

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 64598 / June 3, 2011

ACCOUNTING AND AUDITING ENFORCEMENT
Rel. No. 3287 / June 3, 2011

Admin. Proc. File No. 3-14323

In the Matter of
MICHAEL C. PATTISON, CPA

ORDER DENYING MOTION
TO LIFT TEMPORARY
SUSPENSION AND
DIRECTING HEARING

On April 5, 2011, we issued an order instituting proceedings ("OIP") against Michael C. Pattison, a certified public accountant ("CPA"), pursuant to Commission Rule of Practice 102(e)(3),¹ that temporarily suspended him from appearing or practicing before the

¹ Rule of Practice 102(e)(3)(i), 17 C.F.R. § 201.102(e)(3)(i), provides, in pertinent part, that:

(i) The Commission, with due regard to the public interest and without preliminary hearing, may, by order, temporarily suspend from appearing or practicing before it any . . . accountant . . . who has been by name:

(A) permanently enjoined by any court of competent jurisdiction, by reason of his or her misconduct in an action brought by the Commission, from violating or aiding and abetting the violation of any provision of the Federal securities laws or of the rules and regulations thereunder; or

(B) found by any court of competent jurisdiction in an action brought by the Commission to which he or she is a party or found by the Commission in any administrative proceeding to which he or she is a party to have violated (unless the violation was found not to have been willful) or aided and abetted the violation of any provision of the Federal securities laws or of the rules and regulations thereunder.

Commission as an accountant.² Pattison has filed a petition, pursuant to Rule 102(e)(3)(ii),³ requesting that his temporary suspension be lifted.

Pattison was controller of Embarcadero Technologies, Inc. ("Embarcadero"), from January 2000 through July 2005.⁴ On September 9, 2008, the Commission filed a complaint in the United States District Court for the Northern District of California, alleging that Pattison, among other things, knowingly falsified numerous books, records, and accounts in connection with the backdating of stock options granted to Embarcadero's employees from 2000 through 2005. The complaint further alleged that Pattison knowingly circumvented Embarcadero's internal accounting controls to avoid recording compensation expenses related to the backdated, in-the-money, stock options during the same time period.

A jury found that Pattison violated Section 13(b)(5) of the Securities Exchange Act of 1934, which prohibits persons from "knowingly circumvent[ing] . . . a system of internal accounting controls or knowingly falsify[ing] any [required] book, record, or account."⁵ The jury also found that Pattison violated Exchange Act Rule 13b2-1, which prohibits persons from "directly or indirectly, falsify[ing] any [required] book, record, or account."⁶ On February 23, 2011, the district court entered an amended final judgment against Pattison permanently enjoining him from violating Exchange Act Section 13(b)(5) and Exchange Act Rule 13b2-1.⁷ The final judgment, as amended, further ordered Pattison to pay \$74,446 in disgorgement, plus prejudgment interest, and a second-tier civil monetary penalty of \$50,000.

In issuing the OIP, we found it "appropriate and in the public interest" that Pattison be temporarily suspended from appearing or practicing before the Commission, based on the district court's final judgment. We stated that the temporary suspension would become permanent unless Pattison filed a petition challenging it within thirty days of service of the order, pursuant to Rule of Practice 102(e)(3)(ii). We further advised that, pursuant to Rule of Practice 102(e)(3)(iii),

² *Michael C. Pattison, CPA*, Securities Exchange Act Rel. No. 64190 (Apr. 5, 2011), __ SEC Docket __.

³ 17 C.F.R. § 201.102(e)(3)(ii).

⁴ *Pattison*, __ SEC Docket at __.

⁵ 15 U.S.C. § 78m(b)(5).

⁶ 17 C.F.R. § 240.13b2-1.

⁷ *SEC v. Pattison*, C-08-4238 EMC, 2011 U.S. Dist. LEXIS 23427 (N.D. Cal. Feb. 23, 2011). The district court noted, in enjoining Pattison, that he "currently holds a position as an accountant in a private trading company, and is still a licensed CPA, eligible to return to the public accounting field." *Id.* at *7.

upon receipt of such a petition, we would either "lift the temporary suspension, or set the matter down for hearing . . . , or both."

In his petition, Pattison argues that the temporary "suspension is premature" because he has filed a "meritorious motion to amend the [final judgment]" with the district court and because he "will appeal any adverse ruling on his motion." He requests that the Commission lift the temporary suspension "until that motion, and the potential appeal, are decided." Pattison also contends that the "suspension is inappropriate and excessive in light of the nature of the case," noting that the jury dismissed several charges against him, "absolv[ing]" him of any wrongdoing with respect to the "antifraud and disclosure provisions of the . . . Exchange Act." He further contends that the district court used "an improper standard for the requisite intent" under Exchange Act Section 13(b)(5) and challenges the evidence used against him at trial, claiming the Commission improperly relied on Embarcadero's financial statements and "elicit[ed] improper expert testimony about complicated accounting rules from lay witnesses." In addition, Pattison also claims that the OIP erroneously states that he was enjoined from "indirect" violations of Section 13(b)(5), urges the Commission to issue a more "definitive statement" regarding his misconduct, and requests the opportunity "to present additional briefing . . . and proposed findings . . . before any administrative hearing and decision." The Division of Enforcement opposes Pattison's petition.

Rule 102(e)(3) permits the Commission to suspend any accountant or other professional or expert who has been "permanently enjoined from violating . . . the Federal securities laws or of the rules and regulations thereunder; or . . . found by any court of competent jurisdiction in an action brought by the Commission . . . to have violated . . . the . . . Federal securities laws or rules and regulations thereunder."⁸ Although Pattison is entitled to appeal the underlying case against him, neither the pendency of his current motion before the district court nor the possibility of an appeal to the court of appeals "alter[s] the effect" of the jury's finding of securities law violations or the court's imposition of an injunction, here.⁹ Generally, a respondent in a "follow-on" proceeding is precluded from challenging the basis for, or findings in, the underlying injunctive action.¹⁰ At this stage, it appears that the findings made in the injunctive proceeding and the injunction issued against him justify continuing his suspension "until it can be determined what,

⁸ 17 C.F.R. § 201.102(e)(3)(i).

⁹ *Daniel S. Lezak*, 57 S.E.C. 997, 1000 n.16 (2004); *see also Michael T. Studer*, 57 S.E.C. 890, 897 (2004) (noting that "the fact that Studer is still litigating that action [on appeal] does not affect our statutory authority to conduct this proceeding"), *aff'd*, 148 F. App'x 58 (2d Cir. 2005).

¹⁰ *See, e.g., Jose P. Zollino*, Exchange Act Rel. No. 55107 (Jan. 16, 2007), 89 SEC Docket 2598, 2604-05 n.20 (noting the appropriate forum for respondent's challenges to underlying litigation is the appellate court).

if any, action may be appropriate to protect the Commission's processes."¹¹ As provided in Rule 102(e)(3)(iii), therefore, we will set the matter down for public hearing. We note that Pattison's other claims concerning the present proceeding – *i.e.*, that the OIP is incorrect and that a more definitive statement is needed – are more appropriately addressed, in the first instance, by the law judge in the context of administering the hearing. The law judge may order and schedule the filing of an answer to the OIP, pursuant to Rule of Practice 220.¹² We express no opinion as to the merits of Pattison's claims.

Accordingly, IT IS ORDERED that this proceeding be set down for public hearing before an administrative law judge in accordance with Rule of Practice 110. As specified in Rule of Practice 102(e)(3)(iii), the hearing in this matter shall be expedited in accordance with Rule of Practice 500; it is further

ORDERED that the administrative law judge shall issue an initial decision no later than 210 days from the date of service of this order; and it is further

ORDERED that the temporary suspension of Michael C. Pattison, entered on April 5, 2011, remain in effect pending a hearing and decision in this matter.

By the Commission.

Elizabeth M. Murphy
Secretary

¹¹ *Lezak*, 57 S.E.C. at 1001.

¹² 17 C.F.R. § 201.220.