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15 UNITED STATES DISTRICT COURT
16 FOR THE CENTRAL DISTRICT OF CALIFORNIA
17 SOUTHERN DIVISION

18 SECURITIES AND EXCHANGE
19 COMMISSION,

20 Plaintiff,

21 vs.

22 HENRY T. NICHOLAS, III, et al.,

23 Defendants.

) Case No. SACV08-539 CJC (RNBx)
) NOTICE OF DEFENDANT HENRY T.
) NICHOLAS'S MOTION TO DISMISS
) AND MEMORANDUM IN SUPPORT

) The Honorable Cormac J. Carney

) Date: Monday, August 11, 2008

) Time: 1:30 p.m.

) Location: Courtroom 9B
)

24
25
26 TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

27 PLEASE TAKE NOTICE that on Monday, August 11, 2008, at 1:30 p.m., or as
28 soon thereafter as the parties may be heard, Defendant Henry T. Nicholas, III will, and

1 hereby does, move this Court for an order dismissing, in part, the plaintiff's Complaint.
2 This motion is made pursuant to Rules 12(b)(6) and 9(b) of the Federal Rules of Civil
3 Procedure on the grounds that the Complaint is, in part, barred by the relevant statute of
4 repose and fails to state a claim upon which relief may be granted. This motion is
5 supported by this notice; the attached memorandum; the concurrently filed request for
6 judicial notice and exhibits; the presentation of counsel to be made before the Court; all
7 pleadings and papers on file in this action; and any other matters which are appropriate
8 for consideration by the Court.

9 This motion is made following the conference of counsel pursuant to Local Rule
10 7-3, which took place on July 10, 2008.

11
12 DATED: July 14, 2008

13
14 Respectfully submitted,

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I. Introduction

The Securities and Exchange Commission (the “SEC”) has brought a complaint (the “Complaint”) that asserts nine claims of violations of various federal securities laws against Dr. Henry T. Nicholas, III, the co-founder and former chief executive officer of Broadcom Corporation (“Broadcom”). All the claims arise from the alleged backdating of stock option grants at Broadcom. The Complaint is largely conclusory, and the great majority of its allegations either fail to state a claim, are too vague to comply with Rule 9(b), or are time-barred. In addition, the SEC’s attempt to obtain disgorgement of bonuses and stock-sale profits from Dr. Nicholas fails as a matter of law, because he did not obtain any benefits from the alleged conduct. Accordingly, almost all of the Complaint should be dismissed.

II. Background

The Complaint alleges that, from June 1998 to May 2003, Broadcom periodically granted its employees in-the-money stock options, which the Complaint characterizes as stock options with an exercise price lower than the market value of the stock at the time of the grant. Compl. ¶¶ 13–14. The SEC claims that for accounting purposes, however, Broadcom did not record the proper “compensation expense” associated with those option grants, which the SEC claims should have been the difference between the option’s exercise price and the price of the stock on the date the option was finally allocated to the employee. Compl. ¶ 63. According to the Complaint, this alleged failure to record proper compensation expenses made several of Broadcom’s financial reports inaccurate. Compl. ¶¶ 62–80.

III. Argument

A. Nearly All of the Alleged Violations Are Time-Barred.

Although SEC enforcement actions seeking equitable remedies generally are not subject to any statute of limitation, *see SEC v. Rind*, 991 F.2d 1486 (9th Cir. 1993), a five-year statute of repose is imposed by 28 U.S.C. § 2462 in actions seeking fines,

1 penalties, or forfeitures.¹ Here, that statute of repose bars all of the SEC's claims to the
2 extent they are based on conduct prior to November 12, 2002, which includes the great
3 majority of the conduct alleged in the Complaint.²

4 *1. Section 2462 Applies to All of the SEC's Claims.*

5 Sections 2462 provides:

6 Except as otherwise provided by Act of Congress, an action,
7 suit or proceeding for the enforcement of any civil fine, penalty,
8 or forfeiture, pecuniary or otherwise, shall not be entertained
9 unless commenced within five years from the date when the
10 claim first accrued if, within the same period, the offender or
11 the property is found within the United States in order that
12 proper service may be made thereon.

13 28 U.S.C. § 2462 (2000).

14 The seminal case concerning the meaning of "penalty" under Section 2462 is
15 *Johnson v. SEC*, 87 F.3d 484 (D.C. Cir. 1996). There, the Court of Appeals for the
16 District of Columbia Circuit held that any remedy that "goes beyond remedying the
17 damage caused to the harmed parties by the defendant's action" is a "penalty" under
18 Section 2462. *Id.* at 488. Here, the SEC seeks four remedies with respect to Dr.
19 Nicholas:

- 20 (1) civil penalties pursuant to Section 20(d) of the Securities Act, 15 U.S.C.
21 § 77t(d) (2002), and Section 21(d)(3) of the Exchange Act, 15 U.S.C. §
22 78u(d)(3) (2002);

25 ¹ Because *Rind* did not consider the application of Section 2462, it is "not
26 particularly persuasive if the SEC seeks a 'penalty,'" as it does here. *SEC v. Berry*, No.
C-07-04431 RMW, 2008 WL 2002537, at *7 (N.D. Cal. May 7, 2008).

27 ² November 12, 2002 is the relevant date because the SEC and Dr. Nicholas
28 entered into a tolling agreement that tolled the statute of limitations from June 5, 2007
through December 6, 2007.

- 1 (2) repayment of bonuses and stock-sale profits pursuant to Section 304 of
- 2 the Sarbanes-Oxley Act of 2002, 15 U.S.C. § 7243 (2002);
- 3 (3) an order barring Dr. Nicholas from serving as an officer or director of
- 4 any public company, pursuant to Section 20(e) of the Securities Act, 15
- 5 U.S.C. § 77t(e) (2002), and Section 21(d)(2) of the Exchange Act, 15
- 6 U.S.C. § 78u(d)(2) (2002); and
- 7 (4) a permanent injunction.

8 Compl. at 37–39. As explained below, all these remedies are punitive and therefore
9 constitute “penalt[ies]” under the circumstances presented here. Thus, Section 2462’s
10 five-year statute of repose applies.

11 First, it is beyond dispute that, to the extent the Complaint seeks civil penalties
12 under Section 20(d) of the Securities Act or Section 21(d)(3) of the Exchange Act, it is
13 covered by Section 2462. Both these sections expressly provide for a “civil penalt[y],”
14 which obviously is a “penalty” under Section 2462. *See, e.g., SEC v. Jones*, 476 F. Supp.
15 2d 374, 380–81 (S.D.N.Y. 2007).

16 Second, the request for repayment of bonuses and other compensation under
17 Section 304 of the Sarbanes-Oxley Act of 2002 should be dismissed because Dr.
18 Nicholas did not obtain any benefit that is causally related to the alleged wrongdoing, *see*
19 *infra* Part III.D.1, but if the claim under Section 304 is not so limited, then it clearly
20 would “go[] beyond remedying the [alleged] damage caused” and would therefore
21 constitute a penalty under Section 2462. *Johnson*, 87 F.3d at 488.

22 Third, the SEC’s request for an order barring Dr. Nicholas from serving as an
23 officer or director of any public company is a penalty and thus subject to Section 2462.
24 *See SEC v. DiBella*, 409 F. Supp. 2d 122, 128 & n.3 (D. Conn. 2006).

25 Fourth, the SEC’s prayer for a permanent injunction against Dr. Nicholas is subject
26 to Section 2462. Whether a permanent injunction is a penalty under Section 2462
27 depends on whether the injunction is sought for punitive purposes or as a remedial
28 measure. *Jones*, 476 F. Supp. 2d at 383. This, in turn, depends largely on whether the

1 SEC has pleaded any basis to believe there is a likelihood of recurrence of the alleged
2 violations. *Id.* at 383–84. Here, the Complaint’s own allegations establish that Dr.
3 Nicholas left Broadcom in 2003. Compl. ¶ 7. The Complaint does not plead that Dr.
4 Nicholas has played any managerial role in any public company since that time, or that he
5 intends to do so in the future. Without such allegations, there is no basis to believe that
6 Dr. Nicholas will ever be in a situation in which it would be possible for him to commit
7 the types of violations alleged in the Complaint. Under these circumstances, any
8 permanent injunction would be punitive rather than remedial, and therefore the SEC’s
9 prayer for such an injunction is subject to Section 2462.

10 2. *The SEC Does Not Allege an Adequate Basis for Tolling.*

11 Although the Complaint vaguely alleges that “Defendants [c]oncealed the
12 [b]ackdating [s]cheme,” Compl. at 26, it includes no allegations of fact that could suffice
13 to toll the statute of repose as to Dr. Nicholas. Equitable tolling of the statute of repose
14 may apply only when it is demonstrated that “(1) [the defendant’s] conduct resulted in
15 concealment of the operative facts; (2) the SEC failed to discover the operative facts
16 within the limitations period; and (3) the SEC acted with due diligence before it
17 discovered [the defendant’s] alleged backdating.” *SEC v. Berry*, No. C-07-04431 RMW,
18 2008 WL 2002537, at *7 (N.D. Cal. May 7, 2008). Moreover, a claim of equitable
19 tolling grounded on fraudulent concealment must be pleaded with the particularity
20 demanded by Rule 9(b). *See Rambus Inc. v. Samsung Elecs. Co.*, Nos. C-05-02298
21 RMW, C-05-00334 RMW, 2007 WL 39374, at *6 (N.D. Cal. Jan. 4, 2007). Here, the
22 Complaint sets forth no specific facts from which the Court could find any of these
23 requirements satisfied. The Complaint says nothing at all about (1) how Dr. Nicholas is
24 alleged to have concealed violations from the SEC, (2) when the SEC actually discovered
25 the alleged violations, or (3) what due diligence the SEC conducted. Without any such
26 allegations—let alone allegations that satisfy Rule 9(b)—the SEC has pleaded no basis
27 for equitable tolling. *Berry*, 2008 WL 2002537, at *8 (granting motion to dismiss where
28 SEC did not adequately allege fraudulent concealment or its own due diligence).

1 3. *Section 2462 Bars the Great Bulk of the Complaint's Allegations.*

2 The Complaint was filed on May 14, 2008, and thus Section 2462's five-year
3 statute of repose would normally bar all claims based on conduct prior to May 14, 2003.
4 Here, however, the parties entered into a tolling agreement, which requires that the period
5 from June 5, 2007 through December 6, 2007 (184 days) be excluded from the limitations
6 period. Accordingly, Section 2462 bars all claims based on conduct prior to November
7 12, 2002.

8 The great majority of the conduct alleged in the Complaint took place prior to
9 November 12, 2002. As the Complaint states, Dr. Nicholas resigned as Broadcom's
10 president and CEO in January 2003, Compl. ¶ 7, and the Complaint does not allege that
11 he had any managerial role at Broadcom after he resigned. To the extent the Complaint
12 specifically addresses Dr. Nicholas's conduct at all, almost all such alleged conduct took
13 place prior to November 2002. *See* Compl. ¶¶ 25 (June 1999); 37–38 (November 2001–
14 January 2002); 41 (December 2001); 69 (1998 through 2002); 75 (1999 and 2000); 77
15 (1998 through 2002); 79 (1998 through 2002). Consequently, Section 2462 bars any
16 claim based on this alleged conduct.

17 B. The Allegations of Violations of Section 10(b), Section 13(a), and Rule
18 13b2-2 Are Largely Insufficient (Second, Sixth, and Ninth Claims).

19 The Ninth Circuit has “repeatedly recognized” that actions brought for violations
20 of the federal securities law must meet the exacting pleading standards of Rule 9(b) of the
21 Federal Rules of Civil Procedure. *In re GlenFed, Inc. Sec. Litig.*, 42 F.3d 1541, 1545
22 (9th Cir. 1994); *see also Berry*, 2008 WL 2002537, at *9. Under that standard, the
23 Second, Sixth, and Ninth Claims of the Complaint largely fail to state a claim against Dr.
24 Nicholas.

25 1. *Most of the Alleged Misstatements Do Not Support Any Claim Against*
26 *Dr. Nicholas.*

27 The SEC alleges several years' worth of supposedly false or misleading 10-Ks, 10-
28 Qs, 8-Ks, proxy statements, registration statements, and management representation

1 letters. *See* Compl. ¶¶ 62–80. Most of those allegations do not support Section 10(b),
2 Section 13(a), or Rule 13b2-2 claims against Dr. Nicholas.

3 First, although the SEC alleges that Broadcom’s proxy statements and 8-Ks were
4 false or misleading, it does not sufficiently allege Dr. Nicholas’s involvement with those
5 documents. In particular, it does not allege that Dr. Nicholas signed those documents or
6 that he had “substantial participation or intricate involvement” in the preparation of the
7 documents. *Howard v. Everex Sys., Inc.*, 228 F.3d 1057, 1061–63, 1061 n.5 (9th Cir.
8 2000). The only allegation the SEC makes regarding Dr. Nicholas’s involvement with
9 Broadcom’s proxy statements is that: “Nicholas signed the letter to shareholders that *was*
10 *enclosed with the proxy statements* for 1999 and 2000.” Compl. ¶ 75 (emphasis added).
11 In other words, the SEC alleges only that Dr. Nicholas signed a separate document that
12 was eventually mailed to shareholders along with the proxy statement. It does not allege
13 anything that could constitute “substantial participation or intricate involvement” with the
14 allegedly misleading proxy statements. *Howard*, 228 F.3d at 1061 n.5. Similarly, with
15 respect to the 8-Ks, the Complaint does not allege that Dr. Nicholas had any involvement
16 whatsoever in their preparation or signing. Compl. ¶ 70.

17 Second, although the SEC alleges that Dr. Nicholas signed Broadcom’s 10-Qs
18 from 1998 to 2002, this Court can take notice of the fact that Dr. Nicholas did not sign
19 any of them. *See* Signature pages of Broadcom 10-Qs for 1998-2002 (Exs. 1–16 to
20 Defendant Henry T. Nicholas’s Request for Judicial Notice (“RJN”)). Although the SEC
21 also alleges that Dr. Nicholas “reviewed” the company’s 10-Qs for 1998 through 2002,
22 Compl. ¶ 69, that bare allegation is insufficient to support the claim that the statements
23 are attributable to Dr. Nicholas. *See Berry*, 2008 WL 2002537, at *10 (“The SEC’s
24 conclusory pleadings that [defendant] ‘reviewed’ and ‘discussed’ various filings is
25 insufficient to plead (with particularity) [defendant’s] role in the purported fraud.”).

26 Third, with respect to those filings allegedly signed by Dr. Nicholas, the SEC has
27 not carried its burden of pleading with particularity how a number of those filings were
28 false. The first instance of backdating that the SEC alleges with any specificity is

1 purported to have occurred in December of 1999.³ See Compl. ¶¶ 20–21. Because the
2 SEC has not alleged any *specific* instances of backdating before December 1999, it has
3 not alleged with particularity any basis for concluding that any pre-December 1999
4 filings—whether or not signed by Dr. Nicholas—were false or misleading.

5 Fourth, as explained above, *see supra* Section II.A, any statements allegedly signed
6 by Dr. Nicholas before November 12, 2002 are not actionable because of the statute of
7 repose.

8 Fifth, as the SEC acknowledges, Dr. Nicholas resigned as CEO of Broadcom in
9 January of 2003 and left the board in May 2003. Compl. ¶ 7. Consequently, he cannot
10 be held liable for any statements made after that.

11 2. *The SEC Does Not Allege a Scheme Involving Dr. Nicholas.*

12 Although the Complaint cites generically to Rule 10b-5, 17 C.F.R. § 240.10b-5,
13 *see* Compl. ¶ 94, it can be properly understood only as attempting to state a claim under
14 Rule 10b-5(b), which governs misstatements and omissions. It does not state a claim
15 under Rule 10b-5(a) or (c), which cover fraudulent “schemes.”

16 Courts have limited the application of scheme liability under Rule 10b-5(a) and (c)
17 to situations in which non-verbal conduct is the gravamen of the claim. Where the basis
18 for a claim under Rule 10b-5 is misrepresentations or omissions, there can be no claim
19 under Rule 10b-5(a) or (c), because those subsections address conduct that does not
20 involve speaking. *See Lentell v. Merrill Lynch & Co., Inc.*, 396 F.3d 161, 177–78 (2d
21 Cir. 2005) (upholding dismissal of scheme claim against a brokerage house and its former
22 analyst because a “scheme[] to defraud” that consists “largely of an aggregation of
23 material misrepresentations” does not state a claim under Rule 10b-5(a) and (c)); *In re*
24 *Ditech Networks, Inc.*, No. C 06-5157 JF, 2007 WL 2070300, *6 (N.D. Cal. July 16,

25
26
27 ³ The SEC alleges that Dr. Nicholas *offered* a prospective employee “backdated,
28 in-the-money options” in June 1999. Compl. ¶ 25. The SEC does not, however, allege
any facts concerning the asserted “backdating” of those options—critically, it does not
allege when the options were actually granted and by whom.

1 2007) (prohibiting plaintiffs from proceeding with claim under 10b-5(a) or (c), rather
2 than (b), “given Plaintiffs’ emphasis on the alleged production and dissemination of false
3 financial statements, proxy statements, and Form 4’s [sic]”).

4 Here, the clear thrust of the SEC’s claim is Broadcom’s *statements*, not the alleged
5 options backdating itself. The first sentence of the complaint makes this clear:

6 This matter involves improper stock option backdating at
7 Broadcom Corporation (“Broadcom” or the “Company”), *which*
8 *resulted in the Company’s issuance of false financial statements*
9 *that concealed from shareholders billions of dollars in stock-*
10 *based compensation expenses.*

11 Compl. ¶ 1 (emphasis added).

12 Indeed, courts have recognized that “[b]ackdating option grants is not per se
13 illegal.” *In re VeriSign, Inc. Derivative Litig.*, 531 F. Supp. 2d 1173, 1180 (N.D. Cal.
14 2007). As a commissioner of the SEC put it:

15 [T]he mere fact that options were backdated does not mean that
16 the securities laws were violated. Purposefully backdated
17 options that are properly accounted for and do not run afoul of
18 the company’s public disclosure are legal.

19 Paul S. Atkins, Comm’r, U.S. Sec. and Exch. Comm’n, Remarks Before the International
20 Corporate Governance Network 11th Annual Conference (July 6, 2006).⁴ Thus, properly
21 understood, the Complaint attempts to accuse Dr. Nicholas only of participating in the
22 improper *reporting* of the financial consequences of option grants, specifically, the
23 reporting of financial results premised on inaccurate compensation expenses. That
24 accusation is an accusation of a misstatement or omission under Rule 10b-5(b), not an
25 allegation of a fraudulent scheme under Rule 10b-5(a) or (c).

26
27
28 ⁴ A transcript of this speech is available at
<http://www.sec.gov/news/speech/2006/spch070606psa.htm> (visited July 11, 2008).

1 Moreover, even if Broadcom’s alleged option granting practices, standing alone,
 2 could constitute a “scheme” under Rule 10b-5(a) or (c), the SEC still has not specifically
 3 alleged any facts that connect Dr. Nicholas to such a “scheme.” There is not a single
 4 specific allegation in the Complaint that Dr. Nicholas selected the price for any of the
 5 identified option grants or had any involvement in the decision of what accounting
 6 treatment to give to backdated options. At most, the Complaint makes “conclusory
 7 statements concerning the general nature of the scheme,” not the particularized
 8 allegations required by Rule 9(b). *Burnett v. Rowzee*, --- F. Supp. 2d ---, Nos. SACV 07-
 9 0393 (ANx), 07-0641 (ANx), 2008 WL 638503, at *4 (C.D. Cal. Feb. 11, 2008); *see also*
 10 *SEC v. Yuen*, 221 F.R.D. 631, 636 (C.D. Cal. 2004) (conclusory allegations of an ill-
 11 defined scheme are inadequate).

12 C. The SEC’s Remaining Claims Fail.

13 The SEC’s remaining allegations with respect to Dr. Nicholas do not state a claim
 14 for securities law violations, and certainly not with particularity as required by Rule
 15 9(b).⁵

16 1. *The Complaint Does Not Sufficiently Allege a Section 17(a) Violation*
 17 *(First Claim).*

18 The SEC claims Dr. Nicholas violated Section 17(a) of the Securities Act, which
 19 prohibits:

20 any person in the offer or sale of any securities . . . (1) to
 21 employ any device, scheme, or artifice to defraud, or (2) to
 22 obtain money or property by means of any untrue statement of a
 23 material fact or any omission to state a material fact necessary

24
 25 ⁵ Each of the SEC’s remaining claims against Dr. Nicholas is subject to Rule 9(b).
 26 *See Berry*, 2008 WL 2002537, at *13 (applying Rule 9(b) to claims under Section 17(a));
 27 *SEC v. Baxter*, No. C-05-03843 RMW, 2007 WL 2013958, at *8 (N.D. Cal. July 11,
 28 2007) (“[T]he heightened pleading standard applies to the section 13 claims.”); *Atlas v.*
Accredited Home Lenders Holding Co., --- F. Supp. 2d ---, No. 07-CV-488 H (RBB),
 2008 WL 80949, at *12 (S.D. Cal. Jan. 4, 2008) (“a claim under Section 14(a) and Rule
 14a-9 sounds in fraud and therefore Rule 9(b) [applies]”).

1 in order to make the statements made, in light of the
2 circumstances under which they were made, not misleading; or
3 (3) to engage in any transaction, practice, or course of business
4 which operates or would operate as a fraud or deceit upon the
5 purchaser.

6 15 U.S.C § 77q(a) (2000). As explained above, the SEC has failed to allege with the
7 requisite particularity that Dr. Nicholas had any involvement in any “scheme,” and,
8 consequently, the SEC can only be alleging that Dr. Nicholas made an untrue statement
9 of material fact or a material omission, i.e., a violation of Section 17(a)(2), not Section
10 17(a)(1) or (3).

11 But the SEC’s attempt to allege a Section 17(a)(2) violation is deficient because,
12 with respect to Dr. Nicholas, the SEC has not alleged that he “obtain[ed] money or
13 property” by means of the purported misstatements or omissions. Specifically, the SEC
14 has not alleged a single instance of Dr. Nicholas receiving any of the allegedly backdated
15 options. Neither has the SEC offered any other explanation for how alleged accounting
16 inaccuracies resulted in Dr. Nicholas obtaining “money or property.” Accordingly, the
17 SEC’s Section 17(a) claim against Dr. Nicholas must be dismissed.

18 2. *The Complaint Does Not Allege an Actionable Section 14(a) Violation*
19 *(Fourth Claim).*

20 The SEC attempts to allege a violation of Section 14(a) of the Exchange Act,
21 which generally prohibits the solicitation of proxies in violation of SEC regulations. *See*
22 15 U.S.C. § 78n(a) (2000). The regulation alleged to be violated here is Rule 14a-9,
23 which prohibits the solicitation of any proxy “by means of any proxy statement, form of
24 proxy, notice of meeting or other communication, written or oral,” that contains any
25 materially false statement or omission. 17 C.F.R. § 240.14a-9(a) (2008).

26 The SEC alleges a variety of misstatements and omissions that it believes were
27 contained in Broadcom’s proxy statements for the years 1999 through 2005. *See Compl.*
28 ¶¶ 73–75. With respect to Dr. Nicholas, however, all the relevant conduct pre-dates the

1 start of the limitations period on November 12, 2002. In particular, the SEC alleges Dr.
2 Nicholas's involvement only with proxies sent in 1999 and 2000. *See* Compl. ¶ 75.
3 Moreover, Broadcom's 2002 proxy, the last proxy issued before Dr. Nicholas resigned as
4 Broadcom's CEO and President, was filed on March 25, 2002, well outside the
5 limitations period. *See* March 25, 2002 Proxy (RJN, Ex. 17).

6 3. *The Complaint Does Not Sufficiently Allege that Dr. Nicholas*
7 *Falsified Books and Records (Fifth Claim).*

8 The SEC claims that Dr. Nicholas "falsified" Broadcom's books and records in
9 violation of Rule 13b2-1. 17 C.F.R. § 240.13b2-1 (2007). Specifically, the SEC alleges
10 that Dr. Nicholas was involved in the preparation of the following "books and records"
11 that the SEC claims were "falsified":

- 12 • An offer letter to a prospective employee sent in 1999, Compl. ¶ 25;
- 13 • Related "personnel records," Compl. ¶¶ 25, 83; and
- 14 • Unanimous written consents of the option committee, which indicated
15 that options were granted with "as of" dates in the past, Compl. ¶¶ 3,
16 18, 23, 43, 81, and a board of directors unanimous written consent
17 appointing an independent director to the compensation committee "as
18 of" a date in the past, Compl. ¶¶ 52, 81.

19 In fact, none of these allegations is sufficient to establish a claim for the
20 falsification of books and records.

21 First, falsification of an employment offer letter is not a books and records
22 violation. Section 13(b) requires an issuer to "make and keep books, records, and
23 accounts, which, in reasonable detail, accurately and fairly reflect the transactions and
24 dispositions of the assets of the issuer." 15 U.S.C. § 78m(b). Under this definition it is
25 clear that an offer letter is not a book, record, or account. An offer letter neither reflects a
26 transaction nor the disposition of assets—it is nothing more than an *offer* to engage in a
27 particular transaction. Accordingly, because an offer letter does not meet the statutory
28 definition of a book or record, its alleged falsification is not a violation.

1 Second, although the SEC alleges various “personnel records” were also falsified,
2 it does not state what those records are, when they were falsified, how they were falsified,
3 or who was directly involved in their falsification. Consequently, the SEC has not met its
4 burden under Rule 9(b).

5 Third, although the SEC refers to the unanimous written consents of the option
6 committee and board of directors as being “false,” that allegation is conclusory. What the
7 SEC alleges with particularity is that the consents indicated they were effective “as of” a
8 certain date, and that the “as of” date was not necessarily the same as the date the
9 consents were actually signed. But there is nothing inherently misleading—let alone
10 false—about a document that purports to be effective on a date different than the date on
11 which it is signed. Corporate documents are commonly signed “as of” a date earlier than
12 the date of signature, and the use of the phrase “as of” would alert any reader that the
13 document was not signed until later. Accordingly, the mere allegation that the document
14 contained an “as of” date does not state a claim that Broadcom’s books and records were
15 inaccurate or falsified.

16 Furthermore, even if any of these allegations stated claims for books and records
17 violations, they all concern conduct that occurred outside the limitations period. The
18 allegations regarding the offer letter refer to conduct that allegedly occurred in 1999.
19 Compl. ¶ 83. And, although the SEC alleges in conclusory fashion that “from June 1998
20 through May 2003, Nicholas and Samuelli signed false option committee UWCs for
21 backdated grants,” Compl. ¶ 81, the most recent unanimous written consent that it
22 specifically alleges Dr. Nicholas signed was purportedly signed in “late September
23 2002,” Compl. ¶ 59.

24 4. *The Complaint Does Not Sufficiently Allege a Rule 13a-14 Violation*
25 *(Seventh Claim).*

26 The SEC asserts that Dr. Nicholas violated Rule 13a-14 by certifying that
27 Broadcom’s 2002 third-quarter 10-Q: (a) contained no material misstatements or
28 omissions and (b) included financial information that fairly presented Broadcom’s

1 financial position in all material respects. Compl. ¶¶ 109–110. If anything, the SEC’s
2 claim appears to allege *compliance* with the rule, not a violation.

3 Rule 13a-14, which was promulgated pursuant to Section 302(a) of the Sarbanes-
4 Oxley Act of 2002, 15 U.S.C. § 7241(a) (2002), requires that each 10-Q include
5 certifications of various statements required by the SEC—including the statements
6 allegedly certified by Dr. Nicholas—and that “[e]ach principal executive and principal
7 financial officer of the issuer” must sign such certifications. 17 C.F.R. § 240.13a-14
8 (2008). That is precisely what the SEC alleges Dr. Nicholas did, i.e., he signed the
9 required certification as part of Broadcom’s 10-Q.

10 To the extent the SEC intends to claim this certification was not true, that
11 allegation is beside the point. Knowingly filing a materially false certification may give
12 rise to liability under another provision of the securities laws, but it is not a violation of
13 Rule 13a-14. Rule 13a-14 is a filing rule, not an antifraud rule.⁶

14 5. *The Complaint Does Not Sufficiently Allege Aiding and Abetting a*
15 *Books and Records Violation (Eleventh Claim).*

16 The SEC claims Dr. Nicholas aided and abetted Broadcom’s failure to make and
17 keep accurate books and records, in violation of Section 13(b)(2)(A) of the Securities
18 Act. 15 U.S.C. § 78m(b)(2)(A).

19 As explained above, to the extent the SEC purports to allege that Dr. Nicholas
20 participated in the falsification of any books and records, it has failed to do so with
21 sufficient particularity. *See supra* Part III.C.3.

22 The SEC’s claim also fails to the extent it alleges that Dr. Nicholas’s mere
23 participation in the granting of options—by, for example, signing written consents or
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25
26 ⁶ The SEC acknowledges as much in its release pertaining to this rule, which says
27 nothing about a false filing being a violation of the rule itself, but only that “[a]n officer
28 providing a false certification potentially could be subject to Commission action for
violating Section 13(a) or 15(d) of the Exchange Act and to both Commission and private
actions for violating Section 10(b) of the Exchange Act and Exchange Act Rule 10b-5.”
67 Fed. Reg. 57276, 57280 (Sept. 9, 2006) (footnote omitted).

1 allocating options to specific employees—aided and abetted books and records
2 violations. Even if, as the SEC claims, those actions “were relied upon by employees in
3 Broadcom’s finance and shareholder services departments to record option grants into
4 Broadcom’s books and records, and to prepare Broadcom’s financial results and public
5 filings,” Complaint ¶ 81, those allegations do not state a claim. Simply participating in
6 events that are ultimately improperly recorded does not constitute aiding and abetting the
7 improper recording itself. *See SEC v. Patel*, No. 07-cv-39-SM, 2008 WL 781914, at *17
8 (D.N.H. Mar. 24, 2008) (dismissing claim for aiding and abetting books and records
9 violation because “[t]he act of entering into a transaction is sufficiently attenuated from
10 the process of corporate accounting that mere participation in a transaction . . . cannot be
11 a proximate cause of inaccurate accounting”).

12 6. *The Complaint Does Not Sufficiently Allege Aiding and Abetting an*
13 *Internal Controls Violation (Twelfth Claim).*

14 The SEC alleges that Dr. Nicholas and others “failed to maintain a system of
15 internal accounting controls sufficient to provide assurances that stock option grants were
16 recorded as necessary to permit the proper preparation of financial statements in
17 conformity with GAAP.” Compl. ¶ 84. This, the SEC claims, constitutes aiding and
18 abetting Broadcom’s violation of Section 13(b)(2)(B) of the Securities Act, which
19 required Broadcom to “devise and maintain a system of internal accounting controls.”⁷
20 15 U.S.C. § 78m(b)(2)(B). The SEC does not, however, specify which internal controls
21 were defective or missing. Accordingly, the SEC has not sufficiently alleged a failure to
22 maintain internal controls. *See Berry*, 2008 WL 2002537, at *13 (dismissing internal
23 controls claim because “while the complaint implies that certain controls were
24 insufficient or circumvented, it does not state them”); *see also Patel*, 2008 WL 781914, at

26
27 ⁷ The heading of the Twelfth Claim does not include the words “aiding and
28 abetting.” Compl. at 36. Despite this omission, the allegations themselves clarify that
the SEC is asserting only aiding and abetting liability. *See* Compl. ¶ 130 (“[defendants]
aided and abetted Broadcom’s violations”).

1 *18 (dismissing internal controls claim because SEC could not “point to any factual
2 allegations in the complaint concerning [the company’s] system of internal accounting
3 controls”); *SEC v. Seibel Sys., Inc.*, 384 F. Supp. 2d 694, 710 (S.D.N.Y. 2005)
4 (dismissing claim where “complaint contains only conclusory assertions that [defendant]
5 failed to maintain controls and other procedures”).

6 D. The SEC’s Prayer for Forfeiture Under Section 304 of the Sarbanes-Oxley
7 Act of 2002 Should Be Dismissed.

8 1. *Section 304 Does Not Apply Because Dr. Nicholas Did Not Obtain*
9 *Any Personal Benefit Related to the Alleged Wrongdoing.*

10 The Complaint seeks an order requiring Dr. Nicholas to repay bonuses and stock-
11 sale profits pursuant to Section 304 of the Sarbanes-Oxley Act of 2002. Compl. at 39.
12 Section 304 allows the SEC to seek repayment of certain bonuses and stock-sale profits
13 received by CEOs and CFOs when an issuer’s financial results are required to be restated.
14 But the disgorgement remedy authorized by this section is not applicable to Dr. Nicholas.

15 Section 304 provides as follows:

16 If an issuer is required to prepare an accounting restatement due
17 to the material noncompliance of the issuer, as a result of
18 misconduct, with any financial reporting requirement under the
19 securities laws, the chief executive officer and chief financial
20 officer of the issuer shall reimburse the issuer for:

21 (1) any bonus or other incentive-based or equity-based
22 compensation received by that [CEO or CFO] from the issuer
23 during the 12-month period following the first public issuance
24 or filing with the Commission (whichever first occurs) of the
25 financial document embodying such financial reporting
26 requirement; and

27 (2) any profits realized from the sale of securities of the issuer
28 during that 12-month period.

1 15 U.S.C. § 7243(a). In enacting Section 304, “Congress created a federal right in favor
2 of issuers by specifying they would receive the proceeds of officers’ benefits, but at the
3 same time Congress selected a remedy—disgorgement—which ‘is an equitable remedy
4 designed to deprive a wrongdoer of his unjust enrichment and to deter others from
5 violating securities laws.’” *Neer v. Pelino*, 389 F. Supp. 2d 648, 653 (E.D. Pa. 2005)
6 (*quoting SEC v. Hughes Capital Corp.*, 124 F.3d 449, 455 (3d Cir. 1997)). As a form of
7 disgorgement, the remedy authorized by Section 304 is available only with respect to
8 “property causally related to the wrongdoing.” *SEC v. First City Fin. Corp.*, 890 F.2d
9 1215, 1231 (D.C. Cir. 1989); *see also Jones*, 476 F. Supp. 2d at 386 (“[A] court cannot
10 order disgorgement above the amount wrongfully acquired.”).

11 Section 304 does not apply to Dr. Nicholas because there is no allegation that he
12 personally benefited from the alleged conduct. *See* Compl. ¶ 88 (alleging that other
13 defendants personally benefited, but not Dr. Nicholas). The Complaint does not allege
14 that Dr. Nicholas received any benefit that was causally related to the alleged
15 wrongdoing. Accordingly, the SEC’s claim for relief under Section 304 should be
16 dismissed.

17 2. *At the Very Least, Section 304 Does Not Apply to Conduct Prior to*
18 *July 30, 2002.*

19 The Sarbanes-Oxley Act became effective on July 30, 2002, and it applies only to
20 conduct after that date. Accordingly, even if the SEC may bring a claim under Section
21 304 against Dr. Nicholas here, the claim for the forfeiture remedy under Section 304
22 should be dismissed to the extent that it is based on conduct that took place prior to July
23 30, 2002.

24 In *Landgraf v. USI Film Products*, 511 U.S. 244, 114 S.Ct. 1483, 128 L.Ed.2d 229
25 (1994), the Supreme Court set out the proper method for analyzing whether statutes apply
26 to conduct predating their enactment:

27 When a case implicates a federal statute enacted after the events
28 in suit, the court’s first task is to determine whether Congress

1 has expressly prescribed the statute's proper [temporal] reach.
2 If Congress has done so, of course, there is no need to resort to
3 judicial default rules. When, however, the statute contains no
4 such express command, the court must determine whether the
5 new statute would have retroactive effect, *i.e.*, whether it would
6 impair rights a party possessed when he acted, increase a
7 party's liability for past conduct, or impose new duties with
8 respect to transactions already completed. If the statute would
9 operate retroactively, our traditional presumption teaches that it
10 does not govern absent clear congressional intent favoring such
11 a result.

12 *Id.* at 280.

13 The Sarbanes-Oxley Act, which was enacted on July 30, 2002, says nothing about
14 the temporal reach of Section 304. Moreover, as sought to be applied here, Section 304
15 unquestionably would be "retroactive" because it would, at the least, increase Dr.
16 Nicholas's liability for past conduct.⁸ Accordingly, since the statute contains no clear
17 statement favoring retroactive application, it cannot be applied to conduct prior to its
18 enactment.

19 This has been the conclusion of every court to confront the issue to date. *See In re*
20 *Goodyear Tire & Rubber Co. Derivative Litig.*, Nos. 5:03CV2180, CV2204, CV2374,
21 CV2468, CV2469, 2007 WL 43557, at *8 (N.D. Ohio Jan. 5, 2007) ("Nothing in the text
22 of Section 304 suggests retroactive application of any of its provisions."); *Plumbers &*
23 *Pipefitters Local 572 Pension Fund v. Cook*, No. 1:03cv168, 2004 WL 5349589, at *4
24 (S.D. Ohio Sept. 22, 2004) ("[T]he claim under § 304 of Sarbanes-Oxley would apply
25 only to wrongdoing occurring after its effective date of July 30, 2002, since Congress did
26

27 ⁸ Most of the Complaint's allegations about Dr. Nicholas allege conduct that
28 occurred prior to July 30, 2002. *See, e.g.*, Compl. ¶¶ 25 (June 1999); 37 (November–
December 2001); 38 (January 2002); 40 (January 2002); 75 (1999, 2000).

1 not indicate that it should be applicable to misconduct occurring before that date.”); *see*
2 *also In re AFC Enters., Inc. Derivative Litig.*, 224 F.R.D. 515, 521 (N.D. Ga. 2004)
3 (deferring ruling but noting that “[t]here is no ‘clear indication’ from Congress that this
4 forfeiture provision of the Sarbanes-Oxley Act was intended to have retroactive
5 application to misconduct which occurred before its effective date”).

6 For these reasons, the Complaint should be dismissed to the extent that it seeks to
7 apply Section 304 to conduct that took place before July 30, 2002.

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1 **IV. Conclusion**

2 For the reasons given, the Court should:

- 3 • dismiss all claims against Dr. Nicholas to the extent they are based on
4 conduct prior to November 12, 2002;
- 5 • dismiss the SEC's Second, Sixth, and Ninth Claims against Dr. Nicholas,
6 except to the extent they are based on statements or omissions allegedly
7 made in Broadcom's 10-Ks, registration statements, and management
8 representation letters that were signed by Dr. Nicholas and dated after
9 November 12, 2002;⁹
- 10 • dismiss the SEC's First, Fourth, Fifth, Seventh, Eleventh, and Twelfth
11 Claims against Dr. Nicholas in their entirety; and
- 12 • dismiss the SEC's prayer for forfeiture under Section 304 of the
13 Sarbanes-Oxley Act of 2002.¹⁰

14
15 DATED: July 14, 2008

16 Respectfully submitted,

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27 _____
28 ⁹ As explained above, statements made before November 12, 2002 are not
actionable because of the statute of repose. *See supra* Part III.A. Even if the statute of
repose did not apply, the Court should at a minimum dismiss any claims based on
statements made before December 1999. *See supra* Part III.B.1.

¹⁰ The SEC's Third, Eighth, and Tenth Claims are not brought against Dr.
Nicholas.

1 **PROOF OF SERVICE**

2 I am not a party to this action, and I am over 18 years of age. I am employed in the
3 District of Columbia. My business address is Williams & Connolly LLP, 725 Twelfth
4 St., N.W., Washington, D.C. 20005.

5 On July 14, 2008, I served a true and correct copy of:

6 NOTICE OF DEFENDANT HENRY T. NICHOLAS'S
7 MOTION TO DISMISS AND MEMORANDUM IN
8 SUPPORT,

8 along with all attachments and exhibits, on:

9 Gordon Greenberg
10 McDermott Will & Emery
11 2049 Century Park East #3400
12 Los Angeles, CA 90067-3208

11 *Attorneys for Defendant Henry Samueli.*

12 Service was made by UNITED STATES MAIL: I enclosed the document in a
13 sealed envelope addressed to the person at the address listed above and placed the
14 envelope for collection and mailing, following our ordinary business practices. I am
15 readily familiar with Williams & Connolly LLP's practice for collecting and processing
16 correspondence for mailing. On the same day that the correspondence is placed for
17 collection and mailing, it is deposited in the ordinary course of business with the United
18 States Postal Service, in a sealed envelope with postage fully prepaid.

19 I declare under penalty of perjury that the foregoing is true and correct.

20 Executed on July 14, 2008.

21
22 /s/Negar Tekeei
23 NEGAR TEKEEI
24
25
26
27
28