SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 51950 / June 30, 2005

ACCOUNTING AND AUDITING ENFORCEMENT
Rel. No. 2271 / June 30, 2005

Admin. Proc. File No. 3-11330

In the Matter of

RITA J. McCONVILLE

OPINION OF THE COMMISSION

CEASE-AND-DESIST PROCEEDING

Grounds for Remedial Action

Antifraud and reporting violations

Corporate officer, who served as chief financial officer and then corporate controller, falsely represented to auditors that corporation's consolidated financial statements were in conformity with generally accepted accounting principles and that no events had occurred within stated period that had a material effect on financial statements or should have been disclosed in order to keep statements from being misleading; made misleading statements and omitted to state facts that would make representations in corporation's annual report not misleading; and failed to see that corporation implemented adequate internal controls, resulting in inaccuracies in corporation's books, records, and accounts, thereby violating and causing the corporation to violate antifraud and reporting provisions of the federal securities laws and rules thereunder. Held, it is in the public interest for respondent to be ordered to cease and desist from committing or causing further antifraud and reporting violations.

APPEARANCES:

Kenton E. Knickmeyer and John S. Kingston, of Thompson Coburn LLP, for Rita J. McConville.

Polly A. Atkinson and Elizabeth E. Krupa, for the Division of Enforcement.

Appeal filed: October 19, 2004
Last brief received: January 18, 2005
Oral argument: May 23, 2005 1/

I.

Rita J. McConville appeals from the decision of an administrative law judge. The law judge found that McConville had significant responsibility for the financial statements in the Form 10-K for the year ended December 31, 2000 (the "2000 Form 10-K") filed by her employer, Akorn, Inc. ("Akorn" or "the Company"), which materially inflated Akorn's accounts receivable, net sales, and assets; caused Akorn to maintain inaccurate books and records; and falsely assured Akorn's auditors that the financial statements in the 2000 Form 10-K complied with Generally Accepted Accounting Principles ("GAAP") and that she did not know of any events that would materially impact those financial statements. 2/ In so doing, the law judge found, McConville violated Sections 10(b) and 13(b)(5) of the Securities Exchange Act of 1934 3/ and Rules 10b-5, 13b2-1 and 13b2-2 thereunder, 4/ and caused Akorn to violate Sections 13(a) and 13(b)(2) of the

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1/ Rule of Practice 451(d), 17 C.F.R. § 201.451(d), provides that a member of the Commission who does not attend an oral argument may participate in the decision of the proceeding if that member reviews the oral argument transcript. Commissioner Glassman, who did not attend the oral argument in this matter, has performed the requisite review.

2/ The Financial Accounting Standards Board promulgates GAAP, which are the "conventions, rules, and procedures that define accepted accounting practice." Barron's Dictionary of Finance and Investment Terms 234-35 (5th ed. 1998). Regulation S-X, 17 C.F.R. § 210.1-02(d), requires that the financial statements of a public corporation must be audited by an accountant in accordance with generally accepted auditing standards. United States v. Arthur Young & Co., 465 U.S. 805, 811 n.6 (1984).

3/ 15 U.S.C. §§ 78j(b), 78m(b)(5).

4/ 17 C.F.R. §§ 240.10b-5, 240.13b2-1, 240.13b2-2.

Exchange Act and Rules 12b-20 and 13a-1 thereunder. 5/ The law judge ordered McConville to cease and desist from violating and causing violations of these provisions, and to pay disgorgement in the amount of $115,858, plus prejudgment interest. We base our findings on an independent review of the record, except with respect to those findings not challenged on appeal.

II.

Background

McConville served as chief financial officer ("CFO") of Akorn from February 28, 1997 until March 20, 2001, when she was succeeded by Kevin M. Harris. 6/ From March 21 to July, 2001, McConville was employed by Akorn as corporate controller. During most of the time in question, McConville reported to Floyd Benjamin, Akorn's president and chief executive officer ("CEO"). As CFO, McConville supervised Akorn's corporate controller and its finance department, and was responsible for working with Deloitte & Touche LLP ("Deloitte"), Akorn's auditors. As CFO, McConville, together with Akorn's controller, Thomas Costello, was responsible for Akorn's filings with the Commission. In its 2000 Form 10-K, filed with the Commission pursuant to Section 13(a) of the Exchange Act, 7/ Akorn reported net income of $2,187,000 in 2000. Akorn reported current assets of $42,123,000 as of December 31, 2000, and accounts receivable of $24,144,000, which amounted to approximately 57% of Akorn's current assets.

At all relevant times, Akorn was a corporation that, among other things, manufactured and sold diagnostic and therapeutic pharmaceuticals. Although Akorn's customers included both pharmaceutical wholesalers and direct or end-use customers, a large portion of its sales were made to wholesale distributors. In 2000, Akorn's sales to five such distributors (the "top five wholesale customers") accounted for 43% of its total sales in 2000 and approximately 60% of its gross accounts receivable as of December 31, 2000.

Akorn's Problems With Tracking Customer Account Status

Both Akorn's computer system and some of its business practices made keeping track of its customer accounts problematic. When McConville arrived at Akorn in 1997, the company

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5/ 15 U.S.C. §§ 78m(a), 78m(b)(2); 17 C.F.R. §§ 240.12b-20, 240.13a-1.

6/ Harris was a respondent in this proceeding. The law judge found that he willfully violated Rule 13b2-2 and that he willfully aided and abetted and caused Akorn's violations of Exchange Act Section 13(a) and Rules 13a-1, 13a-13, and 12b-20. She declined to impose sanctions on Harris. Rita J. McConville, Initial Decision Rel. No. 259 (Sept. 27, 2004), 83 SEC Docket 3325, 3364-73.

7/ 15 U.S.C. § 78m.

billed customers and processed cash remittances and credit claims against invoices at three different finance offices, each of which used a different accounting software system. By late 1999, however, Akorn had centralized its finance, billing, and accounts receivable records on a software program called Macola. Later, primarily during 2000, Akorn shifted many of its records, at all of its locations, onto a J.D. Edwards software package, which allowed more sophisticated information recording. In connection with this transition, Akorn recorded new receivables on the J.D. Edwards software, but did not transfer existing accounts receivable due to concerns that conversion might not preserve the integrity of the data.

Akorn's terms of sale varied among customers, with payment schedules of between 30 and 90 days. Wholesalers generally enjoyed longer payment terms than direct customers. Akorn did not charge interest on overdue bills. Akorn classified its aging reports as current, 30-60 days past due, 60-90 days past due, and over 90 days past due.

Extensive paperwork was involved in keeping track of customer orders and payments. With each shipment to a wholesaler, Akorn issued and sent an invoice. A 25- or 30-page invoice was not uncommon. A customer payment to Akorn was accompanied by a remittance advice of up to 400 lines in length, which explained the payment and asserted claims, where applicable, to a variety of credits. 8/ Akorn was unable to match customer payments or credits to invoice numbers, so it could not post a receipt against a particular invoice. 9/

8/ Kevin Harris, who succeeded McConville as CFO, testified that a 22-page remittance advice would be considered short. The credits, which were available under various terms with varying deadlines, included chargebacks, or credits for the difference between the list price wholesalers were billed for products and the contract price to certain end users who had special contractual arrangements with Akorn, as well as various rebates.

9/ McConville testified that chargebacks, for example, were identified by product batch number, not invoice number, and that the same batch number could appear on 150 or more invoices. Thus, matching a chargeback to an invoice was impossible. Customers did not always use the same numbers Akorn used, which created further problems.

Mario Delgado, a Deloitte auditor involved with Akorn's fiscal year 2000 audit, testified that the Macola system "didn't link together a debit with a credit that may have subsequently been issued or a payment that may have been subsequently received." Delgado explained:

> Typically . . . you would want to link all that together and . . . simply understand what is this customer still owing. So I invoice them $100 and subsequently issued a credit for $10 and a subsequent payment of $90, what you really are concerned about is they owe zero. . . . Most companies do link those three together and just . . . wouldn't show anything for that customer because it's paid off.

Using the Macola software to review the aging of accounts receivable presented particular difficulties. 10/ In Macola as used at Akorn, the age of receivables was determined from when the invoices were issued. The Macola software also kept track of payments, credits, and rebates, based on when they were applied to the account. Akorn used the term "aging" indiscriminately to apply to receivables, payments, credits, and rebates, categorizing them in "buckets" or brackets to indicate how recently the invoice had been issued or the payment, credit, or rebate had been applied. Thus, related items (original invoice, payment, and credit) often appeared in different aging "buckets" depending on the dates of the transactions. 11/ An "aging" report for a single customer, showing all transactions with that customer, by date, could have as many as 4000 lines. Additionally, the Macola system was incapable of handling certain tasks that involved a high volume of transactions without ceasing to function. Thus, a detailed review of the age of accounts receivable in Macola was virtually impossible. 12/

McConville's Awareness Of And Attempts to Address Problems With Tracking Customer Accounts

On February 25, 2000, Deloitte sent a letter to Akorn's board of directors, to which it attached a report prepared in connection with Deloitte's audit of Akorn's financial statements for the year ended December 31, 1999. The report commented on, among other things, Akorn's internal controls. Under the heading "Accounts Receivable," the report noted management's failure to review the accounts receivable in detail, misapplication of credits and payments to

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10/ Although Akorn did not charge interest on overdue bills, the age of receivables was nonetheless important because, as testified by Jack Maire, a consultant brought in to analyze Akorn's receivables, the older a receivable is, the more difficult it becomes to collect it. Moreover, the passage of time sometimes made it difficult for Akorn to produce documentation to prove what it was owed. Nancy Phillips, Akorn's assistant controller from March 1999 to September 2001, testified that proofs of delivery were often unobtainable after nine months to a year and that Akorn "pretty often" lacked documentation to support its assertion of amounts due. Phillips also testified that in her experience, wholesalers in some instances purposely waited to pay until the nine months or year had passed so that proofs of delivery would be unobtainable.

11/ As Delgado explained: "[A]n invoice would typically be issued first and would age based on the invoice date. Subsequent to that a credit might be issued, say, a month later. And subsequent to that a payment might be received, let's say, a month after that. In that scenario the invoice would age one month before the credit which would age one month before the payment. And so you could find yourself in a situation where you could have an invoice . . . in one aging bucket, a credit issued in a subsequent bucket, and a payment issued in a third more recent bucket."

12/ Akorn generated some summary aging reports, but Delgado testified that the reports had "little or no value."

customer accounts, and failure to collect on outstanding balances effectively and efficiently. Deloitte recommended reconciling customer accounts with the customers, starting with the wholesaler accounts. The corresponding section of the report captioned "Management Response," which was drafted in part by McConville, stated that management had begun an effort to reconcile all customer accounts and pursue payment of aged balances, with a goal of "significant collection resolution by June 30, 2000 and complete cleanup by August 31, 2000." This management goal was not met.

Concerns were also expressed at both board and audit committee meetings that as Akorn's sales were growing, more and more receivables were moving into the older aging "buckets," i.e., were remaining uncollected for longer times. At McConville's request, Akorn's controller and its accounts receivable manager analyzed the available data and posited that a major factor for the increase in aging was the increase in percentage of sales to wholesalers, who were allowed more time to pay than Akorn's direct customers. Nonetheless, the aging of receivables remained a management and audit committee concern.

During 2000, Akorn realized approximately 12% of its net sales from Cardinal Health, Inc. ("Cardinal") , and Cardinal's accounts receivable balance represented approximately 22% of gross accounts receivable. This made Cardinal both Akorn's largest customer and the customer with the largest accounts receivable balance. In the fourth quarter of 2000, John Kapoor, chairman of the board of Akorn and a major stockholder, instructed McConville and Benjamin to meet with Cardinal and try to collect some of the money Cardinal owed to Akorn. In February, 2001, when the meeting took place, Akorn's records showed that Cardinal owed it approximately $4 million, based on invoices going back at least as far as 1999. Cardinal's own records showed that the balance was approximately $800,000 in Cardinal's favor, yielding a discrepancy of nearly $5 million. 13/ McConville took with her to the meeting copies of open invoices from various dates, selecting the invoices involving the largest dollar amounts so that resolution would yield the biggest results. 14/ After the meeting, Cardinal sent Akorn a check for approximately $913,000, which it viewed as resolving all open issues from the meeting. 15/ Cardinal informed

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13/ Witnesses explained the discrepancy as due in part to Akorn's practice of booking a receivable as soon as the invoice was issued, while Cardinal forwarded the invoices it received to its distribution centers for verification before submitting them for processing, thus occasioning some delay. Moreover, Cardinal did not record the invoice as a payable until it was due, as much as 90 days later. Additionally, McConville testified that some of the invoices shown on Akorn's records did not appear on Cardinal's records.

14/ McConville testified that she believed she took only invoices for more than $10,000. Other evidence suggests that the invoices were for more than $50,000.

15/ In an e-mail following up on the meeting, Cardinal stated that it had been unable to research some of the 1999 invoices, but that those "accounted for immaterial amounts

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Akorn that, having sent the $913,000 check, it regarded itself as in a credit position vis-a-vis Akorn.

Although Cardinal thought the issues raised by the meeting had been resolved, Akorn believed that many issues were still outstanding. A March 15, 2001 letter from Benjamin to Cardinal stated that there was still a discrepancy of more than $5 million to be reconciled between the Akorn records and the Cardinal records, opining that the $913,000 check represented only resolution of certain individual open invoices and there were still smaller open invoices to reconcile, as well as issues involving rebates. 16/

Despite the uncertainty of the situation, McConville told Deloitte that Cardinal had agreed to send Akorn a $913,000 check, and that indications were positive in terms of receivables. 17/ McConville also told Deloitte that there was little past due money owing from wholesalers because most of the old bills were offset by more recent credits.

At around the time of McConville's and Benjamin's meeting with Cardinal, Kapoor received a telephone call from The Northern Trust Company ("Northern Trust"), with which Akorn had a banking relationship, raising questions about Akorn's financial condition and requesting that Kapoor make an additional equity investment in Akorn of $3 million. 18/ Kapoor promptly arranged to meet with Akorn management and its board of directors. In a memorandum dated March 7, 2001, Kapoor assigned McConville and Harris to work with Jack Maire, a consultant brought in by Kapoor, on a thorough analysis of Akorn's accounts receivable and to submit a report discussing any potential write-offs of the receivables by the end of March.

The Maire Report

By mid-March, 2001, Maire concluded that Akorn's need for a quick infusion of cash could not be satisfied by collecting past due receivables. In a draft memorandum to Kapoor,

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15/ (...continued)
relative to the other invoices."

16/ Although it is unclear from the record that McConville saw Benjamin's March 15 letter, she clearly knew that there was a $5 million discrepancy between Akorn's and Cardinal's accounting prior to the payment of the $913,000 check.

17/ The record is unclear as to when McConville told Deloitte about the $913,000 check. Delgado testified that he received assurances "throughout our audit [that] things were positive and the conversations indicated that collections were reasonable."

18/ It is unclear from the record whether Akorn had defaulted on an existing loan or whether the bank insisted on the additional investment as a condition of extending or renewing a line of credit.

Maire concluded that "**there are no quick fixes available**" (emphasis in original). 19/ Maire indicated that, due to the scope and complexity of the receivables problem, he was unable at that time to provide an assessment of what was collectible and what the magnitude of write-offs might be. He concluded that "a determination on the collectibility will require a substantial amount of time (months) and work."

Maire recognized that, because Akorn's accounts receivable were concentrated among its top five wholesale customers, it might appear "that it should be relatively easy to collect on those five accounts and achieve the quick infusion of cash that we are looking for." His analysis, however, revealed that this was not the case:

> **[T]he wholesaler accounts have never been worked**. We are talking about an accumulation of problems over a 3 or 4 year period. This provides us with a legacy of pages and pages of A/R reports on each of those five accounts, consisting of a maze of transactions including: open invoices, partially paid invoices, billbacks, credits for return goods, credits for damaged goods, credits for shipments not received, credits for billing errors, rebate credits, chargeback credits, deductions taken arbitrarily by the wholesaler, situations where the wholesaler used credits multiple times, and unapplied cash. These transactions go back as far as 1996.

(Emphasis in original). In Maire's view, the failure to have systematically reconciled the accounts receivable "magnifies the task to an incredibly detailed undertaking." 20/ He identified "a wide array of process and system issues that severely complicate matters," including the following:

- The Macola system and the J.D. Edwards system operated simultaneously, with the pre-2001 accounts receivable on Macola. "This duplicates work and complicates matters considerably."

- "No management reports exist that trend sales, cash, A/R aging, reserves, unbilled, or [days sales outstanding]. Therefore, the A/R could not have been properly monitored."

- "A/R aging reports have not been previously printed. The staff has had no way to set collection priorities. Producing a simple aging report in descending dollar sequence proved to be a week-long task to accomplish, and then only with outside consulting help because no one within the building knew how to do it."

19/ McConville testified that she did not see the memorandum while employed at Akorn.

20/ Maire thought that Akorn staff did not have sufficient skills and experience to handle the work.

- "Daily reports need to be published to monitor all facets affecting receivables, including unbilled, chargebacks processing backlogs, cash posting backlogs, and returns good credit processing. If any one of these is failing to be processed timely, the customer will not pay. The wholesaler will go ahead and take a deduction in the absence of a timely credit due him, which only complicates the maze of transactions already on the A/R."

Maire also noted, among other matters, problems with staffing, and stated that "[c]hargebacks may be a problem area."

On March 20, 2001, the board voted to dismiss Benjamin as CEO, making him a vice president of Akorn, and to dismiss McConville as CFO. Kapoor became interim CEO, and Kevin Harris, who had been asked by Kapoor to help address Akorn's financial situation following the telephone call from Northern Trust, was appointed interim CFO. McConville was initially asked to work under Harris's direction on various projects, but shortly thereafter Harris asked her to work with him, Maire, and several other Akorn employees on reconciling the Cardinal account. As of the end of April, 2001, McConville had identified Cardinal receivables totaling nearly $1.5 million from Akorn's aging report that were not included in a report showing amounts due and payable that she had obtained from Cardinal.

McConville's Involvement With The Fiscal Year 2000 Audit

While McConville was working on reconciling the Cardinal account, Deloitte was proceeding with work on its audit of Akorn for the year ended December 31, 2000. As noted above, McConville's responsibilities as CFO had included working with Deloitte auditors as Deloitte performed Akorn's annual audits and quarterly reviews. McConville attended meetings with Deloitte before Deloitte began its field work; at these meetings, Deloitte reviewed the proposed scope of the audit and projected time frames. During the course of the field work, which Deloitte completed on February 23, 2001, McConville was generally available for discussions with Deloitte. She attended the meetings at the end of the field work at which Deloitte discussed its findings. She also attended audit committee meetings, which were held at the end of each quarter.

McConville had begun preparation of Akorn's 2000 Form 10-K while serving as CFO. She wrote a press release, dated February 20, 2001, that announced Akorn's fourth-quarter results and provided year-end net income and sales figures. During February and early March, she reviewed drafts of the 2000 financial statements. 21/ The financial statements included the

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21/ McConville admitted in investigative testimony that she reviewed a draft of the 2000 Form 10-K as CFO. Additionally, McConville's expert witness testified that McConville "performed her normal procedures as a reviewer of the draft financial statements in February" and that "she had seen drafts of the financial statements prior to her demotion"

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numbers for year-end 2000 from the February 20 press release that McConville had authored. By March 20, McConville's last day as CFO, the financial statements to be included in the Form 10-K were largely completed, 22/ and a draft of the Form 10-K had already been prepared. The filing of the Form 10-K was delayed, however, while Akorn sought to resolve the questions raised by The Northern Trust Company.

On approximately April 17, 2001, McConville was asked to sign, and did sign, two management representation letters, as corporate controller, in connection with Deloitte's annual audit of the financial statements filed with the 2000 Form 10-K. The first letter, dated February 23, 2001, stated that it was provided in connection with Deloitte's audit of Akorn's consolidated balance sheets as of December 31, 2000 and 1999, and the related consolidated statements of income, shareholders' equity, and cash flows for each of the three years in the period ended December 31, 2000. The letter represented that, to the best of the knowledge and belief of those signing,

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21/ (...continued)
(from the position of CFO). Although McConville testified at the hearing that she no longer believed that she had reviewed a draft of the financial statements, the record supports the conclusion that she did review a draft. Moreover, the law judge, who had a chance to observe McConville's demeanor at the hearing, cited her denial that she reviewed the Form 10-K as one of a number of instances where McConville was not credible. The credibility determination of an initial fact finder is entitled to considerable weight and deference because it is based on hearing the witnesses' testimony and observing their demeanor. See, e.g., Daniel Joseph Alderman, 52 S.E.C. 366, 368 (1995), aff'd, 104 F.3d 285 (9th Cir. 1997); Jonathan Garrett Ornstein, 51 S.E.C. 135, 137 (1992).

McConville contends that the law judge's determination that she reviewed a draft of the Form 10-K is clearly erroneous "because it has no basis in evidence and is the product of an impermissible inference drawn from Kevin Harris' Answer to the [Order Instituting Proceedings ("OIP)]." This characterization of the law judge's finding is inaccurate. In concluding that McConville reviewed a draft of the Form 10-K, the law judge cited, quoted from, and discussed both McConville's investigative testimony that she believed she had reviewed a draft of the Form 10-K and the testimony of McConville's expert witness, as noted above. The law judge's reference to Harris's Answer was not in connection with her finding that McConville reviewed a draft of the Form 10-K, but rather in connection with her finding that McConville had significant responsibility for it. Based on our de novo review of material in the record other than Harris's Answer, and including the law judge's credibility determination, we find that McConville reviewed a draft of the Form 10-K.

22/ Disclosures regarding Akorn's relationship with The Northern Trust Company were subsequently added.

> (1) The consolidated financial statements . . . are fairly presented in conformity with [GAAP]. . . .
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> (18) Other than those disclosed, no events have occurred subsequent to December 31, 2000 that require consideration as adjustments to or disclosures in the consolidated financial statements.
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> (19) The Company is responsible for determining and maintaining the adequacy of the allowance for doubtful accounts receivable, chargebacks, rebates, returns and cash discounts as well as estimates used to determine such amounts. Management believes the allowances are adequate to absorb currently estimated uncollectible receivables in the account balances.

The second letter, dated April 17, 2001, represented that, to the best of the knowledge and belief of the signers,

> (1) Other than the events described in paragraph 4 of Note G [relating to an April 6, 2001 amendment of the revolving credit agreement with The Northern Trust Co.], there are no events which have occurred subsequent to February 23, 2001 that have a material effect on the financial statements that are in the filing or that should be disclosed in order to keep those statements from being misleading.

On April 17, 2001, Akorn filed the 2000 Form 10-K in which, as noted above, it reported net income of $2,187,000 and current assets of $42,123,000. Akorn's current assets included $24,144,000 of "trade accounts receivable (less allowance for uncollectibles of [$801,000])." 23/ Although sales to the top five wholesaler customers accounted for approximately 60% of Akorn's gross accounts receivable, the allowance for uncollectible accounts did not include any amount related to those customers. Moreover, the Form 10-K did not note any impairment of the receivables. Deloitte understood from McConville and others in Akorn management that the top five wholesaler customers did not present a collection risk because they had both the ability and the intent to pay. In the Independent Auditors' Report, which was included in the Form 10-K, Deloitte repeated the assertion from the February 23, 2001 management representation letter that the consolidated financial statements presented Akorn's financial position fairly, in conformity with GAAP. Deloitte issued an unqualified opinion as to the financials that were part of Akorn's Form 10-K for 2000. 24/

23/ Akorn appears to have used the terms "allowance for uncollectibles" and "allowance for doubtful accounts" interchangeably. As indicated above, the allowance was reflected on the financial statements as a reduction of the accounts receivable balance; it thus directly affected Akorn's total assets.

24/ McConville did not sign the 2000 Form 10-K.

On May 22, 2001, slightly more than a month after filing the Form 10-K, Akorn filed its quarterly report, Form 10-Q, for the quarter ended March 31, 2001. In its Form 10-Q, Akorn increased its allowance for doubtful accounts by $7,520,000. On October 7, 2002, Akorn restated its financial statements for 2000 and 2001 by filing a Form 10-K/A. The Form 10-K/A stated that Akorn "had not adequately considered all of the information available with respect to certain disputed receivables in establishing its allowance for uncollectible accounts as of December 31, 2000," that the $7,520,000 increase in its allowance for doubtful accounts should have been recorded at year end 2000 rather than in the first quarter of 2001, and that the bad debt expense in the 2000 financial statement was understated by a corresponding amount. As a result of these adjustments, Akorn's restated financials for 2000 reported a net loss of $2.4 million, or $0.13 per share.

III.

A. McConville violated Section 10(b) and Rule 10b-5.

Exchange Act Section 10(b) makes it unlawful "for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or the mails, . . . [t]o use or employ, in connection with the purchase or sale of any security . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors." Rule 10b-5 prohibits fraud, misleading statements or omissions, and any act, practice or course of business that operates as a fraud "in connection with the purchase or sale of any security." To establish a violation of Section 10(b) and Rule 10b-5, it must be shown that a person acted with scienter, or "a mental state embracing intent to deceive, manipulate, or defraud." 25/ Reckless behavior satisfies the scienter requirement. 26/

1. Akorn's 2000 Form 10-K contained materially misleading statements and omissions.

The financial statements in Akorn's 2000 Form 10-K overstated Akorn's accounts receivable and current assets because its allowance for doubtful accounts did not include any amounts for Akorn's five largest wholesale customers. Additionally, the balance sheet overstated Akorn's accounts receivable, which represented 57% of Akorn's current assets, by failing to note the likelihood of a loss contingency. 27/

25/ Ernst & Ernst v. Hochfelder, 425 U.S. 185, 193 n.12 (1976).

26/ Id., 425 U.S. at 193 n.12.

27/ We do not base our findings as to McConville's liability on the February 20, 2001 press release, even though the press release contained figures that were incorporated into the

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As noted above, Akorn's current assets as reported in the 2000 Form 10-K included accounts receivable of approximately $24 million, with 60% of its gross accounts receivable attributable to the top five wholesale customers. With a sum of approximately $5 million to be reconciled between Akorn and Cardinal alone, and with ample evidence that Akorn would not be able to collect on the entire amount it believed it was due, the amounts at issue were material. The material overstatements rendered the financial statements materially false and misleading.

The statement in the Form 10-K that the financial statements were prepared in accordance with GAAP was also materially false and misleading. GAAP includes Statement of Financial Accounting Standards Number 5 ("FAS 5"), which deals with accounting for contingencies. Under FAS 5, a loss contingency is defined as "an existing condition, situation, or set of circumstances involving uncertainty as to possible . . . loss . . . to an enterprise that will ultimately be resolved when one or more future events occur or fail to occur." 28/ Collectibility of receivables is given as an example of a loss contingency. 29/ FAS 5, paragraph 8, provides that an estimated loss from a loss contingency must be accrued by a charge to income if two conditions are met:

a. Information available prior to issuance of the financial statements indicates that it is probable that an asset has been impaired or a liability has been incurred at the date of the financial statements. It is implicit in this condition that it must be probable that one or more future events will occur confirming the fact of the loss.

b. The amount of loss can be reasonably estimated. 30/

If information available prior to issuance of the financial statements indicates that it is probable that an asset has been impaired (satisfying paragraph 8(a)), but the amount of the loss cannot be reasonably estimated (as required by paragraph 8(b)), FAS 5 paragraph 10 requires that "disclosure of the contingency shall be made when there is at least a reasonable possibility that a

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27/ (...continued)
2000 Form 10-K. The OIP did not charge misstatements in the press release.

28/ Financial Accounting Standards Board, Original Pronouncements, vol. I, 34 (FAS 5, par. 1) (2003/2004 edition).

29/ Id. (FAS 5, par. 4).

30/ Id., vol. I, 35 (FAS 5, par. 8)

loss . . . may have been incurred." 31/ "Reasonably possible" is defined as meaning that "[t]he chance of the future event or events occurring is more than remote but less than likely." 32/

Information available before the financial statements were issued on April 17, 2001 demonstrated that it was not only reasonably possible, but probable, that Akorn would fail to collect 100% of the receivables from its top five wholesale customers. 33/ Akorn's accounting records as to accounts receivable were in a shambles. Akorn management knew that the receivables were increasingly growing more aged, but it lacked the detailed, accurate reports that would permit a thorough analysis of aging. Akorn was unable to tell which invoices had been paid (or offset by credits), so it could not convincingly demonstrate to its customers what payment was still owed. Because Akorn had not monitored accounts receivable properly for years, it was not able to provide proofs of delivery for some shipments. Akorn knew that reconciling its accounts receivable would be an enormous task. And it knew that the one customer account that it had most thoroughly reviewed, the Cardinal account, still presented significant obstacles to collection, with Cardinal contesting approximately $5 million of the amount Akorn claimed was owing. Thus, even if the amount of loss could not reasonably be estimated by April 17, the likelihood that complete collection would not be possible was sufficiently great that impairment should have been indicated. Because no such impairment was noted, the financial statements were not in accordance with GAAP. 34/ Moreover, the failure to disclose that the receivables were impaired was an omission of a material fact necessary to ensure that the figures in the financial statements were not misleading.

2. McConville is liable for the material misrepresentations and omission in Akorn's 2000 Form 10-K.

McConville, as CFO, (working with Costello as controller) oversaw the drafting of the 2000 Form 10-K, and reviewed a draft of the Form 10-K that was virtually identical to the 2000 Form 10-K that Akorn filed with the Commission, which incorporated the fourth-quarter and year-end results that she included in the February 20, 2001 press release that she authored. She also knew that Akorn's allowance for doubtful, or uncollectible, accounts as reported in the Form

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31/ Id., vol. I, 35-36 (footnote omitted) (FAS 5 par. 10).

32/ Id., vol. I, 34 (FAS 5 par. 3(b)).

33/ FAS 5 states that a future event is "probable" if it is "likely to occur."

34/ McConville argues that she did not have adequate notice that the Division's allegations regarding GAAP violations were based on an omitted disclosure concerning Akorn's chargeback and rebate reserves. Since we do not base our finding on this theory, we need not reach this issue. We note, however, that the OIP is replete with references to Akorn's accounts receivable records, and that the treatment of chargebacks and rebates is an aspect of Akorn's accounts receivable accounting.

10-K did not contain any reserve with respect to Akorn's five largest customers, and that the Form 10-K omitted to disclose any impairment of the accounts receivable. McConville signed the management representation letters reassuring Deloitte that the financial statements were in accordance with GAAP and that, with one exception not relevant here, 35/ no events had occurred subsequent to February 23, 2001 that had a material effect on the financial statements that are in the filing or that should be disclosed in order to keep those statements from being misleading. At the time she signed the letters, McConville knew, or was reckless in not knowing, that the statements in those letters were false, 36/ and that Deloitte would rely on them in issuing the audit opinion that was included in the Form 10-K.

Well before the filing of the Form 10-K on April 17, 2001 McConville knew that Akorn's accounts receivables accounting was in terrible disarray. Akorn's adoption of the Macola and J.D. Edwards software packages happened during McConville's tenure as CFO. She was aware that there were accounts receivable records on each of those systems, and that Macola ran into problems and would not function when processing transactions that involved large volumes of data. She knew that Akorn invoices were lengthy, that remittances were not matched with invoices, and that it was impossible to determine aging patterns accurately. She knew from Deloitte's February 25, 2000 report that Deloitte was concerned about management's failure to review the accounts receivable in detail, misapplication of credits and payments to customer accounts, and failure to collect on outstanding balances effectively and efficiently. She also knew that management had undertaken to achieve "significant collection resolution by June 30, 2000 and complete cleanup by August 31, 2000," and she knew that these goals were not accomplished. McConville further knew that as sales were growing, the distribution of the aging of receivables was getting older, and that during 2000, an increasingly large dollar amount was going uncollected for an increasingly long time. 37/ McConville knew that her February 2001

35/ The subsequent event noted in the April 17 letter was the April 16, 2001 amendment of Akorn's revolving credit agreement with The Northern Trust Company.

36/ The record does not address whether McConville reviewed the draft Form 10-K at the time she signed the representation letters, or at any time after she reviewed the draft that incorporated the erroneous numbers from the February press release. Given the assurances about the financial statements provided in those letters, however, it was at least reckless if McConville did not actually review the documents about which she was making representations.

37/ The law judge found McConville's assertion that she did not remember exactly when Akorn's board became concerned about the increased aging of the receivables not credible, since she was responsible for reporting Akorn's financial results to the board and, in 1999 and 2000, Akorn's accounts receivable were increasing at a much faster rate than sales. McConville also prepared the management response to the concerns about accounts receivable expressed by Deloitte in its February 25, 2000 report to Akorn's

(continued...)

meeting with Cardinal resulted in payment by Cardinal of only $913,745 (at a time when she believed that Cardinal owed Akorn approximately $4 million), that after paying the $913,745 Cardinal considered that it was in a credit position with Akorn, and that Akorn's records were in such disarray that Akorn would be unlikely to be able to provide proofs of delivery to substantiate at least some of the allegedly unpaid invoices.

McConville knew that, in part because of computer problems and the volume of paperwork involved, reconciling the accounts receivable would be a monumental task. Moreover, after her February meeting with Cardinal and Cardinal's response, she knew or was reckless in not knowing that Akorn was not going to be able to collect the entire amount Akorn believed was due from Cardinal and Akorn's other top wholesale customers, and that the failure to collect would adversely impact Akorn's financial statements. Given this knowledge, we find that McConville acted with scienter in connection with her involvement in the preparation and filing of the 2000 Form 10-K. 38/

3. McConville's misstatements and omissions were "in connection with" the purchase or sale of a security, and the misstatements were made by jurisdictional means.

The filing of false or misleading Forms 10-K with the Commission satisfies the requirement that misstatements or omissions be made "in connection with" the purchase or sale

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37/ (...continued)
board. We find that McConville, who attended both board and audit committee meetings, was aware of those concerns well before the 2000 Form 10-K was filed.

38/ McConville argues that the alleged misstatements in the Form 10-K are opinion statements and as such are protected by the "bespeaks caution" doctrine. We assume McConville is relying on the cautionary language contained in Note A to the 2000 Form 10-K, which generally states that the preparation of financial statements requires management to use estimates and assumptions and that actual results could differ materially from estimates. (McConville cites Note G on page 30 of the Form 10-K, but this reference appears to have been an error on her part because Note G, which refers to covenants involved in a revolving credit agreement, is irrelevant to the issues in this case.) The "bespeaks caution" doctrine does not permit a company to avoid Rule 10b-5 liability by the insertion of "boilerplate" cautionary language, like that contained in Note A, into a filing. See, e.g., In re Trump Casino Sec. Litig., 7 F.3d 357, 371-72 (3d Cir. 1993) (boilerplate disclaimer that merely warns that investment has risks will ordinarily be inadequate to prevent misinformation; instead, cautionary statements must be substantive and tailored to specific future projections, estimates, or opinions challenged). Moreover, many of the material misstatements in the Form 10-K are statements of fact rather than opinion, including statements of the Company's annual net sales, net income, and year-end accounts receivable.

of a security. 39/ McConville argues, however, that her involvement in the preparation of the financial statements contained in the Form 10-K was not sufficiently "in connection with" the purchase or sale of a security. McConville argues that statements made to auditors "that might eventually find their way into a document distributed to investors" do not satisfy the "in connection with" requirement.

McConville misperceives the basis of her liability. Her liability under Section 10(b) and Rule 10b-5 is not based on statements to auditors that unexpectedly ended up in documents distributed to investors; it is based on misstatements and omissions in the financial statements contained in the 2000 Form 10-K filed with the Commission, which she was involved in drafting and reviewing. 40/ McConville prepared the press release containing the year-end figures that were included in the financial statements contained in the 2000 Form 10-K. She reviewed a draft of the financial statements as part of the drafting of the 2000 Form 10-K; this draft was virtually identical to the financial statements that were ultimately filed with the Commission. Between March and the April 17 filing of the Form 10-K, her substantial work on the reconciliation of the Cardinal account informed her that a significant portion of Cardinal's receivables would not be collectible. She signed the management representation letters relied on by Deloitte stating that the financial statements were in accordance with GAAP and that no events had transpired that would require adjustments or disclosures in the financial statements. This involvement in the dissemination of false and misleading information to investors was sufficient to satisfy the "in connection with" requirement.

In a similar vein, McConville argues that the violations of Section 10(b) and Rule 10b-5 charged were not established because the record does not show that any of her misleading statements to Deloitte were made by the use of jurisdictional means. However, as discussed above, the misleading statements for purposes of Section 10(b) and Rule 10b-5 are not misstatements to Deloitte, but rather misstatements and omissions in the financial statements contained in the 2000 Form 10-K, which was filed with the Commission by electronic filing,

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39/ See SEC v. Rana Research, Inc., 8 F.3d 1358, 1362 (9th Cir. 1993).

40/ McConville's situation is thus distinguishable from that in Zoelsch v. Arthur Andersen & Co., 824 F.2d 27 (D.C. Cir. 1987) and Wessel v. Buhler, 437 F.2d 279 (9th Cir. 1971), on which she relies.

through telephone lines or otherwise across state lines using interstate commerce. Thus, the requirement of use of jurisdictional means was satisfied. 41/

B. McConville violated Exchange Act Section 13(b)(5) and Rule 13b2-1.

Exchange Act Section 13(b)(5) provides, in relevant part, that "[n]o person shall knowingly circumvent or knowingly fail to implement a system of internal accounting controls or knowingly falsify any book, record, or account" described in Section 13(b)(2). Rule 13b2-1 makes it unlawful for a person, directly or indirectly, to falsify or cause to be falsified any book, record, or account subject to Exchange Act Section 13(b)(2)(A). Scienter is not required for a finding of violation of Rule 13b2-1. 42/

As discussed above, Akorn's internal controls fell far short of what would have been necessary for the preparation of accurate financial statements. McConville's tenure as CFO encompassed the period during which Akorn adopted first the Macola, then the J.D. Edwards software programs. She was well aware of the shortcomings of these programs and of the complexity and difficulty of accurately aging the accounts receivable and reconciling Akorn's accounts receivables records with its customers' accounts payable records. Thus, McConville knew that Akorn did not have a system of internal accounting controls for its accounts receivable necessary for the preparation of accurate financial statements and knowingly failed to implement such a system, in violation of Section 13(b)(5). Moreover, by failing to correct those shortcomings, McConville caused the falsification of Akorn's records, in violation of Rule 13b2-1. 43/

41/ McConville does not deny that numerous cases find liability under Section 10(b) and Rule 10b-5 against persons who did not personally "push the button" to transmit a filing to the Commission. See, e.g., Rana Research, 8 F.3d 1358 (consultant liable under Section 10(b) and Rule 10b-5 for misrepresentations in press release that was transmitted by facsimile by office manager). She contends, however, that those cases do not present a finding of violation by a person who "properly objects" to the failure of proof that he or she used jurisdictional means in the manner prescribed by Section 10(b) and Rule 10b-5. We cannot discern from the opinions in question whether an objection to the use of jurisdictional means was raised during those proceedings. The cases hold that liability attaches against persons whose involvement was comparable to McConville's.

42/ SEC v. McNulty, 137 F.3d 732, 740-41 (2d Cir. 1988).

43/ McConville argues that Section 13(b)(5) is silent as to the quality or characteristics of the system of internal accounting controls required and that the standard required under Section 13(b)(2) is inapplicable. McConville cites no authority, and we are aware of none, for the proposition that the term "internal accounting controls" means one thing in one subsection of the statute and something else in another subsection.

(continued...)

C. McConville caused Akorn to violate Exchange Act Section 13(b)(2).

Exchange Act Section 13(b)(2)(A) requires, among other things, that every issuer of securities registered with the Commission pursuant to Section 12 make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer. Exchange Act Section 13(b)(2)(B) requires, in relevant part, that every such issuer of securities devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that transactions are recorded as necessary to permit preparation of financial statements in accordance with GAAP and to maintain accountability for assets. Scienter need not be shown to establish liability under Section 13(b)(2). 44/

As discussed above, Akorn's accounts receivable records did not accurately show what invoices had been paid or what amounts were still owing on particular invoices and therefore did not accurately and fairly reflect the transactions and disposition of Akorn's assets. The financial statements filed with the 2000 Form 10-K materially overstated Akorn's assets because of the failure to include in the allowance for doubtful accounts anything for the five largest wholesale customer accounts. Additionally, as we have already found, the financial statements in the 2000 Form 10-K were not in accordance with GAAP because they failed to disclose the impairment of the accounts receivable. The inaccuracies in the accounts receivable were due to Akorn's inadequate internal controls, as discussed above. Akorn violated Section 13(b)(2) by failing to keep records that accurately and fairly reflected the transactions and dispositions of its assets, and by failing to devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that transactions were recorded as necessary to permit preparation of financial statements in accordance with GAAP and to maintain accountability for assets.

McConville can be found to have caused Akorn's violations of Section 13(b)(2) if she was responsible for an act or omission that she knew or should have known would contribute to the violation. 45/ As discussed above, McConville knew or was reckless in not knowing that her

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43/ (...continued)
McConville also argues she cannot be found to have falsified any book or record for purposes of Rule 13b2-1 because she made no entries in Akorn's ledgers and did not know how to make entries into Akorn's computerized accounting system. Rule 13b2-1 does not limit liability to those who directly falsify books and records; it allows persons to be held liable for having indirectly falsified, or caused to be falsified, books and records. McConville's failure to implement a system of internal controls to ensure that transactions were properly recorded establishes her violation of the rule.

44/ See McNulty, 137 F.3d at 740-41 (citing authorities).

45/ Exchange Act Section 21C; see Robert M. Fuller, Exchange Act Rel. No. 48406
(continued...)

failure to implement more adequate internal controls would result in inaccuracies in Akorn's books and records, and we thus find that McConville caused Akorn's violations of Section 13(b)(2). 46/

McConville contends that Akorn's books, records, and accounts satisfied Section 13(b)(2)(A) because they did reflect the transactions and dispositions of Akorn's assets "in reasonable detail," as the statute requires. She contends that the evidence does not show any deliberate falsification of accounting entries; she argues that at most, it shows that Akorn's bookkeepers did not fully process remittance advices on as timely a basis as was desirable and that the accounts receivable personnel were less diligent than was desirable in pursuing collections.

We reject McConville's characterization of the evidence. The magnitude of the problem went far beyond the description she offers. As Maire noted, problems with Akorn's accounts receivable had been accumulating over a three- to four-year period, with "pages and pages of A/R reports" on each of the top five wholesaler accounts, consisting of a "maze of transactions" going back as far as 1996. This description is not one of books and records that accurately reflect transactions and disposition of assets "in reasonable detail."

McConville argues that the GAAP violation charged was "wholly unrelated to Akorn's internal accounting controls" because "the propriety of disclosure [of the impairment of receivables] and creation of additional reserves would turn on a judgment call as to whether Akorn's customers would duly pay submitted invoices," a judgment as to which, she contends, internal controls are irrelevant. We disagree. Any "judgment call" that Akorn might make about whether its customers would pay must depend heavily on the quality of the information on which the judgment is based. The quality of that information depended, in turn, on its internal controls. If Akorn did not know how much of which invoices remained unpaid, it was in a poor position to judge how much it was likely to collect. Moreover, the question whether customers could be expected to pay invoices depends in significant part on how well substantiated those invoices

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45/ (...continued)
(Aug. 25, 2003), 80 SEC Docket 3539, 3545, pet. for review denied, No. 03-1334 (D.C. Cir. Apr. 23, 2004); Erik W. Chan, Exchange Act Rel. No. 45693 (Apr. 4, 2002), 77 SEC Docket 851, 859-60. Contrary to McConville's argument, the Division was not required to prove that her conduct was a proximate cause of the violations.

46/ McConville argues that Costello, or persons who reported to Costello, were responsible for the making and keeping of Akorn's books and records and that McConville therefore cannot be held liable for the violations of Section 13(b)(2)(A) charged. But Costello reported to McConville, and McConville testified that she "indirectly . . . was responsible for supervising the day-to-day financial operations of the company." Having taken on these responsibilities, McConville cannot evade the consequences of her failure to fulfill them appropriately.

were. If Akorn could not match payments or credits to invoices in order to prove how much was due, and if it could not produce on demand proof of delivery, then it could not expect customers to pay. Additionally, older invoices may be more difficult to collect. The inadequacy of Akorn's internal controls made it impossible to track the aging of receivables in detail and therefore were not sufficient to provide reasonable assurances that transactions were recorded as necessary to permit preparation of financial statements in accordance with GAAP and to maintain accountability for assets, as required by Section 13(b)(2). 47/

D. McConville violated Rule 13b2-2.

Rule 13b2-2, in relevant part, makes it unlawful for an officer of an issuer to make or cause to be made a materially false or misleading statement to an accountant or omit or cause another person to omit any material information necessary to make the statements made not misleading in connection with an audit of financial statements or reports filed with the Commission. The term "officer" includes a "comptroller or principal accounting officer, and any person routinely performing corresponding functions with respect to any organization whether incorporated or unincorporated." 48/ We have already found that the management representation letters signed by McConville and addressed to Deloitte contained false statements about the conformity of the financial statements with GAAP, the adequacy of the allowance for uncollectible accounts receivable, and the lack of need for further disclosures. We also find that McConville falsely represented to Deloitte that indications were positive in terms of receivables and that there was little past due money owing from wholesalers because most of the old bills

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47/ McConville argues that, if the financial statements in the 2000 Form 10-K did not conform to GAAP because of failure to disclose an impairment of Akorn's receivables, the GAAP violation was "not caused by deficiencies in Akorn's internal controls," but rather "caused by a failure of Akorn's accountants to assure that the potential impact of the shortcomings in Akorn's internal controls was properly disclosed." McConville's argument would recast Section 13(b)(2)(B) as a statute about disclosure and shift the blame to Akorn's auditors. Neither argument is persuasive. Section 13(b)(2)(B) is about the adequacy of internal accounting controls. The conduct of Akorn's auditors is not at issue in this proceeding.

McConville contends that Exchange Act Section 13(b)(2) is “unconstitutionally vague,” citing SEC v. World-Wide Coin Investments, Ltd., 567 F.Supp. 724, 751 (N.D. Ga. 1983), a case that, in relevant part, concerns the applicability of the internal control provisions of Section 13(b)(2)(B). World-Wide Coin does not address whether Section 13(b)(2)(B) is unconstitutionally vague. It simply states that "[a]ny ruling by a court with respect to the applicability of both the accounting provisions and the internal accounting control provisions should be strictly limited to the facts of each case." We have engaged in precisely that type of fact-sensitive analysis here.

48/ Exchange Act Rule 3b-2, 17 C.F.R. § 240.3b-2.

were offset by more recent credits. By making these false representations to Deloitte, McConville violated Rule 13b2-2.

McConville contends that she cannot be liable for the violation of Rule 13b2-2 because at the time of the alleged misstatements she was Akorn's "Corporate Controller," not its "comptroller." The securities laws are to be construed broadly to effectuate their remedial purpose. 49/ "Controller" and "comptroller" may be used interchangeably to describe the position in an agency or organization with oversight responsibilities for the agency's or organization's primary accounting functions. 50/ McConville's responsibilities, insofar as they related to the signing of the management representation letters, were commensurate with those of an officer. 51/

E. McConville caused Akorn to violate Exchange Act Section 13(a) and Rules 13a-1 and 12b-20.

Section 13(a) and Rule 13a-1 require the filing of annual reports with the Commission. The contents of those reports must be complete and accurate. 52/ Rule 12b-20 mandates that periodic reports contain such further material information as may be necessary to make the required statements not misleading. 53/

We have already found that Akorn's 2000 Form 10-K was inaccurate in that the current assets were materially overstated and that the impairment of the receivables should have been, but was not, disclosed. For the reasons set forth in finding that McConville violated Section 10(b), we find that she caused Akorn to violate Section 13(a) and Rules 13a-1 and 12b-20.

49/ See SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180 (1963).

50/ Disclosure Required By Sections 404, 406 and 407 of the Sarbanes-Oxley Act of 2002, Securities Act Rel. No. 8138 (Oct. 22, 2002), 78 S.E.C. Docket 2270, 2273 n.46; see also Albert Glenn Yesner, Initial Decision No. 184 (May 22, 2001), 75 S.E.C. Docket 220, 265 ("[C]ontroller is synonymous with comptroller.").

51/ Albert Glenn Yesner, on which McConville relies, is distinguishable on the facts. While a law judge found that Yesner was not an officer for purposes of Rule 3b-2, Yesner was not a primary contact for his employer's accountants and was not involved in the preparation of filings. Yesner, 75 S.E.C. Docket at 265-66. Moreover, Yesner did not sign any management representations letters, as did McConville.

52/ SEC v. Savoy Indus., Inc., 587 F.2d 1149, 1165 (D.C. Cir. 1978); SEC v. IMC Int'l, Inc., 384 F. Supp. 889, 893 (N.D. Tex.), aff'd mem., 505 F.2d 733 (5th Cir. 1974).

53/ 17 C.F.R. § 240.12b-20. Violations of Section 13(a) or of the Commission's rules thereunder do not require scienter. McNulty, 137 F.3d at 740-41.

F. McConville's procedural arguments are without merit.

McConville makes two related arguments that her due process rights were violated because she did not have adequate notice of the charges against her. First, she argues that the law judge erred in refusing to grant her motion for a more definite statement. Second, she claims that, because the law judge denied her motion to strike evidence and proffered findings relating to Akorn's chargeback and rebate reserves, the Division was able to present evidence outside the scope of the OIP of which she did not have notice. These arguments are without merit.

Our rules require that the OIP set forth the factual and legal basis alleged for the order "in such detail as will permit a specific response thereto." 54/ The OIP must inform the respondent of the charges in enough detail to allow the respondent to prepare a defense, but it need not disclose to the respondent the evidence upon which the Division intends to rely. 55/

The OIP in this proceeding alleged facts regarding McConville's employment at Akorn, her knowledge regarding deficiencies and problems related to Akorn's accounts receivable records, her review of the 2000 Form 10-K, the failure to create a reserve for Akorn's largest customer accounts receivable, her false statements in the management representation letters, her failure to make certain disclosures regarding accounts receivable to Akorn's auditors, the increase in the reserve for doubtful accounts in the 10-Q for the first quarter of 2001, and the statutes and rules violated. The OIP also put McConville on notice that Akorn's accounting for chargebacks and rebates would be an issue in the proceeding. 56/ The OIP thus satisfied the due process requirement that a respondent be given fair notice of the claims lodged and the grounds upon which those claims rest, and the law judge did not err in denying her motion. 57/

McConville makes several additional unsubstantial procedural arguments. For example, McConville argues that, because Commission sanctions are “quasi-criminal,” the Division was

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54/ Rule of Practice 200(b)(3), 17 C.F.R. § 201.200(b)(3).

55/ J. Logan & Co., 38 S.E.C. 827 (1959); Charles M. Weber, 35 S.E.C. 79 (1953). McConville does not dispute that she had access to the Division's investigatory record, which provided information about the evidence on which the Division intended to rely.

56/ See supra note 33.

57/ See, e.g., Jaffee & Co. v. SEC, 446 F.2d 387, 394 (2d Cir. 1971). McConville complains that the law judge denied her motion before considering her reply memorandum. The law judge reconsidered her ruling after considering McConville's reply and the cases cited therein. She then denied McConville's motion. McConville does not identify any prejudice that resulted from the law judge's ruling, and we see none.

required to prove its case by clear and convincing evidence. Under Steadman v. SEC it is well settled that the applicable standard, which we applied here, is preponderance of the evidence. 58/

McConville asserts that the Commission's settled administrative proceeding against Costello, who served as Akorn's controller during much of McConville's tenure as CFO, collaterally estops the Commission from finding that she committed the violations charged because the order in that proceeding found that Costello had significant responsibility for the preparation and contents of Akorn's 2000 Form 10-K. 59/ The doctrine of collateral estoppel protects litigants from relitigating an identical issue with the same party. 60/ The question whether McConville had significant responsibility for preparing the 2000 Form 10-K is not identical to the question whether Costello also had significant responsibility for that document, so it is not being relitigated here. 61/

McConville argues that the amended financial statements for fiscal year 2000 contained in the Form 10-K/A filed by Akorn on October 7, 2002 "represent the only concrete evidence of a quantifiable deficiency in the reserve for doubtful accounts" in Akorn's 2000 Form 10-K, and that "to the extent the Initial Decision suggests that such a quantifiable deficiency existed on April 17, 2001, that suggestion rests on the erroneous admission of prior sworn testimony -- the Form 10-K/A -- representing an official change in Akorn's position into which McConville had no input." She goes on to argue that, insofar as the Form 10-K/A represented prior sworn testimony, its admission was governed by our Rule 235; that the requirements of Rule 235 were not satisfied; and that the admission of the Form 10-K/A therefore "violated McConville's Sixth Amendment rights."

McConville's argument is flawed in many respects. To the extent the law judge made "suggestions," such "suggestions" are now irrelevant in light of our de novo review. 62/ We see

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58/ Steadman v. SEC, 450 U.S. 91, 103 (1980).

59/ Thomas D. Costello, Exchange Act Rel. No. 48906 (Dec. 11, 2003), 81 SEC Docket 3151.

60/ Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326-27 (1979).

61/ McConville argues that the law judge "turned the principle of collateral estoppel on its head" and used the Costello order improperly against her. The import of this argument is unclear, but in any event, our de novo review would cure any error of this nature.

62/ In a further argument of this nature, McConville contends that the law judge relied on facts and arguments not explicitly identified in the Initial Decision. McConville fails to identify any portions of the Initial Decision that the law judge failed to support with

(continued...)

nothing in the Initial Decision that suggests that the law judge based any conclusions on a finding that there was a quantifiable deficiency in the reserve for doubtful accounts as of April 17, 2001. We make no such finding, and we base no conclusion on any such finding. None of the numbers contained in the Form 10-K/A are the basis for any finding against McConville. We do not find that the amount of uncollectible receivables could be quantified by April 17; we find, however, that McConville knew or was reckless in not knowing that it was likely that Akorn would fail to collect a substantial amount of the receivables from the top five wholesale customers. In any event, Rule 235 is irrelevant to the admission of the Form 10-K/A, a filing with the Commission, and compliance with the requirements of Rule 235 is consequently irrelevant. The Sixth Amendment is irrelevant to non-criminal proceedings. 63/

IV.

Exchange Act Section 21C authorizes the Commission, where there is a finding that a person has violated or caused a violation of a provision of the Exchange Act or any rule thereunder, to order such person to cease and desist from committing or causing such violation and any future violation of the same provision or rule. 64/ In determining whether a cease-and-desist order is an appropriate sanction, we look to the risk of future violations and a variety of other factors, including the seriousness of the violation, the isolated or recurrent nature of the violation, whether the violation is recent, the degree of harm to investors or the marketplace resulting from the violation, the respondent's state of mind, the sincerity of assurances against future violations, recognition of the wrongful nature of the conduct, opportunity to commit future

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62/ (...continued)
references to specified facts. But again, any errors of this sort in the Initial Decision are of no consequence since our review is de novo.

63/ McConville argues that the law judge improperly quashed her subpoena requiring the Commission to produce certain materials related to its dealings with Akorn leading to the filing of the Form 10-K/A. As noted above, however, none of the numbers in the Form 10-K/A are the basis for any finding against McConville.

64/ 15 U.S.C. § 78u-3. The law judge ordered McConville to pay disgorgement, based on the salary she received from Akorn in 2000 and 2001. Although we believe that imposing disgorgement of salary is within our authority, as an exercise of discretion, we decline to do so here.

Our resolution of this matter makes it unnecessary to reach the question of McConville's alleged inability to pay disgorgement. McConville submitted a Form D-A, containing personal financial information. We grant her unopposed motion pursuant to Rule of Practice 322(b), 17 C.F.R. § 201.322(b), for a protective order for the financial information contained in this Form, based on our finding that the harm to McConville resulting from disclosure would outweigh the benefits of disclosure.

violations, and remedial function to be served by the cease-and-desist order in the context of any other sanctions sought in the proceeding. 65/ We impose a cease-and-desist order only where we have determined that there is some risk of future violation. 66/

The violations here were significant. McConville was responsible for misrepresentations and omissions in Akorn's Form 10-K, which was filed with the Commission and thus made available to investors. As a result of the deficiencies in Akorn's recordkeeping and internal controls, Akorn's receivables were overstated, no impairment of the receivables was disclosed, and no reserve was created for customer accounts that represented 60% of the receivables. McConville made misrepresentations to Deloitte in the management representation letters to Deloitte, knowing that Deloitte would be basing assumptions on those letters in its work on the 2000 audit. She also made oral misrepresentations to Deloitte about the collectibility of the receivables from the top five wholesale customers.

The deficiencies of Akorn's recordkeeping with regard to accounts receivable was an ongoing problem, not a one-time or limited occurrence. The situation deteriorated for months, if not years, and McConville failed to take adequate action to improve matters. The violations were relatively recent: the deficiencies in internal controls became more pronounced over the years and came to a head in 2000 and early 2001, and McConville signed the management representation letters in 2001, and the 2000 Form 10-K was filed in 2001.

McConville's actions caused harm to investors and the marketplace. Fraudulent misstatements and omissions in financial statements and periodic reports mislead investors who buy or sell stock based on the information contained therein. Moreover, exposure of the fraud results in an erosion of confidence in the marketplace in general. 67/

As we found above, McConville acted with scienter. McConville continues to deny responsibility for the violations charged, and does not acknowledge any wrongdoing on her part. Her primary assurance that she will not commit future violations is based on the fact that the bringing of this proceeding against her has damaged her reputation to such an extent that it is unlikely that she will be hired for a position where she could commit such violations. However,

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65/ KPMG Peat Marwick, 54 S.E.C. 1134, 1192 (2001), reconsideration denied, 74 SEC Docket 1351 (Mar. 8, 2001), pet. for review denied, 289 F.3d 109 (D.C. Cir. 2002).

66/ KPMG Peat Marwick, 54 S.E.C. at 1185. The risk of future violations required to support a cease-and-desist order is significantly less than that required for an injunction. Id. at 1191.

67/ See, e.g., SEC v. Dresser Indus., Inc., 628 F.2d 1368, 1377 (D.C. Cir. 1980) (dissemination of false or misleading information by companies to members of investing public may distort efficient workings of securities markets and injure investors who rely on the accuracy and completeness of company's public disclosures).

merely instituting a proceeding does not preclude future employment in the securities industry. A cease-and-desist order will serve the remedial purpose of encouraging McConville to take her responsibilities more seriously in the future. 68/ We find that the record as a whole, especially the evidence with regard to the seriousness of McConville's violations and her lack of acknowledgement of wrongdoing, establishes a sufficient risk that McConville would commit future violations to warrant imposition of a cease-and-desist order. Based on all of these factors, we find a cease-and-desist order to be in the public interest. 69/

An appropriate order will issue. 70/

By the Commission (Chairman DONALDSON and Commissioners GLASSMAN, GOLDSCHMID, CAMPOS, and ATKINS).

Jonathan G. Katz
Secretary

68/ See McCurdy v. SEC, 396 F.3d 1258, 1265 (D.C. Cir. 2005) (recognizing that order suspending auditor from practice before the Commission for one year had remedial purpose of encouraging more rigorous compliance with generally accepted auditing standards in future).

69/ McConville suggests that under Section 21C of the Exchange Act, the Commission may not enter a cease-and-desist order against McConville because the OIP did not also charge Akorn, the primary violator. McConville argues that Section 21C's use of the singular "*an* order" indicates that cease-and-desist orders are permitted only where such an order also is entered against the primary violator.

The Commission has never construed Section 21C as having such a requirement. See, e.g. Robert M. Fuller, 80 SEC Docket 3539 (entering cease-and-desist order for causing violations of primary violator, where no cease-and-desist order was imposed on primary violator). To the contrary, the language in Section 21C providing that the Commission "may" enter a cease-and-desist order against a primary violator and against a person that is a cause of the violation supports our view that the Commission has the option of entering a cease-and-desist order against an individual who causes a violation without entering the same order against the primary violator.

70/ We have considered all of the parties' contentions. We have rejected or sustained them to the extent that they are inconsistent or in accord with the views expressed in this opinion.

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 51950 / June 30, 2005

ACCOUNTING AND AUDITING ENFORCEMENT
Rel. No. 2271 / June 30, 2005

Admin. Proc. File No. 3-11330

In the Matter of

RITA J. MCCONVILLE

ORDER IMPOSING REMEDIAL SANCTIONS

On the basis of the Commission's opinion issued this day it is

ORDERED that Rita J. McConville cease and desist from committing or causing any violations or future violations of Sections 10(b) and 13(b)(5) of the Securities Exchange Act of 1934 and Rules 10b-5, 13b2-1, and 13b2-2 thereunder, and from causing any violations or future violations of Sections 13(a) and 13(b)(2) of the Securities Exchange Act of 1934 and Rules 12b-20 and 13a-1 thereunder.

By the Commission.

Jonathan G. Katz
Secretary