c)(5)(B).

however, provided none of the requested information until after the Board instituted this proceeding. During this period of noncompliance, and in the face of Inspections' warnings, Gately LLC issued 13 audit reports on issuers. Under these circumstances, even viewing the record most favorably to Respondents, their violations can only have resulted from conduct that was at least reckless, and they have failed to identify any issue in that regard that would require a hearing.^{17/}

Having determined that we may, consistent with the Act and the Board's rules, impose a revocation and bar does not alone answer the question of whether those sanctions are appropriate for the violations in this case. We separately address that issue here.

Respondents argue that these sanctions are too severe. They note that there has been no allegation that they engaged in fraud or deceit and conclude that their conduct was less culpable than the conduct of other respondents in other Board actions who received more lenient sanctions. Respondents argue that Gately is, "at worst, an alcoholic who suffered through a debilitating and actually life-threatening condition that he readily admits impaired and impeded his ability to engage in normal business and professional discourse."

This argument misapprehends the threat to the system of Board oversight posed by noncooperation with PCAOB inspections. Under the Act, the Board must periodically inspect any registered firm that, like Gately LLC, regularly issues audit reports for public companies.^{18/} These inspections are fundamental to the Board's ability to "oversee the audit of public companies that are subject to the securities laws . . . in order to protect the interests of investors and further the public interest in the preparation of informative, accurate, and independent audit reports. . . ." ^{19/} In order to obtain the information

^{17/} Respondents argue that the Kerschensteiner affidavit demonstrates a genuine issue of material fact about Gately's state of mind. But even if Gately demonstrated "an avoidance pattern when presented with stressful circumstances" throughout 2007, any rational finder of fact would have to conclude, based on the record taken as a whole, that Respondents' violations of Rule 4006 resulted from conduct that was at least reckless. And in any event, as discussed above, Respondents' failure to cooperate continued well into 2008.

^{18/} Section 104(b)(1) of the Act.

^{19/} Section 101 of the Act.

necessary to conduct the required inspections, the Board must depend on—and requires—the full cooperation of registered firms and associated persons thereof. Failure to cooperate with an inspection frustrates the oversight system put in place by the Act and, in turn, threatens the public interest by impeding the Board's ability to detect violative conduct.^{20/} The absence of fraud or deceit does not, therefore, diminish the seriousness of Respondents' failure to cooperate in an inspection designed, among other things, to uncover any such misconduct.

Respondents also argue that, contrary to the hearing officer's findings, there was evidence "tending to show that Respondent cooperated with the inspection to the extent possible in 2008." Specifically, Respondents note, for the first time in their reply brief on appeal, that they provided Inspections with the IIF on August 15, 2008 and that Inspections acknowledged receipt on August 18, 2008. Respondents also state that on June 5, 2008, two days after a pre-hearing conference in which they claim that the hearing officer "indicated that Respondents completion of the inspections process would likely be a mitigating factor in the pending dispute," Inspections notified Respondents that "it would now be choosing new audit files as opposed to those originally selected for inspection."^{21/} According to Respondents, "[t]his decision ensured that no

^{20/} Congress recognized that cooperation with the Board by registered public accounting firms and their associated persons was critical to the system of oversight it put in place in Title I of the Act. Under Section 102(b)(3), a public accounting firm's application for registration with the Board is required to contain, among other things:

a consent . . . to cooperation in and compliance with any request for testimony or the production of documents made by the Board in furtherance of its authority and responsibilities under this title (and an agreement to secure and enforce similar consents from each of the [firm's] associated persons . . . as a condition of their continued employment by or other association with such firm); and (B) a statement that such firm understands and agrees that cooperation and compliance . . . shall be a condition to the continuing effectiveness of the registration of the firm with the Board.

^{21/} Respondents attached letters evidencing the submission and receipt of the IIF to their reply brief, as well as the fact that Inspections asked Respondents for more current information.

compliance would be effectuated before the PCAOB's Motion for Summary Disposition was decided."^{22/}

While it appears that the hearing officer was unaware of these facts, and he did not consider them, they do not alter our conclusion that Respondents failed to cooperate in any manner with the inspection or mitigate that failure.^{23/} The Board instituted this proceeding after Respondents failed for more than six months to provide any of the information requested by Inspections despite repeated requests for compliance. That Respondents provided the IIF after the proceeding was instituted does not convert their complete failure to cooperate into partial cooperation or demonstrate that they cooperated to "to the extent possible."^{24/} Accordingly, we do not credit Respondents' provision of the IIF months after disciplinary proceedings against them were instituted.^{25/}

^{22/} According to the reply brief, "Respondent finds this occurrence conspicuous." We are unaware of facts suggesting that Inspections altered its document requests in an attempt to influence this proceeding, and Inspections' August 18 letter to Respondents, attached to Respondents' reply brief, explicitly disclaims such an effort. Rather, that letter explains that as a result of Respondents' noncompliance, Inspections was unable to conduct an inspection of Gately LLC in 2007 and hoped instead to conduct an inspection of Gately's more recent audit engagements.

^{23/} As a result, we deny Enforcement's Motion for Leave to File Sur-Reply Brief in response, and Respondents' Motion to Strike Enforcement's Motion is moot.

^{24/} Cf. CMG Institutional Trading, Exchange Act Rel. No. 59325, 2009 SEC LEXIS 215, at *20 (Jan. 30, 2009) ("we have emphasized repeatedly that NASD should not have to initiate a disciplinary action to elicit a response to its information requests made pursuant to Rule 8210"); Paz Securities, Exchange Act Rel. No. 57656, 2008 SEC LEXIS 820, at *16 (Apr. 11, 2008) ("failure to respond until after NASD barred Applicants is not merely a 'slow' response; such a failure is tantamount to a complete failure to respond").

^{25/} We disagree with Respondents' characterization of the hearing officer's remarks at the pre-hearing conference regarding mitigation. According to the transcript, the hearing officer noted that in adjudicating cases for the Financial Industry Regulatory Authority ("FINRA"), he considered relevant whether: (1) the Respondent made a good faith effort to respond, even if he or she could not produce everything requested, and (2) the Respondent ever provided the information, even if he or she did so late. On the second point, the hearing officer said, "So, generally speaking, depending on how far

We have found that Respondents failed to cooperate with a Board inspection for a prolonged period of time and despite repeated warnings that noncooperation could result in a disciplinary proceeding. As a result, the Board has been unable to assess Respondents' compliance with applicable requirements in their conduct of audits. Respondents' actions were egregious—during the period of noncooperation, Gately LLC issued 13 audit reports. As discussed above, that fact fatally undermines Respondents' only proffered explanation for their failure to cooperate—that Gately was rendered so incapacitated by alcoholism and related personal circumstances that Respondents could not provide any of the information Inspections requested. We have found that Respondents' violations resulted from conduct that was at least reckless, and that there are no factors that mitigate Respondents' failure to cooperate. Finally, if Gately LLC continues to issue audit reports for public companies, Respondents will have opportunities for future violations because Gately LLC will again be subject to inspection.

Under the circumstances of this case, there exists too great a risk to investors to allow Respondents to continue to engage in audits of issuers. It is therefore in the public interest to permanently revoke the registration of Gately LLC and to permanently bar Gately from associating with any registered accounting firm.

An appropriate order will issue.^{26/}

By the Board.

down the road it is you may get some credit for doing it late even if it is late even if that is not a complete defense." These are general statements about the hearing officer's view of the law in FINRA cases, rather than about the particular facts of the "pending dispute." Moreover, these statements are not inconsistent with our finding that the Respondents' provision of the IIF was too late in the process— i.e., too "far down the road"— to credit.

^{26/} 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.

PCAOB

Public Company Accounting Oversight Board

PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD

_____)	
)	PCAOB File No. 105-2008-001
)	
In the Matter of Gately & Associates,)	
LLC and James P. Gately, CPA,)	
)	
Respondents.)	
_____)	June 4, 2009

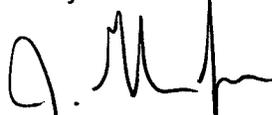
ORDER IMPOSING SANCTIONS

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

ORDERED that James P. Gately is permanently barred from associating with any registered public accounting firm, effective upon the expiration of the time period for filing an application for review of this determination with the Securities and Exchange Commission, or, if such an application is filed, upon the lifting of the stay imposed pursuant to Section 105(e) of the Sarbanes-Oxley Act of 2002; and it is further

ORDERED that Gately & Associates, LLC's registration with the Board is permanently revoked, effective upon the expiration of the time period for filing an application for review of this determination with the Securities and Exchange Commission, or, if such an application is filed, upon the lifting of the stay imposed pursuant to Section 105(e) of the Sarbanes-Oxley Act of 2002.

By the Board



J. Gordon Seymour
Secretary

June 4, 2009