No. 12-535

In the Supreme Court of the United States

CARL W. JASPER, PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

GEOFFREY F. ARONOW
General Counsel
MICHAEL A. CONLEY
Deputy General Counsel
JACOB H. STILLMAN
Solicitor
DOMINICK V. FREDA
Senior Litigation Counsel
Securities and Exchange Commission
Washington, D.C. 20549

QUESTIONS PRESENTED

1. Whether a periodic report, which was filed with the Securities and Exchange Commission to correct a company's prior financial statements, is admissible pursuant to the business records exception to the hearsay rule, Federal Rule of Evidence 803(6).

2. Whether a defendant has a Seventh Amendment right to have a jury determine the facts supporting restitutionary relief to enforce Section 304 of the Sarbanes-Oxley Act of 2002, 15 U.S.C. 7243.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 1
Argument 9
Conclusion 23

TABLE OF AUTHORITIES

Cases:

Certain Underwriters at Lloyd's, London v. *Sinkovich*, 232 F.3d 200 (4th Cir. 2000) 14
Chauffeurs, Teamsters and Helpers Local No. 391 v. *Terry*, 494 U.S. 558 (1990) 17
Curtis v. *Loether*, 415 U.S. 189 (1974) 22
Cutter v. *Wilkinson*, 544 U.S. 709 (2005) 13
Digimarc Corp. Derivative Litig., In re, 549 F.3d 1223 (9th Cir. 2008) 9
EEOC v. *UMB Bank Fin. Corp.*, 558 F.3d 784 (8th Cir. 2008) 14
Echo Acceptance Corp. v. *Household Retail Servs., Inc.*, 267 F.3d 1068 (10th Cir. 2001) 16
Edward J. Goodman Life Income Trust v. *Jabil Circuit, Inc.*, 594 F.3d 783 (11th Cir. 2010) 3
FTC v. *Bronson Partners, LLC*, 654 F.3d 359 (2d Cir. 2011) 18
Feltner v. *Columbia Pictures Television, Inc.*, 523 U.S. 340 (1998) 17
Great-West Life & Annuity Ins. Co. v. *Knudson*, 534 U.S. 204 (2002) 17, 18, 20
Helvering v. *Mitchell*, 303 U.S. 391 (1938) 22
Moses v. *Macferlan*, (1760) 97 Eng. Rep. 676 (K.B.) 19

Cases—Continued: Page

Official Comm. of Unsecured Creditors of WorldCom, Inc. v. *SEC*, 467 F.3d 73 (2d Cir. 2006)....................19
Ollag Const. Equip. Corp., In re, 665 F.2d 43 (2d Cir. 1981)....................13
Paddack v. *Dave Christensen, Inc.*, 745 F.2d 1254 (9th Cir. 1984)....................12
Palmer v. *Hoffman*, 318 U.S. 109 (1943)....................12
Pierce v. *Atchison Topeka and Santa Fe Rwy. Co.*, 110 F.3d 431 (7th Cir. 1997)....................15, 16
Porter v. *Warner Holding Co.*, 328 U.S. 395 (1946)....................20
Providence Hosp. of Toppenish v. *Shalala*, 52 F.3d 213 (9th Cir. 1995)....................3
SEC v. *Cavanagh*, 445 F.3d 105 (2d Cir. 2006)....................20
Scheerer v. *Hardee's Food Sys. Inc.*, 92 F.3d 702 (8th Cir. 1996), cert. denied, 525 U.S. 1105 (1999)....................15
Tull v. *United States*, 481 U.S. 412 (1987)....................16, 17, 21
United States v. *Hathaway*, 798 F.2d 902 (6th Cir. 1986)....................14
United States v. *Ruehle*, 583 F.3d 600 (9th Cir. 2009)....................2, 3
United States v. *Strother*, 49 F.3d 869 (2d Cir. 1995)....................15
Wisniewski v. *United States*, 353 U.S. 901 (1957)....................12

Statutes, regulations and rules:

U.S. Const. VII....................9
Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745....................4
15 U.S.C. 7241 (§ 302)....................4, 18
15 U.S.C. 7241(a)....................20, 21
15 U.S.C. 7243 (§ 304)....................*passim*
15 U.S.C. 7243(a)....................20, 21, 22
15 U.S.C. 7246....................19

Statutes and regulations—Continued: Page

15 U.S.C. 77t(d) ... 7, 19
15 U.S.C. 77t(d)(2)(B) ... 19
15 U.S.C. 77t(d)(2)(C) ... 19
15 U.S.C. 77t(d)(3)(A) ... 19
15 U.S.C. 78m ... 3, 10
15 U.S.C. 78u(d)(3) ... 7, 19
15 U.S.C. 78u(d)(3)(B)(ii) ... 19
15 U.S.C. 78u(d)(3)(B)(iii) ... 19
15 U.S.C. 78u(d)(3)(C)(i) ... 19
17 C.F.R.:
  Section 210.4-01(a)(1) ... 3, 11
  Section 240.13a-14 ... 4
  Section 249.310 ... 3, 10
Fed. R. Evid.:
  Rule 803(6) ... *passim*
  Rule 803(6)(A) ... 14
  Rule 803(6)(B) ... 12, 13, 15
  Rule 803(6)(C) ... 12
  Rule 803(6)(E) ... 13
  Rule 803 advisory committee's note to para. 6 ... 13

Miscellaneous:

Opinion of the Accounting Principles Board No. 20 (1971) ... 3, 11, 12
S. Rep. No. 205, 107th Cong., 2d Sess. (2002) ... 4, 20

In the Supreme Court of the United States

No. 12-535

CARL W. JASPER, PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-28a) is reported at 678 F.3d 1116. The opinion of the district court (Pet. App. 29a-62a) is not published in the Federal Supplement but is available at 2010 WL 8781211.

JURISDICTION

The judgment of the court of appeals was entered on May 15, 2012. A petition for rehearing was denied on July 31, 2012 (Pet. App. 63a-64a). The petition for a writ of certiorari was filed on October 29, 2012. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The Securities and Exchange Commission (SEC) discovered that Maxim Integrated Products, Inc., a publicly-traded semiconductor company based in Silicon Valley, had issued backdated stock options without

properly expensing them. Pet. App. 1a. Based on that conduct, the SEC brought a civil enforcement action against petitioner, the former Chief Financial Officer (CFO) of the company, alleging that he had violated federal securities laws. *Ibid*. A jury returned a verdict in favor of the SEC on eight counts and in favor of petitioner on three. *Id*. at 34a-35a. The district court entered injunctive relief, imposed a civil penalty, and ordered petitioner to reimburse the company for certain bonuses and profits he had obtained during the period at issue. *Id*. at 1a-2a. The court of appeals affirmed. *Id*. at 1a-28a.

1. a. "A stock option grants the recipient the opportunity to purchase a certain number of shares of company stock at a given price [called the 'exercise price'] on or after a predetermined date." Pet. App. 2a (citation omitted; brackets in original). After the recipient purchases the stock at the exercise price, he is free to sell it at its current market price. *Id*. at 2a-3a. Companies usually grant options with an exercise price equal to the market price on the date the options are granted. *United States* v. *Ruehle*, 583 F.3d 600, 602 n.1 (9th Cir. 2009). Option backdating occurs when a company awards a stock option grant retrospectively, on a date when the share price was lower than the current market price. *Ibid.* By so manipulating the exercise price of a stock option, a company "maximizes the benefit to the option holders" by guaranteeing that the option holders can immediately sell the stock for a profit. *Ibid.*

Options backdating does not violate the antifraud provisions of the securities laws, provided that the company properly records the difference between the exercise price and the market price as an expense (a non-cash compensation expense, when the backdated option

is given to an employee), as required by generally accepted accounting principles. *Ruehle*, 583 F.3d at 602 n.1. A backdated option is an expense for a company because, when a company grants an option at a price below current market value, "it is transferring a potential company profit to the option recipient," since the company could have sold the stock to the public at the market price. Pet. App. 3a. A company that does not record backdated options as expenses overstates its net income "for each of the years the options vest, potentially deceiving the market and investors." *Id.* at 4a (citation omitted). Thus, a company that fails to "record backdated options as a compensation expense will necessarily misstate its expenses and income in its financial reports." *Edward J. Goodman Life Income Trust* v. *Jabil Circuit, Inc.*, 594 F.3d 783, 788 (11th Cir. 2010).

b. Companies whose stock is publicly traded on a national securities exchange must file periodic reports with the SEC, 15 U.S.C. 78m, including "Form 10-K" annual reports, 17 C.F.R. 249.310, which must include audited financial statements prepared in accordance with generally accepted accounting principles. See 17 C.F.R. 210.4-01(a)(1) (requiring financial statements filed with the SEC to be prepared in accordance with generally accepted accounting principles, unless the SEC provides otherwise). If a company discovers that its previously filed financial statements contain material errors, generally accepted accounting principles require the company to correct those errors in subsequent financial reports. Opinion of the Accounting Principles Board No. 20, paras. 13, 36 (1971) (requiring the reporting of a correction to previously issued financial statements as prior period adjustment) (APB Op. No. 20); see *Providence Hosp. of Toppenish* v. *Shalala*, 52 F.3d 213, 218

n.7 (9th Cir. 1995) (explaining that opinions of the Accounting Principles Board are among the sources of generally accepted accounting principles).

In response to "the systemic and structural weaknesses affecting our capital markets which were revealed by repeated failures of audit effectiveness and corporate financial and broker-dealer responsibility in recent months and years," Congress enacted the Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745. S. Rep. No. 205, 107th Cong., 2d Sess. 2 (2002) (*2002 Senate Report*). Various provisions of that statute took "steps to enhance the direct responsibility of senior corporate management for financial reporting and for the quality of financial disclosures made by public companies." *Ibid.*

One provision requires the principal executive and financial officers of a company, when filing a financial report with the SEC, to review the report and to certify that, based on the officer's knowledge, the report does not contain any untrue statement of a material fact or misleading omission with respect to the period covered by the report, and that the financial statement fairly presents in all material respects the financial condition, results of operations, and cash flows of the company during the covered period. § 302, 116 Stat. 777 (15 U.S.C. 7241); see 17 C.F.R. 240.13a-14. If a company must "prepare an accounting restatement due to the material noncompliance of the [company], as a result of misconduct, with any financial reporting requirement under the securities laws," another Sarbanes-Oxley provision requires the company's chief executive officer and CFO to repay the company for "any bonus or other incentive-based or equity-based compensation received by that person from the [company] during the 12-month

period" following the filing with the SEC of the earlier, erroneous report, as well "any profits realized from the sale of" the company's stock during the same 12-month period. § 304, 116 Stat. 778 (15 U.S.C. 7243) (Section 304).

2. Petitioner was the CFO, Principal Accounting Officer, and Vice President of Maxim from 1999 to 2007. Pet. App. 4a. Petitioner "was responsible for Maxim's accounting, including the accuracy of its financial statements and internal controls." *Id.* at 4a-5a. Because stock in Maxim is publicly traded on the NASDAQ stock exchange, Maxim is required to file periodic reports with the SEC containing audited financial statements. *Id.* at 4a. Petitioner signed all of Maxim's SEC filings and, after the enactment of the Sarbanes-Oxley Act in 2002, petitioner made the certifications required by that statute. *Id.* at 6a-7a.

From 2000 to 2005, Maxim granted stock options to approximately 70% of its employees. Pet. App. 5a. Petitioner himself received $550,514 in profit from his sale of Maxim stock in that period. *Id.* at 57a. During that period, however, petitioner and other Maxim employees and officers "regularly backdated stock options granted to employees and directors" and "created false paperwork to conceal the true grant dates for those options." *Id.* at 5a. None of Maxim's SEC filings for the period reported the backdated options as expenses. *Ibid.*

In 2006, Maxim undertook an investigation into the backdating scheme and announced that it would be unable to file timely periodic reports because of the investigation. Pet. App. 5a. Petitioner resigned in 2007. *Ibid.* In 2008, "[a]fter a lengthy investigation," Maxim announced that it would need to restate its earnings from

1997 through 2005, and that its financial statements filed in those years were not reliable. *Ibid.* In a Form 10-K filed for 2006, Maxim disclosed a reduction of $838.3 million in its pre-tax income for 2000 through 2005, *ibid.*, of which $515 million was attributable to "additional pre-tax expenses incurred as a result of stock-based compensation," *id.* at 6a; see 07-cv-06122 Docket entry No. (Docket entry No.) 64, Ex. H (N.D. Cal. Oct. 5, 2009) (Maxim's 2006 Form 10-K).

3. a. The SEC filed a civil enforcement action against petitioner, alleging violations of the securities laws. See Docket entry No. 7, at 14-20 (first amended complaint). Before trial, petitioner filed a motion to exclude from evidence Maxim's 2006 Form 10-K, which corrected the false financial statements that had been filed, with petitioner's certification, from 2003 to 2005. Pet. App. 8a. The district court denied petitioner's motion, holding that if the SEC properly authenticated Maxim's 2006 Form 10-K, the report would be admissible under Federal Rule of Evidence 803(6), the business records exception to the hearsay rule. *Ibid.* The court explained that the Form 10-K was "made at or near the time of the accounting review by those with knowledge of Maxim's books," and that "the circumstances of its creation do not indicate that it lacks trustworthiness." *Id.* at 8a-9a (brackets omitted); see Fed. R. Evid. 803(6).[1] At trial, the district court admitted into evi-

---

[1] The business records exception excludes from the hearsay rule:

> **Records of a Regularly Conducted Activity.** A record of an act, event, condition, opinion, or diagnosis if:
>
> **(A)** the record was made at or near the time by—or from information transmitted by—someone with knowledge;

dence Maxim's 2006 Form 10-K after it was authenticated by Maxim's interim CFO. Pet. App. 9a.

After trial, a jury found petitioner liable for eight of eleven claims, including securities fraud, aiding and abetting the filing of false periodic reports with the SEC, falsification of Maxim's books and records, and making false certifications in connection with financial statements filed with the SEC. Pet. App. 7a; *id.* at 34a-35a. The district court rejected petitioner's post-trial motion for judgment as a matter of law or a new trial, which was based in part on petitioner's renewed argument that the 2006 Form 10-K was not admissible evidence under the business records exception. *Id.* at 39a-40a. The court enjoined petitioner from violating applicable securities laws and barred him for two years from serving as an officer or director of any company registered with the SEC. *Id.* at 52a-53a. To "deter[] future violations of the securities laws," *id.* at 55a, the court required petitioner to pay the United States a civil penalty of $360,000, pursuant to 15 U.S.C. 77t(d), 78u(d)(3), see Pet. App. 53a-55a. The court also directed petitioner "to reimburse Maxim $1,869,639 pursuant to Section

---

(B) the record was kept in the course of a regularly conducted activity of business, organization, occupation, or calling, whether or not for profit;

(C) making the record was a regular practice of that activity;

(D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and

(E) neither the source of information nor the method or circumstances of preparation indicate a lack of trustworthiness.

Fed. R. Evid. 803(6).

304(a) of the Sarbanes-Oxley Act." *Id.* at 60a; see *id.* at 55a-60a.

b. The court of appeals affirmed. Pet. App. 1a-28a. On appeal, petitioner did "not dispute his knowledge of or involvement in [the] fraudulent scheme." *Id.* at 6a; see *id.* at 30a-31a (documenting examples of key evidence). Instead, petitioner "object[ed] only to the procedures by which he was tried." *Id.* at 27a. As relevant here, petitioner raised two challenges to the district court proceedings.

First, petitioner argued that the district court had abused its discretion in admitting into evidence Maxim's 2006 Form 10-K under the business records exception. Pet. App. 9a. Petitioner argued that Maxim's 2006 Form 10-K was "not a record of historical facts prepared by people with personal knowledge, at or near the time of the events, who were just doing their ordinary jobs." *Ibid.* Instead, he contended, the report was prepared by "outside investigators and accountants with no personal knowledge" and "was explicitly created with an eye toward pending litigation." *Ibid.*

The court of appeals rejected that argument, concluding that Maxim's 2006 Form 10-K, "like virtually all 10-Ks," is properly admissible as a business record. Pet. App. 9a. The court explained that the SEC had sought to introduce Maxim's 2006 Form 10-K not as evidence of petitioner's state of mind at the time the original financial statements were prepared, but as evidence of what the accounting review revealed. *Id.* at 10a. As such, the court observed, the report was "made at or near the time *of the accounting review* by those with knowledge of Maxim's books." *Ibid.* The court also rejected petitioner's contention that Maxim's 2006 Form 10-K was prepared for litigation rather than in the normal course

of business. The court explained that "the filing of an accurate 10-K was and continues to be a legal requirement for Maxim." *Id*. at 12a.

Petitioner further argued that the district court's order requiring him to reimburse Maxim $1.8 million violated his Seventh Amendment right to a jury trial because the jury was not asked to determine the factual predicate for relief under Section 304—that Maxim was required to restate its financial reports as a result of misconduct. Pet. App. 25a-26a. The court of appeals explained that the Seventh Amendment preserves a right to a jury trial "only on any claim for relief seeking traditionally legal, as opposed to equitable, remedies." *Id*. at 26a. Concluding that its precedent characterized Section 304's reimbursement requirement as "an equitable disgorgement remedy and not a legal penalty," *ibid.* (discussing *In re Digimarc Corp. Derivative Litig.*, 549 F.3d 1223 (9th Cir. 2008)), the court of appeals held that petitioner "had no right to have a jury find all predicate facts to the remedy" provided by Section 304, *id.* at 27a.

ARGUMENT

The court of appeals correctly determined that the district court had properly exercised its discretion in admitting Maxim's 2006 Form 10-K into evidence under the business records exception to the hearsay rule. The court also correctly held that the disgorgement remedy in this case is most analogous to an equitable action for restitution in the days of the divided bench, and that the district court's disgorgement order therefore did not implicate petitioner's Seventh Amendment right to a jury trial. The court of appeals' decision does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted.

1. a. The court of appeals correctly upheld the district court's admission into evidence of Maxim's 2006 Form 10-K.

A report is admissible under the business records exception if it (1) was prepared at or near the time of the events by a person with knowledge; (2) was kept in the course of a regularly conducted activity; (3) was prepared as a regular practice of that activity; (4) has been properly authenticated by a custodian; and (5) raises no concerns about its trustworthiness. Fed. R. Evid. 803(6), note 1, *supra*. On appeal, petitioner challenged the district court's admission of Maxim's 2006 Form 10-K, arguing that the first three requirements of Rule 803(6) had not been not satisfied. Pet. App. 8a-14a. The court of appeals correctly rejected that contention. *Ibid.*

As the court of appeals explained, the SEC sought to introduce Maxim's 2006 Form 10-K not as evidence of petitioner's "state of mind * * * during the relevant time periods," nor as evidence of "the misconduct that gave rise to the need for the restatement," but as a "record of the accounting review itself." Pet. App. 10a. That record was prepared by individuals who undertook "a review of what the books of Maxim showed for the period of the stock options backdating, a comparison of the exercise price to the market price when the options were actually granted, and the consequent losses/expenses to Maxim." *Ibid.* As a company whose stock is traded on a national exchange, Maxim had a legal obligation to file with the SEC periodic reports stating its financial condition. 15 U.S.C. 78m; 17 C.F.R. 249.310. When it learned of the backdating scheme, Maxim also had a legal obligation to undertake a review of its books, and to correct in a subsequent periodic filing with the SEC any financial reporting errors it

discovered. See 17 C.F.R. 210.4-01(a)(1); APB Op. No. 20, paras. 13, 36. For these reasons, "the restated 10-K assuredly was 'prepared by people with personal knowledge, at or near the time of the events, who were just doing their ordinary jobs.'" Pet. App. 10a (quoting petitioner's brief); see *ibid.* (noting that "admission into evidence of 10-Ks restating prior earnings is a regular practice in the federal courts").

b. Petitioner's contrary arguments lack merit.

i. Petitioner contends that Maxim's 2006 Form 10-K "was not 'made at or near the time by, or from information transmitted by, a person with knowledge,'" because "[i]t was prepared many years after the alleged backdating by a large team of outside lawyers and accountants, none of whom had any personal knowledge of the historical events surrounding the options grant." Pet. 11. The court of appeals rejected that argument, concluding that Maxim's 2006 Form 10-K satisfied the first requirement of the business records exception because the form is "a business record of the accounting review itself" rather than a contemporaneous record of the underlying misconduct. Pet. App. 10a; see Pet. 14. Petitioner contends that the court of appeals' rationale would allow the admission of "*any* investigative report" as evidence "that the investigators correctly reconstructed the past." Pet. 15. That argument lacks merit. The court of appeals did not suggest that the Form 10-K's status as a contemporaneous report of the investigation was sufficient by itself to treat it as admissible. Rather, the court simply held on that basis that the form satisfied the first requirement of the business records exception, *i.e.*, that it was prepared by a person with

knowledge at or near the time of the transaction. See Pet. App. 9a-10a & n.2.[2]

Petitioner next argues that Maxim's 2006 Form 10-K "was not 'kept in the course of a regularly conducted activity' of a business with the 'regular practice' of making such reports" because "[i]t was the result of an unprecedented investigation by the Special Committee into allegations of wrongdoing in pending lawsuits." Pet. 12 (quoting Fed. R. Evid. 803(6)(B) and (C)). Petitioner does not dispute, however, that, consistent with its legal obligation, Maxim files periodic reports with the SEC containing audited financial statements prepared in accordance with generally accepted accounting principles. Nor does he dispute that, when a company discovers material errors in its previously filed financial statements, it has a legal obligation to correct those errors in subsequent financial reports. See APB Op. No. 20, paras. 13, 36. Finally, petitioner does not dispute that Maxim's 2006 Form 10-K is a periodic report making such a correction. Those undisputed facts fully support the court of appeals' conclusion that Maxim prepared and kept its 2006 Form 10-K as part of a regularly conducted activity. Pet. 11a-12a; see Fed. R. Evid. 803(6)(B) and (C).[3]

---

[2] Petitioner contends that the court of appeals' application of the first requirement of the business records exception is inconsistent with that court's precedent. See Pet. 15-16 (discussing *Paddack* v. *Dave Christensen, Inc.*, 745 F.2d 1254 (9th Cir. 1984)). The court of appeals properly distinguished its prior decisions. Pet. 10a-11a. In any event, an intra-circuit conflict would not warrant this Court's review. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957).

[3] Petitioner relies on this Court's holding that a particular accident report at issue in a prior case was inadmissible because it had "little or nothing to do with the management or operation of the business *as such*." Pet. 11 (quoting *Palmer* v. *Hoffman*, 318 U.S. 109, 113 (1943)).

Petitioner further contends that "the method or circumstances of preparation indicate a lack of trustworthiness," Pet. 12 (quoting Fed. R. Evid. 803(6)(E)) (internal quotation marks omitted), because Maxim's 2006 Form 10-K was prepared "in the teeth" of litigation and applied accounting principles that could not produce "the best historically accurate account of what actually happened," Pet. 12, 13. In the court of appeals, petitioner did not press the argument that, independent of the other requirements under Rule 803(6), the preparation of Maxim's 2006 Form 10-K raised trustworthiness concerns. 10-1764 Docket entry No. 17, at 35-39 (9th Cir. Apr. 15, 2011) (petitioner's opening brief). And the court of appeals did not pass on that question. Pet. App. 8a-12a. Accordingly, this Court's review of that issue is not warranted. See *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) ("[W]e are a Court of review, not of first view.").

In any event, petitioner's argument lacks merit. Under the business records exception, as under the Federal Rules of Evidence generally, the admissibility of probative evidence does not depend on whether that evidence provides "the best historically accurate account of what actually happened." Pet. 13; see *In re Ollag Const. Equip. Corp.*, 665 F.2d 43, 46 (2d Cir. 1981) ("Rule 803(6) favors the admission of evidence rather than its

---

But *Palmer* predated the adoption of the business records exception in the Federal Rules of Evidence, and the rule as adopted requires that the record be kept as part of a "regularly conducted *activity*." Fed. R. Evid. 803(6)(B) (emphasis added). As such, the rule is a liberalization of the one articulated in *Palmer*, as the advisory committee explained. See Fed. R. Evid. 803 advisory committee's note to para. 6. In any event, the Court in *Palmer* had no occasion to consider the admissibility of a report prepared and submitted to a government agency in compliance with a federal regulatory scheme.

exclusion if it has any probative value at all.") (internal quotation marks and brackets omitted). The exact weight to give to Maxim's 2006 Form 10-K was a matter for the jury. See, *e.g., United States* v. *Hathaway*, 798 F.2d 902, 906-907 (6th Cir. 1986).

ii. Petitioner contends (Pet. 17-25) that this Court's review is necessary to resolve purported circuit conflicts concerning the application of the business records exception to "the specific question presented here." Pet. 17. Petitioner acknowledges, however, that the "issue does not frequently percolate up to the courts of appeals." Pet. 24. He identifies no decision in which a court excluded from evidence a company's Form 10-K filing with the SEC, and the cases he cites are distinguishable. Petitioner thus identifies no pertinent circuit conflict implicated by the court of appeals' decision.

Relying on *EEOC* v. *UMB Bank Fin. Corp.*, 558 F.3d 784 (8th Cir. 2009) and *Certain Underwriters at Lloyd's, London* v. *Sinkovich*, 232 F.3d 200 (4th Cir. 2000), petitioner argues that the Ninth Circuit's decision upholding the admission of Maxim's 2006 Form 10-K demonstrates a conflict about whether "an investigative report may be admitted as a business record *of the investigation* or must be analyzed as a business record of the *underlying events.*" Pet. 17; see Fed. R. Evid. 803(6)(A) (a record of an act is admissible if "the record was made at or near the time by * * * someone with knowledge). In both *UMB Bank* and *Sinkovich*, however, the courts considered whether the records could be used to document the underlying events because that was the purpose for which the proponents of the records' admission sought to use them. See *UMB Bank*, 558 F.3d at 792-793 (defendant sought to use notes of interview with manager to defeat claim of employment discrimination); *Sinko-*

vich, 232 F.3d at 204-205 (defendant sought to use report concerning accident to defeat insurance claim related to that accident). Here, by contrast, Maxim's Form 10-K was introduced as a "record of the accounting review itself," not as evidence of "the misconduct that gave rise to the need for the restatement." Pet. App. 10a.

Petitioner contends that the Ninth Circuit's decision to allow the admission of Maxim's 2006 Form 10-K puts that court in conflict with others applying Rule 803(6)'s "routineness requirement." Pet. 21; see Pet. 22. But the cases on which petitioner relies are inapposite. None involved a "regularly conducted activity," Fed. R. Evid. 803(6)(B), such as Maxim's filing of periodic reports with the SEC. See *Pierce* v. *Atchison Topeka and Santa Fe Ry. Co.*, 110 F.3d 431, 443-444 (7th Cir. 1997) (employer's memorandum to file summarizing meeting with employee); *United States* v. *Strother*, 49 F.3d 869, 875-876 (2d Cir. 1995) (holding that bank memoranda should have been admitted as prior inconsistent statements but stating, in dicta, that the Court was "reluctant" to construe the business records exception to permit the admission "of memoranda drafted in response to unusual or 'isolated' events").

Petitioner similarly argues that the Ninth Circuit's decision is in conflict with other court of appeals decisions that have limited the admissibility under the business records exception of documents prepared in anticipation of litigation. Pet. 22-23. In those cases, the courts excluded documents that were "not made in the ordinary course of business but instead with the knowledge that the incident could result in litigation." *Scheerer* v. *Hardee's Food Sys. Inc.*, 92 F.3d 702, 706-707 (8th Cir. 1996), cert. denied 525 U.S. 1105 (1999); see

Echo Acceptance Corp. v. *Household Retail Servs., Inc.*, 267 F.3d 1068, 1091 (10th Cir. 2001) (exhibits were not "kept in the course of a regularly conducted business activity" and instead appeared to have been generated to support litigation interests); *Pierce*, 110 F.3d at 444 (memorandum "was not created with the kind of regularity or routine which gives business records their inherent reliability"; author may have been concerned that memorialized incident "could have some litigation potential to it"). Maxim's 2006 Form 10-K, by contrast, was created and kept as part of a regularly conducted activity—the submission of periodic reports to the SEC.

2. The court of appeals correctly held that the district court's order requiring petitioner to disgorge bonuses and profits to Maxim did not impair petitioner's Seventh Amendment right to a jury trial. Petitioner acknowledges that "other Circuits have not yet addressed the issue" and that "[t]he issue does not often arise in litigation." Pet. 33. Further review is not warranted.

a. i. The Seventh Amendment entitles a party to "a jury trial on the merits in those actions that are analogous to 'Suits at common law'" at the time of the amendment's adoption. *Tull* v. *United States*, 481 U.S. 412, 417 (1987). Actions that "are analogous to 18th-century cases tried in courts of equity or admiralty do not require a jury trial." *Ibid.* The Seventh Amendment's jury trial right applies to statutory rights of action as it does to common law claims. *Ibid.* "To determine whether a statutory action is more similar to cases that were tried in courts of law than to suits tried in courts of equity or admiralty," courts must "compare the statutory action to the 18th-century actions brought in the courts of England prior to the merger of the

courts of law and equity" and then "examine the remedy sought and determine whether it is legal or equitable in nature." *Id.* at 417-418; see *Feltner* v. *Columbia Pictures Television, Inc.*, 523 U.S. 340, 352 (1998) ("[A]n award of statutory damages may serve purposes traditionally associated with legal relief, such as compensation and punishment."). "The second inquiry is the more important." *Chauffeurs, Teamsters and Helpers Local No. 391* v. *Terry*, 494 U.S. 558, 565 (1990); *Tull*, 481 U.S. at 421 (same).

While "an action for money damages was the traditional form of relief offered in the courts of law," not all claims for monetary relief are legal. *Terry*, 494 U.S. at 570 (citation omitted). For example, some "restitutionary" actions were historically treated as equitable. *Ibid.* "In cases in which the plaintiff could *not* assert title or right to possession of particular property, but in which nevertheless he might be able to show just grounds for recovering money to pay for some benefit the defendant had received from him, the plaintiff had a right to restitution *at law* * * * because he sought to obtain a judgment imposing a merely personal liability upon the defendant to pay a sum of money." *Great-West Life & Annuity Ins. Co.* v. *Knudson*, 534 U.S. 204, 213 (2002) (citations omitted). But actions for restitution "where money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession" are equitable actions. *Ibid.*; see *id.* at 214 (stating that a restitution action is equitable if it seeks "to restore to the plaintiff particular funds or property in the defendant's possession").[4]

---

[4] The Court in *Great-West Life* stated that, when defendants who would otherwise have been subject to equitable restitution orders had

ii. Under those principles, the restitution ordered in this case was equitable in nature.

The Sarbanes-Oxley Act requires the principal executive and financial officers of a company, when filing a financial report with the SEC, to take responsibility for the company's financial reporting by certifying that the filed report contains no untrue statements of material fact or misleading omissions, and that the report fairly presents the company's financial condition. 15 U.S.C. 7241. Petitioner's restitution obligation in this case arose because Maxim was required to "prepare an accounting restatement due to the material noncompliance of the [company], as a result of misconduct, with [a] financial reporting requirement under the securities laws." 15 U.S.C. 7243. Under those circumstances, Section 304 of the Act requires the company's chief executive officer and CFO to "reimburse the [company]" for "any bonus or other incentive-based or equity-based compensation received by that person from the [company] during the 12-month period" after the filing with the SEC of the earlier, erroneous report, as well as for "any profits realized from the sale of" the company's stock during the same 12-month period. *Ibid.*

---

dissipated the relevant assets, courts of equity had traditionally lacked power to impose constructive trusts or equitable liens upon the defendants' other property. See 534 U.S. at 213-214. Even in circumstances where equitable tracing principles might otherwise apply, however, those principles have been held inapposite to public enforcement actions brought by governmental bodies. See *FTC* v. *Bronson Partners, LLC*, 654 F.3d 359, 374 (2d Cir. 2011) (finding "no case in which a public agency seeking to obtain equitable monetary relief has been required to satisfy the tracing rules"). In any event, petitioner does not cite *Great-West Life* or rely on any purported tracing requirement as a ground for setting aside the restitution order in this case.

The federal securities laws also authorize the SEC to seek civil penalties for their violation. See 15 U.S.C. 77t(d), 78u(d)(3). Those statutory actions are legal in nature. Their civil penalties serve a deterrent and punitive purpose. See *Official Comm. of Unsecured Creditors of WorldCom, Inc.* v. *SEC*, 467 F.3d 73, 81 (2d Cir. 2006). They are not intended to restore property to their rightful owner—the civil penalties are generally payable to the United States Treasury. 15 U.S.C. 77t(d)(3)(A); 15 U.S.C. 78u(d)(3)(C)(i).[5] Such civil penalties, moreover, need not be computed by reference to the amount of any gain the defendant may have realized. In this case, the district court imposed on petitioner a $360,000 penalty under those statutory provisions to "deter[] future violations of the securities laws," Pet. App. 55a, based on the jury's finding that petitioner's violation of securities law involved "fraud and deliberate or reckless disregard of regulatory requirements," *id.* at 54a; see 15 U.S.C. 77t(d)(2)(B) and (C), 78u(d)(3)(B)(ii) and (iii) (imposing penalties for violations "involv[ing] fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement").

The restitution remedy imposed in this case was categorically different. Because the SEC sought to recoup for Maxim sums that petitioner had acquired through specified transactions and that he had a statutory obligation to pay over to the company, its suit was like an "equitable action, to recover back money, which ought not in justice to be kept." *Moses* v. *Macferlan*, (1760) 97 Eng. Rep. 676, 680 (K.B.) (Mansfield, C.J.); see *id.* at 681 ("In one word, the gist of this kind of action is that

---

[5] Congress has given the SEC discretion to use funds received as civil penalties to benefit victims of the violation leading to the civil penalty. 15 U.S.C. 7246.

the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money."); see *Porter* v. *Warner Holding Co.*, 328 U.S. 395, 402 (1946) (equitable restitution "restor[es] the status quo and order[s] the return of that which rightfully belongs to" another). The amount of the restitution award was measured by the "bonus or other incentive-based or equity-based compensation," along with "any profits realized from the sale of" the company's stock, that petitioner had received during the relevant period. 15 U.S.C. 7243(a); see Pet. App. 57a. And the purpose of the award was to restore the relevant sums to the company that had provided the compensation and stock options, based on Congress' judgment that a company's chief officers, who are responsible for certifying the accuracy of the company's financial reports, see 15 U.S.C. 7241(a), should not benefit at the company's expense when they certify the filing of reports that are false "as a result of misconduct," 15 U.S.C. 7243(a). See *2002 Senate Report* 26 ("[Section 304 is] designed to prevent CEOs or CFOs from making large profits by selling company stock, or receiving company bonuses, while management is misleading the public and regulators about the poor health of the company.").[6]

[6] Relief under Section 304 is distinct from the disgorgement of ill-gotten gains, an equitable remedy that the Commission commonly seeks from securities laws violators who have profited from their violations. This remedy, the Court in *Great-West Life* observed, is in the nature of an "accounting for profits," *Great-West Life*, 534 U.S. at 214 n.2, which courts of equity traditionally applied as a remedy for fraud, breaches of fiduciary duty, or other wrongs. See, *e.g., SEC* v. *Cavanagh*, 445 F.3d 105, 118, 119 (2d Cir. 2006) (recognizing that chancery courts "for centuries" have compelled wrongdoers to "account for and surrender" their unlawful profits).

b. Petitioner offers no persuasive reason for the Court to grant review on this issue.

Petitioner contends that Section 304 creates a civil penalty because courts have independent sources of equitable discretion to order "disgorgement of wrongful gains." Pet. 28; see Pet. 29 (noting that the SEC "sought disgorgement as a remedy in this case"); but see Pet. App. 60a (explaining that the SEC asked the district court to exercise its equitable authority to order disgorgement for performance-related bonuses "less any amounts forfeited to Maxim pursuant to Section 304(a)"). But the courts' distinct equitable power to order disgorgement for violations of the securities laws (see note 6, *supra*) does not determine whether the restitution remedy imposed in this case was equitable or legal. See *Tull*, 481 U.S. at 417 ("To determine whether a statutory action is [equitable or legal], the Court must examine both the nature of the action and of the remedy sought.").

Petitioner further argues (Pet. 29-31) that the disgorgement remedy at issue here was legal rather than equitable because disgorgement under Section 304 is not limited to defendants who act wrongfully. Congress has required the chief officers of publicly traded companies to certify the accuracy of the companies' financial reports, 15 U.S.C. 7241(a), and to reimburse the company for any incentive-based compensation or stock profits they obtained during specified periods when a company files false financial reports as a result of misconduct, 15 U.S.C. 7243(a); see Pet. App. 35a (noting jury finding that petitioner filed false certifications with the SEC). Petitioner is correct that a restitution order to enforce that reimbursement obligation does not depend on proof that the officer knowingly participated in, or that his

pecuniary gain was traceable to, the underlying misconduct. The restitution order here did not impose a "legal civil penalty" (Pet. 31), however, because it simply directed petitioner to pay over to Maxim the amount of incentive compensation and profits that he had previously received from the company and from sales of company stock. Section 304 reflects Congress's determination that CFOs of publicly traded companies should not be allowed to retain such proceeds when misconduct on their watch has required the company to prepare an accounting restatement, and it requires the CFOs to reimburse their companies when certain events have occurred. See 15 U.S.C. 7243(a). Rather than penalizing petitioner for violating the law, the restitution order appropriately enforced that reimbursement obligation by directing him to make the payment specified in the statute.

Finally, petitioner contends (Pet. 31-32) that a claim under Section 304 must be tried to a jury because a judge has no discretion whether to afford relief if the defendant is found liable. This Court has suggested that a court's discretion to award monetary relief is a consideration relevant to determining whether such relief is legal or equitable. See *Curtis* v. *Loether*, 415 U.S. 189, 197 (1974) (noting that, in cases under Title VII, "the courts have relied on the fact that the decision whether to award back pay is committed to the discretion of the trial judge"). But this Court has never held that a claim for mandatory statutory relief must always be tried to a jury. Cf., *e.g., Helvering* v. *Mitchell*, 303 U.S. 391, 401, 402 (1938) (holding, in a case involving mandatory "sanctions imposing additions to a tax," imposed for the purpose of "protection of the revenue and to reimburse the Government" for its investigation, that "the determina-

tion of the facts upon which liability is based may be by an administrative agency instead of a jury"). A district court's discretion or lack thereof, while relevant to the question whether particular monetary relief is legal or equitable, is not dispositive of that issue.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

GEOFFREY F. ARONOW
General Counsel
MICHAEL A. CONLEY
Deputy General Counsel
JACOB H. STILLMAN
Solicitor
DOMINICK V. FREDA
Senior Litigation Counsel
Securities and Exchange Commission

FEBRUARY 2013