

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 06-11068-RWZ

IN RE BROOKS AUTOMATION, INC.
SECURITIES LITIGATION

MEMORANDUM OF DECISION AND ORDER

November 6, 2007

ZOBEL, D.J.

I. Introduction

This consolidated securities class action alleges violations of the 1933 Securities Act (“33 Act”) and 1934 Securities Exchange Act (“34 Act”) based upon the alleged backdating of stock options by certain executives of Brooks Automation, Inc. (“Brooks” or “the Company”). Currently pending before the court are plaintiffs’ motion to amend the complaint to add a new named plaintiff and defendants’ separate motions to dismiss the complaint. For the reasons discussed below, the motion to amend is allowed, and the motions to dismiss are allowed in part and denied in part.

II. Factual Background¹

Brooks is a publicly-traded semiconductor maker and supplier of hardware and software to chip manufacturers. During the time period relevant to this case, Brooks granted stock options to employees and non-employee directors pursuant to several

¹ These facts are taken from Plaintiffs’ Consolidated Amended Class Action Complaint. In deciding a motion to dismiss under Rule 12(b)(6), the court must accept all well-pleaded factual allegations in the complaint as true. Shaw v. Digital Equip. Corp., 82 F.3d 1194, 1216 (1st Cir. 1996), superceded on other grounds.

stock option plans, including the 1992 Combination Stock Option Plan (the “1992 Plan”), the 1993 Nonemployee Director Stock Option Plan (the “Nonemployee Director Plan”), and the 2000 Equity Incentive Plan (the “2000 Plan”) (collectively, the “Stock Option Plans”). All of the Stock Option Plans provided that, with few exceptions, the exercise price of options granted thereunder was to be not less than the “Fair Market Value” of the stock on the date of the grant. “Fair Market Value” was defined as “the last sale price of the Shares as reported on the [NASDAQ] or on a national securities exchange on which the Shares may be traded on the date of the granting of the Option,” or, “if none, . . . the closing sales price on the nearest trading date before that date” Throughout the putative class period, Brooks’ SEC filings stated that its Stock Option Plans were accounted for in accordance with generally accepted accounting principles (“GAAP”), and that options issued under the Stock Option Plans were granted with exercise prices not less than Fair Market Value.

The 1992 Plan and 2000 Plan gave exclusive authority to Brooks’ Compensation Committee to determine the timing and amount of stock option grants. The Nonemployee Director Plan granted Brooks’ Board of Directors the authority to determine the timing and amount of stock option grants, but it allowed the Board to delegate this authority to the Compensation Committee or other committee of the Board.

On March 18, 2006, the *Wall Street Journal* published an article concerning the timing of stock option grants at six companies, including Brooks. The article suggested that the companies may have engaged in a practice of “backdating” stock option grants

such that the option would reflect an earlier grant date, when the stock price was lower than on the actual grant date.² The article highlighted particular options granted to Brooks' former CEO, defendant Robert Therrien ("Therrien"), in May 2000 and October 2001, and to two members of Brooks' Compensation Committee, defendants Roger D. Emerick ("Emerick") and Amin J. Khoury ("Khoury"), in May 2000.

On April 26, 2006, Brooks announced that a special committee of the board of directors would review the Company's option granting practices. A series of events then quickly occurred in May 2006:

- On May 11, Brooks announced that the special committee had determined that Brooks had not accounted for its stock option grants correctly and its historical financial results for some or all of the periods from fiscal 1999 through fiscal 2005 would need to be restated. The announcement further disclosed that Brooks did not timely file its Form 10-Q for the period ending March 31, 2006, but would do so as soon as was practical after the special committee's review was complete;
- On May 12, after the close of trading, Brooks announced that the Securities and Exchange Commission ("SEC") had commenced an informal investigation into the stock option granting practices at Brooks. The announcement further stated that Brooks' stock might be subject to de-listing by NASDAQ as a result of the Company not making a timely filing of its Form 10-Q;
- On May 17, Brooks announced that it was in technical default of certain debt covenants as a result of not timely filing its Form 10-Q;
- On May 18, Emerick and Khoury resigned from their positions on the board and

² Granting so-called "in the money" options, in which the strike price is lower than the market price on the grant date, is not illegal. However, a company granting "in the money" options must recognize and record a compensation expense in its financial statements. A company need not record a compensation expense for so-called "out of the money" options, in which the strike price is higher than the market price on the grant date. Backdating options to an earlier date with a lower market price would enable a company to grant "in the money" options without recording a compensation expense.

the Compensation Committee; and

- On May 22, Brooks announced that it had received a subpoena from the U.S. Attorney for the Eastern District of New York relating to the stock option granting practices at the Company.

During this period, the price of Brooks' stock fell from \$14.69 per share on May 10 to \$12.00 per share on May 23.

On July 31, 2006, Brooks announced that it was filing an amended Form 10-K with the SEC for the year ended September 30, 2005 (the "Restatement"). It acknowledged that there were material accounting errors with respect to a number of stock options granted during fiscal years 1996 to 2005, and said that the Company had revised its financial statements for those fiscal years to record additional non-cash stock-based compensation expense of \$58.7 million. The announcement further stated that the incorrect accounting for the options at issue stemmed from two errors:

(1) we treated unanimous written consents of directors approving stock option grants as effective on the date stated on the consent, instead of the date upon which the Company received the consent form containing the last signature required for unanimity; and (2) we treated option grants to multiple employees as effective prior to the date upon which we had determined the exact number of options that would be granted to each individual employee.

(Docket # 70 ¶ 83.)³

³ The Restatement further disclosed that the Company recorded approximately \$5.8 million of non-cash, stock-based compensation expense in connection with a stock option held by Therrien that he was permitted to exercise in November 1999 despite its expiration in August 1999. The Company previously accounted for the transaction as a loan, as a result of a ratification document signed by Therrien, Emerick and Khoury in November 1999 under which Therrien was deemed to have been granted a loan as of August 1999. According to the ratification document, Therrien, Emerick and Khoury discussed extending a loan to Therrien in June 1999 for the purpose of permitting him to exercise a stock option prior to its expiration in August 1999. Based on the

On July 25, 2007, the SEC filed a civil complaint against Therrien stemming from its investigation of stock options granting practices at Brooks. The complaint alleges, inter alia, that Therrien engaged in a scheme to falsify company records to create the appearance that options had been granted on earlier dates with lower market prices than the market price existing at the time of the actual grant determination. The complaint contains specific allegations regarding Therrien's November 1999 exercise of expired options and other option grants dated January 4, 1999, May 31, 2000, January 5, 2000, and October 1, 2001. On the same day, the Department of Justice filed a criminal indictment against Therrien for tax evasion stemming from his exercise of the expired options in November 1999.

III. Procedural History

On June 19, 2006, plaintiff Charles E.G. Leech, Sr. ("Leech") filed a putative shareholder class action in which he asserts claims under the '33 and '34 Acts against the following defendants: Brooks; former CEO and director Therrien; former outside director Emerick; former outside director Khoury, former Chief Financial Officer ("CFO") Ellen B. Richstone ("Richstone"); current CEO and director Edward C. Grady ("Grady"); and current CFO Robert W. Woodbury, Jr. ("Woodbury"). A second proposed

ratification document, the Company in November 1999 deemed Therrien to have timely exercised the options and accounted for the exercise without recognizing a compensation expense. The Company stated that the Special Committee's investigation had determined that Therrien misrepresented the facts of the loan and the ratification document was false, as there were no discussions concerning a loan in June 1999. As a result, the option expired in August 1999 and a compensation expense should have been recorded in connection with Therrien's purchase of stock in November 1999. (Compl. ¶ 86.)

shareholder class action, Shaw v. Brooks Automation, Inc., et al., Civ. No. 06-11239-RWZ, was filed one month later, on July 19, 2006. The Shaw action alleges violations only of the '34 Act, but it is otherwise substantively identical to the Leech action in its allegations and claims for relief, and in the defendants named.

On December 13, 2006, this court allowed plaintiffs' motion to consolidate the actions. It also appointed the Los Angeles County Employees Retirement Association ("LACERA") as Lead Plaintiff for the proposed class and its counsel, Lief Cabraser Heimann & Bernstein LLP, as Lead Counsel.

On February 9, 2007, LACERA filed a Consolidated Amended Class Action Complaint ("Complaint" or "Compl.") (Docket # 70). It substantially tracks the original complaint, but adds claims against two new defendants: PricewaterhouseCoopers, LLP ("PwC"), Brooks' independent auditor; and Joseph R. Martin ("Martin"), a director and the current Chairman of Brooks' Board of Directors.

The '34 Act claims, Counts I and II, are asserted on behalf of shareholders who purchased or otherwise acquired shares of Brooks between July 25, 2001, and May 22, 2006 (the "Class Period"). Count I alleges that Brooks, Therrien, Khoury, Emerick, Martin and Richstone violated § 10(b) and Rule 10b-5. Count II claims that Therrien, Khoury, Emerick, Martin, Richstone, Grady and Woodbury violated § 20(a).

The '33 Act claims, Counts III through VI, are brought on behalf of a subset of the proposed class, consisting of investors who acquired Brooks' shares that were traceable to the merger of Brooks with Helix Technologies, Corp. ("Helix") on or about October 26, 2005 (the "Merger"). The claims allege that the Joint Proxy/Prospectus

and Registration Statement issued in connection with the Merger contained materially false statements concerning Brooks' financial results due to the Company's backdating of stock options. Counts III and IV allege violations of § 11 by, respectively, Brooks, Therrien, Emerick, Khoury and Martin (Count III), and Woodbury, Grady and PWC (Count IV). Count V alleges that Brooks violated § 12(a)(2). Finally, Count VI alleges that Therrien, Emerick, Khoury, Martin, Grady and Woodbury violated § 15.

On May 10, 2007, LACERA moved to amend their complaint to add a new named plaintiff, the Sacramento County Employee Retirement System ("SCERS"). LACERA's request stems from defendants' motion to dismiss the '33 Act claims for lack of standing because LACERA did not acquire Brooks' shares traceable to the Merger. SCERS filed a Lead Plaintiff Certification with the motion, certifying that it did acquire Brooks' shares traceable to the Merger. The proposed Consolidated Second Amended Class Action Complaint ("Amended Complaint" or "Am. Compl.") effects no substantive changes to the Complaint; it only (1) adds SCERS as an additional named plaintiff; (2) reflects the price at which SCERS obtained shares of Brooks' stock; and (3) updates LACERA's current membership numbers. SCERS also filed a supplemental Lead Plaintiff certification that provided more detail about its trading activity. Defendants oppose the motion on futility grounds.

The case is before me now on defendants' motions to dismiss and plaintiffs' motion to amend.

IV. Motion to Amend Complaint

A. Legal Standard

Rule 15 of the Federal Rules of Civil Procedure, which governs amendment of pleadings, provides that leave to amend “shall be freely given when justice so requires.” The parties agree that the only issue is whether amendment would be futile. “Futility’ means that the complaint, as amended, would fail to state a claim upon which relief could be granted. In reviewing for ‘futility,’ the district court applies the same standard of legal sufficiency as applies to a Rule 12(b)(6) motion.” Glassman v. Computervision Corp., 90 F.3d 617, 623 (1st Cir. 1996) (internal citations omitted). Defendants argue that amendment would be futile because SCERS does not have standing to bring ’33 Act claims.

B. SCERS’ Damages

The issue underlying the matter of standing is whether SCERS has adequately pled damages of the type compensable under §§ 11 and 12 of the ’33 Act. Section 11(e) provides:

The suit authorized under subsection (a) of this section may be to recover such damages as shall represent the difference between the amount paid for the security (not exceeding the price at which the security was offered to the public) and (1) the value thereof as of the time such suit was brought, or (2) the price at which such security shall have been disposed of in the market before suit

15 U.S.C. § 77k(e). To establish standing under this section, therefore, a plaintiff must at a minimum allege either that it owned traceable shares at the time of the suit or that it sold traceable shares for a loss prior to filing the suit. Id.

Defendants correctly point out that SCERS’ initial certification failed to state whether it satisfied either of these prerequisites. Its supplemental certification has

attempted to address this deficiency. SCERS has certified that it obtained 19,042 shares of Brooks' stock traceable to the Merger on October 27, 2005. The listing of SCERS trading activity which, SCERS has certified, represents all of its transactions in Brooks' stock during this time period, indicates that it sold 17,200.05 shares in the period from October 27, 2005 to June 19, 2006, the date the Leech action was filed. Therefore, if relation back to the commencement of this action is allowed, SCERS has adequately established standing.⁴

Given the statutory provision above, SCERS will only have damages under § 11(e)(1) if Brooks' shares were trading lower at the time of suit than at the Merger date. Alpern v. UtiliCorp United, Inc., 84 F.3d 1525, 1541-42 (8th Cir. 1996). On the Merger date, October 26, 2005, the closing price for Brooks' shares was \$12.69 per share. On the date Leech filed suit, June 19, 2006, Brooks' stock closed at \$11.26 per share. On February 9, 2007, the date LACERA filed its amended complaint, Brooks' stock closed at \$15.25 per share. Finally, on May 10, 2007, the date LACERA moved to amend the complaint to add SCERS as a named plaintiff, Brooks' stock closed at \$16.80 per share. Accordingly, SCERS has only suffered damages under § 11(e)(1) if its claims relate back to the Leech complaint.⁵

⁴ SCERS has not adequately pled that it held shares traceable to the Merger either on February 9, 2007, when LACERA filed its complaint, or on May 10, 2007, when LACERA moved to amend the complaint to add it as a named plaintiff. Therefore, it only has standing to sue under § 11(e)(1) if its claims relate back to the Leech suit.

⁵ SCERS has additionally certified that it "sold a combined 7,900 shares of Brooks securities between June 23, 2006 and July 10, 2006" for amounts less than the Merger price. (Docket # 113-2 ¶ 3.) However, SCERS conspicuously does not certify or plead that the shares it sold during this period are traceable to the Merger, and given

C. Relation Back to the First-Filed Complaint

Defendants argue that SCERS' claims cannot relate back to the Leech complaint because Leech failed to establish his standing to assert '33 Act claims.⁶ Although Leech's certification simply states that he acquired Brooks' shares on October 26, 2005 (the Merger date), and does not list any other transactions in Brooks' stock, his complaint does specifically allege that he acquired Brooks' stock "in the merger between Brooks and Helix" and "traceable to and in reliance on, the Joint Proxy Statement/Prospectus" filed in connection with the Merger. (Id. ¶¶ 103, 108, 117.) The court is constrained to accept the factual allegations of the complaint as true. Tellabs, Inc. v. Makor Issues & Rights, Ltd., — U.S. — , 127 S. Ct. 2499, 2509 (2007).

Similarly, although Leech's certification does not specify whether he still held Brooks' stock traceable to the Merger at the time of his suit or sold such stock for a loss prior to suit, his complaint alleges that he has a right to rescission under § 12 of the '33 Act because he holds Brooks common stock traceable to the Merger. For the purpose of the pending motion this is sufficient to establish Leech's ownership of Brooks' shares traceable to the Merger at the requisite time, and, thus, his standing.⁷

SCERS' active trading history in open market Brooks' shares, the court cannot presume this fact. Therefore, SCERS has not sufficiently alleged damages under § 11(e)(2).

⁶ PwC and Martin alternatively argue that neither LACERA nor SCERS should be allowed to relate back to the Leech complaint as to them, since they were not added as defendants until LACERA filed its complaint in February 2007. This argument will be addressed below.

⁷ Notably, Leech does not similarly identify himself as a class member who is entitled to rescission damages as a result of selling Brooks' common stock traceable to the Merger. Like SCERS, he therefore did not sufficiently allege any damages under §

The next question is whether SCERS' '33 Act claims may relate back to Leech's complaint under Federal Rule of Civil Procedure 15(c)(3). Rule 15(c)(3) provides that an amendment of a pleading relates back to the date of the original pleading when

(3) the amendment changes the party or the naming of the party against whom a claim is asserted if the foregoing provision (2) [requiring the claim or defense asserted in the amended pleading to arise out of the conduct, transaction, or occurrence set forth in the original pleading] is satisfied and . . . the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

Fed. R. Civ. P. 15(c)(3) (emphasis added). "Although the text of Rule 15(c)(3) seems to contemplate changes in the identity of defendants, we have recognized that the rule can be applied to amendments that change the identity of plaintiffs." Young v. Lepone, 305 F.3d 1, 14 (1st Cir. 2002). The First Circuit has identified three requirements for substitution of plaintiffs under Rule 15(c)(3): (1) the amended complaint must arise out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading; (2) there must be a sufficient identity of interest between the new plaintiff, the old plaintiff, and their respective claims so that the defendants can be said to have been given fair notice of the latecomer's claim against them; and (3) undue prejudice must be absent. Id.

All of these requirements are satisfied with regard to the defendants sued by Leech (i.e., Brooks, Therrien, Richstone, Emerick, Khoury, Woodbury and Grady). SCERS' claims arise from the same events alleged by Leech. Sufficient identity of

11(e)(2).

interest between Leech and SCERS exists, as they are both members of the putative class of purchasers of Brooks' stock pursuant to the Merger and allege identical claims. Thus, defendants will not be called upon to defend against new facts and issues. See id. at 15 (noting that whether defendants will face new facts and issues is the "focal point" of the identity of interest requirement). The defendants sued by Leech are not prejudiced by the relation back, as those defendants were put on notice by Leech's suit that they would have to defend class action claims under the '33 Act. See Plubell v. Merck & Co., 434 F.3d 1070, 1073 (8th Cir. 2006).

However, the defendants brought into this case by LACERA's February 9, 2007 complaint (i.e., PwC and Martin) are a different matter. SCERS claims may relate back to the date of LACERA's complaint, February 9, 2007, as the three requirements discussed above are met. However, LACERA's claims against the new defendants do not relate back to the Leech complaint. These new defendants did not receive notice of the filing of the action, nor did they know that they would have been named in the initial complaint but for a mistake of identity. Fed. R. Civ. P. 15(c)(3); see also Bamberg v. SG Cowen, 236 F. Supp. 2d 79, 86 (D. Mass. 2002) (refusing to allow claim against new defendants to relate back to date of initial complaint). Because LACERA's claims against PwC and Martin do not relate back to the Leech complaint, SCERS' claims cannot relate back, either.

In any event, SCERS does not have statutory damages under § 11(e)(1) with regard to PwC and Martin, as the price of Brooks' stock on February 7, 2007, was higher than the price of the stock on the Merger date. Its § 11 claims against them are

therefore dismissed. As the complaint alleged damages against PwC only with regard to § 11, PwC is dismissed from this action entirely.

Since SCERS may assert '33 Act claims against Brooks, Therrien, Richstone, Emerick, Khoury, Woodbury and Grady, LACERA's motion to amend the complaint to add SCERS as a named plaintiff is not futile and is allowed. As the Second Amended Complaint is identical to LACERA's complaint save the addition of SCERS as a named plaintiff, I adopt LACERA's uncontested suggestion to decide the pending motions to dismiss in the context of the Second Amended Complaint. See In re Biopure Corp. Deriv. Litig., 424 F. Supp. 2d 305, 307 (D. Mass. 2006) (granting leave to amend complaint and reading defendants' motion to dismiss initial amended complaint as motion to dismiss second amended complaint).⁸

V. Motions to Dismiss

In deciding the motions to dismiss, I accept as true all well-pleaded allegations and give plaintiffs the benefit of all reasonable inferences. Ezra Charitable Trust v. Tyco Int'l, Ltd., 466 F.3d 1, 6 (1st Cir. 2006). However, I am free to "disregard bald assertions, unsupportable conclusions, and opprobrious epithets." In re Credit Suisse First Boston Corp., 431 F.3d 36, 45 (1st Cir. 2005). Dismissal is appropriate only if the complaint "presents no set of facts justifying recovery." Cooperman v. Individual, Inc., 171 F.3d 43, 46 (1st Cir. 1999).

A. The Section 10(b) and Rule 10b-5 Claims

⁸ For ease of reference, the court will continue to cite to LACERA's initial complaint instead of the Second Amended Consolidated Class Action Complaint.

To make out a securities fraud claim under section 10(b), a plaintiff must show:⁹ (1) a material misrepresentation or omission; (2) scienter; (3) connection with the purchase or sale of a security; (4) reliance; (5) economic loss; and (6) loss causation. Dura Pharm., Inc. v. Broudo, 544 U.S. 336, 341-42 (2005). Defendants argue that the complaint's allegations are inadequate with respect to scienter and loss causation.¹⁰

The Private Securities Litigation Reform Act ("PSLRA") imposes a heightened pleading standard. 15 U.S.C. § 78u-4(a)(2)(A). Under this standard, "any private securities complaint alleging that the defendant made a false or misleading statement must: (1) specify each statement alleged to have been misleading [and] the reason or reasons why the statement is misleading, . . .; and (2) state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." Tellabs, 127 S. Ct. at 2508 (internal citations omitted) (quoting 15 U.S.C. § 78u-4(b)(1) and (2)).

In addition, the complaint must satisfy Rule 9(b), which provides that "[i]n all averments of fraud . . ., the circumstances constituting the fraud . . . shall be stated with particularity." Fed. R. Civ. P. 9(b). The complaint must specify "(1) the statements that

⁹ Section 10(b) makes it unlawful to "use or employ, in connection with the purchase or sale of any security . . ., any manipulative or deceptive device or contrivance. . . ." 15 U.S.C. § 78j(b). Rule 10b-5 outlaws, inter alia, making any "untrue statement of a material fact," or omitting to "state a material fact necessary in order to make the statements made . . . not misleading," or engaging in "any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security." 17 C.F.R. § 240.10b-5.

¹⁰ While defendants also deem insufficient the allegations of materiality, they clearly pass muster.

the plaintiff contends were fraudulent; (2) the identity of the speaker; (3) where and when the statements were made; [and] (4) why the statements were fraudulent.” Fitzer v. Sec. Dynamics Tech., Inc., 119 F. Supp. 2d 12, 18 (D. Mass. 2000). Allegations based on information and belief “must set forth the source of the information and the reasons for the belief.” Romani v. Shearson Lehman Hutton, 929 F.2d 875, 878 (1st Cir. 1991), superseded by statute on other grounds.

1. Loss Causation

Defendants argue that Brooks has not adequately alleged loss causation because Brooks’ stock price rose after the March 18, 2006 *Wall Street Journal* article and again after the July 31, 2006 publication of the Restatement. However, plaintiffs have alleged particular details regarding the decline in Brooks’ stock price that occurred during the period from May 11, 2006, through May 22, 2006, when Brooks made several successive disclosures regarding investigations into its stock option practices. (See supra Section II; Compl. ¶¶ 76-81.) Although the parties dispute the exact timing of some of these disclosures and the resultant effect they may have had on the stock price, the complaint’s allegations of loss causation are, under Rule 8(a)(2), sufficient at this stage. See Brumbaugh v. Wave Sys. Corp., 416 F. Supp. 2d 239, 256 (D. Mass. 2006) (finding that plaintiff who alleged specific disclosures and resultant share price decreases adequately furnished defendants with “some indication of [their] loss and the causal connection that [they have] in mind”) (quoting Dura, 544 U.S. at 347).

2. Scienter

Defendants challenge the adequacy of the complaint to state with particularity facts which give rise to a “strong inference” of scienter. The Supreme Court has defined “scienter” as “a mental state embracing intent to deceive, manipulate, or defraud.” Ernst & Ernst v. Hochfelder, 425 U.S. 185, 193 & n.12 (1976). In the First Circuit, a plaintiff may plead scienter by alleging either that the defendants consciously intended to defraud, or that they acted with a high degree of recklessness. Ezra, 466 F.3d at 6.

The Supreme Court has recently clarified the meaning of the “strong inference” requirement. See Tellabs, 127 S. Ct. at 2508-10. Under the Tellabs test, the court must view the complaint as a whole and take into account competing plausible inferences. Id. at 2510. A complaint will survive only “if a reasonable person would deem the inference of scienter cogent and at least as compelling as any opposing inference one could draw from the facts alleged.” Id. The court must consider whether “all of the facts alleged, taken collectively, give rise to a strong inference of scienter, not whether any individual allegation, scrutinized in isolation, meets that standard. Id. at 2509.

LACERA has alleged that the “Backdating Defendants” (Brooks, Therrien, Emerick, Khoury, Martin and Richstone) engaged in a long-running scheme to enrich themselves and other of Brooks’ officers and directors by purposefully backdating stock options grants to make them appear as if they were issued on dates when Brooks’ stock price was low (e.g., before a steep rise in the price or after a steep decline in the

price). In support of its assertion, which is made on information and belief,¹¹ LACERA relies on: (1) the March 2006 *Wall Street Journal* article, which discussed the odds of two of the grants happening by chance instead of by deliberate backdating; (2) graphs of stock price movements in the days surrounding the dates of twelve grants during the period from 1996-2002; and (3) the Company's Restatement.

The March 18, 2006 *Wall Street Journal* article identified two options given to Therrien dated May 31, 2000, and October 1, 2001. These are two of the option dates identified in the complaint (¶¶ 72(l) and 72(l)). According to the *Wall Street Journal*, on May 31, 2000, Brooks' stock declined over 20%, only to rise more than 30% the next day. Brooks' stock price on October 1, 2001, was the stock's lowest closing price that year. The *Wall Street Journal* analysis put the odds of these two grants occurring on the lowest price dates by chance at "about 1 in nine million." (Compl. ¶ 52.)

LACERA alleges that its graphs of stock price movements show a "striking pattern [of backdating] that could not have been the result of chance." (Compl. ¶ 72.) The graphs of stock price movements show that on six of the twelve dates identified by LACERA, the stock grant was not issued on the day with the lowest price. (See *id.* ¶ 72(b) (price lower the day before the grant); ¶ 72(c) (price lower the day after the grant); ¶ 72(e) (price lower two and three days before the grant); ¶ 72(j) (price lower

¹¹ See Compl. at 1 (allegations are "based upon the investigation of Plaintiff's counsel, except as to allegations specifically pertaining to Plaintiff, which are based on personal knowledge"); *Van Ormer v. Aspech Tech, Inc.*, 145 F. Supp. 2d 101, 104 (D. Mass. 2000) ("[p]leading based on investigation of counsel is similar to pleading on information and belief").

seven days before the grant); ¶ 72(k) (price lower six days before the grant); ¶ 72(m) (price lower three days after the grant). However, six grant dates identified by LACERA occurred on the date with the lowest price during the period. (See id. ¶¶ 72(d), 72(f), 72(g), 72(h), 72(l), 72(m).)

Defendants' argument that the challenged grants were part of either legitimate, demonstrable patterns or predetermined dates is credible. However, the data compiled by plaintiffs and the *Wall Street Journal* regarding stock price movements on grant dates, together with Brooks' Restatement, in which it admitted that millions of options were accounted for based on incorrect grant dates, creates a reasonable inference that intentional backdating may have occurred. The court is required to give plaintiffs the benefit of all reasonable inferences at this stage. Ezra, 466 F.3d at 45.

Of course, that is not the end of the inquiry. Plaintiffs must also meet their obligation to plead specific factual allegations regarding each defendant's knowledge of or participation in the backdating. See Greebel v. FTP Software, Inc., 183 F.R.D. 370, 374 (D. Mass. 1998), aff'd 194 F.3d 185 (1st Cir. 1999).

a. Ellen Richstone

Richstone was the CFO of Brooks from November 1998 through October 2002, and in this capacity signed the Company's 2001 and 2002 financial statements. Although plaintiffs allege generally that Richstone "participated in the issuance of false and/or misleading statements," they have not pled "specific factual allegations to support a reasonable inference that adverse circumstances existed at the time of the statements and were known and deliberately or recklessly disregarded" by her. Van

Ormer, 145 F. Supp. 2d at 104; see also Stone & Webster, Inc. Sec. Litig., 414 F.3d 187, 199 (1st Cir. 2005) (affirming dismissal of Section 10(b) claims against CFO where plaintiff provided nothing to support the inference that the CFO was directly involved in the accounting at issue or had knowledge of the alleged falsity). The complaint lacks any particularized allegation regarding her involvement (if any) in administering the Company's Stock Option Plans or otherwise determining grant dates. Instead, plaintiffs rely upon Richstone's position as CFO and the issuance of "at least 171,370" allegedly backdated stock option grants to her. (Compl. ¶ 104.) Even viewing the allegations in their entirety does not magically change multiple insufficiently generalized allegations into one sufficiently particularized one. A "vague assertion that a defendant must have known about the fraud by virtue of [her] position of authority" does not permit a strong inference of scienter. Orton v. Parametric Tech. Corp., 344 F. Supp. 2d 290, 307 (D. Mass. 2004); Carney v. Cambridge Tech. Partners, Inc., 135 F. Supp. 2d 235, 255 (D. Mass. 2001). Adding allegations of Richstone's receipt and sale of stock options does not alter the result in this instance. Although Richstone received "at least 171,370 stock options," plaintiffs plead that she only sold 1,000 of these shares. There is no indication that this stock sale was sufficiently unusual or atypical to warrant an inference of scienter. See Carney, 135 F. Supp. 2d at 256.

The complaint does not sufficiently plead facts that could lead to a strong inference of Richstone's scienter. Thus, the § 10(b) claim against her (Count I) fails.

b. Joseph Martin

Martin has served as a director and member of the Audit Committee since June 2001 and as Chairman of the Board since May 2006. He served as a member of the Compensation Committee from June 2001 to 2003. Although scienter cannot be inferred based solely on a defendant's position, Martin's membership on the Compensation Committee is relevant to his scienter in light of plaintiffs' allegations that the Compensation Committee administered the Stock Option Plans. (See, e.g., Compl. ¶ 62.) However, of the six grant dates alleged by plaintiffs in which the grant date was the date of the lowest stock price (see supra), only one, on October 1, 2001, occurred when Martin was a director and member of the Compensation Committee. Plaintiffs do not allege any particularized factual allegations regarding the October 1, 2001, grant aside from the *Wall Street Journal's* analysis. Plaintiffs' bare bones assertion that Martin served on the Compensation Committee during this time, without more detail regarding the circumstances surrounding the grant or Martin's participation in approving the grant, is not sufficient to create a strong inference of scienter.

The SEC's complaint supplies some detail regarding the October 1, 2001 grant.¹² The SEC alleges that the grant was not approved by the Board via a written

¹² Under Tellabs, I must consider "documents incorporated into the complaint by reference, and matters of which a court may take judicial notice." 127 S. Ct. at 2509. The SEC's civil complaint against Therrien was filed on July 25, 2007, several months after LACERA filed its complaint, and therefore cannot strictly be said to be "incorporated by reference" into the complaint. Nonetheless, the complaint contains allegations regarding the SEC's investigation, and plaintiffs have filed this complaint with the court. "It is well-accepted that federal courts may take judicial notice of proceedings in other courts if those proceedings have relevance to the matters at hand." Kowalski v. Gagne, 914 F.2d 299, 305-06 (1st Cir. 1990).

consent until late October or early November, even though it was dated October 1, 2001. This factual allegation, as compared with plaintiffs' generalized "information and belief" allegations, can support an inference of scienter. Lirette v. Shiva Corp., 27 F. Supp. 2d 268, 283 (D. Mass. 1998). When combined with the assertion that October 1, 2001, was the lowest price for Brooks' stock during the entire year of 2001 and Martin's role on the Compensation Committee at this time, the allegations suffice to create an inference of scienter with regard to Martin's knowledge of deliberate backdating of the October 2001 stock option grant. However, this inference is a weak one, as there are no specific factual allegations supporting an inference that Martin was involved in knowingly and deliberately backdating this grant.

I must also consider the competing plausible inferences Martin has raised to rebut the inference of scienter. Tellabs, 127 S. Ct. at 2510. First, he argues that the October 1, 2001 grant is part of a "recurring pattern of grants" that occurred the first day in October on 2001, 2003, 2004 and 2005. This is significant, as it suggests that October 1, 2001, may not have been picked in hindsight due to a low stock price. That inference is weakened, however, by the fact that grants were not issued on October 1 in any years prior to 2001. The SEC complaint alleges that in late September 2001 Brooks decided to accelerate its usual January stock option program to the "October 2001 timeframe." (Docket # 124-2 at 16 (emphasis added).) One could infer that the October 1, 2001, date was chosen at the end of October or beginning of November because it had the lowest stock price, and the date was simply followed in later years.

However, the SEC complaint alleges simply that the Board approved the

October 1, 2001, grant in late October or early November via a written consent. It does not specify when each director signed this consent, although it does allege that the Company decided to issue stock options in late September. It is not possible to determine, on these allegations, when Martin may have signed the written consent or his level of involvement in determining the grant date.¹³ These types of omissions and ambiguities count against inferring scienter. See Tellabs, 127 S. Ct. at 2511. Further, the Restatement states that the internal review of stock option practices was conducted by a Special Committee of independent directors, and “[n]either the Company nor the Special Committee concluded that anyone now affiliated with the Company was complicit in any intentional wrongdoing.” (Restatement at 22.) Finally, there is no allegation that Martin ever exercised or even received any allegedly backdated options or otherwise benefitted from the alleged backdating scheme.

Viewing both the complaint’s allegations in their totality, and the competing inferences put forth by Martin, I do not believe that a reasonable person would deem the inference of Martin’s scienter “at least as compelling as any opposing inference.” Tellabs, 127 S. Ct. at 2510. Accordingly, plaintiffs have failed to state a § 10(b) claim against Martin.

¹³ The Restatement notes that the errors were made because “we treated unanimous written consents of directors approving stock option grants as effective on the date stated on the consent, instead of the date upon which the Company received the consent form containing the last signature required for unanimity.” (Compl. ¶ 83.) Although plaintiffs scoff at this explanation, they have given no reason – aside from their information and belief regarding statistical probabilities – why the court should not credit an explanation proffered by a Special Committee of independent directors, none of whom are sued here, and whose statements are not claimed as false in this lawsuit.

c. Roger Emerick and Amin Khoury

Emerick was a director and member of the Compensation Committee from 1993 to May 2006. Khoury similarly served as a director and member of the Compensation Committee from 1994 to May 2006. Both also served on the Company's Audit Committee during the putative Class Period.

Emerick and Khoury composed the entirety of the Compensation Committee for most of the period during which the alleged backdating occurred. Two of the Company's three Stock Option Plans granted exclusive authority to the Compensation Committee to administer stock options. The Audit Committee was tasked with, among other things, direct oversight of the Company's internal accounting controls and review of the Company's financial disclosure documents.

It is reasonable to infer that Emerick and Khoury, by virtue of their almost exclusive administration of the stock option plans, either knew of the alleged backdating or recklessly ignored the evidence thereof. The SEC's complaint alleges particular factual assertions regarding several of the stock option grants that occurred while Emerick and Khoury served on the Compensation Committee, and which they authorized in their capacity as directors. For example, the SEC alleges that in February 1999 the Board approved, via a written consent, options grants backdated to January 4, 1999. The SEC alleges that the written consents from the Board's "two other outside directors" – which can only be Emerick and Khoury – were not faxed to Brooks until February 26, 1999. (Docket # 124-2 at 20.) The price on January 4, 1999, was the lowest market price for Brooks' stock during the entire calendar year 1999.

(Id.) In another instance, the written consents authorizing the grant dated January 5, 2000, were not faxed to the directors for signature until February 4, 2000, and the last consent was not signed until February 7, 2000. (Id. at 24-25.) The exercise price on January 5, 2000, was \$30.13 per share, the lowest price in the past ten-month period. In contrast, the exercise price on February 7, 2000, was \$62.25 per share. (Id.) These allegations permit the strong inference that Emerick and Khoury either knew, or were deliberately reckless in not knowing, that stock options were not being issued at fair market value on the date of the grant. Accordingly, the allegations, when viewed in totality, support the requisite inference of scienter. See Aldridge, 284 F.3d at 83 (“[T]he fact that the defendants published statements when they knew facts suggesting the statements were inaccurate or misleadingly incomplete is classic evidence of scienter.”).

d. Robert Therrien

Therrien served as a director from 1989 to 2006 and Chairman of the Board of Directors from February 2004 to 2006. He also served as the Company’s President from 1989 to February 2003 and its CEO from 1989 to September 2004. Therrien, along with Emerick and Khoury, constituted either 75% or 100% of the Board of Directors throughout the bulk of the time period.

The SEC has filed a civil complaint against Therrien related to the alleged backdating. That complaint alleges particular facts regarding Therrien’s involvement in several of the stock option grants that occurred during the putative Class Period. For example, with regard to the option dated October 1, 2001, the complaint alleges: (1) the

Company did not approve the option until late October or early November 2001, and did not finalize the distribution amounts to the recipients until November 30, 2001; (2) the Company's Director of Human Resources sent Therrien an e-mail on December 6, 2001, stating in part, "[w]e finalized all of the stock option grants last Friday [i.e., November 30, 2001]The effective date (October 1, 2001) and the share price (\$25.22) are included in the [attached] documentation;" (3) the \$25.22 share price on October 1, 2001, was the lowest price for Brooks' stock during the entire calendar year 2001; and (4) Therrien signed a document in February 2002 certifying that the Board of Directors voted on October 1, 2001, to grant stock options to employees. (Docket # 124-2 at 16-17.) The complaint makes similar allegations with regard to grants dated January 4, 1999, January 5, 2000, and May 31, 2000.

Taken as a whole, plaintiffs' allegations against Therrien (including allegations by the SEC, which the court may consider) permit the conclusion that Therrien either knew, or was deliberately reckless in not knowing, that stock options were not being issued at fair market value on the date of the grant. See Aldridge v. A.T. Cross Corp., 284 F.3d 72, 83 (1st Cir. 2002).

e. Brooks

Plaintiffs' scienter allegations against Therrien, Emerick and Khoury may be imputed to Brooks for the purpose of establishing Brooks' fraudulent intent. In re Cabletron Sys., Inc., 311 F.3d 11, 40 (1st Cir. 2002) ("[t]he scienter alleged against the company's agents is enough to plead scienter for the company"). Plaintiffs have therefore adequately alleged a § 10(b) claim against Brooks.

3. Statute of Limitations

Finally, defendants Therrien, Emerick and Khoury argue that plaintiffs' § 10(b) claims are time-barred. Under the Sarbanes-Oxley Act, a private claim under § 10(b) must be filed by the earlier of (1) two years after the discovery of facts constituting the violation; or (2) five years after the violation. 28 U.S.C. § 1658. Under the First Circuit's "discovery rule," the two-year clock begins to tick "when the plaintiff in the exercise of reasonable diligence discovered or should have discovered the fraud of which he complains." Young, 305 F.3d at 8. As the initial complaint was filed on June 19, 2006, the issue is whether plaintiffs, in the exercise of reasonable diligence, should have discovered the alleged fraud before June 19, 2004. Defendants argue that plaintiffs' allegations are largely drawn from an analysis of financial statements that were all publicly filed no later than January 2001. Plaintiffs counter that a reasonable investor is not required to do the statistical analysis that is required to ascertain whether a pattern of backdating has occurred. This dispute, which involves factual questions of when the alleged pattern emerged and when a reasonable investor should have become aware of the alleged pattern, is not amenable to disposition on a motion to dismiss. See Young, 305 F.3d at 9. The motion to dismiss the §10(b) claims on this ground is denied.

B. The Section 20(a) Claims

To state a claim for control person liability under Section 20(a),¹⁴ plaintiffs must

¹⁴ Section 20(a) provides, in pertinent part:

Every person who, directly or indirectly, controls any person liable under

allege (1) “an underlying violation of the same chapter of the securities laws by the controlled entity;” and (2) “control of the primary violator by the defendant.” Stone & Webster, 414 F.3d at 194. As plaintiffs have adequately alleged a § 10(b) violation by Brooks, see supra, the first element is satisfied.

1. Control

In the securities context, “control” means “the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of [an entity], whether through the ownership of voting securities, by contract, or otherwise.” 17 C.F.R. § 230.405 (2006). The alleged controlling person must not only have the general power to control the company, but must actually exercise control over the company. Aldridge, 284 F.3d at 85. Defendants, with the exception of Richstone, do not contest that they are “control persons.”

Richstone, the former CFO, asserts that the complaint fails to allege facts giving rise to the inference that she had the required level of control. “Control is a question of fact that will not ordinarily be resolved summarily at the pleading stage.” Cabletron, 311 F.3d at 41 (internal quotation marks and citation omitted). Plaintiffs have alleged that Richstone participated in the day-to-day management of the company and signed

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

15 U.S.C. § 78t(a).

some of the allegedly misleading SEC filings. These allegations, combined with Richstone's position as an executive officer, are sufficient to allege control at this stage. Furthermore, and contrary to her assertions, plaintiffs need not plead her control over the stock option process. Control over the company is all that is necessary. See In re StockerYale Sec. Litig., 453 F. Supp. 2d 345, 361 (D. N.H. 2006) (finding corporate officers subject to control person liability even when they were not directly involved in drafting or issuing the allegedly misleading press releases at issue).

2. Culpable Participation

In Stone & Webster, the First Circuit provisionally held that the strong-inference requirement of the PSLRA has no application to a claim under § 20(a), and "left open" the issue whether a plaintiff must prove culpable participation on the part of a § 20(a) defendant. In re Stone & Webster, Inc. Sec. Litig., 424 F.3d 24, 26 (1st Cir. 2005). Other Circuits have split on this issue. Compare Sharp v. Coopers & Lybrand, 649 F.2d 175, 185 (3d Cir. 1981) (overruled on other grounds); Carpenter v. Harris, Upham & Co., 594 F.2d 388, 394 (4th Cir. 1979); and Lanza v. Drexel & Co., 479 F.2d 1277, 1299 (2d Cir. 1973) (finding plaintiff must plead culpable participation), with Adams v. Kinder-Morgan, Inc., 340 F.3d 1083, 1109 (10th Cir. 2003) and Hollinger v. Titan Capital Corp., 914 F.2d 1564, 1575 & n.25 (9th Cir. 1990) (citing cases from the Fifth, Sixth, Seventh and District of Columbia Circuits) (plaintiff need not plead culpable participation).

The court is persuaded by the latter group of cases, which reason that because the language of the statute places the burden on the defendant to establish his or her

good faith as an affirmative defense, plaintiff need not make a prima facie showing of defendant's culpable participation. "[T]here would be little reason for the controlling person provision unless it differed in some meaningful ways from the standards for noncontrolling person liability." G.A. Thompson & Co. v. Partridge, 636 F.2d 945, 958 n.23 (5th Cir. 1981). See also Stone & Webster, 414 F.3d at 194 (§ 20(a) "does not on its face obligate the plaintiff to plead or prove scienter (or any other state of mind) on the part of the controlling persons named as a defendant. Instead, the burden is shifted. The defendant can rebut liability by proving that he or she 'acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action.'") (quoting 15 U.S.C. § 78t(a)).

Accordingly, the motion to dismiss the § 20(a) claims against Therrien, Khoury, Emerick, Richstone, Martin, Grady and Woodbury is denied.

C. The Section 11 and 12(a)(2) Claims

The parties dispute whether Fed. R. Civ. P. 9(b) applies to plaintiffs' §§ 11 and 12(a)(2) claims. Under First Circuit precedent, claims under §§ 11 and 12(a)(2) that "sound in fraud" trigger the pleading requirements of Rule 9(b). Shaw, 82 F.3d at 1223. However, Shaw does not require application of Rule 9(b) where a plaintiff has expressly disclaimed and excluded any allegations that could be construed as alleging fraud, and instead has alleged non-fraudulent conduct in support of its §§ 11 and 12(a)(2) claims. See In re Sonus Networks, Inc. Sec. Litig., Civ. No. 04-10294, 2006 WL 1308165, at *6 (D. Mass. May 10, 2006); In re Number Nine Visual Tech. Corp. Sec. Litig., 51 F. Supp. 2d 1, 12 (D. Mass. 1999).

Plaintiffs have clearly attempted to segregate their §§ 11 and 12 causes of action from the course of conduct they allege in support of those under § 10(b), both by disclaiming any intent to allege fraudulent conduct and by incorporating only select paragraphs into their claim allegations. The question is whether they have succeeded.

Although it is a close question, the §§ 11 and 12(a)(2) claims sound in fraud. Plaintiffs expressly do not incorporate many of the complaint's allegations into their §§ 11 and 12(a)(2) claims, but the wording of the allegations that are included is classically fraud language: the defendants "issued, caused to be issued and participated in the issuance of materially false and misleading written statements," (Compl. ¶ 131); Brooks' stock was "artificially inflated" as a result of "Defendants' false statements," (*id.* ¶ 132); the "Company's improper stock option grants" had been "materially misstated" by the defendants (*id.*); the Company "falsely reported" financial numbers (*id.* ¶ 134); and plaintiffs were without knowledge of the facts concerning the "wrongful conduct alleged herein" (*id.* ¶¶ 138, 147). See Rombach v. Chang, 355 F.3d 164, 172 (2d Cir. 2004) (applying Rule 9(b) to § 11 claims where "wording and imputations of the complaint are classically associated with fraud"); Shaw, 82 F.3d at 1223 ("[i]t is the allegation of fraud, not the 'title' of the claim" that is relevant for determining whether Rule 9(b) applies). Finally, defendants are repeatedly charged with making "false statements," and the conduct is described as "wrongful." (See, e.g., Compl. ¶¶ 131, 132, 134, 138, 141, 146, 147, 151). This is precisely the characterization of defendants' conduct that triggers the reputational concerns which underlie Rule 9(b)'s particularity requirement. See United States ex rel. Karvelas v.

Melrose-Wakefield Hosp., 360 F.3d 220, 226 (1st Cir. 2004) (noting that one purpose of Rule 9(b)'s particularity requirement is to "protect defendants whose reputation may be harmed by meritless claims of fraud"). Accordingly, Rule 9(b) applies to plaintiff's §§ 11 and 12(a)(2) claims.

Rule 9(b) does not require the plaintiff to plead scienter.¹⁵ However, "Rule 9(b)'s relaxation of the scienter requirement is not intended to allow plaintiffs to base claims of fraud on speculation and conclusory allegations. Therefore, to serve the purposes of Rule 9(b), we require plaintiffs to allege facts that give rise to a strong inference of fraudulent intent." Id. (internal quotation marks and citations omitted).

1. Section 11 Claims

Section 11 by its terms provides for liability if a registration statement, as of its effective date: (1) "contained an untrue statement of material fact;" (2) "omitted to state a material fact required to be stated therein;" or (3) omitted to state a material fact "necessary to make the statements therein not misleading." 15 U.S.C. § 77k(a).

Plaintiffs allege two separate counts of violation of § 11: Count III (against Brooks, Therrien, Emerick, Khoury and Martin) and Count IV (against PwC, Woodbury and Grady). Both counts are based upon the issuance of the Merger Registration Statement filed with the SEC in connection with the Helix transaction.

Plaintiffs have met Rule 9(b)'s requirements with regard to Brooks, Therrien, Emerick and Khoury, as they have adequately set forth allegations that point to scienter and, therefore, fraud on the part of these defendants. See supra Section V.A.3.

¹⁵See supra p. 14 for Rule 9(b)'s pleading requirement.

However, plaintiffs' § 11 claims against PwC, Woodbury, Grady and Martin do not meet Rule 9(b)'s requirements. The complaint just does not adequately state that any of these defendants believed or knew, at the time the Merger Registration Statement was signed, that Brooks' financial statements contained material misstatements or otherwise failed to comport with GAAP. See Ezra, 466 F.3d at 8-9, 12-13.¹⁶

2. Section 12(a)(2) Claim

Section 12(a)(2) of the '33 Act imposes liability on sellers of a security who have imparted material misstatements or failed to disclose material facts concerning the security by means of a prospectus or oral communication. See 15 U.S.C. § 771(a)(2). Plaintiffs bring this claim only against Brooks, and they have adequately pled it.¹⁷

D. The Section 15 Claims

Plaintiffs allege violations of § 15 of the '33 Act against Therrien, Emerick, Khoury, Martin, Grady and Woodbury (Count VI). Section 15 makes a "controlling person" responsible for the § 11 or § 12(a)(2) liability of a controlled person, in this case Brooks.¹⁸ The standard for "control" under § 15 is the same as under § 20(a). In

¹⁶ As discussed in Section IV.C, supra, plaintiffs do not have standing to assert § 11 claims against Martin and PwC. Even if standing did exist, plaintiffs' allegations do not meet the Rule 9(b) standard. Plaintiffs' bare bones allegation that Martin served on the Compensation Committee during the end of the "Backdating Period," standing alone, is insufficient to infer fraudulent intent.

¹⁷ Although defendants raise an issue regarding plaintiffs' ability to establish loss causation, this factual issue is hotly contested and is not amenable to disposition at this time.

¹⁸ Section 15 provides, in pertinent part:

Every person who, by or through stock ownership, agency, or otherwise. .

re Tyco Int'l, Ltd., MDL No. 02-md-1335-PB, 2007 WL 1687775, at *8 n.10 (D. N.H. June 11, 2007) (citing Maier v. Durango Metals, Inc., 144 F.3d 1302, 1305 nn.5-7) (10th Cir. 1998). The complaint sufficiently alleges the statutory requirements, that these defendants are “control persons” and that Brooks violated of §§ 11 and 12(a)(2). Accordingly, the motion to dismiss the § 15 claims is denied.

VI. Conclusion

For the reasons stated above, the rulings on the pending motions are as follows:

- LACERA’s motion for leave to amend the consolidated amended class action complaint (Docket # 99) is ALLOWED;
- Robert J. Therrien’s motion to dismiss (Docket # 81) is DENIED;
- Roger D. Emerick’s and Amin J. Khoury’s motion to dismiss (Docket # 83) is DENIED;
- Ellen B. Richstone’s motion to dismiss (Docket # 85) is ALLOWED as to Count I and DENIED as to Count II;
- The motion to dismiss by Robert W. Woodbury, Edward C. Grady, Joseph R. Martin and Brooks Automation, Inc. (Docket # 87) is ALLOWED in part and DENIED in part, as follows:

. controls any person liable under sections 77k or 77l of this title, shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable, unless the controlling person had no knowledge of or reasonable ground to believe in the existence of the facts by reason of which the liability of the controlled person is alleged to exist.

15 U.S.C. § 77o.

- Robert W. Woodbury's motion to dismiss is DENIED as to Counts II and VI and ALLOWED as to Count IV;
- Edward C. Grady's motion to dismiss is DENIED as to Counts II and VI and ALLOWED as to Count IV;
- Joseph R. Martin's motion to dismiss is ALLOWED as to Counts I and III and DENIED as to Counts II and VI; and
- Brooks Automation, Inc.'s motion to dismiss is DENIED.
- The motion to dismiss by PricewaterhouseCoopers LLP (Docket # 95) is ALLOWED.

November 6, 2007

DATE

/s/Rya W. Zobel

RYA W. ZOBEL
UNITED STATES DISTRICT JUDGE