12-2943-cv

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff-Appellee,

v.

BRENT C. BANKOSKY,

Defendant-Appellant.

On Appeal from the United States District Court
for the Southern District of New York

BRIEF OF THE
SECURITIES AND EXCHANGE COMMISSION

MICHAEL A. CONLEY
Deputy General Counsel

JACOB H. STILLMAN
Solicitor

ALLAN A.CAPUTE
Special Counsel to the Solicitor
Securities and Exchange Commission
100 F. Street, N.E.
Washington, D.C. 20549
(202) 551-5122 (Capute)
caputea@sec.gov

TABLE OF CONTENTS

Page

PRELIMINARY STATEMENT 1

JURISDICTIONAL STATEMENT 4

COUNTERSTATEMENT OF THE ISSUE 4

COUNTERSTATEMENT OF THE CASE 5

A. Facts 5

1. Bankosky was subject to a duty of confidentiality under Takeda's internal requirements. 5

2. Bankosky breached his duty to Takeda by trading on misappropriated nonpublic information in the securities of four public companies. 6

a. Bankosky traded in Cell Genesys securities. 7

b. Bankosky traded in Millennium securities. 9

c. Bankosky traded in Arena securities. 11

d. Bankosky Traded in AMAG Securities. 12

B. Bankosky gave misleading and evasive testimony 13

C. Bankosky's Position at Tranzyme Pharmaceutical shows he may be employed in the future at a high level in a public company. 16

D. Procedural History and Decision of the District Court 16

SUMMARY OF THE ARGUMENT 20

STANDARD OF REVIEW 23

ARGUMENT 24

I. THE COURTS OF APPEALS RARELY REVERSE DISTRICT COURT DECISIONS TO IMPOSE OFFICER AND DIRECTOR BARS. 24

II. EVEN IF THE PATEL COURT'S APPROACH WERE STILL APPLICABLE, THE DISTRICT COURT ACTED WITHIN ITS SUBSTANTIAL DISCRETION WHEN IT IMPOSED A TEN-YEAR BAR ON BANKOSKY UNDER THAT APPROACH, AND A TEN-YEAR BAR IS ALSO WARRANTED UNDER THE LESS RIGOROUS STANDARD MANDATED BY THE SARBANES-OXLEY ACT. 26

A. Were the approach to officer and director bars taken in still applicable, the district court's decision to impose a ten-year bar on Bankosky could not be attacked as an abuse of discretion because the court reasonably applied the *Patel* analysis. 26

1. Bankosky's conduct was egregious. 28

2. Bankosky acted with a high degree of scienter. 31

3. Bankosky's position at Takeda weighs in favor of affirming the ten-year bar because he held a sensitive position that required a high level of trust. 35

4. Bankosky is reasonably likely to commit future violations. 37

5. Bankosky had an economic stake in his insider trading. 41

6. While the district court thought it "particularly relevant" that Bankosky was not a repeat offender in deciding against a permanent bar, this factor does not weigh against the imposition of a ten-year bar. 42

B. Bankosky's conduct also warrants a ten-year bar under the less rigorous standard mandated by the Sarbanes-Oxley amendment to Section 21(d)(2). 43

1. Congress enacted Section 21(d)(2) in order to strengthen the Commission's enforcement remedies. 43

2. The Patel court analyzed when a defendant's conduct demonstrates "substantial unfitness." 44

3. The district courts adoption of an inflexible view of the Patel analysis had thwarted the remedial effectiveness Congress hoped for when it enacted officer and director bars as part of the Remedies Act. 45

4. Congress amended Section 21(d)(2) in the Sarbanes-Oxley Act to make it easier for the Commission to get officer and director bars by effectively overruling Patel through changing the statutory standard from "substantial unfitness" to "unfitness." 48

5. The Sarbanes-Oxley Act amendment has nonetheless had little impact because the district courts erroneously continue to use the inflexible interpretation of Patel. 49

6. The approach adopted in SEC v. Levine, like the inflexible approach taken by other district courts when applying Patel, inappropriately applies concepts of criminal law, thereby frustrating

the remedial purpose of officer and director bars. 51

7. Given the Remedies Act's concern about recidivism, if the Court reaches the issue here, it should adopt the analysis used by this Court for determining whether injunctive relief is appropriate. 56

CONCLUSION 59

STATUTORY ADDENDUM

Federal Rules of Appellate Procedure Form 6.
Certificate of Compliance With Rule 32(a)

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

CASES

In re American Express Financial Advisors Securities Litigation, 672 F.3d 113 (2d Cir. 2011) 23

Berger v. SEC, 347 F. App'x 692 (2d Cir. 2009) 38

CFTC v. Wilshire Investment Management Corp., 531 F.3d 1339 (11th Cir. 2008) 38

Carpenter v. United States, 484 U.S. 19 (1987) 31

Drucker v. SEC, 346 F. App'x 663 (2d Cir. 2009) 24

Gibson v. SEC, 561 F.3d 548 (6th Cir. 2009) 58

Korman v. SEC, 592 F.3d 173 (D.C. Cir. 2010) 32

NLRB v. Express Publishing Co., 312 U.S. 426 (1941) 36

Portalatin v. Graham, 624 F.3d 69 (2d Cir. 2010) 54

SEC v. Alliance Transcription Services, 2009 WL 5128565 (D. Az. Dec. 18, 2009) 50

SEC v. Alliance Transcription Services, Fed. Sec. L. Rep. 95,566, 2009 WL 5128565 (D. Ariz. Dec. 18, 2009)

SEC v. Cavanaugh, 155 F.3d 129 (2d Cir. 1998) 37, 57

SEC v. Chester Holdings, Ltd., 41 F. Supp. 2d 505 (D.N.J. 1999) 45

SEC v. China Energy Savings Technology, Inc., 2008 WL 6572372 (E.D.N.Y. Mar. 28, 2008) 50

SEC v. Commonwealth Chemical Sec., 574 F.2d 90 (2d Cir. 1978) 57

SEC v. Curshen, 372 F. App’x 872 (10th Cir. 2010) 39

SEC v. Dibella, 2008 WL 6965807 (D. Conn. Mar. 13, 2008), *aff'd,*
587 F.3d 553 (2d Cir. 2009) 54

SEC v. Drexel Burnham Lambert, Inc., 837 F. Supp. 587
(S.D.N.Y. 1993) 44

SEC v. Drucker, 528 F. Supp. 2d 450 (S.D.N.Y. 2007), *aff'd,*
346 F. App'x 663 (2d Cir. 2009) 24, 30, 32
passim

SEC v. East Delta Resource Corp., 2012 WL 3903478 (E.D.N.Y.
Aug. 31, 2012) 49

SEC v. Elliot, 2011 WL 3586454 (S.D.N.Y. Aug. 11, 2011) 54

SEC v. First Pacific Bancorp., 142 F.3d 1186 (9th Cir. 1998) 23, 24

SEC v. Gabelli, 653 F.3d 49 (2d Cir. 2011) , *cert. granted*,
133 S.Ct. 97 (2012) 56

SEC v. Gillespie, 349 F. App'x 129 (9th Cir. 2009) 25

SEC v. Ginsburg, 362 F.3d 1292 (11th Cir. 2004) 31

SEC v. Global Telecom Services, LLC, 325 F. Supp.2d 94
(D.Conn. 2004) 49

SEC v. Huff, 758 F. Supp. 2d 1288 (S.D. Fla. 2010),
aff'd, 445 F. App'x 882 (11th Cir. 2012) 36

SEC v. Ishopnomarkup.com, Inc., Fed. Sec. L. Rep. 96,762,
2012 WL 716928 (E.D.N.Y. Mar. 3, 2012) 54

SEC v. Jasper, __ F. Supp. 2d __, 2010 WL 8781211 (N.D. Cal. July 21,
2010), *aff'd*, 678 F.3d 1116 (9th Cir. 2012), *petition for cert.*
filed, 81 U.S.L.W. 3271 (U.S. No. 12-535, Oct. 29. 2012) 50

SEC v. Leffers, 289 F. App'x 449 (2d Cir. 2008) 24, 47

SEC v. Levine, 517 F. Supp. 2d 121 (D. D.C. 2007), *aff'd*,
279 F. App'x 6 (D.C. Cir. 2008) 51, 52, 53

SEC v. Lorin, 76 F.3d 458 (2d Cir. 1996) 41

SEC v. Lorin, 877 F. Supp. 192 (S.D.N.Y. 1995) 41

SEC v. Manor Nursing Centers, Inc., 458 F.2d 1082 (2d Cir. 1972) 24, 41, 56

SEC v. Metcalf, 2012 WL 5519358 (S.D.N.Y. Nov. 13, 2012) 49, 50, 54

SEC v. Mulcahney, 311 F. App'x 509 (2d Cir. 2009) 24

SEC v. Pace, 173 F. Supp. 2d 30 (D.D.C. 2001) 45

SEC v. Pallais, 2010 WL 2772329 (S.D.N.Y. July 9, 2010) 29

SEC v. Palmisano, 135 F.3d 860 (2d Cir. 1998) 55

SEC v. Patel, 61 F.3d 137 (2d Cir. 1995) 3, 18, 19
passim

SEC v. Platforms Wireless International, Corp., Fed. Sec. L. Rep. 94,307,
2007 WL 1238707 (S.D. Cal. Apr. 25, 2007) 50

SEC v. Posner, 16 F.3d 520 (2d Cir. 1994) 23, 24

SEC v. Quinlan, 373 F. App‘x 581 (6th Cir. 2010) 24, 41

SEC v. Resnick, 604 F. Supp. 2d 773 (D. Md. 2009) 29

SEC v. Robinson, 2002 WL 1552049 (S.D.N.Y. July 16, 2002) 29

SEC v. Save the World Air, Inc, 2005 WL 3077514
(S.D.N.Y. Nov. 15, 2005) 49

SEC v. Shanahan, 2010 WL 173819 (D. Minn. Jan. 13, 2010) 49

SEC v. Snyder, 2006 WL 6508273 (S.D. Tex. Aug. 22, 2006) 51

SEC v. Sprecher, 81 F.3d 1147 1996 WL 175216 (D.C. Cir. Apr. 9, 1996) 36

Silivanch v. Celebrity Cruises, Inc., 333 F.3d 355 (2d Cir. 2003) 23

United States v. Aguilar, 585 F.3d 652 (2d Cir. 2009) 55

United States v. Chestman, 947 F.2d 551 (2d Cir. 1991), *vacated on other grounds*, 503 U.S. 1004(1991) 30

United States v. Chiarella, 588 F.2d 1358 (2d Cir. 1978), *rev'd on other grounds*, 445 U.S. 222 (1980)

United States v. O'Hagan, 521 U.S. 642 (1997) 30

United States v. Preacely, 628 F.3d 72 (2d Cir. 2010) 54

STATUTES AND RULES

Section 20(e)of the Securities Act of 1933, 15 U.S.C. §77t(e) 17

Securities Exchange Act of 1934, 15 U.S.C. 78a, et seq.

Section 10(b), 15 U.S.C. §78j 16, 17
Section 14(e), 15 U.S.C. §78n(e) 16, 17
Section 15(b), 15 U.S.C. §78o(b) 57
Section 21(d)(2), 15 U.S.C. §78u(d)(2) .... 3, 17, 21 *passim*
Section 21A, 15 U.S.C. §78u-1(a) 53

Section 203 of the Investment Advisers Act, 15 U.S.C. §80b-3 57

Rules under the Securities Exchange Act of 1934, 17 C.F.R. 240.0-1, et seq.

Rule 10b-5, 17 C.F.R. §240.10b-5 .... 16, 17
Rule 14e-3, 17 C.F.R. §240.14e-3 .... 16, 17

Insider Trading Sanctions Act of 1984, Pub. L. No. 98-376, 98 Stat.1264 31

Insider Trading and Securities Fraud Enforcement Act of 1988,
P.L. 100-704, 102 Stat. 4677 (1988) 31

Sarbanes Oxley Act of 2002, Pub. L. No. 107-204, §305,
116 Stat. 745 (2002) .... 3, 18, 19, *passim*

Securities Enforcement Remedies and Penny Stock Reform Act of 1990,
Pub. L. No. 101-429, 104 Stat. 931 (1990) 36, 43

P.L. 101-429, 104 Stat. 931 (Oct. 15, 1990)

MISCELLANEOUS

H.R. Rep. No. 98-355 (1984) 31, 53

H.R. Rep. No. 101-616 (1990) 36, 55

S. Rep. No. 101-337 (1990) 36, 44, 55

S. Rep. No. 107-205 (2002) 3, 48

81 U.S.L.W. 3271 24

Donald C. Langevoort, *Seeking Sunlight in Santa Fe's Shadow: The SEC's Pursuit of Managerial Accountability*,
79 Wash. U. L.Q. 449 (summer 2001) 47

Jayne W. Barnard, *Rule 10b-5 and the "Unfitness" Question*,
47 Ariz. L. Rev. 9 (2005) 54, 55

Jayne W. Barnard, *When is a Corporate Executive "Substantially Unfit" to Serve?*, 70 N.C. L. Rev. 1489 (1992) 44, 52, 54

Donald C. Langevoort, *Managing the "Expectations Gap" in Investor Protection: The SEC and the Post-Enron Reform Agenda*, 48 Vill. L. Rev. 1139 (2003) 47

John Downes & Jordan Elliot Goodman, *Dictionary of Finance and Investment Terms* 424 (Barron's 5th ed. 1995) 9

Stephen M. Cutler, *Remarks at the Glasser LegalWorks 20th Annual Federal Securities Institute* (Feb. 15, 2002) (available at http: // www. sec. gov /news / speech / spch538.htm) 46

Philip F.S. Berg, *Unfit to Serve: Permanently Barring People from Serving as Officers and Directors of Publicly Traded Companies After the Sarbanes-Oxley Act*, 56 Vanderbilt L. Rev. 1871 (Nov. 2003) 46

Jon Carlson, *Securities Fraud, Officer and Director Bars, and the "Unfitness" Inquiry after Sarbanes-Oxley*, 14 Fordham J. Corp. & Fin. L. 679 (2009) 49

Harold S. Bloomenthal & Samuel Wolf, *Securities and Federal Corporate Law* §20:10.11 (Thomsen Reuters 2012) 57

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

12-2943-cv

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff-Appellee,

v.

BRENT C. BANKOSKY,

Defendant-Appellant.

On Appeal from the United States District Court
for the Southern District of New York

BRIEF OF THE
SECURITIES AND EXCHANGE COMMISSION, APPELLEE

PRELIMINARY STATEMENT

This is an appeal by the defendant, Brent C. Bankosky, in a civil law enforcement action brought by the Securities and Exchange Commission. Bankosky was a corporate insider who, as relevant to this appeal, repeatedly violated antifraud provisions of the federal securities laws by trading while in possession of material nonpublic information misappropriated from his employer, Takeda Pharmaceuticals International, Inc. ("Takeda"). The violations occurred over a two-year period in at least thirteen separate trades in the securities of four different public companies. Bankosky had access to sensitive confidential information about these companies through his position as a director in Takeda's business development group from 2008 to 2010. In trading on this information, Bankosky consciously flouted clear Takeda policies that prohibited insider trading and forbade use of Takeda confidential information for personal gain.

All of this is undisputed. A consent judgment entered by the district court resolved the issue of liability, permanently enjoined Bankosky from further violations of the relevant securities laws, and required him to disgorge the profits from his illegal trades and pay a monetary penalty. The sole issue left unresolved by the consent decree was whether Bankosky should be barred from serving as an officer or director of a public company.

The district court declined the Commission's request for a permanent bar. Instead, the district court exercised its discretion to bar Bankosky for a period limited to ten years. Nevertheless, Bankosky has appealed and argues that he should not be subjected to any bar or should be subjected to a bar of shorter duration. The only issue on appeal is whether the district court abused its discretion by imposing a ten-year bar.

In declining to impose a permanent bar and imposing a ten-year bar instead, the court favored Bankosky by erroneously applying a more rigorous standard for imposing a bar than is required by current law. Specifically, the district court applied the six-factor analysis set forth in *SEC v. Patel*, 61 F.3d 137, 141 (2d Cir. 1995), to decide when a person's conduct demonstrates "substantial unfitness" to serve as a director or officer - - the statutory standard required *prior to 2002* by Section 21(d)(2) of the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. §78u(d)(2). *See* Statutory Addendum, E. However, in 2002 Congress amended Section 21(d)(2) to lower the statutory standard for obtaining a bar by replacing the term "substantial unfitness" with "unfitness" in order to make it easier for the Commission to obtain officer and director bars. *See* Sarbanes Oxley Act of 2002, Pub. L. No. 107-204, §305, 116 Stat. 745 (2002); S. Rep. No. 107-205 (2002).

Bankosky argues in his opening brief that the district court misapplied the *Patel* factors when it imposed a ten-year bar. This Court should reject his argument. Even under the *Patel* analysis used to determine *substantial unfitness* under the prior version of the statute, the district court did not abuse its discretion in deciding that Bankosky should be barred from serving as an officer or director. And Bankosky is certainly *unfit* under the current lower standard as amended in Sarbanes-Oxley. As the district court found, Bankosky is reasonably likely to violate the law again if he is granted in the future the very sort of trust that he has repeatedly betrayed in the past.

JURISDICTIONAL STATEMENT

The Commission concurs with the jurisdictional statement contained in the brief of the appellant.

COUNTERSTATEMENT OF THE ISSUE

Whether the district court abused its discretion when it decided to impose a ten-year officer and director bar on Bankosky where he:

- repeatedly committed securities fraud violations through insider trading in the stocks of four public companies on thirteen occasions over a period of two years;
- lied in his sworn investigatory testimony about what he had done;
- failed to provide adequate assurance that he understands the wrongfulness of his conduct, such failure having been reflected in his contesting the violations in contravention of the terms of the consent decree, and in his arguing that insider trading is not a serious violation of the securities laws; and
- worked as an officer of a public company after leaving Takeda.

COUNTERSTATEMENT OF THE CASE

A. Facts

The consent judgment provides that the facts in the Commission's complaint are to be "accepted as and deemed true" for the purposes of the district court's determination whether to impose an officer and director bar. Consent Judgment, A25. The facts set forth below are taken from the Commission's complaint and therefore are deemed true.

1. Bankosky was subject to a duty of confidentiality under Takeda's internal requirements.

Bankosky, who is 41 years of age, was a Director of Global Licensing and Business Development at Takeda's Deerfield, Illinois office from January 2008 until September 2010. Compl. A7, ¶7. In 2008, there were ten employees working in Takeda's business development group in Deerfield. *Id.* During Bankosky's tenure, the business development group assisted Takeda as it discussed and negotiated potential nonpublic strategic transactions with other companies that sometimes led to market-moving announcements. Compl. A9-11, ¶¶14-16. Bankosky was promoted to Senior Director in September 2010. Compl. A7, ¶7.

While working at Takeda, Bankosky was subject to clear rules that were designed to prevent employees from misusing confidential information obtained in the workplace. Compl. A12, ¶19. Bankosky was, in fact, prohibited by Takeda's internal policy from trading based on material, nonpublic information. *Id.* Takeda's North America's Code of Conduct specifically forbids trading in the securities of Takeda and "any other company about which you have obtained 'material Non-Public Information' as a result of your employment or assignment with Takeda." *Id.* The Code of Conduct defines material information as "information for which there is a substantial likelihood that a reasonable investor would consider it important in making his or her investment decision." *Id.* The Code of Conduct also provides specific examples of Material Non-Public Information, including "significant acquisitions," "joint venture transactions," "major new contracts," and "licenses." Takeda's Confidentiality, Noncompetion and Intellectual Property Agreement - - entered into with all employees - - similarly prohibits employees from "us[ing], disclos[ing], or tak[ing] any action which may result in the use or disclosure of, any confidential information." *Id.*

2. Bankosky breached his duty to Takeda by trading on misappropriated nonpublic information in the securities of four public companies.

Between 2008 and 2010, Bankosky ignored Takeda's Code of Conduct and its confidentiality policy by using nonpublic information obtained through his employment at Takeda to trade in the securities of four different public companies: Cell Genesys, Inc. ("Cell Genesys"), Millennium Pharmaceuticals, Inc.

(“Millennium”), Arena Pharmaceuticals, Inc. (“Arena”), and AMAG Pharmaceuticals, Inc. (“AMAG”).

a. Bankosky traded in Cell Genesys securities. Bankosky traded in advance of Takeda’s March 31, 2008 announcement, made after the close of business, that it had formed a strategic alliance with Cell Genesys (“Cell Genesys Announcement”). The Cell Genesys Announcement stated that, “in exchange for exclusive worldwide commercial rights to GVAX immunotherapy for prostate cancer, Takeda will pay Cell Genesys $50 million and additional milestone payments totaling $270 million relating to regulatory approval and commercialization of GVAX immunotherapy in the United States.” Compl. A14-15, ¶14.

Prior to the date of the announcement, at least between January 1, 2008 and March 31, 2008, Takeda and Cell Genesys conducted nonpublic discussions regarding the strategic alliance. Compl. A15, ¶14. At the time of these nonpublic discussions, Cell Genesys stock traded at prices ranging between $1.81 and $2.98. Following the Cell Genesys Announcement, the share price rose 31%, from $2.35 (the closing price on March 31) to $3.09 (the closing price on April 1). *Id.*

Bankosky obtained material, nonpublic information concerning Takeda’s negotiations with Cell Genesys on or before February 29, 2008. Compl. A11, ¶17. Bankosky’s supervisor and another colleague in the business development group in

Deerfield led the Cell Genesys discussions on behalf of Takeda. *Id.* Bankosky sent and received emails concerning the negotiations leading up to the March 31, 2008 Cell Genesys Announcement. *Id.* On January 28, 2008, while on a trip to Takeda's Tokyo office, Bankosky sent an email to a colleague saying, in relevant part, "Cell Genesys passed Alliance Committee Review today to submit a non-binding term sheet for the GVAX immunotherapy portfolio." *Id.* A month later, on February 28, 2008, Bankosky was copied on an email that listed the remaining issues subject to continuing negotiations for "Project Ceres," the code name for Cell Genesys. *Id.* On March 26, 2008, Bankosky was copied on another email that indicated that it was "about 90%" certain that "Ceres" would close by the following Monday. *Id.*

Despite Bankosky's duty not to misuse this confidential information, he traded in the securities of Cell Genesys in his personal account. *Id.* On February 29, after learning of the impending announcement, Bankosky wired $40,000 into his brokerage account. Compl. A14, ¶24. Bankosky then purchased over $17,000 worth of out-of-the-money call options in Cell Genesys between February 29, 2008 and March 31, 2008.[1] Compl. A8-9, ¶20. He made these transactions on seven

[1] Equity call options give the buyer the right, but not the obligation, to purchase a company's stock at a set price (the "strike price") for a certain period of time (through the "expiration"). In general, one buys a call option when one expects the stock price to rise, and sells a call option when one expects the stock price to fall. If at the time of the purchase of a call option, the strike price of the

separate days, including the day immediately prior to the Cell Genesys Announcement. *Id.* Each of the call options Bankosky purchased had a strike price above Cell Genesys's share price, which never closed above $2.35 on any of the days that Bankosky purchased the Cell Genesys call options. *Id.* Bankosky was thus betting that Cell Genesys's share price would increase, and sought to profit from the rise in price. *Id.*

Bankosky's first purchase, on February 29, 2008, was made the day after he received an email indicating that Takeda was in active negotiations with Cell Genesys, and one month after he wrote an email to a colleague referring to the confidential negotiations with Cell Genesys. Compl. A9, ¶21. After Takeda's announcement of its strategic alliance with Cell Genesys on March 31, 2008, Bankosky sold all of his Cell Genesys call options for a total of over $38,000, making more than $21,000 in profit on an investment of approximately $17,000. Compl. A14, ¶25.

b. Bankosky traded in Millennium securities. Bankosky also traded in advance of an April 10, 2008 announcement that Takeda had agreed to acquire Millennium ("Millennium Announcement"). Between February 1, 2008

---

option is above the price at which the stock is then trading, the call option is referred to as "out-of-the-money" because it would be unprofitable to exercise the call option and pay more for the stock than if the stock were purchased on a stock market. *See* John Downes & Jordan Elliot Goodman, *Dictionary of Finance and Investment Terms* 424 (Barron's 5th ed. 1995).

and April 10, 2008, Takeda and Millennium conducted nonpublic discussions regarding the impending acquisition. Compl. A10, ¶15. During these nonpublic discussions, Millennium's stock traded at prices between $12.82 and $16.35. Following the Millennium Announcement, shares of Millennium rose from $16.35 (the closing price for April 9) to $24.34 (the closing price for April 10), an increase of 48.87%. Compl. A10, ¶15.

Bankosky obtained material, nonpublic information concerning Takeda's negotiations with Millennium on or before March 4, 2008. Compl. A11-12, ¶18. Between January 2008 and the Millennium Announcement on April 10, 2008, two of Bankosky's colleagues in the business development group in Deerfield performed extensive work to assist Takeda in its due diligence for the impending Millennium deal. *Id.* In a January 17, 2008 email, one of these colleagues wrote to Bankosky to apologize for rescheduling a meeting and referenced "project Mercury," the code name for the Millennium transaction. The email said, "have a deadline tonight on project Mercury . . . will tell you about that one." *Id.*

Again, Bankosky used confidential information to make profitable trades in his personal account. Bankosky purchased over $20,500 worth of out-of-the-money call options in Millennium in four trades on four days between March 4, 2008 and March 12, 2008. Compl. A13, ¶22. Each of the call options Bankosky purchased had a strike price above Millennium's share price, which never closed above $13.75 on any of the days that Bankosky purchased the Millennium call options. *Id.* Bankosky was thus betting that Millennium's share price would increase and sought to profit from the rise in price. These trades were placed after Bankosky's colleagues had begun working intensively on the Millennium transaction, and after Bankosky received a January 17, 2008 email referring to the code name for the confidential negotiations with Millennium. Compl. A14, ¶23. Bankosky later sold all of his call options, making a profit of more than $42,000 on an investment of approximately $20,500. Compl. A14, ¶26.

c. Bankosky traded in Arena securities. In the spring of 2009, Bankosky purchased out-of-the-money call options in Arena, while Takeda was engaged in discussions concerning a cardiovascular drug being developed by Arena. Compl. A15, ¶28. Bankosky participated in these discussions and knew they were confidential. *Id.* Nevertheless, Bankosky spent over $49,000 to purchase call options in Arena on March 26, 2009. *Id.* The strike price of these options was $.86, or 27%, above Arena's closing price on that day. *Id.* Bankosky sold these call options at a loss, however, after Arena announced disappointing results for the clinical trials of a different drug - - not the drug that Bankosky had been working on - - on March 30, 2009. *Id.*

d. Bankosky Traded in AMAG Securities. In the spring of 2010, Bankosky purchased out-of-the-money call options in AMAG, the day before an announcement concerning a deal involving AMAG and Takeda ("AMAG Announcement"). The April 1, 2010 AMAG Announcement stated that AMAG had granted Takeda certain rights to market a drug in return for $60 million and an opportunity to receive an additional $220 million for "development and commercial milestones." Compl. A15, ¶29. Bankosky was aware of Takeda's confidential, nonpublic discussions with AMAG prior to the public announcement. In fact, Bankosky participated in the negotiations with AMAG approximately one year in advance of the AMAG Announcement. Compl. A11-12, ¶30. While Bankosky handed off primary responsibility for the negotiations to another business development colleague a few months later, Bankosky was never excluded from the continuing negotiations. *Id.* Through at least March 2010, Bankosky continued to be copied on documents referencing AMAG. *Id.* For example, on March 15, 2010, Bankosky received an email with a table listing the key events scheduled for the business development group in the next three months. This table included a reference to the planned Board of Directors approval for AMAG scheduled for March 31, 2010. *Id.*

Bankosky used material, nonpublic information to buy AMAG securities the day before the AMAG Announcement. Specifically, Bankosky spent over $6,200 to purchase call options on March 31, 2010, the day before the AMAG Announcement. Compl. A16, ¶31. The $37.50 and $40 strike prices on these options were above AMAG's stock price, which closed at $34.91 on March 31, 2010. Following the April 1, 2010 AMAG Announcement, AMAG's stock rose in price from $34.91 to $37.58, increasing the value of the options Bankosky had acquired. *Id.* But rather than immediately selling these options at a profit, Bankosky held on to them and ultimately sold them just before their expiration in April, at which point they had lost value. *Id.*

B. Bankosky gave misleading and evasive testimony

Bankosky gave misleading testimony to the Commission during its investigation of Bankosky's violations. When questioned under oath on March 4, 2011, Bankosky falsely denied having any knowledge of the impending announcements. *See* Test. 45:10-25 (Cell Genesys); A67, Test. 39:3-13 (Millennium); A78, Test. 83:11-16 (AMAG); and A85, Test. 11:024-111:1 (Arena). For example, Bankosky testified that he was not aware of the confidential negotiations between Takeda and Cell Genesys when he purchased Cell Genesys securities:

> Q: At the time you made your purchase in Genesys, were you aware of whether anybody at Takeda was working on a deal with Cell Genesys?
>
> A: No.

A69, Test. 45:10-13. Bankosky further testified that he was not aware of the confidential discussions between Cell Genesys and Takeda until after the Cell Genesys Announcement:

> Q: When you saw the April 1, 2008 press release * * *, was that the first you learned of the global alliance between Cell Genesys and Takeda?
>
> A: I believe so, yes.
>
> Q: And you say "I believe so." Do you recall knowing about it prior to the press release?
>
> A: I don't recall knowing about it.

A72-73, Test. 60:24-25 - 61:7. Bankosky also testified that even after the Cell Genesys Announcement, he was unaware whether any business development employees in his department had worked on the transaction, or whether the deal was staffed out of Japan:

> Q: And was this a Cell Genesys transaction that your department worked on?
>
> A: Actually, I don't know for sure whether they worked on it or not. We have a mirror department in Japan, so I am not sure whether they did or not.

A73, Test. 6 1:7-20. This testimony is contradicted by the evidence. As detailed above, Bankosky sent and received emails relating to the negotiations with Cell Genesys prior to the Cell Genesys Announcement. Compl. A-11-13, ¶¶17-20; *see also* Riely Decl. Ex. E., A88 (email from Bankosky to Jim Scully, dated January 28, 2008). Moreover, shortly after the Cell Genesys Announcement, Bankosky emailed an acquaintance to describe his position at Takeda and said that he "also worked on our recent deal with Cell Genesys." Riely Decl. Ex. F, A90-91 (email from Bankosky to Matt Reike dated April 9, 2008). Bankosky also emailed a colleague in his department in Deerfield the day after the Cell Genesys Announcement congratulating him on his work: "Congratulations on completing the CGI [Cell Genesys, Inc.] deal this week!" Riely Decl. Ex. G, A-94 (email from Bankosky to Michael Broxson dated April 2, 2008).

Bankosky similarly denied performing any work related to Arena. A85, Test. 110:24 – 111:1. Bankosky was asked: "Did you perform any work related to Arena Pharmaceutical? And he replied, "No." This testimony contradicts other evidence that Bankosky participated in the discussions with Arena. Riely Decl. Ex. H A97 (listing attendees at meetings between Takeda and Arena on March 25 & 26, 2009). In fact, Bankosky sent an email in advance of the meetings with Arena, and one other company, that noted: "We have a [Confidential Disclosure Agreement] executed with both companies." Reily Decl. Ex. H, A96 (email, dated March 18, 2009, from Bankosky to people attending meetings with Arena)

C. Bankosky's Position at Tranzyme Pharmaceutical shows he may be employed in the future at a high level in a public company.

Bankosky resigned from Takeda in May 2011, and joined Tranzyme Pharmaceuticals ("Tranzyme") the following month. Tranzyme is a publicly-traded biopharmaceutical company based in Durham, North Carolina. Riely Decl. Ex. I, A98. Bankosky's hiring was noted by Tranzyme in a November 10, 2011 press release. Under the heading "Senior Management and Board Appointees," Transzyme described Bankosky's hiring: "In August 2011, Brent Bankosky joined Tranzyme as Vice President, Business Development. Mr. Bankosky will be responsible for furthering the partnership and licensing of ulimorelin and TXP-102, and Tranzyme's proprietary drug discovery technology (MATCH)." Riely Decl. Ex. I, A102.

D. Procedural History and Decision of the District Court

The Commission filed its complaint in February 2012, charging Bankosky with violations of Section 10(b) of the Exchange Act, 15 U.S.C. 78j, and Rule 10b-5, 17 C.F.R. §240.10b-5, thereunder. The Commission also charged Bankosky with violations of Section 14(e) of the Exchange Act, 15 U.S.C. 78n(e), and Rule 14e-3, 17 C.F.R. §240.14e-3, thereunder.[2] In March 2012, the district

[2] Section 10(b) and Rule 10b-5 generally prohibit fraud in the purchase or sale of a security. *See* Statutory Addendum, A. Section 14(e) prohibits fraud with respect to a tender offer, and Rule 14e-3, more specifically, prohibits the purchase or sale of a security that is or is to be the subject of a tender offer by a person in

court entered the consent judgment in which Bankosky is (1) permanently enjoined from violations of Section 10(b) and Rule 10b-5 and Section 14(e) and Rule 14e-3; (2) required to disgorge $63,000 in trading profits and to pay $10,076 in prejudgment interest; and (3) required to pay a civil penalty of $63,000. Consent Judgment, A21-26; *see also* Consent Agreement, A55-57, ¶¶1-4.

The consent judgment also provided that the district court would determine the appropriateness of an officer and director bar upon a motion by the Commission. Consent Judgment. A25; *see also* Consent of Bankosky, A56-57, ¶4. The court's authority to impose an officer and director bar is provided in Section 21(d)(2) of the Exchange Act as follows:

> [The district] court may prohibit, conditionally or unconditionally, and permanently or for such period of time as it shall determine, any person who violated [Section 10(b)] of this title or the rules or regulations thereunder from acting as an officer or director of any [public company] if the person's conduct demonstrates unfitness to serve as an officer or director of any such issuer.[3]

The Consent Judgment specifically provides that, for the purposes of determining the appropriateness of an officer and director bar, the allegations in the

---

possession of nonpublic information if that person knows or has reason to know the information was acquired from a tender offeror or the target, or someone connected to either. *See* Statutory addendum, B-D.

[3] See Statutory Addendum, E. This provision is also in the Securities Act of 1933 at Section 20(e), 15 U.S.C.A. § 77t for defendants who violate the antifraud provision of that Act. See Statutory Addendum, E

Commission's Complaint are "accepted as and deemed to be true" and Bankosky is "precluded from arguing that he did not violate the securities laws as alleged in the Complaint." *Id.* Under the terms of the Consent Judgment, the Commission's motion was to be decided "on the basis of affidavits, declarations, excerpts of sworn deposition or investigatory testimony, and documentary evidence, without regard for summary judgment requirements contained in Rule 56 of the Federal Rules of Civil Procedure." *Id.*

In its motion, the Commission argued (Commission's Motion, A45-51) that Bankosky's conduct warranted a permanent bar under the factors enumerated by this Court in *Patel*, 61 F.3d at 141, for determining whether a person is substantially unfit to be an officer or director. They are (1) the egregiousness of the conduct; (2) the defendant's "repeat offender" status; (3) the defendant's role or position when he engaged in the conduct; (4) the defendant's degree of scienter; (5) the defendant's economic stake in the violation; and (6) the likelihood that the misconduct will recur.

But prior to its discussion of the *Patel* factors, the Commission stressed that the Sarbanes-Oxley Act had lowered the standard for the imposition of an officer and director bar from "substantial unfitness" to simply "unfitness" because Congress wanted to make it easier for the Commission to obtain such bars. Commission's Motion, A45. This is significant because the six-factor *Patel* analysis was formulated prior to the Sarbanes-Oxley amendment to determine when a person is *substantially* unfit to serve as an officer and director.

Bankosky argued that a permanent bar was not warranted largely because courts applying *Patel* usually impose permanent bars on persons who are repeat offenders and commit violations concerning financial fraud, as opposed to insider trading. As for the Sarbanes-Oxley amendment, Bankosky argued that "the change from 'substantial unfitness' to 'unfitness' has been largely ignored by the courts, which have continued to look to the Second Circuit's 1995 *Patel* decision." Opposition, A125.

The district court denied the Commission's request for a permanent bar, instead imposing a ten-year bar. In doing so, the court carefully reviewed each of the *Patel* factors. Notably, the court found it was reasonably likely that Bankosky's violations would recur. In this regard, the court noted Bankosky's "pattern of * * * conduct over his two-year employment with Takeda - - where he knowingly traded on the basis of information he had a duty to keep confidential - - and his attempts to 'conceal his misconduct in testimony before the Commission.'" Opinion, A176 (quoting Commission's Motion, A49). The court was not persuaded that the remedies already imposed by the Consent Judgment were adequate because Bankosky was untruthful when his testimony was taken by the

Commission; failed to take responsibility for his actions; and argued his violation were not serious. Opinion, A176.

The court nonetheless declined to grant a permanent officer and director bar. Closely adhering to the *Patel* analysis, the court wrote that "[i]t is particularly relevant that Bankosky is not a repeat offender." Opinion, A174. And "[w]hile undeniably serious and not isolated," the court said, "Bankosky's conduct lacks certain other aspects that courts usually rely on when finding securities law violations to be egregious." Opinion, A173. In this regard the court cited cases where bars were imposed under the *Patel* analysis for antifraud violations other than insider trading.

SUMMARY OF THE ARGUMENT

A district court is afforded substantial discretion in deciding whether to impose an officer and director bar. Indeed, the courts of appeals rarely reverse district court decisions to impose officer and director bars, and this court should not do so here

1. Prior to the Sarbanes-Oxley Act, it was often difficult for the Commission to obtain permanent officer and director bars because of the nature of the six-factor analysis adopted by this Court in *SEC v. Patel.* The *Patel* analysis, as interpreted by district courts, focused not only on whether the defendant's conduct was a future threat to investors, but on whether the defendant was a repeat

offender, *i.e.*, a person who had been found in prior proceedings to have violated the securities laws. In the Sarbanes-Oxley Act, however, Congress amended Section 21(d)(2) in order to make it easier for the Commission to obtain officer and director bars. This was done by lowering the statutory standard for imposing a bar from "substantial unfitness" to "unfitness." Thus, the *Patel* analysis, which construed the old substantial unfitness standard, is no longer applicable. Yet Bankosky, stating that district courts have ignored the Sarbanes-Oxley amendment, asks this Court to make the same mistake.

2. Even if *Patel* were still the applicable analysis, however, the district court could not be said to have engaged in a reversible abuse of discretion when it imposed a ten-year bar on Bankosky under the factors in that analysis. Specifically, Bankosky's conduct was egregious because he knowingly undertook his scheme to trade on confidential information in stocks of four public companies, and, in doing so, flagrantly abused the trust of his employer, Takeda. Bankosky's conduct also manifested a high degree of scienter because in addition to Bankosky's knowing and repeated violations of the securities laws by insider trading, he repeatedly provided misleading sworn investigatory testimony to the Commission in an attempt to conceal his activities. Bankosky's position at Takeda further weighs in favor of affirming the ten-year bar because he was an insider who held a sensitive position that carried with it a high level of trust.

Bankosky, moreover, is reasonably likely to commit additional violations in the future - - one of the six *Patel* factors. Specifically, he committed egregious violations with the highest degree of awareness. And in light of his continued assertions of innocence and his characterization of his violations as not being serious, there is a particularly high risk that Bankosky will commit future violations.

3. Bankosky's conduct also warrants a ten-year bar under the less rigorous standard mandated by the Sarbanes-Oxley amendment. Under the amended statutory standard, this Court should adopt an analysis that focuses on the likelihood that the defendant will commit additional violations in the future. Officer and director bars are remedial in nature, seeking to protect the investing public from defendants who may commit future violations. But the *Patel* analysis, through the repeat offender factor as emphasized by district courts, inappropriately focuses on a principle imported from criminal law. The approach that is appropriate is one that addresses instead the concern that Congress had in mind when it adopted officer and directors bars - - the likelihood of future violations. Accordingly, if this Court reaches the issue, it should adopt the analysis long used by this Court in securities enforcement actions to determine whether a defendant should be enjoined from committing future violations. Under that analysis, Bankosky's conduct warrants at least a ten-year officer and director bar.

STANDARD OF REVIEW

"A district court should be afforded substantial discretion in deciding whether to impose a bar to employment in a public company" under the Exchange Act, *SEC v. Patel*, 61 F.3d at 141, and this Court reviews decisions to impose officer and director bars for abuse of that discretion. *See SEC v. Posner*, 16 F.3d 520, 521 (2d Cir. 1994); *see also SEC v. First Pacific Bancorp.*, 142 F.3d at 1193. This Court will find an abuse of discretion, "only if [it has] 'a definite and firm conviction that the court below committed a clear error of judgment in the conclusion that it reached upon a weighing of the relevant factors.'" *In re American Express Financial Advisors Securities Litigation*, 672 F.3d 113, 129 (2d Cir. 2011) (quoting *Silivanch v. Celebrity Cruises, Inc.*, 333 F.3d 355, 362 (2d Cir. 2003)).

ARGUMENT

I. THE COURTS OF APPEALS RARELY REVERSE DISTRICT COURT DECISIONS TO IMPOSE OFFICER AND DIRECTOR BARS.

Throughout Bankosky's brief he emphasizes his contention that courts "routinely" deny the Commission's requests for bars. In doing so Bankosky discusses several district court cases. But notably absent from Bankosky's appellate brief is any mention of how officer and director bars imposed in district courts have fared when challenged in appellate courts. This absence of appellate case law is likely due to the fact that the courts of appeals rarely overturn district court decisions imposing officer and director bars. As this Court has pointed out, a defendant has the "'heavy burden' of demonstrating that the court abused its 'broad discretion' in ordering [a] director and officer bar." *SEC v. Posner*,16 F.3d at 521 (quoting *SEC v. Manor Nursing Centers, Inc.*, 458 F.2d 1082, 1100 (2d Cir. 1972)). It is no surprise, therefore, that this Court and the other Circuits have regularly affirmed decisions to permanently bar persons from serving as officers and directors when they have violated the antifraud provisions. *See, e.g., SEC v. Posner*, 16 F.3d at 521-22; *SEC v. First Pacific Bancorp.*, 142 F.3d 1186, 1194 (9th Cir. 1998); *SEC v. Quinlan*, 373 F. App'x 581, 586 (6th Cir 2010); *Drucker v. SEC*, 346 F. App'x 663, 665-666 (2d Cir. 2009); *SEC v. Mulcahney*, 311 F. App'x 509, 511 (2d Cir. 2009); *SEC v. Leffers*, 289 F. App'x 449, 452 (2d Cir. 2008); *see* *also SEC v. Gillespie*, 349 F. App'x 129, 131 (9th Cir. 2009) (affirming an eight-year bar).

Indeed, the only case we have found where a *permanent* officer and director bar was not affirmed is *Patel*, 61 F.3d at 142. But the *Patel* court did not decide the defendant there could not be permanently barred. It decided that the district court had failed to clearly state the facts showing there was a likelihood that the defendant's violations would recur, such that the defendant should be permanently barred. And the Court remanded the case to allow the district court to so determine. 61 F.3d at 142.

Even more to the point, unlike the defendant in *Patel*, Bankosky was not barred permanently. We have found no cases where a bar of *limited duration* was overturned.

II. EVEN IF THE *PATEL* COURT'S APPROACH WERE STILL APPLICABLE, THE DISTRICT COURT ACTED WITHIN ITS SUBSTANTIAL DISCRETION WHEN IT IMPOSED A TEN-YEAR BAR ON BANKOSKY UNDER THAT APPROACH, AND A TEN-YEAR BAR IS ALSO WARRANTED UNDER THE LESS RIGOROUS STANDARD MANDATED BY THE SARBANES-OXLEY ACT.

The analysis applied by the Court in *Patel* is no longer applicable because the *Patel* court was interpreting the former statutory provision that was amended by Congress in Sarbanes-Oxley to make it easier for the Commission to obtain officer and director bars. The Commission made this known to the district court in its motion for a permanent officer and director bar (A45), but the district court applied the superseded analysis. Nevertheless, even if the *Patel* approach remained available, the district court did not abuse its discretion in deciding that Bankosky's conduct warranted a ten-year bar under *Patel*. And there is no doubt that a ten-year bar is warranted under the less rigorous standard mandated by Sarbanes-Oxley.

A. Were the approach to officer and director bars taken in *Patel* still applicable, the district court's decision to impose a ten-year bar on Bankosky could not be attacked as an abuse of discretion because the court reasonably applied the *Patel* analysis.

Bankosky argues that the district court failed to follow *Patel.* This argument is meritless. The district court closely adhered to the *Patel* court's approach through each step of its analysis. In *Patel,* this Court decided the district court had not sufficiently explained its reasoning for imposing a permanent bar. The *Patel* court stated that "[t]he loss of livelihood and the stigma attached to the permanent exclusion from the corporate suite certainly requires more" justification than "mere[] general statements of events" that "can in no way justify the prediction that future misconduct will occur." 61 F.3d at 141-42. In *Patel*, the Court identified six factors relevant to the decision to impose a permanent bar. While the factors it named (*see supra* p.18) are useful in making the "substantial unfitness" determination, the *Patel* court did not require the application of each factor in every case and also said that the district court may take other factors into consideration. *Id.* at 141. If a district court has any uncertainty as to the appropriateness of a permanent bar, "the court should consider whether a conditional bar (e.g., a bar limited to a particular industry) and/or a bar limited in time (e.g., a bar of five years) might be sufficient, especially where there is no prior history of unfitness." *Id.* at 142.

Contrary to Bankosky's argument that the district court misapplied the *Patel* factors (Br. 8, 11, 17 & 20), the court, with one exception that unduly favors Bankosky, hewed closely to the *Patel* court's analysis. The court discussed the factors listed in *Patel* and other factors it thought relevant. While the court concluded that Bankosky was reasonably likely to repeat his violations, it declined to impose a permanent bar because it did not view Bankosky's insider trading as egregious and Bankosky had no prior violations. Instead, the court imposed a limited, though substantial, bar of ten years. Applying the *Patel* analysis to the facts of this case, imposing a ten-year bar was plainly within the district court's discretion. Indeed, a permanent bar would have been warranted on these facts.

1. Bankosky's conduct was egregious.

The *Patel* factor as to which we believe the district court erred, but did so by unduly favoring Bankosky, was whether his conduct was egregious. Contrary to the district court's conclusion, Bankosky's conduct was egregious. Bankosky knowingly undertook his scheme to trade on confidential information in four different public companies. In doing so, Bankosky flagrantly abused the trust of his employer, Takeda. Takeda's employee Code of Conduct explicitly prohibited what Bankosky did - - trading on material nonpublic information acquired through his employment, including information about new acquisitions, contracts, joint ventures, and licenses. And the company's Confidentiality, Noncompetition, and Intellectual Property Agreement, signed by all Takeda employees, prohibited taking any action to use nonpublic information. Bankosky's conduct was the direct result of his knowing decision to violate these duties and the law in an attempt to enrich himself.

Nor was Bankosky's insider trading an isolated incident. To the contrary, each of Bankosky's violations was part of a consistent pattern of repeated misconduct. As noted by the district court, Bankosky's insider trading began almost immediately after he started work at Takeda in the beginning of 2008. Op. A173. Ultimately, Bankosky used material nonpublic information to purchase securities of the four companies in a period stretching from February 29, 2008 until March 31, 2010. During this time, Bankosky placed at least thirteen different illegal trades.

While the district court concluded that Bankosky's violations were "undeniably serious and not isolated," the court nevertheless appears to have accepted Bankosky's argument that courts applying *Patel* do not find insider trading violations egregious enough to warrant a permanent bar. Op. A173. By way of comparison, the court's opinion cites and describes the conduct in three cases where *permanent* bars were imposed. Op. A173-74. In *SEC v. Pallais*, 2010 WL 2772329, at *9-10 (S.D.N.Y. July 9, 2010), the defendant's violations involved the "repeated release of fraudulent press releases that made material misstatements and omissions regarding a company's business operations and financial results." Op. A173. In *SEC v. Resnick*, 604 F. Supp.2d 773, 783-84 (D.Md. 2009), the defendant was liable for "a fraudulent scheme to overstate the financial results of a company" (Op. A174), and *SEC v. Robinson*, 2002 WL 1552049, at *5 (S.D.N.Y. July 16, 2002), involved misrepresentations made by a company that it had "a product to market, ties to established telecommunications companies, and an expectation of reaping billions of dollars in sales revenue." A174.

On appeal, Bankosky emphasizes the district court's conclusion that his insider trading is not the kind of egregious violation that warrants a permanent bar. Br. 14-15. But revisiting this argument on appeal does not help Bankosky because the district court did not impose a permanent bar. The district court took into consideration what it considered to be the non-egregious nature of Bankosky's misconduct in deciding to impose a ten-year bar instead. Furthermore, contrary to what Bankosky suggests (Br. 10, 15, 18), insider trading has been held to warrant a permanent officer and director bar. *See SEC v. Drucker*, 528 F. Supp.2d 450, 453-54 (S.D.N.Y. 2007), *aff'd*, 346 F. App'x 663 (2d Cir. 2009).

Moreover, insider trading violations can be egregious. *See, e.g.*, *United States v. Chestman*, 947 F.2d 551, 567 (2d Cir. 1991) (en banc) (stating that insider trading violations were egregious breaches of fiduciary duty), *vacated on other grounds*, 503 U.S. 1004 (1991); *United States v. Chiarella*, 588 F.2d 1358, 1366 (2d Cir. 1978) (stating that inside trader's conduct was egregious), *rev'd on other grounds*, 445 U.S. 222 (1980).[4] The Supreme Court has repeatedly stated that trading on misappropriated nonpublic information "constitutes fraud akin to

---

[4] *Patel* itself did not suggest that insider trading is not egregious. The court recounted that the district court had decided that Patel's violations "were not egregious in comparison" with other defendants in the case. 61 F.3d at 141.

embezzlement - - 'the fraudulent appropriation to one's own use of the money or goods entrusted to one's care by another.'" *United States v. O'Hagan*, 521 U.S. 642, 654 (1997) (quoting *Carpenter v. United States*, 484 U.S. 19, 27 (1987)). Indeed, "[i]t is this type of intentional, knowing conduct, as opposed to more minor, technical violations, for which injunctions are reserved." *SEC v. Ginsburg*, 362 F.3d 1292, 1305 (11th Cir. 2004).

Insider trading is a serious threat that must not be taken lightly. As Congress stated at the time it passed the Insider Trading Sanctions Act of 1984:

> Capital formation and our nation's economic growth and stability depend on investor confidence in the fairness and integrity of our capital markets. Insider trading threatens these markets by undermining the public's expectations of honest and fair securities markets where all participants play by the same rules.

H.R. Rep. No. 98-355, at 2 (1984) (accompanying Pub. L. No. 98-376, 98 Stat. 1264). In light of the serious threat posed by insider trading, Congress has passed several laws increasing the Commission's enforcement arsenal specifically in order to deter such conduct - - the Insider Trading Sanctions Act of 1984, *supra*, and the Insider Trading and Securities Fraud Enforcement Act of 1988, P.L. 100-704, 102 Stat. 4677. Thus, any suggestion that insider trading is any less egregious than other fraud violations is contrary to law and the public interest.

2. Bankosky acted with a high degree of scienter.

Bankosky's conduct also manifested a high degree of scienter. In addition to Bankosky's knowing and repeated violations of the securities laws by insider trading, Bankosky's high degree of scienter is also demonstrated by the fact that he repeatedly provided misleading sworn investigatory testimony to the Commission in an attempt to conceal his activities. *See, e.g., Korman v. SEC,* 592 F.3d 173, 186 (D.C. Cir. 2010) (affirming a decision of the Commission to permanently bar a defendant from association with a broker-dealer partly because he misled the Commission during its investigation); *SEC v. Drucker,* 528 F. Supp.2d 45, 453-54 (S.D.N.Y. 2007) (in imposing a permanent bar, the court emphasized that the defendant, who was liable for insider trading, provided false trial testimony), *aff'd,* 346 F. App'x 663 (2d Cir. 2009).

In assessing Bankosky's scienter, the district court found Bankosky's lack of candor during his sworn testimony to be particularly troubling. Op. A175. Bankosky attempts to excuse his misstatements by arguing that the Commission's questions were broad and the events took place two years earlier. BR. 6. The questions, however, were straight-forward and Bankosky's answers were definite. When asked if he was aware "whether anybody at Takeda was working on a deal with Genesys" at the time he purchased Cell Genesys securities, Bankosky said "No," Test. 45:10-13, A69, and this response is not true. Riely Decl. Ex's E, F, &

G; A88, 91 & 94. When asked whether he "performed work related to Arena," Bankosky said "No." Test. 110:24 – 111:1, A85. This too was false. Riely Decl. Ex. H, A96-97.

Bankosky points out that, because the Commission's allegations concerning his misleading testimony were not in the complaint, they are not deemed to be true. Br. 5, n.2. And he argues that the district court gave undue weight to what he describes as the Commission's "unproven allegations." Br. 20. But both Bankosky's testimony and his email messages were attached as exhibits to the Commission's motion for an officer and director bar. When the email messages are compared to his testimony, the untruthfulness of Bankosky's testimony is inescapable. The Commission, therefore, did not need to rely on and did not rely on the Consent Judgment in order to show that Bankosky lied during his testimony.

Bankosky argues that two of the emails accompanying the Commission's motion for an officer and director bar do not show he worked on the Cell Genesys transaction because he sent them after the Cell Genesys Announcement. Br. 6. He also argues that a third email was sent two years before the Announcement and does not make reference to the potential strategic alliance between the two companies. Br. 6. At the outset, we note that the general import of these arguments goes to Bankosky's liability for insider trading. But under the terms of the consent decree, Bankosky cannot take issue with the allegations of the Commission's complaint and his liability. Consent Judgment, A25-26.

Bankosky's email messages, moreover, were submitted to the court to prove he knew of the transaction, and that is what they show. In the first of the two messages sent after the Cell Genesys announcement, Bankosky tells an acquaintance that he "worked on our recent deal with Cell Genesys," A-91 (April 9, 2008 email to Matt Rieke). Here, Bankosky states he not only knew of, but worked on, the Cell Genesys transaction. In the second message (A94, April 2, 2008 email to Michael Broxson), he congratulates a co-worker on "completing the CGI deal this week." This message shows that Bankosky knew the Cell Genesys transaction was worked on in the Deerfield office, and not in Japan as he suggested in his testimony, and it flatly contradicts his testimony in which he states he never knew about the transaction. *See* Test. 45:21-25, A69. Bankosky also contends that a third email, sent on January 28, 2008, which was two months (not two years) before the Cell Genesys Announcement on March 31, 2008, does not show he was working on matters related to Cell Genesys. Br. 6 (referring to January 28, 2008 email, at A88). But here again Bankosky fails to recognize that this message shows, contrary to his testimony, that he did know the work on the transaction was done in the Deerfield office where he worked and that he did know of the deal at the time he traded in Cell Genesys stock.

3. Bankosky's position at Takeda weighs in favor of affirming the ten-year bar because he held a sensitive position that required a high level of trust.

Bankosky's violations are particularly serious, not only because he was an insider, but also because he held a sensitive position that carried with it a high level of trust. Bankosky was not, as he refers to himself in his brief, a "low level employee." Br. 18. To the contrary, Bankosky was a Director of Business Development and Global Licensing from January 2008 until he was promoted to Senior Director in September 2010. Compl. ¶7, A7. Bankosky helped Takeda identify and evaluate licensing opportunities, and considered himself to be his group's "expert on cardiovascular products." Test. 68, A74. In this position at Takeda, Bankosky gained access to sensitive confidential information, including information about impending market-moving announcements. Comp. ¶¶14-16; A9-12. There is no dispute that Bankosky was in a position where he was bound by Takeda's policies and procedures and that he was obligated not to use confidential information to enrich himself. Compl. ¶19, A12. In fact, these policies and obligations were particularly relevant to his position.

Bankosky erroneously argues that "[t]he imposition of an officer and director bar against an individual who was never an officer or director of a public company goes against the entire weight of precedent." Br. 17. In fact, this argument has been rejected. In a case where a permanent bar was imposed on a non-officer or director, the court stated: "Whether the person considered for injunction has held the precise position of an officer or director in name matters not; rather 'the critical issue is whether the injunction restrains acts of the same type or class or that may fairly be anticipated from the defendant's conduct in the past.' " *SEC v. Huff*, 758 F.Supp.2d 1288, 1356 (S.D. Fla. 2010) (quoting *SEC v. Sprecher*, 81 F.3d 1147 (table), 1996 WL 175216, *4 (D.C. Cir. Apr. 9, 1996) (quoting *NLRB v. Express Publ'g Co.*, 312 U.S. 426, 435 (1941)), *aff'd*, 445 F. App'x 882 (11th Cir. 2012). Both in its sensitive nature and the level of trust it required, Bankosky's position was comparable to even a very senior officer.

Bankosky also argues that "the clear statutory intent" of Section 21(d)(2) is "to use officer and director bars to prevent senior corporate officers from repeating their improper conduct in future positions as officers and directors of public companies." Br.17. This is also wrong. In fact, both the Senate and House reports on the Securities Enforcement Remedies and Penny Stock Reform Act of 1990, Pub. L. No. 101-429, 104 Stat. 931 (1990) ("Remedies Act"), state that "the express authority to grant this relief is not limited to cases involving corporate officers or directors." S. Rep. No. 101-337, at 22 (1990); H.R. Rep. No. 101-616, at 27 (1990).

Nor does the *statutory language* limit the application of Section 21(d)(2) to people serving as officers or directors at the time of the violation. To the contrary, Section 21(d)(2) permits the imposition of an officer and director bar against "any person" who violates the antifraud provisions of the federal securities laws.

4. Bankosky is reasonably likely to commit future violations.

The district court correctly concluded that Bankosky is reasonably likely to commit additional violations in the future. To determine whether there is a reasonable likelihood that a defendant will commit future violations, courts consider the five factors the district court did here: (1) that the defendant has been found liable for illegal conduct; (2) the degree of scienter involved; (3) the isolated or repeated nature of the violation; (4) whether the defendant continues to maintain that his past conduct was blameless; and (5) the sincerity of the defendant's assurances against future violations. *SEC v. Cavanaugh*, 155 F.3d 129, 135 (2d Cir. 1998) (internal citations omitted).

The record indicates that additional violations are reasonably likely to occur. Bankosky committed egregious violations of the federal securities laws with the highest degree of awareness; he did so through a pattern of conduct that lasted throughout the two years that he was employed at Takeda; he sought to conceal his misconduct in his sworn testimony before the Commission; he asserted that his violations were not serious; and he gave no assurances against future violations. Bankosky has had significant experience at Takada, a major pharmaceutical company, and this makes him an attractive candidate for similar future employment. In fact, after leaving Takeda in May 2011, Bankosky became a vice president of business development at a publicly traded pharmaceutical company, which described him as a member of the company's "senior management."

Bankosky argues that "[t]he Commission must explain why the injunctive relief required by the Consent Judgment would not sufficiently deter [him] from future violations." Br. 22.[5] The district court found no such explanation wanting. Op. 5, A176. The court specifically addressed Bankosky's argument that the remedies imposed in the Consent Judgment were adequate, stating that "in light of his unavailing attempts both in his briefs and at oral argument to suggest that he lacked inside information or that he was completely truthful to the SEC, the remedies already set forth in the Consent Judgment may be insufficient to deter future misconduct." *Id.*

The court had good reason to be concerned. Bankosky's testimony before the Commission was not only untruthful, but was so blatantly deceptive that it made a mockery of the investigation. *See, e.g., CFTC v. Wilshire Investment Management Corp.*, 531 F.3d 1339, 1347 (11th Cir. 2008) (affirming permanent injunction where the district court found that "lack of candor . . . demonstrated at

---

[5] Bankosky's argument here is applicable to the review of orders *by the Commission* that impose occupational bars on respondents in Commission administrative proceedings. But even in administrative actions, the Commission "[is] not required to impose the least onerous sanction available." *Berger v. SEC,* 347 F. App'x 692, 694 (2d Cir. 2009).

trial belies any intent of making good faith efforts to comply with restrictions in the future").[6] Bankosky testified that he never worked on the Cell Genesys transaction or even knew that Takeda was involved in discussions with Cell Genesys. Test. 45:21-25, A69. He explained this remarkable testimony by testifying that Takeda's Tokyo office might have done the work. Test. 61:15-24, A73. The evidence shows, however, that Bankosky not only knew about Cell Genesys, but he knew the work on Cell Genesys was done in the Deerfield office in which he worked and actually bragged to a friend about working on the Cell Genesys transaction. Riely Decl. Ex. F, A91. And throughout his testimony he made evasive and implausible assertions as to why he just happened to purchase out-of-the money call options in the securities of companies in the days before major, positive, market-moving announcements were made concerning business developments involving Takeda. Test. 36:21-37:7, A66; Test. 39:21-24, A67; Test. 56:18-20, A71; Test. 74:9-75:10. Test. 78:9-15, A77.

"Apart from [Bankosky's] dismay at still being unemployed," the district court also found there was no evidence that Bankosky had expressed remorse and sufficiently accepted responsibility for what he had done. Op. 5, A176. While Bankosky argues that he has shown remorse by consenting to judgment (Br. 21), in

6 *Cf. SEC v. Curshen*, 372 F. App'x 872, 883 (10th Cir. 2010) (affirming permanent injunction and penny stock bar where there existed likelihood of future violations partly because of the defendant's lack of candor).

the district court he argued that he was not liable because he did not possess inside information. Opposition, A113. Specifically, Bankosky argued that "[t]he Commission's Memorandum of Law makes the unsupported argument that Mr. Bankosky repeatedly misappropriated material nonpublic information from his employer Takeda * * * to trade in the securities of four companies." Opposition, A113. The district court responded to this argument by noting that "the Commission's complaint indicates some of the very evidence that supports those allegations." Op. A175. "Bankosky," the court continued, "entered into the Consent Judgment neither admitting or denying the allegations of the Complaint, as he was free to do, but now is not the time to argue his innocence, particularly where on this motion he has ostensibly admitted wrongdoing." Op. A175.

Bankosky also suggests that his violations were not serious by contrasting his violations to cases where the defendants were "individuals who engaged in serious corporate fraud." Opposition, A112. In this regard the court wrote, "Bankosky's attempts to call into question the seriousness of his actions are at the very least misleading and disingenuous." Op. A175.

In light of his continued assertions of innocence and his non-serious view of his violations, the facts of this case indicate there is a particularly high risk that Bankosky will commit future violations. "[T]he court may properly view a culpable defendant's continued protestations of innocence as an indication that relief is advisable." *SEC v. Lorin*,76 F.3d 458, 461 (2d Cir. 1996) (per curiam); (citing *SEC v. Manor Nursing Center, Inc.*, 458 F.2d 1082, 1101 (2d Cir. 1972)). Indeed, "[p]ersistent refusals to admit any wrongdoing 'ma[k]e it rather dubious that [a defendant] [is] likely to avoid such violations of the securities laws in the future * * *.'" *Lorin*, 76 F.3d at 461 (quoting *SEC v. Lorin*, 877 F. Supp. 192, 201 (S.D.N.Y. 1995)). And Bankosky's refusal to admit his wrongdoing is particularly acute here because Bankosky agreed not to contest liability. *See, e.g., SEC v. Quinlan*, 373 F. App'x 581, 588 (6th Cir. 2010) (affirming permanent officer and director bar where future violations were reasonably likely in light of defendant's attempt to withdraw his guilty plea and to maintain his innocence after he entered it). In much the same light, Bankosky's characterization of his violations as not serious further heightens these already acute concerns. *Cf. SEC v. Drucker*, 528 F.Supp.2d at 453-54 (imposing a permanent officer and director bar where the defendant, an associate general counsel who traded under circumstances similar to those of Bankosky, had "yet to take responsibility for what he ha[d] done," but was "cocky" in his refusal to own up to it).

5. Bankosky had an economic stake in his insider trading.

Bankosky had an obvious and undisputed economic stake in his violations. Bankosky purchased out-of-the-money options in four different companies. He made a profit of $21,000 on an investment of about $17,000 on his purchase of

Cell Genesys options and a profit of about $42,000 on an investment of $20,500 in the millennium options he purchased. Compl. A14, ¶¶23 & 26. In total, Bankosky made a profit of about $63,000.

While Bankosky argues that his economic stake in these transactions was modest and that he did not profit from his trades in the securities of two of the companies (Br. 20), the district court was correct to point out that the fact that Bankosky "ultimately lost money on the Arena and AMAG investments, *see* [Opposition, A130], does not mean that he was somehow less committed to the scheme from the beginning." Op. A175. Indeed, this Court has affirmed the imposition of an officer and director bar where the defendant made no profits. *See SEC v. Mulcahey*, 311 F. App'x 509, 511 (2d Cir. 2009).

6. While the district court thought it "particularly relevant" that Bankosky was not a repeat offender in deciding against a permanent bar, this factor does not weigh against the imposition of a ten-year bar.

In deciding whether or not to impose a permanent officer and director bar, the district court thought "[i]t is particularly relevant that Bankosky is not a repeat offender." Op. A174. This is because, under *Patel*, "especially where there is no prior history of unfitness," the court "should consider whether a conditional bar * * * and/or a bar limited in time * * * might be sufficient." 61 F.3d at 142. Largely because Bankosky had no prior violations, the court declined to impose a permanent bar, as the Commission requested, and imposed a ten-year bar instead.

The Court having done so, Bankosky cannot argue that the district court abused its discretion because it failed to follow *Patel.*

B. Bankosky's conduct also warrants a ten-year bar under the less rigorous standard mandated by the Sarbanes-Oxley amendment to Section 21(d)(2).

Even if the Court were to conclude that it was an abuse of discretion to impose a ten-year bar from serving as officer or director under the *Patel* analysis, that would make no difference here because the *Patel* analysis was effectively overruled by the Sarbanes-Oxley Act. The Act reduces the statutory standard from "substantial unfitness" to "unfitness" in order to make it easier for the Commission to obtain bars from the courts. Under this less rigorous standard, Bankosky's conduct warrants a ten-year bar.

1. Congress enacted Section 21(d)(2) in order to strengthen the Commission's enforcement remedies.

The starting point in the analysis is not the Sarbanes-Oxley amendment to the Remedies Act, but the Remedies Act itself. Section 21(d)(2) of the Exchange Act, the provision expressly allowing the Commission to apply to the courts for officer and director bars, was part of the Remedies Act enacted in 1990. *See* P.L. 101-429, 104 Stat. 931 (Oct. 15, 1990). The purpose of the Act was to give the Commission the authority and flexibility to "maximize the remedial effect of its enforcement actions." *Id.* at 13. The statute provided that any person may be barred from serving as an officer or director of a public company when (1) the defendant violated Section 10(b); and (2) the person's misconduct demonstrates substantial unfitness to serve as an officer or director. "Congress' express purpose in empowering the federal courts to issues such bars was to 'combat recidivism and protect investors' and to 'strengthen the remedial effect of the SEC's enforcement program.'" *SEC v. Drexel Burnham Lambert, Inc.*, 837 F. Supp. 587, 613 (S.D.N.Y. 1993) (quoting S. Rep. No. 101-337, at 1-2). "Although this remedy represents a potentially severe sanction for individual misconduct, persons who have demonstrated a blatant disregard for the requirements of the Federal securities laws should not be placed in a position of trust with a publicly held corporation." S. Rep. 101-337, at 21.

2. The *Patel* court analyzed when a defendant's conduct demonstrates "substantial unfitness."

As discussed earlier (*supra* at p.18) in *Patel* this Court identified six factors relevant to determining when a person's conduct demonstrates "substantial unfitness" to serve as an officer or director of a public company. 61 F.3d at 142. This approach had its origin in a law review article. *See* Jayne W. Barnard, *When is a Corporate Executive "Substantially Unfit" to Serve?*, 70 N.C.L. Rev. 1489, 1492-93 (1992). The six factors considered in *Patel* are not evaluated equally. Importantly, *Patel* elevated two of the six factors above the others - - the likelihood that the defendant's violations will recur and defendant's repeat offender status. 61 F.3d at 141-42. The likelihood of future misconduct "is always an important element in deciding whether the substantial unfitness found justifies the imposition of a lifetime ban." *Id.* at 141. Thus, although the Court noted that "it is not essential for a lifetime ban that there be past violations, we think that it is essential, in the absence of such violations, that a district court articulate the factual basis for a finding of the likelihood of recurrence." 61 F.3d at 142. *Patel* further instructs the district courts that they should consider whether a conditional or time limited bar might be sufficient, "especially where there is no prior history of unfitness." *Id.* In elevating the likelihood that the violations will recur and the defendant's repeat offender status above the other factors, the Court was concerned about "[t]he loss of livelihood and the stigma attached to permanent exclusion from the corporate suite." *Id.*

3. The district courts adoption of an inflexible view of the *Patel* analysis had thwarted the remedial effectiveness Congress hoped for when it enacted officer and director bars as part of the Remedies Act.

A number of district courts read *Patel* inflexibly, particularly with regard to the need to demonstrate a defendant's repeat offender status as a condition for a permanent bar.[7] While the Commission was successful in obtaining bars of some

---

7 *See e.g., SEC v. Pace*, 173 F. Supp. 2d 30, 34 (D.D.C. 2001) (declining to impose any bar on a chief executive officer who diverted corporate funds to his personal because he was not a recidivist, even where he was criminally convicted for the offense); *SEC v. Chester Holdings, Ltd.*, 41 F. Supp. 2d 505, 530 (D.N.J. 1999) (declining to impose a permanent bar on a defendant found liable for insider trading and making material misstatements in Commission filings and press

duration, district court interpretation of *Patel* made it difficult for the Commission to obtain permanent bars in many egregious cases of securities fraud. In a speech given at the time Congress was considering legislation that became the Sarbanes-Oxley Act, Stephen M. Cutler, then Director of the Commission's Division of Enforcement, stated that "[t]he result has been, unbelievably, that in some cases courts have refused to impose permanent officer and director bars on individuals who have engaged in *egregious* - - even *criminal* - - misconduct." *Id.* "It is hard to imagine," Mr. Cutler continued, "that this is what Congress had in mind when it adopted a provision that surely was intended to facilitate the Commission's ability to obtain [officer and director] bars." Stephen M. Cutler, *Remarks at the Glasser LegalWorks 20th Annual Federal Securities Institute* (Feb. 15, 2002) (available at http: // www. sec. gov /news / speech / spch538.htm). Mr. Cutler concluded his remarks stating:

> The role of officers and directors is far too important to allow those with a questionable commitment to the interests of shareholders to serve. * * * In today's complex economy and volatile markets, a single, serious breach of the public trust, in my view, undeniably renders one "substantially unfit" for service as an officer or director. The layering on of additional tests simply frustrates the goals of the statute and endangers the interests of the investing public.

---

releases because she was not a repeat offender); Some commentators have also read *Patel* inflexibly. *See generally* Philip F.S. Berg, *Unfit to Serve: Permanently Barring People from Serving as Officers and Directors of Publicly Traded Companies After the Sarbanes-Oxley Act*, 56 Vanderbilt L. Rev. 1871, 1883 (Nov. 2003).

A commentator became dismayed that the officer and director bar had lost its effectiveness. Donald C. Langevoort, *Seeking Sunlight in Santa Fe's Shadow: The SEC's Pursuit of Managerial Accountability*, 79 Wash. U. L. Q. 449, 476 (summer 2001). Professor Langevoort wrote that some of the remedies provided the Commission and the courts in the Remedies Act had done little to strengthen the Commission's enforcement program. With respect to officer and director bars, Professor Langevoort wrote that "the courts have superimposed additional requirements that make such an order far more difficult to obtain." *Id.* Specifically, in his view *Patel* "held that the officer-director bar is available only in 'recidivist' kinds of cases." Langevoort, *Managing the "Expectations Gap" in Investor Protection: the SEC and the Post-Enron Reform Agenda*, 48 Vill. L. Rev. 1139, 1158 (2003); He lamented, "What would have been a strong threat becomes more muted." Donald C. Langevoort, *Seeking Sunlight in Santa Fe's Shadow*, *supra*, at 476-77.

Notably, on the only other occasion where this Court expressly applied the *Patel* factors, this Court did not take the inflexible approach adopted by the district courts. Instead, this Court, in a case involving violations that predated the Sarbanes Oxley amendment, applied the six factors flexibly and, in an unpublished opinion, affirmed the imposition of a permanent bar. *See SEC v. Leffers*, 289 F. App'x 449, 452 (2d Cir. 2008) (violations predating Sarbanes-Oxley). Although the defendant in *Leffers* was not a repeat offender, this Court did not focus on that factor and affirmed the imposition of a permanent bar.

4. Congress amended Section 21(d)(2) in the Sarbanes-Oxley Act to make it easier for the Commission to get officer and director bars by effectively overruling *Patel* through changing the statutory standard from "substantial unfitness" to "unfitness."

When Congress passed the Sarbanes-Oxley Act in 2002, it amended the statutory standard for imposing officer and director bars in Section 21(d)(2) of the Exchange Act. The amendment's legislative history makes clear that the amendment was intended by Congress to make it easier for the Commission to obtain bars. The Senate Banking Committee stated:

> Currently, it must be proved that an officer or director has both violated the securities laws, and has shown 'substantial unfitness' to serve before a bar can be imposed. The Commission has argued that the 'substantial unfitness' standard for imposing bars is inordinately high, causing courts to refrain from imposing bars even in cases of egregious misconduct. The proposed bill rectifies this deficiency by modifying the standard governing imposition of officer and director bars from 'substantial unfitness' to 'unfitness.'

S. Rep. No. 107-205, at 27 (2002). Thus, changing the level of unfitness that must be shown from "substantial unfitness" to simply "unfitness" was intended by Congress to alter the courts' approach to officer and director bars.[8] As such, the

---

[8] The Sarbanes Oxley Act made the same amendment to the provision of the Securities Act that provides of officer and director bars, Section 20(e). *See* P. L. 107-204, §305 (2002). *See* Statutory Addendum, E.

Sarbanes-Oxley amendment was intended to effectively overrule the *Patel* approach.

5. The Sarbanes-Oxley Act amendment has nonetheless had little impact because the district courts erroneously continue to use the inflexible interpretation of *Patel*.

The Sarbanes-Oxley amendment did not, however, have the effect that Congress intended because district courts continue to apply *Patel* as they did before the amendment. As if to make the point, in his district court brief Bankosky argues that the Sarbanes-Oxley amendment "has been largely ignored by the courts," which continue to rely on an inflexible reading of *Patel* for determining unfitness. Opposition. A125. And he suggests this Court should ignore the amendment as well. *See* Br. 12-13. Indeed, "[m]ost courts have yet to recognize this change." Jon Carlson, *Securities Fraud, Officer and Director Bars, and the "Unfitness" Inquiry after Sarbanes-Oxley*, 14 Fordham J. Corp. & Fin. L. 679, 696 (2009). Like the district court in this case, courts simply apply *Patel* as though nothing had changed. *See SEC v. Dibella*, 2008 WL 6965807, at *9 n.12 (D. Conn. Mar. 13, 2008) (noting that "[n]otwithstanding this change, courts have continued to cite *Patel* and / or use the *Patel* factors in determining whether an officer / director bar is appropriate"),[9] *aff'd*, 587 F.3d 553 (2d Cir. 2009). Indeed,

[9] Citing *SEC v. Save the World Air, Inc*, 2005 WL 3077514, at *16 (S.D.N.Y. Nov. 15, 2005); *SEC v. Global Telecom Services, LLC*, 325 F. Supp.2d. 94, 121 (D.Conn. 2004); *see also SEC v. Shanahan*, 2010 WL 173819, at *16 n.19 (D.

"[m]any courts still cite 'substantial unfitness' as the standard for imposing an officer and director bar." Jon Carlson, *Officer and Director Bars, supra,* at 696. [10] As a result, even in cases where defendants committed egregious violations of the antifraud provisions, district courts have denied permanent bars, often because defendants were not repeat offenders.[11]

Minn. Jan. 13, 2010) (noting that the courts "still apply the factors enumerated in * * * * *Patel* after the enactment of the Sarbanes-Oxley Act" (violations postdating the Sarbanes Oxley amendment)); *see, e.g., SEC v. Metcalf*, 2012 WL 5519358, at *4 (S.D.N.Y. Nov. 13, 2012) (applying the *Patel* factors to violations postdating Sarbanes-Oxley without acknowledging the changed statutory standard); *SEC v. East Delta Resource Corp.*, 2012 WL 3903478, at *9-10 (E.D.N.Y. Aug. 31, 2012) (same); *SEC v. Alliance Transcription Services*, 2009 WL 5128565, at *8 (D.Az. Dec. 18, 2009) (same).

[10] *See, e.g., SEC v. Metcalf*, 2012 WL 5519358, at *3 (S.D.N.Y. Nov. 13, 2012) (expressly applying the *substantial unfitness* standard to conduct postdating Sarbanes-Oxley); *SEC v. China Energy Savings Technology, Inc.*, 2008 WL 6572372, at *9 (E.D.N.Y. Mar. 28, 2008) (same).

[11] *See, e.g., SEC v. Metcalf*, 2012 WL 5519358, at 6-7 (S.D.N.Y Nov. 13, 2012) (denying permanent officer and director bar, where chief executive officer, an attorney, manipulated the company's stock and paid bribes to cause purchase of the stock, partly because he was not a repeat offender); *SEC v. Jasper*, __ F. Supp.2d. __, 2010 WL 8781211, at *10 (N.D. Cal. July 21, 2010) (denying permanent bar where the chief financial officer was responsible for the backdating of options and filing false financial statements with the Commission largely because "the absence of any other violations * * * weighs against a lifetime bar"), *aff'd,* 678 F.3d 1116 (9th Cir. 2012), *petition of cert. filed,* 81 U.S.L.W. 3271 (U.S. 12-535, Oct. 29, 2012); *SEC v. Alliance Transcription Services*, Fed. Sec. L. Rep. ¶95,566, 2009 WL 5128565, at *9 (D. Ariz. Dec. 18, 2009) (denying permanent bar where managing director and treasurer published press releases containing grossly untrue statements about a company's success partly because the defendant was not a repeat offender); *SEC v. Platforms Wireless International, Corp.*, Fed

But courts may not, as Bankosky advocates here, simply ignore the statutory change. The analysis set forth in *Patel* was devised to determine when a person is "substantially unfit," a requirement that has since been repealed in order to avoid the adverse consequences of courts employing too rigid an approach to officer and director bars.

6. The approach adopted in *SEC v. Levine*, like the inflexible approach taken by other district courts when applying *Patel*, inappropriately applies concepts of criminal law, thereby frustrating the remedial purpose of officer and director bars.

The only court to attempt to address the issue of the meaning of the Sarbanes-Oxley amendment devised a analysis that seems contrary to Congress's intent to make it easier for the Commission to obtain officer and director bars. *See SEC v. Levine*, 517 F. Supp.2d 121, 145 (D. D.C. 2007), *aff'd*, 279 F. App'x 6 (D.C. Cir. 2008). The approach adopted in *SEC v. Levine* had been formulated in reaction to the Sarbanes-Oxley amendment in an article by Professor Jayne W. Barnard, who had earlier formulated the factors that the *Patel* court considered. *Id.* (citing and discussing Jayne W. Barnard, *Rule 10b-5 and the "Unfitness"*

Sec. L. Rep. ¶94,307, 2007 WL 1238707, at *14 (S.D. Cal. Apr. 25, 2007) (denying permanent officer and director bar against officer who ran a pump-and-dump scheme because repeat offender); *SEC v. Snyder*, 2006 WL 6508273, at *6 (S.D. Tex. Aug. 22, 2006) (denying permanent bar against chief accounting officer found to have committed insider trading and filed materially false financial information with the Commission because he had no prior violations "other than those he is charged in this case.").

Question, 47 Ariz. L. Rev. 9, 46 (2005)). While the court in *Levine* realized that "Congress's intent was to reduce the government's burden," the analysis it adopted would perversely make it difficult for the Commission to obtain significant officer and director bars.

Under the new nine-factor analysis adopted in *Levine,* [12] first time offenders would rarely be subject to a permanent or substantial bar. This is because the new test, as explained in the law review article from which it was taken, places additional requirements on the imposition of officer and director bars that were not contemplated by Congress when it passed the Remedies Act and which Congress intended to eliminate in the Sarbanes-Oxley Act. The new test will not reach a first time offender unless his "fraud has been 'outside the heartland' of conventional frauds, either because of its magnitude or its impact on investors, in which he has been the driving and organizing force (or 'kingpin')." Barnard, *"Unfitness" Question, supra* at 54-55 (emphasis added). Thus to receive a

---

[12] These nine factors are: (1) the nature and complexity of the scheme; (2) the defendant's role in the scheme; (3) the use of corporate resources in executing the scheme; (4) the defendant's financial gain (or loss avoidance) from the scheme; (5) the loss to investors and others as a result of the scheme; (6) whether the scheme represents an isolated occurrence or a pattern of misconduct; (7) the defendant's use of stealth and concealment; (8) the defendant's history of business and related misconduct; and (9) the defendant's acknowledgment of the wrongdoing and the credibility of his contrition. *SEC v. Levine,* 517 F. Supp.2d at145 (quoting Barnard,*"Unfitness"Question, supra* at 46).

permanent bar, the defrauder must have committed a fraud so extreme that it falls "outside the heartland of conventional fraud" *and* the defrauder must be a "kingpin," that is, the chief conspirator who organizes and drives a large scale fraud involving a number of co-conspirators.

Insider trading might seldom result in a significant bar under the approach adopted in *Levine* because insider trading generally is not "outside the heartland of conventional frauds," and insider trading usually does not involve large-member conspiracies driven by "kingpins." According to Congress, however, insider trading threatens the American capital markets, on which economic growth depends, by undermining the public's expectations about the honesty and fairness of these markets. H.R. Rep. 98-355, at 2. Recognizing this threat, Congress included in the Insider Trading and Securities Fraud Enforcement Act a specific Congressional finding that federal statutes and Commission rules directed at the suppression of insider trading "are necessary and appropriate in the public interest and for the protection of investors." *See* Exchange Act Section 21A, 15 U.S.C. 78u-1(a). In this regard, officer and director bars are a particularly well suited remedy for insider trading because it is the senior management of a company who have access to the most sensitive nonpublic information and are in the best position to gain from it. Thus, in light of the threat posed by insider trading, any test that would impose undue limitations on the imposition of officer and director bars against those who abuse inside information is contrary to the clear intent of Congress and to the public interest.

The problem with the new *Levine* test and the inflexible application of *Patel* by many district courts is that they rest ultimately on concepts taken from criminal law. Barnard, *"Unfitness" Question, supra* at 33-34, 54. "Repeat offender" is a term of art taken from criminal law, and is applied to *enhance* criminal sentencing where defendants have been found in prior proceedings to have committed past infractions. *See United States v. Preacely*, 628 F.3d 72, 79-80 (2d Cir. 2010); *Portalatin v. Graham*, 624 F.3d 69, 72 (2d Cir. 2010).[13] The term "kingpin" refers to one who may receive an enhanced prison sentence because he "engage[s] in a continuing criminal enterprise," namely, by committing "a continuing series" of felony crimes "in concert with five or more other persons" with respect to whom the defendant occupies a "position of management" and from which the defendant

---

[13] The article that introduced the *Patel* factors does not require there be violation from a prior separate proceeding in order for a defendant to be a repeat offender. Barnard, "*Substantially Unfit" to Serve*, 70 N.C.L. Rev. at 1512 "In the Second Circuit, however, the term 'repeat offender' refers to someone who has committed separate violations of securities laws in the past." *SEC v. Ishopnomarkup.com, Inc.* Fed. Sec. L. Rep. ¶96,762, 2012 WL 716928, at *5 (E.D.N.Y. Mar. 3, 2012). And, given that repeat offender is a criminal term of art, that term has been interpreted to require that the defendant has committed a previously adjudicated violation. *See, e.g., SEC v. Metcalf*, 2012 WL 5519358, at *5; *SEC v. Dibella*, 2008 WL 6965807, at *10; *but see SEC v. Elliot*, 2011 WL 3586454, at 14 (S.D.N.Y. Aug. 11, 2011) (finding the defendant was repeat offender where the conduct at issue was recurrent rather than isolated);

"obtains substantial income or resources." *United States v. Aguilar,* 585 F.3d 652, 657 (2d Cir. 2009) (internal citations omitted); *see also* Barnard, "*Unfitness" Question, supra* at 36.

The objectives of these criminal concepts differ dramatically from the intended purpose of the relevant provisions of the Remedies Act. The criminal law seeks to punish offenders for their wrongdoing. "Repeat offender" and "kingpin" are backward looking concepts devised to define who among criminals deserve the harshest punishment for what they have done.

The provisions of the Remedies Act, on the other hand, are remedial. They are forward looking and seek to protect investors and the securities markets. *See SEC v. Palmisano,* 135 F.3d 860, 866 (2d Cir. 1998). Indeed, officer and director bars were specifically intended by Congress "to protect public investors from persons who, by engaging in fraudulent conduct, have already demonstrated that they should not be entrusted with authority over investor funds" in the future. S. Rep. 101-337, at 22; H.R. Rep. 101-616, at 27. Thus, looking at officer and director bars through a prism of criminal law confuses their purpose and frustrates the intent of Congress. The relevant inquiry is not the burden imposed on a defendant by punishment, but on whether the imposition of a bar is needed to protect investors by preventing a defendant from committing future violations.

7. Given the Remedies Act's concern about recidivism, if the Court reaches the issue here, it should adopt the analysis used by this Court for determining whether injunctive relief is appropriate.

Sarbanes-Oxley amended Section 21(d)(2) in order to remove the artificial barriers to the imposition of officer and director bars caused by concepts of criminal law represented by the unduly inflexible district court interpretations of *Patel.* Those district courts focused heavily, if not dispositively, on whether a defendant had been found in prior proceedings to have committed violations, rather than giving past violations such weight as is warranted by the particular facts of each case. This thwarted the effectiveness of the statute. More consistent with Congress's intent is an approach that simply seeks to determine whether a violator's conduct is such that he or she is reasonably likely to commit additional violations in the future. Such an analysis already exists. This is the analysis this Court uses to determine whether injunctive relief is warranted to prevent future violations of the securities laws. This Court has long held that "[i]n determining whether injunctive relief is appropriate, '[t]he critical question . . . is whether there is a reasonable likelihood that the wrong will be repeated.'" *SEC v. Gabelli,* 653 F.3d 49, 61 (2d Cir. 2011) (quoting *SEC v. Manor Nursing Ctrs., Inc.*, 458 F.2d 1082, 1100 (2d Cir. 1972)), *cert. granted,* 133 S.Ct. 97 (2012). A district court, as this Court has recognized, may take into consideration the following factors, among others, in determining whether to issue a permanent injunction:

> the fact that defendant has been found liable for illegal conduct; the degree of scienter involved; whether the infraction is an "isolated occurrence;" whether defendant continues to maintain that his past conduct was blameless; and whether, because of his professional occupation, the defendant might be in a position where future violations could be anticipated.

SEC v. Commonwealth Chem. Sec., 574 F.2d at 90, 99 (2d Cir. 1978); *see also SEC v. Cavanaugh*, 155 F.3d 129, 135 (2d Cir. 1998). This analysis is similar to that in *Patel*, except that a defendant's repeat offender status, replaced by consideration of whether the violation is isolated, does not turn on findings in prior proceedings. *See generally* Harold S. Bloomenthal & Samuel Wolf, *Securities and Federal Corporate Law* §20:10.11 (Thomsen Reuters 2012) (noting the similarity of the factors of the two analyses). And, rather than stating the reasonable likelihood of recurrence of the violations as one of several factors, the entire thrust of the analysis is directed at deciding whether it is reasonably likely that the defendant poses a future threat to investors such that he should be enjoined.

There is another connection between injunctions against future violations of the securities laws and employment bars. When a defendant is enjoined from acts involving securities fraud, the Commission may commence an administrative proceeding, commonly called a "follow-on proceeding," for example, under Section 15(b) of the Exchange Act, 15 U.S.C. §78o(b) (follow-on proceedings against broker-dealers), or Section 203 of the Investment Advisers Act, 15 U.S.C.

§80b-3 (follow-on proceedings against investment advisers). In such a proceeding, the Commission may bar a person from association with the regulated entity (broker-dealers or investment advisers in these examples) if it finds that such a remedial action is in the public interest. Thus, based on an injunction against future violations imposed by a court in a civil enforcement proceeding, the Commission may bar a securities professional from the securities industry. *See e.g.*, *Gibson v. SEC*, 561 F.3d 548, 550-51 (6th Cir. 2009) (affirming broker-dealer and investment adviser bar based on injunction).

In light of Congress's intent in the Remedies Act to protect investors from defrauders who are likely to commit additional violations in the future, it makes little sense to have one analysis to determine whether a violator may be enjoined from future violations of the securities law, and thereby be subject to a bar from the securities industry, and a different analysis to determine whether a violator may be barred from serving as an officer or director of a public company. And it makes even less sense for one analysis to be more rigorous than the other. This is particularly so when there is one analysis, appropriate to both kinds of occupational bars, that has been in place and used by the courts for decades. Accordingly, this Court should adopt the analysis it has long used to decide when injunctions are warranted for use in deciding when an officer and director bar is appropriate.

In part II-A-4 above, the factors this Court uses to determine whether injunctive relief is warranted are applied to show that Bankosky is reasonably likely to violate the federal securities laws in the future. For the reasons provided there, this court should affirm the ten-year bar under the analysis urged here by the Commission.

CONCLUSION

For the foregoing reasons, the order of the Commission should be affirmed.

Respectfully submitted,

MICHAEL A. CONLEY
Deputy General Counsel

JACOB H. STILLMAN
Solicitor

/s/ Allan A. Capute
ALLAN A. CAPUTE
Special Counsel to the Solicitor

Securities and Exchange Commission
100 F. Street, N.E.
Washington, D.C. 20549
(202) 551-5122 (A. Capute)
caputea@sec.gov

January 2013

Federal Rules of Appellate Procedure Form 6. Certificate of Compliance With Rule 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,828 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii),

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and that type style requirements of Fed. R. App. P. 32(a)(6) because: this brief has been prepared in a proportionally spaced typeface using Word 2010 in Times New Roman type style and 14 Point type size.

Signed:	/s/ Allan A. Capute
Attorney for:	Securities and Exchange Commission
Dated:	January 22, 2013

CERTIFICATE OF SERVICE & CM/ECF FILING
12-2943-cv

I hereby certify that I caused the foregoing Brief of the Securities and Exchange Commission, Plaintiff Appellee, to be served on counsel for Defendant-Appellant via Electronic Mail generated by the Court's electronic filing system (CM/ECF) with a Notice of Docket Activity pursuant to Local Appellate Rule 25.1:

Robert G. Heim. Esq.
Mayer & Heim, LLP
444 Madison Avenue, 30th Floor
New York, New York 10022

I further certify that an electronic copy was uploaded to the Court's electronic filing system. Six hard copies of the foregoing Brief of the Securities and Exchange Commission, Plaintiff-Appellee, were sent to the Clerk's Office by overnight delivery to:

Clerk of Court
United States Court of Appeals, Second Circuit
United States Courthouse
500 Pearl Street, 3rd floor
New York, New York 10007
(212)857-8500

on this 22nd day of January 22, 2013.

/s/ Allan A. Capute
Allan A. Capute

STATUTORY ADDENDUM

Securities Exchange Act of 1934, Section 10(b); 15 U.S.C. § 78j(b)

Manipulative and deceptive devices

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange--

* * * *

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, or any securities-based swap agreement any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Exchange Act Rule 10b-5; 17 C.F.R. § 240.10b–5

Employment of manipulative and deceptive devices

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

Securities Exchange Act of 1934, Section 14(e); 15 U.S.C. § 78n(e)

(e) Untrue statement of material fact or omission of fact with respect to tender offer

It shall be unlawful for any person to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, or to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer or request or invitation for tenders, or any solicitation of security holders in opposition to or in favor of any such offer, request, or invitation. The Commission shall, for the purposes of this subsection, by rules and regulations define, and prescribe means reasonably designed to prevent, such acts and practices as are fraudulent, deceptive, or manipulative.

Exchange Act Rule, 14e-3; 17 C.F.R. § 240.14e–3

Transactions in securities on the basis of material, nonpublic information in the context of tender offers

(a) If any person has taken a substantial step or steps to commence, or has commenced, a tender offer (the "offering person"), it shall constitute a fraudulent, deceptive or manipulative act or practice within the meaning of section 14(e) of the Act for any other person who is in possession of material information relating to such tender offer which information he knows or has reason to know is nonpublic and which he knows or has reason to know has been acquired directly or indirectly from:

(1) The offering person,

(2) The issuer of the securities sought or to be sought by such tender offer, or

(3) Any officer, director, partner or employee or any other person acting on behalf of the offering person or such issuer, to purchase or sell or cause to be purchased or sold any of such securities or any securities convertible into or exchangeable for any such securities or any option or right to obtain or to dispose of any of the foregoing securities, unless within a reasonable time prior to any purchase or sale such information and its source are publicly disclosed by press release or otherwise.

(b) A person other than a natural person shall not violate paragraph (a) of this section if such person shows that:

(1) The individual(s) making the investment decision on behalf of such person to purchase or sell any security described in paragraph (a) of this section or to cause any such security to be purchased or sold by or on behalf of others did not know the material, nonpublic information; and

(2) Such person had implemented one or a combination of policies and procedures, reasonable under the circumstances, taking into consideration the nature of the person's business, to ensure that individual(s) making investment decision(s) would not violate paragraph (a) of this section, which policies and procedures may include, but are not limited to, (i) those which restrict any purchase, sale and causing any purchase and sale of any such security or (ii) those which prevent such individual(s) from knowing such information.

(c) Notwithstanding anything in paragraph (a) of this section to contrary, the following transactions shall not be violations of paragraph (a) of this section:

(1) Purchase(s) of any security described in paragraph (a) of this section by a broker or by another agent on behalf of an offering person; or

(2) Sale(s) by any person of any security described in paragraph (a) of this section to the offering person.

(d)(1) As a means reasonably designed to prevent fraudulent, deceptive or manipulative acts or practices within the meaning of section 14(e) of the Act, it shall be unlawful for any person described in paragraph (d)(2) of this section to communicate material, nonpublic information relating to a tender offer to any other person under circumstances in which it is reasonably foreseeable that such communication is likely to result in a violation of this section except that this paragraph shall not apply to a communication made in good faith,

(i) To the officers, directors, partners or employees of the offering person, to its advisors or to other persons, involved in the planning, financing, preparation or execution of such tender offer;

(ii) To the issuer whose securities are sought or to be sought by such tender offer, to its officers, directors, partners, employees or advisors or to other persons, involved in the planning, financing, preparation or execution of the activities of the issuer with respect to such tender offer; or

(iii) To any person pursuant to a requirement of any statute or rule or regulation promulgated thereunder.

(2) The persons referred to in paragraph (d)(1) of this section are:

(i) The offering person or its officers, directors, partners, employees or advisors;

(ii) The issuer of the securities sought or to be sought by such tender offer or its officers, directors, partners, employees or advisors;

(iii) Anyone acting on behalf of the persons in paragraph (d)(2)(i) of this section or the issuer or persons in paragraph (d)(2)(ii) of this section; and

(iv) Any person in possession of material information relating to a tender offer which information he knows or has reason to know is nonpublic and which he knows or has reason to know has been acquired directly or indirectly from any of

Securities Exchange Act of 1934, Section 21(d)(2); 15 U.S.C. § 78u(d)(2)

(d) Injunction proceedings; authority of court to prohibit persons from serving as officers and directors; money penalties in civil actions

* * * *

(2) Authority of court to prohibit persons from serving as officers and directors

In any proceeding under paragraph (1) of this subsection, the court may prohibit, conditionally or unconditionally, and permanently or for such period of time as it shall determine, any person who violated section 78j(b) of this title [Exchange Act Section 10(b)] or the rules or regulations thereunder from acting as an officer or director of any issuer that has a class of securities registered pursuant to section 78*l* of this title [Exchange Act Section 12] or that is required to file reports pursuant to section 78*o*(d) of this title [Exchange Act Section 15] if the person's conduct demonstrates unfitness to serve as an officer or director of any such issuer.

Section 20(e) of the Securities Act of 1933, 15 U.S.C. § 77t

(e) Authority of court to prohibit persons from serving as officers and directors

In any proceeding under subsection (b) of this section, the court may prohibit, conditionally or unconditionally, and permanently or for such period of time as it shall determine, any person who violated section 77q(a)(1) of this title [Securities Act Section 17(a)(1)] from acting as an officer or director of any issuer that has a class of securities registered pursuant to section 78*l* of this title [Exchange Act Section 12] or that is required to file reports pursuant to section 78*o*(d) of this title [Exchange Act Section 15] if the person's conduct demonstrates unfitness to serve as an officer or director of any such issuer.