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IN THE UNITED STATES DISTRICT COURT

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FOR THE DISTRICT OF ARIZONA

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11 Teamsters Local 617 Pension) No. 2:06-CV-2674-PHX-RCB
12 and Welfare Funds, on behalf)
13 of itself and all other) **O R D E R**
14 similarly situated,)

13

Plaintiff,)

14

vs.)

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16 Apollo Group, Inc.; John G.)
17 Sperling; Todd S. Nelson;)
18 Kenda B. Gonzales; Daniel E.)
19 Bachus; John Blair; John R.)
20 Norton III; Hedy Govenar;)
Brian E. Mueller; Dino J.)
DeConcini; Peter Sperling; and)
Laura Palmer Noone,)

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Defendants.)

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Introduction

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Since the publication of a series of *Wall Street Journal* articles in March 2006, "reporting academic research suggesting that various companies were suspiciously lucky in selecting their option grant dates[,]" In re MIPS Technologies, Inc., 2008 WL 3823726, at *2 (N.D.Cal. Aug. 13, 2008), countless lawsuits have been filed across the country alleging backdating of stock options.

1 "caused" Apollo to issue "materially false and misleading"
2 financial statements during the Class Period, "resulting in an
3 artificial inflation of [Apollo's] stock price, the disclosure of
4 which caused investors to lose hundreds of millions of dollars."
5 Id. Through this "scheme," defendants also supposedly "concealed
6 that Apollo was not recording material compensation expenses and
7 was materially overstating its net income and earnings per share,
8 in violation of . . . [GAAP]." Id. During the Class Period
9 plaintiff purchased Apollo stock which, in light of the foregoing,
10 it alleges was purchased at artificially inflated prices.

11 Plaintiff alleges violations of §§ 10(b) and Rule 10b-5,
12 20(A)(a), and 20(a) of the Securities and Exchange Act of 1934
13 ("Exchange Act"), as amended by the Private Securities Litigation
14 Reform Act of 1995 ("the PSLRA"), against all defendants. It
15 further alleges that all defendants violated a host of fiduciary
16 duties under Arizona state common law "and/or aided and abetted" in
17 the violation of those duties. Id. at 94. Lastly, plaintiff
18 alleges that defendants Nelson, Blair, Norton, Gonzales, Bachus and
19 Mueller engaged in a "civil conspiracy to commit fraud[.]" Id. at
20 95.

21 Currently pending before the court is Apollo's motion to
22 dismiss pursuant to Fed. R. Civ. P. 12(b)(6) (doc. 81), and the
23 individual defendants'¹ motions to dismiss on that same basis (doc.
24 82). Additionally, Apollo and the individual defendants have each
25 filed a "Request for Judicial Notice" ("RJN")(docs. 79 and 83),
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28 ¹ Apollo and the individual defendants will be referred to collectively
throughout as "the defendants," unless necessary to distinguish among them.

1 which plaintiff does not oppose.²

2 **II. Overview of Allegations**

3 As the court in In re New Century, 2008 WL 5147991 (C.D.Cal.
4 2008), astutely observed, "in the securities class action context,
5 the stringent pleading requirements appear to invite both parties
6 to throw everything and the kitchen sink into their respective
7 pleadings and motions to dismiss." Id. at *9. This case is no
8 different. In an effort to separate the wheat from the chaff, at
9 the outset the court will summarize plaintiff's allegations. It
10 will then go on to consider each of defendants' numerous dismissal
11 arguments.

12 The following facts, which the court must "accept[] as true" on
13 these motions to dismiss, are derived from the FAC. See South
14 Ferry LP, No. 2 v. Killinger, 542 F.3d 776, 782 (9th Cir. 2008)
15 (citation omitted). Additionally, as explained below, these facts
16 are also derived from various documents which the FAC either
17 incorporates by reference or of which the court may properly take
18 judicial notice. From these documents, the following general
19 picture emerges of Apollo's stock option grant process during the
20 Class Period. More details will be provided herein as necessary to
21 resolve these motions to dismiss.

22 Defendants vigorously deny that they engaged in fraudulent
23 backdating of stock options. Rather, as Apollo depicts it, the
24 Company merely "failed . . . to dot all 'i's and cross all 't's
25

26 ² Given the parties' comprehensive memoranda of law, including
27 supplemental memoranda ordered by the court, and other submissions, the court
28 denies the parties' respective requests for oral argument, finding that it will not
aid the court in its decisional process. See Mahon v. Credit Bureau of Placer
County, Inc., 171 F.3d 1197, 1200 (9th Cir. 1999).

1 when completing the paperwork necessary to grant stock options."
2 Mot. (doc. 81) at 7. The individual defendants similarly maintain
3 that at most "innocent accounting errors[]" were made. Mot. (doc.
4 82) at 13. Given these widely divergent views of Apollo's stock
5 option grant practices, before turning to the specific allegations
6 in the FAC, an overview of stock option grants in general is
7 warranted.

8 **A. The Rudiments of Stock Option Backdating**

9 In re CNET Networks, Inc., 483 F.Supp.2d 947 (N.D.Cal. 2007),
10 provides a succinct description of "the mechanics of stock-options
11 backdating[,]" from which this court will heavily borrow. See id.
12 at 949. When a company grants a stock option to an employee, that
13 employee has "the right to purchase the stock at the exercise price
14 at a later date after the option vests." Id. at 949. The
15 "exercise price" is simply a pre-determined or designated price at
16 which the underlying security may be purchased. See FAC (doc. 71)
17 at 1, ¶ 3. Due to that later vesting date, "[i]f the stock price
18 rises, the employee stands to make a profit." CNET Networks, 483
19 F.Supp.2d at 949. Conversely, "[i]f the stock price falls below
20 the exercise price, the option is worthless to the employee." Id.

21 So-called "at-the-money" options are those "where the exercise
22 price is at the market price as of the date of the grant[.]" Id.
23 On the other hand, "in-the-money" options, which the FAC alleges
24 were the type granted here, are those "where the exercise price is
25 lower than the market prices as of the grant date[.]" Id. The
26 distinction between these two types of options is significant for
27 financial reporting purposes. Companies must "record compensation
28 costs for granting in-the-money options because the company

1 effectively receives a lower price than it could get for the shares
2 on the open market[.]” Id. Not recording such options, as the FAC
3 alleges, results in overstating a company’s net income. See FAC
4 (doc. 71) at 4, ¶ 8. On the other hand, there is no need to record
5 compensation costs “for at-the-money options because the exercise
6 price is the same as the market price.” CNET Networks, 483
7 F.Supp.2d at 949. Consequently, “[t]he company is not foregoing
8 any revenue.” Id. “Backdating occurs when the option’s grant date
9 is altered to an earlier date with a lower, more favorable price to
10 the recipient.” Id. at 950. This “[b]ackdating is done to avoid
11 compensation expenses.” Id. at 956.

12 **B. Apollo Stock Option Grants**

13 Like many publicly held companies, as part of its compensation
14 plan, Apollo granted stock options to its executives and employees.
15 Plaintiff alleges that Apollo engaged in impermissible stock option
16 backdating under two separate compensation plans whereby it awarded
17 “Management Grants” – the Long Term Incentive Plan (“LTIP”) and the
18 2000 Stock Incentive Plan. See FAC (doc. 71) at ¶ 41. Under the
19 LTIP, between June 1994 to March 24, 2000, “Apollo issued stock
20 option grants to Section 16 officers[.]” Id. at ¶ 42. The LTIP
21 expressly required that the exercise price of “Incentive Stock
22 Option[s] [(“ISO)]” thereunder could “not be less than the Fair
23 Market Value of a share of [s]tock on the date of [the] grant[.]”
24 Id. at ¶ 42 (internal quotation marks and citation omitted). That
25 limitation on the exercise price pertained only to ISOs, however.
26 As to other stock options, the LTIP allowed the Compensation
27 Committee to determine the exercise price, with no mention of fair
28 market value. Id., exh. B thereto at ¶ 7.1(a). The LTIP also

1 required that both members of that Committee, defendants Norton and
2 Blair, approve all grants made thereunder. Id. at ¶¶ 42; 22 and
3 23.

4 "After March 24, 2000, . . . Management Grants" were awarded
5 pursuant to the 2000 Plan. Id. at ¶ 43. That Plan required grant
6 approval by the two member Compensation Committee, *i.e.* defendants
7 Blair and Norton, "or by both the President and CEO[,]" which
8 during the relevant time frame was the same person, defendant
9 Nelson. Id. The FAC further alleges that "both Nelson and the
10 Compensation Committee" approved backdated grants "during the
11 relevant period." Id. (emphasis added). Defendant Nelson had the
12 "authority to approve" option grants under the 2000 Plan for not
13 only other employees, but also for himself. Id.

14 The 2000 Plan differed somewhat from the LTIP in terms of the
15 exercise price. Like the LTIP, the exercise price for any ISO
16 could "not be less than the Fair market Value as of the date of the
17 grant." Id., exh. C thereto at ¶ 7.2(a). As for certain other
18 options, however, the Compensation Committee could grant options
19 "with an exercise price of less than Fair Market Value on the date
20 of grant." Id., exh. C thereto at ¶ 7.1(a).

21 Quoting directly from the Restatement, the FAC alleges that the
22 process of granting stock options at Apollo "followed a similar
23 pattern each year[,]" with the initial development of a "list of
24 grantees." Id. at 63, ¶ 106. In the ensuing weeks, adjustments
25 would be made as to names, shares and "underlying vesting goals
26 . . . developed." Id. at 64, ¶ 106. At times during this process
27 there was insufficient documentation as to when, for example,
28 certain grants were actually finalized. See generally id. at 63-

1 67, ¶ 106. As defendants characterize it, these "documentation
2 errors led Apollo to recognize additional compensation expenses of
3 \$52.9 million before tax for the years 1994 to 2005." Mot. (Doc.
4 82) at 9 (citing FAC at 63).

5 Despite defendants' depiction of the grant process at Apollo,
6 plaintiff alleges that on June 28, 2006, "the truth beg[a]n to
7 emerge" regarding Apollo's alleged backdating scheme. FAC (doc.
8 71) at 56, VII. On that date, a Lehman Brothers analyst "published
9 a report titled, 'Did Apollo Backdate Options?'" Id. at ¶ 89.
10 Based upon an indication in that Report that "**Apollo['s] . . .**
11 **option grant history looks highly questionable**[,] " the FAC alleges,
12 "Apollo's stock price fell 2.7%" from the preceding day. Id. at
13 ¶ 89 (internal quotation marks omitted) (emphasis added in FAC).

14 Apollo responded by issuing a news release stating, among other
15 things, that after an internal review of its stock option practices
16 "Management believes that it has complied with all applicable laws,
17 . . . in granting options to officers and it has not backdated
18 options." Farrell Decl'n (doc. 80), exh. 3 thereto at 3; see also
19 FAC (doc. 71) at ¶ 91. Apollo further signaled its intent "to hire
20 an outside firm to review and confirm [Apollo's] conclusions." Id.

21 Several weeks later, on June 19, 2006, Apollo "disclosed that
22 it had received a subpoena from the U.S. Attorney for the Southern
23 District of New York requesting documents relating to [its] stock
24 option grants." FAC (doc. 71) at 58, ¶ 92. Shortly thereafter, on
25 June 28, 2006, defendant John Sperling, at the time Apollo's Acting
26 Executive Chairman, and defendant Peter Sperling, Apollo's Senior
27 Vice President, "appointed a [S]pecial [C]ommittee . . . of the
28 Board to oversee a review of" Apollo's stock option grant

1 practices. Id. at ¶ 93. Defendant Hedy Govenar was one of two
2 Apollo Board members appointed to that Special Committee. Id. The
3 Special Committee "retain[ed] independent legal counsel, who in
4 turn, retained forensic accountants, to assist them in conducting
5 an independent review of [Apollo's] historical practices related to
6 stock option grants[.]" Morrison Decl'n (doc. 83), exh. 1 thereto
7 at 5. Soon after the formation of the Special Committee, Apollo
8 "received a letter from the SEC [Securities Exchange Commission]
9 announcing an informal investigation and requesting documents."
10 FAC (doc. 71) at ¶ 94 (footnote omitted).

11 Due to that "ongoing investigation[.]" on July 13, 2006,
12 "Apollo announced that . . . it was unable to timely file with the
13 SEC its [fourth quarter] Form 10-Q[.]" Id. at ¶ 95 (internal
14 quotation marks omitted). Plaintiff alleges that Apollo's stock
15 dropped "23.5% from a close of \$55.47 on June 8, 2006, to a close
16 of \$43.51 on August 8, 2006, in significant part due to the[se]
17 disclosures of backdating." Id. at ¶ 96.

18 On October 18, 2006, Apollo "issued a news release and
19 disappointing earnings announcement[.]" Id. at ¶ 98. The alleged
20 import of those statements is that "for the first time, and in
21 contrast to Apollo's previous denials, . . . '**various deficiencies**
22 **in the process of granting and documenting stock options have been**
23 **identified to date.** The accounting impact of these matters has not
24 been quantified. **There can be no assurances that the results of**
25 **the investigation will not require a possible restatement of the**
26 **Company's financial statements** when the potential errors are
27 quantified and assessed.'" Id. (emphasis added in FAC). Following
28 that announcement, Apollo's stock price fell "22.0% in one day to a

1 4-year low of \$37.55[.]” Id.

2 **C. Special Committee Results**

3 On November 3, 2006, Apollo “announced the [Special
4 Committee’s] interim factual findings[.]” Id. at ¶ 99. Those
5 findings “identified various deficiencies” in terms of “the process
6 of granting and documenting stock options.” Id. Among those
7 deficiencies were Apollo’s failure to “correctly apply the
8 requirements of Accounting Principles Board . . . Opinion No. 25
9 [(“APB 25”)]” its misapplication of the Internal Revenue Service
10 (“IRS”) Code “with respect to the contemporaneous tax treatment of
11 certain stock options[;]” and “inaccurate documentation concerning
12 the date that grant award lists were completed and approved.” Id.
13 Despite those deficiencies, at that juncture the Special Committee
14 “found no direct evidence that the grant date for any of the large
15 management grants was selected with the benefit of hindsight.”
16 Morrison Decl’n (doc. 83), exh. 3 thereto at 3. Acknowledging the
17 “possibility” in “two instances” that “the grant date was
18 retroactively selected,” nonetheless, Apollo stated that there was
19 “insufficient evidence at th[at] time to reach such a conclusion.”
20 Id. On that same date, Apollo announced that its Chief Financial
21 Officer and Treasurer, defendant Gonzales, had resigned two days
22 earlier, on November 1, 2006. FAC (doc. 71) at ¶ 99. Following
23 the Special Committee’s announcement, the FAC alleges that
24 “Apollo’s stock price dropped another 2.72%[.]” FAC (doc. 71) at
25 ¶ 100.

26 A few days later, on November 9, 2006, Apollo announced another
27 resignation -- the November 5, 2006 resignation of defendant
28 Bachus, Apollo’s Chief Accounting Officer and Controller. Id. at

1 ¶ 102. Allegedly, "Bachus resigned as a result of his involvement
2 in the backdating at Apollo[.]" Id. (citation omitted). During this
3 roughly one week period in early November 2006, plaintiff claims
4 that Apollo's "stock price declined 6.2%" - a decline which it
5 specifically alleges was "not due to market or industry-specific
6 events." Id. at ¶ 103.

7 On December 8, 2006, the Special Committee "presented their
8 final factual findings" to Apollo's Board, findings which "were
9 largely consistent" with the interim findings outlined above.
10 Morrison Decl'n (doc. 83), exh. 4 thereto at 3. Additionally, the
11 Special Committee "reported . . . that certain former officers took
12 steps that may have been intended to mask failures in the grant
13 approval process with respect to [Apollo's] financial reporting and
14 payment of taxes." Id. The Special Committee further advised the
15 Board that it had "recently discovered additional evidence that
16 raise[d] questions whether another grant date" besides the two
17 mentioned earlier, "may have been retroactively selected by a
18 day[,]" but the Committee stated that there was "insufficient
19 evidence to reach such a conclusion." Id. Nonetheless, at that
20 time Apollo determined that it had "understated its allowance for
21 doubtful accounts" and had an "associated bad debt expense of
22 approximately \$34 million." Id., exh. 4 thereto at 4. The next
23 trading day, after this information was filed with the SEC, the FAC
24 alleges that Apollo's stock price "declined by 3.59%[.]" FAC (doc.
25 71) at ¶ 105.

26 **D. Restatement**

27 Roughly six months after the Special Committee released its
28 final findings, on May 22, 2007, Apollo filed with the SEC "its

1 belated Form 10-K containing restated financial results [("the
2 Restatement")]. Id. at ¶ 106. The FAC contains large block quotes
3 from the Restatement making it difficult to ascertain exactly what
4 parts thereof plaintiff deems pertinent to its claims. Suffice it
5 to say for now that the Restatement indicates that Apollo "used
6 incorrect measurement dates for accounting purposes[]" for 57 of
7 the 100 total grants made during this time period[,] "Id. at 62,
8 ¶ 106. "As a result, revised measurement dates were selected for
9 many grants and resulted in exercise prices that were less than the
10 fair market value of the stock on the most likely measurement
11 dates[,] and Apollo "restated [its] financial results] to record
12 additional share based compensation expense." Id. at 63, ¶ 106;
13 and at 69, ¶ 106. Overall, the "Impact of the Restatement[,] was
14 that Apollo's "retained earnings as of September 1, 2003," were
15 "adjusted" downward from \$765.2 million to \$702.7 million.
16 Morrison Decl'n (doc. 83), exh. 1 thereto at 15.

17 On July 3, 2007, Apollo announced that the SEC had "completed
18 its investigation and . . . [it] d[id] not intend to recommend any
19 enforcement action[.]" Farrell Decl'n (doc. 802), exh. 1 thereto at
20 2; see also FAC (doc. 71) at ¶ 94 n. 4. Several months after the
21 filing of the Restatement, but prior to the completion of that SEC
22 investigation, on November 2, 2006, this action was commenced.
23 Approximately one year later, following the appointment of lead
24 plaintiff and lead counsel, on November 23, 2007, the complaint
25 which is the subject of these dismissal motions was filed.

26 . . .

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1 Discussion

2 I. Scope of Documents Considered

3 A. Defendants' Requests

4 Preliminarily, the court will address defendants' requests for
5 consideration of documents beyond the complaint. The court will
6 proceed in this way because "as a general rule, a district court
7 may not consider materials not originally included in the pleadings
8 in deciding a Rule 12 motion." U.S. v. 14.02 Acres of Land More or
9 Less, 530 F.3d 883, 894 (9th Cir. 2008) (internal quotation marks
10 and citation omitted). "When ruling on a Rule 12(b)(6) motion to
11 dismiss, if a district court considers evidence outside the
12 pleadings, it must normally convert the 12(b)(6) motion into a Rule
13 56 motion for summary judgment, and it must give the nonmoving
14 party an opportunity to respond." U.S. v. Ritchie, 342 F.3d 903,
15 907 (9th Cir. 2003) (citations omitted). There are two exceptions
16 to these general rules. The first is the incorporation by
17 reference doctrine; and the second is the doctrine of judicial
18 notice. Under either of those doctrines, a court may consider
19 certain matters beyond the complaint, without converting a motion
20 to dismiss into a summary judgment motion. See id. at 908
21 (citations omitted). Here, the defendants are relying upon both
22 doctrines, which the court will address in turn.

23 1. Incorporation by Reference

24 It is well settled that, "a court may consider material which
25 is properly submitted as part of the complaint on a motion to
26 dismiss without converting th[at] motion . . . into a motion for
27 summary judgment." Lee v. City of Los Angeles, 250 F.3d 668, 688-
28 89 (9th Cir. 2001) (internal quotation marks and citation omitted);

1 see also Fed. R. Civ. P. 10(c) ("A copy of a written instrument
2 that is an exhibit to a pleading is a part of the pleading for all
3 purposes.") The incorporation by reference doctrine allows a court
4 to also "take into account documents whose contents are alleged in
5 a complaint and whose authenticity no party questions, but which
6 are not physically attached to the [plaintiff's] pleading."
7 Knieval v. ESPN, 393 F.3d 1068, 1076 (9th Cir. 2005) (internal
8 quotation marks and citations omitted). Taking a relatively
9 expansive view of that doctrine, the Ninth Circuit has recognized
10 that "[e]ven if a document is not attached to a complaint, it may
11 be incorporated by reference into a complaint if the plaintiff
12 refers extensively to the document or the document forms the basis
13 of the plaintiff's claim." Ritchie, 342 F.3d at 908 (citations
14 omitted). Under those circumstances, "the district court may treat
15 such a document as part of the complaint, and thus may assume that
16 its contents are true for purposes of a motion to dismiss under
17 Rule 12(b)(6)." Marder v. Lopez, 450 F.3d 445, 448 (9th Cir. 2006)
18 (internal quotation marks and citation omitted).

19 Significantly, in In re Silicon Graphics Secs. Litig., 183 F.3d
20 970 (9th Cir. 1999), the Ninth Circuit held that on a motion to
21 dismiss the district court properly invoked the incorporation by
22 reference doctrine to consider a company's SEC filings where the
23 plaintiff alleged the contents of those filings in her complaint
24 and relied on them as a basis for her allegations. Id. at 986; see
25 also Fecht v. Price Co., 70 F.3d 1078, 1080 n.1 (9th Cir. 1078)
26 (affirming district court's consideration on motion to dismiss of
27 "full text of the Company's corporate disclosure documents and
28 . . . securities analysts' reports quoted in the Complaint[]").

1 In this action, the FAC is 103 pages, with attached exhibits
2 totaling 79 pages. It references 11 of the 13 documents which
3 Apollo requests the court to consider, and 8 of the 12 documents
4 which the individual defendants request the court to consider.
5 Defendants' requests overlap somewhat.

6 Given that plaintiff is not opposing these defense requests,
7 obviously, there are no authenticity challenges. Thus, under the
8 incorporation by reference doctrine, the court will consider the
9 following documents, as necessary, to resolve these motions to
10 dismiss:

11 (1) the July 3, 2007, news release entitled "Apollo
12 Group, Inc. Announces Completion of SEC Investigation[;]"

13 (2) a June 8, 2006, Lehman Brothers Equity Research
14 Company Update ("the Lehman Report");

15 (3) Apollo's Form 8-Ks filed with the SEC on October 18,
16 2006; November 6, 2006; and December 15, 2006;

17 (4) excerpts from Apollo's Form 8-Ks filed with the SEC on
18 June 12, 2006, and June 20, 2006;

19 (5) excerpts from Apollo's Form 10-K filed with the SEC on
20 May 22, 2007;

21 (6) a Yahoo! Finance print out, documenting the market
22 price of Apollo's common stock from December 1998, April
23 1999, and May 14, 2007 until present;

24 (7) excerpts from the November 17, 2006, deposition
25 transcript of John Sperling in In re Apollo Group, Inc.
26 Securities Litigation, CV 04-2147-PHX-JAT;

27 (8) a September 19, 2006, letter from the SEC's Chief
28 Accountant; and

(9) Apollo "stock trading price information for the
periods January 1, 1998 through December 31, 2001 and
January 1, 2006 through December 31, 2007 downloaded from
Google Finance . . . [.]"

RJN (doc. 79) at ¶¶ 1-10; and RJN (doc. 83).

. . .

1 **2. Judicial Notice**

2 Pursuant to Fed. R. Evid. 201, a court may "take judicial
3 notice of matters of public record and consider them without
4 converting a Rule 12 motion into one for summary judgment." 14.02
5 Acres of Land, 530 F.3d at 894 (internal quotation marks and
6 citation omitted). That Rule "governs only judicial notice of
7 adjudicative facts." Fed. R. Evid. 201(a). The notes following
8 that Rule define "adjudicative facts" as "simply the facts of the
9 particular case." Fed. R. Evid. 201 advisory committee's note.
10 The court may take judicial notice of such facts "as long as the
11 facts noticed are not subject to reasonable dispute." Intri-Plex
12 Technologies, Inc. v. Crest Group, Inc., 499 F.3d 1048, 1052 (9th
13 Cir. 2007) (internal quotation marks and citation omitted).
14 Rule 201 therefore provides an alternative means by which the court
15 can consider Apollo's SEC filings, reported stock price history,
16 and the other publicly available financial documents listed above.
17 See Metzler Inv. GmbH v. Corinthian Colleges, Inc., 540 F.3d 1049,
18 1064, n.7 (9th Cir. 2008) (citation omitted) ("proper" for district
19 court to take judicial notice of "reported stock price history and
20 other publicly available financial documents, including . . . SEC
21 filings[]" on motion to dismiss).

22 The complaint does not reference the remaining four documents
23 of which the individual defendants request the court to take
24 judicial notice. Three of those documents also are SEC filings:
25 (1) Apollo's Form 8-Ks filed on March 15, 2007, and on May 4,
26 2007; (2) Apollo's Articles of Incorporation, filed on August 1,
27 2000; and (3) the Articles of Amendment thereto, filed in Apollo's
28 Form 8-K filed on July 27, 2007. As just explained, the court may

1 properly take judicial notice of these various SEC filings. That
2 is because such filings "are 'capable of accurate and ready
3 determination by resort to sources whose accuracy cannot be
4 reasonably questioned.'" In re White Electronic Designs Corp. Secs.
5 Litig., 416 F.Supp.2d 754, 760 (D.Ariz. 2006) (quoting In re
6 Network Assoc., Inc. II Secs. Litig., 2003 WL 24051280, at *1 n. 3
7 (N.D.Cal. Mar. 25, 2003)) (other citations omitted). The court
8 stresses that it only is taking judicial notice of "the content" of
9 these various SEC filings, "and the fact that they were filed with
10 the agency." See Patel v. Parnes, 2008 WL 2803076, at *14
11 (C.D.Cal. May 19, 2008). "The truth of the content, and the
12 inferences properly drawn from them, however, is not a proper
13 subject of judicial notice under Rule 201." Id. (citations
14 omitted). Accordingly, as in Patel, the court will take judicial
15 notice of these SEC filings, but only to the extent the individual
16 defendants are seeking judicial notice of the content of those
17 documents and the fact of their filing. See id.

18 The last document of which the individual defendants seek to
19 have this court take judicial notice is a December 4, 2006, court
20 order in Alaska Electrical Pension Fund, Derivatively on Behalf of
21 Apollo Group, Inc. v. Sperling, CV-06-2124-PHX-ROS. Curiously,
22 despite this explicit request, these defendants do not mention that
23 order either in their motion or in their reply. Nor does their RJN
24 offer any insight as to why judicial notice of that order is
25 necessary. The individual defendants merely state that the court
26 may take judicial notice of the Alaska Electrical order "because it
27 is an order of another court." RJN (doc. 83) at 4 (citing U.S. ex
28 rel. Robinson Rancheria Citizens Council v. Borneo, Inc., 971 F.2d

1 244, 248 (9th Cir. 1992)). The court declines to speculate as to
2 the supposed import of the Alaska Electrical order on this action.
3 Accordingly, it denies the individual defendants' request to take
4 judicial notice of that order. See White Electronic, 416 F.Supp.2d
5 at 761 (refusing to take judicial notice where defendants did "not
6 explain[] why they . . . requested judicial notice").

7 Like the individual defendants, Apollo also is requesting that
8 the court take judicial notice of documents which the FAC does not
9 reference. The first is a news article. On the theory that it is
10 a "matter of public record and not subject to dispute[,] " RJN (doc.
11 79) at ¶ 7, Apollo is seeking to have the court judicially notice
12 "an October 18, 2006 news article entitled 'Apollo Group Says
13 Fourth-Quarter Net Income Declines 12 Percent.'" Farrell Decl'n
14 (doc. 80) at ¶ 8; and exh. 7 thereto. The second document is "[a]
15 March 8, 2007 NERA Economic Consulting report entitled 'Options
16 Backdating: The Statistics of Luck,' available at
17 [http://www.nera.com/image/PUB_Backdating_Part_III_Sep2007-](http://www.nera.com/image/PUB_Backdating_Part_III_Sep2007-FINAL.pdf)
18 [FINAL.pdf](http://www.nera.com/image/PUB_Backdating_Part_III_Sep2007-FINAL.pdf)[" Id. at 3; and exh. 12 thereto. As part of the
19 "Background" for their motion, the individual defendants included a
20 section entitled "**Stock Options and 'Backdating' A Primer**["
21 Apollo Mot. (doc. 81) at 4 and 15. (Emphasis omitted) Based
22 generally upon that NERA report, Apollo notes in passing that "one
23 might reasonably expect companies lawfully to grant options at
24 times when their stock prices are relatively low, without any
25 'backdating.'" Id. at 6, n. 5 (citation omitted).

26 "It is appropriate for the court to take judicial notice of news
27 articles regarding defendants' stock or corporate activities[,] "
28 such as the October 18, 2006, news article identified above, and it

1 will. See Patel, 2008 WL 2803076, at 817 (citations omitted).
2 This is so even though the complaint does not mention this
3 particular article. See Helitrope General, Inc. v. Ford Motor Co.,
4 189 F.3d at 981 and n.18. The court will therefore take judicial
5 notice of the October 18, 2006 news article. On the other hand, it
6 will not take judicial notice of the NERA report because although
7 Apollo is referenced generally in a table thereto, neither the
8 report itself nor that table include adjudicative facts properly
9 subject to judicial notice under Rule 201.

10 **B. Plaintiff's Exhibits**

11 In opposing these motions, plaintiff also is relying upon
12 documents not attached to the complaint. Those documents are
13 exhibits to the declaration of attorney Wood who is associated with
14 the law firm appointed as lead counsel. In contrast to the
15 defendants, though, plaintiff did not specifically request that the
16 court take judicial notice of any of those exhibits. Nonetheless,
17 the court could, *sua sponte*, take judicial notice of those
18 exhibits. See Fed. R. Evid. 201(c). For that reason, and because
19 those exhibits are part of plaintiff's opposition, the court must
20 decide whether to consider any of those exhibits on these Rule 12
21 motions.

22 **1. CFRA Educational Report**

23 In its factual recitation, plaintiff includes a relatively
24 lengthy quote by an analyst at the Center for Financial Research
25 and Analysis ("CFRA"). That quote is taken from an "Educational
26 Report" entitled "Options Backdating - Which Companies are at
27 Risk[:] A Survey of the Top 100 Users of Stock Options 1997 -
28 2002[.]" Wood Decl'n (doc. 95), exh. A thereto at 1. Plaintiff

1 relies upon an excerpt from that report to summarize "the risks for
2 companies found to have backdated stock options[.]" Resp. (doc. 94)
3 at 15.

4 Pursuant to Fed. R. Evid. 201(c), the court in its discretion
5 may *sua sponte* take judicial notice of an adjudicative fact. The
6 court declines to do so with respect to this CFRA report however.
7 The primary reason for not taking judicial notice is that, as
8 Apollo accurately points out, "although th[at] report identifies 32
9 companies as having the highest risk of having backdated options,
10 the report does not mention Apollo at all." Reply (doc. 97) at 15.
11 Clearly then this CFRA report does not contain an adjudicative
12 fact, *i.e.* "the facts of the particular case[.]" of which this
13 court may properly take judicial notice. See Fed. R. Evid. 201
14 advisory committee's note. The court observes that while it is not
15 refusing to take judicial notice on this basis, somewhat tellingly,
16 every page of that report includes the qualifying language that it
17 is "[f]or the exclusive use [of] Lerach Coughlin Stoia & Robbins,
18 LLP." Wood Decl'n (doc. 95), exh. A thereto at 10-26. The
19 inclusion of that qualifying language calls into question the
20 objectivity of this CFRA report.

21 **2. "The Arizona Republic" Article**

22 Exhibit B to the Wood declaration is a January 17, 2008,
23 article from "The Arizona Republic" entitled "Apollo Guilty of
24 Securities Fraud[.]" Wood Decl'n (doc. 95), exh. B thereto at 1.
25 If for no other reason, the court will not take judicial notice of
26 this article because the jury verdict discussed therein was
27 subsequently set aside by Judge Teilborg. See In re Apollo Group,
28 Inc. Sec. Litig., 2008 WL 3072731 (D. Ariz. Aug. 4, 2008). Thus,

1 even if this "Arizona Republic" article was relevant to the present
2 case at some point, it no longer is.

3 **3. Verdict Form**

4 Likewise, the court also will not take judicial notice of, or
5 otherwise consider exhibit C to the Wood declaration, the jury
6 verdict form in the Apollo Group case - the same verdict which
7 Judge Teilborg set aside.

8 **4. Apollo Stock Chart**

9 The fourth exhibit to the Wood declaration is an untitled one
10 page document. Neither the source of that document nor its
11 significance appear on the face thereof. Attorney Wood describes
12 the columns of numbers contained thereon as an "Apollo
13 stock chart showing the 50 dates when the highest volume of Apollo
14 Group, Inc. Stock was traded from February 2, 1995 to March 20,
15 2008, retrieved from Yahoo! Finance (<http://finance.yahoo.com>) and
16 sorted by volume with Microsoft Excel." Wood Decl'n (doc. 95) at
17 2, ¶ 2. Plaintiff is relying upon that chart to show that "[m]ore
18 shares of Apollo stock changed hands on October 18, 2006 than ever
19 before in Apollo's history." Resp. (doc. 94) at 28.

20 Largely because the source of that chart is not apparent from
21 its face, and because the method of its creation uncertain, the
22 court will not take judicial notice of it. See White Electronics,
23 416 F.Supp.2d at 761 (refusing to take judicial notice, in
24 securities fraud case, of exhibit "purport[ing] to be a chart
25 showing [defendant's] stock prices" where "source not apparent from
26 the document itself and not all of the share prices on th[e] chart
27 compared with share prices for specific dates listed in the
28 Complaint[]").

1 **II. Motions to Dismiss**

2 **A. Rule 12(b)(6) Standards**

3 It is axiomatic that Rule 12(b)(6) motions “test[] the legal
4 sufficiency of the claims asserted in the complaint[.]” Ileto v.
5 Glock, Inc., 349 F.3d 1191, 1199-1200 (9th Cir. 2003). “A Rule
6 12(b)(6) dismissal may be based on either a lack of a cognizable
7 legal theory or the absence of sufficient facts alleged under a
8 cognizable legal theory.” Johnson v. Riverside Healthcare System,
9 LP, 534 F.3d 1116, 1121-1122 (9th Cir. 2008) (internal quotation
10 marks and citation omitted). It is the latter theory of dismissal
11 which forms the basis for defendants’ attacks on the FAC in this
12 case.

13 When considering a motion to dismiss for failure to state a
14 claim under Rule 12(b)(6), the court must “accept the plaintiffs’
15 allegations as true and construe them in the light most favorable
16 to plaintiffs.” In re Gilead Sciences Sec. Litig., 536 F.3d 1049,
17 1055 (9th Cir. 2008) (internal quotation marks and citation
18 omitted), petition for cert filed, (_____ U.S. _____ Feb. 6,
19 2009)(no. 08-1121). At the same time though, the court is not
20 “required to accept as true allegations that are merely conclusory,
21 unwarranted deductions of fact, or unreasonable inferences.” Id.
22 (internal quotation marks and citations omitted). As the Supreme
23 Court explained in Bell Atlantic Corp. v. Twombly, 550 U.S. 544,
24 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007), “While a complaint attacked
25 by a Rule 12(b)(6) motion to dismiss does not need detailed factual
26 allegations, . . . , a plaintiff’s obligation to provide the
27 grounds of his entitle[ment] to relief requires more than labels
28 and conclusions, and a formulaic recitation of the elements of a

1 cause of action will not do[.]” Id. at ____, 127 S.Ct. 1964-1965
2 (internal quotation marks and citations omitted). “Factual
3 allegations must be enough to raise a right to relief above the
4 speculative level, . . . , on the assumption that all the
5 allegations in the complaint are true (even if doubtful in
6 fact)[.]” Id. at 1965 (citations and footnote omitted). Similarly,
7 “[l]egal conclusions need not be taken as true merely because they
8 are cast in the form of factual allegations.” Lee Myles Associates
9 Corp. v. Paul Rubke Enterprises, Inc., 557 F.Supp.2d 1134, 1137
10 (S.D.Cal. 2008) (citations omitted).

11 At the end of the day, “[t]he complaint is properly dismissed
12 if it fails to plead enough facts to state a claim to relief that
13 is plausible on its face.” Gilead, 536 F.3d at 1055 (internal
14 quotation marks and citations omitted). On the other hand, as the
15 Supreme Court stressed in Twombly, “a well-pleaded complaint may
16 proceed even if it strikes a savvy judge that actual proof of those
17 facts is improbable, and that recovery is very remote and
18 unlikely.” Twombly, 550 U.S. at ____, 127 S.Ct. at 1965 (internal
19 quotation marks and citation omitted). “Indeed, it may appear on
20 the face of the pleading that recovery is very remote and unlikely
21 but that is not the test.” Johnson, 534 F.3d at 1123-24 (internal
22 quotation marks and citations omitted).

23 **B. Statute of Limitations**

24 Although not the first dismissal argument which Apollo raises,
25 because it can potentially narrow the scope of plaintiff’s claims,
26 the court will address Apollo’s statute of limitations argument
27 first.

28 Preliminarily, there is no merit to plaintiff’s suggestion that

1 this statute of limitations argument is not properly before the
2 court on this Rule 12 dismissal motion. "If the expiration of the
3 applicable statute of limitations is apparent from the face of the
4 complaint," it is well settled that "the defendant may raise [that]
5 defense in a Rule 12(b)(6) motion to dismiss." See In re Juniper
6 Networks, Inc. Sec. Litig., 542 F.Supp.2d 1037, 1050 (N.D.Cal.
7 2008) (citing Jablon v. Dean Witter & Co., 614 F.2d 677, 682 (9th
8 Cir. 1980)). Despite plaintiff's contrary suggestion, "[t]his is
9 true even though expiration of the limitations period is an
10 affirmative defense because Federal Rule of Civil Procedure Rule
11 9(f) makes averments of time and place material for the purpose of
12 testing the sufficiency of a complaint." Id. (internal quotation
13 marks and citation omitted). Consistent with the foregoing, "[i]f
14 a claim is barred by [the] applicable statute of limitations,
15 dismissal pursuant to Rule 12(b)(6) is appropriate." Guerrero-
16 Melchor v. Arulaid, 2008 WL 539054, at *2 (W.D.Wash. Feb. 22, 2008)
17 (citation omitted).

18 At the same time, though, the court is keenly aware that a
19 complaint cannot be dismissed as untimely under Rule 12(b)(6)
20 "unless it appears beyond doubt that the plaintiff can prove no set
21 of facts that would establish the timeliness of the claim." Pesnell
22 v. Arsenault, 531 F.3d 993, 997 (9th Cir. 2008) (internal quotation
23 marks and citation omitted). In making this inquiry, the court
24 must "[a]ccept[] as true the allegations in the complaint," and it
25 "must determine whether the running of the statute is apparent on
26 the face of the complaint." Huynh v. Chase Manhattan Bank, 465
27 F.3d 992, 979 (9th Cir. 2006) (internal quotation marks and
28 citations omitted). "[I]f the factual and legal issues are not

1 sufficiently clear to permit a determination with certainty whether
2 the action was timely[,]” then the court “must” deny a motion to
3 dismiss based on the running of the statute of limitations. Lee
4 Myles, 557 F.Supp.2d at 1137 (citing Supermail Cargo, Inc. v.
5 United States, 68 F.3d 1204, 1207 (9th Cir. 1995)).

6 Finding no merit to plaintiff’s procedural argument, the court
7 is free to turn to the merits of Apollo’s statute of limitations
8 argument. As Apollo construes the FAC, plaintiff is proceeding
9 under two related fraud theories. The first is an alleged
10 “fraudulent scheme” of “backdating . . . stock option grants[.]”
11 FAC (doc. 71) at ¶¶ 2 and 6. The second theory, which Apollo terms
12 “an accounting fraud claim[,]” is that due to that alleged
13 “backdating,” Apollo issued financial statements which were
14 purportedly “materially false and misleading, resulting in an
15 artificial inflation of [Apollo’s] stock price[.]” Id. at ¶ 2.

16 As to the first theory, Apollo contends that those backdating
17 claims are barred under 28 U.S.C. § 1658(b). That statute reads as
18 follows:

19 [A] private right of action that involves
20 a claim of fraud, deceit, manipulation, or
21 contrivance in contravention of a regulatory
requirement concerning the securities laws, . . .
may be brought not later than the earlier of -

22 (1) 2 years after the discovery of the facts
23 constituting the violation; or

24 (2) 5 years after such violation.

25 28 U.S.C. § 1658(b) (West 2006). Apollo argues that to the extent
26 the FAC alleges a fraudulent option backdating scheme, it is barred
27 under section 1658(b)’s five year statute of repose. A statute of
28 repose, as distinguished from a statute of limitations, is “not

1 subject to equitable tolling." Munoz v. Ashcroft, 339 F.3d 950,
2 957 (9th Cir. 2003) (citations omitted). Rather, "[a] statute of
3 repose is a fixed, statutory cutoff date, usually independent of
4 any variable, such as claimant's awareness of a violation." Id.
5 (citations omitted).

6 "A claim under § 10(b) that is based on the backdating itself
7 accrues on the date the option grant was made."³ In re Affiliated
8 Computer Servs. Deriv. Litig., 540 F.Supp.2d 695, 701 (N.D.Tex.
9 2007) (citation omitted); see also In re Converse Tech., Inc. Sec.
10 Litig., 543 F.Supp.2d 134, 155 (E.D.N.Y. 2008) (citation omitted)
11 ("[T]o the extent that [plaintiffs'] claims are based directly on a
12 backdated grant of options, the 5-year period begins to run on the
13 date the options were granted.") The five option grants which the
14 FAC identifies, *i.e.*, December 18, 1998; April 19, 1999; January
15 12, 2000; December 15, 2000; and September 21, 2001, all occurred
16 more than five years prior to the filing of this action.
17 Therefore, the court agrees with Apollo that dismissal of those
18 claims is mandated because this lawsuit was not filed until

19
20
21 ³ Plaintiff challenges Apollo's reliance upon three backdating cases
22 because they were derivative, where "the actual granting of a stock option, not the
23 resulting false financial statements," was at issue. Resp. (doc. 94) at 51
24 (footnote and citations omitted). Regardless of that asserted factual distinction,
25 this court will not consider any of those cases because in each the court
26 unequivocally stated: "This disposition is not designated for publication and may
27 not be cited." In re Apple Computer Inc., Derivative Litig., 2007 WL 4170566, at
28 *1 n.1 (N.D.Cal. Nov. 19, 2007) (emphasis added); In re Atmel Corp. Derivative
Litig., 2007 WL 2070299, at *1, n.1 (N.D.Cal. July 16, 2007) (emphasis added); and
In re Ditech Networks, Inc. Derivative Litig., 2007 WL 2070300, at *1, n. 1
(N.D.Cal. July 16, 2007) (emphasis added). United States District Court Judge
Fogel could not have been more clear. This court will abide by the court's express
intention in those cases; none of them will factor into the court's analysis
herein.

Apollo was not alone in improperly relying upon cases such as the foregoing.
All of the parties had a distressing penchant for relying upon cases where courts,
in one way or another, had severely limited the precedential value of their
decisions.

1 November 2, 2006 -- "five years and forty-six days after the last
2 of the five grant dates (September 21, 2001)[.]" Mot. (doc. 81) at
3 11.

4 Plaintiff buries its response to this argument in a footnote,
5 indicating that the general rule that a backdating claim accrues on
6 the date the option was granted "is not directly at issue in this
7 case[.]" Resp. (doc. 94) at 52, n.26. Even assuming the
8 applicability of that rule, plaintiff reasons that a backdating
9 claim based upon "[t]he last grant that [it] specifically alleges
10 was backdated[.]" *i.e.* September 21, 2001, would survive this
11 dismissal motion in any event. Id. That particular backdating
12 claim is not time-barred, plaintiff hypothesizes, if the September
13 21, 2001, grants were "backdated by over forty-six days[.]" Id.
14 Countering that Apollo has not met its burden of proof on such a
15 claim because it has not shown that that "grant was actually
16 granted before November 2, 2006," plaintiff contends that this
17 particular backdating claim is timely. See id.

18 Plaintiff misconceives the parties' respective burdens at this
19 juncture. Absent any allegations in the complaint, the court
20 declines to speculate, as plaintiff urges, as to whether the
21 September 21st grants were "backdated by over forty-six days," so
22 as to bring them within the five year statute of repose. See id.
23 As part of the alleged fraudulent scheme to backdate stock options,
24 the FAC alleges that "[w]hile some of these grants were not
25 publicly reported, several grants reported in Apollo's Forms 10-K
26 had purported grant dates so improbable that backdating is the only
27 plausible explanation." Id. at 17, ¶ 48. Among those are grants
28 made "on September 21, 2001[.]" Id. at 21, ¶ 52. To the extent

1 plaintiff is asserting a claim for the backdating itself in
2 conjunction with those September 21st grants, as set forth above,
3 such a claim accrues the date those option grants were made. See
4 Affiliated Computer, 540 F.Supp.2d at 701 (citation omitted); see
5 also Converse Technology, 543 F.Supp.2d at 155 (citation omitted).
6 Because the present action was not commenced until November 2,
7 2006, any claims based directly on backdating allegedly occurring
8 on September 21, 2001, are time barred. Accordingly, the court
9 grants Apollo's motion to dismiss as untimely any claims based upon
10 backdating itself with respect to the five option grants set forth
11 earlier.

12 Turning to what it concedes is the "[t]he gravamen of" the FAC,
13 "the reporting of false and misleading financial results[,]"
14 plaintiff contends that because it is alleging a "series of
15 fraudulent misrepresentations[,]" the five year repose period began
16 to run "no earlier than 2006[.]" Resp. (doc. 94) at 50 and 51. In
17 essence, plaintiff is urging this court to adopt a theory of
18 continuing wrong so that it can circumvent the five year repose
19 period. Based upon that theory, plaintiff contends that all of its
20 false misrepresentation claims are timely.

21 Primarily because it would run afoul of the general proposition
22 that "the five-year statute of limitations period begins to run on
23 the date of the false representation[,]" the court declines to
24 adopt a continuing wrong or continuing violation theory here. See
25 Juniper Networks, 542 F.Supp.2d at 1051 (citations omitted). As in
26 In re Zoran Corp. Deriv. Litig., 511 F.Supp.2d 986 (N.D.Cal. 2007),
27 the court finds that the statute of limitations accrues for these
28 false representation claims "when the violation itself occurs, not

1 when the last violation in a series of alleged violations occur."
2 Id. at 1014. Accordingly, plaintiff's false representation claims
3 are timely to the extent such misstatements were made during the
4 five-year period of repose. Claims based on misrepresentation
5 statements outside the statute of repose (*i.e.*, prior to November
6 2, 2001) are not timely, however, and the court grants Apollo's
7 motion to dismiss in that regard.⁴ See Juniper Networks, 542
8 F.Supp.2d at 1051 (citation omitted) ("any part of Plaintiffs'
9 § 10(b) claim based on pre-repose period representations is barred
10 even if the injury did not occur until after period began[]").

11 **C. Section 10(b) & Rule 10b-5 Claims**⁵

12 The court will next turn to the core issue of these dismissal
13 motions -- "whether plaintiff[] [has] adequately pled a claim of
14 securities fraud - something that is much harder now than in days
15 gone by." Berson v. Applied Signal Technology, Inc., 527 F.3d 982,
16 983 (9th Cir. 2008). Indeed, fairly recently the Ninth Circuit
17 observed that "[d]ue in large part to the enactment of the . . .
18 PSLRA, . . . plaintiffs in private securities fraud class actions
19 face formidable pleading requirements to properly state a claim and
20 avoid dismissal under Fed.R.Civ.P. 12(b)(6)." Metzler Inv., 540
21 F.3d at 1055 (citation omitted). Although "formidable," those

22
23 ⁴ Having found that the five specifically alleged backdated stock option
24 grants are time-barred, there is no need to address Apollo's alternate argument
25 that those claims also fail because the FAC does not include a "legitimate
26 statistical analysis" to support backdating as to those grants. Mot. (doc. 81) at
27 18. Similarly, there is no need to delve into Apollo's argument that the FAC is
28 deficient because it "does not plead any of the mandatory specifics" as to the
roughly 100 unidentified grants therein. See id. No analysis of this issue is
necessary because the court assumes by plaintiff's silence that it is abandoning
any claims as to fraud based on alleged backdating of grants other than the five
which the FAC specifically identifies.

⁵ Hereinafter section 10(b) shall be read to include Rule 10b-5 as well.

1 standards are not insurmountable.

2 "In a typical § 10(b) private action a plaintiff must prove
3 (1) a material misrepresentation or omission by the defendant;
4 (2) scienter; (3) a connection between the misrepresentation or
5 omission and the purchase or sale of a security (4) reliance upon
6 the misrepresentation or omission; (5) economic loss; and (6) loss
7 causation." Stoneridge Inv. Partners, LLC v. Scientific-Atlanta,
8 ____ U.S. ____, 128 S.Ct. 761, 768, 169 L.Ed.2d 627 (2008).

9 Defendants contend that they are entitled to dismissal of
10 plaintiff's 10b-5 claims because plaintiff has not adequately pled
11 three of those elements. More specifically, Apollo maintains that
12 "plaintiff has failed to adequately plead that any grants were
13 'backdated[.]'" Mot. (doc. 81) at 12 (emphasis in original). In a
14 similar vein, all defendants argue that plaintiff's misstatement
15 and omissions claims are not pled with the requisite particularity.
16 Next, Apollo challenges the sufficiency of plaintiff's loss
17 causation allegations,⁶ whereas the primary thrust of the
18 individual defendants' motion is that the FAC does not adequately
19 plead scienter.⁷

20 _____
21 ⁶ Originally failure to adequately plead loss causation was not a basis
22 for the individual defendants' dismissal motion. In their Supplemental Brief,
23 however, those defendants specifically "incorporate by reference . . . the loss
24 causation aspect of the recent Ninth Circuit decisions . . . addressed in Apollo's
25 [supplemental] brief[.]" Supp. Br. (doc. 100) at 5, n.1. Thus, the court deems the
26 individual defendants to be seeking dismissal for failure to adequately plead loss
27 causation as well.

28 ⁷ "The Ninth Circuit has rejected the concept of collective scienter in
attributing scienter to a corporation." In re International Rectifier Corp. Sec.
Litig., 2008 WL 4555794, at *21 (C.D.Cal. May 23, 2008) (internal quotation marks
and citation omitted). Accordingly, "[a] defendant corporation is deemed to have
the requisite scienter for fraud *only if* the individual corporate officer making
the statement has the requisite level of scienter, i.e., knows that the statement
is false, or is at least deliberately reckless as to its falsity, at the time that
he or she makes the statement.'" Id. (quoting Nordstrom, Inc. v. Chubb & Son,
Inc., 54 F.3d 1424, 1435-36 (9th Cir. 1995)) (emphasis added). In light of the

1 **1. Particularity**

2 **a. Pleading Standards**

3 **i. Rule 9**

4 Rule 9(b) requires that “[i]n all averments of fraud or
5 mistake, the circumstances constituting fraud or mistake shall be
6 stated with particularity.” Fed. R. Civ. P. 9(b). “In order to
7 allege fraud with particularity, the complaint must both identify
8 the allegedly fraudulent statement and explain why it was false
9 when made.” In re Metropolitan Sec. Litig., 532 F.Supp.2d 1260,
10 1279 (E.D.Wash. 200) (citation omitted). A complaint which
11 “specif[ies] such facts as the times, dates, places, and benefits
12 received, and other benefits of the alleged fraudulent activity[.]”
13 provides the notice which Rule 9(b) requires. See id. at 672
14 (citations omitted). “Further, a pleader must identify the
15 individual who made the alleged representation and the content of
16 the alleged representation.” In re Hansen Natural Corp. Sec.
17 Litig., 527 F.Supp.2d 1142, 1151 (C.D.Cal. 2007) (internal
18 quotation marks and citation omitted). The purpose of Rule 9(b)’s
19 heightened pleading requirements is “to give defendants notice of
20 the particular misconduct which is alleged to constitute the fraud
21 charged so that they can defend against the charge and not just
22 deny that they have done anything wrong.” Neubronner v. Milken, 6
23 F.3d 666, 671 (9th Cir. 1991) (internal quotations and citation
24 omitted).

25 A complaint which “relies on ‘shotgun’ or ‘puzzle’ pleading[.]”

26 _____
27 foregoing, it is understandable that Apollo did not focus heavily upon this element
28 of securities fraud and instead basically adopts the individual defendants’
arguments on the issue of scienter. See Mot. (doc. 81) at 25; and Supp. Memo.
(doc. 102) at 10.

1 does not meet Rule 9(b)'s particularity requirement. Metropolitan
2 Sec., 532 F.Supp.2d at 1279 (citation omitted). "Shotgun pleadings
3 are those that incorporate every antecedent allegation by reference
4 to each subsequent claim for relief or affirmative defense." Id.
5 (internal quotation marks and citation omitted). Puzzle pleadings,
6 which "[c]ourts in this [C]ircuit have repeatedly lamented[,]"
7 Defazio v. Hollister, Inc., 2008 WL 958185, at *3 n.3 (E.D.Cal.
8 April 8, 2008) (citing cases), including this one,⁸ "are those that
9 require the defendant and the court to match the statements up with
10 the reasons they are false or misleading." Metropolitan Sec., 532
11 F.Supp.2d at 1279 (internal quotation marks and citations omitted).

12 **ii. PSLRA**

13 In addition to satisfying Rule 9(b), a securities fraud
14 plaintiff must meet the PSLRA's "exacting pleading requirements."
15 Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 127
16 S.Ct. 2499, 2054, 168 L.Ed.2d 179 (2007). "The PSLRA requires a
17 heightened pleading standard for allegations regarding misleading
18 statements and omissions that is similar to the heightened pleading
19 standard required by Rule 9(b)." Hansen, 527 F.Supp.2d at 1151.
20 More specifically, that Act requires plaintiffs alleging securities
21 fraud "to specify each statement alleged to have been misleading,
22 the reason or reasons why the statement is misleading, and if an
23 allegation regarding the statement or omission is made on
24 information and belief, the complaint shall state with
25 particularity all facts on which that belief is formed." 15 U.S.C.

26

27 ⁸ Chan v. Orthologic Corp., 1998 WL 1018624, at *4 n.11 (D.Ariz. Feb. 5,
28 1998) ("This tactic not only makes it difficult to ascertain whether any of the
allegations have more merit than others, it also makes the complaint dreadfully
oversized . . . [and] make[s] a mockery of Rule 9(b).")

1 § 78u-4(b)(1) (West 1997). "The purpose of this heightened
2 pleading requirement was generally to eliminate abusive securities
3 litigation and particularly to put an end to the practice of
4 pleading fraud by hindsight." In re Vantive Corp. Sec. Litig., 283
5 F.3d 1079, 1084-85 (9th Cir. 2002) (internal quotation marks and
6 citation omitted). Indeed, the detail which § 78u-4(b)(1) demands
7 "is the PSLRA's single most important weapon against pleading fraud
8 by hindsight because it forces plaintiffs to reveal whether they
9 base their allegations on an inference of earlier knowledge drawn
10 from later disclosures or from contemporaneous documents or other
11 facts." Hansen, 527 F.Supp.2d at 1152 (citation omitted). "By
12 requiring specificity, § 78u-4(b)(1) prevents a plaintiff from
13 skirting dismissal by filing a complaint laden with vague
14 allegations of deception unaccompanied by a particularized
15 explanation stating *why* the defendant's alleged statements or
16 omissions are deceitful." Metzler Inv., 540 F.3d at 1061 (citation
17 omitted).

18 By Apollo's count, the FAC identifies 26 allegedly false and
19 misleading statements which defendants issued during the class
20 period. See FAC (doc. 71) at ¶¶ 53-87. Plaintiff alleges that
21 those statements were false and misleading as they pertained to:
22 (1) Apollo's "financial results;" (2) "the terms and value of the
23 options granted to [Apollo] officers, directors, and employees;"
24 (3) "the internal controls relating to stock option grants and
25 related financial reporting;" and (4) Apollo's "application" of
26 certain accounting principles and standards pertaining to
27 "accounting for stock option grants." Id. at ¶ 53. The FAC goes
28 on to allege, broadly stated, that in each of the years 2002-2006

1 Apollo issued a series of press releases providing quarterly fiscal
2 results. Although the FAC does not allege that those press
3 releases contained "false financial results[,]" given plaintiff's
4 manner of pleading, that is the obvious inference. See, e.g., id.
5 at ¶ 54 ("On March 26, 2002, Apollo issued a press release entitled
6 'Apollo Group Inc. Reports Fiscal 2002 Second Quarter Results.'
7 These false financial results were reported in Apollo's Form 10-Q,
8 which was filed with the SEC on April 12, 2002.") The FAC also
9 alleges that those purportedly false results were in turn
10 "repeated" in Apollo's Form 10-Qs and 10-Ks, which it filed with
11 the SEC. See, e.g., id. at ¶¶ 54; 57; 72; and 76.

12 After enumerating the supposedly false and misleading
13 statements for each of the years from 2002-2006, plaintiff sets
14 forth what it deems to be "[t]he true facts known at the time[.]"
15 Id. at ¶¶ 59(a)-(f); 65(a)-(f); 74(a)-(g); 81(a)-(f); and 87(a)-
16 (g). With a few minor exceptions, those "true facts" are identical
17 for each of the class period years and are set forth in full below:

18 (a) Apollo's 2000, 2001, and 2002 financial
19 results, including its net income, earnings per share,
20 and profit and gross margins, were all materially
21 overstated due to *contrivances and manipulations* in
22 the administration of Apollo's stock options, including
backdating and failing to properly record or account for
the actual amount and tax consequences of compensation
expenses of its executives;

23 (b) Apollo's financial and operating results
24 reported during the Class Period were not entirely due
25 to the skill and business acumen of its top executives,
26 their successful management of its business or the
27 outstanding performance of its business units, as
represented; in fact, a significant part was due to
falsification of Apollo's financial statements by not
properly accounting for (and thus understating) the true
compensation expenses of its executive and management
team;

28 (c) Apollo's top executives and directors were

1 manipulating the Company's stock option plans to provide
2 themselves with millions of dollars in undisclosed income
3 by backdating stock option grants to a much lower exercise
4 price thus giving them an instant, riskless profit, while
5 exposing the Company to the risk of regulatory
6 investigations, tax penalties and even criminal
7 proceedings;

8 (d) Apollo's internal financial and accounting
9 controls were *materially deficient and not effective*
10 *in providing the necessary and required degrees of*
11 *assurance that Apollo's financial results and reports*
12 *were fairly and accurately presented and free from*
13 *fraud;*

14 (e) Senior management's salaries and option grants
15 had not been determined as a result of arm's-length
16 negotiation with Apollo's Compensation Committee,
17 but rather were the product of cronyism and undisclosed
18 conflicts of interest; and

19 (f) Because Apollo's historical and current financial
20 results were overstated, defendants' forecasts of Apollo's
21 future financial performance were false and could not be
22 achieved.

23 Id. at ¶¶ 59(a)-(f) (emphasis added); see also FAC at ¶¶65(a)-(f);
24 ¶¶ 74(a)-(d) and ¶¶ 74(f)-(g); ¶¶ 81(a)-(f); and ¶¶ 87(a)-(f).

25 An additional "true fact" in 2004 was that purportedly "Apollo
26 had not taken the required compensation expenses for its conversion
27 of University of Phoenix Online common stock." Id. at ¶74(e).

28 Likewise, in 2006 the FAC alleges two other "true facts[:]" (1)
"Apollo's June 9, 2006 denial of stock option backdating was false
and misleading as discussed *infra*[:]" and (2) Apollo's January 11,
2006 press release regarding the resignation of Nelson omitted
material facts regarding the circumstances of [his] resignation."

Id. at ¶¶ 87(g)-(h).

To illustrate its view that plaintiff has not pled fraud with
the requisite degree of particularity, Apollo points out that the
FAC alleges that an April 12, 2002, SEC filing contained "false

1 financial results[.]” Id. at ¶54. Yet, when the FAC later alleges
2 that such financial results were “due to contrivances and
3 manipulations in the administration of Apollo’s stock options,” id.
4 At ¶59(a), it fails to “connect-the-dots” in terms of explaining
5 what is meant by “contrivances and manipulations[.]” and how such
6 actions relate to the earlier allegations of false financials. See
7 In re PetSmart, Inc. Sec. Litig., 61 F.Supp.2d 982, 991 (D.Ariz.
8 1999) (footnote omitted) (“The court should not have to play
9 connect-the-dots in order to identify the facts and trends upon
10 which plaintiffs base their claim.”) Apollo further challenges the
11 sufficiency of plaintiff’s fraud allegations for failing to specify
12 the supposedly backdated stock options as they relate to particular
13 “false financial results.” Apollo adds that given the overly broad
14 and vague nature of the FAC, it is impossible to ascertain, among
15 other things, whether plaintiff is relying upon time-barred
16 backdated stock options.

17 The individual defendants, as does Apollo, take plaintiff to
18 task for essentially cutting and pasting and “simply parrot[ing]
19 lengthy . . . quotes from Apollo’s public filings” without
20 identifying the specific statement therein which supposedly is
21 false. Mot. (doc. 82) at 23. The individual defendants also
22 challenge the sufficiency of plaintiff’s fraud allegations because
23 of the lack of detail as to “why the unidentified misleading
24 statements are purportedly false.” Id.

25 Essentially plaintiff counters that it has complied with the
26 heightened pleading requirements for fraud in that it is alleged
27 “**where** and **when**” each false and misleading statement was made; “**who**
28 made” it; “and a fraudulent course of conduct demonstrating **why**

1 each statement was false and misleading." Resp. (doc. 94) at 29
2 (emphasis in original). Apollo's May 22, 2007, Restatement is the
3 primary basis for plaintiff's claims that the 26 identified
4 statements were all false and misleading.

5 The court agrees with defendants that the FAC does not satisfy
6 the heightened pleading standards for fraud under either Rule 9(b)
7 or the PSLRA. In its current form the FAC is a puzzle-like
8 pleading which the court cannot countenance. The cut and paste
9 nature of the FAC is troubling. Perhaps the most troubling aspect
10 of the FAC as currently pled is that the "vague allegations of
11 deception" are "unaccompanied by a particularized explanation
12 stating why the defendant's alleged statements or omissions are
13 deceitful." See Metzler Inv., 540 F.3d at 1061 (citation omitted).
14 Further, as in Metropolitan Sec., "it is difficult and laborious to
15 determine which portions" of the quoted press releases and SEC
16 filings "are allegedly false and which false statements are
17 attributed to any particular defendant." See Metropolitan Sec.,
18 532 F.Supp.2d at 1279. The FAC "'often rambles through long
19 stretches of material quoted from defendants' public statements
20 . . . unpunctuated by any specific reasons for falsity.'" See id.
21 (quoting In re GlenFed, Inc. Sec. Litig., 42 F.3d 1541, 1547-48 (9th
22 Cir. 1994)) (other citation omitted).

23 The court will not take the "drastic step of dismissal based on
24 the form of the pleading[,]" however. See In re Cornerstone
25 Propane Partners, L.P., Sec. Litig., 355 F.Supp.2d 1069, 1081
26 (N.D.Cal. 2005) (citation omitted). Rather, in accordance with
27 "the Ninth Circuit[']s recommend[ation][,]" the court will
28 "require[] . . . plaintiff to 'streamline and reorganize the

1 complaint before allowing it to serve as the document controlling
2 discovery.'" See Metropolitan Sec., 532 F.Supp.2d at 1280 (quoting
3 GlenFed, 42 F.3d at 1554) (other citation omitted); see also
4 Eminence Capital, LLC v. Aspeon, Inc., 316 F.3d 1048, 1053 (9th Cir.
5 2003) (abuse of discretion to dismiss FAC with prejudice for
6 failure to provide the detail which PSLRA requires where, *inter*
7 *alia*, plaintiff alleged with requisite detail who, what, when and
8 by whom false statements were made, but did not "'plead
9 sufficiently how and why the financial statements were false'").
10 In so doing, plaintiff must be "clear and concise in identifying
11 the false statements and articulating the factual allegations
12 supporting an inference that the statement is false or misleading."
13 See Patel v. Parnes, 253 F.R.D. 531, 554 (C.D.Cal. 2008) (internal
14 quotation marks and citation omitted). The FAC in its current form
15 makes it difficult, if not impossible, to evaluate and determine
16 whether the PSLRA's particularity requirements are met. This task
17 may be both "challenging and burdensome," but as the court astutely
18 observed in Metropolitan Sec., 532 F.Supp.2d at 1278, "the American
19 legal system places this [pleading] burden on the party seeking
20 relief, rather than the party responding to a claim." See id.
21 "Nor is it appropriate for a trial court to effectively involve
22 itself in the drafting process by puzzling out the details of a
23 plaintiff's claims." Id.

24 Assuming that plaintiff can successfully amend its complaint to
25 comply with the dictates of the PSLRA in terms of pleading false
26 and misleading statements or omissions, the court will next address
27 defendants' scienter and loss causation allegations.

28 . . .

1 **2. Scierter**

2 **a. Pleading Standards**

3 The PSLRA also has a heightened pleading standard for scierter.
4 “[P]laintiffs proceeding under the PSLRA can no longer aver intent
5 in general terms of mere motive and opportunity or recklessness,
6 but rather, must state specific facts indicating no less than a
7 degree of recklessness that strongly suggests actual intent.”
8 Metzler Inv., 540 F.3d at 1066 (internal quotation marks and
9 citation omitted). “The requisite recklessness must be an extreme
10 departure from the standards of ordinary care, and . . . present []
11 a danger of misleading buyers that is either known to the defendant
12 or so obvious that the actor must have been aware of it.” Patel,
13 253 F.R.D. at 555 (internal quotation marks and citations omitted).
14 In other words, “reckless conduct” can meet the PSRLA, but only “to
15 the extent that it reflects some degree of intentional or conscious
16 misconduct, or what [the Ninth Circuit] has called deliberate
17 recklessness.” South Ferry, supra, 542 F.3d at 782 (internal
18 quotation marks and citation omitted). This pleading requirement
19 is met when the complaint “contain[s] allegations of specific
20 contemporaneous statements or conditions that demonstrate the
21 intentional or the deliberately reckless false or misleading nature
22 of the statement when made.” Metzler Inv., 540 F.3d at 1066
23 (internal quotation marks and citation omitted).

24 The PSLRA “place[s] an additional gloss on the scierter
25 requirement[.]” Id. Pursuant to the PSLRA, a plaintiff must “state
26 with particularity facts giving rise to a strong inference that the
27 defendant acted with the required state of mind.” 15 U.S.C. § 78u-
28 4(b)(2) (West 1997). Congress did not define “strong inference,”

1 resulting in divergent views as to what constitutes a "strong
2 inference." Setting out "to prescribe a workable construction" of
3 the "strong inference standard," the Supreme Court in Tellabs
4 adopted a holistic approach, *i.e.* "whether *all* of the facts
5 alleged, taken collectively, give rise to a strong inference of
6 scienter, not whether any individual allegation, scrutinized in
7 isolation, meets that standard." 551 U.S. at ___, 127 S.Ct. at
8 2509 (citations omitted). "[A]ssess[ing] all [of] the allegations
9 holistically[]" is necessary, the Tellabs Court explained, because
10 "[t]he strength of an inference cannot be decided in a vacuum."
11 Id. at ___, 127 S.Ct. at 2511 and 2510. While acknowledging that
12 the PSLRA "unequivocally raised the bar for pleading scienter[,]"
13 the Tellabs Court held that pleading facts suggesting a "plausible"
14 inference of scienter does not satisfy that statute. Id. at ___,
15 127 S.Ct. at 2509 (internal quotation marks and citation omitted).
16 Instead, a "strong inference" of scienter can only be shown by
17 "plead[ing] with particularity facts that give rise to a . . .
18 powerful or cogent. . . inference" of scienter. Id. at ___, 127
19 S.Ct. at 2510 (citations omitted).

20 In determining the strength of any given inference, "[t]he
21 inquiry is inherently comparative: How likely is it that one
22 conclusion, as compared to others, follows from the underlying
23 facts?" Id. When undertaking such a comparison, "a court must
24 consider plausible nonculpable explanations for the defendant's
25 conduct, as well as inferences favoring the plaintiff." Id.
26 Clarifying, the Tellabs Court stated that "the inference that the
27 defendant acted with scienter need not be irrefutable, *i.e.*, of the
28 smoking gun genre, or even the most plausible of competing

1 inferences[.]” Id. (internal quotation marks and citation omitted).
2 Likewise, although defendants herein suggest to the contrary, “to
3 carry their burden on scienter, Plaintiffs . . . do not need to
4 invalidate the inferences which Defendants raise.” See McGuire v.
5 Dendreon Corp., 2008 WL 5130042, at *7 (W.D.Wash. Dec. 5, 2008).

6 “Yet the inference of scienter must be more than merely
7 ‘reasonable’ or ‘permissible’ - it must be cogent and compelling,
8 thus strong in light of other explanations.” Tellabs, 551 U.S. at
9 ___, 127 S.Ct. at 2510. As the Ninth Circuit recently put it, “[a]
10 court must compare the malicious and innocent inferences cognizable
11 from the facts pled in the complaint, and only allow the complaint
12 to survive a motion to dismiss if the malicious inference is at
13 least as compelling as any opposing innocent inference.” Zucco
14 Partners, LLC v. Digimarc Corp., 552 F.3d 981, 991 (9th Cir. 2009`)
15 (citing Tellabs, 551 U.S. at ___, 127 S.Ct. at 2510; and Metzler
16 Inv., 540 F.3d at 1066). Thus, after Tellabs “[a] complaint will
17 survive [a motion to dismiss]. . . only if a reasonable person
18 would deem the inference of scienter cogent and at least as
19 compelling as an opposing inference one could draw from the facts
20 alleged.” Tellabs, 551 U.S. at ___, 127 S.Ct. at 2510 (footnote
21 omitted).

22 In the present case, arguing that plaintiff has not adequately
23 pled scienter, Apollo stresses that the standard for pleading
24 scienter in the Ninth Circuit is “more stringent” than in other
25 Circuits, Mot. (doc. 81) at 26 (citing No. 84 Employer-Teamster v.
26 America West Holding, 320 F.3d 920, 931 n. 8 (9th Cir. 2003)) - a
27 point which is implicit in the individual defendants’ argument.
28 Until fairly recently, that was an accurate description of the

1 scienter pleading standards in this Circuit.

2 The Ninth Circuit in South Ferry, however, revisited the issue
3 of the “level of detail required under the PSLRA[.]” when pleading
4 scienter. South Ferry, 542 F.3d at 784. As one commentator
5 describes it, South Ferry “represents a seismic shift in the
6 [Ninth] Circuit’s analysis of securities fraud complaints and
7 significantly lowers the bar for pleading scienter[.]” 14 No. 11
8 Andrews Sec. Litig. & Reg. Rep. 2 (Oct. 7, 2008) (footnote
9 omitted). That commentator further described South Ferry as a ‘sea
10 change in scienter pleading standard by the [Ninth] Circuit[.]” Id.
11 That “seismic shift” or “sea change” is due to the Ninth Circuit’s
12 explicit repudiation in South Ferry of its prior securities fraud
13 pleading standards as set forth in In re Read-Rite Corp. Sec.
14 Litig., 335 F.3d 843 (9th Cir. 2003); Vantive, supra, 283 F.3d 1079;
15 and Silicon Graphics, supra, 183 F.3d 970. Cognizant that
16 “perhaps” it had been “too demanding and focused too narrowly in
17 dismissing vague, ambiguous, or general allegations [of scienter]
18 outright” in that trilogy of pre-Tellabs cases, the Ninth Circuit
19 found that “Tellabs permits a series of less precise allegations to
20 be read together to meet the PSLRA requirements, th[os]e prior
21 holdings . . . notwithstanding.” South Ferry, 542 F.3d at 784. In
22 conformity with Tellabs, and retreating from its prior holdings,
23 the Ninth Circuit further found that “[v]ague or ambiguous
24 allegations are now properly considered as part of a holistic
25 review when considering whether the complaint raises a strong
26 inference of scienter.” Id. (citation omitted).

27 Recognizing that while “Tellabs suggests that . . . a high
28 level of detail is required under the PSLRA,” the South Ferry Court

1 stressed that "a court should look to the complaint as a whole, not
2 to each individual scienter allegation as Silicon Graphics
3 suggests." Id. (emphasis added). Thus, the Ninth Circuit
4 explicitly instructed courts "to consider the totality of the
5 circumstances, rather than to develop separately rules of thumb for
6 each type of scienter allegation." Id. Taking the "holistic[]"
7 approach which Tellabs mandates, the South Ferry Court opined that
8 "federal courts certainly need not close their eyes to
9 circumstances that are probative of scienter viewed with a
10 practical and common-sense perspective." Id.

11 **b. Argument Summary**

12 Plaintiff points to a number of allegations which from its
13 standpoint give rise to "a strong inference of scienter with
14 respect to [Apollo's] false financial reporting resulting from
15 undisclosed stock option backdating, and its failure to properly
16 account for such backdating." Pl. Supp. Br. (doc. 101) at 2.
17 First, plaintiff relies upon allegations of backdating stock
18 options to show "that it is 'at least as likely' that defendants
19 possessed the requisite scienter" as to "their statements regarding
20 stock options granting and accounting[.]" Resp. (doc. 94) at 23-24.
21 Another way plaintiff believes it has sufficiently alleged scienter
22 is based upon circumstances which when taken together show
23 deliberate recklessness "with respect to Apollo's stock option
24 granting practices." Id. at 25. Basically those circumstances
25 are: (1) the Restatement (2) "false SOX [Sarbanes-Oxley]
26 certifications"[";]" (3) resignations of Apollo executives and
27
28

1 directors; and (4) defendants' financial gain.⁹ Id. at 36; and 39.
2 Invoking Tellabs' competing inferences analytical framework,
3 plaintiff maintains that not only has it raised a cogent and
4 compelling inference of scienter, but defendants have not "raise[d]
5 a single reasonable competing inference that could counter [these]
6 allegations." Id. at 58.

7 As the individual defendants construe the FAC, in addition to
8 the foregoing, plaintiff is endeavoring to allege scienter by
9 relying upon defendant Mueller's assurance of no backdating. As
10 more fully explained below, the individual defendants strongly
11 contend that each of plaintiff's allegations "fall woefully
12 short[]" of the standard necessary to adequately plead scienter.
13 Mot. (doc. 82) at 13.

14 Similarly, Apollo maintains that plaintiff has "utterly failed"
15 to adequately plead scienter. Mot. (doc. 81) at 26. Essentially
16 adopting the individual defendants' scienter arguments,¹⁰ Apollo

17
18 ⁹ Plaintiff is also attempting to rely upon the jury verdict in In re
19 Apollo Group, Ins. Sec. Litig., CV 04-2147 (D.Ariz.), finding Apollo, and
20 defendants Nelson and Gonzales liable for securities fraud. As noted earlier,
21 however, Judge Teilborg set aside that verdict. See In re Apollo Group, Inc. Sec.
Litig., 2008 WL 3072731 (D.Ariz. Aug. 4, 2008). Thus, assuming that verdict
otherwise had any bearing on the present action, plainly it no longer does.
Consequently, the court will not take into account that verdict in evaluating the
sufficiency of plaintiff's scienter allegations herein.

22 ¹⁰ Apollo's tack is understandable given that ordinarily as a corporation,
23 Apollo can be "deemed to have the requisite scienter for fraud only if the
24 individual corporate officer making the statement has the requisite level of
25 scienter." Mot. (doc. 81) at 25 (quoting In re Apple Computer, Inc., Sec. Litig.,
243 F.Supp.2d 1012, 1023 (N.D.Cal. 2002) (citing, in turn, Nordstrom, Inc. v. Chubb
& Son, Inc., 54 F.3d 1424, 1435-36 (9th Cir. 1995)). As the Ninth Circuit recently
26 made clear though, it has not completely foreclosed the possibility of "collective
27 scienter," Glazer Capital Management, LP v. Magistri, 549 F.3d 736, 744 (9th Cir.
2008), i.e. where "[t]he knowledge necessary to adversely affect the corporation
28 does not have to be possessed by a single corporate agent; the cumulative knowledge
of several agents can be imputed to the corporation." Nordstrom, 54 F.3d at 1435
(internal quotation marks and citation omitted).

In the present case, to the extent plaintiff may be urging application of the
collective scienter doctrine, the court declines to do so. That doctrine does not
come into play here because the FAC's scienter allegations are not akin to

1 highlights that the Restatement alone is an insufficient basis for
2 inferring scienter. Apollo adds that plaintiff cannot rely upon
3 the corporate titles and responsibilities of the individual
4 defendants to plead scienter because that is tantamount to
5 impermissible "group pleading." Id. Lastly, Apollo notes that the
6 individual defendants' stock sales during the Class Period also do
7 not provide a sufficient basis for pleading scienter.

8 The dominant theme of defendants' scienter argument is that
9 each of the actions complained of, standing alone, is insufficient
10 to create a strong inference of such. Hence, the court should
11 dismiss the FAC for failure to adequately plead scienter.
12 Painstakingly deconstructing each of the FAC's scienter allegations
13 and the competing inferences which can be drawn therefrom, and
14 insisting on viewing each such allegation in isolation, was
15 problematic even after Tellabs. See Metzler Inv., 540 F.3d at 1069
16 (observing, based upon Tellabs, that "a defendant cannot gain
17 dismissal by de-contextualizing every statement in a complaint that
18 goes to scienter[>"). That approach is even more problematic now
19 given evolving Ninth Circuit standards for pleading scienter. In
20 Zucco, the Ninth Circuit recently acknowledged that it had "yet to
21 fully explain how the [Supreme] Court's Tellabs decision relates to
22 much of [its] [prior] analysis" of scienter pleading standards
23 under the PSLRA. Zucco, 552 F.3d at 987. Clarifying, the Ninth
24 Circuit now views "Tellabs [as] permit[ting] a series of less
25

26 "circumstances in which a company's public statements were so important and so
27 dramatically false," such as the hypothetical example mentioned in Glazer Capital
28 where "General Motors announced that it had sold one million SUVs in 2006, and the
actual number was zero[," so as to justify allowing this method of pleading
scienter. See id. at 743 (citation omitted).

1 precise allegations to be read together to meet the PSLRA
2 requirement.'" Zucco, 552 F.3d at 1006 (quoting South Ferry, 542
3 F.3d at 784). It also recognizes that "[v]ague or ambiguous
4 allegations are now properly considered as part of a holistic
5 review when considering whether the complaint raises a strong
6 inference of scienter.'" Id. (quoting South Ferry, 542 F.3d at
7 782).

8 "[R]ecognizing that *Tellabs* calls into question a methodology
9 that relies exclusively on a segmented analysis of scienter[,"] the
10 Zucco Court further explained that it now "read[s] *Tellabs* to mean
11 that [its] prior, segmented approach is not sufficient to dismiss
12 an allegation of scienter." Id. at 991. Indeed, in Rubke v.
13 Capitol Bancorp LTD, 551 F.3d 1156 (9th Cir. 2009), the Ninth
14 Circuit explicitly recognized that it "can no longer summarily
15 dismiss a complaint whose individual allegations are insufficient
16 under the PSLRA." Id. at 1165. Instead, a court must "conduct a
17 dual inquiry." Zucco, 552 F.3d at 992. "First, [it] will
18 determine whether any of . . . plaintiff's allegations, standing
19 alone, are sufficient to create a strong inference of scienter[.]"
20 Id. "Second, if no individual allegations are sufficient, [the
21 court] will conduct a 'holistic' review of the same allegations to
22 determine whether the insufficient allegations combine to create a
23 strong inference of intentional conduct or deliberate
24 recklessness." Id. So, while holding that "Tellabs does not
25 materially alter the particularity requirements for scienter claims
26 established in [its] previous decisions[,"] at the same time the
27 Zucco Court held that Tellabs "adds an additional 'holistic'
28 approach to those requirements[.]" Id. at 987.

1 Consistent with that recently espoused view, a court must
2 “determine whether the complaint contains an inference of scienter
3 that is greater than the sum of its parts.” Rubke, 551 F.3d at
4 1165 (citations omitted); see also Glazer Capital, 549 F.3d at 745
5 (internal quotation marks and citation omitted) (“To determine
6 whether [plaintiff] has met the PSLRA pleading requirements, [the
7 Court] must determine whether these five events [which plaintiff
8 claimed supported an inference of scienter], even though
9 individually lacking, are sufficient to create a strong inference
10 of scienter.”). In accordance with the dual inquiry approach
11 adopted by the Ninth Circuit in Zucco, first the court will
12 individually examine each of plaintiff’s scienter allegations,
13 standing alone, to determine whether they are sufficient to create
14 a strong inference of scienter. If necessary, *i.e.*, “if no
15 individual allegations are sufficient,” the court will then conduct
16 a holistic review of those same allegations. See Zucco, 552 F.3d
17 at 992.

18 **c. Individual Scienter Allegations**

19 **i. Stock Option Backdating**

20 The principle means by which plaintiff is attempting to show
21 scienter is through allegations of stock option backdating.
22 Defendants construe the FAC as alleging that Apollo has “‘admitted’
23 to backdating[.]’” - an admission and an allegation which they
24 vehemently deny. Mot. (doc. 82) at 13 (citing FAC at ¶ 2.) Thus,
25 defendants reason, plaintiff cannot rely upon that supposed
26 admission to establish that they had the requisite scienter. The
27 parties spill much ink over whether defendants have admitted
28 backdating, which is the underpinning of plaintiff’s accounting

1 fraud claims. At this juncture, there is no need to become mired
2 down in whether defendants have "admitted" to backdating because
3 the FAC sufficiently *alleges* that they engaged in such conduct
4 regardless of any purported "admission." At this pleading stage,
5 nothing more is required. See Edmonds v. Getty, 524 F.Supp.2d
6 1267, 1274 (W.D.Wash. 2007) (citation omitted) ("[A]t the pleading
7 stage, the plaintiff need not prove that backdating occurred but
8 rather must only allege circumstances from which it may be
9 reasonably inferred that backdating as opposed to an innocent
10 bookkeeping error occurred.")

11 The FAC alleges that "several grants . . . had purported
12 grant dates so improbable that backdating is the only plausible
13 explanation." FAC (doc. 71) at ¶48. From defendants' viewpoint,
14 this is nothing more than a "self-serving conclusion" which does
15 not plead scienter. Mot. (doc. 82) at 15. Rather than alleging a
16 scheme to fraudulently backdate stock options, the individual
17 defendants construe the FAC as alleging nothing more than "simple
18 accounting errors and sloppy recordkeeping" - allegations which
19 cannot support a finding of scienter. See Supp. Br. (doc. 100) at
20 3. Similarly, Apollo charges plaintiff with improperly "lump[ing]
21 Apollo's innocuous accounting mistakes with nefarious retroactive
22 pricing[,]" in an effort to plead scienter. Reply (doc. 97) at 7.

23 Although it is a close call, when read together, a number of
24 allegations support a finding that the inference of backdating is
25 "at least as compelling as any opposing inference" of innocent
26 bookkeeping error. See Tellabs, 551 U.S. at ___, 127 S.Ct. at 2510
27 (footnote omitted). Tellabs and its progeny require nothing more.
28 In fact, as one court within this district has astutely observed,

1 "[t]he Supreme Court [in Tellabs] has now made clear, . . . that a
2 tie goes to the Plaintiff[]" in terms of competing inferences as to
3 scienter. Communications Workers of America Plan for Employees'
4 Pensions and Death Benefits v. CKS Auto Corp., 525 F.Supp.2d 1116,
5 1120 (D.Ariz. 2007). At this relatively early stage in the
6 litigation, the court endorses this tie-breaking approach.

7 In the present action, the FAC alleges that in conducting their
8 own "investigation" Apollo explicitly acknowledged that it
9 "prepared and maintained inaccurate documentation concerning the
10 date that grant award lists were completed and approved." FAC
11 (doc. 71) at ¶ 115(a) (internal quotation marks omitted). This
12 allegation is akin to the "admission" in Middlesex which the court
13 found, along with other allegations, "lean[ed] heavily toward a
14 finding of scienter." Middlesex, 527 F.Supp.2d at 1181. The
15 Middlesex complaint alleged that defendant "admitted that
16 accounting measurement dates for most of the stock option grants to
17 employees from July 1998 and May 2002 differed from the recorded
18 grant dates." Id. (internal quotation marks and citation omitted).
19 In a similar vein, here the FAC alleges that "'Apollo has admitted
20 in its Form 10-K for the year ending August 31, 2006 that 57 of the
21 100 total grants made during this time period used incorrect
22 measurement dates for accounting purposes.'" FAC (doc. 71) at ¶ 47.

23 Further, other allegations detailed below, much like those in
24 Middlesex, amount to "extremely fortunate [grant] dates [which]
25 give rise to a strong inference that backdating has occurred and
26 that it was done intentionally." See Middlesex, 527 F.Supp.2d at
27 1182. More specifically, the FAC alleges that on December 18,
28 1998, "[d]efendants dated certain of Apollo's 1998 option grants

1 . . . at \$11.39 per share[,]” which “was nearly the low for the
2 month of December when Apollo’s stock traded between \$10.22 and
3 \$15.06 per share.” FAC (doc. 71) at ¶ 49. On that date the
4 Sperling defendants, as well as defendants Nelson, Gonzales, and
5 Noone, allegedly made a 10 day return on those options totaling
6 \$2,396,520.00. Id.

7 The FAC further alleges that on April 19, 1999, Apollo dated
8 option grants at “the low of the month[,]” with defendant Gonzales
9 receiving 20,000 options at that price. Id. at ¶ 50. Allegedly,
10 that particular option grant resulted in a five day return to Ms.
11 Gonzales of \$35,000.00. Id. The FAC also alleges that
12 “[d]efendants dated many of Apollo’s 2000 grants as of January 12,
13 2000 at \$8.39 per share (split adjusted)- **not only the low of the**
14 **month but also the low of the year.”** Id. at ¶ 51 (emphasis in
15 original). The FAC continues, alleging that during 2000 Apollo’s
16 “stock traded as high as \$11.33 per share in January and as high as
17 \$22.14 per share[.]” Id.

18 Later in 2000, the FAC alleges that Apollo dated “many of [its]
19 grants as of December 15, 2000 at \$14.84 per share (split
20 adjusted)[.]” Id. (emphasis in original). Allegedly that share
21 price was “**not only the low of the month but also the low for the**
22 **fourth quarter of 2000.”** Id. (emphasis in original) Plaintiff
23 asserts that this particular stock grant “involved suspicious
24 timing” in that “two days later Apollo issued better than expected
25 results which caused a dramatic and immediate climb in the
26 Company’s stock.” Id. According to the FAC, “[b]y December 20,
27 2000 - a day after the earnings release - Apollo’s stock closed at
28 \$20.89 per share.” Id. Then, the stock purportedly “hit its high

1 for the year of \$22.14 per share a few days later on December 28,
2 2000 - **a 49% increase in eight trading days.**" Id. (emphasis in
3 original). The Sperling defendants and defendants Nelson, Gonzales
4 and Noone allegedly were granted a total of 270,000 options on
5 December 15, 2000, with a total five day return of \$3,877,200.00
6 Id.

7 Finally, the FAC alleges that on September 21, 2001,
8 "[d]efendants dated Apollo's . . . option grants . . . at \$23.22
9 per share - **not only the low of the month but also the low for the**
10 **second half of 2001.**" Id. at ¶ 52 (emphasis in original). To
11 support that assertion, the FAC further alleges that Apollo's
12 "stock traded as high as \$28.02 per share in September [2001] and
13 as high as \$32.03 per share in the second half of th[a]t year."
14 Id. Again the FAC alleges that the Sperling defendants, as well as
15 defendants Nelson, Gonzales, and Noone and, this time, defendant
16 Bachus, received stock options with high returns. More
17 specifically, allegedly those defendants received a total of
18 385,000 options on September 21, 2001, with a five day return
19 totaling \$2,705,550.00. Id.

20 These dates, with one exception, appear to reflect at a
21 minimum the lowest price of the month, and in one instance the
22 lowest price for the year. Additionally, as to the December 15,
23 2000 date, allegedly the grant price immediately preceded a 49%
24 increase in the price of Apollo's stock - a significant price
25 increase by any measure. See id. at ¶ 51. Not only that, like the
26 Middlesex court, this court cannot ignore "[t]he fact that none of
27 the option grant dates resulted in less-than-favorable results for
28 Defendants[,]" which "also gives rise to a strong suggestion that

1 the improper dating of options was intentional." See Middlesex,
2 527 F.Supp.2d at 1182. Bolstering the inference of intentional
3 backdating here are the charts in the FAC showing Apollo's stock
4 price history. Also as in Middlesex, those charts, when "overlaid
5 with demarcations reflecting the date of the option grants at issue
6 (as has been done in Plaintiff's FAC)," strengthen the inference of
7 backdating. See id.

8 The FAC does not include a statistical analysis as part of its
9 backdating allegations. Initially the court found this omission
10 somewhat troubling given defendants' position that such an analysis
11 is a necessary predicate to pleading backdating. A careful reading
12 of the cases to which defendants cite, however, reveals that while
13 a statistical analysis may be preferable, and certainly would
14 strengthen the backdating allegations herein, at this point the
15 lack of such an analysis is not fatal.

16 To illustrate, In re Computer Sciences Corp. Deriv. Litig.,
17 2007 WL 1321715 (C.D.Cal. 2007), the court recognized that "the
18 detailed statistical that the plaintiffs employed in" another case
19 was "not necessary to making particularized allegations of
20 backdating." Id. at *14. Likewise, in CNET Networks, supra, 483
21 F.Supp.2d 947, the court did fault plaintiffs for alleging that
22 they had "employ[ed] a widely accepted analytical model for
23 detecting backdated options," when all they had done was to "merely
24 look[] at the stock price movement." Id. at 957. Significantly,
25 however, the court was quick to point out that it "would not
26 necessarily require plaintiffs to perform a complex financial
27 analysis at the pleading stage." Id. at 958-957. In fact, the
28 court expressly stated that "[s]ound analytical methods are one way

1 that plaintiffs could have eliminated the possibility that the
2 returns from the grants were the product of dumb luck." Id. at
3 958 (emphasis added). Although the court in CNET reasoned that
4 "[w]ithout such models, that inference is more difficult to
5 support[,] " it did not require such models. Id. In fact, even
6 without a "sound analytical method," after scrutinizing the eight
7 alleged grants at issue therein, the CNET court found that
8 plaintiff had sufficiently pled facts supporting an inference that
9 three of the eight grants at issue therein were backdated.

10 That is not to say that at some point in this litigation
11 plaintiff's backdating allegations cannot be defeated due to the
12 lack of a sound financial analysis, but not now. The court is all
13 the more reluctant to require a complex, detailed statistical
14 analysis at this particular juncture given the Ninth Circuit's
15 explicit recognition even "vague or ambiguous" scienter allegations
16 may survive a motion to dismiss, as well as a "series of less
17 precise allegations[,] [when] read together[.]" South Ferry, 542
18 F.3d at 784 (citation omitted).

19 **ii. Deliberately Reckless**

20 Having found plaintiff sufficiently pled backdating, "the
21 question . . . becomes whether Plaintiff has adequately pled that
22 Defendants either knew of the backdating, or were deliberately
23 reckless in not knowing of the backdating." See Middlesex, 527
24 F.Supp.2d at 1182. Plaintiff relies upon a series of
25 circumstances, the totality of which it believes show deliberate
26 recklessness in terms of Apollo's stock option granting practices.
27 As noted earlier, those circumstances are: (1) the Restatement
28 (2) "false SOX certifications"[:]" (3) the "mass exodus" of Apollo

1 executives and directors; and (4) defendants' financial gain.
2 Resp. (doc. 94) at 36 and 39.

3 **(a) Restatement/GAAP Violation**

4 The parties offer diametrically opposing views as to the impact
5 of the Restatement on the court's scienter analysis. Plaintiff
6 contends it "supports a strong inference of scienter[.]" Resp.
7 (doc. 94) at 30, whereas defendants retort that the Restatement
8 actually "shows the absence of scienter[.]" Mot. (doc. 82) at 13.
9 Although not without its weaknesses, plaintiff's argument is the
10 stronger one, at least at this juncture.

11 A strong inference of scienter can be drawn from the
12 Restatement, according to plaintiff because it confirms that "[i]n
13 the accounting of certain stock option grants, [Apollo] did not
14 correctly apply the requirements of APB 25[,] [i]n certain
15 instances" using an improper measurement date for option awards.
16 FAC (doc. 71) at 62, ¶ 106 (internal quotation marks omitted).
17 Additionally, plaintiff stresses that the Restatement also confirms
18 that Apollo "prepared and maintained inaccurate documentation
19 concerning the date that grant award lists were completed and
20 approved." Id. Lastly, plaintiff hones in on the Special
21 Committee's "report[] to [Apollo's] Board that certain former
22 officers took steps that may have been intended to mask failures in
23 the grant approval process with respect to [Apollo's] financial
24 reporting and payment of taxes[.]" as the Restatement recites. Id.
25 (internal quotation marks omitted).

26 The court is well aware that "mere publication of a restatement
27 is not enough to create a strong inference of scienter." Zucco,
28 552 F.3d at 1000; see also In re Marvell Technology Group Ltd. Sec.

1 Litig., 2008 WL 4544439, at *6 (N.D.Cal. Sept. 29, 2008) (citation
2 omitted) ("To the extent . . . Plaintiffs seek to rely solely on
3 the restatement of financials, plaintiffs cannot show scienter
4 solely by pointing to the fact that Marvell restated its financial
5 statements."). The court is equally well aware that "[t]he mere
6 publication of inaccurate accounting figures, or a failure to
7 follow GAAP, without more, does not establish scienter.'" Rudolph
8 v. UTStarcom, 2008 WL 4002855, at *5 (N.D.Cal. Aug. 21, 2008)
9 ("UTStarcom II") (quoting, *inter alia*, DSAM Global Value Fund v.
10 Altris Software, Inc., 288 F.3d 385, 390 (9th Cir. 2002) (other
11 quotation marks and citations omitted) (emphasis added); see also
12 Cornerstone, supra, 355 F.Supp.2d at 1091 ("The majority of
13 circuits have clearly held that standing alone, allegation of GAAP
14 or SEC regulations do not establish scienter.") This is so even if
15 the GAAP violations are "significant" or "requir[e] large or
16 multiple restatements[.]" Rectifier, supra, 2008 WL 4555794, at *13
17 (footnote and citations omitted); but see Batwin v. Occam Networks,
18 Inc., 2008 WL 2676364, at *13 (C.D.Cal. July 1, 2008) (footnote
19 omitted) ("[S]ignificant violations of GAAP [alleged overstatement
20 of revenues by over 30 and 40%], taking place over an extended
21 period of time [nearly every quarter for roughly three years],
22 g[a]ve rise to a strong inference of scienter.")

23 Rather, to create a strong inference of scienter based upon a
24 restatement or alleged GAAP violations, those allegations "must be
25 augmented by other specific allegations that defendants possessed
26 the requisite mental state." Rectifier, 2008 WL 4555794, at *13
27 (collecting cases). Courts have variously described these
28 additional allegations, requiring "specific allegations that the

1 defendant had actual knowledge of relevant facts from which
2 scienter could be inferred[,]” In re U.S. Aggregates, Inc. Sec.
3 Litig., 235 F.Supp.2d 1063, 1073 (N.D.Cal. 2002), or similarly
4 requiring that allegations of GAAP violations “be underpinned by
5 other particularized allegations that defendants possessed the
6 requisite mental state.” Cornerstone, 355 F.Supp.2d at 1091.

7 Apart from defendants Nelson, Norton and Blair, missing from
8 the FAC are any “specific or particularized” allegations that the
9 other individual defendants had the requisite mental state *vis-a-*
10 *vis* the Restatement. Therefore, the Restatement standing alone
11 does not support a strong inference of scienter as to those
12 defendants. Plaintiff’s bald assertion that “failure to adhere to
13 APB 25 and properly record compensation expense for millions of
14 dollars worth of stock options[.]” was “part and parcel” of
15 defendants’ alleged fraudulent scheme, Resp. (doc. 94) at 31, is
16 not the type of specific or particularized allegation which can
17 form the basis for a strong inference of scienter. See Wojtunik v.
18 Kealy, 394 F.Supp.2d 1149, 1167 (D.Ariz. 2005) (in considering GAAP
19 violations, allegations of scienter insufficient as to defendants
20 “given the lack of specific allegations about those defendants’
21 personal involvement[.]”). Similarly unavailing is plaintiff’s
22 contention that scienter can be shown due to the “nature” of the
23 Restatement in that “the earlier false financial results were only
24 achieved by violating Apollo’s own stated accounting policies and
25 stock option plans.” Id. (citing FAC at ¶ 46). Plainly this
26 allegation also lacks the necessary detail from which an inference
27 can be drawn that unspecified defendants had the requisite state of
28 mind.

1 On the other hand, based directly on the Restatement, the FAC
2 "details the[] extensive involvement" of defendant Nelson, Apollo's
3 former CEO, and defendant Norton, the Chairman of the Compensation
4 Committee, and defendant Blair, a member of that Committee, "in the
5 options granting process[,] " and hence their access to information
6 as to that process. See Resp. (doc. 94) at 35. Plaintiff
7 highlights a number of allegations, including the following, in
8 that regard:

- 9 * Apollo's Board or Compensation Committee [*i.e.*
10 Messrs. Blair and Norton] was primarily responsible
11 for selecting the grant dates. See FAC (doc. 71) at
12 ¶ 115(b).
- 13 * "Management Grants . . . required approval
14 by both members of the Compensation
15 Committee." Id. at ¶ 115(c).
- 16 * Apollo's internal investigation revealed
17 "Approval Memoranda signed by the Compensation
18 Committee for grants to [Nelson]." Id. at ¶ 115(d).
- 19 * "In many instances, the [Grant] Approval
20 Memorandum was signed by only the Chairman
21 of the Compensation Committee [Norton] and
22 we lack evidence as to whether all of the grants
23 issued, were, in fact, approved by a majority of
24 the members of th[at] . . . Committee."
25 Id. at ¶ 115(e).
- 26 * Nelson typically attended Compensation
27 Committee meetings where option grants
28 were discussed and approved. See id. at ¶ 117(e).
- * Beginning in August, 2001 either Nelson or the
Compensation Committee signed the memoranda
approving grants to all employees. See id. at
¶ 117(c).

25 Undertaking the "comparative" inquiry which Tellabs elucidates,
26 there is a strong inference of scienter as to defendants Norton,
27 Nelson and Blair in light of their extensive involvement with the
28 grant process as the Restatement indicates. These allegations

1 permit a strong inference of scienter to be drawn as to defendants
2 Nelson, Norton and Blair with respect to the falsity of their
3 statements regarding Apollo's stock option granting practices,
4 especially when read in conjunction with other scienter
5 allegations.

6 Despite the foregoing, defendants insist that the Restatement
7 actually "shows the absence of scienter[,]" partly because it
8 states that "[t]he Special Committee has found no direct evidence
9 that the grant date for any of the large Management Grants was
10 selected with the benefit of hindsight.'" Mot. (doc. 82) at 13
11 (quoting FAC at 62, ¶ 106). They also point to the fact that
12 following its investigation, the SEC did not recommend any
13 enforcement action. Morris Decl'n. (doc. 83), exh. 10 thereto.
14 Thus, from defendants' perspective the Restatement is nothing more
15 than a "simple statement that Apollo misapplied certain complicated
16 accounting rules." Id. at 14 (footnote omitted). Hence, it does
17 not support a strong inference of scienter as to any of the
18 defendants.

19 Neither of these arguments are persuasive. The Special
20 Committee's "no direct evidence" finding does not alter the court's
21 conclusion that at least as to defendants Nelson, Norton and Blair,
22 the Restatement squarely contributes to a finding of scienter.
23 Moreover, despite what defendants imply, the SEC's decision not to
24 take any enforcement action does not undercut a finding of
25 scienter. The SEC's determination is irrelevant to this court's
26 scienter analysis because, in the first instance, as the FAC
27 accurately states, "the SEC's decision not to take action can 'in
28 no way be construed as indicating that the party has been

1 exonerated' and any 'attempted use . . . as a purported defense in
2 any action . . . would be clearly inappropriate and improper[.]'"
3 FAC (doc. 71) at 58, n. 4 (quoting *SEC Procedures Relating to the*
4 *Commencement of Enforcement Proceedings and Termination of Staff*
5 *Investigations*. 1082 SEC LEXIS 238 at *7). Secondly, like the
6 Batwin defendants, defendants herein do not cite to any authority
7 for the proposition that the SEC's discretionary decision not to
8 institute enforcement proceedings should be taken into
9 consideration in determining whether a plaintiff's allegations as
10 to scienter pass muster under the PSLRA." Batwin, 2008 WL 2676364,
11 at *13 n.7. Therefore, the court abides by its ruling that the
12 Restatement provides at least some basis for finding that
13 defendants Nelson, Norton and Blair had the requisite scienter,
14 especially when considering the FAC as a whole.

15 **(b) SOX Certifications**

16 The FAC further specifically alleges that defendant Nelson
17 "signed false and misleading SOX certifications which falsely
18 attested to the adequacy of [Apollo's] internal controls, and the
19 accuracy of [Apollo's] reported financial statements." FAC (doc.
20 71) at ¶ 120. The FAC does not expressly allege that defendant
21 Gonzales also signed false and misleading SOX certifications.
22 However, it does allege that she was "at least deliberately
23 reckless with respect to her administration of [Apollo's] option
24 granting process and her oversight of [Apollo's] accounting." Id.
25 at ¶ 122. That is so, the FAC alleges because "contrary to the SOX
26 certifications [which Gonzales signed] which each year affirmed the
27 adequacy of [Apollo's] internal controls and the accuracy of
28 [Apollo's] financial results, Gonzales wholly failed to monitor the

1 granting of stock options, or account for the backdated stock
2 options at Apollo." Id. at ¶ 125. These purportedly false SOX
3 certifications, from plaintiff's viewpoint, "support a strong
4 inference of scienter." Resp. (doc. 94) at 36. Two recent Ninth
5 Circuit decisions substantially erode this argument, however.

6 Fairly recently, for the first time the Ninth Circuit addressed
7 "the precise interplay between the reporting requirements of [SOX]
8 and the scienter pleading requirements of the PSLRA." Glazer
9 Capitol, 549 F.3d at 747. Agreeing "with the reasoning of the
10 Eleventh and Fifth Circuits[,]" the Court held that "[b]ecause
11 Congress expressed no intent to alter the pleading requirement of
12 the PSRLA, [SOX] certification is only probative of scienter if the
13 person signing the certification is severely reckless in certifying
14 the accuracy of the financial statements." Id. (internal quotation
15 marks and citation omitted). In Glazer Capitol, the plaintiff
16 relied upon standard SOX certification language as to disclosure
17 controls and procedures - the precise language upon which the
18 plaintiff in this action also relies. However, because the
19 plaintiff in Glazer Capitol did not plead any "facts to th[e]
20 effect" that defendants were "severely reckless," the Court held
21 that "without more," the SOX certifications "[we]re not sufficient
22 . . . to raise a strong inference of scienter[.]" Id.

23 As in Glazer Capitol, plaintiff does not allege any facts
24 showing that either Nelson or Gonzales was "severely reckless in
25 certifying the accuracy of the financial statements." See id.
26 Moreover, as in Zucco, plaintiff is relying upon nothing more than
27 "boilerplate language" in Apollo's 10-K forms and statutorily
28 required SOX certifications to establish scienter. Zucco, 552

1 F.3d, at 1003. In fact, in all significant respects, the SOX
2 certification allegations herein are identical to those under
3 scrutiny in Zucco - allegations which the Ninth Circuit found
4 "add[ed] nothing substantial to the scienter calculus." Id. at
5 1004. In light of the foregoing, standing alone the purported
6 false SOX certification allegations do not support a strong
7 inference of scienter as to defendants Nelson and Gonzales, and
8 certainly not to any of the other defendants.

9 **(c) Resignations**

10 Plaintiff believes that "[t]he mass exodus of Apollo executives
11 and directors around the time that the allegations of backdating
12 were revealed also supports an inference of scienter." Resp. (doc.
13 94) at 39. Plaintiff recognizes that such allegations are "not
14 dispositive alone[]" of scienter. Id. Plaintiff reasons though
15 that the "large number of resignations and firings," which it
16 attributes to "Apollo's stock option misconduct and subsequent
17 investigation," along with the "connections" of the departing
18 individuals to "wrongdoing at Apollo," "collectively[] support a
19 strong inference of scienter." Id. at 43.

20 Consistent with their prior proposition, Defendants assert that
21 standing alone such allegations do not raise a strong inference of
22 scienter, adding that resignations are an expected byproduct of a
23 restatement. To further undercut plaintiff's scienter argument on
24 this point, defendants explain that the circumstances under which
25 certain defendants left Apollo militate against a finding of
26 scienter.

27 In Zucco, the Ninth Circuit also recently considered how
28 resignations impact the scienter equation, indicating that "in some

1 circumstances" they "may be indicative of scienter[.]" Zucco, 552
2 F.3d at 1002. However, "[w]here a resignation occurs slightly
3 before or after the defendant corporation issues a restatement, a
4 plaintiff must plead facts refuting the reasonable assumption that
5 the resignation occurred as a result of restatement's issuance
6 itself in order for a resignation to be strongly indicative of
7 scienter." Id. (citation omitted). The mere allegation that the
8 company's independent accounting firm resigned one month after
9 issuance of the restatement did not satisfy that pleading burden,
10 the Court held in Zucco. That resignation was "not surprising[,]"
11 in the Ninth Circuit's estimation, because that firm "had just been
12 partially responsible for the corporation's failure to adequately
13 control its accounting procedures." Id. That, the Ninth Circuit
14 held, "is not enough to support a strong inference of scienter."
15 Id.

16 "For other resignations occurring during the relevant period,"
17 but not necessarily in close proximity to the restatement, the
18 Court in Zucco explained that "a plaintiff must allege sufficient
19 information to differentiate between a suspicious change in
20 personnel and a benign one." Id. "Mere conclusory allegations that
21 a financial manager resigns or retires during the class period or
22 shortly before the corporation issues its restatement, without
23 more, cannot support a strong inference of scienter." Id.
24 (citations omitted). In that context, additional allegations that
25 "the resignation at issue was uncharacteristic when compared with
26 defendant's typical hiring and termination patterns or was
27 accompanied by suspicious circumstances[]" are necessary. Id.
28 Without such allegations, the Ninth Circuit held that "the

1 inference that the defendant corporation forced certain employees
2 to resign because of its knowledge of the employee's role in the
3 fraudulent representations will never be as cogent or as compelling
4 as the inference that the employees resigned or were terminated for
5 unrelated personal or business reasons." Id. (emphasis added).

6 Applying those principles to the record before it, the Zucco
7 Court held that "the bare fact" that the defendant's chief
8 financial officer ("CFO") retired "just prior to the disclosure of
9 [defendant's] improper accounting and lack of financial controls
10 during his tenure[]" did not support plaintiff's allegations of
11 scienter where the complaint did not "indicate whether [that CFO]
12 was nearing retirement age, whether he left to pursue other
13 opportunities, or even the length of his tenure." Id. Likewise,
14 allegations that two controllers resigned during the class period
15 were insufficient "absent particular facts about [defendant's]
16 hiring and firing of controllers during the class period, to create
17 a compelling inference of scienter." Id. Plaintiff's claim that
18 the controllers "left because they believed management was
19 unethical[]" were "based on vague hearsay allegations[,]" the Ninth
20 Circuit found, and hence were "not specific enough to extract a
21 strong inference of scienter from otherwise mundane turnover in the
22 corporation's financial department." Id.

23 Here, plaintiff alleges that two of the individual defendants,
24 Mr. Blair, who wore several Apollo hats, serving as an Apollo
25 director, a Compensation Committee member, and Chairman of the
26 Audit Committee, as well as Ms. Govenar, another Apollo director,
27 resigned in close proximity to the issuance of the Restatement. On
28 May 2, 2007, they advised Apollo of their resignations, Morrison

1 Decl'n (doc. 83), exh. 6 thereto at 3, and the Restatement was
2 issued on May 22, 2007. As Zucco makes clear though, a strong
3 inference of scienter requires more than close proximity between a
4 restatement and a resignation.

5 As to defendant Blair, in its opposition plaintiff points to
6 the allegation that he, along with defendant Norton "had the
7 closest working relationship with Nelson at Apollo." Resp. (doc.
8 94) at 42 (internal quotation marks and citation omitted). That
9 "working relationship" purportedly "consisted of massive systemic
10 stock option misconduct at Apollo." Id. (internal quotation marks
11 and citation omitted). These resignation allegations alone do not
12 suffice to raise a strong inference of scienter as to Blair though
13 because, as in Zucco, these facts are insufficient to "refut[e] the
14 reasonable assumption that [his] resignation occurred as a result
15 of [the] restatement's issuance itself[.]" See Zucco, 552 F.3d at
16 1002.

17 Further, because the resignations of Blair and Govenar "were
18 not accompanied by any public statement by [Apollo] that [they]
19 participated in or were involved in the fraud[.]" their
20 resignations are "minimal evidence of scienter[.]" See Rectifier,
21 2008 WL 4555794, at *16. Not only that, but after resigning,
22 defendant Blair continued to serve on the Board of Western
23 International University, a wholly-owned subsidiary of Apollo,
24 Morrison Decl'n (doc. 83), exh. 6 thereto at 3. That continued
25 service further undermines a strong inference of scienter as to
26 him. See In re Cyberonics Inc. Sec. Litig., 523 F.Supp.2d 547,
27 553-54 (S.D.Tex. 2007) (retention of CFO by company after
28 supposedly "forced resignation," among other reasons, did not

1 support strong inference of scienter), aff'd on other grounds
2 without pub'd opinion, 292 Fed.Appx. 311 (5th Cir. 2008). By the
3 same token though, as discussed herein, because the FAC contains
4 additional allegations of Blair's "wrongdoing[,] his resignation
5 lends credence to a finding of scienter here. See Rectifier, 2008
6 WL 4555794, at *16 (citations omitted) ("A resignation or
7 termination provides evidence of scienter only when it is
8 accompanied by additional evidence of the defendant's wrongdoing.")

9 The FAC also does not include additional allegations as to
10 defendant Govenar so as to support a strong inference of scienter
11 based upon her resignation. Besides the fact of her resignation,
12 plaintiff alleges only that Ms. Govenar was "removed from the
13 Special Committee due to" an unspecified "conflict[] of
14 interest[.]" Resp. (doc. 94) at 43 (citing FAC at ¶ 93). That
15 generic allegation, simply is not enough to create a strong
16 inference of scienter based upon Ms. Govenar's resignation. The
17 FAC does not include allegations which would transform Ms.
18 Govenar's resignation from a "benign" to a "suspicious" one.

19 Plaintiff also relies upon the resignations of four other
20 defendants, Messrs. Nelson, Norton and Bachus, and Ms. Gonazles, to
21 raise a strong inference of scienter. In contrast to defendants
22 Blair and Govenar, none of these resignations were in close
23 proximity to the Restatement - a fact plaintiff overlooks. "Apollo
24 announced that [defendant] Nelson[,] its Chairman, CEO and
25 President, "unexpectedly 'resigned'" in January 2006 - nearly a
26 year and a half prior to issuance of the Restatement. FAC (doc.
27 71) at ¶ 19. The court will not turn a blind eye to the fact,
28 however, that the Special Committee was formed that same month, on

1 January 28, 2006. Nonetheless, without more, that timing does not
2 raise a strong inference of scienter in terms of Nelson's
3 resignation.

4 Plaintiff believes that the following allegation is "powerful
5 evidence" of Nelson's scienter as it relates to his resignation:

6 John Sperling, . . . , stated that he personally
7 recommended that the Board terminate Nelson because
8 'he was preoccupied primarily with the stock price
and not with the function of the company.'

9 FAC (doc. 71) at ¶ 19. Nowhere in the FAC, however, are there
10 allegations as to Apollo's "typical hiring and termination
11 patterns[,] " as Zucco demands. See Zucco, 552 F.3d at 1002. Nor
12 does this allegation amount to a "suspicious circumstance[]" so as
13 to support a strong inference of scienter. See id. Rather John
14 Sperling's purported statement falls into the category of a "vague
15 hearsay" allegation which, as in Zucco is "not specific enough to
16 extract a strong inference of scienter[.]" See id. Clearly then,
17 Nelson's resignation standing alone is insufficient to create a
18 strong inference of scienter. Taking the mandatory holistic
19 approach, however, as will soon become evident, the totality of the
20 allegations as to defendant Nelson shows that plaintiff has
21 sufficiently plead scienter as to him.

22 The FAC alleges that defendant Gonzales, Apollo's CFO,
23 Secretary and Treasurer, was "forced to resign in November 2006
24 because of her involvement in the stock option backdating at
25 Apollo." FAC (doc. 71) at ¶ 20. The FAC further alleges that as
26 part of its "[c]ontinuing . . . attempts to conceal . . .
27 backdating[,] " defendant Mueller "stated . . . that Gonzales
28 resigned to spend more time with her family." Id. at ¶ 99

1 (internal quotation marks omitted). Again, because her resignation
2 was not in close proximity to the Restatement, and because there
3 are no allegations as to Apollo's typical hiring and termination
4 patterns or allegations of "suspicious circumstances[,]" in
5 accordance with Zucco, the lone inference that Apollo "forced"
6 Gonzales "to resign because of its knowledge of [her] role in the
7 fraudulent representations will never be as cogent or as compelling
8 as the inference that [she] resigned . . . for unrelated personal
9 or business reasons." See Zucco, 552 F.3d at 1002 (emphasis
10 added).

11 Plaintiff attempts to show that Gonzales' resignation is
12 highly probative of her state of mind based on allegations that the
13 Special Committee "determined that [she] was unaware of APB 25, and
14 therefore, administered an option plan that did not meet [certain
15 IRS standards[,]" and she thus "[h]elped to cause" the financials
16 to be restated, and necessitated IRS refunds because the options
17 were not in compliance with APB 25. See FAC (doc. 71) at ¶ 125
18 (internal quotation marks and citation omitted). Plaintiff's
19 reliance upon those determinations is misplaced because it is just
20 as plausible to infer from Ms. Gonzales' supposed "unaware[ness] of
21 APB 25" that she was "either negligent or grossly negligent -
22 neither of which are sufficient under the PSLRA and Ninth Circuit
23 precedent." See Middlesex, 527 F.Supp.2d at 1187. Consequently,
24 like defendant Nelson, Gonzales' resignation without more does not
25 establish the requisite strong inference of scienter. Also as with
26 defendant Nelson, however, as will be more fully explained below,
27 collectively viewing the allegations against Ms. Gonzales creates a
28 strong inference of scienter so as to defeat dismissal.

1 Plaintiff barely mentions Bachus in its discussion of
2 resignations, noting simply that he left at the same time as
3 Gonzales - in November 2006. See Resp. (doc. 94) at 41 (citing FAC
4 at ¶¶ 20-21). Such a conclusory allegation falls woefully short of
5 the allegations necessary to support a strong inference of scienter
6 based upon a resignation, especially given that Bachus' resignation
7 preceded the Restatement by almost a year and a half. An
8 independent perusal of the FAC reveals additional allegations as to
9 Bachus' resignation, however. Allegedly "he was forced to resign
10 because of his involvement in the stock option backdating at
11 Apollo." FAC (doc. 71) at ¶ 21. Furthermore, Bachus purportedly
12 resigned before John "Sperling had a chance to ask for [his]
13 resignation." Id. at ¶ 102. At the risk of repetition, the FAC
14 does not include any allegations as to Apollo's typical hiring and
15 termination practices. Although Bachus did resign during the
16 Special Committee's investigation, that does not rise to the level
17 of a "suspicious" circumstance. Absent such allegations, "the
18 inference that [Apollo] forced certain employees[,]" such as
19 Bachus, its former CAO and Controller, "to resign because of [its]
20 knowledge of [his] role in the fraudulent representations will
21 never be as cogent or compelling as the inference that [he]
22 resigned . . . for unrelated personal or business reasons." See
23 Zucco, 552 F.3d at 1002. Thus, Bachus' resignation on its own is
24 insufficient to establish a strong inference of scienter as to him.

25 The FAC is similarly flawed with respect to the allegations
26 surrounding defendant Norton's resignation. The only allegation in
27 the prolix FAC directly pertaining to his resignation alleges that
28 he along with other defendants "'retired' during or shortly after

1 the Special Committee's investigation regarding options backdating
2 and the issuance of [Apollo's] Restatement." FAC (doc. 71) at
3 ¶ 137. The press release announcing his resignation as
4 Compensation Committee Chair, effective December 8, 2006 (well
5 before the Restatement), indicates that Mr. Norton's "intention
6 [was] not to stand for reelection at [Apollo's] Annual Meeting[,]"
7 which "generally occurs in January, 2007." Morrison Decl'n (doc.
8 83), exh. 4 thereto. But, "[i]n light of the fact that the meeting
9 has not been scheduled, Mr. Norton preferred not to continue his
10 term into 2007." Id. Based upon the foregoing, undoubtedly, the
11 FAC does not include sufficient additional information so as to
12 render defendant Norton's resignation suspicious as opposed to
13 benign. Accordingly, without more, his resignation does not
14 support a finding of scienter. As with several of the other
15 defendants, however, as will be seen, viewing the totality of the
16 scienter allegations as to Mr. Norton shows that the FAC does
17 adequately allege scienter as to him.

18 **(d) Financial Gain**

19 Next, plaintiff claims that the individual defendants'
20 "personal enrichment through lucrative stock option grants and
21 insider trading" is another possible means of establishing
22 scienter. FAC (doc. 71) at 79(C); see also id. at ¶ 113(c)
23 ("Additional facts provide actual and strong circumstantial
24 evidence of defendants' scienter including . . . [their] desire to
25 personally obtain greater compensation without public
26 scrutiny[.]"). Essentially defendants assert that the FAC does not
27 include any of the details which are necessary to support an
28 inference of scienter predicated upon financial gain.

1 In this Circuit "unusual or suspicious stock sales by corporate
2 insiders *may* constitute circumstantial evidence of scienter[.]"
3 Zucco, 552 F.3d at 1005 (internal quotation marks and citations
4 omitted) (emphasis added). "[I]nsider trading is suspicious[.]"
5 however, "only when it is dramatically out of line with prior
6 trading practices at times calculated to maximize the personal
7 benefit from undisclosed inside information." Id. (internal
8 quotation marks and citations omitted). There are three factors
9 that a court "must . . . consider[] to determine whether stock
10 sales raise a strong inference of deliberate recklessness[.]" Id.
11 Those factors are: "(1) the amount and percentage of shares sold by
12 insiders; (2) the timing of the sales; and (3) whether the sales
13 were consistent with the insider's prior trading history." Id.
14 (internal quotation marks and citation omitted). An examination of
15 the FAC in light of these factors shows that due to the inadequacy
16 of plaintiff's allegations of insider trading, even in combination,
17 these three sub-factors are insufficient, standing alone, to
18 establish an inference of scienter.

19 **(i) Amount and Percentage**

20 "Typically, courts consider the percentage of shares sold to
21 determine whether insiders are taking advantage of insider
22 knowledge regarding a scheme that will artificially inflate the
23 company's price." Middlesex, 527 F.Supp.2d at 1185 (citation
24 omitted). In the context of an alleged scheme to improperly
25 backdate stock options, however, the court in Middlesex found that
26 plaintiff's failure to plead what percentage of each defendant's
27 stock was sold to be "without consequence." Id. at 1186. In
28 contrast to the "prototypical" insider trading scenario, the

1 alleged backdating scheme in Middlesex "took place over several
2 years[.]" Id. at 1185. Thus the court explained that "there was no
3 reason for Defendants to quickly sell large percentages of their
4 shares." Id. The court further contrasted "insiders . . . who
5 know that the then-inside information will eventually be disclosed
6 to the public, resulting in a drop in the stock price, . . . thus,
7 requiring them to sell large portions of stock to maximize their
8 profit," with backdating where it is "not inevitable that the
9 improperly-dated stock options w[ill] be revealed." Id. Given
10 that distinction, the Middlesex court found that "the requirement
11 that percentages be pled is only relevant when the insider is aware
12 of the time that the inside information will be disclosed and there
13 will be a resulting effect on the stock price." Id. Accordingly,
14 "[b]ecause Plaintiff . . . pled the amount of stock sales with the
15 appropriate degree of specificity, and the amount [wa]s substantial
16 enough to justify an inference of motive," the Middlesex court held
17 that this sub-factor "lean[ed] in favor of finding ths stock sales
18 'suspicious.'" Id. at 1186.

19 Here, the FAC, and especially exhibit G thereto, provide the
20 dates, number of shares, price and proceeds for each of defendants'
21 stock sales, but no allegations as to what percentage of each
22 defendant's shares were sold. Nonetheless, in the context of the
23 backdating scheme alleged herein, this court finds convincing the
24 Middlesex rationale set forth above. Hence, it agrees that
25 plaintiff's failure to plead percentages of stock sold is
26 inconsequential at this time. That is so because the FAC includes
27 the necessary specificity as to defendants' stock sales, and the
28 amount of those sales is substantial, viewed strictly in terms of

1 amounts, in that allegedly proceeds ranged from \$1,715,237 to
2 \$472,463,500. See FAC (doc. 71), exh. G thereto.

3 Unlike the court in Middlesex, however, this court is unwilling
4 to take the next step and find that the foregoing "is substantial
5 enough to justify an inference of motive[,] and in turn a finding
6 that defendants' stock sales were "suspicious." See Middlesex, 527
7 F.Supp.2d at 1186. The court is unwilling to find that the stock
8 sales at issue herein are suspicious based only on the proceeds
9 because plaintiff has "selected an unusually long class period of
10 over [250] weeks." See Brodsky v. Yahoo! Inc., 2008 WL 4531815, at
11 *11 (N.D.Cal. Oct. 7, 2008) (citing Vantive, 283 F.3d at 1092
12 ("plaintiffs have selected an unusually long class period of [63]
13 weeks")). "Just as in Vantive, 'lengthening the class period has
14 allowed plaintiff[] to sweep as many stock sales into their totals
15 as possible, thereby making the stock sales appear more suspicious
16 than they would be with a shorter class period.'" Id. (quoting
17 Vantive, 283 F.3d at 1092). "Thus, 'by themselves, large numbers do
18 not necessarily create a strong inference of fraud.'" Id. (quoting
19 Vantive, 283 F.3d at 1093). In sum, although the lack of percentage
20 allegations is not critical, the court cannot ignore the "unusually
21 long class period" here in terms of the amounts sold and the
22 proceeds. Thus, the court finds that the first sub-factor regarding
23 insider trading does not weigh in favor of a finding that
24 defendants' stock sales were suspicious.

25 **(ii) Timing**

26 The FAC includes details as to when certain defendants received
27 allegedly backdated Apollo stock options. See FAC (doc. 71) at
28 ¶¶ 49-52. However, as the individual defendants stress, the FAC

1 does not allege, nor have plaintiffs "attempt[ed] to demonstrate
2 that the **timing** of any Defendant's sales was suspicious." Supp. Br.
3 (doc. 100) at 5 (emphasis in original). This omission is readily
4 explainable from defendants' standpoint because the alleged stock
5 sales, even the most recent one of December 30, 2005, occurred
6 "before backdating was even an issue in corporate America[,] and
7 "before Apollo disclosed that it may have to restate its financial
8 results." Mot. (doc. 82) at 21. Given the lack of temporal
9 proximity both in terms of the timing of the stock sales themselves
10 and in relation to the alleged misconduct, the individual defendants
11 maintain that these sales were "not suspicious at all." Id. at 20.

12 "Traditionally," the timing factor "is not only concerned with
13 the date on which the insider's shares were sold, but rather when
14 the shares were sold in relation to the revelation of the inside-
15 information." Middlesex, 527 F.Supp.2d at 1186 (citation omitted).
16 In a backdating situation though, where there is "no preordained
17 date on which the allegations of [such] w[ill] be revealed with [a]
18 resulting drop in stock price[,] the court again concurs with the
19 Middlesex court - "[t]he facts . . . do not lend themselves to
20 analysis under this factor[.]" See id. In the first place, unlike
21 the prototypical insider scenario, "here defendants were not aware
22 of the date on which [Apollo's] backdating practice would be
23 revealed." See id. Plainly then, their "stock sales will not
24 [necessarily] reflect large sales prior to disclosure." See id.
25 Second, a backdating scheme, in contrast to the prototypical insider
26 scenario, "does not depend on timing; regardless of when the stock
27 is sold, the fact that the stock was granted at such a relatively
28 low price virtually guarantees Defendants will reap significant

1 profits." Id.

2 Further, reasoned the Middlesex court, the nature of backdating
3 places defendants in a classic "catch-22[]" in that selling shortly
4 after reports of backdating "cause[s] a strong appearance of
5 impropriety[,]" whereas waiting to sell until after disclosure
6 forces defendant to sell after the decline in stock prices. Id.
7 For these reasons, in Middlesex the court found that plaintiff's
8 failure to plead facts as to the timing of defendants' stock sales
9 was "of little significance[.]" Id. Consistent with that view, the
10 court further held that that timing sub-factor "neither weigh[ed]
11 for nor against a finding of suspicious stock sales." Id.

12 The Middlesex rationale applies with equal force to the alleged
13 backdating scheme at Apollo. Accordingly, this court, too, finds
14 that although the FAC does not include allegations as to the timing
15 of defendants' stock sales, that sub-factor does not figure in the
16 court's final determination as to whether plaintiff's insider
17 trading allegations are sufficient to support a finding of scienter.

18 **(iii) Prior Trading History**

19 In Zucco, the Ninth Circuit repeated that "[f]or individual
20 defendants' stock sales to raise an inference of scienter, plaintiff
21 must provide a meaningful trading history for purposes of comparison
22 to the stock sales within the class period." Zucco, 552 F.3d at
23 1005 (internal quotation marks and citation omitted). The Court in
24 Zucco did not equivocate as to the necessity of such a comparison,
25 stating that "[e]ven if the defendants' trading history is simply
26 not available, for reasons beyond a plaintiff's control, the
27 plaintiff is not excused from pleading the relevant history." Id.
28 (citations omitted). Thus, in Zucco the Ninth Circuit held that

1 although the stock sales of two defendant officers were
2 "significant," because the complaint did not include any allegations
3 that their stock sales were "inconsistent" with their "usual trading
4 patterns, no inference of scienter c[ould] be gleaned from
5 [plaintiff's] stock sale assertions." Id. At 1006.

6 The same is true here. Missing from the FAC are any allegations
7 as to the trading history of the ten individual defendants whom
8 allegedly engaged in insider trading.¹¹ Plaintiff seeks to
9 circumvent this requirement by noting, as the FAC alleges, that
10 "[s]ince this fraudulent scheme had commenced by at least 1998, no
11 meaningful comparison of prior trading patterns can be performed.'" Id.
12 Resp. (doc. 94) at 46 (quoting FAC at ¶ 134). Therefore,
13 allegations of defendants' trading history are not necessary.

14 To support that argument, plaintiff relies upon Middlesex, where
15 the court found "persuasive" plaintiff's argument "that because
16 Defendants were backdating options during the *entire* pre-Class
17 Period, the fact that Plaintiff ha[d] not demonstrated that the
18 sales were consistent with Defendants' prior trading history [wa]s
19 effectively meaningless as there [wa]s no trading period without the
20 influence of backdated options with which to compare the sales."
21 Middlesex, 527 F.Supp.2d at 1187 (emphasis in original). What
22 plaintiff overlooks, however, is that in the end, given the lack of
23 trading history, the Middlesex court found that factor "neither
24 weighs for nor against a finding of suspicious stock sales." See
25 id. Moreover, this court is not at liberty to disregard the Ninth
26 Circuit's clear-cut directive in Zucco quoted earlier: "Even if the

27
28 ¹¹ There are no allegations that the eleventh individual defendant, Brian
Mueller, engaged in insider trading.

1 defendants' trading history is simply not available, for reasons
2 beyond a plaintiff's control, the plaintiff is *not* excused from
3 pleading the relevant history." Zucco, 552 F.3d at 1005 (citation
4 omitted) (emphasis added). Thus, as with the amount of shares sold,
5 the lack of allegations as to defendants' trading history weighs
6 against finding that their stock sales were suspicious. In sum,
7 because two of the three stock sales sub-factors weigh against a
8 finding that those sales were suspicious, and the third, timing,
9 does not come into play here, the court finds that even in
10 combination, these three factors are insufficient, standing alone,
11 to create a strong inference of scienter based upon alleged insider
12 trading.

13 **(e) Motive**

14 Closely related to plaintiff's insider trader allegations are
15 its allegations that defendants had financial motives to backdate
16 stock options, which plaintiff also believes is indicative of
17 scienter. Succinctly put, the FAC alleges that "[d]efendants were
18 motivated to commit the fraudulent scheme [of backdating] to reap
19 significant personal profits." FAC (doc. 71) at ¶¶ 133 and
20 ¶ 113(c). That motivation allegedly derived from "the fact that the
21 vast majority of [defendants'] overall compensation was through
22 stock option grants." Id. at ¶ 134. Additionally, supposedly
23 defendants were motivated "to falsify [Apollo's] financial statement
24 by failing to record the additional compensation expenses in order
25 to meet their projected earnings goals and receive lucrative
26 bonus[es][.]" Id.

27 Interestingly, plaintiff did not directly respond to defendants'
28 valid argument that "motive and opportunity" alone, and likewise

1 "the desire to maintain profitability"¹² alone, do not show
2 scienter. See, e.g., Cornerstone, 355 F.Supp.2d at 1091 (and cases
3 cited therein) ("The Ninth Circuit has clearly held that incentives
4 to enhance business prospects and executive compensation incentives
5 are insufficient allegations of scienter.") In accordance with this
6 well-settled precedent, the court easily finds that the scant motive
7 allegations are insufficient alone to carry plaintiff's burden of
8 alleging scienter.

9 As should be evident by now, when viewed individually,
10 plaintiff's scienter allegations are lacking. Therefore, in
11 accordance with Zucco, the court "will conduct a 'holistic' review
12 of the[se] same allegations to determine whether the[y] combine to
13 create a strong inference of intentional conduct or deliberate
14 recklessness." See Zucco, 552 F.3d at 992.

15 **d. Holistic View of Scienter Allegations**

16 Defendants took the first step in the Zucco dual inquiry by
17 viewing each scienter allegation in isolation, and then concluding
18 those allegations do not sufficiently allege scienter. Defendants
19 did not take the second and, as it turns out, critical step under
20 Zucco - a holistic consideration of those individual allegations.
21 When the court does that, although it finds that even when read
22 together the allegations in the FAC do not create a strong inference
23 of scienter as to some of the defendants, the FAC does sufficiently
24 allege scienter as to others.

25 Even collectively, the allegations do not create a strong
26 inference of scienter as to defendants Bachus and or Govenar. The
27

28 ¹² Mot. (doc. 82) at 22.

1 allegations as to defendant Bachus are relatively minimal. He was
2 Apollo's Chief Accounting Officer and Controller from August 2000
3 until his resignation in November 2006, which allegedly was "forced"
4 due to his "involvement in . . . backdating[.]" FAC (doc. 71) at
5 ¶¶ 11; 21; and 102. The FAC further alleges a one-time receipt of
6 stock option grants as to Mr. Bachus. Id. at ¶ 52. In contrast to
7 some of the other defendants whom the court will discuss below, the
8 FAC does not include any particularized facts outlining Bachus'
9 alleged involvement in backdating stock options. There is just the
10 bald and factually unsubstantiated allegation that he was involved
11 in backdating. Bachus' resignation, even when coupled with his
12 stock sales and receipt of stock option grants does not create a
13 "malicious inference" which 'is at least as compelling as any
14 opposing innocent inference." See Zucco, 552 F.3d at 991 (citations
15 omitted). Thus, the court finds that plaintiff has not sufficiently
16 alleged scienter as to Mr. Bachus. Accordingly, it grants his
17 motion to dismiss the § 10(b) & Rule 10b-5 claims as against him.

18 The FAC is similarly bereft of allegations that Ms. Govenar
19 acted with the requisite intent. The FAC merely alleges that she
20 served on the Special Committee; later resigned; and sold Apollo
21 stock. FAC (doc. 71) at ¶¶ 11; 24; and 93. The FAC does not allege
22 that Ms. Govenar herself ever received stock options; and perhaps
23 more importantly, it does not allege that she had any role at all in
24 the stock option granting or accounting process. Without such
25 allegations it is readily apparent that plaintiff has not "plead
26 with particularity facts that give rise to a . . . powerful or
27 cogent . . . inference" of scienter. See Tellabs, 551 U.S. at ____,
28 127 S.Ct. at 2510 (citations omitted). Hence, the court grants

1 defendant Govenar's motion to dismiss the § 10(b) and Rule 10b-5
2 claims against her.

3 On the other hand, holistically viewing the allegations of
4 scienter as to defendants Nelson, Blair, Norton, and Gonzales
5 persuades the court that plaintiff has sufficiently alleged scienter
6 as to each of them. The primary although not only difference
7 between these four defendants and Mr. Bachus and Ms. Govenar is that
8 the FAC contains allegations as to their responsibility for, and
9 rather extensive involvement with, the stock option granting and
10 accounting processes. As set forth below, "[each of these
11 defendants is alleged to have participated in several different
12 activities[,]" pertaining to option granting and the accounting
13 thereof, which taken together "evidenc[e] scienter." See In re
14 Asyst Technologies, Inc. Deriv. Litig., 2009 WL 4891220, at *11
15 (N.D.Cal. 2008) (citing cases).

16 To be sure, "[i]n the options backdating context, allegations
17 that a defendant holds a high executive position," such as Nelson,
18 former Apollo CEO, and Gonzales, Apollo's former CFO, Secretary and
19 Treasurer, "without more do not support a strong inference of
20 scienter." See id. (internal quotation marks and citations
21 omitted). But, "allegations that the defendant signed false
22 financial documents, approved options grants, oversaw the options
23 granting process, or was intimately involved in deciding when and to
24 whom options would be granted may support a strong inference of
25 scienter." Id. (internal quotation marks and citations omitted);
26 see also Juniper, 542 F.Supp.2d at 1047-48 (allegations that CEO and
27 CFO received sizeable backdated stock options; issued and signed
28 false securities filings; knew of or recklessly disregarded

1 backdating; signed false financial documents knowing they were false
2 or recklessly not knowing they were false; and who were in positions
3 to oversee stock options such that they were in a position to know
4 or were reckless in not knowing that options were inconsistent with
5 financial statements supported strong inference of scienter).

6 The FAC alleges that defendant Nelson engaged in not just one of
7 the activities listed above, but in all of them and more. In
8 particular, allegedly he: (1) received backdated stock options;
9 (2) signed "false and misleading" Forms 10-K and 10-Q; signed false
10 SOX certifications "attest[ing] to the adequacy of [Apollo's]
11 internal controls, and the accuracy of [Apollo's] reported financial
12 statements[;]" falsely certified 10-K forms; and was an integral
13 part of the option granting process, including "generally
14 select[ing] the grant date[,]" hence acquiring knowledge of the
15 option granting process. See, e.g., FAC (doc. 71) at ¶¶ 19, 58, 64,
16 117(a)-(e), 119, 120, and 199, and exh. G thereto. The FAC further
17 alleges that Nelson profited from insider trading by selling shares
18 of Apollo stocks resulting in proceeds of \$82,789,312. Id. Exh. 6
19 thereto. It further alleges that Nelson resigned as Apollo's CEO in
20 January 2006, less than a month after the Apollo's 8-K indicated
21 that the "Special Committee . . . reported that certain former
22 officers took steps that may have been intended to mask failures in
23 the grant approval process with respect to [Apollo's] financial
24 reporting and payment of taxes." Id. at ¶¶ 19 and 104; and exh. G
25 thereto. Additionally, the FAC alleges that backdating violated
26 Apollo's own stock option plans. Id. at ¶ 6. Lastly, the FAC
27 alleges that ultimately Apollo was forced to issue a Restatement,
28 the overall impact which was that a downward adjustment of its

1 "retained earnings as of September 1, 2003" by approximately \$62.5
2 million dollars. Morrison Decl'n (doc. 83), exh. 1 thereto at 15.

3 Viewing plaintiff's allegations together, although the inference
4 of scienter as to defendant Nelson may not be of the "smoking gun
5 genre," it does not need to be. See Tellabs, 551 U.S. at ____, 127
6 S.Ct. at 2510 (internal quotation marks and citation omitted). The
7 inference is certainly enough, however, to defeat these motions to
8 dismiss in that "the malicious inference is at least as compelling
9 as any opposing innocent inference[,]" such as an innocent
10 bookkeeping error. See Zucco, 552 F.3d at 991 (citations omitted).
11 Put differently, the totality of these allegations supports a
12 finding that plaintiff has adequately pled that defendant Nelson
13 "either knew of the backdating, or w[as] deliberately reckless in
14 not knowing of the backdating." See Middlesex, 527 F.Supp.2d at
15 1182. Thus, the court denies defendant Nelson's motion to dismiss
16 to the extent it is based upon failure to adequately plead scienter.

17 For similar although not identical reasons, the court denies
18 defendant Gonzales' motion to dismiss on scienter grounds. Gonzales
19 attempts to minimize her alleged responsibility for backdating by
20 selectively noting only the allegations of her "accounting
21 position[]" and her resignation in November 2006. Mot. (doc. 82) at
22 11 (citations omitted). The FAC alleges much more than that though.
23 It alleges that like defendant Nelson, Gonzales, Apollo's former
24 CFO, received stock options; profited from the sale of Apollo stock
25 in the amount of \$5,257,858; knowingly signed false SOX
26 certifications, attesting to the adequacy of Apollo's internal
27 controls and the accuracy of its financial results; and also signed
28 "false and misleading" Form 10-Ks. FAC (doc. 71) at ¶¶ 11, 20, 49-

1 52, 58, 64, 99, 124. Furthermore, the FAC alleges that Ms. Gonzales
2 "was at least deliberately reckless with respect to the options
3 granting process at Apollo because, contrary to the SOX
4 certifications . . . , [she] wholly failed to monitor the granting
5 of stock options, or account for the backdated stock options at
6 Apollo." Id. at ¶¶ 125. These allegations, along with Ms.
7 Gonzales' supposed unawareness of APB 25, taken together meet the
8 threshold pleading requirements for scienter. This is all the more
9 so in light of recent Ninth Circuit pronouncements, set forth
10 earlier, that "[v]ague or ambiguous allegations are now properly
11 considered as part of a holistic review when considering whether the
12 complaint raises a strong inference of scienter." Zucco 552 F.3d at
13 1006, South Ferry, 542 F.3d at 784.

14 Defendants Norton and Blair are not current or former Apollo
15 officers. Norton did, however, serve as Chair of the Compensation
16 Committee and he was a member of the Audit Committee. Defendant
17 Blair served as Chair of the Audit Committee and also was a member
18 of the Compensation Committee. Given their membership on the
19 Compensation Committee, both of these defendants allegedly were an
20 integral part of Apollo's grant process, as the Special Committee's
21 investigation demonstrates. "[M]ost grant dates were selected at
22 Board or Compensation Committee meetings[] . . . prior to August
23 2001[.]" FAC (doc. 71) at ¶ 115(b) (internal quotation marks
24 omitted). "Under the LTIP and the [2000 Plan], only the
25 Compensation Committee could approve grants to the Former CEO[,]"
26 defendant Nelson. Id. at ¶ 115(f) (internal quotation marks
27 omitted). "In many instances, the Approval Memorandum" for the
28 option grants "was signed by only the Chairman of the Compensation

1 Committee [Norton][;] and there was a "lack [of] evidence as to
2 whether all of the grants were, in fact, approved by a majority of
3 the members of [that] Committee." Id. at ¶ 115(e) (internal
4 quotation marks omitted). There were also Approval Memorandum
5 signed by the Compensation Committee as a whole. See id. at
6 ¶ 117(c). The Compensation Committee minutes reflect that
7 "typically . . . option grants were discussed and approved[]" at
8 meetings of that Committee. Id. at ¶ 117(e).

9 In light of the foregoing, it is apparent that defendant
10 Norton's and Blair's respective positions on the Compensation
11 Committee gave them detailed knowledge as to the option grant dates.
12 The other allegations against them such as Blair's profits of
13 slightly more than \$3.5 million from insider trading, and Norton's
14 profits of nearly \$8.0 million, along with the allegations discussed
15 in preceding sections, such as their resignations, individually
16 might not suffice to plead scienter. Mindful of the Court's
17 acknowledgment in South Ferry, that "federal courts certainly need
18 not close their eyes to circumstances that are probative of scienter
19 viewed with a practical and common-sense perspective[,] " the court
20 finds that the allegations against defendants Norton and Blair give
21 rise to the inference that at the very least they were deliberately
22 reckless in not knowing of the backdating.

23 Based upon In re Nash Finch Co. Sec. Litig., 323 F.Supp.2d 956
24 (D.Minn. 2004), defendants strongly urge this court to find that
25 "[j]ust as two plus two will never equal five, the[] allegations [in
26 the FAC] - whether considered apart or together - do not add up to a
27 strong inference of scienter." See id. at 964 (footnote omitted).
28 While that is true with respect to defendants Bachus and Govenar, it

1 is not true to defendants Nelson, Gonzales, Norton and Blair. The
2 allegations against those four defendants, in sharp contrast to
3 Nash, are neither "trivial [n]or irrelevant[.]" See id.
4 Collectively the FAC's allegations as to defendants Nelson,
5 Gonzales, Norton and Blair go far beyond the "collective minutia
6 offered" in Nash. In short, the allegations as to these four
7 defendants "create an inference greater than the sum of [their]
8 parts," that they acted with knowledge or at least were deliberately
9 indifferent as to th falsity of their statements regarding
10 accounting for stock-based compensation expenses and the existence
11 of internal controls in that regard. See Zucco, 552 F.3d at 1006.
12 That inference is "still . . . at least as compelling as an
13 alternative innocent explanation[,]" of innocent bookkeeping error
14 or a simple failure to cross every "t" and dot every "i". See
15 id. Consequently, the court denies the motion to dismiss for
16 failure to adequately plead scienter by these four defendants.
17 Likewise, it denies Apollo's motion to dismiss on that same basis
18 because "[t]he scienter of the[se] individual defendants, as
19 directors and officers of [Apollo] is imputed to [Apollo]." See
20 Batwin, 2008 WL 2676364, at *15 n. 8 (citation omitted).

21 **e. Remaining Individual Defendants**

22 As did the parties, to this point the court has deliberately not
23 addressed the remaining defendants - John and Peter Sperling, Brian
24 Mueller, Dino DeConcini, and Laura Noone. As Apollo reads the FAC,
25 plaintiff is asking the court to infer scienter based "merely" on
26 the individual defendant's "corporate titles and responsibilities."
27 Mot. (doc. 81) at 26. This amounts to impermissible "group
28 pleading," according to Apollo. Id. "[T]he group pleading

1 doctrine establishes a presumption, for purposes of drafting a
2 complaint, that statements in group-published information such as
3 prospectuses, registration statements, annual reports, or press
4 releases are the collective work of those individuals with direct
5 involvement in the day-to-day affairs of the company." New Century,
6 supra, 2008 WL 5147991, at *13 (internal quotation marks and
7 citations omitted). It is possible to interpret the FAC as relying
8 upon the group pleading doctrine, but plaintiff does not mention
9 that doctrine anywhere in its response or supplemental memorandum.
10 Presumably, then, plaintiff is not invoking that doctrine. To the
11 extent that plaintiff may be relying upon group pleading, however,
12 the court adopts the thorough and well-reasoned analysis in New
13 Century, id. at *13-*14, and "[j]oin[s] the majority of other courts
14 in this Circuit, . . . hold[ing] that group pleading is no longer
15 viable under the PSLRA." Id. at *14.¹³

16 Much like Apollo, the five defendants identified above, contend
17 that plaintiff has not sufficiently pled scienter as to each of them
18 because it "does no more than identify their positions at [Apollo]
19 and allege that, based on their . . . positions, they had access to
20 information concerning [Apollo's] stock option plans." Mot. (Doc.
21 82) at 23 (citing FAC at ¶ 112). Such "tactics" are "never," these
22 defendants broadly assert, "sufficient to plead knowledge of fraud."
23 Id. (footnote omitted). Defendant Mueller seeks dismissal on that

24

25
26 ¹³ Of course, "the group pleading doctrine is not fatal to allegedly
27 misleading statements in SEC filings signed by the Officer Defendants[.]" New
28 Century, 2008 WL 5147991, at *14 (citing Howard v. Everex Systems, Inc., 228 F.3d
1057, 1061-62 (9th Cir. 2000)). Those defendants cannot, however, "be liable for the
press releases, except to the extent that there are specific statements attributed
to them, or the press releases are otherwise connected to them[.]" Id. (citation
omitted).

1 same ground. In addition, he asserts that plaintiff has not
2 sufficiently pled scienter based solely upon two allegedly false
3 statements which he made, and which will be discussed more fully
4 below.

5 Retorting that it has "plead far more than fraud by job
6 title[,] " plaintiff emphasizes "the essential roles that Nelson,
7 Blair and Norton played in the granting and approval of backdated
8 stock options at [Apollo]." Supp. Br. (doc. 101) at 4 (citation
9 omitted). Significantly though, plaintiff does not mention any of
10 the defendants discussed above. By its silence, the court assumes
11 that plaintiff concedes that it has not adequately pled scienter as
12 to those defendants. The court thus grants the motion to dismiss as
13 to John and Peter Sperling, Brian Mueller, Dino DeConcini and Laura
14 Noone.

15 Even without plaintiff's implicit concession that it has not
16 adequately pled scienter as to the just named defendants,
17 nonetheless, they are entitled to dismissal of the 10(b) claims.
18 Dismissal is mandated because, as discussed below, the FAC is
19 glaringly deficient in terms of scienter allegations as to any of
20 these defendants.

21 Ordinarily, "corporate management's general awareness of the
22 day-to-day workings of the company's business does not establish
23 scienter-at least absent some additional allegations of specific
24 information conveyed to management and related to the fraud or other
25 allegations supporting scienter." South Ferry, 542 F.3d at 784-85
26 (internal quotation marks and citation omitted). In South Ferry,
27 the Ninth Circuit did "recognize two exceptions to th[at] general
28 rule[.]" Zucco, 552 F.3d at 1000 (citing South Ferry, 542 F.3d at

1 785). "The first permits general allegations about 'management's
2 role in a corporate structure and the importance of the corporate
3 information about which management made false or misleading
4 statements' to create a strong inference of scienter when these
5 allegations are buttressed with 'detailed and specific allegations
6 about management's exposure to factual information within the
7 company.'" Id. (quoting South Ferry, 542 F.3d at 785). "To satisfy
8 this standard," the Ninth Circuit has explained, "plaintiffs might
9 include in their complaint specific admissions from top executives
10 that they are involved in every detail of the company and that they
11 monitored portions of the company's database, . . . a specific
12 admission from a top executive that [w]e know exactly how much we
13 have sold in the last hour around the world, . . . , or other
14 particular details about the defendants' access to information
15 within the company." Id. (internal quotation marks and citations
16 omitted).

17 The Zucco complaint did not allege the necessary particularized
18 details, although it did "include allegations that senior management
19 . . . closely reviewed the accounting numbers generated [by the
20 defendant company] each quarter . . . , and that top executives had
21 several meetings in which they discussed quarterly inventory
22 numbers[.]" Id. Those allegations, according to the Ninth Circuit,
23 did "not support the inference that management was in a position to
24 know that such data was being manipulated[]" because "[n]othing in
25 the complaint suggest[ed] that [one of the company's officers] had
26 access to the underlying information from which the accounting
27 numbers were derived." Id.

28 "The second exception . . . permits an inference of scienter

1 where the information misrepresented is readily apparent to the
2 defendant corporation's senior management." Id. at 1001. Thus,
3 "[w]here the defendants 'must have known' about the falsity of the
4 information they were providing to the public because the falsity of
5 the information was obvious from the operations of the company, the
6 defendants' awareness of the information's falsity can be assumed."
7 Id. (quoting Berson, 527 F.3d at 987-89). By the same token, in
8 quite strong language, the Ninth Circuit has held that "reporting
9 false information will only be indicative of scienter where the
10 falsity is patently obvious - where the facts [are] prominent enough
11 that it would be absurd to suggest that top management was unaware
12 of them." Id. (internal quotation marks and citations omitted).

13 Berson is an example of a case with such "prominent" facts.
14 Berson fell "into the exceedingly rare category of cases in which
15 the core operations inference, without more, [wa]s sufficient under
16 the PSLRA." South Ferry, 542 F.3d at 785 n.3. The "unusual
17 circumstances" which led the Berson Court to find "that the
18 defendant company's misrepresentation of the status of stop-work
19 orders was enough to infer scienter" were the issuance of "four
20 stop-work orders [which] . . . respectively halted between \$10 and
21 \$15 million of work on the company's largest contract with one of
22 its most important customers, halted \$8 million of work, caused the
23 company to reassign 50-75 employees, and required [Defendant] to
24 complete massive volumes of paperwork." Zucco, 552 F.3d at 1001
25 (internal quotation marks and citation omitted).

26 Here, the allegations in the FAC are, in many respects, even
27 weaker than those in Zucco, and nothing on the magnitude of those in
28 Berson. The court thus has little difficulty finding that plaintiff

1 cannot rely upon the core-operations inference to create a strong
2 inference of scienter with respect to John and Peter Sperling, Laura
3 Noone, and Brian Mueller.

4 Before separately considering the allegations as to these
5 defendants, it should be noted that the FAC includes two paragraphs
6 of what can best be described as "catch-all" scienter allegations
7 against all defendants. See FAC (doc. 71) at ¶¶ 112-113.
8 Particularly noteworthy at this point is the allegation that
9 "defendants acted with scienter in that they . . . had access to all
10 internal data concerning [Apollo's] stock option plans[.]" Id. at
11 ¶ 112. The FAC does not indicate exactly how each of the defendants
12 achieved that access and, perhaps more importantly, it does not
13 allege the exact nature of that "internal data." In similarly broad
14 language, the FAC further alleges that "[a]dditional facts provide
15 actual and strong circumstantial evidence of defendants' scienter
16 including[.]" among other things, "defendants' roles,
17 responsibilities, and specifically articulated duties for granting
18 and administering grants[.]" Id. at ¶ 113. As will be more fully
19 explained below, while this is an accurate allegation as to some of
20 the defendants, it is not as to all of them.

21 As to Peter Sperling, the allegations in the FAC are few. He is
22 Apollo's Senior Vice President and a director, and allegedly
23 received backdated stock option grants. FAC (doc. 71) at ¶¶ 27; 49;
24 and 51-52. Further, he, along with John Sperling, appointed the
25 Special Committee. Id. at ¶ 93. Finally, Peter Sperling
26 purportedly indicated that Ms. Gonzales resigned due to backdating,
27 and that she was "'unaware of APB 25.'" Id. at ¶¶ 99 and 127. Such
28 allegations do not come close to meeting the standards recently

1 explicated by the Ninth Circuit. There are no specific admissions
2 of the type described in South Ferry. Nor does the FAC include any
3 "details about [Peter Sperling's] access to information within
4 [Apollo][.]" See Zucco, 552 F.3d at 1001 (internal quotation marks
5 and citation omitted).

6 Moreover, this is not an "exceedingly rare" case such as Berson
7 where the "falsity is patently obvious - where the facts [are]
8 prominent enough that it would be absurd to suggest that top
9 management[,]" such as Peter Sperling, "was unaware of them." See
10 Berson, 527 F.3d at 989 (internal quotation marks and citation
11 omitted). The allegedly false statements pertain, *inter alia*, to
12 Apollo's misapplication of certain accounting principles, such as
13 how it did or did not account for stock-based compensation expenses,
14 and the existence of internal controls in that regard. Lastly, the
15 FAC is devoid of any allegations that Peter Sperling had any role in
16 granting stock options, accounting for them, or that he had any
17 information as to the approval process for those grants. For all of
18 these reasons, the court grants his motion to dismiss the § 10(b)
19 and Rule 10b-5 claims.

20 The FAC includes more detailed allegations as to John Sperling,
21 but in the end those additional allegations are not enough to defeat
22 dismissal of the § 10(b) and Rule 10b-5 claims. As with Peter
23 Sperling, there are no allegations in the FAC as to John Sperling's
24 role, if any, in the granting of or accounting for Apollo stock
25 options. Further, there are no details as to his access to any
26 Apollo information, much less his access to grant process or
27 accounting information. Nor, as just explained in connection with
28 Peter Sperling, does the FAC include allegations bringing it within

1 either of the two exceptions to the "general rule that falsity alone
2 cannot create a strong inference of scienter." See Zucco, 552 F.3d
3 at 1001. Consequently, plaintiff cannot rely upon the core-
4 operation inference to salvage its section 10(b) claims against John
5 Sperling.

6 Defendant Laura Noone did not hold a management position at
7 Apollo *per se*, but since September 2000, she has been President of
8 the University of Phoenix, purportedly "Apollo's most important and
9 well known subsidiary." See FAC (doc. 71) at ¶ 24. Arguably,
10 therefore, assuming the allegations are otherwise sufficient, the
11 core-operations inference may apply to create a strong inference of
12 scienter as to her. However, the FAC does not contain the necessary
13 allegations as to Ms. Noone. What the FAC does allege is that:

14 Because of [her] position, [Noone] knew
15 the adverse non-public information about the
16 business of Apollo, as well as its finances, markets
17 and present and future business prospects, via access
18 to internal corporate documents, conversations and
connections with other corporate officers and employees,
attendance at management meetings and via reports
and other information provided to her in connection
therewith.

19 Id. at ¶ 28.

20 This sweeping allegation is nothing more than a statement of Ms.
21 Noone's "general awareness of the day-to-day workings of [Apollo's]
22 business[,]" which the Ninth Circuit has repeatedly held cannot
23 support a strong inference of scienter "absent some additional
24 allegations of *specific* information conveyed to management and
25 related to the fraud or other allegations supporting scienter."
26 See, e.g., South Ferry, 542 F.3d at 784-85 (internal quotation marks
27 and citation omitted) (emphasis added). Conspicuously absent from
28 the FAC are any such particularized allegations. Besides the

1 paragraph quoted above, the only other allegations in the FAC as to
2 Ms. Noone are that she received stock option grants on three
3 occasions. See FAC (doc. 71) at ¶¶ 49; and ¶¶ 51-52. Clearly these
4 allegations do not create the requisite strong inference of
5 scienter.

6 The expansive scienter allegations in paragraphs 112 and 113,
7 quoted earlier, do not convince the court otherwise. See, supra at
8 88-89. The inference that Ms. Noone, University of Phoenix's
9 President - not an Apollo director or manager -- "would not have
10 responsibility or control over the grant of employee stock options
11 is significant[.]" See Juniper, 542 F.Supp.2d at 1048. In light of
12 the foregoing, the court finds that plaintiff has not sufficiently
13 alleged scienter as to defendant Noone.

14 Next the court turns to the allegations pertaining to defendant
15 Mueller, Apollo's President since 2006, who served "in a variety of
16 executive positions" with Apollo prior to that. FAC (doc. 71) at
17 ¶ 128. In addition to relying upon his "executive" status at
18 Apollo, the FAC alleges that "[f]rom at least June 2006, Muller
19 issued a *series* of knowingly false statements regarding the
20 backdating at Apollo[.]" Id. at ¶ 129 (emphasis added). Purportedly
21 those statements are "specifically designed to mislead Apollo's
22 investors." Id. Close scrutiny of the FAC reveals, however, that
23 it contains only two allegations that defendant Mueller made
24 "knowingly false statements." The first is that Mueller allegedly
25 stated that defendant Gonzales "resigned to 'spend more time with
26 her family.'" Id. at ¶¶ 99 and 130. Plaintiff alleges that "[it]
27 is simply inconceivable that Mueller, as President of Apollo, would
28 not know why his CFO resigned." Id. at ¶ 130. The second is

1 Mueller's purported statement on November 3, 2006, "that 'to date
2 there has been no indication that there has been any backdating.'"
3 Id. at ¶ 131.

4 Defendant Mueller's status as an Apollo executive of
5 longstanding in a variety of capacities clearly is insufficient to
6 support a strong inference of scienter as to him. Nor do his
7 allegedly false statements just quoted support such an inference,
8 especially given the complete absence of "particular details about
9 [Mueller's] access to information within [Apollo]." See Zucco, 552
10 F.3d at 1000 (internal quotation marks and citations omitted).
11 Thus, the court also finds the defendant Mueller is entitled to
12 dismissal of the section 10-b claims as against him.

13 Defendant DeConcini stands in a slightly different position
14 than the defendants just discussed in that he was not an Apollo
15 officer; nor did he hold a management position there. It is thus
16 questionable, in the first instance, whether the core-operation
17 inference would apply to him.

18 Regardless, given the relatively *de minimis* nature of the
19 allegations against them, it is readily apparent that plaintiff has
20 not adequately pled scienter as to Mr. DeConcini. Mr. DeConcini's
21 name appears in only two of the FAC's 200 paragraphs. At one point
22 the FAC alleges that he has been an Apollo director since 1981, and
23 an Audit Committee member. Id. at ¶ 26. Later in the FAC it
24 generally alleges his "responsib[ilities]" as a member of that
25 Committee:

26 (I) reviewing and discussing the audited financial
27 statements of [Apollo] with management; (ii) discussing
28 with [Apollo's] independent accountants the matters
required to be discussed by the Statement of Accounting
Standards . . . ; (iii) receiving and reviewing the

1 written disclosures and letters from its independent
2 accountants . . . ; (iv) discussing with its independent
3 accountants, the independent accountants' independence;
4 and (v) recommending to the Board . . . that the
audited financial statement be incorporated by reference
into [Apollo's] Annual Reports.

5 Id. at ¶ 40. Reciting a laundry list of defendant DeConcini's
6 alleged Audit Committee responsibilities does not create a strong
7 inference of scienter, primarily because without more the inference
8 that he "had knowledge of the relevant facts will not be much
9 stronger, if at all, than the inference that [he] remained unaware."
10 See South Ferry, 542 F.3d at 784. Hence, this generic allegation
11 cannot save this otherwise deficient FAC in terms of Mr. DeConcini's
12 scienter. There is nothing linking him to any aspect of stock
13 option granting or the associated accounting. Accordingly, these
14 meager allegations, even when viewed collectively under the rubric
15 of Tellabs and its progeny, do not create a strong inference of
16 scienter as to Mr. DeConcini. Thus, the court grants his motion to
17 dismiss the section 10(b) claims.

18 Having found that the FAC sufficiently alleges scienter as to at
19 least some of the defendants, the court will next turn to the
20 adequacy of the loss causation allegations.

21 **3. Loss Causation**

22 **a. Pleading Standards**

23 **I. Rule 8 v. Rule 9**

24 Preliminarily, the court must address the parties' disagreement
25 as to the pleading standard for loss causation. Rule 8(a)(2)
26 requires "a short and plain statement of the claim showing that the
27 pleader is entitled to relief[.]" Fed. R. Civ. P. 8(a)(2). "In
28 alleging "fraud or mistake," however, Rule 9(b) requires a party to

1 "state with particularity the circumstances constituting [that]
2 fraud or mistake." Fed. R. Civ. P. 9(b) (emphasis added).
3 Plaintiff contends that Rule 8(a)(2)'s "short and plain statement"
4 supplies the relevant pleading standard, whereas Apollo "suggests
5 that the heightened pleading requirements of Fed. R. Civ. P. 9(b)"
6 apply. Reply (doc. 97) at 17 (citations omitted).

7 Logically, loss causation is one of the "circumstances
8 constituting fraud for which Rule 9(b) demands particularity[]"
9 because without loss causation, there is no securities fraud claim.
10 See Teachers' Ret. Sys. of La. v. Hunter, 477 F.3d 162, 186 (4th
11 Cir. 2007) (citing, *inter alia*, Dura Pharmaceuticals, Inc. v.
12 Broudo, 544 U.S. 336, 343-44, 125 S.Ct. 1627, 161 L.Ed.2d 577
13 (2005)) (other citations omitted). Following that reasoning would
14 require that loss causation be pled in conformity with Rule 9(b)'s
15 particularity requirement.

16 Neither the Supreme Court nor the Ninth Circuit has definitively
17 held that Rule 9(b) applies when pleading loss causation, however.
18 Instead, the Supreme Court in Dura "assum[ed] at least for
19 argument's sake, that neither the [Federal] Rules [of Civil
20 Procedure] nor the securities statutes impose any special further"
21 pleading requirement, apart from Rule 8(a)(2), when pleading loss
22 causation. Dura Pharms., 544 U.S. at 346, 125 S.Ct. 1627. The Dura
23 Court was able to sidestep that issue because the complaint there
24 did not "provide the defendant with 'fair notice of what the
25 plaintiff's claim is and the grounds upon which it rests.'" Id.
26 (quoting Conley v. Gibson, 355 U.S. 41, 47, 78 S.Ct. 99, 2 L.Ed.2d
27 80 (1957)). Thus, the Dura complaint "fail[ed]" the "simple test[]"
28 of Rule 8(a)(2), which requires a "short and plain statement"

1 showing entitlement to relief. Id.

2 The Ninth Circuit in Berson purported “not to decide the
3 question” of whether loss causation allegations are subject to Rule
4 8(a)(2) or Rule 9(b) pleading standards. Berson, 527 F.3d at 989.
5 At the same time, though, the Berson Court made the opposite
6 assumption from the Supreme Court in Dura. Berson, 527 F.3d at 989.
7 Rather than assuming the applicability of Rule 8, the Ninth Circuit
8 “[a]ssum[ed]-without deciding-that Rule 9(b) governs[.]” Id. Based
9 upon that assumption, the Berson Court opined “that plaintiffs
10 bringing a 10b-5 securities fraud claim must plead . . . loss
11 causation with particularity[.]” Id. The Berson plaintiffs met
12 that standard “by alleging particular facts indicating that but for
13 the circumstances that the fraud concealed . . . [plaintiffs’]
14 investment . . . would not have lost its value.” Id. (internal
15 quotation marks and citations omitted). The Berson Court further
16 reasoned that because the complaint there gave “defendants ample
17 notice of plaintiffs’ loss causation theory,” as well as “giv[ing]
18 some assurance” to the Court “that the theory has a basis in fact[,]
19 . . . Rule 9(b) require[d] no more.” Id. at 989-990 (citations
20 omitted).

21 More recently, in Gilead, the Ninth Circuit once again declined
22 to decide whether Rule 8(a)(2) or Rule 9(b) controls loss causation
23 pleading, holding that “under either Rule 8 or Rule 9, the Investors
24 ha[d] sufficiently ple[d] loss causation.” See Gilead, 536 F.3d at
25 1056. Plaintiffs alleged that Gilead, a biopharmaceutical company,
26 misled investors by claiming that there was a high demand for one of
27 its drugs without disclosing that unlawful off-label marketing
28 caused that demand. In assessing the strength of the loss causation

1 allegations in Gilead, the Court once again focused on Rule 9(b)'s
2 heightened pleading requirement.

3 The Gilead complaint met that standard because it was
4 "meaningfully different" from the Dura complaint. See id. The Dura
5 plaintiffs merely alleged that they "paid artificially inflated
6 prices for Dura securities" and that they "suffered damage[s]
7 thereby." Dura Pharms., 544 U.S. at ___, 125 S.Ct. at 1630
8 (emphasis, quotation marks and citation omitted). In contrast, the
9 Gilead complaint alleged a specific economic loss caused by Gilead's
10 misrepresentations. Additionally, the Gilead plaintiffs "provide[d]
11 abundant details of Gilead's off-label marketing, . . . assert[ing]
12 that th[at] lead to higher demand [for the drug], which in turn
13 inflated Gilead's stock price." Gilead, 536 F.3d at 1056 (footnote
14 omitted). These allegations allowed "the fraud-action defendant" to
15 prepare an adequate answer[,] in accordance with Rule 9(b). See
16 id. (internal quotation marks and citation omitted).

17 Although Berson and Gilead left open the issue of whether Rule 8
18 or Rule 9 governs loss causation pleading, the Ninth Circuit was
19 clear on one point. A securities fraud complaint must, as the
20 foregoing discussion shows, "offer sufficient detail to give
21 defendants ample notice of [their] loss causation theory, and to
22 give [the court] some assurance that the theory has a basis in
23 fact." Id. (internal quotation marks and citation omitted). In
24 other words, ample notice is the cornerstone of loss causation
25 pleading. Here, as explained below, the FAC provides the requisite
26 ample notice, but only as to one of the three alleged disclosures.

27 **ii. Dura and its Progeny**

28 As the Ninth Circuit recently stressed, "[a] plaintiff does not,

1 of course, need to prove loss causation in order to avoid dismissal;
2 but the plaintiff must properly allege it." Metzler Inv., 540 F.3d
3 at 1062 (citation omitted). Loss causation is simply the proximate
4 cause element of a securities fraud claim. Johnson v. Aljian, 490
5 F.3d 778, 782 (9th Cir. 2007). This loss causation requirement
6 furthers the objectives of federal securities laws, which are
7 designed "not to provide investors with broad insurance against
8 market losses, but to protect them against those economic losses
9 that misrepresentations actually cause." Dura Pharms., 544 U.S. at
10 345, 125 U.S. at 1633.

11 In the seminal case of Dura Pharmaceuticals, the Supreme Court
12 held that a plaintiff invoking the fraud-on-the-market theory must
13 do more than simply plead an artificial inflation of a company's
14 stock to satisfy the loss causation element of a securities fraud
15 action. Such allegations do not suffice to plead loss causation
16 because the link between an inflated share price and a subsequent
17 economic loss "is not invariably strong." Dura, 544 U.S. at 342,
18 125 S.Ct. at 1632. To illustrate, the Court pointed out that if a
19 share with an allegedly inflated price is later sold at a lower
20 price, that lower price is not necessarily reflective of an alleged
21 misrepresentation. That lower price could be due to "changed
22 economic circumstances, changed investor expectations, new industry-
23 specific or firm-specific facts, conditions, or other events[,]"
24 none of which may have any relation to the earlier
25 misrepresentation. See id. at 343, 125 S.Ct. at 1632. Because the
26 Dura plaintiffs did not attempt to link their damages to any defense
27 conduct, the Supreme Court held that they did not sufficiently plead
28 loss causation.

1 Recognizing that that requirement is "not meant to impose a
2 great burden upon a plaintiff," nonetheless, the Dura Court requires
3 a plaintiff to "provide [a] defendant with notice of what the
4 relevant economic loss might be or of what the causal connection
5 might be between that loss and the misrepresentation[.]" Id. at
6 347, 125 S.Ct. at 1634. Allegations short of that "would bring
7 about harm of the very sort the statutes seek to avoid[,]" and
8 "transform a private securities action into a partial downside
9 insurance policy." Id. (citation omitted).

10 Shortly after Dura, in In re Daou Sys., Inc., 411 F.3d 1006
11 (9th Cir. 2005), the Ninth Circuit reversed the dismissal of
12 plaintiff's complaint finding that they had sufficiently alleged
13 loss causation. The Daou Court held that "[t]o establish loss
14 causation, 'the plaintiff must demonstrate a causal connection
15 between the deceptive acts that form the basis for the claim of
16 securities fraud and the injury suffered by the plaintiff.'" Gilead,
17 536 F.3d at 1055 (quoting Daou, 411 F.3d at 1025). In so holding,
18 the Daou Court set forth two important principles. First, it
19 explained that "[a] plaintiff is not required to show that a
20 misrepresentation was the *sole* reason for the investment's decline
21 in value in order to establish loss causation." Daou, 411 F.3d at
22 1025 (internal quotation marks and citation omitted) (emphasis in
23 original). However, the misrepresentation "must be a substantial
24 cause. . . for the decline in the value of the securities[.]"
25 Gilead, 536 F.3d at 1055-56 (internal quotation marks and citation
26 omitted). Other causes of decline are factored into any subsequent
27 damages analysis. Therefore, so "long as the misrepresentation is
28 one substantial cause of the investment's decline in value, other

1 contributing forces will not bar recovery under the loss causation
2 requirement but will play a role in determining damages." Daou, 411
3 F.3d at 1025 (internal quotation marks and citation omitted).

4 Second, there is a temporal component to loss causation, which
5 Daou illustrates. "[C]areful[ly] delineati[ng] between losses
6 caused after the company's conduct was revealed, and losses suffered
7 before the revelation[,]" the Daou Court "confirm[ed] that the
8 complaint must allege that the practices that the plaintiff contends
9 are fraudulent were revealed to the market and caused the resulting
10 losses." Metzler Inv., 540 F.3d at 1063 (emphasis added).

11 Plaintiffs' theory of fraud in Daou "was that the defendant was
12 systematically recognizing revenue on contracts that had not been
13 completed." Id. (citation omitted). The Daou Court held that
14 plaintiffs adequately pled loss causation "because their complaint
15 alleged that the market learned of and reacted to this fraud, as
16 opposed to merely reacting to reports of the defendant's poor
17 financial health generally." Id. (citations omitted).

18 The Ninth Circuit revisited the loss causation pleading
19 requirements in a recent trilogy of cases, Berson, 527 F.3d 982;
20 Gilead, 536 F.3d 1049; and Metzler Inv., 540 F.3d 1049.¹⁴ Gilead
21 provides another example of the temporal component of loss
22 causation. Allegedly Gilead illegally marketed one of its drugs,
23 Viread, for off-label purposes. As a result of those aggressive
24 off-label marketing tactics, plaintiffs further alleged that sales
25 of Viread improperly increased, in turn driving Gilead's stock
26

27 ¹⁴ As ordered by this court, the parties provided "limited supplemental
28 briefing . . . on the issues of loss causation and scienter" as discussed in this
trilogy. Doc. 99 at 1-2.

1 prices higher.

2 The Food and Drug Administration ("FDA") issued two warning
3 letters informing Gilead that it was violating FDA regulations
4 pertaining to off-label marketing. When one of the FDA letters
5 became public on August 7, 2003, the market did not react
6 negatively. Gilead challenged the sufficiency of plaintiffs' loss
7 causation allegations given the absence of a market decline at that
8 point.

9 Three months later though, on October 29, 2003, one day
10 following Gilead's issuance of a press release explaining that
11 Viread's sales volume was below expectations, Gilead's stock fell
12 12%. The district court declined to "make the unreasonable
13 inference that a public revelation on August 8 *caused* a price drop
14 *three months later* on October 28." Id. at 1057 (internal quotation
15 marks and citation omitted). In reversing, the Ninth Circuit held
16 that the allegations of a "specific economic loss[]" -- the October
17 29th stock price - coupled with allegations that that loss was
18 caused by Gilead's misrepresentations, was sufficient to allege loss
19 causation, despite the three month gap. Id. at 1056.

20 Finding that "what truly motivated the dismissal was the district
21 court's incredulity[,]" the Ninth Circuit admonished that such
22 "skepticism is best reserved for later stages of the proceedings
23 when the plaintiff's case can be rejected on evidentiary grounds."
24 Id.

25 Quoting from Twombly, the Ninth Circuit emphasized: "[A] well-
26 pleaded complaint may proceed even if it strikes a savvy judge that
27 actual proof of those facts is improbable, and that a recovery is
28 very remote and unlikely.'" Id. at 1057 (quoting Twombly, 550 U.S.

1 at ____, 127 S.Ct. at 1965) (internal quotation marks omitted). The
2 loss causation element is "no exception to this rule[.]" Id.
3 Indeed, the Gilead Court expressly "agree[d]" with the Third
4 Circuit's view "that loss causation becomes most critical at the
5 proof stage[;]" and noted that Circuit's "cit[ation] [to] scholarly
6 authority stating that it is normally inappropriate to rule on loss
7 causation at the pleading stage." Id. (internal quotation marks and
8 citation omitted). Likewise, the Gilead Court expressly "agree[d]"
9 with the Second Circuit "that loss causation is a matter of proof at
10 trial and not to be decided on a Rule 12(b)(6) motion to dismiss."
11 Id. (internal quotation marks and citations omitted).
12 Accordingly, "[s]o long as the complaint alleges facts that, if taken
13 as true, plausibly establish loss causation," the Ninth Circuit
14 opined that "a Rule 12(b)(6) dismissal is inappropriate." Id.
15 Again quoting from Twombly, the Ninth Circuit pointed out that
16 "[t]his is not 'a probability requirement . . . it simply calls for
17 enough fact to raise a reasonable expectation that discovery will
18 reveal evidence of' loss causation." Id. (quoting Twombly, 550 U.S.
19 at ____, 127 S.Ct. at 1965). Thus, in Gilead a three month gap
20 between the revelation of a misrepresentation and a drop in stock
21 price did not necessarily foreclose the possibility that that
22 earlier misrepresentation caused that later loss.

23 The temporal aspect of loss causation was not an issue in
24 Metzler Inv., decided just a few weeks after Gilead.¹⁵ Rather, the
25 Metzler Inv. Court held that simply alleging a risk of loss or
26

27 ¹⁵ Metzler was originally decided on July 25, 2008, before Gilead. See
28 Metzler Inv. GmbH v. Corinthian Colleges, Inc., 534 F.3d 1068 (9th Cir. 2008). On
August 26, 2008, however, the Ninth Circuit withdrew that earlier decision because
it was superseded and amended by Metzler Inv., 540 F.3d 1049.

1 misrepresentation without more does not satisfy the loss causation
2 element of a securities fraud claim. There, the plaintiffs alleged
3 that Corinthian Colleges artificially inflated its stock prices by
4 (1) manipulating student enrollment figures, which it then used to
5 fraudulently obtain federal funding; and (2) by improperly
6 recognizing federal funding as income in violation of GAAP. Two
7 public disclosures allegedly caused the company's stock to drop.
8 The first was a June 24, 2004 "Financial Times" article disclosing a
9 Department of Education investigation of enrollment irregularities
10 at one of Corinthian's campuses. The second disclosure was an
11 August 2, 2004, company press release announcing reduced earnings
12 and an adjusted revenue forecast.

13 The Ninth Circuit found, however, that neither of those
14 disclosures "disclosed - or even suggested to the market that
15 Corinthian was manipulating student enrollment figures. . . which is
16 the fraudulent activity that Metzlers contend[ed] forced down the
17 stock that caused its losses." Id. at 1063. The Ninth Circuit
18 reasoned that a plaintiff cannot be "allow[ed] . . . to plead loss
19 causation through 'euphemism[,]'. . . thereby avoid[ing] alleging
20 the necessary connection between defendant's fraud and the actual
21 loss." Id. at 1064. The Court explained:

22 So long as there is a drop in a stock's price,
23 a plaintiff will always be able to contend that
24 the market 'understood' a defendant's statement
25 precipitating a loss as a coded message revealing
26 the fraud. Enabling a plaintiff to proceed on such
27 a theory would effectively resurrect what Dura
28 discredited - that loss causation is established
through an allegation that a stock was purchased at
an inflated price.

27 Id. (citation omitted). Instead, "[s]tated in the affirmative, the
28 complaint must allege that the defendant's share price *fell*

1 significantly after the truth became known." Id. at 1063 (internal
2 quotation marks and citation omitted) (emphasis added). At a
3 minimum, "[a] plaintiff's complaint must, . . . , set forth
4 allegations that if assumed true, are sufficient to provide [the
5 defendant] with *some indication* that the drop in [defendant's] stock
6 price was causally related to [the defendant's] financial
7 misstatement[s]." Id. at 1062 (internal quotation marks and
8 citations omitted) (emphasis added). It is against this legal
9 backdrop which the court will examine the three allegedly corrective
10 disclosures at issue herein.

11 **b. Corrective Disclosures?**

12 The FAC alleges that throughout the Class Period defendants
13 "issued a series of false and misleading" statements regarding
14 Apollo's "financial results[]" and its stock option practices. FAC
15 (doc. 71) at ¶ 53. Due to those alleged misstatements, the FAC
16 further alleges Apollo's stock price was artificially inflated.
17 Plaintiff's theory is that when the "truth" about those alleged
18 misstatements became known to the market in three separate
19 disclosures, it resulted in a decline in the price of Apollo's
20 stock.

21 From Apollo's perspective, the "truth" was not revealed to the
22 market, however, until May 22, 2007. On that date Apollo issued a
23 Restatement correcting its prior misstatements regarding its stock
24 option practices, and, for the first time, quantifying the financial
25 impact of its accounting errors resulting therefrom. Apollo
26 stresses that after that Restatement its stock value actually rose.
27 Based upon this scenario, framed in terms of the standard applied in
28 Gilead, Apollo contends the loss causation allegations are "facially

1 implausible[,]" thus mandating dismissal. See Gilead, 536 F.3d at
2 1057. Plaintiff retorts that the FAC contains "extensive factual
3 detail far beyond the required 'plausible' standard[,]" and thus it
4 can withstand these dismissal motions. See Supp. Br. (doc. 101) at
5 6 (citations omitted).

6 "One way in which [a] plaintiff can prove [loss causation] is
7 by showing that a corrective disclosure caused the stock price to
8 decline." In re Apollo Group, Inc. Sec. Litig., 2008 WL 3072731, at
9 *2 (D.Ariz. Aug. 4, 2008) (citations and footnote omitted).
10 Succinctly put, "[a] 'corrective disclosure' is a disclosure that
11 reveals the fraud, or at least some aspect of the fraud, to the
12 market." Id. (citing Lentell v. Merrill Lynch & Co., Inc., 396 F.3d
13 161, 175 n.4 (2nd Cir. 2005) (holding that, to be corrective, a
14 disclosure must "reveal to the market the falsity of the prior
15 [representations])). It stands to reason then that "[a] disclosure
16 that does not reveal anything new to the market is, by definition,
17 not corrective." Id. (citing Omnicom Group, Inc. Sec. Litig., 541
18 F.Supp.2d 546, 551 (S.D.N.Y. 2008)).

19 As just shown, revelation of the fraud, or at some aspect of it,
20 is critical in terms of assessing whether a given disclosure is
21 corrective. Consequently, before examining the claimed corrective
22 disclosures here, it is necessary to determine the fraudulent
23 activity which the FAC alleges. The FAC alleges that Apollo engaged
24 in three types of fraudulent activity. First, allegedly Apollo's
25 "financial statements were false and misleading because they failed
26 to account for stock option expenses[.]" Supp. Br. (doc. 101) at 10
27 (citing FAC, e.g., ¶¶ 53 and 135). Second, the FAC alleges that
28 Apollo falsely represented that it "account[ed] for its stock-based

1 awards in accordance with [APB 25][.]” Id. (citing FAC, e.g., ¶¶ 46
2 and 53). The third alleged fraudulent activity is that “defendants
3 signed false [SOX] . . . certifications . . . attest[ing] to the
4 adequacy of Apollo’s internal controls” pertaining to stock option
5 grants. Id. (citing FAC, e.g., ¶¶ 53 and 124).

6 As Apollo reads the FAC, plaintiff is attempting to plead loss
7 causation based upon three supposed “corrective disclosures,” which
8 purportedly revealed the claimed fraudulent activities listed above.
9 The first such disclosure is a June 8, 2006, report by Lehman
10 Brothers (the “Lehman Report” or “the Report”) questioning Apollo’s
11 stock option history. The second is a June 19, 2006, announcement
12 that the U.S. Attorney for the Southern District of New York had
13 issued a subpoena to Apollo requesting documents pertaining to its
14 stock option grants. Third, plaintiff is relying upon an October
15 18, 2006, news release by Apollo regarding the identification of
16 “various deficiencies in the process of granting and documenting
17 stock options[.]” FAC (doc. 71) at ¶ 98 (emphasis omitted).

18 From Apollo’s perspective, none of these disclosures are
19 corrective. Taking the opposite view, believing that each of the
20 three “either disclosed - or . . . suggested that Apollo’s prior
21 statements were false[,]” plaintiff asserts that those disclosures
22 are corrective. See Supp. Br. (doc. 101) at 15 (citation omitted).
23 The court will separately examine each of these three disclosures to
24 ascertain whether they are corrective in the first place.

25 **i. Lehman Report**

26 The FAC alleges that “[o]n June 8, 2006, . . . an analyst at
27 Lehman Brothers[] published a report titled, ‘Did Apollo Backdate
28 Options?’[.]” FAC (doc. 71) at ¶ 89. The FAC selectively quotes

1 from one sentence in that nine page Report: "'While it is impossible
2 to tell definitively from a company's proxy and other SEC filing
3 whether or not it is guilty of backdating, **Apollo['s] . . . option**
4 **grant history looks highly questionable. . . .**" Id. (emphasis added
5 in FAC). The FAC also relies upon tables in that Report "showing
6 that Apollo's option grant prices occurred" at what the FAC
7 characterizes "almost miraculously at the lowest price of the year
8 in 2000, 2001, 2002 and 2004." Id. The FAC goes on to allege that
9 the same day as the Lehman Report, Apollo's stock price "fell 2.7%"
10 from the previous day's closing price. Id.

11 Apollo strenuously contends that the Lehman Report "did not
12 'correct' Apollo's historical financial statements[,]" or "indicate"
13 a need for their correction. Mot. (doc. 81) at 18. Hence, that
14 Report is not a corrective disclosure which can form the basis for
15 pleading loss causation.

16 Basically plaintiff responds that the Lehman Report "revealed,
17 at least in part, the 'fraudulent activity'" which it is alleging,
18 and that is all that Dura and its progeny require. Supp. Br. (doc.
19 101) at 14 (citation omitted). Although the FAC does not make this
20 allegation, in its supplemental brief, plaintiff baldly asserts that
21 the Lehman Report "*explicitly alerted the market that Apollo had*
22 *very likely engaged in backdating, and thereby revealed that its*
23 *prior statements which failed to disclose or account for such*
24 *backdating may well have been false.*" Supp. Br. (doc. 101) at 10
25 (emphasis added). This characterization, even if included in the
26 FAC, does not comport with even the relatively minimal loss
27 causation pleading standards of Dura. Moreover, plaintiff is
28 overstating what the Lehman Report actually states.

1 Certainly the snippet which the FAC quotes does not substantiate
2 the view that the Lehman Report "explicitly alerted [the market]
3 that Apollo had very likely engaged in backdating[.]" See id.
4 Indeed, a careful review of that entire Report demonstrates the
5 fallacy in this assertion. Nowhere in the Lehman Report does it
6 reveal any of the three types of fraudulent activity of which
7 plaintiff complains, or even reveal some aspect of those allegedly
8 fraudulent activities. Instead, much like one of the disclosures at
9 issue in Metzler Inv., at most, the Lehman Report "reveals a 'risk'
10 or 'potential' for widespread fraudulent conduct." See Metzler
11 Inv., 540 F.3d at 1063 (emphases omitted). As the FAC itself
12 highlights, the Lehman report stated that "**Apollo['s] . . . option**
13 **grant history looks highly questionable. . . .**" FAC (doc. 71) at
14 ¶ 89 (emphasis added in FAC). Having a "questionable" grant
15 history, even a "highly questionable grant history" is not
16 equivalent to revealing a fraud, or at least some aspect of a fraud,
17 however.

18 Again quoting from the Lehman Report, the FAC candidly
19 acknowledges that "it is impossible to tell definitively from a
20 company's proxy and other SEC filings whether or not it is guilty of
21 backdating[.]" Id. The Lehman Report goes on to explain that it
22 has "**taken a look at the history of the option grant prices . . . as**
23 **an attempt to determine if any questionable activity exists.**"
24 Farrell Decl'n (doc. 80), exh. B thereto at 2 (bold emphasis in
25 original) (italicized emphasis added). The Report itself expressly
26 "reiterated[d][,]" not once but twice "that it is *impossible* to tell
27 *definitively* if a company has backdated options from the disclosure
28 in its SEC filings [sic]." Id. at 2 and 4 (emphasis added).

1 "[B]eliev[ing] the probability" to be "very small" that Apollo's
2 option grant timing could be due to "either luck or excellent
3 timing[,]" the Report twice opined that Apollo "**is highly**
4 **susceptible to future scrutiny by either the press or the two**
5 **government agencies who have been investigating and prosecuting**
6 **other option backdating cases (the SEC and U.S. Attorney's Office)."**

7 Id. at 4 (bold emphasis in original) (italicized emphasis added).
8 The Lehman Report, therefore, cautioned "investors to tread lightly
9 with [Apollo] shares at current levels." Id. None of these
10 speculative observations, even had they all been included in the
11 FAC, comport with the loss causation pleading requirements of Dura
12 as recently elucidated by the Ninth Circuit, however. See Metzler
13 Inv., 540 F.3d at 1064 ("[Neither *Daou* nor *Dura* support the notion
14 that loss causation is pled where a defendant's disclosure reveals a
15 'risk' or 'potential' for widespread fraudulent conduct.")

16 As the foregoing demonstrates, the FAC's allegations do not, as
17 they must, "confirm that the practices . . . plaintiff contends are
18 fraudulent were revealed to the market" through the Lehman report.
19 See Metzler Inv., 540 F.3d at 1063. All that the Lehman Report
20 "revealed to the market" on June 8, 2006, was a "highly
21 questionable" option grant history by Apollo. Despite how plaintiff
22 depicts it, that Report did not "explicitly alert[] the market that
23 Apollo had very likely engaged in backdating and thereby reveal that
24 its prior statements which failed to disclose or account for such
25 backdating may well have been false." Supp. Br. (doc. 101) at 10.

26 There is nothing in the Lehman Report even hinting that Apollo
27 engaged in any of the three fraudulent activities which the FAC
28 alleges. Indeed, there is no mention in the Lehman Report of

1 Apollo's prior financial statements, let alone that they "were false
2 and misleading because they failed to account for stock option
3 expenses[.]" See id. (citations omitted). That Report is similarly
4 silent regarding the allegedly false SOX certifications, and
5 Apollo's purported false representations as to how it accounted for
6 its stock-based awards. While the court is well aware that "a
7 disclosure need not reflect every detail of the alleged fraud,"
8 nonetheless, it "must reveal some aspect of it." See Omnicom, 541
9 F.Supp.2d at 551. The Lehman Report does not make any such
10 revelations. Succinctly put, no "truth of a misrepresentation about
11 [Apollo's] stock was revealed[]" in the Lehman Report. See Amkor,
12 527 F.Supp.2d at 946 (citations omitted).

13 The weakness in plaintiff's reliance upon the Lehman Report to
14 support loss causation becomes even more evident considering the
15 relatively insignificant drop in the price of Apollo stock which
16 followed that Report. As noted earlier, the FAC alleges a 2.7
17 percent drop in Apollo's stock price on June 8, 2006, the date the
18 Lehman Report was issued. This allegation does not meet Dura's
19 requirement of an allegation "that the defendant's 'share price fell
20 *significantly* after the truth became known." See Metzler Inv., 540
21 F.3d at 1062 (quoting Dura, 544 U.S. at 347) (emphasis added).
22 Certainly if, as in Metzler Inv. "stock recover[y] very shortly
23 after the modest 10% drop that accompanied" the alleged corrective
24 disclosure does not suffice to allege loss causation, the modest 2.7
25 percent drop alleged herein is not sufficient either. See id. at
26 1064 (footnote omitted). In sum, the Lehman Report is not a
27 corrective disclosure which can, in turn, support a finding that
28 plaintiff's loss causation allegations are sufficient.

1 ii. Subpoena Disclosure

2 The next alleged "corrective disclosure" occurred on June 19,
3 2006. On that date, the FAC alleges, Apollo "disclosed that it
4 received a subpoena from the U.S. Attorney for the Southern District
5 of New York requesting documents relating to [its] stock option
6 grants." FAC (doc. 71) at ¶ 92. The FAC further alleges that at
7 that point, "Apollo again denied any impropriety, stating that
8 '[its] board of directors has hired an outside firm to review and
9 confirm the company's initial conclusions that the Company acted
10 appropriately regarding its stock option practices.'" Id.
11 Allegedly this "disclosure caused Apollo's stock price to drop 5.3%
12 on the next trading day[.]" Id.

13 Apollo contends that these allegations do not constitute a
14 corrective disclosure because, as with the Lehman Report, they do
15 not correct prior financial statements, or state a need for such a
16 correction. Moreover, Apollo contends, the fact that a public
17 company is subject to a "regulatory investigation[.]" or conducts
18 its own internal review, does not amount to a corrective disclosure.
19 Mot. (doc. 81) at 19. From plaintiff's standpoint, however, the
20 significance of the allegations quoted above is that they "began to
21 reveal the falsity of Apollo's prior statements or omissions, which
22 is all that Daou and Metzler Inv. require." Supp. Br. (doc. 101) at
23 11 (internal quotation marks and citations omitted).

24 For several reasons, Apollo has the stronger argument. First,
25 neither of these announcements disclose any wrongdoing by
26 defendants. As in Amkor, Apollo's June 19th news release did "not
27 signal, much less state, that any prior option grants were
28 incorrect, that [the company's] internal controls were weak, that

1 there was evidence supporting a finding [of] intentional[]
2 manipul[at]ion [of] stock option pricing or that prior financial
3 statements were incorrect in any way." Amkor, 527 F.Supp.2d at 947.

4 Second, the court agrees with those courts finding that
5 standing alone the announcement of an internal investigation does
6 not give rise to a viable loss causation allegation. See, e.g.,
7 Hansen, supra, 527 F.Supp.2d at 1162 (internal quotation marks and
8 citations omitted) ("[T]he mere existence of [an] investigation
9 cannot support any inferences of wrongdoing . . . on the part of [a]
10 company or its senior management."). Plaintiff does not attempt to
11 distinguish that line of cases, but instead directs the court's
12 attention to UTStarcom II, supra, 2008 WL 4002855. As plaintiff
13 reads that case, it stands for the proposition that "merely
14 announc[ing] . . . an internal investigation [is] sufficient to
15 allege loss causation." Supp. Br. (doc. 101) at 12 (citation
16 omitted). That is too broad a reading of UTStarcom II, however. As
17 will be discussed more fully below, it was not the "mere"
18 announcement of an internal investigation upon which the court there
19 based its finding that plaintiff had adequately pled loss causation.
20 Rather, it was the content of that announcement and the message it
21 sent to the market - content which is missing from Apollo's June
22 19th announcement.

23 In Rudolph v. UTStarcom, 560 F.Supp.2d 880 (N.D.Cal. 2008)
24 ("UTStarcom I"), the court held that a press release announcing an
25 internal investigation into the company's historical equity award
26 grant practices did not sufficiently allege loss causation. Among
27 other reasons, the court in UTStarcom I held that that announcement
28 did not sufficiently plead loss causation because "prior to any

1 revelation by defendants of actual backdating, the 'true nature of
2 [the company's] financial condition had not yet been disclosed.'" Id.
3 Id. at 888 (quoting Daou, 411 F.3d at 1027). Upon reconsideration,
4 however, applying Gilead's plausibility standard, the court held
5 that the announcement of an internal investigation "could plausibly
6 establish loss causation." UTStarcom II, 2008 WL 4002855, at *4.

7 At first glance UTStar II might appear to compel the conclusion
8 that Apollo's June 19th announcement sufficiently pleads loss
9 causation. What plaintiff fails to consider though is the critical
10 distinction between the language of the UTStar press release and
11 that of Apollo's news release. Like Apollo's June 19th news
12 release, the UTStar press release, "did not definitively state that
13 backdating had occurred or that UTStarcom would adjust its prior
14 financial statements as they related to equity grants[.]" UTStarcom
15 II, 2008 WL 4002855, at *4. What the press release in UTStarcom II
16 did accomplish, however, was, "for the first time, [to] put the
17 market on notice that such disclosures *might be forthcoming*." Id.
18 (emphasis added). The UTStarcom press release foreshadowed the
19 possibility that the Company would be correcting its prior financial
20 statements, although that release "specifically stated that no
21 conclusions have been reached about whether the Company would need
22 to record any non-cash adjustments to its financial statements
23 related to prior equity grants." UTStarcom I, 560 F.Supp.2d at 888
24 (internal quotation marks and citation omitted).

25 Apollo's June 19th news release does not contain any similar
26 language. As will be discussed in detail momentarily, here, such a
27 revelation did not occur until October 18, 2006. Given this
28 significant distinction between the UTStarcom press release and

1 Apollo's June 19th news release, plaintiff's reliance upon UTStarcom
2 II is unavailing.

3 Further undermining plaintiff's reliance upon the June 19th news
4 release to plead loss causation is the fact that that release
5 explicitly states, "[a]s previously announced, Apollo . . . has
6 hired an outside firm" to review its stock option practices.
7 Farrell Decl'n (doc. 80), exh. 4 thereto at 6 (emphasis added).
8 Therefore, even if the court agreed that that release revealed a
9 fraud, it would not be a new fraud to which the market was
10 purportedly reacting. It could not be a new fraud because that
11 information had already been revealed to the public in a prior
12 announcement. Cf. Apollo Group, supra, 2008 WL 3072731, at *3
13 (emphasis added) ("evidence . . . insufficient to show . . . any
14 . . . aspect[]" of analyst's reports were corrective where they "did
15 not provide any *new, fraud-revealing* analysis[]").

16 Having found that the June 19, 2006, news release is not a
17 corrective disclosure which can form the basis for pleading loss
18 causation, there is no need to address the parties' arguments as to
19 whether the alleged 5.3% drop in the price of Apollo stock on June
20 20, 2006 is sufficient to support a loss causation allegation. In
21 any event, it is highly doubtful that a 5.3 percent price drop,
22 assuming it was sufficiently tethered to the June 19th disclosure,
23 would satisfy Dura's requirement that the "share price f[a]ll
24 significantly after truth bec[o]me[s] known." See Dura, 544 U.S. at
25 347. Thus, as with the Lehman Report, the June 19th press release
26 cannot form the basis for pleading loss causation here.

27 **iii. News Release & Earnings Announcement**

28 The third purported corrective disclosure is a "news release and

1 disappointing earnings announcement" issued by Apollo on October 18,
2 2006. FAC (doc. 71) at ¶ 98. Plaintiff alleges that in those items
3 Apollo "stated, for the first time, and in contrast to Apollo's
4 previous denials, . . . **'various deficiencies in the process of**
5 **granting and documenting stock options have been identified to date.**
6 The accounting impact of these matters has not been quantified.
7 **There can be no assurances that the results of the investigation**
8 **will not require a possible restatement of the Company's financial**
9 **statements** when the potential errors are quantified and assessed.'" Id.
10 at ¶ 98 (emphasis added in FAC). Although the FAC does not
11 allege it, the news release itself (of which the court has taken
12 judicial notice), continues: "The attached unaudited financial
13 statements do not include the impact of any unrecorded non-cash
14 equity-based compensation charges that may be required at the
15 conclusion of the review." Farrell Decl'n (doc. 80), exh. 6 thereto
16 at 7. "Following this announcement," the FAC alleges that "Apollo's
17 stock price dropped dramatically, falling 22.9% in one day to a 4-
18 year low[.]" FAC (doc. 71) at ¶ 98.

19 Stressing that that news release merely indicates that "a
20 restatement might be 'possible,'" Apollo asserts that this
21 announcement is not a corrective disclosure which can form the basis
22 for pleading loss causation. Mot. (doc. 81) at 19. Apollo further
23 reasons that this disclosure is not corrective because it gives no
24 indication of the number of stock option grants potentially affected
25 by the identified deficiencies. As Apollo depicts it, this
26 disclosure simply "identified options process 'deficiencies' with
27 unknown accounting impact that may possibly necessitate an as-yet-
28 unquantified restatement." Supp. Memo. (doc. 102) at 3.

1 Apollo's attempts to minimize the significance of the October
2 18th news release is not persuasive. Surely if the press release
3 in UTStarcom was sufficient to put the market on notice of the
4 possibility of forthcoming restatements, the October 18th press
5 release did the same. As discussed earlier, the press release in
6 UTStarcom "specifically stated that no conclusions have been reached
7 about whether the Company would need to record any non-cash
8 adjustments to its financial statements related to prior equity
9 grants." UTStarcom I, 560 F.Supp.2d at ___ (internal quotation
10 marks and citation omitted). Yet, the court was willing to find
11 that loss causation was sufficiently pled there because that
12 disclosure "for the first time, put the market on notice that such
13 disclosures might be forthcoming." UTStarcom II, 2008 WL 4002855,
14 at *4.

15 Here, as the highlighted language quoted above shows, the
16 October 18th release is cast in far more definite terms when it
17 comes to suggesting the possibility of future restatements. What is
18 more, that release explicitly "identified . . . various
19 deficiencies" in Apollo's stock option grant processes. Farrell
20 Decl'n (doc. 80), exh. 6 thereto at 7. Thus, plaintiff's theory
21 that Apollo's stock price dropped in response to the October 18th
22 announcement is "not facially implausible[.]" See Gilead, 536 F.3d
23 at 1057. After Gilead, that is all the Ninth Circuit demands.

24 In addition, "[l]oss causation may be premised on partial
25 revelations that do not uncover the complete extent of the falsity
26 of specific prior statements." In re Take-Two Interactive Sec.
27 Lit., 551 F.Supp.2d 247, 283 (S.D.N.Y. 2008) (citation omitted).
28 This significantly undercut's Apollo's assertion that the October

1 18th news release is not a corrective disclosure because,
2 essentially, it is too vague in terms of what it is revealing.

3 Apollo further argues that the October 18th news release cannot
4 form the basis for allegations of loss causation because
5 contemporaneously therewith Apollo made a "disappointing earnings
6 announcement[.]" FAC (doc. 71) at ¶ 98. Apollo announced "fourth-
7 quarter earnings fell 12 percent" because of enrollment issues.
8 Farrell Decl'n (doc. 80), exh. 7 thereto at 2. Apollo also stated
9 that it missed analysts' earnings expectations by 12 cents per
10 share, or 18%. Id. Based upon the foregoing, Apollo contends that
11 the stock drop is attributable to factors other than the announced
12 identified deficiencies in its option grant process. Therefore,
13 Apollo contends that the causal link between the announcement of a
14 possible restatement and the stock price drop was effectively
15 severed.

16 If the only announcement on October 18th had been a weak
17 earnings statement, then perhaps Apollo would prevail on this
18 argument. See, e.g., In re Initial Public Offering Sec. Litig., 399
19 F.Supp.2d 261, 265-267 (S.D.N.Y. 2005) (disclosures of failure to
20 meet revenue forecasts and downward revisions of forecasts did not
21 allege loss causation); and In re First Union Corp. Sec. Litig.,
22 2006 WL 163616 (W.D.N.C. Jan. 20, 2006) (allegations that stock
23 price decline was caused by two public revised earnings statements
24 did not allege loss causation where no fraud revealed). In the
25 present case, plaintiff alleges more than that, however. The
26 allegations here of a "disappointing earnings announcement" coupled
27 with the announcement of identified deficiencies in Apollo's option
28 grant processes, along with raising the possibility of a

1 restatement, are sufficient at the pleading stage. Whether the
2 October 18th stock drop is attributable to some other cause, as
3 Apollo maintains, is best left for another day. See In re Openwave
4 Systems Sec. Litig., 528 F.Supp.2d 236, 253 (S.D.N.Y. 2007)(citation
5 omitted).

6 Based upon the foregoing, the court finds plaintiff's
7 allegations of loss causation are, as the Ninth Circuit requires,
8 "not facially implausible" with respect to the October 18th
9 announcement. See Gilead, 536 F.3d at 1057. For the reasons set
10 forth above, however, the other two claimed corrective disclosures
11 cannot form the basis for pleading loss causation.

12 Having ruled on defendants' motions insofar as they are directed
13 at plaintiff's section 10(b) claims, the court will turn to
14 plaintiff's remaining four causes of action.

15 **D. Insider Trading**

16 Section 20A(a) of the Exchange Act creates a private cause of
17 action for "contemporaneous" insider trading. See 15 U.S.C. § 78t-
18 1(a) (West 1997). Pursuant to that statute, plaintiff is seeking to
19 hold those "defendants that sold Apollo stock during the Class
20 Period[,]" FAC at ¶ 184, meaning all of the defendants except Apollo
21 and Mr. Mueller, liable for insider trading. The FAC alleges, "for
22 example," that "Lead Plaintiff and members of the Class traded
23 contemporaneously with defendants Blair, Bachus and Govenar by
24 purchasing Apollo securities at artificially inflated prices on
25 January 6-7, 2005 and suffered damages." FAC (doc. 71) at ¶ 186(a).
26 As another "example," the FAC alleges that "Lead Plaintiff . . . and
27 members of the class" also "traded contemporaneously with defendants
28 Bachus and Govenar . . . on January 10-12, 2005[.]" Id. at ¶ 186(b).

1 Apart from the individuals just named, the insider trading claim
2 does not specifically mention any of the other individual
3 defendants. Exhibit G to the FAC is a detailed list, however, of
4 purported "insider sales" during the Class Period, listing every
5 individual defendant except Brian Mueller, the dates of sale, shares
6 sold, price and proceeds.

7 To state a cause of action under § 20A(a), "a plaintiff must
8 plead . . . a predicate violation of the securities laws," and
9 "facts showing that the trading activity of plaintiffs and
10 defendants occur[ed] 'contemporaneously[.]'" In re Countrywide
11 Financial Corp. Deriv. Litig., 554 F.Supp.2d 1044, 1074 (C.D.Cal.
12 2008) (quoting Neubronner, supra 6 F.3d at 670). The individual
13 defendants assert that plaintiff has not plead either of those two
14 elements; and hence the court should dismiss the §20A(a) insider
15 trading claim in its entirety.

16 Plaintiff has not, as the court previously found, adequately
17 pled a violation of § 10(b) as to the following defendants - Bachus,
18 DeConcini, Govenar, Noone, and John and Peter Sperling. Therefore,
19 its § 20A(a) insider trading claim against those six defendants
20 necessarily fails and the court grants their motion to dismiss in
21 that regard. See Johnson v. Aljian, 490 F.3d 778, 781 (9th Cir.
22 2007) (§ 20A claims require an independent violation of the Exchange
23 Act).

24 Defendants Nelson, Gonzales, Blair and Norton stand on different
25 footing that the defendants listed above, however, given the court's
26 finding that the FAC adequately alleges § 10(b) claims as to them.
27 Thus, the court must consider whether, nonetheless, these particular
28 defendants are entitled to dismissal of the § 20A(a) claim for

1 failure to plead contemporaneous trading. Contemporaneous trading
2 is a "judicially-created standing requirement, specifying that to
3 bring an insider trading claim, the plaintiff must have traded in a
4 company's stock at about the same time as the alleged insider."
5 Brody v. Transitional Hosps. Corp., 280 F.3d 997, 1001 (9th Cir.
6 2002). The underlying purpose of that requirement is to ensure
7 that "only parties who have traded with someone who had an unfair
8 advantage will be able to maintain insider trading claims; those who
9 did not trade contemporaneously could not have suffered a
10 disadvantage from the insider's failure to disclose." In re Silicon
11 Graphics, Inc. Sec. Litig., 970 F.Supp. 746, 761 (N.D.Cal. 1997).

12 Based upon Neubronner, Nelson, Norton and Gonzales contend that
13 because the FAC does not "identify stock purchases [plaintiff] made
14 contemporaneously with stock sales" by them, the court should
15 dismiss the insider trading claim as against them. Plaintiff
16 counters, in essence, that it is excused from that pleading
17 requirement because "contemporaneous trading can encompass
18 defendants' entire scheme." Resp. (doc. 94) at 53 (citation
19 omitted). Defendants retort that this argument runs afoul of the
20 Ninth Circuit's holding in Neubronner.

21 These arguments can easily be laid to rest. The "ultimate
22 conclusion" in Neubronner was "that contemporaneous trading must be
23 plead with particularity." Brody, 280 F.3d at 1001 (citing
24 Neubronner, at 673). That particularity requirement encompasses
25 allegations, at a minimum, of the dates upon which defendants sold
26 their stock compared with the dates upon which plaintiff purchased
27 stock. See, e.g., In re Connetics Corp. Sec. Litig., 2008 WL
28 3842938, at *12 (N.D.Cal. Aug. 14, 2008) (granting motion to dismiss

1 § 20A claims where plaintiff did not allege the dates upon which
2 certain defendants traded on insider information, and declining to
3 find that allegations that one defendant's contemporaneous trading
4 sufficed to show that other defendants also did); Silicon Graphics,
5 970 F.Supp. at 761 (dismissing with prejudice plaintiffs' insider
6 trading claims against three defendants where plaintiffs did not
7 allege that they traded contemporaneously with plaintiffs); and
8 Chan, supra, 1998 WL 1018624, at *12, n. 10 (citations omitted)
9 ("little basis" for insider trading claims where plaintiffs did not
10 allege "sufficient facts to establish that any of the Plaintiffs
11 traded contemporaneously with the Defendants[]"). No such
12 comparison can be made here. While exhibit G lists stock sales by
13 ten of the 11 individual defendants, with the exception of the two
14 allegations quoted at the beginning of this section, the FAC does
15 not include similar details as to plaintiff. The lack of
16 particularity as to plaintiff's trading history renders it
17 impossible for the court to perform any meaningful analysis of the
18 contemporaneous trading requirement, which at its core is a temporal
19 requirement.

20 To illustrate, In re Petco Animal Supplies Inc. Sec. Litig.,
21 2005 WL 5957816 (S.D.Cal. Aug. 1, 2005), by comparing that
22 plaintiff's "certification of [its] stock trades," listing purchases
23 with specific settlement dates, which was included as an exhibit to
24 the complaint, with the SEC forms defendants provided listing their
25 transaction dates, the court found that contemporaneous trading had
26 been sufficiently alleged so as to state a claim for insider
27 trading. Id. at *36-*37; see also In re Countrywide Financial Corp.
28 Sec. Litig., 588 F.Supp.2d 1132, 1205 (C.D.Cal. 2008) (§20A claim

1 sufficiently alleged based on "common stock transactions" as
2 evidenced in exhibit to complaint "listing § 20A Defendants' sales
3 next to contemporaneous [lead plaintiff's] purchases").

4 Plaintiff cites to In re Am. Bus. Computers Corp. Sec. Litig.,
5 1994 WL 848690 (S.D.N.Y. Feb. 24, 1994) (Brieant, J.), as a basis
6 for circumventing this contemporaneous trading requirement. The
7 court there did adopt the "rule that a class action may be
8 maintained on behalf of all persons who purchased stock on an
9 exchange during the period that defendants were selling that stock
10 on the basis of insider information." 1994 WL 848690, at *4. That
11 rule does not obviate the need, however, for plaintiff to allege in
12 the first instance "the precise days when it purchased and sold
13 [defendant's] stock," as is evidenced in Middlesex, 527 F.Supp. at
14 1196.

15 After weighing different approaches to the contemporaneous
16 trading requirement, including a strict same day time frame, the
17 Middlesex court decided to follow Judge Brieant's approach.
18 Nevertheless, it granted plaintiff leave to amend its complaint "to
19 add allegations related to its purchase of [defendant's] stock."
20 Id. In particular, it directed plaintiff to "specif[y] the precise
21 days when it purchased and sold [defendant's] stock" because neither
22 the FAC nor the exhibits thereto included such information, although
23 "another filing" before the court did. Id. That other filing
24 showed that "Plaintiff traded on the same day as [one defendant],
25 within eight days of [another], and within three days of [yet
26 another]." Id.

27 Without deciding whether it will ultimately adopt Judge
28 Brieant's rule, the court will follow the approach of the Middlesex

1 court and allow plaintiff to amend its complaint so as to allege
2 contemporaneous trading in the manner specified therein. Thus, the
3 motion to dismiss the second claim as to defendants Nelson, Norton
4 and Gonzales is denied on the condition that plaintiff amends its
5 complaint to sufficiently allege contemporaneous trading as to these
6 defendants. In the absence of such an amendment, the court will
7 grant the motion by these three defendants to dismiss the §20A(a)
8 insider trading claim.

9 Defendant Blair's position differs from the three defendants
10 just discussed because the FAC does allege that he traded
11 contemporaneously with Lead Plaintiff on January 6-7, 2005. FAC
12 (doc. 71) at ¶ 186(a).¹⁶ Nevertheless, the court agrees with
13 defendant Blair that this insider trading claim is lacking as
14 against him because plaintiff did not "plead facts to show that
15 [Blair's] trading was out of proportion with [his] usual trading."
16 See Chan, 1998 WL 1018624, at *12, n.10 (citation omitted).
17 Plaintiff makes the wholly unsupported assertion that because it has
18 adequately alleged scienter, "there is no requirement in § 20 that
19 an insider's sales . . . be out of line with prior trading history
20 to allege a violation[]" of that statute. Resp. (doc. 94) at 53.
21 The court adheres to its view previously expressed in Chan though,
22 and on that basis finds that plaintiff has not sufficiently pled
23 insider trading against defendant Blair.

24 The court will, however, allow plaintiff to amend its complaint
25

26 ¹⁶ Exhibit G actually shows that defendant Blair sold Apollo stock on,
27 among other days, January 3, 2005, but not on January 6-7, 2005. The court assumes
28 by his silence, and his failure to move for dismissal on the grounds that the
January 3, 2005, sale date is not sufficiently close to plaintiff's alleged sale
dates, that he concedes that the temporal proximity aspect of contemporaneous
trading is met by these allegations.

1 insofar as it is attempting to allege insider trading against
2 defendant Blair. Thus, as with defendants Nelson, Norton and
3 Gonzales, Blair's motion to dismiss this insider trading claim is
4 denied on the condition that plaintiff amends its complaint to
5 sufficiently allege insider trading as to defendant Blair.

6 **E. Control Person Liability**

7 In its third claim, plaintiff alleges "control person" liability
8 against all defendants pursuant to section 20(a) of the Exchange
9 Act. In the Ninth Circuit, to "prove a prima facie case under
10 Section 20(a), a plaintiff must prove: (1) a primary violation of
11 federal securities law and (2) that the defendant exercised actual
12 power or control over the primary violator." America West, supra,
13 320 F.3d at 945 (internal quotation marks and citation omitted).
14 However, "to make out a prima facie case, it is not necessary to
15 show actual participation or the exercise of power[,]" but "a
16 defendant is entitled to a good faith defense if he can show no
17 scienter and an effective lack of participation." Id. (internal
18 quotation marks and citation omitted).

19 The individual defendants offer two alternative bases for
20 dismissal of this section 20(a) claim. First, they state that
21 because plaintiff has not pled an underlying violation of section
22 10(b), the control person claim necessarily fails as well. Second,
23 the individual defendants contend that the FAC is deficient in that
24 it does not sufficiently "plead facts showing that each [of them]
25 controlled Apollo[.]" Mot. (doc. 82) at 25. These arguments are
26 meritorious as to some, but not all of the defendants.

27 "There is no concrete test for establishing whether a defendant
28 is a control person." Howard v. Hui, 2001 WL 1159780, at *3

1 (N.D.Cal. Sept. 24, 2001) (citing Wool v. Tandem Computers, Inc.,
2 818 F.2d 1433, 1441 (9th Cir. 1987) (“[T]he concept of control, in
3 the context of securities law, is an elusive notion for which no
4 clear-cut rule or standard can be devised.”). Accordingly,
5 “[w]hether [the defendant] is a controlling person is an intensely
6 factual question, involving scrutiny of the defendant’s
7 participation in the day-to-day affairs of the corporation and the
8 defendant’s power to control corporate actions.” America West, 320
9 F.3d at 945. The SEC defines “control” as “the possession, direct
10 or indirect, of the power to direct or cause the direction of the
11 management and policies of a person, whether through the ownership
12 of voting securities, by contract, or otherwise.” 17 C.F.R. §
13 230.405. Thus, among “the traditional indicia of control[]” are
14 “owning stock in the target company, or having a seat on the
15 board[.]” America West, 320 F.3d at 945 (internal quotation marks
16 and citation omitted). By the same token, “an individual’s status
17 as an officer or director of the issuing corporation is
18 insufficient, standing alone, to demonstrate the exercise of
19 control.” In re Amgen Inc. Sec. Litig., 544 F.Supp.2d 1009, 1037
20 (C.D.Cal. 2008) (citing Howard v. Everex Systems, Inc., 228 F.3d
21 1057, 1065 (9th Cir. 2000)). Nevertheless, there is “persuasive
22 authority indicat[ing] that an officer or director who has signed
23 false financial statements containing materially false and
24 misleading statements qualifies as a control person.” Id.
25 (collecting cases).

26 As previously discussed, plaintiff has not adequately pled a
27 primary violation of section 10(b) as to defendants Bachus,
28 DeConcini, Govenar, Mueller, Noone, and the Sperlings. Therefore,

1 the court grants the motion by these defendants to dismiss the
2 section 20(a) claims as against them. See Zucco, 552 F.3d at 990
3 (citations omitted) ("Section 20(a) claims may be dismissed
4 summarily, . . . , if a plaintiff fails to adequately plead a
5 primary violation of section 10(b).")

6 However, assuming *arguendo* that upon amendment plaintiff can
7 adequately allege a violation of § 10(b) against defendants Nelson,
8 Norton, Gonzales and Blair, the court must address the second prong
9 of § 20(a) liability - whether any of these individuals is a
10 controlling person within the meaning of that statute. Examining
11 the FAC in light of the principles set forth above readily shows
12 that the control person allegations are sufficient as to defendants
13 Nelson and Gonzales.¹⁷ The FAC alleges not just their respective
14 positions with Apollo -- Nelson as former Chair, CEO and President
15 and Gonzales as former CFO, Secretary and Treasurer -- but it also
16 describes their roles in Apollo's day-to-day operations, and more
17 specifically their involvement in the option grant and accounting
18 processes. The FAC further alleges as to defendants Nelson and
19 Gonzales that they signed false SOX certifications. The court thus
20 concludes that the FAC adequately alleges control person liability
21 under § 20(a) insofar as defendants Nelson and Gonzales are
22 concerned. Accordingly it denies their motion to dismiss the
23 § 20(a) claim as against them.

24 Although he was not an Apollo officer, the FAC sufficiently
25 alleges control person liability as to defendant Blair, former

26

27 ¹⁷ Indeed perhaps these defendants concede as much in that individual
28 defendants' motion focuses only upon the insufficiency of the control person
allegations as to defendants DeConcini, Govenar, Mueller and Noone. See Mot. (doc.
82) at 25.

1 Chairman of the Audit Committee and Compensation Committee member,
2 and defendant Norton, Audit Committee member and Chairman of the
3 Compensation Committee. The FAC delineates their duties and
4 responsibilities in the respective Committee capacities. More
5 specifically, the FAC alleges that as a member of the Audit
6 Committee, Norton "was responsible for Apollo's public financial
7 statements[,]" and as Compensation Committee Chairman, allegedly he
8 "controlled the other defendants' backdated stock option awards."
9 FAC at ¶ 23; see also id. at ¶¶ 39-40; and 115. Thus, the court
10 denies defendant Nelson's motion to dismiss the § 20(a) claim as
11 against him. See Batwin, 2008 WL 2676364, at *25 (denying motion to
12 dismiss § 20(a) claim by two defendants who "controlled the Audit
13 Committee" and as such "direct[ed] [the defendant Company's policies
14 relating to accounting and auditing during the Class Period[]").

15 The FAC includes similar allegations with respect to defendant
16 Blair, thus warranting the same result - denying his motion to
17 dismiss the section 20(a) claim. In particular, the FAC alleges
18 that as Chairman of the Audit Committee, he "caused or allowed the
19 dissemination of improper public statements[.]" FAC (doc. 71) at
20 ¶ 22. Moreover, "[a]s a member of the Compensation Committee,
21 defendant Blair controlled the other defendants' backdated stock
22 option awards." Id. As the FAC describes it, while serving on the
23 Compensation Committee defendants Blair and Norton "were responsible
24 for review[ing] all aspects of compensation of executive officers
25 and determin[ing] or mak[ing] recommendations on such matters to the
26 full [Apollo] Board. . .[.]" Id. at ¶ 39 (internal quotation marks
27 omitted); see also id. at ¶ 115 (enumerating "the role of the
28 Compensation Committee . . . in the backdating at Apollo, as well as

1 the deficiencies in the conduct of th[at] . . . Committee with
2 respect to the options granting process[]").

3 To summarize, the court grants the motion to dismiss the section
4 20(a) control person liability claims as against defendants Bachus,
5 DeConcini, Govenar, Mueller, Noone, and John and Peter Sperling.
6 However, the court denies this aspect of the motion to dismiss by
7 defendants Blair, Norton, Nelson, Gonzales and Apollo.

8 **F. State Law Claims**

9 State law is the basis for plaintiff's remaining two claims.
10 Plaintiff's fourth claim is for "breach of fiduciary duty and/or
11 aiding and abetting" against all defendants. FAC at 94.
12 Plaintiff's fifth and final claim is for "civil conspiracy to commit
13 fraud[,] " but it is only against defendants Nelson, Blair, Norton,
14 Bachus, Mueller, and Gonzales. Id. at 95.

15 As an initial matter, the individual defendants argue that the
16 court should decline to exercise its supplemental jurisdiction over
17 these remaining state law claims on the theory that plaintiff has
18 failed to state a claim under federal law. The court's rulings
19 herein undermine that argument however. Therefore, at this point in
20 the litigation, the court will continue to exercise its supplemental
21 jurisdiction over these state law claims.

22 **1. Securities Litigation Uniform Standards Act of 1998**

23 Apollo's penultimate argument is that the Securities Litigation
24 Uniform Standards Act of 1998 ("SLUSA") mandates dismissal of
25 plaintiff's state law claims because they include "allegations of
26 material misrepresentation and omission . . . and incorporate the
27 fraud claims asserted throughout the [FAC]." Mot. (doc. 81) at 29.
28 Reasoning that "[b]ecause Apollo is an Arizona corporation . . . ,

1 and plaintiff's state law claims are based on Arizona state law,"
2 plaintiff counters that those claims come within the purview of
3 SLUSA's so-called Delaware carve-out. Resp. (doc. 94) at 55. In
4 rejoinder, Apollo convincingly argues that plaintiff has not shown
5 that its state law claims fit within either prong of that carve-out.

6 After the enactment of the PSLRA which, *inter alia*, heightened
7 the pleading standards in federal securities cases, there was a
8 "pilgrimage of securities claims to state courts, thus circumventing
9 congressional reforms to restrict federal securities claims."
10 Falkowski v. Imation Corp., 309 F.3d 1123, 1128 (9th Cir. 2002)
11 (citations omitted). To stem this tide, Congress enacted the SLUSA.
12 See Merrill Lynch v. Dabit, 547 U.S. 71, 82, 126 S.Ct. 1503, 164
13 L.Ed.2d 179 (2006). "With few exceptions, SLUSA limits the
14 maintenance of certain class-action suits in either state or federal
15 court[.]" Huang v. Reyes, 2008 WL 648519, at *2 (N.D.Cal. March 6,
16 2008) (citing 15 U.S.C. § 77p(c), 78 bb(f)(2)). If a court
17 determines that SLUSA precludes an action or claim, dismissal is
18 required. See Kircher v. Putnam Funds Trust, 547 U.S. 633, 644, 126
19 S.Ct. 2145, 2155, 165 L.Ed.2d 92 (2006) ("If the action is
20 precluded [under SLUSA], neither the District Court nor the state
21 court may entertain it, and the proper course is to dismiss.")

22 Under SLUSA, no "covered class action" based on state law and
23 alleging "a misrepresentation or omission of a material fact in
24 connection with the purchase or sale of a covered security" may be
25 "maintained in any State or Federal Court by any private party." 15
26 U.S.C. § 78bb(f)(1)(A). Because plaintiff is invoking the Delaware
27 carve-out, presumably it concedes at the outset that its state law
28 claims meet those criteria, and thus are governed by SLUSA in the

1 first instance. In any event, as set forth below, undoubtedly that
2 is the case.

3 "A 'covered class action' is a lawsuit in which damages are
4 sought on behalf of more than 50 people[,] such as the present
5 action. See Dabit, 547 U.S. at 83, 126 S.Ct. at 1512 (footnote
6 omitted). Further, "[t]he grant of an employee stock option on a
7 covered security[,] of the kind at issue herein, "is a 'sale' of
8 that covered security for purposes of SLUSA preemption." Falkowski,
9 309 F.3d at 1129-30. Finally, in alleging state common law breach
10 of fiduciary duty, plaintiff expressly alleges "material
11 misrepresentations . . . regarding defendants' option backdating
12 scheme." FAC (doc. 71) at ¶ 194. Plaintiff similarly alleges that
13 certain defendants engaged in a civil conspiracy to commit fraud by,
14 *inter alia*, making false or misleading statements and/or omitting
15 material facts regarding stock option grants at Apollo. As the
16 foregoing shows, these state law claims fall within the category of
17 claims which SLUSA precludes. The issue thus becomes whether, as
18 plaintiff urges, it can avail itself of the Delaware carve-out
19 exception to SLUSA's broad reach.

20 That carve-out "exempts class actions based on the statutory or
21 common law of the security issuer's state of incorporation." Huang,
22 2008 WL 648519, at *2 (citations omitted). This exception
23 "preserves class actions based on the law of the security issuer's
24 state of incorporation when certain criteria are met." Crimi v.
25 Barnholt, 2008 WL 4287566, at *2 (N.D.Cal. Sept. 17, 2008) (citation
26 omitted). The action must involve either:

27 (I) the purchase or sale of securities by the
28 issuer or an affiliate of the issuer exclusively
from or to holders of equity securities of the

1 issuer; or
2 (ii) any recommendation, position, or other
3 communication with respect to the sale of
4 securities of the issuer that-
5 (I) is made by or on behalf of the issuer or an
6 affiliate of the issuer to holders of equity
7 securities of the issuer; and
8 (II) concerns decisions of those equity holders
9 with respect to voting their securities, acting
10 in response to a tender or exchange offer, or
11 exercising dissenters' or appraisal rights.

12 15 U.S.C. §§ 77p(d)(1), 78bb(f)(3)(A)(West Supp. 2008). A case
13 falling into either prong of this carve-out "may be maintained in a
14 State or Federal court[.]" 15 U.S.C. §§ 77p(d)(1)(A), 78
15 bb(f)(3)(A)(i)(West Supp. 2008).

16 As Apollo correctly points out, plaintiff made no attempt
17 to satisfy either of those two prongs. It is readily apparent that
18 plaintiff's state law claims do not meet the criteria of the first
19 prong. Apparently plaintiff is attempting to rely upon the second
20 prong because it cites to Indiana Elec. Workers Pension Trust Fund
21 v. Millard, 2007 WL 2141697 (S.D.N.Y. July 25, 2007), where the
22 court did hold that that prong precluded removal. Millard is
23 readily distinguishable, though, in that it included allegations
24 "that the defendants misrepresented the way the strike prices for L-
25 3's stock options were calculated in proxy statements sent to
26 shareholders . . . and that th[o]se misstatements led the
27 shareholders to authorize the Board to dedicate 6.5 million
28 additional shares to the stock option plan." Id. at *4. The
Millard court found that those allegations "relate[d] to
communications concerning a shareholder vote[.]" thus satisfying the
"voting their security' element of prong (II)." Id. at *8.

Here, the FAC does not include any such similar allegations

1 pertaining to Apollo's proxy statements. Accordingly, because
2 plaintiff's fourth and fifth claims based upon state law fall within
3 the ambit of SLUSA, and because these claims are not exempt under
4 the Delaware carve-out to that Act, the court grants defendants'
5 motion to dismiss these state law claims as precluded by SLUSA.
6 Having found that SLUSA clearly bars plaintiff's state law claims,
7 there is no need to address defendants' other proffered reasons for
8 dismissing these state law claims.

9 **III. Leave to Amend**

10 If the court grants all or, as it has, any part of defendants'
11 motions to dismiss, plaintiff specifically requests leave to amend
12 its FAC to "address any concerns" which the court "identifie[s][.]"
13 Resp. (doc. 94) at 56. In seeking leave to amend, plaintiff
14 stresses that where, as here, a responsive pleading has not yet been
15 filed, a plaintiff "may amend its pleading once as a matter of
16 course[.]" Fed. R. Civ. P. 15(a)(1).

17 Apollo alone is taking the position that the court should not
18 allow plaintiff to amend because this is the second amended
19 complaint and "Lead Counsel had more than one year from the end of
20 the proposed class period until the [FAC] was filed to conduct an
21 investigation[.]" Reply (doc. 97) at 14. "More importantly," from
22 Apollo's standpoint, is that granting leave to amend would not alter
23 the statute of repose; the preclusive effects of the SLUSA and
24 plaintiff's failure to adequately plead loss causation. Id.
25 Apollo's position is well taken as to the first two issues, but not
26 as to the third - loss causation -- given the court's finding that
27 plaintiff has sufficiently pled that element.

28 It is beyond cavil that leave to amend "should [be] freely

1 give[n] when justice so requires." Fed. R. Civ. P. 15(a)(2).
2 According to the Ninth Circuit, "[t]his policy is to be applied with
3 extreme liberality." Eminence Capital, *supra*, 316 F.3d at
4 1052(internal quotation marks and citations omitted). In the
5 seminal case of Foman v. Davis, 371 U.S. 178, 83 S.Ct. 227,
6 9 L.Ed.2d 222 (1962), the Supreme Court specified the following
7 factors which a district court should consider in deciding whether
8 to grant leave to amend:

9 In the absence of any apparent or declared
10 reason - such as undue delay, bad faith or dilatory
11 motive on the part of the movant, repeated failure
12 to cure deficiencies by amendments previously
13 allowed, undue prejudice to the opposing party by
14 virtue of allowance of the amendment, futility of
15 amendment, etc. - the leave should, as the rules
16 require, be 'freely given.'

17 Id. at 182, 83 S.Ct. 227.

18 "Not all of these factors merit equal weight[]" in a court's
19 analysis, however. Eminence Capital, 316 F.3d at 1052.

20 "[C]onsideration of prejudice to the opposing party . . . carries
21 the greatest weight." Id. (citation omitted). Moreover, "[a]bsent
22 prejudice, or a strong showing of any of the remaining Foman
23 factors, there exists a *presumption* under Rule 15(a) in favor of
24 granting leave to amend." Id. (emphasis in original) (citation
25 omitted). In a similar vein, the Ninth Circuit has stated that
26 "[a]dherence to these" relatively liberal amendment "principles is
27 especially important in the context of the PSLRA." Id. The Ninth
28 Circuit further cautioned that "we are not operating the world of
notice pleadings." Id. Rather, "[i]n this technical and demanding
corner of the law, the drafting of a cognizable complaint can be a
matter of trial and error." Id.

1 Preliminarily, the court notes that defendants are not
2 claiming any prejudice here, and the court can conceive of none.
3 There also has been no suggestion of bad faith and, again, the court
4 conceives of none. Likewise, defendants do not contend that
5 amendment would be futile. As in Cornerstone, supra, the court
6 finds that “[a]mendment may not be futile in this case, as
7 plaintiff’s [FAC] contains many of the factual allegations required
8 to plead securities liability against [Apollo] and [some of] the
9 individual defendants.” Cornerstone, 355 F.Supp.2d at 1094.

10 The pleading deficiencies here do not lay “in the raw content
11 of” the FAC, “but in the absence of rigorously particularized
12 allegations in accordance with the PSLRA.” See id. “While this
13 court regrets the accordingly painstaking effort that was required
14 by this court and [to some extent] by defendants to interpret [the
15 FAC], leave to amend will be granted[]” in accordance with the
16 court’s rulings herein and as set forth below. See id. Plaintiff
17 is advised, however, that failure to cure the pleading deficiencies
18 identified herein, and failure to comply with the relevant case law
19 in that regard, may well lead to dismissal of these claims in the
20 future.

21 **IV. Rule 54(b) Certification**

22 Pursuant to Fed. R. Civ. P. 54(b), a district court may direct
23 entry of final judgment, *inter alia*, “[w]hen an action presents more
24 than one claim for relief . . . or when multiple parties are
25 involved.” Fed. R. Civ. P. 54(b). In deciding whether entry of
26 final judgment under that Rule is appropriate, the court
27 “must first determine that it has rendered a ‘final judgment[.]’”
28 Wood v. GCC Ben, LLC, 422 F.3d 873, 878 (9th Cir. 2005). That means

1 a decision that is "an ultimate disposition of an individual claim
2 entered in the course of a multiple claims action." Curtiss-Wright
3 Corp. v. General Elec. Co., 446 U.S. 1, 7, 100 S.Ct. 1460, 64
4 L.Ed.2d 1 (1980) (internal quotation marks and citation omitted).
5 Here, the court has rendered a final disposition as to plaintiff's
6 claims against Messrs. Bachus, Mueller and DeConcini, and Ms.
7 Govenar and Ms. Noone by granting their respective motions to
8 dismiss all claims against them.

9 Next, as Rule 54(b) requires, the court must "expressly
10 determine[] that there is no just reason for delay." Fed. R. Civ.
11 P. 54(b). "It is left to the sound judicial discretion of the
12 district court to determine the 'appropriate' time when each final
13 decision in a multiple claim action is ready for appeal." Id. at 8,
14 100 S.Ct. 1460. "This discretion is to be exercised in the interest
15 of sound judicial administration." Id. (internal quotation marks
16 and citation omitted).

17 Whether there is "no just reason for delay" involves a two-step
18 inquiry - "judicial concerns and "equitable concerns. See Gregorian
19 v. Izvestia, 871 F.2d 1515, 1519 (9th Cir. 1989). Succinctly put,
20 "judicial concerns" involve evaluating "the interrelationship of
21 claims so as to prevent piecemeal appeals in cases which should be
22 reviewed only as single units." Curtiss-Wright, 446 U.S. at 10, 100
23 S.Ct. 1460. "A judgment should not be certified . . . under Rule
24 54(b) when 'the facts on all claims and issues *entirely overlap* and
25 successive appeals are essentially inevitable.'" Robinson v. De la
26 Vega, 2008 WL 4748171, at *2 (S.D.Cal. Oct. 24, 2008) (quoting Wood,
27 422 F.3d at 883) (emphasis added). "Thus, the trial court must
28 consider whether: 1) certification would result in unnecessary

1 appellate review; 2) the claims finally adjudicated were separate,
2 distinct, and independent of any other claims; 3) review of the
3 adjudicated claims would be mooted by any future developments in the
4 case; and 4) an appellate court would have to decide the same issue
5 more than once even if there were subsequent appeals." Id. (citing
6 Wood, 422 F.3d at 879).

7 There is some commonality among the claims against the remaining
8 defendants and the adjudicated claims of the defendants listed
9 above. On balance, however, and focusing upon "severability and
10 efficient judicial administration[,]" Wood, 422 F.3d at 880, the
11 court finds that the dismissed claims are "sufficiently separate and
12 distinct" from plaintiff's remaining claims so as to warrant entry
13 of final judgment as to defendants Bachus; Govenar; Mueller;
14 DeConcini; and Noone. See Ahmadi v. Chertoff, 2008 WL 1886001, at
15 *6 (N.D.Cal. April 25, 2008). Moreover, the facts on all claims and
16 issues certainly do not "entirely overlap." Given that the claims
17 of the just listed defendants are easily severable from those of the
18 remaining defendants, the court finds that in the interest of
19 efficient judicial administration, judgment under Rule 54(b) is
20 appropriate here.

21 Assessing the equities, the court sees no just reason for
22 delaying an appeal as to the defendants listed in the preceding
23 paragraph. Given the already protracted nature of this action,
24 prejudice would result to those defendants if they were forced to
25 await the final resolution of this action. Moreover, the court
26 cannot ignore the fact that litigation of this kind is costly, both
27 from a monetary and an emotional standpoint. Given those costs and
28 the resultant prejudice, the equities weigh heavily in favor of

1 allowing defendants Bachus, Govenar, Mueller, DeConcini, and Noone,
2 to have finality sooner rather than later. Thus, the court finds
3 that judgment should be entered as to the above named defendants as
4 Rule 54(b) allows.

5 **Conclusion**

6 For the reasons set forth above, IT IS ORDERED that the motion
7 to dismiss by defendant Apollo Group, Inc. (doc. 81) and the
8 individual defendants (doc. 82) is GRANTED in part and DENIED in
9 part:

- 10 (1) defendants' motions are GRANTED to the extent
11 plaintiff's claims are based on statements outside the
statute of repose (*i.e.*, prior to November 2, 2001);
- 12 (2) defendants motions are GRANTED on statute of
13 limitations grounds to the extent plaintiff is alleging
14 stock option backdating for grants on December 18, 1998;
April 19, 1999; January 12, 2000; December 15, 2000; and
September 21, 2001;
- 15 (3) GRANTS with prejudice the motion to dismiss the §10(b)
16 and Rule 10b-5 claim against defendants Daniel E. Bachus;
Dino J. DeConcini; Hedy Govenar; Brian E. Mueller; and
17 Laura Noone;
- 18 (4) GRANTS without prejudice the motion to dismiss the §
10(b) and Rule 10b-5 claim against defendants John G.
19 Sperling and Peter Sperling;
- 20 (5) DENIES the motion to dismiss the § 10(b) and Rule 10b-
21 5 claims against defendants Todd S. Nelson; Kenda B.
Gonzales; John R. Norton III; John Blair; and the Apollo
Group, Inc.;
- 22 (6) GRANTS with prejudice the motion to dismiss the
23 §20A(a) insider trading claim against defendants Daniel E.
Bachus; Dino J. DeConcini; Hedy Govenar; and Laura Noone;
- 24 (7) GRANTS without prejudice the motion to dismiss the §
25 20A(a) insider trading claim against defendants John G.
Sperling and Peter Sperling;
- 26 (8) DENIES the motion to dismiss the § 20A(a) insider
27 trading claim against defendant Todd S. Nelson; Kenda B.
Gonzales; John R. Norton III; and John Blair;
- 28 (9) GRANTS with prejudice the motion to dismiss the §20a

1 control person liability claims against defendants Daniel
2 E. Bachus; Dino J. DeConcini; Hedy Govenar; Brian E.
Mueller; and Laura Noone;

3 (10) GRANTS without prejudice the motion to dismiss the §
4 20a control person liability claim against defendants John
G. Sperling and Peter Sperling;

5 (11) DENIES the motion to dismiss the § 20a control person
6 liability claim against defendants Todd S. Nelson, Kenda B.
Gonzales; John R. Norton III; John Blair; and the Apollo
7 Group, Inc.;

8 (12) GRANTS with prejudice defendants' motion to dismiss
9 the state law claim "For Breach of Fiduciary Duty and/or
Aiding and Abetting[;]"

10 (13) GRANTS with prejudice the motion to dismiss the state
11 law claims for "Civil Conspiracy to Commit Fraud" by
defendants Todd S. Nelson; John Blair; John R. Norton III;
Kenda B. Gonzales; Daniel E. Bachus; and Brian E. Mueller;

12 (14) GRANTS plaintiff's "request" for leave, if it so
13 desires, to further amend its complaint and to file a
14 second amended complaint within thirty (30) days of the
15 entry of this order as to defendants Apollo Group, Inc.;
John G. Sperling; Todd S. Nelson; Kenda B. Gonzales; John
Blair; John R. Norton III; and Peter Sperling; and

16 IT IS FURTHER ORDERED that pursuant to Fed. R. Civ. P. 54(b),
17 the Clerk of the Court is hereby directed to enter judgment in favor
18 of defendants Daniel E. Bachus; Hedy Govenar; Brian E. Mueller; Dino
19 J. DeConcini; and Laura Noone.

20 DATED this 27th day of March, 2009.

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23 _____
24 Robert C. Broomfield
25 Senior United States District Judge
26
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28 Copies to all counsel of record