INITIAL DECISION RELEASE NO. 434
ADMINISTRATIVE PROCEEDING
FILE NO. 3-14323

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

In the Matter of	:	
	:	
	:	INITIAL DECISION
MICHAEL C. PATTISON, CPA	:	September 29, 2011
	:	

APPEARANCES: Marc J. Fagel, Mark P. Fickes, Susan F. LaMarca, and Robert L. Tashjian for the Division of Enforcement, Securities and Exchange Commission

Patrick J. Richard, Brendan F. Macaulay, and James H. Vorhis, Nossaman LLP, for Respondent Michael C. Pattison

BEFORE: Cameron Elliot, Administrative Law Judge

SUMMARY

This Initial Decision grants the Motion for Summary Disposition filed by the Division of Enforcement (Division), denies the Motion for Summary Disposition filed by Respondent Michael C. Pattison, CPA (Pattison), and permanently denies Pattison the privilege of practicing or appearing before the Securities and Exchange Commission (Commission).[1]

[1] The parties have filed the following papers in connection with their cross-motions for summary disposition: the Division's Motion for Summary Disposition Against Respondent Michael C. Pattison, CPA (Division's Motion), Declaration of Mark P. Fickes in Support thereof (Fickes Decl.), the Division's Opposition to Respondent's Motion for Summary Disposition (Division's Oppo.), and the Division's Reply in Support of the Division's Motion (Division's Reply), as well as Pattison's Motion for Summary Disposition (Pattison's Motion), Declaration of James H. Vorhis in Support thereof (Vorhis Decl. I), Pattison's Opposition to the Division's Motion for Summary Disposition (Pattison's Oppo.), Declaration of James H. Vorhis in Support thereof (Vorhis Decl. II), Pattision's Reply in Support of Pattison's Motion (Pattison's Reply), and Declaration of James H. Vorhis in Support thereof (Vorhis Decl. III).

PROCEDURAL HISTORY

On April 5, 2011, the Commission instituted this proceeding against Pattison by issuing an Order Instituting Public Administrative Proceedings and Imposing Temporary Suspension Pursuant to Rule 102(e)(3) of the Commission's Rules of Practice (OIP). The Commission noted that on February 23, 2011 the United States District Court for the Northern District of California (Court) entered an amended final judgment against Pattison in SEC v. Pattison, C-08-4238 EMC (Civil Case). OIP, p. 2. The amended final judgment permanently enjoined Pattison from violating Section 13(b)(5) of the Exchange Act of 1934 (Exchange Act), 15 U.S.C. § 78m(b)(5), and Exchange Act Rule 13b2-1, 17 C.F.R. § 240.13b2-1, based on the Court's findings and conclusions that Pattison had violated federal securities laws. OIP, p. 2. The Commission believed it necessary and in the public interest to temporarily suspend Pattison from appearing or practicing before the Commission. Id.

On May 5, 2011, Pattison petitioned the Commission to lift the temporary suspension. Vorhis Decl. I, Ex. S. The Division filed an Opposition to Pattision's petition on May 19, 2011. Vorhis Decl. I, Ex. T. On June 3, 2011, the Commission denied Pattison's petition and set the matter for hearing. Vorhis Decl. I, Ex. U. On June 9, 2011, Pattison filed an Answer and Motion for More Definite Statement. Vorhis Decl. I, Ex. V.

At a telephonic prehearing conference on June 24, 2011, the parties were granted leave to file motions for summary disposition, and Pattison's Motion for More Definite Statement was granted in part. Vorhis Decl. I, Ex. W. The Division filed its more definite statement on July 8, 2011. Vorhis Decl. I, Ex. X. The more definite statement declares that the Division is proceeding under Rules 102(e)(3)(i)(A) and 102(e)(3)(iv). See generally 17 C.F.R. § 201.102(e)(3). The parties filed their respective motions for summary disposition on July 21, 2011, their respective oppositions by July 28, 2011, and their respective replies on August 1, 2011.

SUMMARY DISPOSITION STANDARD

After the respondent's answer has been filed and documents have been made available for inspection and copying, a party may make a motion for summary disposition of any or all allegations of the OIP. See 17 C.F.R. § 201.250(a). The facts of the pleadings of the party against whom the motion is made shall be taken as true, except as modified by stipulations or admissions made by that party, by uncontested affidavits, or by facts officially noticed pursuant to 17 C.F.R. § 201.323. Id. A motion for summary disposition may be granted if there is no genuine issue with regard to any material fact and the party making the motion is entitled to a summary disposition as a matter of law. See 17 C.F.R. § 201.250(b).

The findings and conclusions in this Initial Decision are based on the record and on facts officially noticed pursuant to 17 C.F.R. § 201.323. In particular, Pattison is precluded from contesting any findings made against him or facts admitted by him in the Civil Case, as to which official notice has been taken. 17 C.F.R. § 201.102(e)(3)(iv); Chris G. Gunderson, Exchange Act Release No. 61234 (Dec. 23, 2009), 97 SEC Docket 24040, 24047. Thus, the Court's

findings of fact, discussed and relied upon throughout this Initial Decision, are binding upon Pattison.

The parties' motion papers, and indeed, all documents and exhibits of record, have been fully reviewed and carefully considered. Preponderance of the evidence has been applied as the standard of proof. See Steadman v. SEC, 450 U.S. 91, 101-104 (1981); see also William R. Carter, 47 S.E.C. 471, 472 n.3 (1981) (applying preponderance standard to a proceeding under Rule 2(e) (predecessor to Rule 102(e))). All arguments and proposed findings and conclusions that are inconsistent with this Initial Decision have been considered and rejected.

FINDINGS OF FACT

Embarcadero Technologies, Inc. (Embarcadero) is a Delaware corporation headquartered in San Francisco, California. Court's Corrected Order Denying Plaintiff's Motion to Strike; Denying Defendant's Motion for Judgment as a Matter of Law; and Denying Defendant's Motion for a New Trial (Corrected Order), p. 2 (Vorhis Decl. I, Ex. Y); SEC v. Pattison, 2011 WL 2313267, Fed. Sec. L. Rep. P 96,328 (N.D.Cal. June 9, 2011). Pattison served as Embarcadero's controller from approximately January 2000 through July 2005. Id. As controller, Pattison was responsible for many day-to-day accounting functions and for recording all equity account activity, including options activity. Id.

Embarcadero's Compensation Committee authorized its chief executive officer, Stephen Wong (Wong), to grant options to employees, and Wong did so regularly from late 2000 until the third quarter of 2004. Corrected Order, p. 2. The options were issued pursuant to an "Amended and Restated Embarcadero Technologies, Inc. 1993 Stock Option Plan" (Options Plan), approved by stockholders and the Board of Directors in February 2000. Id., pp. 2-3.

Pattison personally prepared or directed the preparation of documentation for option grants from late 2000 through 2004. Corrected Order, p. 3. He received recommendations for employee option grants and compiled them into a list, and near the end of each quarter he sent the list to Wong via email, along with proposed grant dates. Id. Pattison selected grant dates retrospectively, based on the lowest share value of the previous or expiring quarter.[2] Id. After receiving approval from Wong, Pattison transmitted the list of grants to E*Trade Financial Corporation (E*Trade), the company that maintained Embarcadero's options data, using a template provided by E*Trade. Id. One field in the template called for entry of the date the option was granted. Id. E*Trade thereafter entered the provided data into its option tracking database. Id. Each employee's stock option agreement was prepared based on the data as reflected in E*Trade's database, and thus reflected the date entered by Pattison as the date the option was granted. Id.

[2] This practice, known as "backdating," was not itself illegal. However, the benefit to the option grantee must have been recorded and reported as a non-cash compensation expense. See generally U.S. v. Reyes, 577 F.3d 1069, 1072-73 (9th Cir. 2009).

Each quarter, Pattison compiled a list of option grants into a spreadsheet, which he sent to Wong for approval. Corrected Order, p. 3. He also provided summaries of new option grants and option exercises to Embarcadero's auditor, PriceWaterhouseCoopers (PWC). Id., p. 4.

None of the documents prepared by Pattison accurately stated the date of actual approval by Wong. Corrected Order, p. 4. All of the grant dates recited in the quarterly summaries, E*Trade templates, employee stock option agreements, and documentation provided to PWC were selected retrospectively, based on the lowest share value of the previous or expiring quarter. Id. PWC was not aware that grant dates for options were retrospectively chosen, and no expenses in connection with the options were reported on the financial statements Embarcadero publicly filed with the Commission. Id. Nor was Embarcadero's Board of Directors aware of the backdating. Id.

In 2006, Embarcadero's Audit Committee asked PWC to review past option grants. Corrected Order, p. 4. Upon receiving PWC's report, the Audit Committee retained a law firm to conduct an internal investigation. Id. Shortly thereafter, Embarcadero's Board of Directors formed a Special Committee to analyze the company's past stock options practices. Id. The Special Committee concluded that about half of the grants reviewed, or two thirds of the number of shares covered under option grants, were misdated and mispriced from April 2000, the time of Embarcadero's initial public offering, until March 2005. Id. On December 18, 2006, Embarcadero issued a press release announcing the Audit Committee's conclusion that the company's previously issued financial statements should not be relied on. Id. Embarcadero thereafter filed a restatement of its consolidated balance sheet as of December 31, 2005, along with amended statements covering ten quarters from 2004 to 2006 (Restatement). Id.

On September 9, 2008, the Division filed the Civil Case, asserting 12 claims for relief based on, among other things, options backdating practices over 16 quarters from 2000 to 2004. Corrected Order, p. 4; Fickes Decl., Ex. 1. The Division alleged that Pattison, Wong, and Embarcadero's chief financial officer executed a fraudulent scheme to issue backdated options and hide millions of dollars in compensation expenses, in violation of federal securities laws, and concealed the scheme from shareholders, auditors, and the government. Corrected Order, pp. 4-5.

The Court tried the case in August and September 2010, and the jury rendered a verdict on September 24, 2010. Vorhis Decl. I, Ex. M. Five counts were submitted to the jury: (1) violating Exchange Act Rule 10b-5, (2) aiding and abetting the violation of Exchange Act Rule 10b-5, (3) aiding and abetting the violation of § 13(a) of the Exchange Act, (4) violating § 13(b)(5) of the Exchange Act, and (5) violating Exchange Act Rule 13b2-1. Id. The jury found in Pattison's favor on the first three counts, and found him liable on the last two. Id.

The Court thereafter issued a series of orders and judgments. On June 9, 2011, the Court entered a Corrected Order and Judgment Granting Motion for Entry of Final Judgment (Corrected Judgment), which is currently in effect. Vorhis Decl. I, Ex. P. Also on June 9, 2011, the Court entered an Order Denying Defendant's Motion for Judgment of Law and Motion for New Trial; and Granting in Part and Denying in Part Defendant's Motion to Amend Judgment

(Order Denying JMOL),[3] with the Corrected Order and the Corrected Judgment attached as exhibits.[4] Vorhis Decl. I, Ex. Y.

The Corrected Judgment contains the following injunction:

> 1. [Pattison] is permanently enjoined from violating § 13(b)(5) of the Exchange Act of 1934, [15 U.S.C. § 78m(b)(5)], by, directly or indirectly, knowingly circumventing or knowingly failing to implement a system of internal accounting controls or knowingly falsifying any book, record or account made by or kept pursuant to § 13(b)(2) of the Exchange Act, 15 U.S.C. § 78m(b)(2).
> 2. [Pattison] is permanently enjoined from violating Exchange Act Rule 13b2-1, [17 C.F.R. § 240.13b2-1], by directly or indirectly falsifying or causing to be falsified any book, record, or account subject to § 13(b)(2)(A) of the Exchange Act.

Corrected Judgment, p. 9.[5]

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[3] In many instances, the legal standard for judgment as a matter of law required the Court to make findings only as to what the jury reasonably could have found, rather than actual findings of fact. Pattison's Oppo., p. 8; Pattison's Reply, p. 3. Accordingly, only the Court's actual findings have been relied upon in this Initial Decision.

[4] Pattison asserts that the "findings" in the Civil Case, for purposes of Section 102(e)(3)(iv), do not include the Court's conclusions in the Corrected Order and Order Denying JMOL, and that such conclusions may therefore be contested. Pattison's Reply, p. 3. Pattison offers no authority for this proposition beyond the language of Section 102(e)(3)(iv) itself, which has been construed more broadly than Pattison urges. Gunderson, 97 SEC Docket at 24050 (considering findings made by court in post-injunction contempt proceeding); Daniel S. Lezak, Exchange Act Release No. 50729 (Nov. 23, 2004), 84 SEC Docket 723 (considering findings made by court in ruling on Commission's partial summary judgment motion). Moreover, the Corrected Judgment cross-references the Order Denying JMOL, particularly regarding Pattison's degree of intent (Corrected Judgment, p. 2), and the Order Denying JMOL explains the Court's reasons for amending the language of the injunction (Order Denying JMOL, pp. 4-5) and repeatedly cross-references the original version of the Corrected Order (referred to as the "February 22 order" (see Fickes Decl., Ex. 6)) (Order Denying JMOL, pp. 5, 6, 8, 9, 11). Clearly, both the Corrected Order and the Order Denying JMOL were actually litigated, necessary to the Court's decision to issue an injunction, and inextricably intertwined with the Corrected Judgment, and are therefore incontestable in the instant proceeding. See James E. Franklin, Exchange Act Release No. 56649 (Oct. 12, 2007), 91 SEC Docket 2708, 2713, aff'd, 285 Fed.Appx. 761 (D.C. Cir. 2008) (in Section 102(e)(1) proceeding, Commission may not reconsider any factual or procedural issues actually litigated and necessary to the court's decision to issue the injunction). Indeed, even Pattison quotes from the Order Denying JMOL. Pattison's Motion, p. 13. By contrast, the Court's remarks during the course of the trial, but not memorialized in an order and therefore not final, do not rise to the level of "findings." E.g., Pattison's Motion, p. 13.

[5] Additional findings of fact are set forth where appropriate in the Discussion section, infra.

DISCUSSION

Once a petition to lift a temporary suspension has been filed in accordance with Rule 102(e)(3)(ii) of the Commission's Rules of Practice, the Commission may, after opportunity for a hearing, censure or temporarily or permanently disqualify the petitioner from appearing or practicing before the Commission. 17 C.F.R. § 201.102(e)(3)(iii). In any such hearing, the Commission (here, the Division) has the burden to show that the respondent has been enjoined as described in Rule 102(e)(3)(i)(A). 17 C.F.R. § 201.102(e)(3)(iv). That is, the Division must show that Pattison has been (1) permanently enjoined, (2) by a court of competent jurisdiction, (3) by reason of his misconduct, (4) in an action brought by the Commission, (5) from violating federal securities laws. Id.; Gunderson, 97 SEC Docket at 24046-47. If the Division meets its burden, the burden shifts to Pattison to show cause why he should not be censured or temporarily or permanently disqualified. Gunderson, 97 SEC Docket at 24047. Ultimately, any remedial sanction is determined in light of the factors set forth in Steadman v. SEC, 603 F.2d 1126, 1140 (5th Cir. 1979), aff'd on other grounds, 450 U.S. 91 (1981). Id. at 24048.

A. The Division is Entitled to Summary Disposition

The Court permanently enjoined Pattison from violating federal securities laws, by reason of his misconduct, in an action brought by the Commission. Corrected Judgment, p. 9. There is no dispute that the Court had jurisdiction. Accordingly, the Division has met its burden.

Pattison nonetheless requests an evidentiary hearing, on the ground that there exist disputed issues of material fact pertaining to mitigation.[6] Pattison's Oppo., p. 1. But a party opposing summary disposition must present specific facts showing that there is a genuine issue for trial. Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986). Pattison has failed to carry this burden, either because he cannot now contest any findings made against him in the Civil Case, or because his version of the facts has been adopted. 17 C.F.R. § 201.102(e)(3)(iv); Gibson, 561 F.3d at 553 (because respondent agreed not to dispute the facts alleged in the District Court complaint, they cannot establish a genuine issue of material fact in a follow-on administrative proceeding).

Pattison's motion papers recite five allegedly disputed and material facts. First, Pattison contests the allegation that he "intentionally engaged in knowing violations of the securities laws," and asserts that "the evidence that led the jury to reject [the] scienter-based claims" must be considered in mitigation. Pattison's Oppo., p. 9. The Division does not dispute that the jury found in Pattison's favor on the fraud claims. Division's Reply, p. 4. But Jury Instruction 21, pertaining to the Section 13(b) count, on which Pattison was found liable, required the jury to find that Pattison "knowingly falsified" Embarcadero's books, and defined "knowingly" as "intentionally; recklessness is not sufficient." Fickes Decl., Ex. 8, p. 24; see also Fickes Decl., Ex. 7, pp. 7-9 (Pattison's objections to the proposed jury instruction, arguing that the 13(b) count

[6] Pattison also argues that an evidentiary hearing is required under the Commission's Rules of Practice. Pattison's Reply, p. 3. This is not the law. Kornman v. SEC, 592 F.3d 173, 182 (D.C. Cir. 2010); Gibson v. SEC, 561 F.3d 548, 553 (6th Cir. 2009).

required proof of knowing, intentional, and deliberate conduct); Order Denying JMOL, p. 14 (noting that the parties agreed on a jury instruction requiring proof of scienter, even though it was not required by Section 13(b)). The Court noted that "if a person intentionally makes a false statement (found here), that is tantamount to an intent to deceive," that is, to scienter. Order Denying JMOL, p. 14. In short, although Pattison vehemently disagrees with the Court's conclusion that he acted with scienter, and even though Section 13(b) of the Exchange Act does not actually require proof of scienter, the Court found that he acted with scienter, and he cannot contest that conclusion in this proceeding.

Second, Pattison contests the allegation that he repeatedly provided the wrong approval date in grant approval lists. Pattison's Oppo., p. 10. This fact was found against him by the Court, and therefore does not raise a genuine issue of material fact. Corrected Order, pp. 4, 10 ("In not one instance did Defendant state the actual date of approval by CEO Wong on any of these documents.").

Third, Pattison contests the allegation that he has failed to recognize the wrongful nature of his conduct. Pattison's Oppo., p. 13. This fact was also found against him by the Court. Corrected Judgment, pp. 3-4.

Fourth, Pattison contests the allegation that he is likely to again violate Section 13(b) of the Exchange Act and regulations thereunder. Pattison's Oppo., pp. 14-16. The Court, after carefully considering the evidence, concluded that this factor weighed slightly in favor of an injunction, i.e., the Court found against him. Corrected Judgment, pp. 4-5.

Fifth, Pattison asserts that he is aware of the importance of robust internal accounting procedures. Pattison's Oppo., p. 16. The Division apparently does not dispute this, and inasmuch as this is one element pertaining to the sincerity of Pattison's assurances against future violations, the Court found in his favor. Corrected Judgment, p. 5. Pattison's assertion will be accepted in accordance with Rule 250 of the Commission's Rules of Practice.

In sum, Pattison has not raised a genuine issue of material fact, even as to a fact that "could mitigate his misconduct," and summary disposition in the Division's favor is appropriate. John S. Brownson, Exchange Act Release No. 46161 (July 3, 2002), 77 SEC Docket 3636, 3640 n. 12 ("[A] respondent may present genuine issues with respect to facts that could mitigate his or her misconduct, although we believe that those cases will be rare.").

B. Pattison is Not Entitled to Summary Disposition

Pattison argues that he is entitled to summary disposition, and the Division is not, because "the only basis for this administrative proceeding is an unprecedented permanent injunction rooted in evidentiary error." Pattison's Motion, p. 9. As noted, Pattison cannot now contest any such "evidentiary error[s]," and his lengthy and detailed discussion of the Civil Case's alleged flaws is not pertinent except as to the Steadman factors.[7] 17 C.F.R. §

[7] If the underlying injunction is vacated, Respondent may request the Commission to reconsider any sanctions imposed in this administrative proceeding. See Charles Phillip Elliott, Exchange

201.102(e)(3)(iv); see Pattison's Reply, p. 2 (disclaiming any effort to contest the findings against him). Moreover, even assuming the truth of Pattison's assertion that "no defendant has ever been enjoined . . . on only the books and records claims here," the threshold requirements of Section 102(e)(3) remain satisfied. Pattison's Reply, p. 2 (emphasis in original); Gunderson, 97 SEC Docket at 24046-47.

Pattison further contends that this proceeding was not properly brought pursuant to Section 102(e)(3), that it should instead have been brought pursuant to Section 102(e)(1), and that the Division has neither met its burden under Section 102(e)(1) nor properly notified Pattison that it was proceeding under that section. Pattison's Motion, p. 14; Pattison's Reply, pp. 4-5. Pattison offers no authority for this argument, and indeed, there have been multiple cases of accountants barred from SEC practice pursuant to Section 102(e)(3) as a result of improper stock option backdating. Sharlene Abrams, Exchange Act Release No. 60017 (June 1, 2009), 95 SEC Docket 17221; Carole D. Argo, Exchange Act Release No. 58668 (Sept. 29, 2008), 94 SEC Docket 10166; Steven J. Landmann, Exchange Act Release No. 55432 (March 9, 2007), 90 SEC Docket 572; David Kreinberg, Exchange Act Release No. 54712 (Nov. 6, 2006), 89 SEC Docket 754. Based on the Division's more definite statement – filed at Pattison's request – this case falls under Section 102(e)(3), just as similar cases have. Vorhis Decl., Ex. X.

Pattison nonetheless argues that because the jury verdict did not conclusively establish that he acted with scienter, Section 102(e)(3) cannot apply. But the Court concluded that the jury's verdict necessarily implies that Pattison did act with scienter. Order Denying JMOL, p. 14. Moreover, Section 102(e)(3) does not require a showing of scienter, or any particular state of mind, in connection with the subject permanent injunction, and the cases Pattison cites are not to the contrary. 17 C.F.R. § 201.102(e)(3). Touche Ross v. SEC, 609 F.2d 570 (2d Cir. 1979), upheld the authority of the Commission to bar professionals pursuant to administrative proceedings, and does not address any scienter requirement. SEC v. Fehn, 97 F.3d 1276 (9th Cir. 1996), was a District Court case, and does not address Section 102(e)(3). Checkosky v. SEC, 23 F.3d 452, 462 (D.C. Cir. 1994), remanded a case to the Commission for a precise definition of the state of mind required to violate the predecessor rule to Section 102(e)(1). Section 102(e)(1) is not at issue here, however, and in any event, the state of mind question was resolved well before Pattison began his illegal course of conduct. Marrie v. SEC, 374 F.3d 1196, 1198 (D.C. Cir. 2004) (noting that proof of recklessness is required for a Section 102(e)(1) violation).

SANCTIONS

The sanctions available in this proceeding include censure, temporary suspension, permanent suspension, or, provided Pattison has shown sufficient cause, no sanction at all. 17 C.F.R. § 201.102(e)(3)(iii); Gunderson, 97 SEC Docket at 24047; see Alan E. Rosenthal, Exchange Act Release No. 40387 (Sept. 1, 1998), 67 SEC Docket 2694, 2698 (rejecting a penny stock bar in light of the Steadman factors). The Division requests that Pattison be permanently

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Act Release No. 31202 (Sept. 17, 1992), 52 SEC Docket 2011, 2017 n.17, aff'd on other grounds, 36 F.3d 86 (11th Cir. 1994).

disqualified from appearing or practicing before the Commission. Division's Motion, p. 1. Pattison requests no sanction at all. Pattison's Motion, p. 1; Pattison's Reply, pp. 6-7.

The appropriate remedial sanction is guided by the well-established public interest factors listed in Steadman.[8] Gibson, 561 F.3d at 554-55; Gunderson, 97 SEC Docket at 24048. They include: (1) the egregiousness of the respondent's actions; (2) the isolated or recurrent nature of the infraction; (3) the degree of scienter involved; (4) the sincerity of the respondent's assurances against future violations; (5) the respondent's recognition of the wrongful nature of his conduct; and (6) the likelihood of future violations. Steadman, 603 F.2d at 1140. Deterrence should also be considered, and the sanction may not be punitive. Steven Altman, Exchange Act Release No. 63306 (Nov. 10, 2010), 99 SEC Docket 34405, 34435; Gunderson, 97 SEC Docket at 24048; Johnson v. SEC, 87 F.3d 484, 490 (D.C. Cir. 1996). The inquiry into the appropriate remedial sanction is flexible and no one factor is controlling. Conrad P. Seghers, Investment Advisers Act Release No. 2656 (Sept. 26, 2007), 91 SEC Docket 2293, 2298, aff'd, 548 F.3d 129 (D.C. Cir. 2008).

Pattison convincingly demonstrates that the misconduct (as opposed to the degree of intent) for which he was found liable was not as egregious as the conduct of other accountants subject to administrative proceedings under Rule 102(e)(3), after having been found liable for backdating stock options or accounting fraud.[9] See generally Pattison's Motion, p. 10 (listing cases of other accountants); Pattison's Reply, p. 5. Although the Division correctly notes that these other accountants all settled their administrative proceedings, it concedes that Pattison was not convicted of fraud and fails to point to a single case of an accountant similarly situated to Pattison – that is, found liable in an option backdating case – who was permanently barred from practicing before the Commission. Division's Oppo., p. 9; Division's Reply, p. 4.

On the other hand, Pattison's knowing and intentional misconduct was quite serious. It involved over $14 million in understated corporate expenses. Corrected Order, p. 4. "An accurate grant date or 'measurement date' is thus necessary to 'accurately and fairly reflect transactions and dispositions of assets.' The records prepared by Defendant failed to do so." Corrected Order, p. 13 (quotations in original, interlineations omitted). As a result, the PWC auditors "testified persuasively that they were not aware of the backdating." Order Denying JMOL, p. 11; see also Corrected Order, p. 10. Other results of inaccurate grant dates include: less money paid to Embarcadero upon option exercise, which adversely affected Embarcadero's asset disposition; an increased likelihood that employees exercised their options, thus diluting equity and potentially affecting share value; a change in gross deferred tax assets of $2.4 million; and the need for a financial restatement. Corrected Order, pp. 4, 13. It is irrelevant that proof of materiality was not an element of either charge for which Pattison was found liable, because the

[8] Section 102(e)(3) is thus not "standardless," as Pattison contends. Pattison's Motion, p. 15; Pattison's Reply, p. 5.

[9] Pattison also argues, more generally, that a permanent bar would be a disproportionate penalty. However, so long as a sanction is within the Commission's authority, proportionality is not a relevant consideration. Seghers, 548 F.3d at 135 (citing Butz v. Glover Livestock Commission Co., 411 U.S. 182, 187 (1973) and Hiller v. SEC, 429 F.2d 856, 858-59 (2d Cir. 1970)).

restatement itself demonstrates that Pattison's misconduct was "material" in an accounting sense. Pattison's Motion, p. 10.[10] Taken as a whole, the nature of the conduct for which Pattison was found liable was egregious, but not especially so.

Pattison argues that his misconduct was not recurrent because it amounted to only a single violation of a single accounting rule.[11] Pattison's Oppo., pp. 11-12. However, the Court found that Pattison knowingly provided false documentation every quarter for almost four years. Corrected Judgment, pp. 2-4 & n.2. Pattison's conduct was plainly recurrent, even if it was the result of a single management decision, because as a result of that decision Pattison routinely and repeatedly backdated stock option grants over the course of several years. See Altman, 99 SEC Docket at 34436 (attorney's misconduct found recurrent even though it lasted only two weeks).

That the jury found Pattison not liable on the fraud charges does weigh in Pattison's favor. However, Pattison still acted with scienter. This point merits emphasis, because of the vigor with which Pattison disputes it. As the Court found:

> While the instant case is a civil action and not a criminal action, the § 13 jury instruction that the parties agreed upon stated that *knowing* falsification was required – in other words, the SEC (although it did not have to) agreed to the criminal liability scienter requirement. Accordingly, there was scienter in this case (in the sense of a knowing falsification); at least, the jury so found.

Order Denying JMOL, pp. 13-14 (italics in original); Corrected Judgment, p. 2 (cross-referencing scienter discussion in Order Denying JMOL). Pattison cannot now contest the fact that he acted with scienter, that is, that he "knowingly . . . falsified records and/or circumvented internal controls to make it appear that no stock option grants were backdated and below fair market value." Corrected Judgment, p. 2. Additionally, "while scienter is not required to make out violations of . . . the statutory sections involved here, the respondent's state of mind is highly

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[10] Pattison does not take a consistent position regarding the materiality of his misconduct. Although he concedes at one point that "a restatement, by definition, means that the company's prior financial statements and records were materially incorrect" (Pattison's Motion, p. 10 (emphasis omitted)), he argues repeatedly that the evidence failed to prove such materiality (Pattison's Motion, p. 16; Pattison's Oppo., pp. 2, 8). Regardless, his conduct still qualifies as egregious.

[11] Pattison cites three unpublished District Court cases for the proposition that because he engaged in a "course of conduct," and some courts have treated such a course as a single violation in assessing civil penalties, his misconduct does not qualify as "recurrent." SEC v. Alanar, Inc., 2008 WL 1994854 (S.D.Ind. May 6, 2008); SEC v. Stanard, 2009 WL 196023 at *35 (S.D.N.Y. 2009); SEC v. Robinson, 2002 WL 1552049 (S.D.N.Y. 2002). However, the standard used in evaluating civil penalties is different from the standard used in evaluating sanctions under Section 102(e)(3). Indeed, whether the misconduct is recurrent may not even need to be considered in evaluating civil penalties. Rizek v. SEC, 215 F.3d 157, 163-64 (1st Cir. 2000).

relevant in determining the remedy to impose." Steadman, 603 F.2d at 1140. This factor weighs heavily in favor of a permanent suspension.

The Court found that Pattison provided sincere assurances against future violations, such that this factor weighed against an injunction. Corrected Judgment, p. 5. Although the Division disagrees with this conclusion, it cannot now be contested by either party. See Franklin, 91 SEC Docket at 2713 (in Section 102(e)(1) proceeding, Commission may not reconsider any factual or procedural issues actually litigated and necessary to the court's decision to issue the injunction).

The Court also found that Pattison had not recognized the wrongful nature of his conduct. Corrected Judgment, p. 3. Specifically: Pattison took no steps to correct any erroneous financial statements over a four year period; he either blamed others for his misconduct or stated that he was merely complying with Embarcadero's stock option plan; and he failed to acknowledge the wrongfulness of temporarily placing stock options in unrelated employee E*Trade accounts. Corrected Judgment, p. 3. Pattison is of course entitled to present a zealous defense of the charges against him, but the fact remains that he "acted knowingly on a repeated basis without taking any steps to issue proper accounting," that is, with scienter. Corrected Judgment, p. 3. He did not recognize the wrongful nature of his conduct at the time he committed it, and he still does not recognize it. See Seghers, 548 F.3d at 136-37 (due process is not violated by giving a respondent a choice between recognizing the wrongfulness of his conduct, or refusing to do so and thereby risking more severe remedial action). Pattison's other arguments that he recognized the wrongful nature of his conduct were also presented to the Court, which rejected them. Corrected Judgment, pp. 3-4. They are also rejected in the instant proceeding.

Finally, the Court found that the likelihood of Pattison committing future violations of the securities laws "tips the scales slightly in favor of an injunction." Corrected Judgment, p. 5. The Division does not dispute that Pattison is currently working for a private company, stopped backdating options at Embarcadero as soon as his misconduct was discovered, has not violated any securities laws for almost seven years, and never worked for a public company either before or after working for Embarcadero. Pattison's Oppo., pp. 14-15. However, Pattison remains a licensed CPA, currently works as an accountant, and has not ruled out returning to work for a public company. Corrected Judgment, p. 4. Pattison has offered no concrete evidence (such as a declaration) that he has no intention of working again for a public company, and indeed, acknowledges that he made "no representations one way or the other about his future plans" when he was deposed. Pattison's Oppo., p. 16. Pattison's likelihood of committing future violations weighs slightly in favor of a permanent suspension.

Thus, Pattison's misconduct was recurrent and egregious (but not especially so), he acted with scienter, he has not recognized the wrongfulness of his conduct, and he is slightly likely to commit future violations. On the other hand, he has given sincere assurances against future violations and he was not found liable for fraud. In this case, the greatest weight should be placed on Pattison's degree of intent, because it is "highly relevant" and the Court placed considerable significance on it. Steadman, 603 F.2d at 1140. Additionally, a permanent suspension will further the Commission's interests in deterrence, particularly general deterrence. See Altman, 99 SEC Docket at 34438 ("Other attorneys, who might be encouraged by a more lenient sanction to act in a similar fashion, must also be deterred."); Steadman, 603 F.2d at 1140

("even if further violations of the law are unlikely, the nature of the conduct mandates permanent debarment as a deterrent to others in the industry"). A permanent suspension is remedial rather than punitive in nature because it will protect the integrity of the Commission's processes, and thereby the investing public, from future harm.

Overall, the mitigating factors are greatly overborne by the aggravating factors, and the totality of the circumstances demonstrate the need for a permanent suspension. Thus, considering the Steadman factors in their entirety, including the evidence in mitigation, the need for deterrence, and the remedial nature of the Commission's sanctions, it is in the public interest to permanently disqualify Pattison from appearing or practicing before the Commission.

ORDER

It is ORDERED, pursuant to Rule 250 of the Commission's Rules of Practice, that the Division's Motion for Summary Disposition is GRANTED and Pattison's Motion for Summary Disposition is DENIED; and

It is further ORDERED that, in accordance with Rules 102(e)(3)(i)(A) and 102(e)(3)(iii) of the Commission's Rules of Practice, Michael C. Pattison, CPA, is hereby permanently denied the privilege of appearing or practicing before the Commission.

This Initial Decision shall become effective in accordance with and subject to the provisions of Rule 360 of the Commission's Rules of Practice, 17 C.F.R. § 201.360. Pursuant to that Rule, a party may file a petition for review of this Initial Decision within twenty-one days after service of the Initial Decision. A party may also file a motion to correct a manifest error of fact within ten days of the Initial Decision, pursuant to Rule 111 of the Commission's Rules of Practice, 17 C.F.R. § 201.111. If a motion to correct a manifest error of fact is filed by a party, then that party shall have twenty-one days to file a petition for review from the date of the undersigned's order resolving such motion to correct manifest error of fact. The Initial Decision will not become final until the Commission enters an order of finality. The Commission will enter an order of finality unless a party files a petition for review or motion to correct manifest error of fact or the Commission determines on its own initiative to review the Initial Decision as to a party. If any of these events occur, the Initial Decision shall not become final as to that party.

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Cameron Elliot
Administrative Law Judge