PCAOB
Public Company Accounting Oversight Board

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PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD

In the Matter of *Eric C. Yartz, P.C.* Respondent.	PCAOB File No. 105-2012-006 **Notice of Finality of Initial Decision** May 7, 2013

On March 15, 2013, the Chief Hearing Officer of the Public Company Accounting Oversight Board issued the attached Initial Decision pursuant to PCAOB Rule 5204(b) ordering, as sanctions, that the PCAOB registration of Eric C. Yartz, P.C. ("the Firm") be suspended for one year and that the Firm pay a civil money penalty in the amount of $2,500.

There having been no petition for Board review of the Initial Decision filed by any party pursuant to PCAOB Rule 5460(a) and no action by the Board to call the matter for review pursuant to PCAOB Rule 5460(b), the Initial Decision has today become final pursuant to PCAOB Rule 5204(d).

The Firm shall pay the civil money penalty by (a) wire transfer pursuant to instructions provided by Board staff; or (b) United States postal money order, certified check, bank cashier's check or bank money order; (c) made payable to the Public Company Accounting Oversight Board; (d) delivered to the Controller, Public Company Accounting Oversight Board, 1666 K Street, N.W., Washington D.C. 20006; and (e) submitted under a cover letter which identifies Eric C. Yartz, P.C. 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 Notice, a copy of which cover letter and money order or check shall be sent to Office of the Secretary, Attention: Phoebe W. Brown, Secretary, Public Company Accounting Oversight Board, 1666 K Street, N.W., Washington, D.C. 20006.

Effective Date of Sanctions: If the Firm 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 the Firm 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

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

Phoebe W. Brown
Secretary

May 7, 2013

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In the Matter of Eric C. Yartz, P.C., Respondent.	PCAOB No. 105-2012-006 Hearing Officer – DMF **INITIAL DECISION** March 15, 2013

Summary

The Division of Enforcement and Investigations' motion for summary disposition, submitted in accordance with PCAOB Rule 5427, is granted; Respondent's cross-motion for summary disposition is denied. The undisputed facts establish that Respondent, a registered public accounting firm, violated Section 102(d) of the Sarbanes-Oxley Act of 2002, as amended, ("the Act") and PCAOB Rule 2200 by failing to timely file annual reports for 2010, 2011, and 2012 and Section 102(f) of the Act and Rule 2202 by failing to timely pay annual fees for 2010, 2011, and 2012. For those violations, pursuant to Sections 105(c)(4) and 105(c)(5) of the Act and PCAOB Rule 5300(a), Respondent's registration is suspended for one year and Respondent is ordered to pay a $2,500 civil money penalty.

Appearances

Noah A. Berlin, Esq., Washington, DC, for the Division of Enforcement and Investigations.

Eric C. Yartz, Owner, on behalf of Respondent Eric C. Yartz, P.C.

DECISION

1. Background

On December 11, 2012, pursuant to Section 105(c) of the Sarbanes-Oxley Act of 2002, as amended, ("the Act"), the Public Company Accounting Oversight Board ("PCAOB" or "Board")

issued an Order Instituting Disciplinary Proceedings ("OIP") against Eric C. Yartz, P.C., ("Respondent"), a registered public accounting firm. The OIP set forth the allegations of the Division of Enforcement and Investigations ("Division") that Respondent violated Section 102(d) of the Act and PCAOB Rule 2200 by failing to file its annual reports for 2010, 2011, and 2012, and that Respondent violated Section 102(f) of the Act and PCAOB Rule 2202 by failing to pay its annual fees for the same years.

Respondent filed its Answer on December 21, 2012, generally denying the allegations in the OIP. On January 10, 2013, the Division submitted a proposed schedule, agreed to by Respondent, under which the Division would file a motion for summary disposition, pursuant to Rule 5427. The schedule contemplated that if I denied the Division's motion, I would hold a pre-hearing conference and establish a more complete pre-hearing schedule at a later date.

The Division filed its motion for summary disposition and supporting materials on February 4, 2013. On February 21, 2013, Respondent filed a response to the Division's motion and supporting materials in which Respondent cross-moved for summary disposition in its favor. For the reasons set forth below, the Division's motion is granted and Respondent's cross-motion is denied.

2. Summary Disposition Standards

Rule 5427(d) 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." Rule 5427(d) "mirrors the summary judgment standard in Rule 56 of the Federal Rules of Civil Procedure, and accordingly federal court interpretations of Rule 56 are instructive in interpreting the Board rule." Gately & Assocs.

LLC, Exch. Act. Rel. No. 62656, 2010 WL 3071900 at *7 (SEC Aug. 5, 2010) (footnote omitted).

In considering a motion for summary disposition, 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." 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." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986) (emphasis in original). In considering a motion for summary disposition, the record will be viewed most favorably to the nonmoving party, but the adjudicator "need not credit purely conclusory allegations, indulge in rank speculation, or draw improbable inferences." National Amusements, 43 F.3d at 735. "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.'" Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986) (quoting Fed. R. Civ. P. 56(e)).

3. Violations

The facts establishing Respondent's violations are undisputed. Respondent is a professional corporation located in Houston, Texas. Eric C. Yartz ("Yartz") is Respondent's

only associated person. Operating as a sole proprietorship, Yartz issued an audit report for an issuer in 2003, without being registered with the PCAOB. Yartz subsequently applied for PCAOB registration in 2004, but, pursuant to a settlement agreement, the Board disapproved his application, because of his issuance of an audit report for an issuer without being registered. The Texas State Board of Public Accountancy reprimanded and disciplined Yartz for the same conduct.

In 2006, Respondent applied for registration and its application was approved by the Board. Respondent's registration was effective March 14, 2006, and at all relevant times, Respondent was registered with the Board. Pursuant to Section 102(d) of the Act and PCAOB Rules 2200 and 2201, each registered public accounting firm must submit an annual report to the PCAOB by June 30 of each year. In addition, pursuant to Section 102(f) of the Act and Rule 2202, each registered public accounting firm must pay an annual fee to the PCAOB by July 31 of each year. Respondent, however, failed to file annual reports by June 30, 2010, June 30, 2011, and June 30, 2012. Respondent also failed to pay annual fees by July 31, 2010, July 31, 2011, and July 31, 2012. In 2013, subsequent to the Division's filing of its motion for summary disposition, Respondent filed its past-due annual reports, paid its past-due annual fees, and filed a Form 1-WD, pursuant to Rule 2107, to withdraw from PCAOB registration, which remains pending before the Board, pursuant to Rule 2107(e).

The undisputed facts, therefore, establish that Respondent violated Sections 102(d) and 102(f) of the Act and Rules 2200 and 2202 by failing to timely file its annual reports and failing to timely pay its annual fees for 2010, 2011, and 2012.[1] Indeed, in its response to the Division's

[1] The OIP charged Respondent with failing to file the annual reports and to pay the annual fees. Because Respondent has now submitted its annual reports and paid its annual fees, the violations are properly characterized as failures to timely file the annual reports and to timely pay the annual fees.

motion, Respondent states: "Respondent acknowledges that it mistakenly failed to timely file an annual report in 2010, 2011, and 2012 ...."[2]

Accordingly, I conclude that the Division is entitled to a disposition as a matter of law that Respondent violated Sections 102(d) and 102(f) of the Act and PCAOB Rules 2200 and 2202.

4. Sanctions

The remaining issue is whether summary disposition is appropriate as to sanctions in this case, and, if so, what sanctions are appropriate. The imposition of disciplinary sanctions is governed by Sections 105(c)(4) and 105(c)(5) of the Act. Pursuant to Section 105(c)(5), Respondent's registration may be suspended or revoked only if Respondent's violations involved "intentional or knowing conduct, including reckless conduct," or "repeated instances of negligent conduct, each resulting in a violation of the applicable statutory, regulatory, or professional standard." On the other hand, a civil money penalty may be imposed without such a finding, so long as the penalty does not exceed the amount set forth in Section 105(c)(4)(D)(i) of the Act, as adjusted.

The Division requests, as sanctions for Respondent's violations, that its registration be suspended for one year and that it be ordered to pay a civil money penalty in the amount of $7,500. Respondent asserts: "Respondent agrees that a suspension and/or bar from registration with the Board for a period of one year is warranted. Respondent strongly believes that no civil money penalty is warranted. Material facts are in dispute. Respondent acknowledges that it mistakenly failed to timely file an annual report in 2010, 2011, and 2012, and further mistakenly

[2] In fact, Respondent states that "Respondent has admittedly never filed an annual report or paid any dues since Respondent initially registered with the Board."

failed to pay an annual fee for those periods, but that said omissions were a good faith mistake and not willful or reckless."

Although Respondent does not oppose the imposition of the one-year suspension requested by the Division, such a sanction cannot be imposed unless, first, Respondent's conduct satisfies the requirements of Section 105(c)(5), and, second, the requested suspension appears to be an appropriate, remedial sanction to address Respondent's conduct. The Division contends that "Respondent's conduct here was intentional, reckless, or repeatedly negligent, at the very least." To support that contention, the Division relies primarily on undisputed evidence that the Division of Registration and Inspections ("Registration"), initially, and the Division, subsequently, repeatedly attempted to notify Respondent, by email and correspondence, that it was delinquent in filing its annual reports and in paying its annual fees. The emails were sent to the email address used in Respondent's application for registration and the letters were sent by Federal Express to the address listed in Respondent's application for registration. Registration and the Division received receipts for all of the letters with indications that they had been delivered to Respondent. Nevertheless, neither Registration nor the Division received any response from Respondent until after the OIP was served on Respondent.

Notwithstanding the communications sent by Registration and the Division, Respondent's response to the Division's motion states: "Under penalties of perjury, Respondent, without qualification, swears that it had no knowledge of a continuing reporting or dues paying obligation to the PCAOB" (emphasis in original). Respondent asserts: "Respondent's first knowledge of this proceeding, and the underlying infractions, occurred when it received [the Division's] email containing the Complaint."

Respondent further asserts that, although it registered to perform audits of public companies in 2006, it also "purposefully and voluntarily ceased issuing audit reports of any kind-public, private, exempt - in 2006, specifically and in direct response to" a proceeding brought against Yartz, and other accounting firms by the Securities and Exchange Commission for issuing audit reports for issuers without being registered." Respondent states:

> Respondent has one CPA, owner Eric C. Yartz. Respondent recognized in 2006 that it more than likely could not adequately discharge its responsibilities under Board rules, and that continuing to audit public companies is not "in the best interest of investors" nor does it "further the public interest". So it quit. And, for good measure, ceased auditing non-public entities as well. Respondent honestly believed that because it limits its practice to tax compliance, it had no further responsibilities to the PCAOB or the SEC. Respondent was simply unaware of the requirement to file Form 1-WD [to withdraw from registration], until it received notice of the present action and contacted the Division's attorney. [Footnote omitted.]

With regard to the email communications sent by Registration and the Division, Respondent stated in its Answer to the OIP that "PCAOB is on Respondent's Junk e-mail list." With regard to the correspondence, Respondent asserts that it was misaddressed to Suite 310 in the building where Respondent maintains its office—the suite number listed in Respondent's application for registration—rather than to Suite 100, where Respondent's office is currently located. Respondent suggests in its cross-motion that "there is a likelihood someone other than Respondent's Owner signed for those letters." Respondent also states: "However, as embarrassing as it appears in hindsight, even if Respondent received said correspondence, they would have been treated as junk mail under the assumption that after four years of no communication, what substantive issue could the PCAOB possibly have with Respondent."

The first question posed is whether Respondent's assertions establish the existence of genuine issues of material fact regarding whether Respondent's conduct satisfies the requirements of Section 105(c)(5). If so, the Division's motion must be denied as to its request

that Respondent's registration be suspended. In this case, however, I conclude that the undisputed facts are sufficient to support a conclusion that Respondent's conduct amounted to "repeated instances of negligent conduct, each resulting in a violation of the applicable statutory, regulatory, or professional standard."[3]

There is no dispute that Respondent voluntarily registered with the Board. By doing so, Respondent accepted the duties and responsibilities of a registered public accounting firm, including the obligations to file annual reports and to pay annual fees. Respondent's admitted failure to inform itself of these obligations is not exculpatory; rather, it demonstrates that Respondent's failure to timely file its annual reports and to pay its annual fees for 2010, 2011, and 2012 was attributable to repeated instances of negligent conduct, each resulting in a violation of the Act and the Board's rules.

Further, there is no dispute that Registration and the Division made numerous efforts to notify Respondent of its delinquencies and the potential consequences for those delinquencies, and that the communications sent by Registration and the Division conveying those notifications were delivered. While Respondent asserts that it did not learn of its delinquencies until it received the OIP instituting this proceeding, there is no dispute that Respondent failed to update its address with the PCAOB. Respondent also asserts that it put the PCAOB on its junk email list and that PCAOB correspondence, if delivered, would have been treated as junk mail. These facts are aggravating, not mitigating, in determining the appropriate sanctions for Respondent's violations.

[3] The Division argues that Respondent's conduct should be characterized as intentional or reckless. "Recklessness in this context ... is an 'extreme departure from the standards of ordinary care, . . . which presents a danger' to investors or the markets 'that is either known to the (actor) or is so obvious that the actor must have been aware of it.'" Gately & Assocs., LLC, Exch. Act Rel. No. 62656, 2010 SEC LEXIS 2535, at *33 (Aug. 5, 2010) (quoting Amendment to Rule 102(e) of the Commission's Rules of Practice, 63 Fed. Reg. 57,164, 57,166 (Oct. 26, 1998)). It is generally inappropriate to resolve issues regarding intent or state of mind through summary disposition, unless the appropriate resolution of such issues is clear based on the undisputed facts, which I do not find to be the case here.

I find, therefore, that, even accepting all of Respondent's assertions as true for present purposes, the undisputed facts are sufficient to establish that Respondent's violations entailed repeated instances of negligent conduct, each of which violated applicable PCAOB rules. Accordingly, the one-year suspension requested by the Division and not opposed by Respondent will be imposed.[4]

As explained above, a civil money penalty may be imposed under Section 105(c)(4)(D) of the Act without a finding that Respondent's violations involved "intentional or knowing conduct, including reckless conduct," or "repeated instances of negligent conduct, each resulting in a violation of the applicable statutory, regulatory, or professional standard." In determining whether a civil money penalty is an appropriate sanction and, if so, the amount of the penalty, the Board has considered the factors set forth in Section 21B(c) of the Securities Exchange Act of 1934 ("Exchange Act") as providing helpful and relevant guidance.

> 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.

Larry O'Donnell, CPA, P.C., PCAOB File No. 105-2010-002 (Oct. 19, 2010), at 9-10 (footnotes omitted). The Securities and Exchange Commission ("Commission") has confirmed that "[a]n analysis based on Section 21B is … sufficiently flexible to be used in this context." R.E. Bassie

[4] I have considered whether a shorter or longer suspension, or a permanent revocation, of Respondent's registration would be a more appropriate sanction, and conclude that the one-year suspension is appropriately remedial in light of the undisputed facts.

& Co., Accounting and Auditing Enforcement Rel. No. 3354, 2012 SEC LEXIS 89 at *47 (Jan. 10, 2012).

The Division argues that two of these factors are applicable here. The Division points to the fact that Respondent was previously sanctioned by the Commission for issuing an audit report for an issuer without being registered, and urges that a civil money penalty is required to deter Respondent and others from ignoring their responsibility, as registered firms, to file annual reports and to pay annual fees. Further, the Division contends that Respondent's conduct justifies the imposition of a civil money penalty greater than the $5,000 penalties imposed in Paul Gaynes, PCAOB No. 105-2011-006, Initial Decision (Nov. 10, 2011) and Buckno Lisicky & Company, P.C., PCAOB No. 105-2011-004, Initial Decision (Nov. 17, 2011). Respondent, on the other hand, argues that no penalty, in any amount, should be imposed.

In both Paul Gaynes and Buckno Lisicky & Company, P.C., there was undisputed evidence that the respondent was aware of its obligations to file annual reports, but failed to do so. More importantly, in both those cases the respondent had issued audit reports for issuers during the periods for which it failed to file annual reports. In contrast, Respondent has not performed any audits of public companies since registering with the Board. Further, in those cases, the respondents never filed their annual reports or paid their annual fees, whereas Respondent has recently filed its overdue reports and paid its overdue annual fees.

The facts in this case are more akin to those in Baumgarten & Company LLP, PCAOB Rel. No. 105-2013-001 (Feb. 21, 2013), where the Board approved the settlement of a disciplinary proceeding in which the respondent had failed to file annual reports and to pay annual fees for 2010, 2011, and 2012. As in this case, the respondent filed its overdue annual reports, paid its overdue annual fees, and filed a Form 1-WD after an OIP was issued. The

settlement imposed a censure and a $2,000 civil money penalty on the respondent. See also Reuben E. Price & Co., Public Accountancy Corp., PCAOB Rel. No. 105-2011-008 (Dec. 20, 2011) (settlement imposing censure and $2,000 civil money penalty for failure to timely file annual reports and to pay annual fees for 2010 and 2011; reports filed, fees paid, and Form 1-WD submitted after OIP issued); GLO CPAs, LLLP, PCAOB Rel. No. 105-2011-006 (Nov. 30, 2011) (settlement imposing censure and $1,000 civil money penalty for failure to timely file annual reports for 2010 and 2011 and to timely pay an annual fee for 2011; reports filed, fee paid, and Form 1-WD submitted after OIP issued).

Of course, "the appropriate sanction depends on the facts and circumstances of each case and cannot be precisely determined by comparison with action taken in other proceedings. This is especially true with regard to settled cases, where ... pragmatic factors may result in lesser sanctions." Anthony A. Adonnino, 56 S.E.C. 1273, 1295 (2003) (footnotes omitted). Thus, the settlements approved by the Board do not require, or dictate the amount of, civil money penalties in this case.

In that regard, I note that Respondent's violations, while not involving fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement did involve negligent disregard of Respondent's obligations as a registered public accounting firm over an extended period. Further, Respondent failed to fulfill those obligations notwithstanding the prior actions by the Board, the Commission, and the Texas State Board of Public Accountancy against Yartz, Respondent's owner and sole professional, for auditing a public company without being registered. There is, moreover, a need to properly deter Respondent and other registered public accounting firms from similar failures to fulfill their obligations. Considering all these

circumstances, I conclude that a civil money penalty in the amount of $2,500 will appropriately accomplish the Board's remedial goals.

5. Order

For the foregoing reasons, **IT IS ORDERED**, that the Division's motion for summary disposition is granted, and that Respondent's cross-motion for summary disposition is denied.

IT IS FURTHER ORDERED that, pursuant to Section 105(c)(4) and (c)(5) of the Act and Rule 5300(a), for violating Section 102(d) of the Act and PCAOB Rule 2200 by failing to timely file its annual reports for 2010, 2011, and 2012, and for violating Section 102(f) of the Act and Rule 2202 by failing to timely pay its annual fees for 2010, 2011, and 2012, the registration of Respondent Eric C. Yartz, P.C., is suspended for one year and Respondent Eric C. Yartz, P.C., shall pay a $2,500 civil money penalty.

This Initial Decision shall become final in accordance with Rule 5204(d)(1) upon issuance of a notice of finality by the Secretary. Any party may obtain Board review of this Initial Decision in accordance with Rule 5460(a), or the Board may, on its own initiative, order review, in which case this Initial Decision will not become final.

David M. FitzGerald
Hearing Officer