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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Teamsters Local 617 Pension)
and Welfare Funds, on behalf)
of itself and all others)
similarly situated,)
Plaintiff,)
vs.)
Apollo Group, Inc., *et al.*,)
Defendants.)

No. CIV 06-2674-PHX-RCB

O R D E R

In Teamsters Local 617 Pension & Welfare Funds v. Apollo Group, Inc., 623 F.Supp.2d 763 (D.Ariz. 2009) ("Apollo I"), the court issued a host of rulings pertaining to defendants' motions to dismiss the First Amended Complaint ("FAC") in this securities fraud action. In the pending reconsideration motion (doc. 107), lead plaintiff, Pension Trust Fund for Operating Engineers ("plaintiff"), challenges several aspects of Apollo I. First, it asserts that dismissal was improper as to the control person liability claims under section 20(a) of the Securities and Exchange Act of 1934 ("the Exchange Act") as against the following

1 defendants: Daniel E. Bachus; Dino J. DeConcini, Hedy Govenar;
2 Brian E. Mueller; Laura Palmer Noone ("Noone") (collectively "the
3 group one defendants"); John G. Sperling; and Peter Sperling
4 (collectively "the Sperlings"). Relatedly, plaintiff contends that
5 because the FAC sufficiently alleges that each of the group one
6 defendants and the Sperlings had the requisite control over a
7 primary violator, the section 20(a) claims should stand as against
8 each of them. Necessarily then, plaintiff further asserts that the
9 court must vacate the judgments entered in favor of each of the
10 group one defendants. Lastly, if the court finds that the FAC
11 inadequately alleges a section 20(a) control person claim as to any
12 of the group one defendants, still, according to plaintiff,
13 reconsideration is "appropriate[.]" Reply (doc. 111) at 11:3
14 (emphasis omitted). Plaintiff reasons that because the court
15 dismissed with prejudice the section 20(a) claim against the group
16 one defendants, it must reconsider and grant plaintiff leave to
17 amend in that regard.

18 Basically, defendants counter that the court should deny
19 plaintiff's motion "in its entirety" because the FAC does not
20 adequately allege "that any of these defendants controlled any
21 purported primary violator of the federal securities laws in
22 connection with Apollo['s] . . . alleged stock option backdating
23 practices." Resp. (doc. 110) at 1. Moreover, defendants assert
24 that plaintiff's "promise to cure" the deficient section 20(a)
25 claim is not a proper basis for reconsideration. Id. at 10:16.

26 Discussion

27 I. Reconsideration Standards

28 Evidently because the court entered judgment against some but

1 not all of the moving defendants, plaintiff is relying upon two
2 different rules as the procedural bases for its motion. Pursuant
3 to LRCiv 7.2(g),¹ plaintiff is moving for reconsideration as to all
4 of the moving defendants. As to the group one defendants, in
5 accordance with Fed. R. Civ. P. 59(e), plaintiff also is seeking to
6 have "the Court vacate the judgment[s]" entered against them. Mot.
7 (doc. 107) at 2:1-2. LRCiv 7.2(g) is entitled "Motions for
8 Reconsideration[,]" whereas Fed. R. Civ. P. 59(e) is entitled
9 "Motion[s] to Alter or Amend a Judgment." So on the face of it,
10 plaintiff's distinction between the group one defendants and the
11 Sperlings, based upon entry of judgment, is understandable.
12 Regardless of the procedural vehicle, the legal standards governing
13 plaintiff's motion are the same however.

14 There is no express provision in the Federal Rules of Civil
15 Procedure for a motion for reconsideration. See United States v.
16 Comprehensive Drug Testing, Inc., 473 F.3d 915, 955 (9th Cir. 2006)
17 (Thomas, J., dissenting). "Rather, such motions are creatures of
18 local rule or practice." Id. In this action, as just noted,
19 plaintiff is relying upon LRCiv 7.2(g) as the procedural vehicle
20 for this reconsideration motion. "Absent good cause shown," that
21 Rule requires the filing of such motions "no later than ten (10)
22 days after the filing of the order that is the subject of the
23 motion." LRCiv 7.2(g)(2). Where, as here, a timely
24 reconsideration motion is brought pursuant to the Local Rules, it
25

26 ¹ Defendants construe plaintiff's motion to reconsider pursuant to LRCiv
27 7.2(g) as directed solely against the Sperling defendants. See Resp. (doc. 110)
28 at 3 n. 3. In seeking relief under that Rule, however, plaintiff lists each of the
seven dismissed defendants. See Mot. (doc. 107) at 2:25-27. Thus, the court does
not read plaintiff's motion as narrowly as do the defendants.

1 "is construed as a motion to alter or amend a judgment under Rule
2 59(e)." See Shapiro v. Paradise Valley Unified, 374 F.3d 857, 863
3 (9th Cir. 2004) (citations omitted); see also Carroll v. Nakatani,
4 342 F.3d 934, 945 (9th Cir. 2003) (Although Rule 59(e) is entitled
5 "Motion to Alter or Amend Judgment," the Ninth Circuit "permits a
6 district court to reconsider and amend a previous order" pursuant
7 to that Rule.)

8 "The history of Rule 59(e) shows that 'alter or amend' means a
9 substantive change of mind by the court." Miller v. Transamerican
10 Press, Inc., 709 F.2d 524, 527 (9th Cir. 1983). "Under Rule 59(e),
11 it is appropriate to alter or amend a judgment if (1) the district
12 court is presented with newly discovered evidence, (2) the district
13 court committed clear error or made an initial decision that was
14 manifestly unjust, or (3) there is an intervening change in
15 controlling law." United Nat. Ins. Co. v. Spectrum Worldwide,
16 Inc., 555 F.3d 772, 780 (9th Cir. 2009) (citation and internal
17 quotation marks omitted). Local Rule 7.2(g) in part mirrors that
18 standard. That Rule provides that "[t]he Court will ordinarily
19 deny a motion for reconsideration . . . absent a showing of
20 manifest error or a showing of new facts or legal authority that
21 could not have been brought to its attention earlier with
22 reasonable diligence." LRCiv 7.2(g)(1). Irrespective of the
23 grounds, in the end, "[w]hether or not to grant reconsideration is
24 committed to the sound discretion of the court." In re Fowler, 394
25 F.3d 1208, 1214 (9th Cir. 2005) (citation and internal quotation
26 marks omitted).

27 There is a basis for reconsidering Apollo I to the extent the
28 court required, as a predicate to stating a section 20(a) claim,

1 that plaintiff plead a primary securities law violation as to each
2 of the defendants. As explained below, however, Rule 12(b)(6)
3 provides the legal framework for the remainder of plaintiff's
4 arguments - not the reconsideration standards which defendants
5 repeatedly invoke.

6 **II. Section 20(a) - Control Person Claim**

7 This court in Apollo I reiterated that "to 'prove a prima
8 facie case under Section 20(a), a plaintiff must prove: (1) a
9 primary violation of federal securities law and (2) that the
10 defendant exercised actual power or control over the primary
11 violator.'" Apollo I, 633 F.Supp.2d at 827 (quoting, *inter alia*,
12 No. 84 Employer-Teamster Joint Council Pension Trust Fund v. Am. W.
13 Holding Corp., 320 F.3d 920, 945 (9th Cir. 2003) ("America West").
14 In Apollo I, this court, *inter alia*, granted the motion to dismiss
15 the section 20(a) claims as against the group one defendants and
16 the Sperlings. The sole basis for that dismissal was failure to
17 "adequately" plead the first element of a section 20(a) claim - "a
18 primary violation of section 10(b)[.]" See id. at 828. Given that
19 holding, the court did not address the second prong of control
20 person liability as to those particular defendants.

21 **A. Primary Violation**

22 Plaintiff asserts that "the court's dismissal of plaintiff's
23 § 20(a) claim was clear error justifying Rule 59(e) relief."
24 Mot. (doc. 107) at 2:10-11 (emphasis omitted). First, plaintiff
25 challenges the court's finding that as a prerequisite to
26 stating a section 20(a) claim, it had to plead a primary securities
27 law violation as to each of the group one defendants and as to each
28 of the Sperlings. Second, plaintiff contends that the FAC

1 adequately alleges that each of those seven defendants had the
2 "requisite control" so as to state a section 20(a) claim against
3 them. Id. at 3:14. Defendants vigorously dispute whether the FAC
4 contains sufficient allegations of control. Tellingly, however,
5 their response is silent as to the first prong for section 20(a)
6 liability. By their silence, the court assumes that defendants
7 concede the validity of plaintiff's position.

8 Even absent such a concession, the court recognizes that in
9 Apollo I it erroneously required, as a precursor to control person
10 liability, allegations that each of the defendants individually
11 violated section 10(b). After reciting section 20(a) of the
12 Exchange Act,² the Ninth Circuit reiterated that "a defendant
13 employee of a corporation who has violated the securities law will
14 be jointly and severally liable to the plaintiff, as long as the
15 plaintiff demonstrates 'a primary violation of federal securities
16 law' and that 'the defendant exercised actual power or control over
17 the primary violator.'" Zucco Partners, LLC v. Digimarc Corp., 552
18 F.3d 981, 990 (9th Cir. 2009) (citing America West, 320 F.3d at 945
19 (quoting Howard v. Everex Sys., Inc., 228 F.3d 1057, 1065 (9th Cir.
20 2000) (quotation marks omitted) (other citations omitted)

21
22 ² That section provides:

23 Every person who, directly or indirectly, controls *any person*
24 *liable* under any provision of this chapter or of any rule or
25 regulation thereunder shall also be liable jointly and severally
26 with and to the same extent as such controlled person to any
27 person to whom such controlled person is liable, unless the
28 controlling person acted in good faith and did not directly
or indirectly induce the act or acts constituting the violation
or cause of action.

15 U.S.C. § 78t(a) (emphasis added).

1 (emphasis added). Consistent with the plain language of section
2 20(a) and the Ninth Circuit case law construing it, it stands to
3 reason that although control person liability under that statute
4 cannot exist without a primary violation, section 20(a) does not
5 require that the alleged controlling person be primarily liable
6 under section 10(b). See Paracor Finance, Inc. v. General Electric
7 Capital Corp., 96 F.3d 1151, 1161 (9th Cir. 1996) ("The plaintiff
8 need not show the controlling person's scienter or that they
9 culpably participated in the alleged wrongdoing.") (internal
10 quotation marks omitted); Howard, 228 F.3d at 1065 (To prove a
11 *prima facie* violation under section 20(a), a "[p]laintiff need not
12 show that the defendant was a culpable participant in the
13 violation, but defendant may assert a 'good faith' defense.")
14 (citations omitted). That is so because section 20(a) "premises
15 liability *solely* on the control relationship, subject to the good
16 faith defense." Hollinger v. Titan Capital Corp., 914 F.2d 1564,
17 1575 (9th Cir. 1990) (emphasis added). Recognizing that a
18 plaintiff need only plead and prove the commission of "a primary
19 violation of federal securities law" generally, and not a "primary
20 violation" by a given defendant, (citations and internal quotation
21 marks omitted), plaintiff is entitled to reconsideration of that
22 issue.³

23 Before proceeding, the court notes that in In re Amgen Sec.
24 Litig., 544 F.Supp.2d 1009 (C.D.Cal. 2008), the court did dismiss
25 the section 20(a) control person claims as to certain outside

27 ³ At this juncture, the court is reminded of Justice Frankfurter's astute
28 observation that "[w]isdom too often never comes, and so one ought not to reject
it merely because it comes late." Henslee v. Union Planters Nat. Bank & Trust Co.,
335 U.S. 595, 600, 69 S.Ct. 290, 93 L.Ed. 259 (1949) (Frankfurter, J., dissenting).

1 director and non-speaking defendants, "since [it] ha[d] dismissed
2 the § 10(b) claims against them." Id. at 1037-1038. The Amgen
3 court did not cite any support for its holding, however; and, as
4 the preceding discussion makes clear, Amgen is an aberration.

5 Notwithstanding the foregoing, defendants contend that
6 reconsideration is not warranted because it will not change the
7 outcome. The outcome will not change, defendants argue, because
8 the FAC does not sufficiently allege that any of them exercised
9 actual power or control over a primary violator - the second
10 element of a section 20(a) claim. Hence, they reason that the
11 Apollo I order granting dismissal of the section 20(a) claims and
12 entry of judgment as to the group one defendants should still
13 stand, albeit for a different reason than articulated in Apollo I.

14 Plaintiff strenuously disagrees. Plaintiff's position is
15 that the FAC sufficiently alleges the exercise of actual power or
16 control by each of the group one defendants, and by the Sperlings.
17 Therefore, the court must reinstate the section 20(a) claims.

18 The Sperlings are in a different procedural posture than the
19 group one defendants. Thus, as to the Sperlings, presently there
20 is no need to address the issue of whether the FAC adequately
21 alleges control for section 20(a) purposes - a fact which
22 plaintiff and the Sperlings did not take into account. In Apollo
23 I, *inter alia*, this court granted with prejudice the group one
24 defendants' motion for dismissal of the section 20(a) claims.
25 Apollo I, 633 F.Supp.2d at 834. Pursuant to Fed. R. Civ. P.
26 54(b), the court also ordered that judgment be entered in favor of
27 that group of defendants. Id. at 832-834. In contrast, this
28 court granted the Sperlings' motion to dismiss the section 20(a)

1 claims *without prejudice*. Id. at 834, ¶ (10). Moreover, the
2 court also expressly granted plaintiff leave to file a second
3 amended complaint ("SAC") as to the Sperlings, among other
4 defendants. Id. at 834, ¶ (14).

5 Plaintiff timely filed a SAC wherein, *inter alia*, it added
6 allegations as to the Sperling defendants purported control. See,
7 e.g., SAC (doc. 112) at 70-71, ¶ 161. In light of the foregoing,
8 the court denies as moot the plaintiff's motion for
9 reconsideration as to the Sperlings. See Struggs v. Evans, 2008
10 WL 5068522, at *1 (N.D.Cal. 2008) (denying as moot motion for
11 reconsideration, even as to claims dismissed with prejudice, where
12 plaintiff, in his original motion, also was granted leave to
13 amend); see also Valentine v. First Advantage Saferent, Inc., 2008
14 WL 4367353, at *1 (C.D.Cal. 2008) (reconsideration motion filed
15 simultaneously with motion to amend motion rendered moot by
16 granting leave to amend). Indeed, because the SAC superseded the
17 FAC, at this point it would be improper for the court to consider
18 the sufficiency of the FAC's allegations of control person
19 liability against the Sperlings. See Loux v. Rhay, 375 F.2d 55,
20 57 (9th Cir. 1967) ("The amended complaint supersedes the original,
21 the latter being treated thereafter as non-existent."); Bullen v.
22 De Bretteville, 239 F.2d 824 (9th Cir. 1956) ("It is hornbook law
23 that an amended pleading supersedes the original, the latter being
24 treated thereafter as non-existent.")

25 In contrast to the Sperling defendants, the claims against
26 the group one defendants were dismissed with prejudice, including
27 the section 20(a) claim, and judgment entered in their favor.
28 Pursuant to Fed. R. Civ. P. 59(e) and LRCiv 7.2, plaintiff had ten

1 days in which to move for reconsideration. In Apollo I, however,
2 the court granted plaintiff 30 days in which to file a second
3 amended complaint ("SAC"). Anticipating that it would prevail on
4 this reconsideration motion in its entirety, plaintiff's SAC
5 includes allegations even as to the group one defendants against
6 whom judgment was previously entered. See SAC (doc. 112) at 70,
7 n. 9. Plaintiff's anticipatory amendment does not preclude their
8 reconsideration motion. Accordingly, as to the group one
9 defendants the court must determine whether the FAC alleges
10 control so as to state a section 20(a) claim against each of them.

11 **B. Exercise of Actual Power or Control**

12 Before examining the sufficiency of the FAC's section 20(a)
13 claims against each of the group one defendants and the Sperlings,
14 the court must address three preliminary but significant issues.
15 First, it must determine the applicable pleading standards for a
16 section 20(a) control person claim. Second, the court must decide
17 whether, as defendants repeatedly assert, a control person claim
18 must include allegations of "actual participation." Third, the
19 court must consider the impact, if any, of the signing of
20 allegedly false financial statements upon the control person
21 liability analysis. The court will address these issues seriatim.

22 **1. Pleading Standards**

23 In Apollo I this court was confronted with the issue of
24 whether Rule 8 or Rule 9 supplies the governing pleading standards
25 for loss causation. See Apollo I, 633 F.Supp.2d at 813-814. Once
26 again, the issue of the applicable pleading standards has arisen,
27 but in a different context than Apollo I. The parties have a
28 fundamental disagreement as to the applicable pleading standards

1 for a section 20(a) claim. Plaintiff contends that Rule 8(a)'s
2 notice pleading standards govern. Subsection (2) of that Rule
3 merely requires "a short and plain statement of the claim showing
4 that the pleader is entitled to relief[.]" Fed. R. Civ. P.
5 8(a)(2). On the other hand, defendants contend that the
6 "'heightened pleading standard'" of the Private Securities
7 Litigation Reform Act of 1995 ("PSLRA") governs. Resp. (doc. 110)
8 at 5:2-3. Among other things, the PSLRA "requir[es] that a
9 complaint plead with *particularity* both falsity and scienter." In
10 re Vantive Corp. Sec. Litig., 283 F.3d 1079, 1084 (9th Cir. 2002)
11 (citation omitted) (emphasis added).

12 Defendants frame their pleading standards' argument strictly
13 in terms of the PSLRA. Close scrutiny of the cases to which
14 defendants cite reveals, however, that in some the courts applied
15 the pleading dictates of Rule 9(b) rather than those of the PSLRA.
16 For example, in Howard v. Hui, 2001 WL 1195780 (N.D.Cal. Sept. 24,
17 2001), characterizing a section 20(a) claim as "an allegation of
18 fraud[.]" the court held that "a plaintiff must plead the
19 *circumstances of the control relationship* with sufficient
20 particularity to satisfy rule 9(b)." Id. at *4 (citations
21 omitted) (emphasis added). Rule 9(b), in turn, requires that when
22 "alleging fraud . . . , a party must state with *particularity* the
23 circumstances constituting fraud[.]" Fed. R. Civ. P. 9(b)
24 (emphasis added). In other cases to which the defendants cite,
25 the court jointly invoked Rule 9(b) and the PSLRA. See, e.g., In
26 re Splash Tech. Holdings, Inc. Sec. Litig., 2000 WL 1727377, at
27 *25 (N.D.Cal. Sept. 29, 2000) (citation omitted) ("[T]he complaint
28 must plead the circumstances of the control relationship with

1 particularity[]" as "required by 9(b) and [the] PSLRA."). Based
2 upon the cases to which defendants cite, the court interprets
3 their response as asserting that plaintiff's section 20(a) claims
4 must satisfy the more stringent pleading standard of Rule 9(b) and
5 the PSLRA.

6 Regardless of whether based upon the PSLRA or Rule 9(b), as
7 discussed below, none of the cases upon which defendants rely
8 convince the court to apply a "heightened pleading standard" to
9 the section 20(a) claims at issue herein. See Resp. (doc. 110) at
10 5:2 (internal quotation marks omitted). The court finds
11 defendants' authority unavailing because those cases overlook a
12 fundamental distinction between section 20(a) control person
13 claims and section 10(b) and Rule 10b-5 securities fraud claims.⁴
14 Fraud and scienter -- essential elements of a section 10(b) claim
15 -- are not elements of a section 20(a) control person claim. That
16 distinction easily justifies applying a heightened pleading
17 standard to a section 10(b) claim, but not to a section 20(a)
18 claim.

19 The Ninth Circuit has yet to address the issue of whether a
20 section 20(a) claim should be plead in conformity with Rule 9(b),
21 as reinforced by the PSLRA, or in conformity with the notice
22 pleading requirements of Rule 8(a)(2). Additionally, there is a
23 split of authority within the district courts of this Circuit on
24 that issue. The requirement that a plaintiff allege "the
25 circumstances of control with particularity[]" for purposes of
26 stating a section 20(a) claim, "is set forth in several district

27
28 ⁴ Hereinafter these claims will be referred to collectively as "section
10(b)" claims.

1 court decisions." Hayley v. Parker, 2002 WL 925322, at *9
 2 (C.D.Cal. March 15, 2002) (citing, *inter alia*, Howard v. Hui, 2001
 3 WL 1159780, at *4 (N.D.Cal. Sep. 24, 2001); In re Splash Tech.
 4 Holdings, Inc. Sec. Litig., 2000 WL 1727405, at *16 (N.D.Cal.
 5 Sept. 29, 2000); In re Oak Tech. Sec. Litig., 1997 WL 448168, at
 6 *14-15 (N.D.Cal. Aug. 1, 1997)); see also In re Atmel Corp. Deriv.
 7 Litig., 2008 WL 2561957, at *11 (N.D.Cal. June 25, 2008) (same).⁵

8 In more recent years, however, the weight of district court
 9 authority within this Circuit is to the contrary. Siemers v.
 10 Wells Fargo & Co., 2006 WL 2355411 (N.D.Cal. Aug. 14, 2006), upon
 11 which the plaintiff herein relies, is representative. There, the
 12 defendants argued that because "the complaint sound[ed] in
 13 fraud[,]" Rule 9(b) require[d] the allegations of control to be
 14 stated with particularity." Id. at *14 (citation omitted).
 15 Stressing that Rule 9(b) "requires only that 'the circumstances
 16 constituting fraud . . . shall be stated with particularity[.]'"
 17 the Siemers court rejected that defense argument. Id. The court
 18 soundly reasoned:

19 The control exerted by [defendant] is not
 20 a circumstance that constitutes fraud.
 21 Plaintiff is only required to assert fraud
 22 with particularity as to primary violations.
 23 At the control-person level, liability exists
 24 irrespective of the control person's scienter.

24 ⁵ In Chan v. Orthologic Corp., 1998 WL 1018624, at *8 (D.Ariz. Feb. 5,
 25 1998), this court, too, indicated that in pleading a section 20(a) claim a
 26 plaintiff must satisfy Rule 9(b). This court further noted that PSLRA "has
 27 strengthened the requirement of Rule 9(b)." Id. (citing Oak Tech., 1997 WL 448168,
 28 at *3). Those statements were dicta, however, in that the court went on to discuss
 the merits of plaintiffs' section 10(b) claims, but not their section 20(a) claims.
 Moreover, as fully explicated above, in the more than a decade since Chan the case
 law pertaining to pleading a section 20(a) claim has evolved and changed to the
 point where now the court is firmly convinced that Rule 8 provides the applicable
 pleading standard.

1 Id. (citing Hollinger v. Titan Capital Corp., 914 F.2d 1564, 1575
2 (9th Cir. 1990) (“[W]e hold that a plaintiff is not required to
3 show ‘culpable participation’ to establish that a broker-dealer
4 was a controlling person The statute does not place such
5 a burden on the plaintiff .”) Thus, the Siemers court expressly
6 declined to adopt the contrary view of cases such as Hui, to which
7 the defendants herein cite. Id. (“To the extent [Hui] held that
8 . . . , control must be alleged with particularity, this order
9 respectfully disagrees.”)

10 Siemers is the basis for several other decisions within this
11 Circuit, concluding that “[b]ecause claims based on control person
12 liability do not directly touch on circumstances that constitute
13 fraud, Rule 9(b) does not apply to Plaintiff’s claims of control
14 person liability[.]” In re Wash. Mutual, Inc., 259 F.R.D. 490, 504
15 (W.D.Wash. 2009) (citing Siemers, 2006 WL 235411, at *14); Fouad
16 v. Isilon Systems, Inc., 2008 WL 5412397, at *12 (W.D.Wash. Dec.
17 29, 2008) (expressly applying “Rule 8[’s] notice pleading
18 standard” to plaintiffs’ control person liability claims based
19 upon the reasoning in Siemers); In re LDK Solar Sec. Litig., 2008
20 WL 4369987, at *12 (N.D.Cal. Sept. 24, 2008) (same); see also In
21 re Countrywide Fin. Corp. Sec. Litig., 588 F.Supp.2d 1132, 1201
22 (C.D.Cal. 2008) (quoting LDK Solar, 2008 436997, at *12)
23 (“‘Although the circumstances of the primary violators’ fraud must
24 be pled with particularity under Rule 9(b) [and the PSLRA], the
25 control element is not a circumstance that constitutes fraud and
26 therefore need not be pled with particularity.’”)

27 Although it did not mention Siemers, in Batwin v. OCCAM
28 Networks, Inc., 2008 WL 2676364 (C.D.Cal. July 1, 2008), the court

1 similarly reasoned "that a § 20(a) claim need not be pled in
2 accordance with Rule 9(b) or the PSLRA because scienter and fraud
3 are not elements of such a claim." Id. at *24 n. 17 (citing,
4 *inter alia*, In re Initial Pub. Offering, 241 F.Supp.2d 281, 396
5 (S.D.N.Y. 2003)). Instead, the Batwin court expressly held that
6 control person liability claims "must be pleaded in accordance
7 with Fed. R. Civ. P. 8(a)(2), requiring that the plaintiff provide
8 "a 'short and plain statement of the claim showing that the
9 pleader is entitled to relief.'" Id. at *24 (citing, *inter alia*,
10 Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am.
11 Sec., LLC, 446 F.Supp.2d 163, 190 (S.D.N.Y. 2006)).

12 Of the two lines of cases just discussed, in this court's
13 view, the Siemers line is the more soundly reasoned because they
14 recognize that scienter and fraud are not elements of a section
15 20(a) claim. The cases upon which the defendants rely fail to
16 make that crucial distinction, as will soon be readily apparent.
17 Further, as will also be seen, applying a heightened pleading
18 standard to a section 10(b) claim but not to a section 20(a) claim
19 fully comports with the PSLRA's plain language and its underlying
20 purpose.

21 Quoting at length from In re Tyco Int'l, Ltd., 2007 WL
22 1687775 (D.N.H. 2007), defendants assert that a plaintiff "must
23 plead specific facts demonstrating that Defendants exercised
24 actual power or control over the primary violation in relevant
25 respects." Resp. (doc. 110) at 5:23-25 (emphasis in original).
26 Significantly, however, the Tyco court did not directly confront
27 the issue of which pleading standards apply to section 20(a)
28 control person claims. In fact, in discussing whether plaintiffs

1 sufficiently alleged that a defendant director and major
2 shareholder was a control person, Tyco does not mention the
3 pleadings standards of Rules 8 or 9(b), or the PSLRA. Rather,
4 without citing to any legal authority, the Tyco court held that
5 plaintiffs' "bare assertions and generalized allegations [we] re
6 simply insufficient to establish that [a former director
7 defendant] exercised control over the company [so as] to sustain
8 plaintiff's control person claims against him." Tyco, 2007 WL
9 1687775, at *8.

10 In addition to the shortcomings just identified, two other
11 factors undermine the precedential value of Tyco. The first is
12 that Tyco, a district court within the First Circuit, is not
13 binding on this district court which sits within the Ninth
14 Circuit. See Dabbas v. Moffitt & Associates, 2008 WL 686687, at
15 *2 n. 2 (S.D.Cal. 2008) (federal cases from outside the Ninth
16 Circuit are "not binding authority" on district courts within the
17 Ninth Circuit). Second, Tyco expressly states that it is "NOT
18 FOR PUBLICATION[.]" Tyco, 2007 WL 1687775 (emphasis in original).
19 That unequivocal declaration, although not determinative of Tyco's
20 precedential value,⁶ strongly suggests that such value is rather
21 limited. For all of these reasons, although the defendants in the
22 present action place great credence on Tyco, this court does not.

23 Defendants' reliance upon Hui also is misplaced, but for
24 different reasons. Initially, as already explained, the court
25

26 ⁶ The court is well aware that Federal Rule of Appellate Procedure
27 32.1(a), effective January 1, 2007, states in relevant part, "[A] court may not
28 prohibit or restrict the citation of federal judicial opinions, . . . that have
been: . . . designated as . . . , 'not for publication,' . . . , or the like[.]"

1 disagrees with the basic premise of Hui, which is that a "section
2 20(a) claim is an allegation of fraud[,]" and thus is governed by
3 Rule 9(b)'s particularity requirement. See Hui, 2001 WL 1159780,
4 at *4 (citation omitted). Furthermore, the two cases to which the
5 Hui court cites - Oak Tech., 1997 WL 446168, and In re Glenfed,
6 Inc. Sec. Litig., 60 F.3d 591 (9th Cir. 1995) - do not persuade
7 this court that Rule 9(b)'s particularity requirement applies to
8 the section 20(a) claims at issue herein. Despite mandating that
9 the "'control relationship' be pled with particularity, in
10 accordance with Rule 9(b)[,]" critically, as the Batwin court
11 astutely noted, the court in Oak Tech. "did not explain the basis
12 for th[a]t requirement." Batwin, 2008 WL 2676364, at *24 n. 17.

13 The Hui court's reliance upon GlenFed is equally tenuous.
14 Despite what Hui implies, the Ninth Circuit in GlenFed "did not
15 require that all allegations of control be set forth with
16 particularity." See Siemers, 2006 WL 2355411, at *14. "Instead,"
17 the GlenFed Court "held that plaintiffs could not rely on a theory
18 of group-published information to hold outside directors liable for
19 misleading statements issued by the corporation unless the
20 plaintiffs pleaded the outside directors' involvement in the
21 day-to-day operations of the corporation with particularity." Id.
22 In GlenFed, "whether or not the directors were involved in
23 day-to-day operations was a circumstance determinative of whether
24 or not they committed fraud in the issuance of the statements."
25 Id. (citation omitted). Thus, as the court persuasively reasoned
26 in Siemers, the "holding of GlenFed does not apply to the situation
27 . . . , where," as here, "liability is not dependent upon showing
28 that the control person engaged in fraud." See id. In sum, unlike

1 the Hui court, this court does not find either Oak Tech. or GlenFed
2 persuasive on the issue of the pleading standards for a section
3 20(a) claim.

4 Likewise, Splash Technology Holdings, 2000 WL 1727405, another
5 case to which defendants cite, does not advance their argument that
6 a section 20(a) claim must be pled with particularity. In
7 requiring "the circumstances of the control relationship [to be
8 pled] with particularity[,]" the Splash Technology Holding court
9 simply cited to Oak Tech. Id. at *25 (citation omitted). The Oak
10 Tech. court offered no rationale whatsoever for its holding though,
11 as mentioned earlier. What is more, the court's pronouncement in
12 Splash Technology Holding was merely dicta in that it was
13 unnecessary to that court's holding. Because the plaintiffs in
14 Splash Technology Holding did not plead a primary violation of the
15 federal securities law, the court found "any discussion of control
16 person liability . . . moot." Id. at *26. Therefore, Splash
17 Technology Holding, like the other cases to which defendants cite,
18 is not persuasive in terms of the governing pleading standards for
19 a section 20(a) claim.

20 The final case to which defendants cite is In re Digital
21 Island Sec. Litig., 223 F.Supp.2d 546 (D.Del. 2002), aff'd on other
22 grounds, 357 F.3d 322 (3rd Cir. 2004). As with Tyco, Digital Island
23 is a district court decision outside the Ninth Circuit; hence it is
24 not binding upon this district court. See Dabbas, 2008 WL 686687,
25 at *2 n.2. Moreover, Splash Technology Holding was the primary
26 basis for the court's holding in Digital Island, but, as just
27 explained, the Splash Technology Holding court's rationale was
28 weak, to say the least.

1 To summarize, each of the cases to which defendants cite
2 requires a section 20(a) claim to be pled with particularity. Yet,
3 none of those cases are convincing on the issue of pleading such a
4 claim because they are: (1) not soundly reasoned; (2) outside this
5 Circuit; or (3) both. Consequently, despite defendants' repeated
6 urging, the court will not require a section 20(a) claim to be pled
7 in accordance with either the PSLRA or Rule 9(b).

8 Indeed, adopting a heightened pleading standard for section
9 20(a) claims would run afoul of the PSLRA. In enacting the PSLRA,
10 Congress sought to provide "protections to discourage frivolous
11 [securities] litigation." H.R. Conf. Rep. No. 104-369, 104th Cong.,
12 1st Sess. at 32 (Nov. 28, 1995). One of those "protections" was to
13 "strengthen[] the already-heightened pleading requirements of Rule
14 9(b)." Glenbrook Capital Ltd. Partnership v. Kuo, 2009 WL 839289,
15 at *5 (March 30 2009). Significantly, the PSLRA did not uniformly
16 heighten the pleading standards for all Exchange Act causes of
17 action. The PSLRA explicitly adopted stringent pleading standards
18 for allegations of material misstatements or omissions brought
19 pursuant to 15 U.S.C. § 78u-4(b)(1).⁷ The PSLRA also
20 "[s]pecifically . . . imposed strict requirements for pleading
21 scienter[.]"⁸ id., which "is an essential element of a § 10(b) or
22 Rule 10b-5 claim." Lipton v. Pathogenesis Corp., 284 F.3d 1027,

23
24 ⁷ The PSLRA requires that for "securities fraud actions" alleging
25 "[m]isleading statements and omissions[.]" a complaint must "specify each statement
26 alleged to have been misleading, the reason or reasons why the statement is
misleading, and, if an allegations regarding the statement or omission is made on
information and belief, the complaint shall state with particularity all facts on
which that belief is formed." 15 U.S.C. § 78u-4(b)(1) (West 2009)

27 ⁸ "Under the PSLRA, a complaint must "'state with particularity facts
28 giving rise to a strong inference that the defendant acted with the required state
of mind.'" Glenbrook Capital, 2009 WL 839289, at *5 (quoting 15 U.S.C.
§ 78u-4(b)(2)).

1 1035 n. 15 (9th Cir. 2002) (citation omitted).

2 In sharp contrast, the PSLRA is silent as to the pleading
3 standards for section 20(a) control person claims. Unlike section
4 10(b) claims, however, “to establish the liability of a controlling
5 person, the plaintiff does not have the burden of establishing that
6 person’s scienter distinct from the controlled corporation’s
7 scienter.” Batwin, 2008 WL 2676364, at *24 (quoting Arthur
8 Children’s Trust v. Keim, 994 F.2d 1390, 1398 (9th Cir. 1993)).
9 Therefore, it is logical and wholly consistent with the PSLRA to
10 find, as did the Batwin court, that for a section 20(a) cause of
11 action, where scienter is not an element, the PSLRA’s heightened
12 pleading standards do not apply. See id., 2008 WL 2676364, at *24
13 n. 17 (citations omitted).

14 Lastly, “the legislative history of the PSLRA, . . . specifies
15 that its heightened pleading standards *only apply* to ‘securities
16 *fraud*’ claims.” Initial Pub. Offering, 241 F.Supp.2d at 397 n. 185
17 (quoting S.Rep. No. 104-98, at 7) (emphasis added). Having found,
18 as this court has, that section 20(a) claims do not sound in fraud,
19 requiring such claims to be alleged in accordance with the PSLRA’s
20 heightened pleading standards would conflict with the legislative
21 history of that Act.

22 For all of these reasons, agreeing with plaintiff, the court
23 holds that section 20(a) control person claims are subject to the
24 more general notice pleading requirements of Fed. R. Civ. P.
25 8(a)(2). Not only is there case law outlined herein to support this
26 holding, but, from the court’s perspective, that line of cases is
27 more soundly reasoned, and hence more persuasive, than defendants’
28 contrary authority. Accordingly, the court will examine the FAC’s

1 allegations of section 20(a) control person liability to determine
2 whether they satisfy the less stringent notice pleading standards of
3 Rule 8(a).

4 The court's holding that Rule 8 provides the governing pleading
5 standards here seriously erodes defendants' Response, which is cast
6 in terms of the more exacting standards of Rule 9(b) and the PSLRA.
7 Further undermining defendants' response is that it borrows heavily
8 from Apollo I. That reliance is misplaced, though, because the
9 pleading deficiencies which defendants stress from Apollo I were in
10 the context of scienter. And, as should be abundantly clear by now,
11 from this court's standpoint, scienter is not an element of a
12 section 20(a) claim. Hence, the section 20(a) claims which the FAC
13 alleges are not subject to the more exacting pleading standards of
14 Rule 9(b) and the PSLRA.

15 **2. Actual Participation**

16 Defendants fare no better with their argument that plaintiff
17 must plead "actual participation" to satisfy the second element of a
18 section 20(a) control person claim. Quoting from Burgess v. Premier
19 Corp., 727 F.3d 826 (9th Cir. 1984), defendants repeatedly state
20 that "[t]here must be some showing of *actual participation* in the
21 corporation's operation or some influence before the consequences of
22 control may be imposed[]" under section 20(a). Resp. (doc. 110) at
23 2:5-7; 4:20-22; 12:23-25; 13:21-23; 14:5-7; and at 15:22 - 16:1-3
24 (emphasis added). Primarily due to an intervening change in the law
25 since Burgess, that statement evinces a basic misconception as to
26 control person liability - at least at the pleading stage. See
27 Howard, 228 F.3d at 1065 (showing of an "effective lack of
28 participation" and lack of scienter entitles defendant to good faith

1 defense to control person liability claim).

2 Burgess was decided prior to Hollinger. Id. at 1066. "Prior
3 to Hollinger, it was clear that a plaintiff needed to show actual
4 participation to make out a prima facie § 20(a) case in this
5 circuit." Id. (citation omitted). Hollinger "shifted the burden to
6 the defendant[,]" however, "to show that she acted in good faith and
7 did not directly or indirectly induce the violations." Id.
8 (citation and internal quotation marks omitted). Consequently,
9 despite defendants' contrary assertions, "it is *not necessary to*
10 *show actual participation* or the exercise of power[]" to make out a
11 *prima facie* § 20(a) claim in the Ninth Circuit. Id. (emphasis
12 added). So, rather than focusing on defendants' alleged actual
13 participation, this court must look to allegations of their
14 "participation in the day-to-day affairs of the corporation and the
15 defendant's power to control corporate actions." See Apollo I, 633
16 F.Supp.2d at 827 (quoting America West, 320 F.3d at 945).

17 **3. Signing Allegedly False Financial Statements**

18 Plaintiff's sole basis for moving for reconsideration as
19 to defendants other than the Sperlings⁹ is that they "were all
20 officers and directors who 'signed' false financial statements[.]'"
21 Mot. (doc. 107) at 3:18-19. According to plaintiff, the foregoing
22 "qualif[ies] [defendants] as control persons under" Apollo I. Id.
23 at 3:19-20 (citations omitted). There are factual and legal flaws
24 with this proposition.

25

26 ⁹ As to the Sperling defendants, plaintiff also argues that because the
27 FAC alleges that they "control over 99% of Apollo's voting stock[,]" they are
28 control persons. Mot. (doc. 107) at 3:14-15 (citation omitted). Defendants retort
that "stock ownership does not establish control[.]" Resp. (doc. 110) at 10:27
(emphasis omitted). The court will leave this argument for another day given its
finding that this reconsideration motion is moot as to the Sperlings.

1 First, plaintiff reads Apollo I too broadly. In Apollo I, this
2 court did not, as plaintiff strongly implies, hold that signing
3 false financial statements, absent any other allegations, suffices
4 to allege control under section 20(a). This court simply reiterated
5 that "there is 'persuasive authority indicat[ing] that an officer or
6 director who has signed false financial statements containing
7 materially false and misleading statements qualifies as a control
8 person.'" Apollo I, 633 F.Supp.2d at 828 (quoting Amgen, 544
9 F.Supp.2d at 1037 (in turn, collecting cases)). The court in Apollo
10 I did not further discuss that proposition because it was
11 unnecessary to the holdings therein.

12 Second, there is no factual basis for plaintiff's argument.
13 Plaintiff cites to paragraphs 156-182 of the FAC as the factual
14 underpinning for this argument. See Mot. (doc. 107) at 3:18. On
15 the face of it, none of those paragraphs pertain to the section
16 20(a) control person claims; rather, they allege section 10(B) and
17 Rule 10b-5 violations. Moreover, close examination of paragraphs
18 156-182 reveals that they do not include allegations that any of the
19 defendants signed any documents - financial statements or otherwise.
20 Nor does the FAC contain allegations elsewhere that any of the
21 defendants signed any documents. So, even assuming *arguendo* that
22 the signing of a false financial statement by an officer or director
23 suffices to plead a section 20(a) claim, the FAC does not include
24 such allegations as to any of the defendants. Plainly then,
25 defendants' purported signing of false financial statements is not a
26 basis for reinstating the section 20(a) claims as against them.

27 Although it disagrees with plaintiff's proffered basis for
28 finding that the FAC sufficiently alleges control within the meaning

1 of section 20(a), the court will *sua sponte* examine the sufficiency
2 of the FAC's allegations in that regard as to each of the
3 defendants. The court is proceeding in this way because in Apollo I
4 it did not reach the issue of whether the FAC sufficiently alleges
5 the exercise of actual power or control over a primary violator by
6 each of these defendants.

7 Proceeding in this way does not prejudice defendants. Upon the
8 filing of plaintiff's reconsideration motion, pursuant to LRCiv
9 7.2(g)(2), the court ordered that in responding, defendants were to
10 "address the issue of whether the [FAC] sufficiently alleges that
11 each of them exercised actual power or control over the primary
12 violation for purposes of asserting control person liability under
13 [s]ection 20(a) of the . . . Exchange Act[.]"¹⁰ Doc. 108 at 2:4-8.
14 Defendants thus were notified of the possibility that upon
15 reconsideration the court would examine the control element of a
16 section 20(a) claim, and they tailored their response accordingly.

17 To summarize, in scrutinizing the FAC's allegations of control
18 as to each of the defendants, Rule 8's notice pleading requirements
19 will apply. The court will not require allegations of actual
20 participation, however. Lastly, the signing of allegedly false
21 financial statements will not factor into the court's analysis of
22 the FAC's control allegations. Against that backdrop, the court
23 will examine the FAC to ascertain whether it sufficiently alleges
24 control so as to state a section 20(a) claim against each of the
25 defendants.

26
27 ¹⁰ The parties' original control person liability arguments were cursory,
28 to say the least. Three of the seven dismissed defendants did not even mention the
sufficiency of the control person allegations against them, making this additional
briefing all the more necessary.

1 **4. Rule 12(b)(6) Standards**

2 As acknowledged earlier, in Apollo I the court improperly
3 dismissed the section 20(a) claims against defendants because the
4 FAC did not allege a primary securities law violation against them
5 individually. Plainly then, in Apollo I this court never reached
6 the issue of whether the FAC sufficiently alleges that each of the
7 defendants had the requisite control so as to state a section 20(a)
8 claim against them. Now, for the first time, the court is
9 considering that issue. Therefore, as to this particular control
10 issue, Rule 12(b)(6)'s dismissal motion standards apply, not the
11 more demanding reconsideration standards which defendants invoke.

12 Apollo I includes a recitation of the basic standards governing
13 a Rule 12(b)(6) motion in the post-Twombly¹¹ era. See Apollo I, 633
14 F.Supp.2d at 779. Since Apollo I, the Supreme Court decided
15 Ashcroft v. Iqbal, 556 U.S. ___, 129 S.Ct. 1937, 173 L.Ed.2d 868
16 (2009), which discussed Rule 8(a)(2)'s standards in conjunction with
17 Rule 12(b)(6)'s dismissal standards. Significantly, in Iqbal the
18 Supreme Court removed any doubt as to Twombly's applicability
19 outside the anti-trust realm. The Iqbal Court held that the Twombly
20 standards apply to "all civil actions" pled under Fed. R. Civ. P. 8,
21 not just to antitrust cases. Iqbal, 556 U.S. at ___, 129 S.Ct. at
22 1953 (citations and internal quotation marks omitted). Because
23 Iqbal reaffirms the Supreme Court's decision in Twombly, Iqbal does

24 _____
25 ¹¹ "In Twombly, . . . , the Supreme Court 'retired' the familiar language
26 derived from Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80
27 (1957), which provided 'the accepted rule that a complaint should not be dismissed
28 for failure to state a claim unless it appears beyond doubt that the plaintiff can
prove no set of facts in support of his claim which would entitle him to relief.'" Rick-Mik Enterprises v. Equilon Enterprises, 532 F.3d 963, 970-971 (9th Cir. 2008)
(quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, ___, 127 S.Ct. 1955, 1968, 167
L.Ed.2d 929 (2007) (quoting Conley)).

1 not alter the standards which this court employed in Apollo I.
2 Certain aspects of Twombly bear emphasizing though.

3 As before, "to survive a motion to dismiss, a complaint must
4 contain sufficient factual matter, accepted as true, to 'state a
5 claim to relief that is plausible on its face.'" Iqbal, 129 S.Ct. at
6 1949 (quoting Twombly, 550 U.S. at 570, 127 S.Ct. 1955). "A claim
7 has facial plausibility when the plaintiff pleads factual content
8 that allows the court to draw the reasonable inference that the
9 defendant is liable for the misconduct alleged." Id. (citing
10 Twombly, at 556, 127 S.Ct. 1955). Although "the pleading standard
11 Rule 8 announces does not require 'detailed factual allegations,'
12 . . . it demands more than an unadorned, the-defendant-unlawfully-
13 harmed-me accusation." Id. (citing, *inter alia*, Twombly, 550 U.S.
14 at 555, 127 S.Ct. 1955).

15 The Supreme Court in Iqbal stressed that Twombly's plausibility
16 standard "is not akin to a 'probability requirement,' but it asks
17 for more than a sheer possibility that a defendant has acted
18 unlawfully." Iqbal, 556 U.S. at ___, 129 S.Ct. at 1949 (quoting
19 Twombly, 550 U.S. at 556, 127 S.Ct. 1955). After Twombly,
20 "[f]actual allegations must be enough to raise a right to relief
21 above the speculative level, . . . , on the assumption that all the
22 allegations in the complaint are true (even if doubtful in
23 fact)[.]" Twombly, 550 U.S. at ___, 127 S.Ct. at 1965 (citations and
24 footnote omitted). Thus, "[p]ost-Twombly, plaintiffs face a higher
25 burden of pleading facts, and courts face greater uncertainty in
26 evaluating complaints." al-Kidd v. Ashcroft, 580 F.3d 949, 977 (9th
27 Cir. 2009). Engaging in the "context-specific task" of determining
28 whether the FAC states a plausible section 20(a) claim as to any of

1 the remaining defendants, the court is particularly mindful that it
2 must "draw on its judicial experience and common sense." See Iqbal,
3 556 U.S. at ___, 129 S.Ct. at 1950 (citation omitted).

4 With that clarification, the court will consider the FAC's
5 broad allegations of control, as well as the control allegations
6 specific to each of the defendants. In so doing, the general
7 principles of control person liability outlined in Apollo I will
8 continue to inform the court. See Apollo I, 633 F.Supp.2d at 827-
9 828.

10 **a. Control Allegations Generally**

11 Section IV of the FAC, entitled "Defendants' Duties," alleges
12 in relevant part as follows:

13 Because of their positions of control and authority
14 as directors or officers of Apollo, each of the
15 defendants was able to and did, directly and
16 indirectly, control the wrongful acts complained
17 of herein. These acts include: (i) agreement to
18 and/or acquiescence in the improper stock practices;
19 and (ii) causing Apollo to file false SEC filings in
violation of the U.S. securities laws. Because of
their positions with Apollo, each of the defendants
had access to adverse non-public information and was
required to disclose these facts promptly and
accurately to Apollo shareholders and the financial
markets but failed to do so.

20 FAC (doc. 71) at 10, ¶ 32:16-23. Additionally, the FAC alleges that
21 "[e]ach of the defendants participated in the issuance and/or review
22 of the false and/or misleading statements, including the false SEC
23 filings and reports issued to Apollo shareholders." Id. at 12,
24 ¶ 34:4-6.

25 In another section of the FAC pertaining to "defendants'
26 duties" as "to granting and approving stock option grants," it
27 alleges:

28 The individual defendants, because of their positions

1 with [Apollo], possessed the power and authority to
2 control the contents of Apollo's quarterly reports,
3 press releases, SEC filings, and presentations to
4 securities analysts, money and portfolio managers and
5 institutional investors, i.e., the market. They
6 were provided with copies of [Apollo's] reports, SEC
7 filings, registration statements and press releases
8 alleged herein to be misleading prior to or shortly after
9 their issuance and had the ability and opportunity to
10 prevent their issuance or cause them to be corrected.

11 Id. at 14:10-18 (emphasis omitted).

12 **b. Daniel Bachus**

13 As to Daniel Bachus, the FAC alleges that he was Apollo's Chief
14 Accounting Officer ("CAO") and Controller throughout the Class
15 Period. FAC (doc. 71) at ¶ 21. The FAC also alleges that Bachus
16 had "knowledge of material non-public information regarding" Apollo.

17 Id. That knowledge allegedly formed the basis for Bachus' sale of
18 Apollo stock for \$1.7 million in proceeds during the Class Period.

19 Id. Additionally, the FAC states that Bachus "sign[ed] the
20 allegedly false and misleading Forms 10-K and 10-Q[,] " which were
21 filed with the SEC thereby "conceal[ing] Apollo's true financial
22 conditions[.]" Id. at 95, ¶ 199.

23 Instead of analyzing those allegations in terms of a section
24 20(a) claim, Bachus relies solely upon the court's analysis in
25 Apollo I. From Bachus' perspective, that prior analysis "doom[s]
26 the Section 20(a) claim as against him." Resp. (doc. 110) at 16:21.
27 Then, characterizing the preceding allegations as "conclusory[.]"
28 Bachus maintains that the FAC "do[es] not establish [him] as a
control person." Id. at 16-17 (citation and internal quotation
marks omitted). The FAC is deficient in that regard, Bachus
contends, because it "does not allege that his employment position
permitted him to maintain any control over Apollo, much less its

1 stock option granting process or its public disclosures." Id.
2 Bachus thus argues that the court should adhere to its ruling in
3 Apollo I, and continue to hold that the FAC does not adequately
4 allege a section 20(a) claim against him.

5 Addressing these contentions in order, there is no merit to
6 defendants' recurring argument that because the court in Apollo I
7 found many of these same allegations inadequate, it should make the
8 same finding now. In taking this stance, defendants, including
9 Bachus, are conveniently overlooking the context of Apollo I. The
10 focus there was scienter - a critical element of a section 10(b)
11 violation - which must be pled in conformity with the heightened
12 pleading standards of Rule 9(b) and the PSLRA. As discussed
13 earlier, those more stringent standards do not apply to section
14 20(a) claims. Consequently, the court disagrees with defendants
15 that the Apollo I rationale applies with equal force to the section
16 20(a) claims now under scrutiny.

17 As to Bachus' assertion that the FAC's allegations of control
18 are inadequate because they are "conclusory," he relies solely upon
19 Tyco, supra. Id. at 16. The court has already found that Tyco is
20 not controlling on several grounds, however. Therefore, obviously
21 Tyco cannot provide a basis for finding the FAC's allegations as to
22 Bachus "conclusory."

23 More significantly, the FAC's factual allegations and the
24 reasonable inferences therefrom "plausibly suggest" that defendant
25 Bachus had the requisite control so as to state a section 20(a)
26 claim against him. See al-Kidd, 580 F.3d at 975 (citation and
27 internal quotation marks omitted). The allegation that Bachus
28 signed false and misleading financial statements arguably takes on

1 even more significance given that he was Apollo's CAO and
2 controller. The allegations that he was among the defendants who
3 "had the ability and opportunity to prevent the[] issuance" of such
4 statements, among other items, and that he along with others "had
5 the ability and opportunity to . . . cause" the allegedly misleading
6 statements "to be corrected[,] " also take on greater significance
7 given Bachus' role as Apollo's CAO and controller. See FAC (doc.
8 71) at 14, ¶ 37. Id. Those allegations, in conjunction with the
9 FAC's broader control allegations, such as that each of the
10 defendants' asserted "participat[ion] in the issuance and/or review
11 of the false and/or misleading statements, including the false SEC
12 filings and reports issued to Apollo shareholders[,] " id. at 12,
13 ¶ 34:4-6, along with Bachus' position as Apollo's CAO and
14 controller, are sufficient to withstand dismissal at this pleading
15 stage. See Hayley, 2002 WL 925322, at *10 (plaintiffs stated a
16 valid section 20(a) claim against outside director defendants
17 despite lack of "allegations of day-to-day oversight," where those
18 defendants, *inter alia*, allegedly "signed the 10-K form that
19 allegedly reflects fraudulent accounting practices[;]" and they had
20 "access to non-public information . . . essential to th[e] case[]").

21 In fact, the allegations as to defendant Bachus are strikingly
22 similar to those in Amgen which that court found were "sufficient to
23 satisfy the second element of a § 20(a) claim" against four
24 corporate executives. See Amgen, 544 F.Supp.2d at 1038. The Amgen
25 complaint, like the FAC, alleged that certain executives "signed SEC
26 financial statements during the Class Period." Id. (citation
27 omitted). Also much like the FAC, the Amgen complaint alleged as
28 follows:

1 Defendants held positions of control, and they
2 participated in drafting, preparing, and/or
3 approving public reports and other statements
4 and communications complained of . . . , were
5 . . . able to and did control the content of
6 various SEC filings, press releases, and other
7 public statements pertaining to the Company
8 during the Class Period[.]

9 Id. (citations and internal quotation marks omitted).

10 Amgen thus provides additional support for the view that, when
11 read together, the FAC's allegations as to defendant Bachus are
12 sufficient to "nudge" plaintiff's section 20(a) claim "across the
13 line from conceivable to plausible." See Twombly 550 U.S. at 570,
14 127 S.Ct. 1955. Twombly requires nothing more. "The intensely
15 factual questions surrounding [Bachus'] actual participation in the
16 day-to-day affairs of [Apollo] relate to any good faith defense that
17 [he] may choose to assert in response to Plaintiff['s] allegations."
18 See In re UTStarcom, In. Sec. Litig., 617 F.Supp.2d 964, 979-980
19 (N.D.Cal. 2009) (citing Howard, 228 F.3d. at 1065). Development of
20 those issues must await another day. Hence, the court finds that at
21 this juncture the section 20(a) claim against defendant Bachus
22 should be allowed to stand.

23 **c. Dino DeConcini**

24 Defendant DeConcini has been an Apollo director since 1981.
25 See FAC (doc. 71) at 9, ¶ 26:11-12. DeConcini maintains that
26 because he "was an outside director uninvolved with the day-to-day
27 affairs of [Apollo], and because the Court has already found that
28 [he] was not involved in the stock option backdating process or
accounting for stock options, the [FAC] does not sufficiently allege
that he is a 'control person.'" Resp. (doc. 110) at 14, ¶ 10-14
(citation and footnote omitted). DeConcini adds that "[g]iven the

1 court's finding" as to the purported stock option backdating, the
2 FAC's allegations of his Audit Committee membership cannot "rescue"
3 plaintiff's control person claim against him. Id. at 14 n.9:23-24
4 (citation omitted). Defendant DeConcini also stresses the absence
5 of "any" allegations showing his "'actual participation in the
6 corporation's operation or some influence'" by him so that the
7 "'consequences of control may be imposed.'" Id. at 145-6 (quoting
8 Burgess, 727 F.2d at 832) (other citation omitted).

9 None of these arguments are compelling. Defendant DeConcini
10 characterizes the FAC as alleging his "mere[]" status as "an outside
11 director during the relevant time period." Resp. (doc. 110) at
12 14:3-4 (citing FAC at ¶ 26). To be sure, "being an officer or
13 director does not create any *presumption* of control[.]" Paracor, 96
14 F.3d at 1163 (citations and internal quotation marks omitted)
15 (emphasis in original). On the other hand, "director status 'is a
16 sort of red light' indicating the potential for day-to-day
17 involvement in a company." Fouad, 2008 WL 5412397, at *12 (quoting
18 Arthur Children's Trust v. Keim, 994 F.2d 1390, 1397 (9th Cir.
19 1993)). Moreover, the FAC alleges more than simply DeConcini's
20 position as an outside director. The FAC also alleges that
21 DeConcini was "a member of the Audit Committee[.]" FAC (doc. 71) at
22 9, ¶ 26:12. As a member of that Committee, allegedly, DeConcini had
23 the following "responsib[ilities][:]"

24 (i) reviewing and discussing the audited financial
25 statements of [Apollo] with management; (ii)
26 discussing with [Apollo's] independent accountants
27 the matters required to be discussed by the Statement
28 of Accounting Standards . . . ; (iii) receiving and
reviewing the written disclosures and letters from
its independent accountants . . . ; (iv) discussing
with its independent accountants, the independent
accountants' independence; and (v) recommending to

1 the Board . . . that the audited financial statements
2 be incorporated by reference into [Apollo's] Annual
Reports.

3 Id. at ¶ 40. As an Audit Committee member, the FAC also alleges
4 that "DeConcini caused or allowed the dissemination of the improper
5 public statements described [t] herein." Id. at 9, ¶ 26:12-13.

6 Lastly, the FAC alleges that "[b]ased on his knowledge of material
7 non-public information regarding [Apollo]," during the Class Period
8 DeConcini sold over 100,000 shares of Apollo stock for proceeds of
9 \$5.7 million. Id. at 9, ¶ 26:13-16.

10 Defendant DeConcini's attempt to downplay the significance of
11 these allegations is not convincing. The FAC alleges "traditional
12 indicia" of control by him, such as stock ownership and having a
13 seat on Apollo's Board of Directors. See America West, 320 F.3d at
14 945 (citation and internal quotation marks omitted). The FAC also
15 alleges DeConcini's responsibilities, as detailed above, as a member
16 of Apollo's Audit Committee. The issuance of false and misleading
17 financial statements, and improprieties surrounding Apollo's
18 accounting procedures, is part of the alleged primary violation of
19 stock option backdating. See Apollo I, 633 F.Supp.2d at 769-770.
20 Financial statements and Apollo's accounting clearly fall within the
21 purview of the Audit Committee, as the FAC alleges.

22 What is more, the FAC explicitly alleges that as an Audit
23 Committee member DeConcini "review[ed] and discuss[ed] the audited
24 financial statements of [Apollo] *with management*[.]" FAC (doc. 71)
25 at 15, ¶ 40:15-16 (emphasis added). The allegations of DeConcini's
26 Audit Committee responsibilities, in conjunction with the broader
27 control allegations, sufficiently allege control person status at
28 this motion to dismiss stage. See, e.g., In re Wash. Mutual, Inc.,

1 259 F.R.D. at 509 (denying motion to dismiss control person claims
2 against outside director defendants who served on Audit Committee,
3 Finance Committee, or both, where their committee-related
4 responsibilities were related to the alleged primary violations)
5 (citing Fouad, 2008 WL 5412397, at *10 (same)).

6 The court is well aware that in Apollo I it found that
7 "defendant DeConcini's alleged Audit Committee responsibilities
8 d[id] not create a strong inference of scienter[.]" Apollo I, 633
9 F.Supp.2d at 813. Of course, scienter is an element of a section
10 10(b) primary violation - not of a section 20(a) control person
11 claim. So although the FAC did not sufficiently allege scienter as
12 to DeConcini, that does not preclude a finding that those same
13 allegations are sufficient for purposes of alleging control under
14 section 20(a).

15 Likewise, the court's observation in Apollo I that "[t]here is
16 nothing linking [Mr. DeConcini] to any aspect of stock option
17 granting or the associated accounting[]" does not justify dismissal
18 of the section 20(a) claim against him. See id. In responding to
19 plaintiff's motion, Mr. DeConcini places far too much credence in
20 that statement. First, it was made while discussing the sufficiency
21 of the section 10(b) scienter allegations against him. As should be
22 abundantly clear by now, the pleading standards for scienter are far
23 more strict than they are for pleading a section 20(a) claim.
24 Further, because the inquiry at this juncture "revolve[s] around the
25 management and policies" of Apollo, "not around discrete
26 transactions[.]" the court's prior comment is not germane in this
27 context. See Paracor, 96 F.3d at 1162 (internal quotation marks
28 omitted).

1 Finally, as earlier discussed, the lack of allegations of
2 "actual participation" by DeConcini is not a basis for dismissing
3 the section 20(a) claim against him. See Reese, 2009 WL 506820, at
4 *9 (plaintiffs were "not required to demonstrate actual
5 participation by Defendants or the exercise of power . . . to
6 establish derivative liability under § 20(a)) (citation omitted).
7 The FAC's allegations as to DeConcini, and the reasonable inferences
8 therefrom, signal a level of involvement and control beyond being
9 merely a titular member of the Audit Committee. The allegations
10 concerning DeConcini's "title and responsibilities are sufficient at
11 the pleading stage[]" to allege the requisite control for section
12 20(a) purposes. See id. (citations omitted). Thus, as with Bachus,
13 the court finds that the FAC's allegations "nudge" plaintiff's
14 section 20(a) claim against DeConcini "across the line from
15 conceivable to plausible." See Twombly, 550 U.S. at 570, 127 S.Ct.
16 1955. By the same token though, also as with defendant Bachus, the
17 court "recogniz[es] that [DeConcini] will be permitted to develop
18 the nature of Plaintiff['s] proof through discovery and interpose
19 defenses of good faith or lack of participation at a later date."
20 See Reese, 2009 WL 506280, at *10.

21 **d. Hedy Govenar**

22 The FAC's allegations specifically pertaining to Ms. Govenar
23 are scant. The FAC alleges that she was an Apollo director during
24 the Class Period. FAC (doc. 71) at 8, ¶ 24. It also alleges that
25 Ms. Govenar was a director of the University of Phoenix, an Apollo
26 subsidiary for five years well before the Class Period. Id. at 8-9,
27 ¶ 24. Allegedly, "[b]ased on her knowledge of non-public material
28 information regarding [Apollo]," during the Class Period Ms. Govenar

1 sold nearly 80,000 shares of Apollo stock "for proceeds of \$3.4
2 million[.]" Id. at 9, ¶ 24:2-4.

3 Additionally, the FAC alleges that Ms. Govenar was one of two
4 Apollo directors whom the Sperlings appointed to serve on a Special
5 Committee ("SC"). Id. at 58, ¶ 93:10-11. That Committee was
6 charged with "oversee[ing] a review of [Apollo's] practices related
7 to stock option grants." Id. at 58, ¶ 93:11-13. The FAC vaguely
8 alleges, as discussed in Apollo I, that Ms. Govenar was "removed
9 from the SC due to [an] [unspecified] conflict[] of interest[.]" Id.
10 at 58, ¶ 13-14. "[U]ltimately [Ms. Govenar] resigned from the
11 Apollo Board." Id. at 58, ¶ 93:14.

12 Essentially, Ms. Govenar's argument is the same as Mr.
13 DeConcini's. The FAC's allegations of control are inadequate
14 because it "merely alleges that [she] was a[n] . . . outside
15 director of Apollo." Resp. (doc. 110) at 13 (citations omitted).
16 Likewise, Ms. Govenar points to the lack of allegations that she
17 "had any control, much less actual control over the day-to-day
18 management of Apollo or was otherwise involved in options granting
19 or reporting processes." Id. (footnote omitted). Relying upon
20 Burgess, supra, Ms. Govenar also emphasizes her lack of "actual
21 participation" in Apollo's operations. Id. at 12.

22 Again, the court disagrees with the proposition that in this
23 Circuit "actual participation" is a necessary predicate to stating a
24 claim under section 20(a). Nonetheless, the court agrees that the
25 FAC does not sufficiently allege a section 20(a) claim against Ms.
26 Govenar. Admittedly, as outlined above, the FAC does include
27 specific allegations regarding Ms. Govenar beyond its broad
28 allegations of control pertaining to all of the defendants. Those

1 specific allegations are not sufficient, even when read with the
2 broad control allegations, to allow plaintiff to proceed on a theory
3 of control person liability against Ms. Govenar.

4 The allegations as to Ms. Govenar are much like those in Reese,
5 supra, 2009 WL 506820, wherein the court granted a defendant's
6 motion to dismiss the section 20(a) control person claim because it
7 was not adequately pled. The Reese court held that the complaint
8 did not sufficiently allege a section 20(a) claim because it
9 "stat[ed] only that he was a non-executive member of the [corporate
10 defendant] board of directors . . . and served on the Ethics and
11 Environment Assurance Committee." Id. at *9 (citation and internal
12 quotation marks omitted). The court reasoned that those
13 "allegations d[id] not speak to any degree of control over the
14 operations of the corporation and certainly no involvement in its
15 day-to-day activities." Id.

16 Here, the FAC suffers from the same deficiencies with respect
17 to Ms. Govenar. The FAC "do[es] not speak to any degree of control"
18 over Apollo's "operations" by Ms. Govenar, and "certainly no
19 involvement [by her] in [Apollo's] day-to-day activities." See id.
20 Aside from her appointment on the SC, in sharp contrast to defendant
21 DeConcini, the FAC does not include any allegations as to Ms.
22 Govenar's responsibilities as an outside Apollo director. The
23 absence of such allegations make it impossible to discern whether
24 Ms. Govenar was responsible for controlling any aspect of Apollo's
25 management or policies.

26 Further, primarily because of the time frame, Ms. Govenar's
27 SC assignment does not save this otherwise deficient section 20(a)
28 claim. As the FAC alleges, that Committee was charged with the

1 discrete task of "oversee[ing] a review of [Apollo's] practices
2 related to stock option grants." FAC (doc. 71) at 58, ¶ 93:11-12.
3 That Committee was formed in late June 2006, in the aftermath of the
4 alleged backdating. This is not a situation, for example, where Ms.
5 Govenar was appointed to a corporate committee charged with
6 promulgating Apollo's policy for granting stock options. Nor are
7 there any allegations that this SC assignment put Ms. Govenar in a
8 position of controlling any aspect Apollo's management or policies.
9 Instead, the SC was charged with reviewing and "investigating"
10 alleged "options misconduct" which had already occurred. See id. at
11 5, ¶ 11:21. As the foregoing shows, the meager allegations in the
12 FAC specific to Ms. Govenar do not "plausibly suggest" that she had
13 the requisite control so as to state a section 20(a) claim against
14 her. See al-Kidd, 580 F.3d at 975 (citation and internal quotation
15 marks omitted). Consequently, the court stands by its prior holding
16 that the FAC does not state a section 20(a) claim against Ms.
17 Govenar, albeit for a different reason than in Apollo I.

18 **e. Brian Mueller**

19 The court has little difficulty finding that the FAC does not
20 adequately allege control person status as to defendant Mueller.
21 After joining Apollo in 1987, the FAC twice alleges that Mueller
22 "serv[ed] in a variety of positions, including a variety of
23 executive positions since 1993." FAC (doc. 71) at 9, ¶ 25:7-8; and
24 at 77, ¶ 128:22-24. "Most recently," prior to his January 2006
25 appointment as Apollo's President, "Mueller held the title of Chief
26 Operating Officer ("COO")[.]" Id. at 9, ¶ 25:8-9. As discussed in
27 Apollo I, the FAC includes two allegations of "knowingly false
28 statements" by Mr. Mueller as well. Apollo I, 633 F.Supp.2d at 812.

1

2 Arguing that the court should "confirm" the dismissal of the
3 section 20(a) claim against him, Mueller notes the paucity of
4 allegations as to his "knowledge of stock options[.]" Resp. (doc.
5 110) at 15:1. Mueller asserts that the foregoing, along with the
6 timing of his Apollo presidency, which began roughly nine months
7 before the end of the Class Period, "cannot be reconciled with
8 Plaintiff's proposition that [he] is a 'control person' for the
9 entire class period." Id. at 15:3-4 (emphasis added).

10 There are several glaring deficiencies in the FAC's pleading of
11 section 20(a) control person status as to Mr. Mueller. First, the
12 court agrees with Mueller's assertion that "officers and directors"
13 cannot be found "liable as control persons under Section 20(a) for
14 alleged violations that took place before they assumed their
15 positions." Resp. (doc. 110) at 14-15, n. 10 (citing, *inter alia*,
16 Roberts v. Heim, 670 F.Supp. 1466, 1487 (N.D.Cal. 1987), aff'd in
17 part on other grounds, rev'd in part on other grounds, 857 F.2d 646
18 (9th Cir. 1988)). That reasoning is not entirely dispositive of the
19 section 20(a) claim against Mueller though because the FAC alleges
20 that he became Apollo's president during the Class Period, albeit
21 not until near the end of that Period. Nevertheless, due to the
22 lack of factual allegations of control specific to Mr. Mueller,
23 plaintiff has not met its burden of pleading a plausible section
24 20(a) claim against him.

25 The lack of specific time frames regarding Mueller's other
26 positions with Apollo further weakens plaintiff's section 20(a)
27 claim as against this particular defendant. Aside from his January
28 2006 appointment as Apollo's President, the FAC is silent as to

1 whether Mueller held any of those "executive positions" during the
2 Class Period. Further, the FAC does not elaborate as to the nature
3 of those "executive positions," Mueller's responsibilities while he
4 served in those positions, or any specific time frames for that
5 service. Similarly, there is no time frame as to when Mueller was
6 COO and what responsibilities he had as such. The FAC also is
7 silent as to Mueller's responsibilities as Apollo's president.
8 Perhaps he was simply a titular President, or perhaps he was more.
9 There is no way to know from the FAC. The lack of allegations as to
10 Mueller's responsibilities as Apollo's president becomes even more
11 problematic given his relatively short tenure during the Class
12 Period as Apollo's president.

13 Compounding the pleading deficiencies just identified are the
14 lack of allegations of "traditional indicia" of control by Mr.
15 Mueller. For example, the FAC does not specifically allege stock
16 ownership by Mr. Mueller; nor does it allege that he held a seat on
17 Apollo's Board of Directors. To be sure, "*Twombly* and *Iqbal* do not
18 require that the complaint include *all facts* necessary to carry
19 plaintiff's burden." See al-Kidd, 580 F.3d at 977 (emphasis added).
20 But here, insofar as Mr. Mueller is concerned, the FAC does not
21 allege "plausible grounds to infer the existence of a claim for
22 relief" pursuant to section 20(a). See id. (citation and internal
23 quotation marks omitted).

24 In short, the court adheres to its prior ruling that dismissal
25 of the section 20(a) claim against Mueller is proper, albeit for a
26 different reason than articulated in Apollo I. Now, the court finds
27 that the FAC does not adequately allege the control elements of a
28 section 20(a) claim against defendant Mueller.

1 **f. Laura Palmer Noone**

2 As already explained, plaintiff's argument that defendants
3 "were all officers and directors who 'signed' false financial
4 statements," thus qualifying them as control persons is tenuous at
5 best. See Mot. (doc. 107) at 3:18-19 (citation omitted). That
6 argument is even more tenuous as to Ms. Noone, though, because the
7 FAC does not allege that she was an officer or director of Apollo.
8 Rather, the FAC alleges that since September 2000, Ms. Noone has
9 been president of the University of Phoenix -- an Apollo subsidiary.
10 FAC (doc. 71) at 9, ¶ 28. Thus, assuming *arguendo* that an officer
11 or director who allegedly signs a false financial statement is a
12 control person for § 20(a) purposes, Ms. Noone does not qualify as
13 such because the FAC does not allege that she was an officer or
14 director of Apollo.

15 What is more, as Ms. Noone persuasively argues, because she was
16 neither an Apollo director nor officer, she "could not have
17 'controlled' Apollo, including its disclosures, in any way." Resp.
18 (doc. 110) at 12:15-16. The lack of any allegation as to her
19 director or officer status with Apollo, as distinguished from an
20 Apollo subsidiary, is "dispositive" of the § 20(a) claim against
21 her, Ms. Noone argues. Id. (citations omitted).

22 Her position is well-taken. To illustrate, in Copland v.
23 Grumet, 88 F.Supp.2d 326 (D.N.J. 1999), plaintiffs sought to amend
24 their complaint to add section 20(a) claims against two officers of
25 a subsidiary on the theory that they were control persons of the
26 subsidiary's parent. Id. at 335-336. The Copland court reasoned
27 that "at best" plaintiffs' allegations could only show that the
28 officers of the subsidiary controlled the subsidiary, not that they

1 controlled the parent defendant. Id. at 335; see also Brown v.
2 Enstar Group, Inc., 84 F.3d 393, 397 (11th Cir. 1996) (affirming
3 summary judgment on section 20(a) claim in favor of chairman of
4 subsidiary due to lack of record evidence that he had the power to
5 control the parent when the allegedly fraudulent and misleading
6 prospectus was issued). Unlike Copland, the FAC's allegations do
7 not even minimally show that Ms. Noone exercised any measure of
8 control over an Apollo subsidiary, much less over Apollo itself.

9 The few other allegations as to Ms. Noone described in Apollo
10 I, even when taken together with the FAC's general control
11 allegations, provide nothing "more than a sheer possibility" that
12 she is a control person for section 20(a) purposes. See Iqbal,
13 U.S. ___, 129 S.Ct. at 1949 (citing Twombly, 550 U.S. at 556, 127
14 S.Ct. 1955). A "sheer possibility" does not satisfy Twombly's
15 plausibility standard. See id. Thus, as with defendants Govenar
16 and Mueller, the court finds that the FAC does not adequately plead
17 a section 20(a) claim for control person liability against Ms.
18 Noone.

19 **III. Leave to Amend**

20 In its motion, plaintiff sought limited relief in the form of
21 having this court "reconsider [Apollo I] and deny defendants Bachus,
22 DeConcini, Govenar, Mueller, Noone and the Sperlings' motion to
23 dismiss the § 20(a) claims against them." Mot. (doc. 107) at 4:27-
24 5:1. The sole basis for that motion is the fact that the court
25 erroneously required plaintiff to allege a section 10(b) primary
26 violation as against each individual defendant as a predicate to a
27 section 20(a) control person claim. In any event, plaintiff also
28 sought "withdraw[al] [of] the Judgment entered in favor of Bachus,

1 DeConcini, Govenar, Mueller and Noone [("the group one
2 defendants")][.] " Id. at 5:1-2 (citation omitted).

3 Plaintiff's reconsideration motion does not explicitly mention
4 amending the FAC as to the section 20(a) claims. Plaintiff does
5 indicate that it is "[m]indful that [Apollo I] required [it] to
6 amend [its] Complaint to more particularly alleged the falsity of
7 the alleged misstatements[.]" Mot. (doc. 107) at 3 (citation
8 omitted). Plaintiff then assures that its "forthcoming [SAC] will
9 particularly allege each false and misleading statement 'signed' by
10 defendants that are the subject of this motion." Id. But of
11 course the amendments just referenced, and which the court addressed
12 in some length in Apollo I, do not pertain to the second control
13 element of a section 20(a) claim. The amendments to which plaintiff
14 is referring are directed strictly at the primary section 10(b)
15 violations. Thus, there is nothing on the face of plaintiff's
16 reconsideration motion suggesting to either the court or the group
17 one defendants that plaintiff intended to amend the FAC regarding
18 control person liability as to any of them.

19 Plaintiff first made the suggestion of such an amendment in its
20 reply to this reconsideration motion. Plaintiff raised the
21 possibility of amendment by seeking to have the court "*reconsider*
22 the *dismissal* of . . . plaintiff's § 20(a) claims *with prejudice*" as
23 to the group one defendants. Reply (doc. 111) at 11:6-8 (emphasis
24 added). In urging amendment, plaintiff simply stated that "there
25 has been no showing that any such defects could not be cured by
26 amendment." Id. at 11:9. Further, plaintiff notes that "defendants
27 have not contended that any amendment would be futile." Id. at
28 11:16-17. Of course, there would have been no reason for defendants

1 to address those contentions in their response because, as detailed
2 above, plaintiff did not even hint at amendment until it filed its
3 reply. Thus, defendants were not on notice that as part of this
4 motion plaintiff also was seeking leave to amend.

5 Further complicating plaintiff's belated request for leave to
6 amend is that during the pendency of this motion, plaintiff filed a
7 SAC which includes a section 20(a) claim against the group one
8 defendants. As the SAC candidly notes, plaintiff included those
9 allegations despite being fully aware that in Apollo I this court,
10 *inter alia*, had previously dismissed those claims with prejudice and
11 directed entry of judgment thereon. See SAC (112) at 70, n. 9. The
12 group one defendants, as well as the other remaining individual
13 defendants and Apollo Group, Inc. then promptly moved for dismissal
14 of the SAC. That motion has been fully briefed and submitted.

15 This procedural quagmire, which put the court in a somewhat
16 tenuous position, easily could have been avoided. Despite the 30
17 day deadline for filing the SAC which the court imposed in Apollo I,
18 plaintiffs could have sought an extension of that deadline. That
19 would have delayed the filing of the SAC until after resolution of
20 this reconsideration motion. Even after the SAC was filed, the
21 group one defendants also could have sought an extension of time in
22 which to answer or otherwise respond to the SAC, but they did not.
23 Instead, *all* defendants forged ahead with motions to dismiss the
24 SAC.

25 Given the unique procedural posture of this case, the court
26 rules as follows. Despite finding that the FAC does not
27 sufficiently allege section 20(a) control person liability against
28 defendants Hedy Govenar; Brian E. Mueller; and Laura Palmer Noone,

1 the court grants plaintiff's reconsideration motion. The court now
2 deems the section 20(a) claims against the three defendants just
3 listed to be dismissed without prejudice and with leave to amend.
4 Necessarily, the Rule 54(b) judgment previously entered in favor of
5 these defendants shall be vacated.

6 By the same token though, because a SAC has already been filed,
7 that SAC is the operating complaint for purposes of the pending
8 defense motions to dismiss. No other amendment shall be allowed,
9 nor shall any further briefing regarding the SAC be filed unless
10 sought by the court. In other words, whether plaintiff has
11 adequately alleged a section 20(a) claim against defendants Govenar;
12 Mueller and/or Noone is now entirely dependent upon the sufficiency
13 of the allegations in the SAC.

14 Next, having considered for the first time the sufficiency of
15 the control element of a section 20(a) claim as against defendants
16 Daniel E. Bachus and Dino J. DeConcini, and having found that the
17 FAC does adequately allege such a claim against these two
18 defendants, the court must vacate the judgment previously entered in
19 favor of those defendants. As with the three defendants discussed
20 in the preceding paragraph, because a SAC has already been filed,
21 that SAC is the operative complaint for purposes of the pending
22 motions to dismiss. No other amendment shall be allowed, nor shall
23 further briefing regarding the SAC be filed unless sought by the
24 court.

25 **Conclusion**

26 For the reasons set forth herein, Lead Plaintiff's Motion to
27 Reconsider Dismissal of Plaintiff's § 20(a) Claim (doc. 107) is
28 DENIED in part and GRANTED in part, as enumerated below:

1 The court hereby ORDERS that:

2 (1) Lead Plaintiff's Motion For Reconsideration is DENIED as
3 moot as to defendants John Sperling and Peter Sperling;

4 (2) Lead Plaintiff's Motion For Reconsideration is GRANTED as
5 to defendants Daniel Bachus; Dino DeConcini; Hedy Govenar; Brian E.
6 Mueller; and Laura Palmer Noone;

7 (3) The Clerk of the Court is directed to vacate the judgment
8 (doc. 106) previously entered as to the five defendants enumerated
9 in paragraph (2) above; and

10 (4) Apollo I, doc. 105 at 127:10 is *sua sponte* amended to
11 insert defendant Norton for defendant Nelson.

12 DATED this 19th day of February, 2010.

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20 Copies to counsel of record

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Robert C. Broomfield
Senior United States District Judge