

SECURITIES AND EXCHANGE COMMISSION  
Washington, D.C.

ACCOUNTING AND AUDITING ENFORCEMENT  
Rel. No. 3354 / January 10, 2012

Admin. Proc. File No. 3-14130

In the Matter of the Application of

R.E. BASSIE & CO.  
and  
R. EVERETT BASSIE, C.P.A.  
c/o Dwight E. Jefferson  
405 Main Street, Suite 950  
Houston, TX 77002

For Review of Disciplinary Action Taken by

PCAOB

OPINION OF THE COMMISSION

PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD -- REVIEW OF  
DISCIPLINARY PROCEEDINGS

**Refusal to Cooperate with Investigation**

Registered public accounting firm and associated person refused to cooperate with board investigation. *Held*, findings of misconduct and sanctions imposed are *sustained*.

APPEARANCES:

*Dwight E. Jefferson*, of Dwight E. Jefferson, PLLC, for R.E. Bassie & Co. and R. Everett Bassie, C.P.A.

*J. Gordon Seymour, Michael Stevenson, and Davis B. Tyner*, for PCAOB.

Appeal filed: November 17, 2010

Last brief filed: February 22, 2011

**I.**

R. Everett Bassie, C.P.A., and R.E. Bassie & Co., a registered public accounting firm ("REB" or the "Firm" and, together with Bassie, "Applicants"), filed an application pursuant to Section 107(c) of the Sarbanes-Oxley Act of 2002 ("Sarbanes-Oxley" or the "Act")<sup>1</sup> for review of disciplinary action taken by the Public Company Accounting Oversight Board ("PCAOB" or the "Board"). Acting pursuant to Section 105(b)(3) of the Act<sup>2</sup> and PCAOB Rule 5300(b),<sup>3</sup> the Board found that Applicants refused to cooperate with an investigation by the Board's Division of Enforcement and Investigations (the "Division"), permanently revoked the Firm's registration, permanently barred Bassie from association with any registered public accounting firm, and imposed a civil money penalty of \$75,000 on Bassie. We base our findings on an independent review of the record.

**II.****FACTS****A. Background**

This case concerns Applicants' protracted failure to produce to PCAOB staff documents that the staff had requested in connection with an investigation. The facts, which are largely undisputed, are as follows.

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<sup>1</sup> 15 U.S.C. § 7217(c).

<sup>2</sup> *Id.* § 7215(b)(3). Section 105(b)(3) authorizes the Board to impose sanctions, including revocation of the registration of a public accounting firm, bar from association of an associated person, and "such other lesser sanctions as the Board considers appropriate, and as specified by rule of the Board," if a registered public accounting firm or an associated person thereof "refuses to testify, produce documents, or otherwise cooperate with the Board in connection with an investigation" under Section 105.

<sup>3</sup> Rule 5300(b), incorporating by reference certain provisions of Rule 5300(a), provides that the Board may impose "such disciplinary or remedial sanctions as it determines appropriate," including civil money penalties, if it finds that a registered public accounting firm or an associated person thereof "has failed to comply with an accounting board demand . . . or has otherwise failed to cooperate in an investigation." PCAOB rules may be found at the Board's website: <http://pcaobus.org>.

REB is a public accounting firm that has been registered with the Board pursuant to Section 102 of the Act<sup>4</sup> and PCAOB rules since October 2003. Bassie, who is licensed as a certified public accountant in Texas, was, at all relevant times, the sole proprietor of REB and an associated person of a registered public accounting firm as defined in Section 2(a)(9) of the Act<sup>5</sup> and PCAOB Rule 1001(p)(i).

**B. January 2006: Issuance of Order of Formal Investigation**

On January 10, 2006, the Board issued an Order of Formal Investigation ("OFI") pursuant to PCAOB Rule 5101(a)(1). The OFI stated that the Board had received information indicating that REB and one of its associated persons may have violated PCAOB rules by failing to comply with certain standards in auditing and reviewing the financial statements of Calypso Wireless, Inc. ("Calypso"). The OFI authorized a formal investigation "to determine whether [REB] or any associated persons of [REB] have engaged in or are engaging in any of the acts or practices described [in the OFI] or in acts or practices of similar purport or object." The OFI further authorized Division staff to issue Accounting Board Demands ["ABDs"] to any person "pursuant to Section 105(b)(2) of the Act, and the Board's Rules thereunder, to the extent that the information sought is relevant to the matters described" in the OFI.<sup>6</sup>

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<sup>4</sup> 15 U.S.C. § 7212.

<sup>5</sup> 15 U.S.C. § 7201(a)(9).

<sup>6</sup> In relevant part, Section 105(b)(2)(B) of Sarbanes Oxley permits the Board, by rule, 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 . . . that the Board considers relevant or material to the investigation." 15 U.S.C. § 7215(b)(2)(B). Rule 5103(a) tracks the statutory language closely: it permits the Board, and PCAOB staff designated in an OFI, to issue ABDs "for the production of audit work papers or any other document or information in the possession of a registered public accounting firm or any associated person thereof . . . that the Board or its staff considers relevant or material to the investigation."

The "relevant or material" standard is also used in Section 21(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78u(b), which authorizes the Commission and its officers, in conducting investigations, "to administer oaths and affirmations, subpoena witnesses, compel their attendance, take evidence, and require the production of any books, papers, correspondence, memoranda, or other records which the Commission deems relevant or material to the inquiry." The statutory grant of authority to the Commission under Exchange Act Section 21(b) has been called "[a] potent [weapon], but hardly dispensable in the protection of the investing public and the fairness and honesty of the Nation's financial markets." *SEC v. Arthur Young & Co.*, 584 F.2d 1018, 1023 (D.C. Cir. 1978).

The staff also obtained information that REB's audit work on behalf of Calypso may have involved Bassie's dealings with entities related to the management of another REB audit client, American International Industries, Inc. ("AMIN"). During investigative testimony on May 19, 2006, Bassie testified that, while the Firm was serving as outside auditor for AMIN, Bassie was "charged with a lawsuit" involving Calypso, along with the brother of the president and chief executive officer of AMIN. Bassie further testified that the litigation arose from a reverse merger involving Calypso and AMIN management, that a dispute arose over payment, and that Bassie was given contested shares to hold pending resolution of the dispute. Bassie hypothesized that he was named as a defendant in order to pressure the president of Calypso to settle. He testified that he did not consider whether this lawsuit impaired his independence as an auditor.<sup>7</sup> Bassie was served with the complaint in this lawsuit before REB issued its audit report on Calypso's 2003 financial statements. However, Applicants admitted in their response to the Board OIDP that there was no disclosure concerning the lawsuit in those financial statements.

On November 17, 2006, Division staff served on REB through counsel ("Counsel I") an ABD (the "Firm ABD") requiring REB to produce certain documents pertaining to audit, review, or other services that the Firm provided to AMIN and one of AMIN's subsidiaries, International American Technologies, Inc. ("IAT").<sup>8</sup> Among the documents requested were "all working papers and other documents concerning the audit, review or other services performed by [REB and its officers and employees]" for AMIN and IAT for the period from January 1, 2003 to the date of the Firm ABD. The Firm ABD required production of the documents by December 1, 2006. The Firm did not respond.

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<sup>7</sup> The Board's Order Instituting Disciplinary Proceedings ("Board OIDP"), issued January 9, 2009, alleged that

[i]n auditing the financial statements of Calypso, Respondents violated PCAOB Rule 3100, *Compliance with Auditing and Related Professional Practice Standards*, and Rule 3600T, *Interim Independence Standards*, by failing to comply with relevant PCAOB standards, in that Bassie . . . failed to consider whether his role as a co-defendant with Calypso in a dispute involving his service as an escrow agent in a transaction involving both Calypso and the management of Calypso and AMIN

impaired his independence as an auditor.

<sup>8</sup> The Division had previously issued ABDs requiring the production of documents concerning Calypso (the "Calypso ABDs"). The Board's brief on appeal acknowledges that Applicants produced documents responsive to the Calypso ABDs. *But see infra* note 12 (noting that the Division stated, in a letter dated March 27, 2007, that some documents requested by the Calypso ABDs had not yet been produced).

### C. December 2006: Issuance of Demand Letter

On December 6, 2006, Division staff sent Counsel I a letter "again demanding the immediate production of all documents responsive to the [Firm] ABD," and stating:

As we have repeatedly reminded your clients, R.E. Bassie & Co. and Mr. Bassie's cooperation in this matter, including the timely production of documents requested pursuant to an ABD, is required by [the Act] and the rules of [the PCAOB]. See § 105(b) of the Act and PCAOB Rule 5110. Failure to comply with an [ABD] may constitute grounds for instituting a disciplinary proceeding for non-cooperation with an investigation. See PCAOB Rule 5110(a).

On December 8, Counsel I told Division staff that due to a miscommunication between Counsel I's office and Bassie, Bassie had only recently received the Firm ABD, and that Bassie would produce responsive documents the following week.

As of December 27, however, REB had still not produced any documents responsive to the Firm ABD. On that date, Division staff sent another letter to Counsel I demanding the immediate production of all such documents. The letter again warned that failure to comply with an ABD could lead to disciplinary action.<sup>9</sup>

By letter dated January 2, 2007, Counsel I sought to quash the request for documents. Counsel I asserted that the Board lacked jurisdiction to request any work product created before the effective date of Sarbanes-Oxley and suggested that "some of the recent requests for documents may have fallen within this category." The letter nonetheless represented that "Mr. Bassie is in the process of gathering and submitting the requested relevant information and will forward it to you pursuant to your request." On January 10, Division staff responded, noting that (1) the Firm ABD requested only documents from January 1, 2003 or later, and thus not documents created before the effective date of the Act; (2) nothing in the Act or Board rules prohibited the staff from seeking documents created before the effective date of the Act; and (3) Section 105(b)(2)(B) of the Act<sup>10</sup> and Rule 5105(b) permit the Board to require from a registered public accounting firm the production of any document that the Board considers "relevant or material" to the investigation. The letter reiterated the demand for the immediate production of documents responsive to the Firm ABD.

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<sup>9</sup> Additional letters dated February 2, 2007, March 27, 2007, and May 17, 2007 included similar warnings. *See infra*.

<sup>10</sup> 15 U.S.C. § 7215(b)(2)(B).

By January 12, 2007, REB had retained new counsel ("Counsel II"). Counsel II informed Division staff that Counsel I had provided to Bassie only the transmittal letter for the Firm ABD, not the Firm ABD itself, which specified the documents to be produced.<sup>11</sup> Counsel II therefore asked Division counsel to resend the Firm ABD and to allow REB "a reasonable amount of time" to respond. Division staff sent a copy of the Firm ABD to Counsel II on January 12, but stated that "[b]ecause responsive documents were due nearly 45 days ago, extending additional time to respond to the ABD is not appropriate. Under the circumstances, we would expect your client to produce documents immediately, and in any event no later than next week."

Counsel II wrote again on January 23, 2007, stating that Bassie had not received the Firm ABD until after Division staff sent it to Counsel II on January 12 and that "my client is cooperating with your request and *is* in the process of locating said information; however, as he has a very limited staff and is currently in the middle of tax season, it is going to take some time to locate all of the information that you are requesting" (emphasis in original). Counsel II also commented that the OFI mentioned in Division staff's January 12 letter

seemed to indicate that the investigation was pursuant to "In the Matter of R.E. Bassie & Co's audit and review of Calypso Wireless, Inc. PCAOB 105-OFI-2006-001" only. The information that you are presently requesting [is] for two entirely different companies. While my client is in the process of obtaining your requested information, . . . please provide us with a copy of the Board's Formal Orders of Investigation for Calypso Wireless, Inc., American International and International American Technologies.

On February 2, 2007, Division staff sent yet another letter to Counsel II, stating that Bassie had not yet produced documents responsive to the Firm ABD and referring to a telephone conversation between Division staff and Counsel II that addressed, among other things, Counsel II's question regarding the staff's authority to seek documents not directly related to REB's audits and reviews of Calypso: "As we discussed, the [OFI] does not limit the Division's investigation to matters involving Calypso. On the contrary, the OFI expressly provides that the Division may investigate any 'acts or practices of similar purport or object.'"

On February 16, 2007, having still not received documents responsive to the Firm ABD, Division staff sent Bassie an ABD requiring him individually to produce certain documents related to audits, reviews, or other services performed for AMIN for the period from January 1, 2003 to the present (the "Bassie ABD"; together with the Firm ABD, the "AMIN ABDs"). The Bassie ABD required Bassie to produce the documents by March 2, 2007. Bassie did not produce any documents.

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<sup>11</sup> The record does not explain how Bassie could have been "in the process of gathering and submitting the requested information" on January 2 if, as of January 12, he had not yet received the Firm ABD.

**D. March 3, 2007: Applicants' Final Response to the AMIN ABDs**

By letter dated March 3, 2007, Counsel II made his final written response to the staff regarding the production of documents requested by the AMIN ABDs: "I want to make it perfectly clear that Mr. Bassie is not exhibiting conduct that in any way is meant to be construed as non-cooperation. Mr. Bassie has a small accounting practice and is in the middle of the busiest time of the year for tax professionals . . . Tax season!" (ellipsis in original). Counsel II further wrote,

[T]he documents you are requesting are several years old and it is requiring a considerable amount of time to collect them and then to prepare them for inspection. . . . To gather the documents at the pace you are requesting would require Mr. Bassie to halt his practice in the middle of tax season and that would be and it is unreasonable. What we have [asked for] and continue to ask for is additional time until the end of the tax season to complete your request.

The March 3 letter additionally observed that Counsel II had reviewed various statutory provisions "and [had] not found a section in the code [sic] that provides you the authority to request the information concerning [AMIN and IAT], under an order of investigation for an entirely unrelated company and order." Counsel II then asked for copies of any other OFIs that had been issued concerning Bassie or REB.

In a reply dated March 27, 2007, Division staff noted that the AMIN ABDs had been outstanding since November 17, 2006 and February 16, 2007 respectively and stated that it was "simply not credible" that the occurrence of tax season was responsible for Applicants' failure to comply with the AMIN ABDs.<sup>12</sup> The staff therefore refused to allow additional time for providing the documents. Finally, the staff informed Counsel II that the staff had authority to demand documents related to the AMIN and IAT audits under the Calypso OFI, pointing out that the OFI "explicitly authorizes the staff to investigate not only the potential violations specified therein, but also 'acts or practices of similar purport or object.'" Division staff sent additional letters to Counsel II regarding Applicants' failure to produce documents responsive to the AMIN ABDs on May 17, 2007 and June 1, 2007. Counsel II did not respond.

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<sup>12</sup> The letter also rejected the contention that production of the documents would require Bassie to halt his practice, pointing out that, if REB complied with PCAOB auditing standards regarding document retention (which provided that a complete and final set of audit documentation should be assembled for retention as of a date not more than forty-five days after the report release date), it should not require much time to have the AMIN and IAT work papers copied and produced to the Division.

The Division's March 27 letter additionally stated that some documents requested by two of the Calypso ABDs had not yet been produced. As noted above, however, compliance with the Calypso ABDs is not at issue in this proceeding. *See supra* note 8.

### **E. September 10, 2007: Staff Notifies Applicants of Potential Disciplinary Action**

On September 10, 2007, Division staff sent Counsel II a letter stating that it intended to recommend that the Board commence a disciplinary proceeding to determine whether Applicants had violated certain rules, laws, or professional standards within the Board's jurisdiction, by, among other things, failing to comply with the AMIN ABDs.<sup>13</sup> The letter offered Applicants an opportunity to submit to the Division, by September 25, a written statement setting forth their positions regarding whether such a proceeding should be commenced.<sup>14</sup>

On the afternoon of September 25, Counsel II left a voicemail message stating that Bassie was preparing a response and requesting additional time to complete and send in the response. Applicants were granted an extension until October 2, 2007. On October 1, Bassie retained new counsel ("Counsel III"), who requested an additional thirty-day extension. Bassie was granted an extension until November 1, 2007. On November 1, Counsel III wrote that he was "diligently analyzing the issues in [the] September 10, 2007 letter," but that he was not yet prepared to respond, and requesting a further sixty-day extension. The staff agreed to a thirty-day extension, noting that "[t]he length of this investigation is a direct result of Mr. Bassie's repeated and continuing failure to cooperate." Applicants never submitted a position statement, nor have they produced documents responsive to the AMIN ABDs.

## **III.**

### **PCAOB PROCEEDINGS**

The Board OIDP alleged, among other things, that Applicants had failed to comply with the AMIN ABDs, and that this conduct constituted noncooperation with a Board investigation. On March 3, 2009, the Division filed a motion for summary disposition. On April 9, 2009, the hearing officer issued an initial decision granting the motion and imposing a revocation and bar, but no money penalty (the "Initial Decision").<sup>15</sup>

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<sup>13</sup> Rule 5110(a)(1) permits the Board to institute a disciplinary proceeding for noncooperation with an investigation "if it appears to the Board . . . that a registered public accounting firm, or a person associated with such a firm, may have failed to comply with an accounting board demand."

<sup>14</sup> See PCAOB Rule 5109(d) (providing for the submission of such statements of position).

<sup>15</sup> The hearing officer also granted summary disposition in favor of the Division on a charge that Bassie knowingly made false material declarations in sworn testimony during the Division's investigation. On appeal, however, the Board found that genuine issues of material fact precluded resolution of that charge by summary disposition. In light of the sanctions

(continued...)

Applicants filed a petition for Board review of the Initial Decision on April 20, 2009.<sup>16</sup> In paragraph 1 of their petition, Applicants argued that "Enforcement has unreasonably interpreted [Applicants'] requests for additional extensions of time due to tax season as intentional noncooperation with the investigation," and that Bassie "at all times complied with Enforcement's requests and there is no evidence that he knowingly refused to respond to or produce the requested documents." In paragraph 3 of their petition, however, Applicants asserted that Bassie

did in fact rely on the legal advice of counsel. [Counsel II] found no authority for [the Division] to request information regarding AMIN under an order of investigation for an entirely unrelated company, advice on which Mr. Bassie relied. Mr. Bassie made complete disclosure to [Counsel II], sought advice on the legality of the issue, received advice that he did not have to produce information regarding a company wholly unrelated to the investigation, and relied in good faith on the advice.

In their petition, Applicants did not attempt to harmonize the assertions in paragraph 1 – that Bassie's requests for more time should not be construed as noncooperation and that the Division acted unreasonably in refusing to give Bassie more time – with the assertions in paragraph 3 – that Bassie was told by Counsel II that he did not have to produce information regarding AMIN and that he relied in good faith on that advice.

On May 5, 2009, Applicants filed an amended petition for review. The amended petition reiterated the arguments made in the original petition, but it included as an attachment an affidavit of Bassie. Among other things, the affidavit recited that

I reasonably relied in good faith on counsel's advice that [the Division] did not have the authority to demand documentation regarding AMIN because AMIN was not the subject of the Board's investigation. Specifically, the advice I relied upon was that I did not have to respond to an ABD unless the ABD specified AMIN. The only ABD I received was regarding Calypso Wireless, Inc., which was the only subject of the investigation.

After retaining [Counsel II] as my counsel, I did not directly receive any correspondence, including ABDs, from the PCAOB.

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<sup>15</sup> (...continued)

imposed, the Board did not remand that aspect of the case or order any further proceedings, effectively dismissing that charge, and it is therefore not before us.

<sup>16</sup> By this time, Applicants had retained new counsel, who continues to represent them on appeal.

On May 29, 2009, Applicants filed their opening brief, in which they offered to "make available the documents requested by the Board at a mutually agreeable time and place," under a variety of conditions that included a requirement that the Board be responsible for the costs involved in procuring and, if desired, photocopying relevant documents. Applicants also argued that the Initial Decision should not be summarily affirmed and that the revocation and bar were harsh and excessive.

The Board refused to allow the submission of Bassie's affidavit. It found that Applicants did not file a motion describing any grounds for their failure to adduce the affidavit in the proceedings before the hearing officer, and that it was not apparent from anything in the record what possible grounds there could be. The Board also found that the affidavit was "at odds with what [Applicants] repeatedly told the Division during the investigation – that they were gathering the documents, intended to cooperate, and just needed an extension until after the tax season," and that it was also at odds with the assertions in the petition for review that their request for an extension until after tax season was reasonable and that the Division had unreasonably interpreted Applicant's requests for additional time due to tax season as intentional noncooperation with the investigation.

As to the merits of the proceeding, the Board, citing its authority under Section 105(b)(3) of the Act and Rule 5300(b), found, as an undisputed fact, that Applicants possessed, but did not produce, documents responsive to the AMIN ABDs. The Board further found that each Applicant's conduct constituted noncooperation, and that summary disposition was appropriate. The Board held that although Section 105(b)(3) is worded in terms of a "refus[al] to . . . produce documents, or otherwise cooperate" with an investigation, the refusal need not be express: "To hold otherwise would render [S]ection 105(b)(3) a dead letter, since any noncooperating registered firm or associated person could then avoid [S]ection 105(b)(3) sanctions merely by refraining from expressly articulating a refusal to cooperate."

The Board found that Applicants did not dispute, either before the hearing officer or before the Board, that the AMIN ABDs were within the scope of ABDs authorized by the Calypso OFI. The Board acknowledged that Applicants argued that they relied on legal advice they claimed to have received before the disciplinary proceeding was initiated to the effect that they were not obligated to produce documents concerning AMIN and IAT because the OFI named only Calypso, but it found that they did not establish such reliance.

The Board affirmed the sanctions imposed by the hearing officer and additionally imposed a civil money penalty against Bassie in the amount of \$75,000. The Board stated that Applicants' offer, made in their opening brief, to make the documents available for review and copying was not, as Applicants contended, a mere "delay" in the production of the documents. The Board therefore gave that offer no weight in the determination of sanctions. This appeal followed.

**IV.****ANALYSIS**

The record shows that, during the period between the issuance of the Firm ABD on November 17, 2006 and the institution of disciplinary proceedings on January 9, 2009, Applicants did not produce any documents in response to the AMIN ABDs, effectively refusing to cooperate with the investigation.<sup>17</sup> Instead, Applicants engaged in a protracted campaign of stalling and delay. The Division granted several extensions and addressed Applicants' questions about the propriety of the ABDs, but Applicants continued to withhold the documents, ultimately lapsing into total noncommunication.

**A. Applicants' Substantive Arguments**

Applicants contend that "Calypso was the only proper subject of the OFI and Applicants produced documents in compliance with the OFI." By asserting that Calypso was "the only proper subject," they appear to contend that the AMIN ABDs were not authorized by the OFI and that they therefore had no obligation to produce documents responsive to the AMIN ABDs.

We reject Applicants' attempt to restrict the scope of the OFI to Calypso, the company named as its subject. Both Sarbanes-Oxley Section 105(b)(2)(B) and PCAOB Rule 5103 permit the Board and designated staff to require the production of any documents that the Board or its staff considers "relevant or material" to an investigation.<sup>18</sup> The OFI authorized the staff to issue ABDs "to the extent that the information sought is relevant to matters described in this Order of Formal Investigation." Thus, the statute, the rule, and the OFI are consistent in authorizing requests for information "relevant" to the investigation.

As described above, Bassie testified that he held shares involved in a dispute between Calypso and AMIN management and that he was named as a party in a lawsuit involving AMIN management and Calypso, perhaps in order to pressure Calypso's president to settle. These events transpired while Bassie was auditing both AMIN and Calypso. The questions about Applicants' independence as auditors raised by Bassie's role in the lawsuit involving Calypso and AMIN management made Applicants' relationship to AMIN relevant to the investigation authorized by the OFI. Bassie testified, however, that he did not consider whether his involvement in the lawsuit impaired his independence as an auditor, a potential violation of

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<sup>17</sup> As noted above, Applicants' responsiveness to the Calypso ABDs is not at issue in this proceeding.

<sup>18</sup> See *supra* note 6 (discussing Section 105(b)(2)(B) and Rule 5103(a)).

PCAOB rules.<sup>19</sup> We therefore find that the AMIN ABDs comported with the statutory and regulatory standard: they required the production of documents relevant or material to the investigation authorized in the OFI. Thus, Applicants were required to produce documents responsive to those ABDs.<sup>20</sup>

Applicants contend that they "were willing to make available to the PCAOB the documents it requested subject to a mutually agreeable time and place at the advice of [their current counsel]." Applicants made their offer more than two years after the issuance of the AMIN ABDs, and only after the hearing officer had issued the Initial Decision, recommending a bar for Bassie and revocation for the Firm. Applicants' belated and conditional offer, which was made only when they faced the imminent prospect of sanctions, does not constitute compliance with the AMIN ABDs.<sup>21</sup> Moreover, the unwarranted conditions that accompanied the offer further diminish its value.

Applicants assert that "[t]here is no evidence to suggest that Applicants would not have produced documents related to AMIN had the PCAOB properly issued an OFI for the same." As discussed above, however, the Division was authorized to issue the AMIN ABDs because the materials sought appeared to be relevant or material to the investigation authorized in the OFI that named Calypso. There was no requirement that the Board issue an additional OFI naming AMIN and IAT. In any event, the assertion that Applicants would have complied had the ABD been worded differently cannot be tested and is not a defense.

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<sup>19</sup> See *supra* note 7 (noting allegation in Board OIDP that Bassie failed to consider whether his involvement in the lawsuit impaired his independence, a potential violation of PCAOB rules). Bassie's admission that Calypso's 2003 financial statements contained no disclosure regarding the lawsuit further illustrates the relevance of Applicants' involvement with AMIN to the investigation authorized by the OFI.

<sup>20</sup> Applicants suggest that their willingness to cooperate with the Division is demonstrated by their production of documents related to the Calypso audit. Applicants' compliance with the Calypso ABDs does not, however, excuse their failure to produce documents responsive to the AMIN ABDs. Similarly, Applicants contend that "Bassie was never found in violation of any state or federal regulation regarding the audit work he performed for Calypso, nor was he ever required to re-state Calypso's financial statements." Whether Applicants' audit work for Calypso violated regulations or standards is not at issue in this proceeding, and the resolution of that question would have no apparent bearing on whether Applicants failed to produce documents in response to the AMIN ABDs.

<sup>21</sup> Cf., e.g., *CMG Institutional Trading, LLC*, Securities Exchange Act Rel. No. 59325 (Jan. 30, 2009), 95 SEC Docket 13802, 13810 ("[W]e have emphasized repeatedly that NASD should not have to initiate a disciplinary action to elicit a response to its information requests . . . ." (citations omitted)); *Gately & Assocs.*, Exchange Act Rel. No. 62656 (Aug. 5, 2010), 99 SEC Docket 31023, 31045 (applying same principles to PCAOB inspection requests).

For the above reasons, we sustain the Board's action finding that Applicants' failure to produce documents in response to the AMIN ABDs constitutes noncooperation for which the Board was authorized to impose sanctions pursuant to Section 105(b)(3) of the Act and Rule 5300(b).

## **B. Applicants' Remaining Arguments**

### **1. Propriety of Summary Disposition**

Applicants argue that the hearing officer erred in granting the Division's motion for summary disposition because, they claim, there was a material dispute about whether, in refusing to produce the documents in question, they were relying on the advice of counsel. We disagree.

PCAOB Rule 5427(d) provides that summary disposition is appropriate in Board disciplinary proceedings "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."<sup>22</sup> A party seeking summary disposition must make a preliminary showing that no genuine issue of material fact exists.<sup>23</sup> The burden then shifts to the nonmovant. To avoid summary disposition, the nonmovant "must contradict the showing by pointing to specific facts demonstrating that there is, indeed, a trialworthy issue."<sup>24</sup> In determining whether there is a genuine dispute as to a material fact, the record "should be 'viewed most favorably to the non-moving party,' but the hearing officer 'need not credit purely conclusory allegations, indulge in rank speculation, or draw improbable inferences.'"<sup>25</sup>

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<sup>22</sup> As we have previously noted, Rule 5427 "mirrors the summary judgment standard in Rule 56 of the Federal Rules of Civil Procedure," and we have therefore found federal court interpretations of Rule 56 instructive in interpreting the Board rule. *Gately*, 99 SEC Docket at 31031.

<sup>23</sup> *E.g.*, *Nat'l Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 735 (1st Cir. 1995).

<sup>24</sup> *Id.*

<sup>25</sup> *Gately*, 99 SEC Docket at 31032 (quoting *Nat'l Amusements*, 43 F.3d at 735).

There is no factual dispute as to whether Applicants provided to the PCAOB documents specified in the AMIN ABDs. They did not.<sup>26</sup> The Division introduced facts establishing the refusal to produce documents in the statement of undisputed facts filed to support their motion for summary disposition. The burden then shifted to Applicants to show that there was a trialworthy issue.

Applicants attempted to establish a trialworthy issue by arguing that they received and reasonably relied on legal advice in refusing to produce the documents. They identify two items in the record as supporting their assertion: first, the March 3, 2007 letter from Counsel II stating that he "[had] not found a section in the code" that provided the Board the authority to request information for AMIN under an OFI that named only Calypso, and second, the Bassie affidavit submitted with the amended petition for review.

**a. Counsel Letter.** The March 3, 2007 letter is not sufficient to establish a genuine issue of material fact as to whether Applicants received and relied on legal advice that they were not required to produce documents requested in the AMIN ABDs. The letter states:

Mr. Bassie is not exhibiting conduct that in any way is meant to be construed as non-cooperation. . . . [I]t is taking a considerable amount of time to collect [the documents] and then to prepare them for inspection. . . . What we have [asked for] and continue to ask for is additional time . . . to complete your request.

These statements are inconsistent with the premise that Counsel II had advised Applicants that they were not required to provide the AMIN documents. There would be no need to collect the documents or prepare them for inspection, and no need for additional time to complete the request, if the ultimate intention were to refuse to produce the documents.

Nor does Counsel II's statement that he had not identified a statutory provision allowing the Division to request the AMIN documents create a genuine issue as to whether Counsel II advised Applicants that they should refuse to produce the documents. That statement suggests only that Counsel II was looking into the question of the breadth of the Board's authority.

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<sup>26</sup> Applicants assert that the Division made a "patently false" statement that "it had never received one document pursuant to the [ABDs] it served on Applicants" because Applicants produced documents in response to the Calypso ABDs. However, the Division did not assert, and the Board did not find, that Applicant's response to the Calypso ABDs was inadequate. The Division's brief in support of its motion for summary disposition accurately states that "[n]otwithstanding numerous efforts by Enforcement over nearly 12 months to obtain [documents concerning AMIN], and numerous written warnings that failure to comply with ABDs could lead to disciplinary action, [Applicants] failed to produce a single document." From the context, it is clear that the Division's statement relates only to the failure to produce documents required by the AMIN ABDs. The Division did not challenge Applicants' response to the Calypso ABDs.

Nothing in the record considered by the Board suggests that Counsel II concluded, after writing the March 3 letter, that the staff's authority did not extend to demanding the documents specified in the AMIN ABDs, nor does the record show that Counsel II conveyed any such conclusion to Bassie. Moreover, Applicants do not explain how Bassie could have continued to rely on such a conclusion after Division staff reiterated its position, in its March 27 letter, that the OFI's grant of authority was broad enough to encompass ABDs for documents related to AMIN and IAT. A finding that Bassie reasonably relied on the advice of Counsel II in refusing to respond to the AMIN ABDs would therefore be based not on evidence, but on the sort of "rank speculation" that does not justify reversing the summary disposition.

**b. Refusal to Consider Bassie's Affidavit.** Applicants challenge the Board's decision to exclude Bassie's affidavit from the record. However, PCAOB Rule 5464 requires a party seeking to introduce additional evidence when a matter is on appeal before the Board to "show with particularity that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence previously." Applicants did not attempt to make such a showing when they submitted Bassie's affidavit with their amended petition for review. Thus, the Board properly refused to consider the affidavit.

In their brief on appeal, Applicants assert that "Applicants were unaware that an affidavit was required to be submitted in support of previous sworn testimony until Enforcement specifically charged that the burden was on Bassie to point to specific facts demonstrating a trialworthy issue." They point to a passage of the Initial Decision stating that "Applicants have not submitted an affidavit from Bassie or any other evidence to support the truth of Bassie's PCAOB testimony" and assert that "[t]his statement invited [Applicants] to submit an affidavit."<sup>27</sup>

There was no requirement that Applicants submit an affidavit. As discussed above, once the Division introduced evidence sufficient to establish the misconduct at issue, the burden shifted to Applicants to show that there was a genuine issue of material fact that would preclude

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<sup>27</sup> Applicants' quotation from the Initial Decision is taken out of context. As noted above, the hearing officer granted summary disposition in favor of the Division with respect to the allegation that Bassie provided false testimony during the investigation, an issue that is not involved in this appeal. *See supra* note 15. The statement that Applicants introduced no affidavit "to support the truth of Bassie's testimony" related to that allegation; it thus has no relevance to this appeal.

the entry of summary disposition. Whether Applicants attempted to satisfy this burden by testimony, by affidavit, or otherwise was their choice. But if Applicants wanted to strengthen their case by introducing an affidavit, they should have done so before the hearing officer, not on appeal to the Board.<sup>28</sup>

For these reasons, we find that Applicants did not demonstrate that there was a trialworthy issue with respect to whether they reasonably relied on the advice of counsel in failing to produce documents in response to the AMIN ABDs.<sup>29</sup>

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<sup>28</sup> Bassie's affidavit, even if timely presented, would have done little to strengthen his case. Bassie merely asserted that he was relying on counsel's advice; he provided no details showing that he had made full and complete disclosure to counsel and received relevant advice appropriately tailored to the circumstances. *See, e.g., Howard Brett Berger*, Exchange Act Rel. No. 58590 (Nov. 14, 2008), 94 SEC Docket 11615, 11630-31 (discussing cases holding that the advice received must be based on "a full and complete disclosure" to counsel and that a person cannot successfully establish reliance by "'offer[ing] nothing more than his say-so'" but must, instead, "'produc[e] the actual advice from an actual lawyer,'" for example, in the form of an opinion letter or the attorney's live testimony (citations omitted)), *petition denied*, 2009 WL 3160620 (2d Cir. 2009) (summary disposition). Bassie's affidavit, which does not even specify which of his successive attorneys allegedly rendered the advice on which he purportedly relied, falls far short of this standard.

Moreover, the assertions in the affidavit appear to conflate two issues: whether Bassie was required to respond to the AMIN ABDs when the OFI named only Calypso, and whether he was required to respond to the AMIN ABDs if they were not sent to him "directly" by the PCAOB. Bassie does not assert, in the affidavit or elsewhere, that he was advised by counsel that he was not required to respond to ABDs unless they were sent to him "directly."

We also note that, although Bassie asserts that "[t]he only ABD I received was regarding Calypso Wireless, Inc.," he did not argue earlier in the proceeding that he did not receive the Bassie ABD, which was addressed to him. Further, Counsel II's January 23, 2007 letter stating that Bassie had not received the Firm ABD until after staff sent it to Counsel II on January 12 implies that Bassie did subsequently receive the Firm ABD, and Counsel II's representations in the January 23, 2007 letter that Bassie "is cooperating with your request and is in the process of locating said information" shows that if Bassie did not receive the Firm ABD, he was at a minimum aware of the documents he was required to produce.

<sup>29</sup> Because the Board determined that Applicants did not establish reliance on the advice of counsel, it did not reach the question whether reliance on such advice would be material to the question whether Applicants' conduct constituted noncooperation, or whether such reliance would be relevant to a determination of sanctions. *But see, e.g., Berger*, 94 SEC Docket at 11629-30 (finding that advice-of-counsel claim "is not relevant to liability" for failure to appear and provide information to NASD because scienter is not an element of the violation);

(continued...)

## V.

**SANCTIONS**

Applicants challenge the sanctions imposed by the Board as unwarranted. They claim that they "have not exhibited behavior constituting noncooperation, nor has Bassie ever been accused of performing insufficient audits."<sup>30</sup> In particular, they contend that the civil penalty is unjust and groundless in light of the revocation and bar.

Section 107(c)(3) of Sarbanes-Oxley governs our review of sanctions imposed by the Board.<sup>31</sup> If we find, "having due regard for the public interest and the protection of investors," that the sanction "is not necessary or appropriate in furtherance of [the] Act or the securities laws," or that the sanction "is excessive, oppressive, inadequate, or otherwise not appropriate to the finding or the basis on which the sanction was imposed," then we may enhance, modify, cancel, reduce, or require the remission of the sanction.<sup>32</sup> As discussed below, we find no basis to modify the sanction.

Congress established the Board to "protect the interests of investors and further the public interest in the preparation of informative, accurate, and independent audit reports."<sup>33</sup> To further these goals, the Board is required to "establish, by rule, . . . fair procedures for the investigation

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<sup>29</sup> (...continued)

*Joseph G. Chiulli*, 54 S.E.C. 515, 524 (2000) ("Reliance on counsel . . . does not excuse Chiulli from his obligation to supply information to the NASD. When Chiulli registered with the NASD, he agreed to abide by its rules which are unequivocal with respect to an associated person's duty to cooperate with NASD investigations." (footnotes omitted)); *Michael Markowski*, 51 S.E.C. 553, 557 (1993) ("When Markowski became registered with the NASD, he agreed to abide by its Rules of Fair Practice, which are unequivocal with respect to the obligation to cooperate with the NASD. Reliance on counsel is immaterial to an associated person's obligation to supply requested information to the NASD." (footnotes omitted)), *aff'd*, 34 F.3d 99 (2d Cir. 1994).

<sup>30</sup> In fact, the OIDP alleges numerous statutory and regulatory violations in Applicants' audits of both Calypso and AMIN. However, these allegations are not at issue in this proceeding, and we have not considered them.

<sup>31</sup> 15 U.S.C. § 7217(c)(3).

<sup>32</sup> *Id.*

<sup>33</sup> Sarbanes-Oxley § 101(a), 15 U.S.C. § 7211(a).

and disciplining of registered public accounting firms and associated persons of such firms."<sup>34</sup> The Board may, among other things, "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 . . . that the Board considers relevant or material to the investigation."<sup>35</sup> The Act requires every registered public accounting firm to consent "to cooperat[e] in . . . and compl[y] with any request for . . . the production of documents made by the Board in furtherance of its authority and responsibilities" under the Act, to agree to secure and enforce similar consents from each associated person of the firm,<sup>36</sup> and to acknowledge that the firm "understands and agrees" that cooperation and compliance with any such request for documents, and the securing and enforcement of the required consents from the firm's associated persons, are conditions to the continuing effectiveness of the registration of the firm with the Board.<sup>37</sup>

It is clear from these statutory provisions that investigations play a crucial role in furthering the Board's goals of investor protection and the preparation of informative, accurate, and independent audit reports. The requirements that registered public accounting firms consent to cooperate with document production requests, obtain and enforce similar consents from associated persons, and acknowledge that such cooperation is a condition to the continuing effectiveness of a firm's registration with the Board underscore the seriousness with which Sarbanes-Oxley views cooperation with the Board in furtherance of the Board's statutory responsibilities. Imposing sanctions to deter noncooperation with PCAOB investigations thus clearly serves the public interest.

#### **A. Revocation and Bar**

Nearly ten months passed between the date the Firm ABD was served on REB and the date Division staff warned Applicants that it intended to recommend the commencement of a disciplinary proceeding. In all those months, not a single document responsive to the AMIN ABDs was produced. Applicants repeatedly represented (through counsel) that they were in the process of gathering the documents and that they needed more time. The Division repeatedly responded by granting extensions, while reminding Applicants of their obligation to comply with the ABDs. The record does not show, however, that Applicants were actually using the extra time to collect the information requested, rather than simply trying to postpone the investigation as long as possible. Ultimately, Applicants simply stopped responding. This failure to cooperate impairs the Division's ability to investigate, which in turn impairs the Board's ability to identify violations and sanction violators. For these reasons, failure to cooperate in an investigation is very serious misconduct.

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<sup>34</sup> *Id.* § 105(a), 15 U.S.C. § 7215(a).

<sup>35</sup> *Id.* § 105(b)(2), 15 U.S.C. § 7215(b)(2).

<sup>36</sup> *Id.* § 102(b)(3)(A), 15 U.S.C. § 7212(b)(3)(A).

<sup>37</sup> *Id.* § 102(b)(3)(B), 15 U.S.C. § 7212(b)(3)(B).

Applicants argue that no specific harm to a particular investor can be traced back to their failure to cooperate, and that the lack of such identifiable harm should be considered in assessing sanctions. The Board's power to impose appropriate sanctions in disciplinary proceedings is fundamental to its ability to act in the public interest.<sup>38</sup> Failure to respond to ABDs frustrates the oversight system envisioned by Sarbanes-Oxley, impeding the Board's ability to discover violations. Noncooperation deprives investors of an important protection that the Act was intended to provide.<sup>39</sup> The fact that the Board could not identify whether there was specific harm to a particular investor does not detract from the seriousness of the misconduct.<sup>40</sup>

We find, as the Board did, that Applicants' conduct warrants revocation of the Firm's registration and a bar on Bassie's association with any registered public company accounting firm. In choosing to register with the Board, Applicants agreed to cooperate with the Board when it sought information from them. Bassie, who chose to be an associated person of the Firm, made a similar agreement. Rather than fulfilling these agreements, however, Applicants used the excuse that they needed more time to collect the information, thus delaying the Division's investigation into their conduct. As the Board observed, in the absence of mitigating circumstances – of which we find none<sup>41</sup> – noncooperation indicates a lack of sufficient regard for Board processes and authority designed by statute to protect investors. Allowing the Firm to remain registered and Bassie to remain an associated person would give them opportunities in the

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<sup>38</sup> Cf. *Berger*, 94 SEC Docket at 11620 (characterizing NASD Rule 8210, which required NASD members and associated persons to provide information if requested by NASD staff as part of an investigation, complaint, examination, or proceeding as "at the heart of the self-regulatory system for the securities industry").

<sup>39</sup> *Id.* at 11620-21 (finding that delay and neglect by NASD members and their associated persons in responding to requests for information "'undermine the ability of the NASD to conduct investigations and thereby protect the public interest'" (quoting *Barry C. Wilson*, 52 S.E.C. 1070, 1075 (1996))).

<sup>40</sup> Cf. *PAZ Sec., Inc.*, Exchange Act Rel. No. 57656 (Apr. 11, 2008), 93 SEC Docket 5122, 5129 ("[A] Rule 8210 violation will rarely, in itself, result in direct harm to a customer. Rather, failing to respond undermines NASD's ability to detect misconduct that may have occurred and that may have resulted in harm to investors . . . . Thus, even if the failure to respond does not result in . . . harm to investors, it is serious because it impedes detection of such violative conduct." (footnote omitted)), *petition denied*, 566 F.3d 1172 (D.C. Cir. 2009); *Gately*, 99 SEC Docket at 31044-45 (finding that absence of fraud or deceit does not diminish seriousness of failure to cooperate in PCAOB inspection designed, among other things, to uncover any such misconduct).

<sup>41</sup> We have explained above why we do not consider mitigating (1) Applicants' purported reliance on advice of counsel, (2) the belated and conditional offer to make documents available, (3) the production of documents responsive to the Calypso ABDs, or (4) the lack of findings that Applicants' audits were insufficient.

future to similarly undermine those processes and thus erode the investor protection that Congress intended the Board to provide. Moreover, the awareness that a revocation and bar may be imposed as sanctions for noncooperation may deter other firms and associated persons from engaging in similar misconduct.<sup>42</sup> We therefore sustain the bar and revocation imposed by the Board.<sup>43</sup>

## **B. Civil Money Penalty**

We similarly sustain the imposition of a civil money penalty of \$75,000. In cases involving intentional or knowing conduct, including reckless conduct, that results in a violation of the applicable statutory, regulatory, or professional standard, the Board may impose a civil money penalty not exceeding \$800,000 against an individual for each violation.<sup>44</sup>

Applicants refused for months to produce documents required by the AMIN ABDs. They repeatedly attempted to stall for time, representing to staff that they were working to fulfill the requests but citing work pressure to justify the alleged need for extensions. The staff allowed multiple extensions, reminded Applicants repeatedly of their obligation to cooperate with the investigation, and warned Applicants over and over again of the consequences of a failure to cooperate. Applicants finally stopped responding altogether. In light of this course of conduct,

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<sup>42</sup> In making this determination, we note that "general deterrence . . . may be considered as part of the overall remedial inquiry." *Siegel v. SEC*, 592 F.3d 147, 158 (D.C. Cir. 2010) (quoting *PAZ Sec., Inc.*, 494 F.3d 1059, 1066 (D.C. Cir. 2007)), *cert. denied*, 130 S. Ct. 3333 (2010); *see also Boruski v. SEC*, 289 F.2d 738, 740 (2d Cir. 1961) ("The public interest requires that appropriate sanctions be imposed to secure compliance with the rules, regulations and policies of both NASD and SEC.").

<sup>43</sup> Applicants contend that the hearing officer's imposition of a bar and revocation was based in part on his finding that Bassie made material false declarations in sworn testimony during the Division's investigation. *See supra* note 15. Applicants contend that because the Board effectively dismissed this charge, the sanction should be lowered accordingly. The Board, however, imposed a bar and revocation even though it did not find the allegations of making false declarations established. We agree with the Board that the bar and revocation were appropriate as sanctions for the failure to cooperate charge that was not dismissed. *See Sarbanes-Oxley Section 105(b)(3)(A)*, 15 U.S.C. § 7215(b)(3)(A) (authorizing Board to impose revocation and bar, among other sanctions, for refusal to produce documents in connection with investigation).

<sup>44</sup> Sarbanes-Oxley Sections 105(c)(4)(D)(ii), 105(c)(5), 15 U.S.C. §§ 7215(c)(4)(D)(ii), 7215(c)(5); 17 C.F.R. § 201.1003. The Act also provides for the imposition of a civil penalty not exceeding \$110,000 against an individual for each violation where there is no showing of scienter. Sarbanes-Oxley Section 105(c)(4)(D)(i), 15 U.S.C. § 7215(c)(4)(D)(i); 17 C.F.R. § 201.1003. As noted above, *see supra* note 3, PCAOB Rule 5300(b) expressly provides for the imposition of civil penalties for failure to comply with an ABD.

we find that Applicants' deliberate or reckless refusal to cooperate with the investigation satisfies the statutory standard for the imposition of a civil penalty.

The Act does not specify factors to be considered in determining whether a penalty is in the public interest. Here, the Board considered the factors set forth in Exchange Act Section 21B(c), which the Commission may consider in determining whether it would be in the public interest to impose a civil penalty in an administrative proceeding. These factors are whether there was fraudulent misconduct or deliberate or reckless disregard of a regulatory requirement, harm to others, or unjust enrichment, whether the respondent had committed prior violations, and the need for deterrence, as well as such other matters as justice may require.<sup>45</sup> However, as the Board recognized, a penalty may be imposed under Section 21B(c) even when not all of these factors are present.<sup>46</sup>

We have not previously considered the application of the Section 21B factors to a failure to cooperate with an investigation.<sup>47</sup> However, Section 21B allows the consideration not only of the enumerated factors (not all of which need be present), but of "such other matters as justice may require." An analysis based on Section 21B is therefore sufficiently flexible to be used in this context.

In this case, Applicants' deliberate or reckless disregard of their obligation to cooperate with the Board's investigation strongly supports the imposition of a civil penalty. By refusing to produce the requested documents, Applicants prevented the Board from carrying out an investigation that was necessary to determine whether it was proper for Applicants to be allowed to continue to perform audits. Moreover, by dragging out the matter for months, Applicants caused the Board's staff to expend considerable time trying to obtain the cooperation Applicants should have freely given.

Applicants' failure to comply harmed the Board's ability to carry out its investigation. The Board's investigatory power is central to its ability to carry out its statutory responsibilities and fulfill its goals in the public interest. Its ability to obtain documents from registered public accounting firms and their associated persons is, in turn, critical to the effective conduct of

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<sup>45</sup> Exchange Act Section 21B(c), 15 U.S.C. § 78u-2(c).

<sup>46</sup> *See, e.g., Phlo Corp.*, Exchange Act Rel. No. 55562 (Mar. 30, 2007), 90 SEC Docket 1089, 1113 n.84 (imposing civil penalty against respondent "even though there is no evidence that unjust enrichment resulted from the violations and even though [the respondent] does not have a history of regulatory violations").

<sup>47</sup> In Commission investigations, when the recipient of an administrative subpoena requiring the production of documents or an appearance for the taking of testimony refuses to comply, the Commission has recourse to federal district court, which may issue an order enforcing the subpoena, "and any failure to obey such order of the court may be punished by such court as a contempt thereof." Exchange Act Section 21(c), 15 U.S.C. § 78u(c).

investigations. The recalcitrance manifested by Applicants, who had consented to cooperate with the Board's document production requests, interferes with and hinders the Board's performance of these important duties. Moreover, Applicants' failure to cooperate indirectly harmed investors by depriving them of important protection that they should have had under Sarbanes-Oxley. We therefore regard Applicants' refusal to cooperate with the investigation as very serious misconduct.

The need for deterrence also supports a civil penalty. In imposing a civil penalty in addition to revocation and bar, the Board noted that if individuals are concerned that cooperation with an investigation may provide information that could lead to sanctions, those individuals – absent the threat of a civil penalty – could have an incentive to avoid cooperation in order to maximize their income from issuer audit work for as long as possible. As the Board observed, in public filings with the Commission, issuers disclosed having paid audit fees totaling \$154,000 to the Firm for audit services performed during the period of Applicants' noncooperation.<sup>48</sup> The Board found that imposition of a civil penalty in such cases may act as a deterrent. We agree.

The record would not support a finding of unjust enrichment, nor a finding of a history of prior misconduct. The absence of these factors is not determinative; in applying Section 21B in the context of administrative proceedings, we have found civil penalties appropriate "even though there is no evidence that unjust enrichment resulted from the violations and even though [the respondent] does not have a history of regulatory violations."<sup>49</sup> Moreover, we find that justice requires the consideration of several factors relevant to this matter that are not explicitly enumerated in Section 21B. The Firm collected \$154,000 in audit fees from issuers for audit services performed during the period of Applicants' noncooperation.<sup>50</sup> Both the duration of the period of noncooperation and the amount of fees collected are factors that may be considered under Section 21B as "such other matters as justice may require." Additionally, Applicants' stalling, through statements that they were working on collecting the documents and merely needed more time (statements that were not supported by any other record evidence), while not clearly deceitful or fraudulent, is relevant to our consideration of whether a penalty is appropriate.

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<sup>48</sup> See Form 10-K/A filed by FTS Group, Inc. on May 15, 2008 (including REB audit report dated April 11, 2008 on financial statements for period ended December 31, 2007 and disclosing audit fees of \$45,000 to REB); Form 10-KSB filed by Larrea Biosciences Corp. on August 6, 2007 (including REB audit report dated July 26, 2007 on financial statements for period ended April 30, 2007 and disclosing audit fees of \$64,000 to REB); Form 10-K filed by FTS Group, Inc. on April 16, 2007 (including REB audit report dated April 11, 2007 on financial statements for period ended December 31, 2006 and disclosing audit fees of \$45,000 to REB).

<sup>49</sup> *Phlo Corp.*, 90 SEC Docket at 1113 n.84.

<sup>50</sup> See *supra* note 48.

For the reasons discussed above, we find the penalty justified.<sup>51</sup>

As noted above, Sarbanes-Oxley allows the imposition of a civil penalty as high as \$800,000 against an individual for each violative act. The \$75,000 penalty imposed by the Board is far below this limit.<sup>52</sup> The Board explained that the penalty is designed in part as deterrence against avoiding cooperation in order to continue collecting audit fees during the pendency of an investigation. While imposing a larger penalty in this case might provide an even greater deterrent against similar stalling by other registered public accounting firms and their associated persons, a civil penalty of \$75,000 appears sufficient to have a deterrent effect on a firm such as Bassie's. Under these circumstances, we find a civil penalty of \$75,000 not excessive, oppressive, inadequate, or otherwise inappropriate.<sup>53</sup>

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<sup>51</sup> The consideration of "such other matters as justice may require" may result in the need to consider additional factors in future cases involving failure to cooperate with an investigation.

<sup>52</sup> As noted above, a penalty not exceeding \$110,000 would be allowed even if the misconduct at issue were not intentional or reckless. *See supra* note 44.

<sup>53</sup> Applicants assert that "they do not possess the financial means to pay any civil fine, let alone \$75,000," and they argue that the Commission "must provide Applicants with a separate opportunity to argue specifically against the imposition of a civil money penalty."

Sarbanes-Oxley does not recognize ability to pay as a factor to consider in determining whether to impose a civil money penalty. In cases where the Commission may impose a penalty under Section 21B(c), the ability to pay may be considered, but it is only one factor, it is discretionary, and where, as here, the conduct is egregious, inability to pay may be disregarded. *See, e.g., Thomas C. Bridge*, Exchange Act Rel. No. 60736 (Sept. 29, 2009), 96 SEC Docket at 20848 (stating that "when conduct is 'sufficiently egregious,' the Commission may impose a sanction despite a demonstrated inability to pay" and refusing to grant discretionary waiver of penalties where egregiousness of conduct outweighed any reason to do so (citations omitted)), petition denied sub nom. *Robles v. SEC*, 2010 U.S. App. LEXIS 26537 (D.C. Cir. Dec. 30, 2010) (unpublished).

Applicants had every opportunity to argue against the imposition of a civil penalty in their briefs, yet they gave no substantiation of their claim beyond making the flat statement that they could not pay. Moreover, although the briefing scheduling order expressly provided Applicants the opportunity to file a reply brief on appeal, Applicants did not take advantage of this opportunity. Under these circumstances, we find that Applicants did not establish that they were unable to pay the penalty, and we decline to grant them a separate hearing as to this issue.

For the foregoing reasons, we sustain the findings of misconduct and sanctions imposed by the PCAOB.

An appropriate order will issue.<sup>54</sup>

By the Commission (Chairman SCHAPIRO and Commissioners WALTER, PAREDES and GALLAGHER); Commissioner AGUILAR not participating.

Elizabeth M. Murphy  
Secretary

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<sup>54</sup> We have considered all of the arguments advanced by the parties. We reject or sustain them to the extent that they are inconsistent or in accord with the views expressed herein. Because the issues have been thoroughly briefed and can be adequately determined on the basis of the record filed by the parties, Applicants' request for oral argument is denied. Rule of Practice 451, 17 C.F.R. § 201.451.

UNITED STATES OF AMERICA  
before the  
SECURITIES AND EXCHANGE COMMISSION

ACCOUNTING AND AUDITING ENFORCEMENT  
Rel. No. 3354 / January 10, 2012

Admin. Proc. File No. 3-14130

In the Matter of the Application of

R.E. BASSIE & CO.  
and  
R. EVERETT BASSIE, C.P.A.  
c/o Dwight E. Jefferson  
405 Main Street, Suite 950  
Houston, TX 77002

For Review of Disciplinary Action Taken by

PCAOB

ORDER SUSTAINING DISCIPLINARY ACTION TAKEN BY PUBLIC COMPANY  
ACCOUNTING OVERSIGHT BOARD

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

ORDERED that PCAOB's findings that R.E. Bassie & Co. and R. Everett Bassie, C.P.A. failed to cooperate with an investigation by the Board's Division of Enforcement and Investigations be, and they hereby are, sustained; and it is further

ORDERED that the sanctions imposed by PCAOB be, and they hereby are, sustained; and it is further

ORDERED that the automatic stay of the Board sanctions imposed on Applicants pending the Commission's review be, and it hereby is, terminated.

By the Commission.

Elizabeth M. Murphy  
Secretary