

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 73427 / October 24, 2014

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 3592 / October 24, 2014

ADMINISTRATIVE PROCEEDING
File No. 3-16212

In the Matter of

**BERMAN & COMPANY, P.A.,
and ELLIOT BERMAN CPA**

Respondents.

**ORDER INSTITUTING PUBLIC
ADMINISTRATIVE AND CEASE-
AND-DESIST PROCEEDINGS
PURSUANT TO SECTIONS 4C AND 21C
OF THE SECURITIES EXCHANGE ACT
OF 1934 AND RULE 102(e) OF THE
COMMISSION'S RULES OF PRACTICE,
MAKING FINDINGS, AND IMPOSING
REMEDIAL SANCTIONS AND A CEASE-
AND-DESIST ORDER**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate that public administrative and cease-and-desist proceedings be, and hereby are, instituted against Elliot Berman ("Elliot") and Berman & Company, P.A. ("Berman & Co.") (collectively, "Respondents") pursuant to Sections 4C¹ and 21C of the Securities Exchange Act of 1934 ("Exchange Act") and Rule 102(e)(1)(ii) and 102(e)(1)(iii) of the Commission's Rules of Practice.²

¹ Section 4C provides, in relevant part, that:

The Commission may censure any person, or deny, temporarily or permanently, to any person the privilege of appearing or practicing before the Commission in any way, if that person is found . . . (1) not to possess the requisite qualifications to represent others . . . (2) to be lacking in character or integrity, or to have engaged in unethical or improper professional conduct; or (3) to have willfully violated, or willfully aided and abetted the violation of, any provision of the securities laws or the rules and regulations thereunder.

² Rule 102(e)(1)(ii) provides, in pertinent part, that:

II.

In anticipation of the institution of these proceedings, Respondents have submitted an Offer of Settlement (the “Offer”) which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission’s jurisdiction over them and the subject matter of these proceedings, which are admitted, Respondents consents to the entry of this Order Instituting Public Administrative and Cease-and-Desist Proceedings Pursuant to Sections 4C And 21C of the Securities Exchange Act of 1934 and Rule 102(e) of the Commission’s Rules Of Practice, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order (“Order”), as set forth below.

III.

On the basis of this Order and Respondents’ Offer, the Commission finds³ that:

A. SUMMARY

Berman & Co. audited the financial statements of Issuer A for the year ended December 31, 2011, as it had done for the prior five years. Berman & Co.’s owner, Elliot Berman (“Elliot”) had been the lead partner for the Issuer A audit for the previous five years. Accordingly, Elliot could no longer serve as the lead partner for the fiscal year (“FY”) 2011 audit.

Elliot appointed an employee at Berman & Co. (“Employee A”) as the nominal lead partner of the FY 2011 audit of Issuer A. Employee A was not a certified public accountant (“CPA”). Employee A was not otherwise qualified to be the lead partner. While Berman & Co. was registered in the State of Florida and with the Public Company Accounting Oversight Board

The Commission may . . . deny, temporarily or permanently, the privilege of appearing or practicing before it . . . to any person who is found . . . to have engaged in unethical or improper professional conduct.

Rule 102(e)(1)(iii) provides, in pertinent part, that:

The Commission may . . . deny, temporarily or permanently, the privilege of appearing or practicing before it . . . to any person who is found . . . to have willfully violated, or willfully aided and abetted the violation of any provision of the Federal securities laws or the rules and regulations thereunder.

³ The findings herein are made pursuant to Respondents’ Offer of Settlement and are not binding on any other person or entity in this or any other proceeding.

(“PCAOB”) to issue audits, relevant Florida statutes governing the practice of accounting in that state did not permit Employee A to issue an audit opinion and Employee A was not qualified under the standards of the PCAOB to express an opinion on the financial statements of a public company in an audit report.

In addition, despite the Commission’s rule that he rotate off the engagement, Elliot performed certain services of a lead partner on the audit. Performing these duties violated the rotation requirements of the Federal securities laws and the rules and regulations thereunder.

By appointing Employee A as nominal lead partner and by Elliot’s continued performance of certain lead partner duties, Berman & Co. and Elliot Berman engaged in improper professional conduct and willfully violated and aided and abetted violations of the Federal securities laws and the rules and regulations thereunder.

B. RESPONDENTS

Berman & Company, P.A. (“Berman & Co.”) is an accounting and auditing firm based in Boca Raton, Florida. Berman & Co. is registered with the PCAOB. The firm reported having 14 issuer audit clients on its PCAOB Form 2 filed on June 19, 2013. The firm listed six accountants, two of which are CPAs, and stated two partners have the ability to sign audit reports. Berman & Co. served as the auditor for Issuer A since 2006.

Elliot Berman is a CPA licensed to practice in Florida. He has been a CPA in Florida since 2005 and a CPA since 1998, and has no disciplinary history. Elliot served as the lead partner on Issuer A’s audits and reviews for the years ended 2006 through 2010. During the relevant period, Elliot generally served as the lead partner for all of the firm’s issuer clients. Elliot is the founder and managing director of Berman & Co.

C. OTHER RELEVANT PARTIES

Employee A is an accountant in the firm Berman & Co. Employee A served as the nominal lead partner on the audit of Issuer A for the year ended December 31, 2011.

Issuer A, a Delaware corporation, is a biotech company. Issuer A’s stock is registered pursuant to Section 12(b) of the Exchange Act.

D. FACT SUMMARY

1. Berman & Co. audited Issuer A for the years ended December 31, 2006 through December 31, 2011.
2. Elliot served as the lead partner for the FY2006 through FY2010 audits. After the audit for the year ended December 31, 2010, Elliot was required to rotate off as lead partner for the Issuer A engagement for FYs 2011 through 2015. Elliot was also required not to serve

as the lead partner for any Form 10-Q reviews during this time. *See* Rule 2-01(c)(6) of Regulation S-X [17 C.F.R. 210.2-01(c)(6)].

3. Elliot, as the managing director of Berman & Co., appointed Employee A as the nominal lead partner on the Issuer A audit engagement and quarterly reviews for the year ended December 31, 2011.
4. Employee A was not licensed to practice as a CPA and had never been a CPA. Nor was Employee A qualified to perform the functions of a lead partner for the audit of a public company. Employee A had no experience auditing public companies and very little experience auditing private companies. Nor did Employee A have the requisite understanding of PCAOB audit standards necessary to perform a public company audit.
5. Through the course of the Issuer A quarterly reviews and audit for the year ended December 31, 2011, Elliot performed some of the functions of a lead partner.
6. In particular, Elliot continued to serve as the primary contact with Issuer A's management, board of directors, and the board's audit committee. Elliot made the presentation of certain matters related to the conduct of the audit to Issuer A's audit committee (via phone). He also communicated with Issuer A's management on substantive audit issues.
7. Elliot was the sole contact with the engagement quality review partner for the 2011 Issuer A audit.
8. Elliot also reviewed and commented on the company's 2011 Form 10-K, reviewed the audit work papers for some of the 2011 quarterly reviews and left comments for the audit team, made staffing decisions concerning the engagement, directed staff regarding audit documentation, and performed the audit work regarding the company's discontinued operations.
9. On March 30, 2012, Berman & Co. issued an audit report in connection with its audit of the financial statements of Issuer A for the year ended December 31, 2011. In the audit report, Berman & Co. incorrectly represented that it conducted its audit in accordance with PCAOB standards. Berman & Co did not, however, conduct its audit of the financial statements of Issuer A for the year ended December 31, 2011 in accordance with PCAOB standards, which require Berman & Co. to be independent and require the lead audit partner to be qualified. *See* PCAOB Rule 3520.

E. BERMAN & CO. AND ELLIOT BERMAN'S PERFORMANCE OF LEAD PARTNER SERVICES VIOLATED FEDERAL SECURITIES LAWS AND CONSTITUTED IMPROPER PROFESSIONAL CONDUCT

Exchange Act Section 10A(j), Audit Partner Rotation, and Rule 2-01(c) of Regulation S-X, Partner Rotation

10. Section 10A(j) of the Exchange Act, *Audit Partner Rotation*, states:

It shall be unlawful for a registered public accounting firm to provide audit services to an issuer if the lead (or coordinating) audit partner (having primary responsibility for the audit), or the audit partner responsible for reviewing the audit, has performed audit services for that issuer in each of the 5 previous fiscal years of that issuer.

11. Rule 2-01(c)(6) of Regulation S-X, *Partner Rotation*, states:

... an accountant is not independent of an audit client when:

(A) Any audit partner ... performs:

(1) The services of a lead partner or concurring partner ... for more than five consecutive years;

....

(B) Any audit partner:

(1) Within the five consecutive year period following the performance of services for the maximum period permitted under paragraph (c)(6)(A)(1) of this rule, performs for that audit client the services of a lead partner ... or concurring partner ... or a combination of those services.

12. As detailed above, Elliot provided certain services of a lead partner for more than the five consecutive years permitted.

13. As a result, Berman & Co. was not independent with respect to the audit services provided in connection with Berman & Co.'s audit and reviews of Issuer A's financial statements for the year ended December 31, 2011.

F. BERMAN & CO. AND ELLIOT BERMAN'S APPOINTMENT OF EMPLOYEE A AS LEAD PARTNER CONSTITUTED IMPROPER PROFESSIONAL CONDUCT

Florida Statutes Governing the Practice of Accounting

14. The State of Florida defines the practice of public accounting to include the following:

(8) "Practice of," "practicing public accountancy," or "public accounting" means:

(a) Offering to perform or performing for the public one or more types of services involving the expression of an opinion on financial statements, the attestation as an expert in accountancy to the reliability or fairness of presentation of financial information, the utilization of any form of opinion or financial

statements that provide a level of assurance, the utilization of any form of disclaimer of opinion which conveys an assurance of reliability as to matters not specifically disclaimed, or the expression of an opinion on the reliability of an assertion by one party for the use by a third party;

Fla. Stat. §§ 473.302(8)(a).

15. The State of Florida states that a person may not knowingly

(1) A person may not knowingly:

(a) Practice public accounting unless the person is a certified public accountant or a public accountant;

....

(c) Perform or offer to perform any services described in s. 473.302(8)(a) unless such person holds an active license under this chapter and is a licensed audit firm, provides such services through a licensed audit firm, or complies with ss. 473.3101 and 473.3141. This paragraph does not prohibit the performance by persons other than certified public accountants of other services involving the use of accounting skills, including the preparation of tax returns and the preparation of financial statements without expression of opinion thereon;

....

(g) Employ unlicensed persons to practice public accounting....

Fla. Stat. § 473.322(1).

16. Accordingly, Employee A was not permitted to serve as lead audit partner for the Issuer A audit under the laws of the State of Florida.

17. Nor were Berman & Co. and its principal Elliot permitted to employ Employee A as the lead partner for that audit.

18. Accordingly, Berman & Co. and Elliot's employment of Employee A as the nominal lead partner of that audit constituted a violation of applicable professional standards.

**PCAOB Interim Standards, AU Section 210:
Training and Proficiency of the Independent Auditor**

19. PCAOB Interim Standards, AU Section 210.01 requires that an audit "be performed by a person or persons having adequate technical training and proficiency as an auditor.

20. AU Section 210.02 makes clear that “however capable a person may be in other fields, including business and finance, he cannot meet the requirements of the auditing standards without proper education and experience in the field of auditing.”
21. AU Section 210.03 states, “In the performance of the audit which leads to an opinion, the independent auditor holds himself out as one who is proficient in accounting and auditing. The attainment of that proficiency begins with the auditor’s formal education and extends into his subsequent experience. The independent auditor must undergo training adequate to meet the requirements of a professional. This training must be adequate in technical scope and should include a commensurate measure of general education.... The engagement partner must exercise seasoned judgment in the varying degrees of his supervision and review of the work done and judgments exercised by his subordinates....”
22. Berman and Co. and Elliot appointed a lead audit partner who did not meet the requirements of PCAOB AU Section 210.

PCAOB Interim Standards, AU Section 230:
Due Professional Care in the Performance of Work

23. PCAOB Interim Standards, AU Section 230 .06 states, “Auditors should be assigned to tasks and supervised commensurate with their level of knowledge, skill and ability so that they can evaluate the audit evidence they are examining. The engagement partner should know, at a minimum, the relevant professional accounting and auditing standards and should be knowledgeable about the client.”
24. AU Section 230.03 makes clear that an auditor “assumes the duty to exercise in the employment such skill as he possesses with reasonable care and diligence. In all these employments where peculiar skill is requisite, if one offers his services, he is understood as holding himself out to the public as possessing the degree of skill commonly possessed by others in the same employment, and if his pretensions are unfounded, he commits a species of fraud upon every man who employs him in reliance on his public profession.”
25. Berman and Co. and Elliot Berman knowingly appointed a lead audit partner who did not meet the requirements of PCAOB AU Section 230.

PCAOB Interim Standards, QC Section 40:
The Personnel Management Element of a Firm’s System of Quality Control Competencies Required by a Practitioner-in-Charge of an Attest Engagement

26. PCAOB Interim Standards, PCAOB QC Section 40.07 states that the “practitioner-in-charge of an engagement to audit the financial statements of a public company would be expected to have certain technical proficiency in SEC reporting requirements.... This would include, for example, experience in the industry and appropriate knowledge of SEC ... rules and regulations, including accounting and independence standards.”

27. Berman and Co. and Elliot Berman appointed a lead audit partner who did not meet the requirements of PCAOB QC Section 40.

G. BERMAN & CO.’S AUDIT REPORT DID NOT COMPLY WITH PCAOB STANDARDS AND THUS VIOLATED RULE 2-02 OF REGULATION S-X

Rule 2-02 of Regulation S-X, Accountants’ Reports and Attestation Reports

28. Rule 2-02(b)(1) of Regulation S-X (*Representations as to the Audit included in Accountants’ Reports*) requires an accountant’s report to state “whether the audit was made in accordance with generally accepted auditing standards. (“GAAS”).” These standards include the standards of the PCAOB. “[R]eferences in Commission rules and staff guidance and in the federal securities laws to GAAS or to specific standards under GAAS, as they related to issuers, should be understood to mean the standards of the PCAOB plus any applicable rules of the Commission.” SEC Release No. 34-49708.
29. Berman & Co. issued an audit report on Issuer A’s 2011 financial statements stating that it had conducted its audits in accordance with PCAOB standards.
30. Berman & Co.’s audit, however, was not conducted in accordance with PCAOB auditing standards and interim standards as described above, and, moreover, was not conducted by an independent auditor. *See* PCAOB Rule 3520, *Auditor Independence*.
31. Accordingly, Berman & Co. violated and Elliot Berman aided and abetted and caused a violation of Rule 2-02 of Regulation S-X.

H. BERMAN & CO. AND ELLIOT BERMAN’S CONDUCT CAUSED VIOLATIONS OF EXCHANGE ACT SECTION 13(a) AND RULE 13a-1 THEREUNDER

32. Exchange Act Section 13(a) and Rule 13a-1 require an issuer to file accurate annual reports on Form 10-K.
33. Berman & Co. issued an audit report improperly indicating that its audit of Issuer A’s 2011 financial statements had been conducted in accordance with PCAOB standards, despite the facts that Employee A lacked the requisite technical competence as required by PCAOB auditing standards. In addition, Berman & Co. was not independent because Elliot continued to provide lead partner services.
34. The above-described actions by Berman & Co. and Elliot caused Issuer A to violate Section 13(a) and Rule 13a-1 thereunder. Berman & Co. and Elliot caused Issuer A to file a Form 10-K for the year ended December 31, 2011 that included an audit report that incorrectly stated it had been conducted by an independent public accounting firm in accordance with the standards of the PCAOB. To the contrary, Berman & Co. was not independent and its audit was not conducted pursuant to PCAOB standards.

I. VIOLATIONS

35. As a result of the conduct described above, Berman & Co. and Elliot Berman willfully⁴ violated Section 10A(j) of the Exchange Act;
36. As a result of the conduct described above, Berman & Co. willfully violated and Elliot Berman willfully aided and abetted and caused a violation of Rule 2-02 of Regulation S-X.
37. As a result of the conduct described above, Berman & Co. and Elliot Berman caused Issuer A to violate Section 13(a) of the Exchange Act and Rule 13a-1 thereunder.
38. As a result of the conduct described above, Berman & Co. and Elliot Berman engaged in improper professional conduct as defined in Rule 102(e)(1)(ii) in that their conduct constituted a single instance of highly unreasonable conduct resulting in a violation of applicable professional standards, that indicate a lack of competence to practice before the Commission.

J. FINDINGS

39. Based on the foregoing, the Commission finds that Elliot Berman and Berman & Co. engaged in improper professional conduct pursuant to Section 4C(a)(2) of the Exchange Act and Rule 102(e)(1)(ii) of the Commission's Rules of Practice.
40. Based on the foregoing, the Commission finds that Elliot Berman (a) willfully violated Section 10A(j) of the Exchange Act and, (b) willfully aided and abetted and caused a violation of Rule 2-02 of Regulation S-X, and (c) caused Issuer A's violations of Section 13(a) of the Exchange Act and Rule 13a-1 thereunder.
41. Based on the foregoing, the Commission finds that Berman & Co. (a) willfully violated Section 10A(j) of the Exchange Act, Rule 2-02 of Regulation S-X, and (b) caused Issuer A's violations of Section 13(a) of the Exchange Act and Rule 13a-1 thereunder.

K. RESPONDENTS' REMEDIAL EFFORTS

In determining to accept the Offer, the Commission considered remedial acts promptly undertaken by Respondents and cooperation afforded the Commission staff.

⁴ A finding of willfulness does not require intent to violate, but merely intent to do the act which constitutes a violation. *SEC v. K.W. Brown & Co.*, 555 F. Supp. 2d 1275, 1309 (S.D. Fla.2007), citing *Wonsover v. SEC*, 205 F.3d 408, 413-15 (D.C. Cir. 2000); *SEC v. Steadman*, 603 F.2d 1126, 1135 (5th Cir. 1979); *Arthur Lipper Corp. v. SEC*, 547 F.2d 171, 180 (2d Cir. 1976).

IV.

In view of the foregoing, the Commission deems it appropriate to impose the sanctions agreed to in Respondents' Offer.

Accordingly, it is hereby ORDERED, effective immediately, that:

A. Elliot Berman and Berman & Co. shall cease and desist from committing or causing any violations and any future violations of Section 10A(j) and 13(a) of the Exchange Act, Rule 13a-1 promulgated thereunder, and Rule 2-02 of Regulation S-X.

B. Berman & Co. is censured.

C. Elliot Berman is denied the privilege of appearing or practicing before the Commission as an accountant.

D. After 1 year from the date of this order, Elliot Berman may request that the Commission consider his reinstatement by submitting an application (attention: Office of the Chief Accountant) to resume appearing or practicing before the Commission as:

1. a preparer or reviewer, or a person responsible for the preparation or review, of any public company's financial statements that are filed with the Commission. Such an application must satisfy the Commission that Elliot Berman's work in his practice before the Commission will be reviewed either by the independent audit committee of the public company for which he works or in some other acceptable manner, as long as he practices before the Commission in this capacity; and/or
2. an independent accountant. Such an application must satisfy the Commission that:
 - (a) Elliot Berman, or the public accounting firm with which he is associated, is registered with the Public Company Accounting Oversight Board ("Board") in accordance with the Sarbanes-Oxley Act of 2002, and such registration continues to be effective;
 - (b) Elliot Berman, or the registered public accounting firm with which he is associated, has been inspected by the Board and that inspection did not identify any criticisms of or potential defects in the Elliot Berman's or the firm's quality control system that would indicate that the Elliot Berman will not receive appropriate supervision;
 - (c) Elliot Berman has resolved all disciplinary issues with the Board, and has complied with all terms and conditions of any sanctions

imposed by the Board (other than reinstatement by the Commission); and

- (d) Elliot Berman acknowledges his responsibility, as long as Elliot Berman appears or practices before the Commission as an independent accountant, to comply with all requirements of the Commission and the Board, including, but not limited to, all requirements relating to registration, inspections, concurring partner reviews and quality control standards.

E. The Commission will consider an application by Elliot Berman to resume appearing or practicing before the Commission provided that his state CPA license is current and he has resolved all other disciplinary issues with the applicable state boards of accountancy. However, if state licensure is dependent on reinstatement by the Commission, the Commission will consider an application on its other merits. The Commission's review may include consideration of, in addition to the matters referenced above, any other matters relating to Elliot Berman's character, integrity, professional conduct, or qualifications to appear or practice before the Commission.

F. Elliot Berman and Berman & Co. shall jointly and severally pay civil penalties of \$15,000, to the Securities and Exchange Commission. Payment shall be made in the following installments:

Within 14 days of the issuance of this Order	\$3,750
Within 90 days of the issuance of this Order	\$3,750
Within 180 days of the issuance of this Order	\$3,750
Within 210 days of the issuance of this Order	\$3,750

If any payment is not made by the date the payment is required by this Order, the entire outstanding balance of disgorgement, prejudgment interest, and civil penalties, plus any additional interest accrued pursuant to SEC Rule of Practice 600 or pursuant to 31 U.S.C. 3717, shall be due and payable immediately, without further application. Payment must be made in one of the following ways:

- (1) Respondents may make direct payment from a bank account via Pay.gov through the SEC website at <http://www.sec.gov/about/offices/ofm.htm>; or
- (2) Respondents may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and hand-delivered or mailed to:

Enterprise Services Center
Accounts Receivable Branch
HQ Bldg., Room 181, AMZ-341

6500 South MacArthur Boulevard
Oklahoma City, OK 73169

Payments by check or money order must be accompanied by a cover letter identifying Elliot Berman and Berman & Co. as a Respondents in these proceedings, and the file number of these proceedings; a copy of the cover letter and check or money order must be sent to John T. Dugan, Associate Regional Director, Boston Regional Office, Securities and Exchange Commission, 33 Arch Street, Boston, MA 02110.

By the Commission.

Brent J. Fields
Secretary