12-2943-cv

To Be Argued By:
ROBERT G. HEIM

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

SECURITIES AND EXCHANGE COMMISSION,
Plaintiff-Appellee,

—against—

BRENT C. BANKOSKY,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLANT

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JURISDICTIONAL STATEMENT

In this civil action brought by the Securities and Exchange Commission, the District Court had jurisdiction under Sections 21(d), 21(e), and 27 of the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. 78u(d), 78u(e), and 78aa. The District Court entered a final order on May 21, 2012. The Appellant filed a Notice of Appeal on July 20, 2012, within the 60-day period prescribed by Federal Rule of Appellate Procedure 4(a)(1)(B). This Court has jurisdiction under 28 U.S.C. §1291.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SECURITIES AND EXCHANGE COMMISSION, Plaintiff-Appellee, -against- BRENT C. BANKOSKY, Defendant-Appellant.	No. 12-2943

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF DEFENDANT-APPELLANT

Defendant-Appellant Brent C. Bankosky submits this brief in support of his appeal from the Opinion and Order of the United States District Court for the Southern District of New York (Harold Baer, Jr.), dated May 21, 2012, A[1]-172 (the "Order"), prohibiting Appellant for a period of ten years from acting as an officer or director of any issuer that has a class of securities registered pursuant to Section

[1] References to the Joint Appendix are designated as "A-___."

12 of the Exchange Act, 15 U.S.C. § 78l, or that is required to file reports pursuant to Section 15(d) of the Exchange Act, 15 U.S.C. § 78o.

STATEMENT OF ISSUES

1. Whether the Court below erred in finding Bankosky unfit to serve as an officer or director of a public company and barring Bankosky from acting as an officer or director of a public company for ten years pursuant to 15 U.S.C. § 78u(d)(2) even though it found: (i) Bankosky's conduct lacked aspects that courts usually rely on when finding securities law violations to be egregious; (ii) Bankosky was not a repeat offender; (iii) Bankosky was not an officer or director of a public company; and (iv) Bankosky's conduct did not involve serious corporate malfeasance or financial reporting fraud as is typical for individuals who have been barred from acting as officers and directors?

STATEMENT OF THE FACTS

This case involves the finding by the District Court that Bankosky was unfit to serve as an officer or director of a public company and the imposition of a ten year officer and director bar on Bankosky. The bar resulted from the Securities and Exchange Commission's (the "Commission") allegation that Bankosky engaged in insider trading in his personal securities account resulting in profits of $63,000 in a case where the Court below found that Bankosky had never been an officer or director of a public company and that his conduct lacked certain aspects

that courts usually rely on when finding securities law violations to be egregious such as tipping others and engaging in efforts to hide his trading. The ten year officer and director bar imposed on Bankosky by the Court below was in addition to the significant sanctions that Bankosky had previously consented to which included an injunction against future violations of the federal securities laws, disgorgement of all of the $63,000 in profits from the trades at issue, the payment of an additional civil penalty of $63,000 and the payment of $10,076 in prejudgment interest. Consent Judgment, A-21.

A. The Commission's Complaint

In its Complaint dated February 9, 2012, the Commission averred that Appellant Bankosky violated Section 10(b) of the Exchange Act, 15 U.S.C. § 78j(b), and Rule 10b-5 thereunder, 17 C.F.R. § 240.10b-5, and Section 14(e) of the Exchange Act, 15 U.S.C. § 78n(e), and Rule 14e-3 thereunder, 17 C.F.R. § 240. 14e-3, by engaging in insider trading while he was employed by Takeda Pharmaceuticals International, Inc. ("Takeda"). Complaint, A-5. The Commission sought a permanent injunction against future violations of the federal securities laws, the disgorgement of Appellant's profits, civil penalties and a permanent bar against Appellant acting as an officer or director of any publicly traded company. Complaint, A-6 – A-7.

B. Allegations in the Commission's Complaint

The Commission's Complaint alleged that Appellant made a limited amount of profits by trading in the securities of two companies -- Cell Genesys, Inc. ("Cell Genesys") and Millennium Pharmaceuticals, Inc. ("Millennium") -- based on material, non-public information he learned about while working at Takada. *See* ¶25 of the Commission's Complaint, A-114, alleging approximately $21,000 in profits on the Cell Genesys trades and A-114, ¶26 of the Complaint alleging approximately $42,000 in profits on the Millennium trades. The Complaint also alleged that Bankosky traded in the securities of Arena Pharmaceutical, Inc. ("Arena") and AMAG Pharmaceutical, Inc. ("AMAG") while in possession of material non-public information but no profits were generated. In fact, losses were incurred on the trades of both Arena and AMAG. *See* A-115, Compl. ¶ 28 regarding losses in Arena and ¶ 31 regarding losses in AMAG.

C. Consent Judgment

The Court below entered a Consent Judgment on March 15, 2012, which is not at issue in this appeal. Consent Judgment, A-21 – A-26. In the Consent Judgment, without admitting or denying the allegations of the Complaint, Appellant agreed to: (a) the entry of an injunction prohibiting him from engaged in any future violations of the federal securities law; (b) disgorge $63,000 in profits from the trades at issue; (c) pay $10,076 in prejudgment interest; and (d) pay a

$63,000 civil penalty. A-24 – A-26. The Consent Judgment provided that the District Court would decide on motion whether to impose an officer and director bar on Appellant and that, for purposes of that motion only, the allegations of the Complaint would be deemed to be true by the Court. A-25.

D. New Allegations in the Commission's Memorandum of Law In Support of Its Motion for An Officer and Director Bar

In addition to the allegations in the Complaint, the Commission's Memorandum of Law in Support of Its Motion for an Officer and Director Bar made the allegation that Bankosky provided misleading testimony in the Commission's investigation.[2] A-34. The Commission's allegations concerned answers that Bankosky provided in response to four broad questions regarding his knowledge of the Cell Genesys transaction while he worked at Takeda. A-41 – A-43. As set forth in the Commission's Memorandum of Law in Support of Its Motion for an Officer and Director Bar, Bankosky testified that he believed the first time he learned about the Cell Genesys transaction was when the April 1, 2008 public announcement was made. A-42. The Commission then cited to three e-mails -- none of which were ever shown to Bankosky during his testimony -- that

[2] Because this allegation was not part of the Complaint or Consent Judgment it is not deemed to be true for purposes of the Commission's motion for an officer and director bar.

it claimed supported its argument that Bankosky provided misleading testimony. A-42 – A-43.

E. Bankosky's Memorandum in Opposition to the Commission's Motion for an Officer and Director Bar

Bankosky's Memorandum in Opposition to the Commission's Motion for an Officer and Director bar argued that two of the three e-mails were sent after the public announcement and do not provide any support for the allegation that Bankosky knew about or worked on the Cell Genesys transaction before it was publicly announced. A-42 – A-43. The third e-mail cited by the Commission was sent in January 2008 -- almost two years before Cell Genesys was acquired -- and does not contain any reference to a potential acquisition. This January 2008 e-mail merely references an immunotherapy portfolio owned by Cell Genesys and there is no indication that Bankosky was working on any matters related to Cell Genesys. A-88. Bankosky's Memorandum in Opposition to the Commission's Motion for an Officer and Director Bar noted that Bankosky was never shown any of the three e-mails cited by the Commission during his testimony in the Commission's investigation and he was answering a question that related to events that occurred over three years prior to his testimony. A-41 – A-43. Moreover, reading the other parts of Bankosky's testimony transcript (which is included as Exhibit D to the Declaration of Charles Riely dated March 30, 2012) where he was questioned about his Cell Genesys trading and the work he performed at Takeda demonstrates

that Bankosky provided complete and truthful answers to all of the questions asked. *See* A-61-A-85. In addition, Bankosky cooperated with the Commission during its investigation and promptly produced all of the documents and trading records the Commission requested, appeared for testimony when the Commission requested him to do so and answered all of the questions the Commission asked to the best of his ability.

F. The District Court's Order

On May 16, 2012, the District Court heard oral argument from the Commission and Bankosky on the Commission's motion seeking a permanent bar against Bankosky serving as an officer or director of any publicly traded company. *See* A-150 – A-171. On May 21, 2012, the District Court entered its Order finding that Bankosky was unfit to serve as an officer or director of a public company and barring Bankosky from acting as an officer or director of any issuer which has a class of securities registered pursuant to Section 12 of the Securities and Exchange Act ("Exchange Act"), 15 U.S.C. § 78l, for ten years under 15 U.S.C. § 78u(d)(2) and Section 15(d) of the Exchange Act, 15 U.S.C. § 78o. A-171 – A-176. The Order analyzed the Commission's request for an officer and director bar using the six factors that were set out by the Second Circuit in *SEC v. Patel*, 61 F.3rd 137 (2d Cir. 1995). A-173. The six factors are: (1) the 'egregiousness' of the underlying securities law violation; (2) the defendant's 'repeat offender' status; (3) the

defendant's 'role' or position when he engaged in the fraud; (4) the defendant's degree of scienter; (5) the defendant's economic stake in the violation; and (6) the likelihood that misconduct will recur. *Patel* at 141.

Of note, the Order found that "Bankosky's conduct lacks certain aspects that courts usually rely on when finding securities law violations to be egregious" such as tipping others or engaging in efforts to hide his trading. *See* A-173. The Order also found that "[i]t is particularly relevant that Bankosky is not a repeat offender" and that "Bankosky was not an officer or director of Takeda. . ." *See* A-174. In imposing the ten year officer and director bar the District Court relied primarily on "Bankoksy's responses to the SEC's investigation and his failure to provide the Court any assurance of his acceptance of responsibility." *See* A-175. The District Court made this finding even though Bankosky had entered into a Consent Judgment accepting the full panoply of remedies the Commission sought to impose including the payment of full disgorgement, the payment of a substantial civil penalty and the imposition of an injunction against future violations of the federal securities laws. Consent Judgment, A-21 – A-26. This appeal followed.

STANDARD OF REVIEW

The standard of review is whether the lower court abused its discretion in entering its Order finding that Bankosky was unfit to serve as an officer or director of a public company and barring Bankosky from such positions for a period of ten

years. *See SEC v. Colonial Inv. Mgmt. LLC*, 381 Fed. Appx. 27, 31 (2d Cir. 2010); *SEC v. Posner*, 16 F.3d 520, 521 (2d Cir. 1994).

On review of the District Court's ruling for abuse of discretion, the Second Circuit may reverse the ruling if the Court 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 Exp. Financial Advisors Securities Litigation*, 672 F.3d 113, 129 (2d Cir. 2011). In addition, the Second Circuit may reverse if a district court abuses its discretion when its ruling is based on an incorrect legal standard or a clearly erroneous finding of fact. *Warner-Lambert Co. v. Northside Dev. Corp.*, 86 F.3d 3, 6 (2d Cir. 1996). Further, "[The Court] may reverse ... even where the abuse of discretion is not glaring." *Am. Alliance Ins. Co. v. Eagle Ins. Co.*, 92 F.3d 57, 62 (2d Cir.1996). The Second Circuit has reversed district court decisions for an abuse of discretion when balancing applicable factors. *See Hedges v. Town of Madison*, 456 Fed. Appx. 22, 24 (2d Cir. 2012) (reversing district court's decision to dismiss claims with prejudice in supplemental jurisdiction case reviewed for abuse of discretion after finding that applicable factors weighed in favor of dismissal without prejudice); *Slupinski v. First Unum Life Ins. Co.*, 554 F.3d 38, 48 (2d Cir. 2009) (reviewing denial of attorneys' fees under abuse of discretion standard, finding that the district court's rulings on certain factors should have weighed heavily,

particularly in light of its previous findings on the merits, and holding that the district court's finding that the factors did not overwhelmingly favor the Appellant was clearly erroneous "and beyond the range of permissible decisions."); *Bethlehem Contracting Co. v. Lehrer/McGovern, Inc.*, 800 F.2d 325 (2d Cir. 1986) (the Second Circuit reversed the district court's judgment, holding that the district court had abused its discretion because it gave no weight to the heavy presumption favoring the exercise of jurisdiction in the several factors weighed in considering whether to invoke federal jurisdiction).

SUMMARY OF ARGUMENT

Before imposing an officer and director bar a district court must find: (1) that a securities law violation occurred; and (2) that the individual who committed a securities law violation is unfit to serve as an officer or director of a public company. A securities law violation does not automatically warrant the imposition of an officer and director bar. An officer and director bar is a harsh penalty and is generally reserved for senior corporate officers and director who commit extremely serious violations of the federal securities laws such as serious corporate governance fraud or financial reporting fraud that results in losses or the risk of losses to the company's shareholders. As discussed below, courts routinely deny the Commission's requests for officer and director bars where these circumstances

are not present, including cases involving insider trading allegations made against the most senior corporate officers.

In this case, the District Court abused its discretion in finding that Bankosky was unfit to serve as an officer or director of a public company and by granting the Commission's Motion for an Officer and Director Bar because it erroneously applied the factors that were set out in the Second Circuit's decision in *SEC v. Patel* and because the District Court gave undue weight to the unproven allegation that Bankosky was not truthful in his testimony during the Commission's investigation or that he did not take responsibility for his actions. For these reasons, we respectfully request that this Court reverse or vacate the district court's decision in its entirety.

ARGUMENT

A. The District Court Erred in Barring Appellant from Acting as an Officer or Director of a Public Company for Ten Years

(1) History of Officer and Director Bars

The securities laws did not explicitly provide for general officer and director bars until 1990. The remedy was added with passage of the Securities Enforcement Remedies and Penny Stock Reform Act of 1990, which added Section 20(e) to the Securities Act of 1933, 15 U.S.C. 77t(e), and Section 21(d)(2) to the Securities Exchange Act of 1934, 15 U.S.C. § 78u(d)(2), to provide that, in any case of willful or reckless fraud, a court may prohibit a person from acting as

an officer or director of a public company —"conditionally or unconditionally, and permanently or for such period of time as it shall determine" -- but only upon a showing of "substantial unfitness" to serve as an officer or director. *See* Securities Enforcement Remedies and Penny Stock Reform Act of 1990, Pub. L. No. 101-429, 104 Stat. 931 (codified in scattered sections of 15 U.S.C.)

In the first reported case to interpret the new provision, the court declined to impose any officer and director bar on a defendant charged with selling his company's stock while in possession of the material nonpublic information that he was a target of a grand jury investigation into bribing government officials. The court found that the SEC had not met the statute's "substantial unfitness" standard for a bar because the defendant had no previous securities law violations, and because he had already been "severely punished" by a criminal prosecution and civil litigation arising from his misconduct. *SEC v. Shah*, No. 92 Civ. 1952, 1993 U.S. Dist. LEXIS 10347, 1993 WL 288285, (S.D.N.Y. July 28, 1993).

When addressing officer and director bars in the Sarbanes-Oxley Act of 2002 Congress eliminated the word "substantial" from the test, so instead of having to prove the defendant's conduct "demonstrates substantial unfitness to serve as an officer or director," the Commission now has to prove that the defendant's conduct "demonstrates unfitness to serve as an officer or director." (Pub. L. 107-204, §305(a)(1)). However, removing the word "substantial" from

the unfitness test has not made a substantive difference in the way courts interpret the standard of when an officer and director bar is appropriate because, as discussed herein, the courts have continued to look to the Second Circuit's 1995 *Patel* decision, *SEC v. Patel*, 61 F.3d 137, 141 (2d Cir.1995), for guidance on when to impose a bar. *See, e.g. SEC v. Johnson*, No. 04 Civ. 4114, 2006 U.S. App. LEXIS 8230, at *11-12 (3d Cir. Apr. 5, 2006) (applying *Patel* analysis without citing); *SEC v. Patterson,* No. 03 Civ. 0302, 2006, U.S. Dist. LEXIS 17351, at *9-10 (N.D. Okla. Mar. 23, 2006) (applying *Patel* analysis without citing); *SEC v. Save the World Air, Inc.*, No. 01 Civ. 11586, 2005 U.S. Dist. LEXIS 28313, at *49-50 (S.D.N.Y. Nov. 15, 2005) (expressly relying on *Patel*); *SEC v. Pardue*, 367 F. Supp. 2d 773, 776-77 (E.D. Pa. 2005) (relying on *Patel*; "There is no statutory definition of unfitness"); *SEC v. Lawbaugh*, 359 F. Supp. 2d 418 (D. Md. 2005) (relying on *Patel*); *SEC v. Global Telecom Servs. L.L.C.*, 325 F. Supp. 2d 94, 121 (D. Conn. 2004)(relying on *Patel*); *see also,* "Where Are We Going With SEC Officer and Director Bars?" *Securities Regulation & Law Report* (BNA), Vol. 38, No. 17, April 24, 2006).

Under 15 U.S.C. § 78u(d)(2), "[T]he court may prohibit, conditionally or unconditionally, and permanently or for such period of time as it shall determine, any person who violated Section 10b [15 U.S.C. §78j] of this title or the rules or

regulations thereunder from acting as an officer or director . . . if the person's conduct demonstrates unfitness to serve as an officer or director..."

(2) The Second Circuit's Patel Factors

To determine whether an individual is "unfit" to serve as an officer or director, the Court may consider the following factors: (1) the 'egregiousness' of the underlying securities law violation; (2) the defendant's 'repeat offender' status; (3) the defendant's 'role' or position when he engaged in the fraud; (4) the defendant's degree of scienter; (5) the defendant's economic stake in the violation; and (6) the likelihood that misconduct will recur." *SEC v. Patel*, 61 F.3d 137, 141 (2d Cir.1995). In fact, the six factors set forth in *Patel* present a high hurdle that the Commission must surmount before a court may impose a permanent officer and director bar.

(a) Egregiousness

Officer and director bars are generally imposed on corporate officers and directors who have engaged in extremely egregious violations of the federal securities laws -- such as serious corporate governance fraud and financial reporting fraud -- that result in financial losses or the risk of financial losses to shareholders. In this matter, the District Court found that "Bankosky's conduct lack[ed] certain other aspects that courts usually rely on when finding securities law violations to be egregious." A-173, *citing*, *SEC v. Pallais*, No. 08 Civ. 8384,

2010 WL 2772329 (S.D.N.Y. July 9, 2010) (involving the repeated release of fraudulent press releases that made material misstatements and omissions regarding a public company's business operations and financial results); *SEC v. Resnick*, 604 F.Supp.2d 773, 784 (D.Md.2009) (involving a fraudulent scheme to overstate the financial results of a public company by $700 million); *SEC v. Robinson*, No. 00 Civ. 7452, 2002 WL 1552049, at *5 (S.D.N.Y. July 16, 2002) (finding defendant's conduct was "egregious" when defendant lied about his company having a product to market, ties to established telecommunications companies, and an expectation of reaping billions of dollars in sales revenue). This factor weighed against imposing any officer or director bar, as Bankosky's alleged misconduct involved personal securities trading, not corporate governance or financial reporting fraud or behavior that contributed to large financial losses to shareholders.

(b) Repeat Offender Status

As noted correctly by the District Court in its opinion, Bankosky was not a repeat offender. A-174. This factor should be weighed heavily against the imposition of an officer and director bar, and the District Court abused its discretion in failing to do so. Indeed, in cases in which the first time offender status so heavily weighs against the imposition of an officer and director bar, even when multiple or egregious securities violations may be involved, the courts have

still declined to impose *any* officer and director bar. *See, e.g., SEC v. Stanard*, No. 06 Civ. 7736, 2009 U.S. Dist. LEXIS 6068, 92-93, Fed. Sec. L. Rep. (CCH) P94,053 (S.D.N.Y. Jan. 27, 2009) (finding "particularly relevant" the defendant's lack of previous securities law violations and "the fact that the injunctive relief already granted will provide a significant deterrent, greatly reducing the likelihood that [defendant], who has had an otherwise unblemished career, will engage in future securities violations as an officer or director."); *SEC v. Chester Holdings, Ltd.*, 41 F. Supp. 2d 505, 530 (D.N.J. 1999) (applying the Second Circuit factors in *Patel* and applying a temporary five-year ban to a co-defendant whose behavior and culpability were similar to defendant who received "the severe penalty of a permanent bar", but whose status as a one-time offender meant that "the likelihood of future violations [was] not as clear"); *SEC v. DiBella*, 04 Civ. 1342, 2008 U.S. Dist. LEXIS 109378, 2008 WL 6965807, at *11 (D.Conn. Mar. 13, 2008) (an officer/director bar was not warranted where defendant did not "currently serve on the boards of any publically traded companies, and [had] never served as an officer of any publically traded company" and where defendant "was never found to have committed securities violations" in his previous positions, so that "[a] lthough [defendant] acted with scienter, he is not the type of "repeat offender" for whom an officer/director bar is especially appropriate."); *SEC v. Shah*, No. 92 Civ. 1952, 1993 U.S. Dist. LEXIS 10347, 1993 WL 288285, (S.D.N.Y. July 28, 1993) (citing

the factors eventually adopted by *Patel* and finding an officer/director bar unwarranted where defendant was an officer during his illegal conduct and pled guilty in related criminal case, but was not a repeat offender, his gain of $121,340 was not egregious in comparison with other insider trading schemes, the circumstances of Defendant's actions did not evidence a high degree of scienter, and Defendant was sufficiently punished by other remedies).

(c) Role or Position

The District Court improperly concluded that Bankosky "was acting in a corporate or fiduciary capacity," even though the Court acknowledged, "Bankosky was not an officer or director of Takeda." A-174. The Commission's Complaint did not support a finding that Bankosky was acting in a corporate or fiduciary capacity when he carried out the securities trades at issue or that he was an officer or director of the Company. In fact, the District Court found that Bankosky was not a corporate officer or director at Takeda. The 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 and the clear statutory intent 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.

As discussed herein, federal courts have used the authority granted to them under Section 21(d)(2) of the Exchange Act, 15 U.S.C. 78u(d), to bar individuals from acting as corporate officers and directors when:

(i) those individuals were senior corporate officers or directors of a public company at the time of the alleged fraud -- not low level employees like Bankosky; and

(ii) their misconduct involved fraud that is related to serious corporate governance failures or improper financial reporting -- not personal securities trading like Bankosky.

The statutory history of Section 21(d)(2), and the decisions of other federal courts that have addressed officer and director bars, make it clear that not every securities fraud case merits the extraordinary remedy of an imposition of an officer and director bar. Specifically, courts have often refused to impose officer and director bars on individuals such as Bankosky who have been accused of insider trading -- even when such trading allegedly involved nonpublic information that the defendant learned about during the course of his employment with a public company.

For example, in the leading case cited by the Commission in its Memorandum of Law in Support of an Officer and Director Bar, *SEC v. Patel*, 61 F.3d 137 (2d Cir. 1995), the Second Circuit reversed the District Court's

imposition of a permanent officer and director bar that had been imposed on a defendant charged with, among other things, selling his company's stock while in possession of material nonpublic information. Other courts have also refused to impose officer and director bars on individuals who were found to have traded while in possession of material non-public information -- even when such individuals were senior corporate officers who were criminally convicted in related proceedings. *See SEC v. Shah*, No. 92 Civ. 1952, 1993 U.S. Dist. LEXIS 10347, 1993 WL 288285, (S.D.N.Y. July 28, 1993) (applying the *Patel* Factors).

The precedent for officer and director bars almost uniformly involves misconduct by senior corporate officers -- such as Chief Executive Officers -- and egregious corporate governance and financial reporting frauds. In contrast, Bankosky was not a corporate officer or director at Takeda and his personal trading did not involve corporate governance or financial reporting violations.

(d) Scienter

The District Court found that this factor weighed in favor of an officer and director bar. A-174 – A-175. However, the Commission did not allege circumstances that demonstrated a high degree of scienter which would warrant an officer and director bar. "The circumstances of [the defendant's] insider trading do not suggest a very high degree of scienter. While [the defendant] has conceded proof of scienter, the SEC does not allege that he engaged in clandestine trading

such as tipping, purchasing stock in the names of other people, or trading in a secret account." *SEC v. Shah*, 1993 WL 288285, at *7. Similarly, in this case, there is no allegation that Bankosky engaged in clandestine trading, tipped others or purchased stock in the name of other people. Moreover, the District Court gave undue weight to the SEC's unproven allegation that Bankosky was not truthful in his SEC testimony and that Bankosky had not accepted responsibility for his conduct -- even though Bankosky consented to the entry of the full array of sanctions sought by the SEC.

(e) Economic Stake

Bankosky's economic stake in the transactions was very modest and in fact the losses he suffered on the trading in Arena and AMAG were almost enough to cancel out his profits from the trades in Cell Genesys and Millennium.

(f) Likelihood that Misconduct will Recur

The District Court focused in part on Bankosky's responses to the questions posed during his investigative testimony before the Commission. The Court noted that it could not find, "that [Bankosky] has expressed remorse and sufficiently accepted responsibility for his actions." A-176. The Court erred by interpreting Bankosky's "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," as not taking responsibility for his actions, when Bankosky was simply arguing that the

Commission's complaint did not support the imposition of an officer and director bar in addition to the other remedies to which Bankosky had already consented, including paying more than $136,000 in disgorgement and civil penalties. While the Consent Judgment entered into between Bankosky and the Commission deemed the allegations in the Complaint to be true for the purposes of the Commission's motion for an officer and director bar, the District Court improperly made conclusions which were not supported by the allegations in the Complaint. "[T]he Court must accept the consent decree 'as it is written, and not as it might have been written had the plaintiff established his factual claims and legal theories in litigation.'" *SEC v. General Host Corp.*, 438 F. Supp. 105, 109 (S.D.N.Y. 1977), citing *United States v. Armour & Co.*, 402 U.S. 673, 682, 29 L. Ed. 2d 256, 91 S. Ct. 1752 (1971); *see United States v. ITT Continental Baking Co.*, 420 U.S. 223, 236-37, 43 L. Ed. 2d 148, 95 S. Ct. 926 (1975).

Indeed, the District Court did not articulate a sufficient "factual basis for a finding of the likelihood of recurrence," as required by *Patel*. *Patel,* 61 F.3d at 142. Rather, the District Court erroneously concluded that Bankosky maintained his innocence and held that Bankosky's "attempts to call into question the seriousness of his actions" were "at the very least misleading and disingenuous." A-175. However, it is Bankosky's right to argue that his conduct did not fall within the *Patel* factors and that the Commission bears the burden of proving that

there is a lack of assurances against future misconduct. Here, the Commission simply did not meet its burden with regard to Bankosky. *SEC v. iShopNoMarkup.com, Inc.*, No. 04 Civ. 4057, 2012 U.S. Dist. LEXIS 28179, Fed. Sec. L. Rep. (CCH) P96,762 (E.D.N.Y. Mar. 3, 2012), citing *SEC v. DiBella*, 04 Civ. 1342, 2008 U.S. Dist. LEXIS 109378, 2008 WL 6965807, at *11 (D.Conn. Mar. 13, 2008). "[C]ourts that have imposed permanent, and even temporary bars, have found the defendants' past and ongoing conduct to clearly demonstrate a likelihood of reoccurrence." The Commission must explain why the injunctive relief set forth in the Consent Judgment would not sufficiently deter the individual from future violations. *Id.*, *see also SEC v. Stanard*, No. 06 Civ. 7736, 2009 U.S. Dist. LEXIS 6068, 2009 WL 196023 at *33 (S.D.N.Y. Jan. 27, 2009) (finding it "particularly relevant" that "the injunctive relief already granted will provide a significant deterrent, greatly reducing the likelihood that [defendant], who has had an otherwise unblemished career, will engage in future securities violations as an officer or director"); *Shah*, 1993 U.S. Dist. LEXIS 10347, 1993 WL 288285 at *7 (finding that the "likelihood of future misconduct appears relatively slight" given that defendant "committed no previous securities law violations and that he has been severely punished for the instant misconduct"). In this matter there is no evidence that Bankosky's past or ongoing conduct demonstrates a likelihood of reoccurrence.

Although the District Court concluded that Bankosky's short term employment with a different pharmaceutical company meant there would be future opportunities for Bankosky to violate the securities laws, the simple fact that an individual's occupation might present an opportunity for fraud in the future does not evidence a likelihood of future misconduct. *See SEC v. Jadidian*, No. 08 Civ. 8079, 2011 U.S. Dist. LEXIS 36485 (S.D.N.Y. Mar. 31, 2011) (noting that the standard for a penny stock bar mirrors that for imposing an officer and director bar, and finding that there was no future likelihood of misconduct), citing *SEC v. Freiberg*, No. 2:05-CV-00233, 2007 U.S. Dist. LEXIS 67900, 2007 WL 2692041 at *23 (D. Utah Sept. 12, 2007) (declining to impose penny stock bar where "[defendant's] occupation might present opportunities for future securities violations, but there is no evidence he has participated in a violation since the events at issue here").

B. Courts Have Imposed Officer and Director Bars of Less Than Ten Years in Other SEC Litigated Cases

In cases significantly more egregious than Bankosky's, District Courts have imposed officer director bars for time periods that are significantly shorter than ten years. For example, in *SEC v. Chester Holdings, Ltd.*, 41 F. Supp. 2d 505 (D.N.J. 1999)(citing *SEC v. Patel*, 61 F.3d 137 (2d Cir. 1995)), the court imposed a permanent bar on one officer, but only a five year bar on another officer in the same case. The court explained that the officer receiving the permanent bar had

been "restrained, censured, fined, and even imprisoned for prior securities violations," had "failed to assure this court that he will not engage in future violations," and was then working as a "mergers and acquisitions business consultant." Commenting on the second officer receiving a five year bar, the court observed that "[w]hile her behavior and culpability with respect to this violation are similar. . . she is not a repeat offender. That being the case, the likelihood of future violations is not as clear and this court will therefore not impose the severe penalty of a permanent bar." *SEC v. Chester Holdings, Ltd.*, 41 F. Supp. 2d at 530. In attempting to tailor the duration of a bar to the particular circumstances present, courts have also imposed bars limited to six years, *see, e.g.*, *SEC v. McCaskey*, No. 98 Civ. 6153, 2001 U.S. Dist. LEXIS 13571, at *17-21 (S.D.N.Y. Sept. 4, 2001)(company president charged with market manipulation through washed sales and matched orders; pled guilty to related criminal charges; under *Patel*, permanent bar found "not warranted," and six-year bar "sufficient").

C. The Commission Itself Has Accepted Settlements in More Egregious Cases Where More Limited Bars Were Imposed

The Commission itself has entered into settlement agreements with defendants who are senior corporate officers for officer and director bars of under ten years in cases that are significantly more egregious than Bankosky's. Typically, defendants who are senior corporate officers and who were accused of far more egregious conduct than Bankosky received five year officer and director

bars in settlements with the SEC. For example, a CEO labeled by the SEC as "the alleged architect of an international pump-and-dump scheme," who was charged with "issuing false and misleading press releases, while secretly dumping tens of millions of … shares into the inflated market that he had created," and who had refused to cooperate with the Commission's investigation settled with the Commission for a five year officer and director bar. *SEC v. Bauer*, SEC Litigation Release No. 19563, 2006 SEC LEXIS 307 (Feb. 13, 2006). *See also SEC v. Bauer*, SEC Litigation Release No. 19153, 2005 SEC LEXIS 670 (Mar. 23, 2005).

Other senior officers who received five year officer and director bars in settlements with the Commission involve CFO's (*SEC v. Skoulis*, SEC Litigation Release No. 19630, 2006 SEC LEXIS 724 (Mar. 29, 2006); *SEC v. Bennett*, SEC Litigation Release No. 19310, 2005 SEC LEXIS 1848 (July 26, 2005) and Corporate Controllers, *SEC v. Sport-Haley, Inc.*, SEC Litigation Release No. 19532, 2006 SEC LEXIS 97 (Jan. 19, 2006); *SEC v. Dollar Gen. Corp.*, SEC Litigation Release No. 19174, 2005 SEC LEXIS 787 (Apr. 7, 2005); *SEC v. Baker*, SEC Litigation Release No. 18980, 2004 SEC LEXIS 2689 (Nov. 19, 2004).

D. The Remedies to Which Bankosky Has Already Consented Weigh Against the Imposition of an Officer and Director Bar

The *Patel* Court stated that a District Court may take into consideration other factors when deciding whether to impose an officer and director bar. One additional factor that the District Court in this matter failed to consider was

whether the defendant has been subjected to other remedies and punishments for alleged misconduct. *See Patel*, 61 F.3d at 142; and *SEC v. Pace*, 173 F. Supp. 2d 30, 34 (D.D.C. 2001) (court considered the punishment imposed in a related criminal case when declining to impose an officer and director bar). *See also Shah*, 1993 U.S. Dist. LEXIS 10347, at *21 ("[g]iven that [the defendant] . . .has been severely punished for the instant misconduct, the likelihood of future misconduct appears relatively slight."); *SEC v. Farrell*, 1996 WL 788367 (W.D.N.Y. Nov. 6, 1996) (an insider trading case involving criminal charges where the court denied the Commission's request for an unconditional officer and director bar and stated the defendant's "securities violations were serious and he did engage in fraudulent conduct in the hopes that his illegal activities would not be discovered. However, upon release from prison, he should not be barred from holding any other officer or director positions…. Farrell is a talented executive and a permanent bar would effectively prevent him from using those talents to rebuild his life." *Id.* at *8.)

The likelihood that Bankosky would commit future violations of the federal securities laws is extremely low and the District Court has not adequately articulated otherwise. Bankosky has never been an officer or director of a public company and is currently unemployed. The likelihood that he will ever become an officer or director of a public company now that he has settled the Commission

matter is extremely low. The remedies that have already been imposed against Bankosky -- with his consent -- are more than enough to ensure there is a low likelihood of future recurrences of misconduct. Moreover, as the sole source of financial support for his family, piling on an officer and director bar would serve no remedial purpose.

CONCLUSION

For the reasons set forth above, Appellant Bankosky respectfully requests that this Court reverse or vacate the District Court's Order.

Respectfully submitted,

Dated: October 24, 2012

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Brief for Petitioner complies with the 14,000 word type-volume limitation of Fed. R. Civ. P. 32(a)(7)(B) in that it contains 6,273 words, excluding the table of contents, table of authorities, and certificates of counsel. The number of words was determined through the word-count function of Microsoft Word. Counsel agrees to furnish to the Court an electronic version of the brief upon request.

/s/ Robert G. Heim
Robert G. Heim

CERTIFICATE OF SERVICE & CM/ECF FILING

12-2943-cv

I hereby certify that I caused the foregoing Brief for Defendant-Appellant to be served on counsel for Plaintiff-Appellee 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:

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I certify that an electronic copy was uploaded to the Court's electronic filing system. Six hard copies of the foregoing Brief for Defendant-Appellant were sent to the Clerk's Office by hand delivery to:

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on this 24th day of October 2012.

/s/ Samantha Collins
Samantha Collins