

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

IN RE MONSTER WORLDWIDE, INC.,
SECURITIES LITIGATION

Case No. 07 CV 2237 (JSR)

**LEAD PLAINTIFFS'
MEMORANDUM OF LAW IN OPPOSITION TO
DEFENDANT ANDREW J. MCKELVEY'S MOTION TO DISMISS
THE AMENDED COMPLAINT FOR FAILURE TO STATE A CLAIM**

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Lead Plaintiffs Middlesex County Retirement System and the Steamship Trade Association-International Longshoremen's Association Pension Fund (collectively "Lead Plaintiffs") respectfully submit this Memorandum of Law in Opposition to Defendant Andrew J. McKelvey's ("McKelvey") Motion to Dismiss the Amended Complaint for Failure to State a Claim.¹

PRELIMINARY STATEMENT

The Amended Class Action Complaint for Violation of the Federal Securities Laws ("AC") was filed after the Court granted Lead Plaintiffs leave, at the June 14, 2007 hearing on McKelvey's initial motion to dismiss, to file an amendment limited to bolstering allegations against McKelvey. (DE# 37.) The AC includes approximately 90 new paragraphs detailing how McKelvey systemically participated in, indeed orchestrated, the backdating of stock options granted by Monster to its employees, officers and directors. These amendments corroborate McKelvey's initial admission to the *Wall Street Journal* that he was "completely responsible" for all of Monster's stock option grants, and hence the wrongdoing in connection with the grants.² (¶59-60; *Wall Street Journal* article, dated June 12, 2006, attached as Ex. 16 to the Declaration of Nicole M. Zeiss ("Zeiss Decl."), dated Aug. 9, 2007.)³ Indeed, McKelvey no longer contests, and now concedes, that the AC sufficiently particularizes that he **participated in** and **knew about** the backdating at Monster to give "in the money" grants to employees and directors. But despite this and: (a) Monster's admission that "persons formerly in positions of responsibility" acted with fraudulent intent; (b) McKelvey's refusal

¹ Defendant Monster Worldwide, Inc. ("Monster" or the "Company") and Defendant Myron Olesnyckyj ("Olesnyckyj"), Monster's former General Counsel, answered the original complaint on April 18, 2007. (DE 15; 17.) All citations to McKelvey's motion to dismiss are referred to herein as ("Def. Br. at ___").

² McKelvey's statements to the *Wall Street Journal* are admissions against his interest. *See In re JDS Uniphase Corp. Sec. Litig.*, No. 02-1486, 2005 WL 43463, at *3, 8-9 (N.D. Cal. Jan. 6, 2005) (construing statements made by CEO to industry journal as admissions and finding Section 10(b) claim was sufficiently pled against him, among others.) The AC also pleads that he stood by his statements of responsibility after the article appeared. (¶61.)

³ All references to "¶ ___" are to paragraph numbers in the AC.

to cooperate with Monster's internal investigation by appearing to explain prior incorrect statements he made to its Special Committee concerning his knowledge of backdating, and instead resigning from the Company; and (c) numerous additional facts alleged in the AC showing the McKelvey was one of those "persons," McKelvey has renewed his motion to dismiss. He argues that the claims against him should be dismissed because the AC fails to: (i) sufficiently allege that he knew that the accounting for the backdated options was improper; (ii) sufficiently allege scienter based on his "motive and opportunity;" and (iii) state a Section 20(a) claim. However, viewed together, the well-pled facts in the AC adequately allege scienter and control-person liability at the pleading stage and the Court should deny McKelvey's motion to dismiss in its entirety.

STATEMENT OF FACTS

Despite McKelvey's hearsay arguments to the contrary, this action involves a simple decade-long scheme orchestrated by McKelvey and Monster's most senior officers, designed to inflate the Company's reported net income while attracting and retaining top level officers, directors and employees by generating undisclosed profits for them. On Dec. 13, 2006, Monster *admitted*, through its \$339.6 million restatement ("Restatement") covering its financial results from 1997 to 2005, that the Company's internal investigation into its stock option practices revealed an intentional fraud that began in 1997, just one year after it went public. (¶2; 11; 51; 187; Form 10-K/A attached as Ex. 1 to Zeiss Decl.) As part of the Restatement, the Company admitted:

In most cases, the original date assigned to the grant corresponded to the date as of which a unanimous written consent ("UWC") was executed by the members of the Compensation Committee of the Company's Board of Directors, but the date of that consent did not correspond to the actual date on which the identities of the individual optionees and the number of shares underlying each option was determined. ***The Company believes that the dates as of which the UWC's were dated were earlier than the dates on which they were actually executed.*** In a significant number of instances, the stock price on the assigned date (the date as of which the UWC was executed) ***was lower, sometimes substantially lower,*** than the price on the date the award may be deemed to have actually been determined. ***The Company believes that this practice was done intentionally, by persons formerly in***

positions of responsibility at the Company for the purpose of issuing options at a higher intrinsic value than would have otherwise been the case.

(¶72) (emphasis added).⁴ As stated in the Form 10-K/A, the Special Committee’s investigation identified evidence demonstrating that the Restatement and GAAP violations resulted from an intentional fraud. As part of their investigation, the Special Committee also reviewed the Company’s internal controls and determined that they were not effective:

In connection with the restatement discussed above, we recorded \$339.6 million of additional pre-tax non-cash stock based compensation expense (\$271.9 million on an after-tax basis) ***related, in part, to management override of the historical stock option grant process during the periods 1997 through March 31, 2003. The Company believes that this practice was done intentionally, by persons formerly in positions of responsibility at the Company for the purpose of issuing options at a higher value than would have otherwise been the case.*** Since certain of these persons remained employed throughout December 31, 2005, we did not have sufficient safeguards in place to monitor our control practices in this area or prevent other opportunities for management override.

(Zeiss Decl. Ex. 1 at 98-99)(emphasis added.) Although McKelvey was not identified by name in documents concerning the Restatement, and indeed those documents were careful to avoid mentioning any specific individual’s name with respect to wrongdoing, it is clear that Monster’s stock options were ***intentionally manipulated*** on numerous occasions by a cohort of “***persons formerly in positions of responsibility at the Company.***”⁵ The AC now pleads newly discovered facts adding to the showing that McKelvey was indeed one of these people.

Monster’s Stock Option Practices

Throughout the class period, Monster falsely accounted for millions of dollars in stock options to its officers, employees and directors, in contravention of Accounting Principles Board

⁴ The Restatement also revealed that neither the “as of” dates of the UWCs nor the dates of Compensation Committee minutes could be relied on as proper grant dates. (¶116.)

⁵ By the time of the Restatement, McKelvey, Monster’s long-time Chief Executive Officer (“CEO”), founder and majority shareholder, had resigned and Olesnyckyj, its General Counsel and Secretary, had been terminated. (¶179; 181; 183; 186.)

Opinion No. 25 (“APB 25”) and Monster’s own stated accounting policies. Indeed, each of the Company’s class period Forms 10-Q and 10-K signed by McKelvey falsely stated that:

*The Company’s financial statements are presented in accordance with Accounting Principles Board (“APB”) Opinion No. 25, Accounting for Stock Issued to Employees. Under APB 25, generally, no compensation expense is recognized in connection with the awarding of stock option grants to employees **provided that, as of the grant date, all terms associated with the award are fixed and the quoted market price of the stock is equal to or less than the amount an employee must pay to acquire the stock as defined. As the Company has only issued fixed term employee stock option grants at or above the quoted market price on the date of the grant, there has been no compensation expense associated with stock options recognized in the accompanying financial statements.***

(¶169; excerpts from Class Period Forms 10-Q and 10-K are attached as Ex. 2 to Zeiss

Decl.)(emphasis added.) These statements were materially false and misleading and were made by McKelvey who knew, based on his direct participation in the backdating, that Monster was decidedly doing the very opposite and that this had consequences. By accepting that the AC pleads that he knew option grants were being backdated so they were granted immediately “in the money,” McKelvey must accept allegations that he knew the option grants were not issued “at or above the quoted market price on the date of the grant.” By accepting that statement as true, a compelling and cogent inference arises that McKelvey must have known, or was severely reckless in not knowing, that his class period statements were false at the time he made them.

Olesnyckyj has admitted (and the AC alleges) that issuing backdated options was integral to Monster’s efforts to hire employees. (¶9; 119-26; Information, filed Feb. 15, 2007, at ¶32-33, attached as Ex. 3 to the Declaration of Cristina M. Posa (“Posa Decl.”); Transcript of Olesnyckyj Plea Allocution, dated Feb. 15, 2007, attached as Ex. 3 to Zeiss Decl.) As reported in its annual Form 10-Ks, Monster grew from having 2,200 employees in 1996 to 9,500 in 2000—peaking at 11,000 employees in 2001 and attracting approximately 9,000 new employees over time using backdated options as extra incentive for proposed employees. (Excerpts from Monster’s 1996 Form 10-K, 2000 Form 10-K and 2001 Form 10-K are attached as Ex. 4-6 to Zeiss Decl.) The backdated

options, with a higher intrinsic value than would have been the case if they were issued “at the money,” were used as currency—that is additional compensation—to attract and reward Monster’s employees. (¶¶65-70; 98-106; 119-26.) After Monster went public in 1996, McKelvey organized and attended a series of “road shows” to educate company employees on how the option plan worked and, more importantly, how it would benefit each employee. (¶¶66-69.) Former Monster employees recalled these road shows and how options were a “huge initiative” to keep talented employees. (¶¶67-69.) One such employee recalled a presentation informing employees that grant dates would be chosen by “look[ing] back during certain periods.” (¶¶69.) In a private message to Monster employees after the June 12, 2006 *Wall Street Journal* article was published, (¶¶125), McKelvey confirmed the important role Monster’s stock option plans played in its ambitious growth:

Ever since Monster Worldwide became a public company 11 years ago, we used our stock option incentive plan as an effective tool to drive our growth and foster the entrepreneurial spirit that continues to exist throughout the organization. The option grants were used to attract and retain talented and creative individuals, to recognize individual performance and facilitate strategic acquisitions... Since day one, our philosophy has been to provide incentives to many members of our staff and recognize their important contributions across the organization- from administrative and support personnel to business unit leaders.

McKelvey’s Improper Conduct

Paragraphs 59 to 118 of the AC detail McKelvey’s direct involvement in the backdating at Monster. Not only does the AC allege that he manipulated certain grants, but he was hands-on and played a central role in the stock option process.

With respect to Monster’s annual “Company-wide” grants, which were made from a pool of options allocated by McKelvey to the various divisions of the Company, McKelvey and members of the executive committee would *predetermine* the “grant date” and the number of options to be allotted, after which the division heads were expected to allocate their pool and documentation, including UWCs, was prepared. (¶¶71-95; *see also* memoranda concerning Monster’s 1998 and 2001 Annual Company-wide grants, attached as Ex. 10 and 11 to Zeiss Decl.) These UWCs were

prepared and signed by McKelvey and/or the Compensation Committee long after grant dates were chosen, using “as of” dating so they would appear to be contemporaneous with the chosen grant date.⁶ (¶72-74.) This was not possible, however, because under the accounting rules purportedly followed by Monster, an option is not granted (and priced) until at least the identities of the optionees and number of shares allotted to them are determined. The Restatement disclosed that the *average* period between the UWC “as of” date and the actual grant date was 97 days. (¶74.)

A prime example of McKelvey’s cherry-picking was the 1998 Annual Company-wide grant. (¶75-81; *see also* Complaint against Olesnycky filed by SEC at ¶ 37-40, attached as Ex. 7 to Zeiss Decl.; Posa Decl. Ex. 3 at ¶20-21.) At a Jan. 15, 1999 executive committee meeting, McKelvey announced that he wanted to grant options at \$25, even though Monster’s stock was trading at more than \$42. A human resources employee found that on Dec. 9, 1998 the stock was trading near \$25 at \$26.875, so that became the grant date. Division heads were told of the grant in a Feb. 26, 1999 memorandum and were told to make their allotments by March 12, 1999, at which point the stock was trading at \$64. (Zeiss Decl. Ex. 10.) The actual grants were made after March 12, when they were approved and the documentation complete--when the stock was trading at more than twice the strike price. (¶79-80.) The AC also details McKelvey’s manipulations of the 2001 Annual Company-wide grant. There, he and the executive committee chose a Jan. 2, 2001 grant date (on Jan. 15, 2001), when the stock was trading at its lowest price since Jan. 19, 1999. As the options were being allocated by the division heads, however, the stock price fell and McKelvey re-dated the grant to March 13, 2001, then to April 4, 2001 when the price hit its lowest point since Nov. 2, 1999.

⁶ For example, McKelvey joined the Compensation Committee in signing the UWC for the 1999 Annual Company-wide grant dated “as of” Dec. 1, 1999, the day before Monster’s stock price shot up from \$95 to over \$127 with the announcement of an alliance with AOL. Based on the Restatement, these options were likely granted sometime in March or April 2000. (¶91-95; copy of UWC is attached as Ex. 12 to Zeiss Decl.)

(¶82-90; Zeiss Decl. Ex. 11; Posa Decl. Ex. 3 at ¶24-26.) The grant was not actually made until it was documented, an average of 97 days later. (¶73-74.) For instance, McKelvey was still issuing options backdated to April 4 in May 2001. (¶97; Stock Option Grant Form attached as Ex. 13 to Zeiss Decl.)

McKelvey, and others, also routinely added new grants on top of prior grants to award people in the money options, which was really backdating upon backdating. For instance, the AC alleges that McKelvey added employees from the newly acquired Morgan & Banks to the Dec. 9, 1998 Annual Company-wide grant. (¶98-101.)

Furthermore, McKelvey was also responsible for approving periodic individual grants, often made to new hires. (¶103-114.) The AC explains the process, which included human resources personnel being trained to “go to [Monster’s] stock info on Nasdaq.com to search for the lowest strike/date in quarter to find lowest amount to propose and include it on the sheets sent.” (¶105.) This was also made clear to employees during the “road shows” about options organized by McKelvey. (¶66-69.) Once option request forms were prepared and approved by a division head, they were forwarded to McKelvey for final approval. No grants could be processed without McKelvey’s signature. (¶106-09; Zeiss Decl. Ex. 13.) Moreover, if there was a negative trend in the stock price, McKelvey would also withhold approval until the stock price bottomed-out, at which time he would amend the “grant date.” (¶108-114; *see* Stock Option Grant Form attached as Ex. 14 to Zeiss Decl.) For instance, a July 25, 2001 grant at \$48 was faxed from Monster.com to McKelvey on Aug. 22, 2001 for his approval after being signed by Monster.com’s Jeff Taylor. However by August, the stock was trading at \$44. Sometime after Sept. 21, 2001, when the stock had bottomed-out, McKelvey changed the grant date and price to “9/21/01” and “31.290.” McKelvey then approved the grant and subsequently documentation, such as stock option agreements and a UWC dated “as of” Sept. 21, 2001, was prepared and the grant was made. *Id.*

Olesnyckyj Has Admitted That He and Others Engaged in Securities Fraud

Olesnyckyj joined Monster in 1994 and was the Company's General Counsel, Senior Vice President and Secretary until he was suspended in Sept. 2006 and terminated on Nov. 22, 2006. (¶19; 179; 186.) On February 15, 2007, he pled guilty to two felony counts relating to his involvement in the Company's historical stock option grants--criminal federal securities fraud and conspiracy to commit securities fraud. (¶9; Zeiss Decl. Ex. 3; Posa Decl., Ex. 3.) When Olesnyckyj appeared before Judge Swain, he testified in support of his allocution that the scheme lasted from 1996 to 2006. After Monster went public in 1996, he and others agreed to backdate annual companywide stock option grants, choosing the dates of the grants after looking at the historical records of the Company's stock price movements. He admitted that he and others then concealed the backdating from the Company's financial records and reports, auditors, and investors. He specifically testified, "I and others discussed and understood that the company should have recognized the compensation expense from granting in the money options and that it was not doing so." *Id.* Although Olesnyckyj has not yet publicly named his co-conspirators, his testimony and the information delineating the charges against him show that he did not act alone or hide his crimes from other top level officers at the Company. *Id.*

McKelvey's Resignation and Refusal to Cooperate

On Oct. 6, 2006, McKelvey resigned as CEO and Chairman of the Board.⁷ Then on Oct. 29, 2006, he refused to appear at a previously scheduled interview with the Special Committee to explain a July 2006 interview in which he had falsely stated that he had no knowledge of options backdating at Monster. (¶62-64; 183-84; *Wall Street Journal* article, dated Oct. 31, 2006, attached as Ex. 8 to Zeiss Decl.) Instead of cooperating, he proffered a letter from his attorney containing excuses about his physical condition and his complete resignation from the Board. (¶183-84.)

⁷ However, he remained a member of Monster's Board as "Chairman Emeritus." (¶63.)

ARGUMENT

I. STANDARDS OF REVIEW

A complaint may not be dismissed under Fed. R. Civ. P. 12(b)(6) “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.” *Chance v. Armstrong*, 143 F.3d 698, 701 (2d Cir. 1998) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)).” *City of Sterling Heights Police & Fire Ret. Sys. v. Abbey Nat’l, PLC*, 423 F. Supp. 2d 348, 354 (S.D.N.Y. 2006). “The test for dismissal is not whether the plaintiff is likely to prevail, but whether it is entitled to offer evidence to support its claims. . . . The court must accept the factual allegations of the complaint as true and draw all reasonable inferences in favor of the plaintiff.” *Id.* See also *In re Scholastic Corp. Sec. Litig.*, 252 F.3d 63, 69 (2d Cir. 2001).

In the Supreme Court’s recent ruling in *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 127 S. Ct. 2499 (2007), the Court explained that a complaint alleging a claim under Section 10(b), 15 U.S.C. § 78j(b), will survive if “a reasonable person would deem the inference of scienter cogent and at least as compelling as any opposing inference one could draw from the facts alleged.” *Id.* at 2510. The Court held that “[t]he inference that the defendant acted with scienter need not be irrefutable, *i.e.*, of the ‘smoking-gun’ genre, or even ‘the most plausible of competing inferences.’” *Id.* Instead, partially out of concern that a plaintiff not be held to a higher standard than would be required at trial, the Court favored a comparative test of whether the facts give rise to a strong inference that the defendant acted with scienter equal to the inference that he did not. *Id.* at 2509-10.⁸

⁸ For instance, the Court applied its “strong inference” standard to a hypothetical where “a jade falcon [was] stolen from a room to which only A and B had access.” *Id.* at 2510 n.5. The majority explained that “law enforcement officials as well as the owner of the precious falcon would find the inference of guilt as to B quite strong – certainly strong enough to warrant further investigation.” *Id.* This reasoning applies with equal force to the facts alleged in the instant case. Here, the potential wrongdoers consist of a limited pool of Monster’s senior officers, including McKelvey and Olesnyckj.

The relevance of *Tellabs* is not limited to its interpretation of the phrase “strong inference.” It also reiterates two other basic principles for reviewing courts. The first “prescription” is that “faced with a Rule 12(b)(6) motion to dismiss a § 10(b) action, courts must, as with any motion to dismiss for failure to plead a claim on which relief can be granted, accept all factual allegations in the complaint as true.” *Id.* at 2509. The second is that, “the inquiry is whether **all** of the facts alleged, taken collectively, give rise to a strong inference of scienter, not whether any individual allegation, scrutinized in isolation, meets that standard.” *Id.* at 2509 (emphasis in original).

Here, McKelvey has not suggested **any** competing inference that might be derived from the facts pled in the AC.⁹ Nor has he explained why his improper inferences are **more** compelling than those offered by Lead Plaintiffs, as required by *Tellabs*. *Id.* at 2509-10.

II. THE AC PLEADS SCIENTER WITH THE REQUIRED PARTICULARITY

Under Second Circuit law, a plaintiff can plead scienter by alleging (a) facts showing strong circumstantial evidence of the defendant’s conscious misbehavior or recklessness **or** (b) that the defendant had the motive and opportunity to commit fraud. *Scholastic*, 252 F.3d at 74; *see also Ganino v. Citizens Utils. Co.*, 228 F.3d 154, 169 (2d Cir. 2000). An:

⁹ The purported complexity of APB 25 is a defense to be weighed by a fact finder. His argument that APB 25 is “notoriously opaque” and has been misconstrued by companies such as Microsoft and Barnes & Noble is irrelevant given the deliberate backdating detailed in the AC and the clarity of Monster’s Forms 10-Q and 10-K. It has no place in a motion to dismiss where the challenged pleading is taken as true and hearsay opinion evidence is outside the AC. Several of the documents submitted in support of this theory: (i) two *Wall Street Journal* articles, attached as exhibits 5 and 6 to the Posa Decl., and (ii) a guidance letter from the SEC’s Chief Accountant (which says it has not been approved by the SEC), attached as exhibit 7 to the Posa Decl., were not referenced in the AC, are being offered for the truth-of-the-matter and are not entitled to judicial notice. *See Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC*, 446 F. Supp. 2d 163, 175-76 (S.D.N.Y. 2006) (explaining courts “may consider documents attached to, referenced in, or integral to the pleadings. Courts may also take judicial notice of stock prices and press articles, for the fact of their publication.”) Accordingly, they should either be stricken from the record, or not considered by the Court.

inference [of scienter] may arise where the complaint sufficiently alleges that the defendants: (1) benefited in a concrete and personal way from the purported fraud; (2) engaged in deliberately illegal behavior; (3) knew facts or had access to information suggesting that their public statements were not accurate; or (4) failed to check information they had a duty to monitor.

Novak v. Kasaks, 216 F.3d 300, 311 (2d Cir. 2000)(internal references omitted). “Under such circumstances, defendants [are liable if they] knew or, more importantly, should have known that they were misrepresenting material facts related to the corporation.” *Id.* at 308. Recklessness can also be established by allegations of “[a]n egregious refusal to see the obvious, or to investigate the doubtful. . . .” *Id.* See also *In re Winstar Commc’ns*, Nos. 01-3014, 01-11522, 2006 WL 473885, at *6 (S.D.N.Y. Feb. 27, 2006)(same).

Here, McKelvey argues that the AC fails to meet the scienter requirement, because it does not particularize that he knew Monster’s *accounting* for the backdated options was false and misleading. However, this argument is based on an overly myopic reading of the AC and ignores the simple fact that regardless of whether he understood all the accounting permutations of APB 25, the AC alleges he knew that his statements in the Form 10-Qs and 10-Ks representing that the exercise prices of Monster’s grants were no lower than the prices on the grant dates were false. (¶22; 25; 166-69; 192-93; 211.) He also knew, from the face of those statements, that if there was a difference, there had to be a compensation expense, but that Monster was not incurring the expense. (¶169.) These facts very clearly and succinctly demonstrate his awareness that the backdating was inconsistent with Monster’s public statements.

A. Evidence of McKelvey’s Conscious Misbehavior and Recklessness

McKelvey has now conceded that the AC sufficiently particularizes the fact that he backdated stock options granted by Monster. This is fatal to his argument that the AC still does not properly allege securities fraud and McKelvey’s motion misses the overall picture. He backdated stock options of all types, repeatedly. When considering the inference to be drawn from this, and

the facts alleged in the AC, the Court should consider why would McKelvey do this? Why match the option grant dates and the “as of” dates of the UWCs to a particular time when Monster’s stock was trading at a beneficial price?¹⁰ For instance, in the case of the Dec. 1, 1998 grant, why make that the date of the grant, why not just grant an option for \$25.00 on the real grant date, which was sometime after March 12, 1999? (§74; 80.) There is only one reasonable answer: to pay more money to employees without bringing down the bottom line. McKelvey has offered no other innocent purpose. He clearly knew that the stock price of the option had to match the market value of Monster’s stock on the grant date—indeed the UWCs stated this. (Zeiss Decl. Ex. 12.) He also knew this, because that is what Monster clearly said it had to do to comply with APB 25 in each of the Form 10-Qs and 10-Ks that he signed. Why else go through the machinations? His knowledge of the accounting implications of the backdating is evident from the manipulation of the grant date, as other courts have found. In *In re UnitedHealth Group PSLRA Litig.*, No. 06-1691, 2007 WL 1621456, at *1 (D. Minn. June 4, 2007), another recent backdating case arising out of disclosures in 2006, the court summed up the situation as “Notwithstanding counsel’s siren song, the Court persists in its belief that two plus two equals four.” It went on:

¹⁰ The cases McKelvey cites concerning “as of” dating, which deal with contract matters without corresponding accounting or disclosure implications, support this. See *Rosner v. Metro. Prop. & Liab. Ins. Co.*, 236 F.3d 96, 100 (2d Cir. 2000) (“[T]he phrase [as of] frequently signifies the effective legal date of a document, as when the document is backdated...”); *Viacom Int’l Inc. v. Tandem Prods., Inc.*, 368 F. Supp. 1264, 1270 (S.D.N.Y. 1974) (“When a written contract provides that it shall be effective ‘as of’ an earlier date, it generally is retroactive to the earlier date”). *S.E.C. v. Durgarian*, 477 F. Supp. 2d 342, 352 (D. Mass. 2007), explains that in securities related matters backdating by way of “as of” transactions is a method that is commonly used to conceal deceptive practices, including attempts to cover up securities violations. Such language can indeed be a red flag of deceptive practices. In *S.E.C. v. Nat’l Student Mktg. Corp.*, 402 F. Supp. 641, 644 (D.D.C. 1975), an attorney used “as of” language to backdate documents involving the sale of certain corporate assets. The court found that although the backdating may not itself have been technically illegal, it was done in connection with an intent to mislead third parties into believing that the divesting of assets had resulted in a profit to the corporation, when in fact a substantial loss had been incurred. *Id.* at 646, 649-50.

Plaintiffs' claims are nowhere near as complex as defense counsel suggest. If plaintiffs are correct, this case is incredibly simple. Plaintiffs claim defendants were playing a game with a stacked deck. When awarded options, with deliberately selected grant dates which were already in the money, defendants were playing a game they knew they could not lose; and unsurprisingly, defendants won.

Id. In the case of McKelvey, although he personally received no options,¹¹ he benefited from the options and used them to make Monster grow. In *In re Zoran Corp. Derivative Litig.*, No. 06-05503, 2007 WL 1650948, at *20 (N.D. Cal. June 5, 2007), on very similar facts as those alleged in the AC, the court found that a Section 10(b) claim had been alleged:

Plaintiff has here pled specific facts that Gerzberg [founder/CEO] and Schneider [CFO] exercised supervision and control over the options-granting process. In their respective roles at Zoran, Gerzberg and Schneider were required to review, certify and sign financial disclosure statements. Additionally, from plaintiff's confidential witnesses, Gerzberg and Schneider were intimately involved in deciding when and to whom options would be granted. Indeed, Gerzberg allegedly exercised final approval over options grants. If Gerzberg and Schneider had been so involved with granting options as plaintiff pleads, they would have either known, or been deliberately reckless in not knowing, that stock options were not being issued at fair market value on the date of the grant. Thus, plaintiff has pled facts that, if proven true, would show a strong inference of the required state of mind. Plaintiff has pled that defendants acted with scienter.

Accordingly, there is no competing inference to be drawn from the AC that is more compelling than the inference that McKelvey acted with scienter. *Tellabs*, 127 S. Ct. at 2509-10.

1. A Strong Inference is Raised by McKelvey's Signatures on Each of the Class Period SEC Reports and False Certifications to the SEC

As discussed above, McKelvey's knowledge is evident from the face of Monster's Forms 10-Q and 10-K filed with the Securities and Exchange Commission ("SEC") during the class period. Each was signed by him, as CEO and Chairman. Each expressly stated on their face, in plain language, that Monster followed APB 25 and simply that:

¹¹ The same was true of the former CEO of Brocade Communications Systems Inc. who on Aug. 8, 2007 was nonetheless found guilty by a jury of securities fraud related to backdating. (*Wall Street Journal* article, dated Aug. 8, 2007, attached as Ex. 9 to Zeiss Decl.)

(1) no compensation expense for options was recognized “provided that, as of the grant date, **all terms associated with the award are fixed** and the quoted market price of the stock is equal to or less than [the exercise price];”

(2) “the Company has only issued fixed term employee stock option grants **at or above the quoted market price on the date of the grant;**” and

(3) therefore “there has been no compensation expense associated with stock options recognized in the accompanying financial statements”

(¶169; Zeiss Decl. Ex. 2.) From these facts alone, there is a strong inference that McKelvey knew of APB 25’s requirements (at least to the extent explained in the filings) and therefore, since he no longer contests that the AC properly alleges his knowledge of backdating, the only conclusion, and reasonable inference, is that he knew APB 25 was being violated and Monster’s financial statements were false. *In re AOL Time Warner, Inc. Sec. & “ERISA” Litig.*, No. 02-5575, 2004 WL 1810661, at *1 (S.D.N.Y. Aug. 12, 2004)(finding scienter pled and crediting argument that CEO’s signature on numerous “SEC filings is sufficient to plead [CEO’s] knowledge, or at least reckless disregard of, AOL’s advertising situation.”)

For instance, with respect to the 2001 Annual Company-wide grant, dated “as of” April 4, 2001 the AC alleges that on, *inter alia*, Jan. 15, 2001 and approximately March 13, 2001, McKelvey intervened in that grant, and related periodic grants, manipulating its price and grant date. (¶82-89; Zeiss Decl. Ex. 11.) Yet, within days, on March 22, 2001, he signed the Company’s 2000 Form 10-K which clearly stated, “Under APB 25, because the exercise price of the Company’s employee stock options equals the market price of the underlying stock on the date of grant, no compensation expense is recognized.” (Zeiss Decl. Ex. 5 at 70.) During the class period those representations continued as he signed a Form 10-Q for the first quarter of 2005, a Form 10-Q for the second quarter of 2005 and a Form 10-K for the year 2005, each of which should have reflected that options were issued “in the money” and that expenses were due. Instead, investors were told, “As the Company has only issued fixed term employee option grants at or above the quoted market price

on the date of the grant, there has been no compensation expense. . . .” (¶167-69; Zeiss Decl. Ex. 2.) McKelvey’s manipulation of a series of grants between Aug. 22, 2001 and Sept. 21, 2001 similarly were near his signing Monster’s 2001 Form 10-K on March 28, 2002 and impacted the Company’s filings through its Form 10-Q for the third quarter of 2005 and 2005 Form 10-K, which, again, stated that Monster did not do what McKelvey was doing. (¶110-113; 167; Zeiss Decl. Ex. 14; Zeiss Decl. Ex. 2, 6 at 55.)¹²

Moreover, McKelvey’s certifications, pursuant to the Sarbanes-Oxley Act of 2002 (“SOX”), 15 U.S.C. §7262, were not meaningless paperwork. They evidenced to investors that McKelvey was not an idle participant in the Company’s affairs. As Sections 302 and 906 of SOX required, McKelvey repeatedly attested that adequate control procedures were in place and functioning for each quarterly reporting period, that he had reviewed Monster’s Forms 10-Q and 10-K, that, based on his knowledge, none of the information presented in those reports was false or misleading and the information contained therein fairly represented Monster’s financial results. (¶170-71.) To assure investors that McKelvey had a legitimate basis for making these statements, and to prevent him from later claiming to be unaware of material information that rendered the filings false, SOX further required him to certify that he was responsible for establishing and maintaining Monster’s disclosure controls and procedures and that he had evaluated them. *Id.*

Given Monster’s Restatement and admissions, Olesnyckyj’s plea and McKelvey’s concession that the AC sufficiently places him in the thick of the backdating, the Sarbanes-Oxley certifications McKelvey signed at the time of each false report to the SEC support a strong inference that he was *at least* deliberately reckless in causing or permitting the fraudulent statements to be published. Indeed, recent cases have expressly recognized that SOX certifications may provide additional

¹² This is far from the scenario where an individual defendant’s only involvement in an alleged fraud is his signature on an SEC filing. (Def. Br. at 14-15.)

evidence of scienter on the part of the certifying officers. *See, e.g., Croker v. Carrier Access Corp.*, No. 05-01011, 2006 WL 2035366, at *11 (D. Colo. July 18, 2006); *In re Am. Italian Pasta Co. Sec. Litig.*, No. 05-0725, 2006 WL 1715168, at *5 (W.D. Mo. June 19, 2006)(SOX certifications supported inference of scienter as to CEO, CFO and others); *In re Lattice Semiconductor Corp. Sec. Litig.*, No. 04-1255, 2006 WL 538756, at *18 (D. Or. Jan. 3, 2006) (“Sarbanes-Oxley certifications give rise to an inference of scienter because they provide evidence either that defendants knew about” improper accounting “or, alternatively, knew that the controls they attested to were inadequate. . . .”).¹³

2. McKelvey’s Suspicious Resignation

As discussed above, within one month, the Company suspended Olesnyckyj pending the results of the Special Committee’s ongoing options review and announced that McKelvey had resigned as CEO and Chairman of the Board. (¶179; 181.) On Oct. 29, 2006, Monster reported that McKelvey had resigned, effective immediately, as a member of Monster’s Board and Chairman Emeritus, and refused to appear and explain his prior statements regarding his lack of knowledge of backdating. (¶183-84.) The specifics of his resignation, namely his refusal to cooperate with Monster’s ongoing investigation, also add to a strong negative inference against him. The general fact that several senior-officers, including McKelvey, left Monster around the same time under suspicious circumstances also support a strong inference of scienter with respect to McKelvey.¹⁴

¹³ McKelvey tries to undercut the inferences from these certifications by arguing that a signature on company filings is insufficient to allege scienter. (Def. Br. at 14-15.) However, his argument ignores the fact that he signed SOX certifications in addition to signing the class period Forms 10-Q and Form 10-K. None of the cases he cites even mention SOX certifications.

¹⁴ *See, e.g., In re Adaptive Broadband Sec. Litig.*, No. C 01-1092, 2002 WL 989478, at *14 (N.D. Cal. Apr. 2, 2002) (denying individual defendants’ motion to dismiss and finding CEO and CFO resignations, coupled with second CFO’s reassignment near time of restatement and internal investigation were highly suspicious and “add one more piece to the scienter puzzle”); *In re Mercator Software, Inc. Sec. Litig.*, 161 F. Supp. 2d 143, 150 (D. Conn. 2001)(firing of vice president of finance and resignation of CFO on the same day as financial restatement was announced supported finding of scienter against CEO and CFO.)

B. McKelvey Had Both Motive and Opportunity to Commit the Alleged Fraud

It has long been the law in this District that scienter is sufficiently pled where a plaintiff alleges nothing more than a defendant's motive and opportunity to commit fraud. *Novak*, 216 F.3d at 307; *In re Indep. Energy Holdings PLC Sec. Litig.*, 154 F. Supp. 2d 741, 765 (S.D.N.Y. 2001). An inference of motive arises where the complaint alleges that defendant "benefited in a concrete and personal way from the purported fraud...." *Novak*, 216 F.3d at 311. Here, McKelvey does not challenge that he had the opportunity to commit fraud, (Def. Br. at 15), and Lead Plaintiffs have adequately pled motive because the AC clearly alleges that he benefited from the fraud in a number of "concrete and personal" ways.¹⁵

1. McKelvey Was Motivated to Avoid Margin Calls on Personal Loans

Inflating a company's stock price to avoid margin calls on a personal loan confers a concrete and personal benefit on that defendant sufficient to infer a strong inference of scienter. *See In re WorldCom, Inc., Sec. Litig.*, 294 F. Supp. 2d 392 (S.D.N.Y. 2003). In *WorldCom*, the Court found that the financial pressures facing WorldCom's CEO, Bernard Ebbers ("Ebbers") were "unique and substantial," because his WorldCom stock "provided a crucial underpinning for his complicated personal finances...." *Id.* at 416. Specifically, the Court noted that Ebbers had at least \$900 million in loans secured by his WorldCom holdings. *Id.* "In order to avoid margin calls from lenders, *Ebbers faced a substantial pressure to maintain the price of WorldCom stock that was serving as his collateral.*" *Id.* (emphasis added). Based largely on this one factor, the Court concluded, "[t]he benefit to Ebbers of

¹⁵ In addition to the motives discussed in detail here, McKelvey also received annual bonuses for 2003 through 2005 that were directly tied to Monster's earnings per share ("EPS"), which was inflated by the backdating and failure to account for the compensation expenses while Monster's options vested, as recognized in the Restatement. (¶146-147.)

maintaining a fraudulently inflated share price was enormous, unusual, personal and concrete enough to satisfy the pleading requirements for scienter.” *Id.* at 417.¹⁶

McKelvey’s complicated personal finances, and his motives to commit fraud to secure those finances, mirror the motives and pressures faced by Ebbers. Here, McKelvey owed almost his entire personal fortune to his holdings of Monster stock. (¶128-129.) That considerable position in company stock was also the sole source of his voting power at the Company. (¶131-137.) In order to derive an immediate financial benefit from his stock without sacrificing his power and control over Monster, McKelvey, like Ebbers, leveraged his stock to secure a number of sizeable personal loans. (¶129.) By 2001, McKelvey had pledged every share of Monster stock he owned as collateral for nearly \$250 million in personal loans and other credit facilities to support his lifestyle. *Id.* The down side to these financing arrangements was that they were all dependant upon the value of the Company’s stock.

As the Company’s stock plummeted in the first half of 2001, McKelvey found himself “dangerously close” to margin calls on his personal loans that threatened to implode his financing arrangements and eviscerate his voting control over the Company he had founded. (¶131-135.) The situation was so dire, that Monster commissioned a report for its Board of Directors to analyze the

¹⁶ McKelvey fights mightily to avoid any comparison with the pressures that motivated Ebbers to commit securities fraud. (Def. Br. at 16-18.) However in both instances, the company’s founder and CEO had grounded virtually all of his personal finances in the collateralization of his company stock, and the pressure to maintain the stock price to avoid upsetting these arrangements was the same. In fact, as part of the Board Report, the Company commissioned a case study of Ebbers to be included as a comparison. The first sentence of that case study states, “Attached hereto are several documents that pertain to a recent situation with a world-class company very similar to the one being faced by [the Company], whereby WorldCom’s (“WCOM’s”) President and CEO, Bernard J. Ebbers, received several loans and a corporate guarantee from WCOM to repay his indebtedness related to margin loans from institutional lenders secured by shares of WCOM’s common stock held by Ebbers.” (¶132; “Worldcom (B. Ebbers) Case Study” attached as Ex. 15 to Zeiss Decl.)

impact that calls on McKelvey's margin loans could have on the Company (the "Board Report").

(¶132.) The Board Report stated:

[t]he precipitous drop in the [Company's] stock price over the last several months has already resulted in one margin call. . . and such price drop has currently left Mr. McKelvey dangerously close to additional margin calls or similar events under one or more of these loans and credit facilities. Given the potential effect of substantial sales of stock on the market price of [the Company's] stock, it is quite possible that a single margin call may itself trigger margin calls by other lenders due to the downward pressure on the stock.

(¶133.) The pressure to avoid this scenario (and protect his voting power and personal financing arrangements) provided a powerful incentive for McKelvey to commit fraud. For instance, with respect to the 2001 Annual Company-wide grant dated "as of" April 4, 2001, using the 97 day average between the actual grant date and the purported grant date, as used by Monster in its Restatement, this one backdated grant alone amounted to nearly \$42 million in compensation expenses that McKelvey hid from investors.¹⁷ For the entire fiscal year 2001, the Company reported net income of only \$69 million. (Zeiss Decl. Ex. 1 at 28). After accounting for the 2001 backdated options properly, Monster actually earned only \$3.4 million in net income that year. *Id.* It is self evident that such a dramatic decrease in net income would have negatively impacted the Company's stock price during the second half of 2001. (¶143.)

Aside from compromising McKelvey's voting power and personal finances, the forced sale of his stock to satisfy margin calls would have also jeopardized the Company's preferred accounting treatment for at least four acquisitions made in and around 2001. (¶¶138-139.) Specifically, had McKelvey been forced to sell his shares of company stock during this time, Monster would have violated "pooling" accounting rules and the acquisitions would have to be accounted for using the "purchase" method. (¶139.) According to the Board Report referenced above, a change to

¹⁷ On April 4, 2001, the Company's stock closed at \$30.62. Ninety-seven days later, on July 10, 2001, the Company's stock price had risen to \$49.58.

“purchase” accounting would have forced Monster to recognize an estimated \$334 million in acquired goodwill, resulting in a \$2.8 million quarterly amortization expense. *Id.*

McKelvey has discounted the motive to avoid this quarterly expense arguing that Plaintiff has tried to “impute the *company’s* alleged desire to preserve favorable accounting treatment for Monster’s acquisitions to *McKelvey* as an individual.” (Def. Br. at 19.) However, the Board Report found, “the effect of breaking any and all such poolings may include a substantial drop in our stock price and could very well lead to litigation on the basis of typical allegations ranging from breach of fiduciary duties and inadequate disclosure.” (¶140.) As noted above, McKelvey was highly motivated to avoid a further drop in the Company’s stock price that could trigger even more margin calls, not to mention the effect a drop in share price would have on McKelvey’s personal wealth, which was all tied to the value of the Company’s stock. (During the class period alone, McKelvey sold 245,882 shares of stock and made more than \$9 million. (¶149.))

2. McKelvey Was Motivated By His Strategy of Growing Monster Through Continued Acquisitions and Strategic Hires

“This Court has ruled that, in some circumstances, the artificial inflation of stock price in the acquisition context may be sufficient for securities fraud scienter.” *Rothman v. Gregor*, 220 F.3d 81, 93 (2d Cir. 2000). As the *Rothman* court stated: “Although virtually every company may have the desire to maintain a high bond or credit rating ... not every company has the desire to use its stock to acquire another company.” *Id.*; see also *Marra v. Tel-Save Holdings, Inc.*, No. 98-3145, 1999 WL 317103, at *9 (E.D. Pa. May 18, 1999).

In a 1998 interview, McKelvey explained clearly that the success of his Company was dependent upon continually growing the Company by acquisition and attracting and retaining talented employees. (¶119; 123.) To attain the latter goal, McKelvey had to offer highly competitive compensation and incentive benefits. (¶119; 120.) To attain the former goal, he relied on the value of the Company’s stock to facilitate purchases. (¶123.) This, however, created a conundrum for

him. Large compensation expenses necessary to attract and retain key employees would significantly erode profits, which would in turn impair Monster's perceived value in the market and drag-down its stock price. A lower stock price would then make continued acquisitions more difficult and expensive (and could also threaten to trigger margin calls on his loans).

As a solution to this dilemma, McKelvey backdated options to Monster's employees, rendering the options immediately valuable when issued. (¶124; 126; 143.) This tangible and immediate perk was a powerful catalyst to attract new employees, as well as an incentive for current employees to remain with the Company. *Id.* By improperly accounting for these in-the-money options and treating them as if they were issued at fair market value on the date they were granted, Monster's income statement was not burdened by this compensation expense, and its stock price was unaffected by these expenditures because they were hidden from investors. *Id.* By accommodating both of McKelvey's growth goals without sacrificing either, the alleged backdating scheme became an essential component of the Company's success. *Id.* Accordingly, the fraud benefited McKelvey by allowing him to pursue more aggressive growth opportunities than the Company's resources would have otherwise allowed.

Based upon the foregoing, McKelvey derived a number of "concrete and personal" benefits from the alleged fraud. These benefits were unique to McKelvey and provided a direct and personal motive to commit the alleged fraud. Accordingly, these motives alone are sufficient to raise a strong inference that McKelvey acted with scienter.

C. Other Allegations Within Total Mix Support a Strong Inference of Scienter

There are several other factors the Court may consider as part of the totality of the allegations supporting a strong inference of scienter against McKelvey.

First, as the Company's CEO and Chairman for the past four decades and overseer of the stock option program at Monster, McKelvey was certainly in a position to know how the Company

accounted for its stock options and courts have considered a defendant's position when assessing scienter.¹⁸ *In re Complete Mgmt., Inc. Sec. Litig.*, 153 F. Supp. 2d 314, 325-26 (S.D.N.Y. 2001) (“Based on the detailed pleading as to the defendants’ roles in the company [as CEO, chairman, president *inter alia*] the complaint establishes a strong inference that defendants were aware of the allegedly illicit practices. . . .”); *In re Am. Bank Note Holographics, Inc. Sec. Litig.*, 93 F. Supp. 2d 424, 447 (S.D.N.Y. 2000) (allegations of magnitude and scope of restatement together with access to sales and revenue information by virtue of positions combined to raise a strong inference of scienter against CFO and CEO).

Second, “the magnitude of the alleged fraud is properly considered in weighing whether [a] complaint meets the pleading standard for scienter.” *In re Livent, Inc. Sec. Litig.*, 148 F. Supp. 2d 331, 367-68 (S.D.N.Y. 2001); *In re Computer Assocs. Class Action Sec. Litig.*, 75 F. Supp. 2d 68, 74 (E.D.N.Y. 1999)(allegations when combined with “enormous scope and scale of this alleged fraud [improper revenue recognition amounting to \$100 million reduction in estimates of future revenue], if true, rises to the level of conscious misbehavior or recklessness.”). Here, the AC alleges that the fraud at Monster lasted for almost a decade and was the result of numerous widespread and recurring acts of fraud, occurring for example each time employees were hired, which caused Monster’s net income to be restated by nearly \$340 million. (¶9; 11; 105.) As was reiterated by the court in *Livent*:

[c]ommon sense suggests that, all other things being equal, more opportunities should exist to discover a larger fraud than a smaller fraud, especially where, as here, the magnitude of the fraud was not accomplished by one fraudulent transaction of enormous monetary significance, but by countless small adjustments.

¹⁸ In *In re Health Management, Inc. Securities Litigation*, 970 F. Supp. 192, 204-05 (E.D.N.Y. 1997), cited by McKelvey to undermine any inference from his position, the court did not credit allegations concerning the position of an individual defendant on the board of directors, however it did credit allegations concerning the position of the company’s “founder, President, Chairman of the Board, and second largest shareholder” when coupled with allegations concerning knowledge and reckless disregard of red flags.

148 F. Supp. 2d at 367 (alteration in original); *see also In re Veeco Instruments, Inc. Sec. Litig.*, 235 F.R.D. 220, 232 (S.D.N.Y. 2006) (“When a company is forced to restate its previously issued financial statements. . . . the mere fact that the company had to make a large correction is some evidence of scienter.”).¹⁹

Lastly, this Court and others within the Second Circuit have explained that “[r]epeated and pervasive GAAP violations may be sufficient to establish the requisite inference [of scienter].” *In re Gilat Satellite Networks, Ltd.*, No. CV-02-1510 (CPS), 2005 WL 2277476, at *20 (E.D.N.Y. Sept. 19, 2005) (finding scienter as to CEO and CFO where, in part, the GAAP violations involved premature revenue recognition which suggested conscious choice and “unlike other types of GAAP violations, is less likely to be an inadvertent mistake.”); *see also Lewin v. Lipper Convertibles, L.P.*, No. 03-1117, 2004 WL 1077930, at *2 (S.D.N.Y. May 13, 2004) (“accounting violations alleged are on such a repeated and pervasive scale that, if proven, they could provide strong circumstantial evidence of [scienter].”).

When all the allegations discussed above are taken into consideration, it is clear that the AC has sufficiently particularized McKelvey’s scienter and his motion to dismiss the Section 10(b) claim should be denied.

III. LEAD PLAINTIFFS HAVE PLED VIOLATIONS OF SECTION 20(a)

The AC also adequately alleges a Section 20(a) claim, 15 U.S.C. § 78t(a), against McKelvey as it sets forth: (i) a primary violation by a controlled person (here Defendants Monster and Olesnyckyj who have answered the complaint); (ii) control of the primary violator by McKelvey; and (iii)

¹⁹ Here, McKelvey argues the opposite, that such a large systemic fraud is not fraud at all and that the scope of it shows that McKelvey could not have acted with bad intent. (Def. Br. at 4-5, 11.) This is nonsensical, but regardless, it is not more compelling, as required by *Tellabs*, than the strong inference raised by the AC that McKelvey was an experienced senior officer of Monster who, after ten years of doling out valuable stock options to recruit and retain the very employees that allowed his company to grow, knew that there was a cost associated with these grants.

culpable participation by McKelvey, assuming this element is required.²⁰ *See, e.g., In re Van Der Moolen Holding N.V. Sec. Litig.*, 405 F. Supp. 2d 388, 413 (S.D.N.Y. 2005). McKelvey's *only* challenge to the Section 20(a) claim is that because the AC fails to properly allege his state of mind "with respect to the accounting and disclosure implications of the alleged backdating," it has not alleged the requisite state of mind for Section 20(a) liability. (Def. Br. at 21.) McKelvey concedes that the AC sufficiently alleges his control.

Here, the AC sufficiently alleges McKelvey's state of mind for Section 20(a) liability. "The concept of culpable participation describes that degree of control which is sufficient to render a person liable under Section 20(a). At the pleading stage, the extent to which the control must be alleged will be governed by Rule 8's pleading standard." *WorldCom*, 294 F. Supp. 2d at 415, 419-20 (finding director defendants liable where they had the requisite control to sign SEC filings containing misrepresentations); *Van Der Moolen*, 405 F. Supp. 2d at 413 (finding CEO, CFO and other individuals liable based on allegations that they exercised direct day-to-day management and were responsible for statements to public). Culpable participation is surely satisfied here given the fact that McKelvey is alleged, as detailed herein and as he concedes, to have heavily participated in the backdating itself.

²⁰ The law in the Second Circuit is unsettled on the question of whether culpable participation must be alleged to adequately plead a Section 20(a) claim. *See In re Parmalat Sec. Litig.*, 375 F. Supp. 2d 278, 307-10 (S.D.N.Y. 2005) (noting intra-Circuit split and finding the Second Circuit has not held that culpable participation is required.); *WorldCom*, 294 F. Supp. 2d at 414-16 (discussing conflict and finding no state of mind required); *see also Pension Comm.*, 446 F. Supp. 2d at 190-91 (ruling plaintiff need not affirmatively plead culpability or scienter on part of control person). In any event, as set forth above, the AC adequately alleges McKelvey's culpability. Additionally, even if culpable participation is an element of a Section 20(a) claim, it should not be raised to the level of scienter. *See, e.g., In re Initial Pub. Offering Sec. Litig.*, 241 F. Supp. 2d 281, 392-97 (S.D.N.Y. 2003) (discussing case law and noting that Second Circuit "has never defined 'culpable participation' or equated that term with scienter" and that "[t]hus, although the meaning of 'culpable participation' is unclear, there is strong reason to believe it is not the same as scienter.") (footnotes omitted).

CONCLUSION

For all the foregoing reasons, Lead Plaintiffs respectfully submit that the Court should deny Defendant McKelvey's motion to dismiss in its entirety.

Dated: New York, New York
August 9, 2007

Respectfully submitted,

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