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NORTHERN DISTRICT OF CALIFORNIA

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10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA
12 SAN FRANCISCO DIVISION

13
14 SECURITIES AND EXCHANGE COMMISSION,
15 Plaintiff,
16 v.
17 STEPHEN R. WONG
18 Defendant.

Case No. **08** **4239**

COMPLAINT

CW

19 Plaintiff Securities and Exchange Commission (the "Commission") alleges:

20
21 **SUMMARY OF THE ACTION**

22 1. From late 2000 to 2004, Stephen R. Wong ("Wong"), the former Chairman, President
23 and Chief Executive Officer of Embarcadero Technologies, Inc. ("Embarcadero" or the "Company"),
24 a San Francisco software company, fraudulently hid several million dollars in employee
25 compensation and significantly overstated the Company's income by routinely backdating stock
26 option grants to dates when the Company's stock was trading at or near quarterly lows.

27 2. Under well-settled accounting principles in effect throughout the relevant period,
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1 Embarcadero did not need to record an expense for options granted to employees at the current day's
2 market price ("at-the-money") while the Company *was* required to record an expense in its financial
3 statements for any options granted below the current market price ("in-the-money").

4 3. Wong made material misstatements about the Company's financial condition and stock
5 option practices in Embarcadero's public filings. In 2002, as a result of the fraud, Embarcadero
6 understated its net losses by over 530%. Moreover, the backdating scheme caused the Company to
7 falsely report that it was profitable in periods that it was actually operating at a loss.

8 4. From late 2000 through 2004, Embarcadero granted options to employees with exercise
9 prices below the current market price, but failed to record the compensation expenses for these
10 options. Rather, Wong and others hid the fact these options were made in-the-money by falsely
11 backdating the grants to make them appear to have been granted on earlier dates when Embarcadero's
12 stock was trading at or near the lowest prices of the quarter.

13 5. By engaging in the acts alleged in this Complaint, the defendant, among other things,
14 violated the antifraud provisions of the federal securities laws, falsified books and records, lied to
15 Embarcadero's accountants, and caused Embarcadero to falsely report its financial results. The
16 Commission seeks an order enjoining Wong from future violations of the securities laws, requiring
17 Wong to pay a civil monetary penalty, barring him from serving as an officer or director of a public
18 company, and providing other appropriate relief.

19 **JURISDICTION, VENUE, AND INTRADISTRICT ASSIGNMENT**

20 6. The Commission brings this action pursuant to Sections 20(b) and 20(d) of the Securities
21 Act of 1933 ("Securities Act") [15 U.S.C. §§ 77t(b) and 77t(d)] and Sections 21(d) and 21(e) of the
22 Securities Exchange Act of 1934 ("Exchange Act") [15 U.S.C. §§ 78u(d) and 78u(e)].

23 7. This Court has jurisdiction over this action pursuant to Sections 20(b) and 22(a) of the
24 Securities Act [15 U.S.C. §§ 77t(b) and 77v(a)] and Sections 21(d), 21(e), and 27 of the Exchange
25 Act [15 U.S.C. §§ 78u(d), 78u(e), and 78aa].
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1 8. Venue is proper in this district pursuant to Section 22 of the Securities Act [15 U.S.C. §
2 77v] and Section 27 of the Exchange Act [15 U.S.C. § 78aa]. Acts and transactions constituting
3 violations of the federal securities laws occurred in this district.

4 9. Assignment to the San Francisco Division is appropriate pursuant to Civil Local Rules 3-
5 2(c) and 3-2(d) because a substantial part of the events and omissions giving rise to the Commission's
6 claims occurred, among other places, in San Francisco County.

7 **DEFENDANT**

8 10. Stephen R. Wong, age 48, co-founded Embarcadero in 1993. He served as
9 Embarcadero's Chairman of the Board from 1993 until 2007, and Chief Executive Officer from July
10 1993 to October 1999 and from June 2000 to January 2007. Wong also served as Embarcadero's
11 President from June 2000 until January 2007. Prior to co-founding Embarcadero, Wong was a
12 partner at a San Francisco venture capital firm.

13 **RELEVANT ENTITY**

14 11. Embarcadero Technologies, Inc. is a Delaware corporation headquartered in San
15 Francisco, California. Embarcadero develops database management software. From its initial public
16 offering in April 2000 until June 25, 2007, Embarcadero's common stock was registered under
17 Section 12 of the Exchange Act and was publicly traded on the NASDAQ National Market (or
18 NASDAQ Global Market) under the symbol "EMBT." At all times relevant to this action,
19 Embarcadero's fiscal year ended on December 31. On or around June 2007, the Company was
20 acquired by a private firm and is currently privately-held.

21 **FACTUAL ALLEGATIONS**

22 **A. Embarcadero's Disclosures Regarding Its Stock Option Practices.**

23 12. From late 2000 to 2004, Embarcadero regularly granted stock options to its employees
24 and officers as a form of compensation to recruit, retain, and incentivize them. The Company granted
25 options as new employees and executives were hired, and as retention compensation. Each option
26 gave the grantee the right to buy Embarcadero's common stock from the Company at a set price,
27 called the "exercise" or "strike" price. The option was "at-the-money" when granted if the then-
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1 current fair market value of the stock and the exercise price were the same. The option was “in-the-
2 money” when granted (and more valuable to the grantee) if the then-current fair market value of
3 Embarcadero’s stock exceeded the option’s exercise price.

4 13. As a public company, Embarcadero made disclosures to shareholders about its stock
5 option practices in periodic reports filed with the Commission. Embarcadero’s public disclosures
6 from 2000 to 2004 stated that the Company followed an accounting principle that required it to record
7 compensation expenses for any in-the-money options. Embarcadero also represented that options
8 granted after the Company’s stock had become publicly traded were granted at-the-money, and
9 therefore the Company recorded no associated compensation expense.

10 14. From 2000 through 2004, Embarcadero reported in its public filings with the
11 Commission that its audited financial statements conformed with generally accepted accounting
12 principles (known as “GAAP”). In its 2000 to 2004 annual reports filed on Forms 10-K (each signed
13 by Wong) and in its 2003 to 2004 quarterly reports on Forms 10-Q (each certified by Wong),
14 Embarcadero stated that it followed the specific GAAP rule known as Accounting Principles Board
15 Opinion No. 25, “Accounting for Stock Issued to Employees” (“APB 25”) in accounting for stock
16 options granted to employees and executives, which required that an expense be recorded on its
17 financial statements for the in-the-money portion of any options granted. No compensation expense
18 needed to be recorded, so long as the option exercise price was not below the closing market price for
19 the Company’s stock on the date of the grant. Consequently, granting in-the-money options could
20 have a significant impact on the Company’s expenses and income (or loss) reported to the
21 shareholders.

22 15. In particular, Embarcadero stated in its 2000 to 2003 annual reports that “[u]nder APB
23 No. 25, compensation expense is based on the difference, if any, on the date of the grant, between the
24 estimated fair value of the Company’s shares and the exercise price of options to purchase that
25 stock.” Similarly, Embarcadero’s 2004 annual report states: “The Company accounts for stock-based
26 compensation using the intrinsic value method in accordance with Accounting Principles Board
27 (APB) Opinion No. 25 and related interpretations, which generally requires that the amount of
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1 compensation cost that must be recognized, if any, is the quoted market price of the stock at the
2 measurement date, which is generally the grant date, less the amount the grantee is required to pay to
3 acquire the stock.”

4 16. Embarcadero’s annual reports state that option grants to its employees and executives
5 were made pursuant to its primary stock option plan. Embarcadero’s public filings represented that
6 the operative stock option plan allowed the granting of in-the-money options. In its annual reports for
7 each of the five years from 2000 to 2004, Embarcadero stated that the effective primary stock option
8 plan required options to be priced at “no less than 100% of the estimated fair value of the shares on
9 the date of the grant as determined by the Board of Directors.” The 2001 to 2003 annual reports
10 further stated that “all stock option grants made during the year were at fair market value, which is
11 defined as the closing share price on the day prior to the option grant date.”

12 17. Similarly, Embarcadero’s proxy statements announcing the annual meetings with
13 shareholders and filed with the Commission from 2001 to 2005, stated that after the Company’s
14 initial public offering in April 2000 through the end of 2004, all of Embarcadero’s stock options to its
15 “named executive officers” were granted “at an exercise price at least equal to the fair market value of
16 our common stock[.]” In addition, the proxy statements filed with the Commission from 2003 to
17 2005 incorporated the description of the stock option plans from the annual reports.

18 **B. Wong Engaged in a Backdating Scheme to Secretly Grant In-the-Money Options.**

19 18. At the time of its initial public offering in April 2000, Embarcadero’s effective primary
20 stock option plan required that Embarcadero’s board of directors, or a Compensation Committee
21 made up of at least two outside directors, approve stock option grants to the Company’s employees.

22 19. However, in approximately October 2000, the Compensation Committee amended the
23 Company’s stock option plan at Wong’s request to authorize him to grant options to certain
24 employees without having to wait for a meeting of the Compensation Committee. Shortly thereafter,
25 Wong began granting valuable in-the-money options to Embarcadero’s employees. Under Wong’s
26 authorization, from approximately 2000 to 2004 Embarcadero made over 800 option grants,
27 representing over 4 million shares, to Embarcadero’s employees.

1 20. Most of these grants were backdated. For sixteen consecutive quarters, from the fourth
2 quarter 2000 through the third quarter 2004, Embarcadero granted in-the-money employee options,
3 priced at Embarcadero's historically low stock prices for the weeks or even months prior to the day
4 on which the grant was actually made. Wong and others hid this practice by backdating the grant
5 documentation to make it look as if the grants had been made at-the-money on the earlier low-priced
6 date.

7 21. Wong personally selected many of the favorable grant dates based on historical stock
8 prices and he was continually aware that the options were priced with hindsight at or near quarterly
9 lows. Wong ultimately was responsible for approving the backdated stock grants, and he made false
10 records of his approvals by signing documentation bearing false grant dates. These approvals were
11 provided to the auditors in connection with their audits and reviews.

12 22. While Wong approved backdated grants to the CFO and the Controller, he did not
13 personally receive backdated grants.

14 **Examples of Backdated Grants**

15 ***Options With Strike Prices Based on the Fictitious "April 5, 2001" Grant Date***

16 23. On several occasions from April through August 2001, Wong worked with others to
17 backdate stock option grants to employees, representing more than 300,000 shares, claiming that the
18 options had been granted on April 5, 2001. In reality, the April 5, 2001 date was selected with
19 hindsight because Embarcadero's stock price closed at an all time low of approximately \$10.62 per
20 share on the previous day, which remained the lowest closing price through mid-August 2001.

21 24. On around April 10, 2001, when Embarcadero's stock closed at approximately \$17.82
22 per share, Embarcadero's CFO instructed the Company's Controller to grant options for
23 approximately 84,000 shares to approximately 16 employees using a low-priced date in the first week
24 of April. Each of the grants had originally been prepared during Embarcadero's first fiscal quarter of
25 2001, in the calendar period between January 1, 2001 and March 31, 2001. However, Embarcadero
26 did not finalize these grants at the end of the quarter, after Embarcadero's stock price had fallen

1 precipitously from approximately \$45.00 per share on January 1, 2001 to approximately \$16.63 per
2 share on March 31, 2001, and to approximately \$10.62 per share on April 4, 2001.

3 25. On approximately April 10, as Embarcadero was closing the books for the first quarter of
4 2001, the CFO instructed the Controller to “take out the March grants to the first week of April. We
5 should be able to get them around \$10 or \$11.” These options were granted and approved by Wong
6 in emails and in a grant approval summary.

7 26. Throughout the next several months, Wong, with the CFO and the Controller, repeatedly
8 backdated grants to April 5, 2001. One of these grants was an option for 25,000 shares to the CFO.
9 This grant was actually prepared on approximately May 11, 2001, which had a closing price of
10 approximately \$29.97 per share. Wong approved the CFO’s backdated option.

11 27. In a June 2001 email to Wong, the Controller summarized the composition of the
12 backdated April 5, 2001 grants to that point: “The April 5, 2001 grants are comprised of three distinct
13 blocks— 1) Performance grants made in March that were pushed back to April; 2) New hire grants if
14 they were hired in March; and 3) Performance grants (existing employees) that were made in the 2nd
15 Q [that] were deemed to have been made on April 5, 2001 regardless of when the manager requested
16 them[.]”

17 28. April 5 had the lowest corresponding strike price from January and August 2001, and
18 Wong continued to approve backdated “April 5” grants through August (when Embarcadero closed
19 its second quarter books).

20 ***Options With Strike Prices Based on the Fictitious “August 13, 2004” Grant Date***

21 29. Wong continued to facilitate and authorize the backdating practice through the third
22 quarter of 2004.

23 30. In an October email discussion, shortly following the close of the third quarter,
24 Wong, the CFO, the Controller and the Vice President of Sales, discussed the grants with respect to
25 two recipients. In this email, Wong indicated how fortuitous the grants were, and how he would
26 continue to use hindsight to ensure the best price:
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1 Actually, Bryan and Duncan [two recipients of the August 13, 2004 grants] made out
2 like bandits—because they are not VPs, I have the discretion to make their grants. By
some strange coincidence, this happened at the low price for the quarter (<\$6).

3 Unfortunately, you . . . have to go through a different process, which gets recorded
4 and validated. . . . Let's see how things trade next week before I make the option
grant official.

5 Hope this makes the weekend a bit more pleasant.

6 31. The Vice President's two subordinates referenced in the email both received grants
7 falsely backdated to August 13, 2004.

8 **C. Wong Made False Public Statements and Omissions About Embarcadero's Stock**
9 **Option Grants and Financial Results.**

10 32. As a public company, Embarcadero made public filings with the Commission that
11 included audited financial statements, certified by the Company's outside auditors. As Wong knew,
12 or was reckless in not knowing, Embarcadero was required to record a compensation expense in
13 connection with the backdated, in-the-money option grants but failed to do so in these financial
14 statements. Embarcadero materially understated expenses and overstated net income throughout the
15 period of the backdating scheme. Because the in-the-money options continued to affect the financial
16 statements as employees became eligible to exercise their options, those misstatements continued
17 until 2006.

18 **Embarcadero's Annual Reports**

19 33. Embarcadero filed with the Commission annual reports on Forms 10-K for the fiscal
20 years ended December 31, 2000 (filed March 20, 2001); December 31, 2001 (filed March 26, 2002);
21 December 31, 2002 (filed March 26, 2003); December 31, 2003 (filed March 12, 2004); and
22 December 31, 2004 (filed April 7, 2005) which included audited financial statements. Wong made
23 false statements in these annual reports, by understating Embarcadero's expenses and overstating its
24 net income.

25 34. Embarcadero's Forms 10-K from 2000 to 2004 falsely claim that the Company accounted
26 for its employee stock options under APB 25 and specify that APB 25 requires a compensation
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1 expense based on the difference between a grant's fair value on the date of the grant and the exercise
2 price of the grant.

3 35. Embarcadero's 2000 to 2004 Forms 10-K falsely claim that the Company's policy was to
4 grant stock options at current fair market value on the date of the grant, which the Company defined
5 as the last closing price prior to the grant date. The Form 10-K for 2001 states that all stock options
6 grants made during the year were priced at current fair market value, and the Forms 10-K for 2002
7 and 2003 further specify that all of the Company's post-IPO grants were priced at current fair market
8 value. These statements were false.

9 36. Wong signed Embarcadero's annual reports filed on Forms 10-K for 2000 to 2004. In
10 connection with Embarcadero's 2002 to 2004 annual reports, Wong signed certifications stating,
11 among other things, that he had reviewed the annual reports; that the annual reports fairly presented,
12 in all material aspects, the financial condition and results of operation of the Company; and that the
13 annual reports did not contain any untrue statements of a material fact or omit to state a material fact
14 necessary to make the statements made, in light of the circumstances under which such statements
15 were made, not misleading.

16 **Embarcadero's Quarterly Reports**

17 37. Embarcadero filed with the Commission quarterly reports on Forms 10-Q for the quarters
18 ended March 31, 2001 (filed May 11, 2001); June 30, 2001 (filed August 6, 2001); October 31, 2001
19 (filed on November 9, 2001); March 31, 2002 (filed on May 14, 2002); June 30, 2002 (filed on
20 August 13, 2002); October 31, 2002 (filed on November 8, 2002); March 31, 2003 (filed on May 12,
21 2003); June 30, 2003 (filed on August 11, 2003); October 31, 2003 (filed on November 10, 2003);
22 March 31, 2004 (filed on May 10, 2004); June 30, 2004 (filed on August 9, 2004); and September 30,
23 2004 (filed on January 18, 2005) which contained Embarcadero's quarterly financial statements.
24 Embarcadero also filed amended quarterly reports, Forms "10-Q/A," for the quarters ended March 31,
25 2004 (filed on January 18, 2005) and June 30, 2003 (filed on January 18, 2005). These financial
26 statements were materially false or misleading because Embarcadero failed to record in its quarterly
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1 financial statements compensation expenses associated with the Company's backdated and repriced
2 options.

3 38. For the quarter ended June 30, 2002, Wong certified that the quarterly reports fairly
4 represented Embarcadero's financial condition and results of operation. For the Forms 10-Q and 10-
5 Q/A for quarters ended October 31, 2002; March 31, 2003; June 30, 2003; October 31, 2003; March
6 31, 2004; June 30, 2004; and September 30, 2004 Wong further certified, among other things, that he
7 had reviewed the quarterly reports and that the quarterly reports did not contain any untrue statements
8 of a material fact or omit to state a material fact necessary to make the statements made, in light of the
9 circumstances under which such statements were made, not misleading.

10 **Embarcadero's Earnings Releases and Earnings Calls**

11 39. Wong, with others, caused Embarcadero to make false quarterly earnings releases
12 associated with at least fourth quarter 2002 to fourth quarter 2004. These releases misleadingly
13 omitted stock compensation expenses from their disclosures of the Company's income and/or
14 expenses. Each release was accompanied by a quotation from Wong regarding the Company's
15 financial condition.

16 40. In connection with the quarterly earnings releases for at least fourth quarter 2002 to
17 fourth quarter 2004, Wong participated with others in publicly disclosed "earnings calls" with
18 analysts during which financial results were presented with the falsely understated expenses and
19 overstated income.

20 **Embarcadero's Current Reports**

21 41. In addition, Embarcadero filed with the Commission current reports on Forms 8-K on
22 April 22, 2003; July 24, 2003; October 16, 2003; January 27, 2004; April 20, 2004; and July 20,
23 2004, each of which includes a press release announcing the Company's financial results for the prior
24 quarter. In addition, Embarcadero filed a Form 8-K on January 18, 2005, announcing the Company's
25 financial results for the quarter ended September 30, 2004. These reports contained materially false
26 and misleading financial information because Embarcadero failed to record compensation expenses
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1 associated with undisclosed grants of in-the-money and repriced stock options. The press releases
2 filed with each report includes a quotation from Wong regarding the Company's financial results.

3 **Embarcadero's Registration Statements**

4 42. Embarcadero also sold securities pursuant to offering documents, including registration
5 statements on Forms S-8. The Forms S-8 incorporated Embarcadero's false and misleading financial
6 statements. Those Forms S-8 were filed with the Commission on August 14, 2003 (incorporating the
7 Form 10-K for the year ended December 31, 2002 and the Forms 10-Q for the quarters ended March
8 31, 2003 and June 30, 2003); August 5, 2004 (incorporating the Form 10-K for the year ended
9 December 31, 2003; the Form 10-Q for the quarter ended March 31, 2004; and the Forms 8-K filed
10 on January 27, 2004; April 20, 2004; and July 20, 2004); and November 14, 2005 (incorporating the
11 Form 10-K for the year ended December 31, 2004). Wong signed each of these Forms S-8.

12 **Embarcadero's Proxy Statements**

13 43. Embarcadero filed proxy statements on April 27, 2001; April 26, 2002; April 23, 2003;
14 April 29, 2004; and June 1, 2005. Wong reviewed the proxy statements and, as Chairman of the
15 Company's Board of Directors, signed the introductory letters to each of the proxy statements. Wong
16 and the CFO were appointed as substitute representatives for certain shareholders at the proxy
17 meetings associated with these statements. Embarcadero's proxy statements (which were sent to
18 shareholders and filed with the Commission) made materially false representations about
19 Embarcadero's stock option grants.

20 44. The April 26, 2002 proxy statement falsely states that the CFO's "April 5, 2001" and
21 "October 2, 2001" stock option grants (which were actually backdated) were priced at fair market
22 value, based on the last closing price before the grant date.

23 45. The April 23, 2003 and April 29, 2004 proxy statements incorporate "Note 10" from the
24 previous year's Forms 10-K, which falsely states that, following Embarcadero's initial public
25 offering, Embarcadero's stock option grants were priced at the last closing price prior to the grant
26 date. The June 1, 2005 statement likewise incorporates the section of Embarcadero's 2004 Form 10-
27 K/A that falsely states that Embarcadero grants stock options at the fair value on the grant date.

1 46. Like the company's other public misstatements, the misrepresentations in the proxy
2 statements regarding Embarcadero's financial performance and stock option practices were material
3 and were important to the relevant shareholder votes. This is particularly true for the votes associated
4 with the 2003 and 2004 proxy statements, which sought approval of new stock option plans.

5 47. Wong knew, or was reckless in not knowing, that Embarcadero did not properly account
6 for its resulting stock option compensation expenses in its publicly disclosed financial statements and
7 in its financial reports included in Embarcadero's public filings and other public disclosures described
8 herein. Wong also knew, or was reckless in not knowing, that Embarcadero did not accurately
9 describe its stock option grants in its public filings and other public disclosures.

10 **D. Wong Knew or Was Reckless in not Knowing the Wrongfulness of the Backdating**
11 **Scheme.**

12 48. Wong knew or was reckless in not knowing that the failure to properly disclose
13 Embarcadero's in-the-money grants or the compensation expenses associated with these grants was
14 misleading, as demonstrated throughout this Complaint by the mechanics of the backdating practice
15 and in particular by the use of false documentation to facilitate the fraud.

16 49. In addition, Wong was advised of the proper method of dating stock option grants. For
17 example, during the relevant period, Embarcadero's outside counsel repeatedly advised Wong that
18 option grants must be priced according to the approval date, or, in the case of new-hires, the later of
19 the approval date or the date of hire.

20 50. Moreover, Wong knew or was reckless in not knowing that awarding in-the-money
21 options would result in a compensation expense that must be reported under the accounting rules.
22 Specifically, Wong had a familiarity with the GAAP rules, including APB 25, which required the
23 reporting of a compensation expense for in-the-money options. In fact, Wong revisited these
24 accounting concepts at least once a year. Embarcadero's own annual reports articulate the expense
25 requirements under APB 25 (and falsely claim that the Company abides by them). Wong signed each
26 of these public filings.

1 **E. Wong Misled Embarcadero's Financial and Legal Gatekeepers into Believing that**
2 **the Embarcadero's Grants Were Properly Dated.**

3 51. Wong circumvented Embarcadero's internal controls to create false grant documentation
4 to make it appear as though Embarcadero was not required to record an expense for its in-the-money
5 options. As Wong knew, or was reckless in not knowing, the grant documentation, which contained
6 false grant dates, was provided to the Company's external auditors in connection with the audits and
7 reviews of Embarcadero's financial statements from at least 2000 to 2004.

8 52. Throughout the period of the backdating, in connection with annual audits and quarterly
9 reviews of Embarcadero's financial statements by the Company's outside auditors, Wong signed
10 management representation letters with false representations. Among these false representations
11 were (1) that Embarcadero's financial statements adhered to Generally Accepted Accounting
12 Principles; (2) that Wong had provided to the auditors all financial records and related data; (3) that
13 Wong acknowledged his responsibility for the design and implementation of controls to detect and
14 prevent fraud and there were no significant deficiencies in these internal controls; and (4) that there
15 were no instances of fraud involving management or material transactions that had not been properly
16 recorded.

17 53. In or around July 2006, Embarcadero's Audit Committee asked the Company's
18 management to investigate Embarcadero's historical stock option granting practices. The purpose of
19 the investigation was to determine whether the Company had ever backdated any stock option grants.
20 This internal investigation was led by two accountants at Embarcadero, and both Wong and the CFO
21 participated in the internal investigation.

22 54. The results of the internal investigation were ultimately memorialized in a November
23 2006 memorandum, titled "Stock Option Back-Dating Testing Memo."

24 55. Wong failed to disclose his past backdating practices to the Company's accountants. As
25 Wong was aware, Embarcadero's accountants were relying on the false grant documentation to test
26 the validity of the grants. Yet, Wong never told anyone involved with the internal investigation that
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1 the dates were false or that the grants were priced with hindsight. In particular, Wong gave support
2 for the validity of the purported "April 5, 2001" grant, which he knew had been backdated.

3 56. Based in part on the misleading information provided by Wong, the Stock Option Back-
4 Dating Testing Memo erroneously found that the Company's stock option grants had "appropriate
5 approval and measurement dates," with the exception of the facts that Embarcadero had exceeded its
6 quarterly cap on the number of options granted, and that a single, immaterial grant had been misdated
7 by around a week.

8 57. In multiple communications with internal accountants, Wong expressed his approval of
9 the Stock Option Back-Dating Testing Memo and he never disagreed with any of the findings of the
10 memorandum. Wong knew that the memorandum was being sent to Embarcadero's external auditors,
11 its Audit Committee, and its outside counsel, and Wong was present for a related presentation of the
12 internal investigation at an October 2006 Audit Committee meeting. At this time Embarcadero was
13 in negotiations to be acquired by a private company, and Wong also sent the memorandum to the
14 potential buyer of the Company.

15 **F. Subsequent Events.**

16 58. After considering the Stock Option Back-Dating Testing Memo, Embarcadero's Audit
17 Committee believed that additional inquiry was necessary to explain some of the fortuitous grant
18 dates. Accordingly, in November 2006, the Audit Committee retained outside legal counsel and
19 accounting advisors to assist in an independent review of two suspiciously timed grant dates,
20 including the "April 5, 2001" grant. Before the end of November 2006, the Company announced that
21 the Audit Committee had discovered evidence of backdating from 2000 to 2005 and that it was
22 expanding the scope of its investigation to cover this period. In December, the Company's Board
23 formed an independent Special Committee to complete the investigation of the Company's options
24 practices.

25 59. In or around January 2007, Wong resigned from all positions at the Company.

26 60. In November 2006, following the engagement of Audit Committee counsel, Embarcadero
27 told the potential buyer of the Company of the possible past stock option backdating. Following this
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1 disclosure, the private firm backed out of the acquisition deal in late 2006. The parties reentered
2 negotiations in 2007, and in June 2007, the parties finalized the sale of Embarcadero at a substantially
3 discounted price.

4 61. Embarcadero ultimately restated its past financial statements in its 2006 Form 10-K, filed
5 on May 24, 2007. Embarcadero adjusted its stock compensation expense to reflect the proper
6 accounting for its backdated in-the-money options, claiming a net understated compensation expense
7 of approximately \$14.6 million.

8 62. In the 2006 Form 10-K, Embarcadero conceded that it had failed to maintain effective
9 controls necessary to “maintain an appropriate level of management integrity” and that this failure
10 resulted in the incorrect accounting of its stock-based compensation that precipitated the restatement.

11 **FIRST CLAIM FOR RELIEF**

12 *(Violations of Exchange Act Section 10(b) and Rule 10b-5 Thereunder)*

13 63. The Commission realleges and incorporates by reference paragraphs 1 through 62

14 64. By engaging in the conduct described above, Wong, directly or indirectly, in connection
15 with the purchase or sale of securities, by the use of means or instrumentalities of interstate
16 commerce, or the mails, with scienter:

- 17 a. Employed devices, schemes, or artifices to defraud;
- 18 b. Made untrue statements of material facts or omitted to state material facts
19 necessary in order to make the statements made, in the light of the circumstances
20 under which they were made, not misleading; and
- 21 c. Engaged in acts, practices, or courses of business which operated or would operate
22 as a fraud or deceit upon other persons, including purchasers and sellers of
23 securities.

24 65. By reason of the foregoing, Wong violated and, unless restrained and enjoined, will
25 continue to violate Section 10(b) of the Exchange Act [15 U.S.C. § 78j(b)] and Rule 10b-5 [17 C.F.R.
26 § 240.10b-5].

SECOND CLAIM FOR RELIEF
(Violations of Securities Act Section 17(a)(1))

66. The Commission realleges and incorporates by reference Paragraphs 1 through 62.

67. By engaging in the conduct described above, Wong, directly or indirectly, in the offer or sale of securities, by use of the means or instruments of transportation or communication in interstate commerce or by use of the mails, with scienter, employed devices, schemes, or artifices to defraud.

68. By reason of the foregoing, Wong violated and, unless restrained and enjoined, will continue to violate Section 17(a)(1) of the Securities Act [15 U.S.C. § 77q(a)].

THIRD CLAIM FOR RELIEF
(False Periodic Reports – Aiding and Abetting Violations of Exchange Act Section 13(a) and Rules 12b-20, 13a-1, 13a-11, and 13a-13 Thereunder)

69. The Commission realleges and incorporates by reference Paragraphs 1 through 62.

70. Based on the conduct alleged above, Embarcadero violated Section 13(a) of the Exchange Act [15 U.S.C. § 78m(a)] and Rules 12b-20, 13a-1, 13a-11, and 13a-13 thereunder [17 C.F.R. §§ 240.12b-20, 240.13a-1, 240.13a-11, and 240.13a-13], which obligate issuers of securities registered pursuant to Section 12 of the Exchange Act [15 U.S.C. § 78l] to file with the Commission accurate periodic reports, including annual, current, and quarterly reports.

71. By engaging in the acts and conduct alleged above, Wong knowingly provided substantial assistance to Embarcadero's filing of materially false and misleading reports with the Commission.

72. By reason of the foregoing, Wong aided and abetted Embarcadero's violations of Section 13(a) of the Exchange Act [15 U.S.C. § 78m(a)] and Rules 12b-20, 13a-1, 13a-11, and 13a-13 [17 C.F.R. §§ 240.12b-20, 240.13a-1, 240.13a-11, and 240.13a-13] thereunder. Unless restrained and enjoined, Wong will continue to aid and abet such violations.

FOURTH CLAIM FOR RELIEF
(False Books and Records – Aiding and Abetting Violations of Exchange Act Section 13(b)(2)(A))

73. The Commission realleges and incorporates by reference Paragraphs 1 through 62.

74. Based on the conduct alleged above, Embarcadero violated Section 13(b)(2)(A) of the Exchange Act [15 U.S.C. § 78m(b)(2)(A)], which obligates issuers of securities registered pursuant to

1 Section 12 of the Exchange Act [15 U.S.C. § 78l] to make and keep books, records, and accounts
2 which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets
3 of the issuer.

4 75. By engaging in the acts and conduct alleged above, Wong knowingly provided substantial
5 assistance to Embarcadero's failure to make and keep books, records, and accounts which, in
6 reasonable detail, accurately and fairly reflect its transactions and dispositions of its assets.

7 76. By reason of the foregoing, Wong aided and abetted violations by Embarcadero of
8 Section 13(b)(2)(A) of the Exchange Act [15 U.S.C. § 78m(b)(2)(A)]. Unless restrained and
9 enjoined, Wong will continue to aid and abet such violations.

10 **FIFTH CLAIM FOR RELIEF**

11 *(Inadequate Internal Accounting Controls—Aiding and Abetting Violations of Section 13(b)(2)(B)
12 of the Exchange Act)*

13 77. The Commission realleges and incorporates by this reference Paragraphs 1 through 62.

14 78. Based on the conduct alleged above, Embarcadero violated Section 13(b)(2)(B) of the
15 Exchange Act [15 U.S.C. § 78m(b)(2)(B)], which obligates issuers of securities registered pursuant to
16 Section 12 of the Exchange Act [15 U.S.C. § 78l] to devise and maintain a sufficient system of
17 internal accounting controls.

18 79. By engaging in the acts and conduct alleged above, Wong knowingly provided substantial
19 assistance to Embarcadero's failure to devise and maintain a sufficient system of internal accounting
20 controls.

21 80. By reason of the foregoing, Wong aided and abetted violations by Embarcadero of
22 Section 13(b)(2)(B) of the Exchange Act [15 U.S.C. § 78m(b)(2)(B)]. Unless restrained and
23 enjoined, Wong will continue to aid and abet such violations.

24 **SIXTH CLAIM FOR RELIEF**

25 *(Falsifying Books and Records or Circumventing Internal Accounting Controls—Violation of Section
26 13(b)(5) of the Exchange Act)*

27 81. The Commission realleges and incorporates by reference Paragraphs 1 through 62.
28

1 82. By the conduct alleged above, Wong violated Section 13(b)(5) of the Exchange Act [15
2 U.S.C. § 78m(b)(5)] which prohibits anyone from knowingly circumventing a system of internal
3 accounting, or knowingly falsifying certain books, records, and accounts.

4 83. Wong violated and, unless restrained and enjoined, will continue to violate Section
5 13(b)(5) of the Exchange Act [15 U.S.C. § 78m(b)(5)].

6 **SEVENTH CLAIM FOR RELIEF**

7 *(Falsifying Books and Records—Violation of Rule 13b2-1 of the Exchange Act)*

8 84. The Commission realleges and incorporates by this reference Paragraphs 1 through 62.

9 85. By engaging in the conduct described above, Wong falsified or caused Embarcadero's
10 books, records, and accounts to be falsified in violation of Rule 13b2-1 under the Exchange Act [17
11 C.F.R. § 240.13b2-1].

12 86. Wong violated and, unless restrained and enjoined, will continue to violate Rule 13b2-1
13 under the Exchange Act [17 C.F.R. § 240.13b2-1].

14 **EIGHTH CLAIM FOR RELIEF**

15 *(False Statements and Omissions to Accountants and Auditors— Violation of Rule 13b2-2)*

16 87. The Commission realleges and incorporates by this reference Paragraphs 1 through 62.

17 88. By engaging in the acts and conduct alleged above, Wong directly or indirectly, made or
18 caused to be made a materially false or misleading statements or omitted to state or caused another
19 person to omit to state, material facts necessary in order to make statements made, in light of the
20 circumstances under which such statements were made, not misleading to an accountant in
21 connection with an audit or examination of the financial statements of Embarcadero required to be
22 made or the preparation or filing of reports required to be filed by Embarcadero with the
23 Commission.

24 89. By reason of the foregoing, Wong violated and, unless restrained and enjoined, will
25 continue to violate Rule 13b2-2 [17 C.F.R. § 240.13b2-2].

NINTH CLAIM FOR RELIEF
(Violations of Rule 13a-14 of the Exchange Act)

90. The Commission realleges and incorporates by this reference Paragraphs 1 through 62.

91. Wong signed false certifications pursuant to Rule 13a-14 of the Exchange Act that were included in Embarcadero's Forms 10-K, as well as its quarterly reports filed on Forms 10-Q.

92. By reason of the foregoing, Wong violated, and unless restrained and enjoined will continue to violate, Exchange Act Rule 13a-14 [17 C.F.R. § 240.13a-14].

TENTH CLAIM FOR RELIEF
(False Proxy Statements—Violations of Section 14(a) of the Exchange Act and Rule 14a-9 Thereunder)

93. The Commission realleges and incorporates by this reference Paragraphs 1 through 62.

94. Based on the conduct alleged above, Wong violated Section 14(a) of the Exchange Act [15 U.S.C. § 78n(a)] and Rule 14a-9 thereunder [17 C.F.R. § 240.14a-9], which prohibit solicitations by means of a proxy statement, form of proxy, notice of meeting, or other communication, written or oral, that contains a statement which, at the time and in the light of the circumstances under which it was made, was false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading or necessary to correct any statement in any earlier communication with respect to the solicitation of a proxy for the same meeting or subject matter which had become false or misleading.

95. By reason of the foregoing, Wong violated Section 14(a) of the Exchange Act [15 U.S.C. § 78n(a)] and Rule 14a-9 [17 C.F.R. § 240.14a-9] thereunder. Unless restrained and enjoined, Wong will continue to violate Section 14(a) of the Exchange Act [15 U.S.C. § 78n(a)] and Rule 14a-9 [17 C.F.R. § 240.14a-9] thereunder.

PRAYER FOR RELIEF

WHEREFORE, the Commission respectfully requests that this Court:

I.

Permanently enjoin Wong from directly or indirectly violating Section 17(a) of the Securities Act [15 U.S.C. § 77q(a)] and Sections 10(b), 13(b)(5), and 14(a) of the Exchange Act [15

1 U.S.C. §§ 78j(b), 78m(b)(5), and 78n(a)], and Rules 10b-5, 13a-14, 13b2-1, 13b2-2, 14a-9 thereunder
2 [17 C.F.R. §§ 240.10b-5, 240.13b2-1, 140.13b2-2, and 240.14a-9], and from aiding and abetting
3 violations of Sections 13(a), 13(b)(2)(A), and 13(b)(2)(B) of the Exchange Act [15 U.S.C. §§ 78m(a),
4 78m(b)(2)(A), and 78m(b)(2)(B)] and Rules 12b-20, 13a-1, 13a-11, and 13a-13 [17 C.F.R. §§
5 240.12b-20, 240.13a-1, 240.13a-11, and 240.13a-13] thereunder.

6 II.

7 Prohibit Wong, pursuant to Section 21(d)(2) of the Exchange Act [15 U.S.C. § 78u(d)(2)],
8 from serving as an officer or director of any entity having a class of securities registered with the
9 Commission pursuant to Section 12 of the Exchange Act [15 U.S.C. § 78l] or that is required to file
10 reports pursuant to Section 15(d) of the Exchange Act [15 U.S.C. § 78o(d)].

11 III.

12 Order Wong to pay a civil penalty pursuant to Section 20(d) of the Securities Act [15 U.S.C. §
13 77t(d)] and Section 21(d) of the Exchange Act [15 U.S.C. § 78u(d)].

14 IV.

15 Retain jurisdiction of this action in accordance with the principles of equity and the Federal
16 Rules of Civil Procedure in order to implement and carry out the terms of all orders and decrees that
17 may be entered, or to entertain any suitable application or motion for additional relief within the
18 jurisdiction of this Court.

19 V.

20 Grant such other and further relief as this Court may determine to be just and necessary.

21
22 DATED: September 9, 2008

Respectfully Submitted,

23
24 

25 Attorney for Plaintiff

26 SECURITIES AND EXCHANGE COMMISSION