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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

SECURITIES AND EXCHANGE  
COMMISSION,

No. C-08-4238 EMC

Plaintiff,

**PRELIMINARY JURY INSTRUCTIONS**

v.

**(September 1, 2010)**

MICHAEL C. PATTISON,

Defendant.

**United States District Court**  
For the Northern District of California



**JURY INSTRUCTION NO. [2] – CLAIMS AND DEFENSES**

To help you follow the evidence, I will give you a brief summary of the positions of the parties:

Plaintiff the Securities and Exchange Commission (the “SEC” or “Commission”) claims that Defendant Michael Pattison violated the federal securities laws. The SEC claims that the defendant participated in a scheme to defraud shareholders of Embarcadero Technologies, Inc. (“Embarcadero”), between 2000 and 2005, while he was the Controller of the company. The SEC also claims that the defendant made, or helped others make, misrepresentations to shareholders and failed to disclose important information about securities called stock options. The SEC alleges that the defendant helped in a scheme to select prices and dates for those stock options, and that the defendant, as the Controller, failed to accurately disclose this practice, or the cost of the practice in Embarcadero’s reports to shareholders. The SEC also alleges that the defendant helped keep the practice from other persons, including Embarcadero’s independent auditors and its outside lawyer, in order to permit the scheme to remain undetected. The SEC claims that the failure to disclose truthfully how options prices were picked, or how they were dated, or how they were accounted for, deprived Embarcadero’s shareholders of important information about their investment in the company’s stock.

The defendant denies the SEC’s claims and contends that, if any accounting errors were indeed made, those errors were made in good faith and not unreasonable in light of many factors, such as the widespread industry confusion over the relevant accounting rules, the language of Embarcadero’s stock plan, his inexperience with public companies and stock options accounting, his reliance on more experienced professionals (including senior management and auditors) and his belief that many others knew of and approved the practice. The defendant claims that he never thought that anyone else was inaccurately accounting for stock options, never intend to help anyone do so, and never actually did help anyone else do so. He claims that there was simply no secret scheme to defraud anyone. Finally, the defendant claims that the supposedly omitted accounting information about the stock options was not important to the shareholders, who had the relevant information.

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Authority: 9th Cir. Model Civil Jury Instruction No. 1.2 (modified).

Court Comments: No objection by the parties; stipulated version drafted by the parties. The Court has made minor changes to the parties' stipulated instruction (*e.g.*, for purposes of consistency).

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**JURY INSTRUCTION NO. [13] – BURDEN OF PROOF –  
PREPONDERANCE OF THE EVIDENCE**

When a party has the burden of proof on any claim [or affirmative defense] by a preponderance of the evidence, it means you must be persuaded by the evidence that the claim [or affirmative defense] is more probably true than not true.

You should base your decision on all of the evidence, regardless of which party presented it.

Authority: 9th Cir. Model Civil Jury Instruction No. 1.3.

Court Comments: No objection by the parties.

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**JURY INSTRUCTION NO. [3] – WHAT IS EVIDENCE**

The evidence you are to consider in deciding what the facts are consists of:

1. the sworn testimony of any witness;
2. the exhibits which are received into evidence; and
3. any facts to which the lawyers have agreed.

Authority: 9th Cir. Model Civil Jury Instruction No. 1.6.

Court Comments: The parties stipulated to this instruction.

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**JURY INSTRUCTION NO. [4] – WHAT IS NOT EVIDENCE**

In reaching your verdict, you may consider only the testimony and exhibits received into evidence. Certain things are not evidence, and you may not consider them in deciding what the facts are. I will list them for you:

- (1) Arguments and statements by lawyers are not evidence. The lawyers are not witnesses. What they have said in their opening statements, [will say in their] closing arguments, and at other times is intended to help you interpret the evidence, but it is not evidence. If the facts as you remember them differ from the way the lawyers have stated them, your memory of them controls.
- (2) Questions and objections by lawyers are not evidence. Attorneys have a duty to their clients to object when they believe a question is improper under the rules of evidence. You should not be influenced by the objection or by the court’s ruling on it.
- (3) Testimony that has been excluded or stricken, or that you have been instructed to disregard, is not evidence and must not be considered. In addition sometimes testimony and exhibits are received only for a limited purpose; when I [give] [have given] a limiting instruction, you must follow it.
- (4) Anything you may have seen or heard when the court was not in session is not evidence. You are to decide the case solely on the evidence received at the trial.

Authority: 9th Cir. Model Civil Jury Instruction No. 1.7.

Court Comments: No objection by the parties.

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**JURY INSTRUCTION NO. [5] – EVIDENCE FOR LIMITED PURPOSE**

Some evidence may be admitted for a limited purpose only.

When I instruct you that an item of evidence has been admitted for a limited purpose, you must consider it only for that limited purpose and for no other.

Authority: 9th Cir. Model Civil Jury Instruction No. 1.8.

Court Comments: No objection by the parties.

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**JURY INSTRUCTION NO. [6] – DIRECT AND INDIRECT EVIDENCE**

Evidence may be direct or circumstantial. Direct evidence is direct proof of a fact, such as testimony by a witness about what that witness personally saw or heard or did. Circumstantial evidence is proof of one or more facts from which you could find another fact. You should consider both kinds of evidence. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. It is for you to decide how much weight to give to any evidence.

By way of example, if you wake up in the morning and see that the sidewalk is wet, you may find from that fact that it rained during the night. However, other evidence, such as a turned on garden hose, may provide a different explanation for the presence of water on the sidewalk. Therefore, before you decide that a fact has been proved by circumstantial evidence, you must consider all the evidence in the light of reason, experience, and common sense.

Authority: 9th Cir. Model Civil Jury Instruction No. 1.9.

Court Comments: No objection by the parties.

1           **JURY INSTRUCTION NO. [16] – DEPOSITION IN LIEU OF LIVE TESTIMONY**

2           A deposition is the sworn testimony of a witness taken before trial. The witness is placed  
3 under oath to tell the truth and lawyers for each party may ask questions. The questions and answers  
4 are recorded. When a person is unavailable to testify at trial, the deposition of that person may be  
5 used at the trial.

6           The deposition of the witness was taken on an earlier date. You should consider deposition  
7 testimony, presented to you in court in lieu of live testimony, insofar as possible, in the same way as  
8 if the witness had been present to testify.

9           Do not place any significance on the behavior or tone of voice of any person reading the  
10 questions or answers.

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12 Authority: 9th Cir. Model Civil Jury Instruction No. 2.4.

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14 Court Comments: The parties stipulated to this instruction.  
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**JURY INSTRUCTION NO. [26] – DRAWING REASONABLE INFERENCES**

During the trial, you have heard the attorneys use the term “inference,” and in their arguments they have asked you to infer, on the basis of your reason, experience, and common sense, from one or more established facts, the existence of some other fact.

You may make reasonable inferences based on the facts of the case. An inference is not a suspicion or guess. It is a reasoned, logical conclusion based on some fact or facts that have been shown to exist.

There are times when different inferences may be drawn from facts, whether proved by direct or circumstantial evidence. The plaintiff may ask you to draw one set of inferences, while the defense may ask you to draw another. It is for you, and you alone, to decide what reasonable inferences you will draw.

Court Comments: The parties stipulated to this instruction.

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**JURY INSTRUCTION NO. [7] – RULING ON OBJECTIONS**

There are rules of evidence that control what can be received into evidence. When a lawyer asks a question or offers an exhibit into evidence and a lawyer on the other side thinks that it is not permitted by the rules of evidence, that lawyer may object. If I overrule the objection, the question may be answered or the exhibit received. If I sustain the objection, the question cannot be answered, and the exhibit cannot be received. Whenever I sustain an objection to a question, you must ignore the question and must not guess what the answer might have been.

Sometimes I may order that evidence be stricken from the record and that you disregard or ignore the evidence. That means that when you are deciding the case, you must not consider the evidence that I told you to disregard.

Authority: 9th Cir. Model Civil Jury Instruction No. 1.10.

Court Comments: No objection by the parties.

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**JURY INSTRUCTION NO. [8] – CREDIBILITY OF WITNESSES**

In deciding the facts in this case, you may have to decide which testimony to believe and which testimony not to believe. You may believe everything a witness says, or part of it, or none of it. Proof of a fact does not necessarily depend on the number of witnesses who testify about it.

In considering the testimony of any witness, you may take into account:

- (1) the opportunity and ability of the witness to see or hear or know the things testified to;
- (2) the witness’s memory;
- (3) the witness’s manner while testifying;
- (4) the witness’s interest in the outcome of the case and any bias or prejudice;
- (5) whether other evidence contradicted the witness’s testimony;
- (6) the reasonableness of the witness’s testimony in light of all the evidence; and
- (7) any other factors that bear on believability.

The weight of the evidence as to a fact does not necessarily depend on the number of witnesses who testify about it.

Authority: 9th Cir. Model Civil Jury Instruction No. 1.11.

Court Comments: No objection by the parties.

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**JURY INSTRUCTION NO. [10] – NO TRANSCRIPT AVAILABLE TO JURY**

During deliberations, you will have to make your decision based on what you recall of the evidence. You will not have a transcript of the trial. I urge you to pay close attention to the testimony as it is given.

If at any time you cannot hear or see the testimony, evidence, questions or arguments, let me know so that I can correct the problem.

Authority: 9th Cir. Model Civil Jury Instruction No. 1.13.

Court Comments: No objection by the parties.

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**JURY INSTRUCTION NO. [11] – TAKING NOTES**

If you wish, you may take notes to help you remember the evidence. If you do take notes, please keep them to yourself until you and your fellow jurors go to the jury room to decide the case. Do not let note-taking distract you. When you leave, your notes should be left in the envelope in the jury room. No one will read your notes. They will be destroyed at the conclusion of the case.

Whether or not you take notes, you should rely on your own memory of the evidence. Notes are only to assist your memory. You should not be overly influenced by your notes or those of your fellow jurors.

Authority: 9th Cir. Model Civil Jury Instruction No. 1.14.

Court Comments: No objection by the parties.

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**JURY INSTRUCTION NO. [15 ]– BENCH CONFERENCES AND RECESSES**

From time to time during the trial, it may become necessary for me to talk with the attorneys out of the hearing of the jury, either by having a conference at the bench when the jury is present in the courtroom, or by calling a recess. Please understand that while you are waiting, we are working. The purpose of these conferences is not to keep relevant information from you, but to decide how certain evidence is to be treated under the rules of evidence and to avoid confusion and error.

Of course, we will do what we can to keep the number and length of these conferences to a minimum. I may not always grant an attorney’s request for a conference. Do not consider my granting or denying a request for a conference as any indication of my opinion of the case or of what your verdict should be.

Authority: 9th Cir. Model Civil Jury Instruction No. 1.18.

Court Comments: No objection by the parties.

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**JURY INSTRUCTION NO. [12] – OUTLINE OF TRIAL**

Trials proceed in the following way: First, each side may make an opening statement. An opening statement is not evidence. It is simply an outline to help you understand what that party expects the evidence will show. A party is not required to make an opening statement.

The plaintiff will then present evidence, and counsel for the defendant may cross-examine. Then the defendants may present evidence, and counsel for the plaintiff may cross-examine.

After the evidence has been presented, I will instruct you on the law that applies to the case and the attorneys will make closing arguments.

After that, you will go to the jury room to deliberate on your verdict.

Authority: 9th Cir. Model Civil Jury Instruction No. 1.19.

Court Comments: No objection by the parties.



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instruction is not necessary. Furthermore, the Court has amended Instruction No. [30] to make clear  
unanimity is required as to each claim.

VIOLATION OF RULE 10b-5

**JURY INSTRUCTION NO. [34] – RULE 10b-5 CLAIM – ESSENTIAL ELEMENTS**

A “10b-5 claim” is a claim brought under a federal statute, Section 10(b) of the Exchange Act, which in essence prohibits acts of deception in connection with the purchase or sale of a security and in violation of rules and regulations that the SEC has the duty and power to issue. A corresponding SEC Rule, Rule 10b-5, prohibits the misrepresentation of material facts and the omission of material facts in connection with the purchase or sale of securities. A person or business entity who violates the securities laws, including Rule 10b-5, may be liable for the violation.

The SEC alleges that the defendant violated Rule 10b-5 by participating in a scheme to defraud shareholders of Embarcadero and making, or helping others make, material misrepresentations and omissions of fact regarding how Embarcadero granted and accounted for employee stock options.

On this claim, the SEC has the burden of proving each of the following elements by a preponderance of the evidence:

1. The defendant did any of the following things in connection with the purchase or sale of securities: (a) employed a device, scheme or artifice to defraud; or (b) made an untrue statement of a material fact; or omitted a material fact necessary under the circumstances to keep the statements that were made from being misleading; or (c) engaged in an act, practice or course of business that operated as a fraud or deceit;
2. The defendant acted knowingly or recklessly; and
3. The defendant used or caused the use of an instrumentality of interstate commerce, such as mail or telephone facility of a national securities exchange in connection with the purchase or sale of securities, regardless whether the instrumentality or facility itself was used to make an untrue statement or a material omission. In connection with means that there was some nexus or relationship between the allegedly fraudulent conduct and the sale or purchase of the securities.

1           If you find that the SEC has proved all of the above elements, your verdict should be for the  
2 SEC. If, on the other hand, you find that the SEC has failed to prove one or more of these  
3 elements, your verdict should be for the defendant.

4  
5 Authority: 9th Cir. Model Civil Jury Instruction No. 18.0 (modified); 9th Cir. Model Civil Jury  
6 Instruction No. 18.1 (modified).

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8 **Court Comments: As noted above with respect to Instruction No. [33], the Court has included a**  
9 **definition of the phrase “in connection with.”**

10           **In addition, the Court has decided to include the phrase “or recklessly” as the parties had**  
11 **originally proposed in their joint proposed jury instructions. See Docket No. 159 (joint proposed**  
12 **jury instructions). The Court has made this decision based on its conclusion that, for the relevant**  
13 **period, the aiding and abetting claims require actual knowledge and not mere recklessness.**

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**JURY INSTRUCTION NO. [27] – STIPULATIONS OF FACT**

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2 The parties have agreed to certain facts that will be read to you. You should therefore treat  
3 these facts as having been proved.

4 1. Defendant Michael C. Pattison served as Embarcadero’s controller from  
5 approximately January 2000 through July 2005. The defendant is a certified public accountant.

6 2. Embarcadero is a corporation located in San Francisco, California, that makes  
7 software. From approximately April 2000 through June 25, 2007, Embarcadero was a “public  
8 company,” meaning that its common stock was registered with the SEC and was publicly traded on  
9 the NASDAQ National Market, also called the NASDAQ Global Market. In June 2007, the  
10 company was acquired by private investors.

11 3. Exhibit 653 describes, for each date that Embarcadero’s stock was traded when it was  
12 a public company, the stock’s closing prices. A “closing price” is the last price reported on an  
13 exchange (in this case, the NASDAQ) as a sales price in a transaction for the purchase and sale of  
14 shares of stock.

15 4. From approximately June 2000 through January 2007, Stephen R. Wong, a  
16 co-founder of Embarcadero, served as its chief executive officer (or “CEO”). Also, from January  
17 2000 through October 2005, Raj P. Sabhlok served as Embarcadero’s chief financial officer (or  
18 “CFO”).

19 5. As a public company, Embarcadero made quarterly and annual reports to  
20 shareholders  
21 about its financial condition on certain forms.

22 6. Embarcadero filed three quarterly reports to shareholders each year on a form called a  
23 “Form 10-Q.” The first quarterly period each year covered the three months that ended March 31;  
24 the second covered the three months that ended June 30; and the third covered the three months that  
25 ended September 30. Embarcadero’s fiscal year ended on December 31. Instead of filing a fourth  
26 quarterly report, Embarcadero included information about the last three months of every year in its  
27 annual reports.  
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1           7.       Embarcadero’s annual reports to shareholders were filed on a form called a “Form  
2 10-K.”

3           8.       From late 2000 through the third quarter of 2004, Embarcadero regularly granted  
4 stock options to its employees and executives as a form of compensation.

5           9.       Each stock option gave the person granted the option the right to buy Embarcadero’s  
6 common stock in the future from Embarcadero at a set price, called the “exercise” price or the  
7 “strike” price.

8           10.      The stock options Embarcadero granted had terms describing when the employee  
9 could exercise the option by paying the exercise price, and when the option would expire if  
10 the employee did not exercise it. Those terms were called the vesting schedule. At Embarcadero,  
11 employee stock options generally vested over a four-year period and employees could not exercise  
12 stock options for at least one year from the grant date.

13           11.      In approximately October 2000, Embarcadero’s Compensation Committee authorized  
14 the CEO, Mr. Wong, to grant options to employees who were not officers or directors of  
15 Embarcadero.

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17 Authority: 9th Cir. Model Civil Jury Instruction No. 2.2.

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19 **Court Comments: The Court has included as part of this instruction the facts that the parties**  
20 **stipulated to in their Joint Proposed Pretrial Order (located at Docket No. 161).**

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**JURY INSTRUCTION NO. [9] – CONDUCT OF THE JURY**

I will now say a few words about your conduct as jurors.

First, keep an open mind throughout the trial, and do not decide what the verdict should be until you and your fellow jurors have completed your deliberations at the end of the case.

Second, because you must decide this case based only on the evidence received in the case and on my instructions as to the law that applies, you must not be exposed to any other information about the case or to the issues it involves during the course of your jury duty. Thus, until the end of the case or unless I tell you otherwise:

Do not communicate with anyone in any way and do not let anyone else communicate with you in any way about the merits of the case or anything to do with it. This includes discussing the case in person, in writing, by phone or electronic means, via e-mail, text messaging, or any Internet chat room, blog, Web site or other feature. This applies to communicating with your fellow jurors until I give you the case for deliberation, and it applies to communicating with everyone else including your family members, your employer, and the people involved in the trial, although you may notify your family and your employer that you have been seated as a juror in the case. But, if you are asked or approached in any way about your jury service or anything about this case, you must respond that you have been ordered not to discuss the matter and to report the contact to the court.

Because you will receive all the evidence and legal instruction you properly may consider to return a verdict: do not read, watch, or listen to any news or media accounts or commentary about the case or anything to do with it; do not do any research, such as consulting dictionaries, searching the Internet or using other reference materials; and do not make any investigation or in any other way try to learn about the case on your own.

The law requires these restrictions to ensure the parties have a fair trial based on the same evidence that each party has had an opportunity to address. A juror who violates these restrictions

1 jeopardizes the fairness of these proceedings[, and a mistrial could result that would require the  
2 entire trial process to start over]. If any juror is exposed to any outside information, please notify  
3 the court immediately.

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5 Authority: 9th Cir. Model Jury Instruction No. 1.12.

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7 Court Comments: No objection by the parties.

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