

1 WO

2

3

4

5

6

7

IN THE UNITED STATES DISTRICT COURT

8

FOR THE DISTRICT OF ARIZONA

9

10

11

12 Teamsters Local 617 Pension)
and Welfare Funds, on behalf)
13 of itself and all others)
similarly situated,)

No. CIV 06-02674-PHX-RCB

14

Plaintiff)

O R D E R

15

vs.)

16

Apollo Group, Inc., et al.,)

17

Defendants.)

18

19

20

21

22

23

24

25

26

27

28

Currently pending before the court in this securities fraud action are motions to dismiss the second amended complaint ("SAC") for failure to state a claim pursuant to FED.R.Civ.P. 12(b)(6) by defendant Apollo Group, Inc. ("Apollo") (Doc. 122); and by the individual defendants John G. Sperling, Todd S. Nelson, Kenda B. Gonzales, Daniel E. Bachus, John Blair, John R. Norton III, Hedy Govenar, Brian E. Mueller, Dino J. DeConcini, Peter Sperling, and Laura Palmer Noone ("the individuals" or "the individual

1 defendants")¹ (Doc. 120). If the court denies their motion to
2 dismiss, alternatively, pursuant to FED.R.CIV.P. 12(f), the
3 individual defendants are moving to strike allegations which this
4 court previously dismissed or found insufficient as a matter of law
5 in Teamsters Local 617 Pension & Welfare Funds v. Apollo Group,
6 Inc., 633 F.Supp.2d 763 (D.Ariz. 2009) ("Apollo I").² Oral
7 argument will not aid the court's decisional process, hence the
8 court denies the parties' requests in that regard.³ See

9 _____
10 ¹ The individual defendants explicitly "join in and . . . incorporate by
11 reference" Apollo's motion to dismiss and supporting memorandum, as well as
12 "join[ing]" in Apollo's reply. Defs'. Mot. (Doc. 120) at 1:28, n.1; Defs'. Reply
13 (Doc. 133) at 1:28, n.1. Likewise, Apollo specifically "adopts and incorporates
14 the Individual[s'] . . . motion to dismiss and to strike[,] as well as their
15 reply. Apollo Mot. (Doc. 122) at 1:4-5 (footnote omitted); and Apollo Reply (Doc.
16 132) at 1:2-3 (footnote omitted). Thus, unless necessary to distinguish among
17 them, Apollo and the individual defendants will be collectively referred to
18 throughout as "the defendants."

19 ² In Teamsters Local 617 Pension and Welfare Fund v. Apollo Group, Inc.,
20 609 F.Supp.2d 959 (D.Ariz. 2010) ("Apollo II"), granted plaintiff's motion for
21 reconsideration in part, and vacated in part the previously entered judgment.

22 ³ The court will briefly address the parties' respective Requests for
23 Judicial Notice ("RJN") (Docs. 121; 123; and 131). These Requests need not detain
24 the court for long because they are unopposed, and in securities litigation courts
25 routinely take judicial notice of the types of documents which these RJNs list.

26 The majority of the documents which are the subject of these RJNs pertain to
27 various Securities and Exchange Commission ("SEC") filings. All three RJNs include
28 Form 10-Ks and Form 4 SEC filings. Such SEC filings are properly subject to
29 judicial notice. See Apollo I, 633 F.Supp.2d at 776-77; see also Metzler Inv. GMBH
30 v. Corinthian Colleges, Inc., 540 F.3d 1049, 1064 n. 7 (9th Cir. 2008) (citation
31 omitted) ("proper" for district court to take judicial notice of defendant's "SEC
32 filings[]"). The court reiterates that:

33 [I]t only is taking judicial notice of the content of these
34 various SEC filings, and the fact that they were filed with the
35 agency. . . . The truth of the content, and the inferences
36 properly drawn from them, however, is not a proper subject of
37 judicial notice under Rule 201.

38 Id. at 776 (citations and internal quotation marks omitted).

39 Further, this court will take judicial notice of the complaint filed in Alaska
40 Electrical Pension Fund v. Sperling et al., No. 2:06-cv-02124-ROS (Doc. 125-5), as
41 it is a matter of public record. See Lauter v. Anoufrieve, 642 F.Supp.2d 1060, 1077
42 (C.D.Cal. 2009) (citing cases).

43 Pursuant to the incorporation by reference principles outlined in Apollo I,
44 633 F.Supp.2d at 775, to the extent necessary to resolve these motions, the court

1 FED.R.CIV.P. 78(b).

2 **I. Overview of SAC**

3 The SAC sets forth three separate securities fraud claims.
4 The first is for an alleged violation of § 10(b) of the Securities
5 and Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. § 78j(b), as
6 amended by the Private Securities Litigation Reform Act of 1995
7 ("the PSLRA"), and Rule 10b-5 promulgated thereunder, 17 C.F.R.
8 § 240.10b-5 (the "section 10(b) claims"). Whereas the FAC named
9 Apollo and all 11 individuals as defendants in that section 10(b)
10 claim, the SAC now limits those defendants to Apollo and four of
11 the previously named individuals. Those individuals are: (1) John
12 Blair, an Apollo director from September 2000 until his resignation
13 in May 2007, and "Chairman of the Audit Committee" and "a member of
14 the Compensation Committee[;]" (2) Kenda B. Gonzales, Apollo's
15 "CFO, Secretary and Treasurer . . . from October 1998 until"
16 allegedly "she was forced to resign in November 2006 because of her
17 involvement in stock option backdating at Apollo[;]" (3) Todd S.
18 Nelson, who "was until 2006" variously Apollo's "Chairman, CEO and
19 President[;]" and (4) John R. Norton III, an Apollo director during

20
21 will consider the SAC's 40 attached exhibits. That doctrine also allows the court
22 to consider documents referenced in the SAC, but not attached thereto. See id.
23 Here, those documents include the September 19, 2006, letter by SEC's Chief
24 Accountant; the Bloomberg Transcript of Apollo's "Q1 2005 Earnings Call[;]" and the
25 historical trading prices for Apollo stock from January 1, 1998 through December 31,
2007, downloaded from Yahoo! Finance (<http://finance.yahoo.com>) ("Apollo stock
chart"). The Apollo I stock chart did not include trading dates between January 1,
2002 and December 31, 2005. The present chart closes that gap. In sum, the SAC
references the foregoing documents, and no party is questioning their authenticity.
The court will, therefore, take these documents into account to the extent necessary
to resolve these motions.

26 In accordance with FED. R. Evid. 201, the court also takes judicial notice of
27 the "print out from Bloomberg Finance L.P., documenting the market price of Apollo's
28 common stock from January 2, 2003 until August 31, 2004" (RJN (Doc. 121) at 1:7-8).
See id. at 776 (citing Metzler, 540 F.3d at 1064 n. 7) ("Rule 201 . . . provides an
alternative means by which the court can consider Apollo's SEC filings, reported
stock price history, and . . . other publicly available financial documents[.]")

1 the relevant time frame, and "a member of the Audit Committee" and
2 "Chairman of the Compensation Committee[.]" SAC (Doc. 112) at 8:4
3 and 8:5-6, ¶ 21; 7:18-20, ¶ 19; 7:8, ¶ 18; and at 8:11 and 13,
4 ¶ 22.

5 After first alleging "defendants' duties with respect to
6 granting and approving stock options[.]" the SAC devotes its next
7 section to "backdated stock option grants at Apollo[.]" Id. at 13:6
8 (emphasis omitted). The court previously granted defendants'
9 motion "to dismiss as untimely any claims based upon backdating
10 itself with respect to the five option grants" alleged in the FAC.
11 Apollo I, 633 F.Supp.2d at 781. Yet, the SAC includes precisely
12 those same five grant allegations and adds a sixth grant date --
13 October 20, 2003. The next section of the SAC enumerates
14 "defendant's false and misleading statements issued during the
15 class period[.]" Id. at 20:3 (emphasis omitted) (footnote added).
16 Compared to the FAC, the SAC more than doubles the number of those
17 statements, from 26 to 54.

18 The SAC's second and third claims for relief are not nearly as
19 expansive as its first. In the second, in contrast to the FAC
20 which alleged insider or contemporaneous trading in violation of
21 section 20A of the Exchange Act by all defendants, the SAC names
22 only defendant Blair in this claim. Just like the FAC though, the
23 SAC's third claim for relief alleges "control person" liability
24 against all defendants pursuant to section 20(a) of the Exchange
25 Act.

26 . . .

27

28

1 **II. Section 10(b) Claim**⁴

2 "Section 10(b) of the Securities Exchange Act makes it unlawful
3 for any person to 'use or employ, in connection with the purchase or
4 sale of any security . . . any manipulative or deceptive device or
5 contrivance in contravention of such rules and regulations as the
6 Commission may prescribe as necessary or appropriate in the public
7 interest or for the protection of investors.'" Matrixx Initiatives,
8 Inc. v. Siracusano, ___ S.Ct. ___, 2011 WL 977060, at *7 (U.S. March
9 22, 2011) (quoting 15 U.S.C. § 78j(b)). "SEC Rule 10b-5 implements
10 this provision by making it unlawful to, among other things, 'make
11 any untrue statement of a material fact or to omit to state a
12 material fact necessary in order to make the statements made, in the
13 light of the circumstances under which they were made, not
14 misleading.'" Id. (quoting 17 CFR § 240.10b-5(b)). The Supreme
15 Court has "implied a private cause of action from the text and
16 purpose of § 10(b)." Id. (citing Tellabs, Inc. v. Makor Issues &
17 Rights, Ltd., 551 U.S. 308, 318, 127 S.Ct. 2499, 168 L.Ed.2d 179
18 (2007)). "In a typical § 10(b) private action a plaintiff must
19 prove (1) a material misrepresentation or omission by the
20 defendant⁵; (2) scienter; (3) a connection between the
21 misrepresentation or omission and the purchase or sale of a

22
23 ⁴ Previously this court articulated the general Rule 12(b)(6) standards,
24 as well as the dual pleading standards of the PSLRA and Rule 9(b) which apply to
25 a section 10(b) claim. See Apollo I, 633 F.Supp.2d at 778-780; 783-784; and 787-
26 789. The court will apply those same standards in evaluating defendants' current
27 motions to dismiss. Apart from form, there are a number of similarities between
28 the FAC and the SAC. Hence, the court incorporates by reference the "Overview of
Allegations" in Apollo I, 633 F.Supp.2d at 770-775. Other allegations will be
fully developed herein as necessary to resolve the pending motions.

⁵ In a shortened form, this is sometimes referred to as the "falsity"
element. See N.Y. State Teachers' Retirement Sys. v. Fremont Gen. Corp., 2009 WL
3112574, at *2 (C.D.Cal. Sept. 25, 2009).

1 security; (4) reliance upon the misrepresentation or omission;
2 (5) economic loss; and (6) loss causation.'" In Re Oracle Corp. Sec.
3 Litig., 627 F.3d 376, 387 (9th Cir. 2010) (quoting Stoneridge Inv.
4 Partners, LLC v. Scientific-Atlanta, Inc., 552 U.S. 148, 156, 128
5 S.Ct. 761, 169 L.Ed.2d 627 (2008) (citation omitted)).

6 In arguing that the SAC fails to state a section 10(b) claim,
7 the defendants broadly assert that the SAC does not plead backdating
8 with particularity. Separately analyzing the newly added October
9 20, 2003 grants, defendants then turn to the sufficiency of all six
10 grants, include the five original grants which the SAC re-alleges.
11 Next, defendants argue that the SAC's "false and misleading
12 statements" do not satisfy the particularity requirements of Rule
13 9(b) and the PSLRA. Defendants further contend that the SAC does
14 not adequately plead scienter or loss causation. The court will
15 address these issues seriatim.

16 **A. October 20, 2003 Grants**

17 Paragraph 44 of the SAC adds a new grant date - October 20,
18 2003. More specifically, the SAC alleges that "[d]efendants dated
19 certain of Apollo's 2003 grants on" that date "at \$60.90 per
20 share[.]" SAC (Doc. 112) at 19:2-3, ¶ 44. Allegedly that share
21 price was ***not only the low of the month but also the low for the***
22 ***entire year.***" Id. at 19:3, ¶ 44. Defendants John Sperling, Nelson,
23 Gonzales, and Noone allegedly received options at that price. The
24 SAC alleges that "Carroll" received 20,000 options dated October 20,
25 2003, and that he is a defendant. See id. at 19:5-6; and 25, ¶ 44.
26 The record shows that Mr. Carroll filed a Form 4 on October 22, 2003
27 for 20,000 options at a price of \$60.90 per share. Farrell Decl'n
28 (Doc. 124), exh. 8 thereto. Other than this paragraph, Carroll's

1 name does not appear anywhere else in the SAC. The caption does not
2 list him as a defendant; nor is he including the in SAC's
3 enumeration of "parties."⁶ In any event, of the six identified
4 grants, this is the only one alleging a "2 Day Return[.]" Id. at
5 19:21-22, ¶ 44.

6 Defendants argue that there are "insufficient" allegations in
7 the SAC as to that grant date "to raise any reasonable inference
8 that [it] was backdated." Defs.' Mot. (Doc. 120) at 4:20.
9 Defendants offer two reasons as to why a reasonable inference of
10 backdating cannot be drawn as to those October 20th grants. First,
11 those grants were publicly disclosed by the timely filing of Form 4s
12 with the SEC. Second, despite what the SAC alleges, those grants
13 were not made at "***the low for the entire year.***" See SAC (Doc. 112)
14 at 16:3, ¶ 44. Disagreeing as to the impact of the timely reporting
15 to the SEC, plaintiff maintains that such reporting "simply
16 restricts [the] backdating to two days." Resp. (Doc. 129) at 22:7-8
17 (citations omitted).

18 1. Form 4 SEC Filings

19 Pursuant to section 16(a) of the Exchange Act, "[i]nitial
20 statements of beneficial ownership of equity securities" must be
21 filed with the SEC on a Form 3, whereas "[s]tatements of changes in
22 beneficial ownership" must be filed on a Form 4. See 17 C.F.R.
23 § 240.16a-3(a); see also 15 U.S.C. § 78p(a). "On August 29, 2002,
24 Congress passed the Sarbanes-Oxley Act [{"SOX"}], which instituted
25

26 ⁶ That is not the only inconsistency in the SAC's allegations as to the
27 October 20, 2003 grants. The associated chart indicates that defendant Bachus,
28 among others, received such options, but, in contrast to John Sperling, Nelson,
Gonzales and Noone, there are no specific allegations preceding that chart as to
Bachus' actual receipt of such options.

1 new reporting requirements for stock option grants." U.S. v.
2 Shanahan, 2008 WL 2225731, at *6 (E.D.Mo. 2008). That Act
3 significantly decreased the filing time for employees who received a
4 stock option grant, making "a company's ability to fraudulently
5 backdate option grants . . . much more difficult." Id. (citation
6 omitted).

7 Prior to SOX, "an employee who received a stock option grant
8 had to file financial forms with the SEC within forty-five days
9 after the company's fiscal year end." Id. But after SOX, those
10 forms must be filed with the SEC "before the end of the second
11 business day" following the transaction. 15 U.S.C. § 78p(a)(2)(C).
12 Therefore, "[b]lackdaters must now work with the two-day window plus
13 the one or more late days they think will be overlooked." In re
14 Zoran Corp. Derivative Litig., 511 F.Supp.2d 986, 1006 (N.D.Cal.
15 2007). Or, as the Zoran court colloquially put it, "[t]he Form 4
16 requirement has cramped [management's] style." Id. "Management no
17 longer has the latitude to backdate as far back." Id.

18 There is no dispute here that the Form 4s were timely filed as
19 to the October 20, 2003 grant. See Farrell Decl'n (Doc. 124), exhs.
20 7-13 thereto. Rather, the dispute centers on the impact of those
21 filings upon plaintiff's theory that those particular grants were
22 the product of intentional backdating. Defendants argue that due to
23 the timely filing of the Form 4s, plaintiff has failed to state a
24 section 10(b) claim based upon the October 20, 2003 grants. They
25 reason that any "inference of backdating is entirely undermined by"
26 the timely filing of those Form 4s. Defs'. Mot. (Doc. 120) at 4:21;
27 see also Apollo Mot. (Doc. 122) at 8:5-6 (emphasis omitted)
28 ("contemporaneously filed Form 4s prove that the October 20, 2003

1 grant date was not retroactively selected”).

2 On the other hand, plaintiff counters that “a timely filed Form
3 4 does not eliminate the possibility of backdating, but simply
4 restricts such backdating to two days.” Resp. (Doc. 129) at 22:6-8
5 (citations omitted). Plaintiff reasons that “there is the potential
6 for substantial self-enrichment if a company’s stock price increases
7 sharply in [that] day or two” after the filing of the Form 4. Id.
8 at 22:15-17. To make this point, plaintiff notes that defendant
9 “Nelson’s stock options were \$915,000 in the money by the time such
10 options were reported” to the SEC two days later on October 22,
11 2003. Id. at 22:17-18 (citing SAC (Doc. 112) at ¶ 44). Thus,
12 plaintiff asserts that the October 20, 2003, grant “further supports
13 an inference of scienter with respect to defendant’s backdating[.]”
14 Id. at 23:8-10. Plaintiff’s argument is not convincing.

15 The timely filing of a Form 4 has broader ramifications than
16 “simply restrict[ing] such backdating to two days[.]” as plaintiff
17 urges. See id. at 22:7-8 (citations omitted). In re Hansen Natural
18 Corp. Sec. Litig., 527 F.Supp.2d 1142 (C.D.Cal. 2007), to which
19 defendants cite, is illustrative. One way the plaintiff there
20 alleged scienter was by alleging a scheme to backdate stock option
21 grants. The court held that such allegations did not give rise to a
22 strong inference of scienter because, *inter alia*, Form 4s “were all
23 filed with the SEC within days” of the challenged grants. Id. at
24 1156 (emphasis added). The Hansen court soundly reasoned that the
25 timely filing of Form 4s “corroborates the grant dates, and makes
26 backdating of [stock] options *highly unlikely*[.]” Id. (emphasis
27 added). Significantly, the Hansen court found that to be so
28 “*regardless of the change in the stock price.*” Id. (emphasis added)

1 (citation omitted). Thus, because the Hansen plaintiffs did not
2 otherwise adequately allege scienter, and because they did not
3 adequately plead materiality or loss causation, the court granted
4 defendants' motion to dismiss.

5 Like here, in In re CNET Networks, Inc. Shareholder Derivative
6 Litig., 483 F.Supp.2d 947 (N.D.Cal. 2007), to which Apollo cites,
7 the directors timely filed Form 4s, and there were no allegations
8 that those Forms were false. Consequently, the court held that
9 plaintiffs "failed to plead facts that th[e] grant [at issue] and
10 the accompanying returns could not have merely been the product of
11 chance." Id. at 961. In reaching that conclusion, the CNET court
12 astutely explained:

13 It is highly unlikely that defendants could have
14 gone back in time to change the date for this grant
15 if it was on record with the SEC two days after the
16 fact. Defendants would not have had time to see what
the stock did in the next few days in order to find
the most advantageous grant date. This does cast doubt
on plaintiffs' allegations.

17 Id. at 961. The CNET court did recognize the "possibl[ity] that as
18 part of the scheme, CNET had adopted a 'wait-and-see' approach
19 toward the timing of options trying to spot periodic low points."
20 Id. Nonetheless, the court soundly reasoned, "the executives and
21 directors simply could not have known precisely what the stock would
22 do in the coming days. The ability to go back and change the date
23 to a more fortuitous time is essentially the guts of any backdating
24 scheme." Id.

25 That reasoning applies with equal force here. As in CNET, the
26 defendants which the SAC alleges received grants dated October 20,
27 2003 at a price of \$60.90 per share, John Sperling, Nelson, Gonzales
28 and Noone, all timely filed their Form 4s as to those grants. See

1 Farrell Decl'n (Doc. 124), exhs. 9 -12. Also as in CNET, the SAC
2 does not allege that those Form 4s were false. Moreover, quoting
3 verbatim from the Restatement,⁷ the SAC alleges that based upon the
4 timely filed Forms 4 for Section 16 officers, such as Ms. Gonzales,
5 Apollo "generally determined the *original stated grant date* is the
6 *most likely measurement date* for Section 16 Officer grants after
7 August 2002." SAC (Doc. 112) at ¶ 96, 47:12-13 (emphasis added).
8 Also quoting from the Restatement, the SAC further alleges that as
9 to the post-SOX grants to former CEO and a section 10(b) defendant,
10 Todd Nelson, the Restatement "generally concluded the *original*
11 *stated grant date* is the *most likely measurement date* after August
12 2002, based on the history of the filing process for Forms 4 after a
13 grant." Id. at ¶ 96, 47:26-27 (emphasis added). These allegations,
14 especially when coupled with the timely filed Form 4s, severely
15 erode a strong inference of scienter to engage in intentional
16 backdating as to the October 20, 2003 grants.

17 Edward J. Goodman Life Income Trust v. Jabil Circuit, Inc., 595
18 F.Supp.2d 1253 (M.D.Fl. 2009), aff'd on other grounds, 594 F.3d 783
19 (11th Cir. 2010), bolsters that conclusion. There, the complaint
20 merely alleged that "Jabil's Section 16 officers *usually[,]*" filed
21 Forms 4 within two days of the option grant." Id. at 1275 (citation
22 and internal quotation marks omitted) (emphasis added). In sharp
23 contrast to the present case, there was nothing before the Jabil
24 court showing that those officers actually timely filed the Form 4s.

25
26
27 ⁷ The SAC repeatedly refers to the "restatement of May 22, 2007[.]" See,
28 e.g., SAC (Doc. 112) at 20:25, ¶ 48. For clarification, that Restatement was
accomplished by and published in Apollo's May 22, 2007 Form 10-K. See RJN (Doc.
126), exh. 19. So although this decision will continue to refer to the
Restatement, as does the SAC, it actually means that 2007 Form 10-K.

1 Nonetheless, the court found that because those officers "usually"
2 timely filed Form 4s such filings "*completely undermine[d]* any
3 suspicion otherwise attending any grant after 2001." Id. (emphasis
4 added). Therefore, the court held that "plaintiffs' allegations of
5 receipt of stock options fail[ed] to support an inference of
6 scienter as to any defendant." Id.

7 The allegations and proof here, as discussed, are even more
8 compelling than in Jabil. Certainly, if allegations that section 16
9 officers *usually* filed Form 4s "fail[]s to support an inference of
10 scienter," then allegations and proof that defendants Nelson and
11 Gonzales *actually* timely filed Form 4s for the October 20, 2003
12 grants, likewise negates any such inference.

13 Courts have recognized that theoretically it is possible to
14 backdate within the two day window for filing Form 4s, as plaintiff
15 suggests. Plaintiff overlooks the fact, however, that ultimately
16 those same courts held that backdating was not sufficiently pled as
17 to such grants. For example, in In re Openwave Systems, Inc.
18 Shareholder Derivative Litigation, 503 F.Supp.2d 1341 (N.D.Cal.
19 2007) ("Openwave I"), the court did remark that "[b]ackdating stock
20 options by two days is still backdating." Id. at 1350. The court
21 thus found that the timely filed Form 4s "somewhat diminished the
22 ability to infer backdating from the allegations [in the]
23 Complaint[.]" Id. at 1349. Consequently, the court did recognize
24 that where "the stock price increased in the two days following the
25 grants[,]" those three grants "*may . . . still support plaintiffs'*
26 *claims, despite the filing of Forms 4 within two days of the*
27 *grants.*" Id. (emphasis added). Nevertheless, because the
28 "allegations and statistical analyses [we]re simply insufficient, at

1 th[at] point, to allow a reasonable inference of backdating[,]” the
2 court granted nominal defendants’ motion to dismiss, albeit with
3 leave to amend. Id. at 1351.

4 Given the rise in Apollo’s stock in the two days after the
5 October 20, 2003, grants plaintiff asserts that Openwave I supports
6 its backdating claim as to those grants. Plaintiff overlooks that
7 even after amendment, the court in In re Openwave Systems, Inc.,
8 2008 WL 410259 (N.D.Cal. Feb. 12, 2008) (citation omitted)
9 (“Openwave II”), was “not convinced that a one- or two-day window
10 could give defendants enough perspective on the market to
11 intentionally choose the lowest closing prices of the quarter.” Id.
12 at *3 (citation omitted). For that reason, among others, the court
13 held that “the specific dates . . . in [the] Amended Complaint and
14 Opposition d[id] not suggest backdating.” Id. at *4. Thus the
15 Openwave II court again granted nominal defendants’ motion to
16 dismiss, but it did again allow amendment. Id. at *7.

17 The same is true here. The narrow two day window between the
18 October 20, 2003 grants and the timely filed Form 4s would not have
19 “given defendants enough perspective on the market to intentionally
20 choose the lowest closing price” for fiscal year 2004. See id. at
21 *3 (citation omitted). This is especially so, as the individual
22 defendants emphasize, because the bulk of that time frame (e.g.,
23 October 22, 2003 through August 31, 2004) took place after the
24 filing of the Form 4s. Thus, despite what the SAC implies, in
25 picking the October 20, 2003 grant date, for most of the relevant
26 time frame, defendants would not have had the advantage of
27 hindsight.

28 With no analysis, plaintiff also relies upon selective quotes

1 by the courts in Zoran, 511 F.Supp.2d 986, and Finisar Corp.
2 Derivative Litig., 542 F.Supp.2d 980 (N.D.Cal. 2008) ("Finisar I").
3 Close examination of those cases reveals that rather than supporting
4 plaintiff's argument, they actually support defendants' position.
5 The Zoran court, too, acknowledged, that "backdating is [not]
6 completely impossible within a two-day window[.]" Zoran, 511
7 F.Supp.2d at 1006. But at the same time, that court indicated that
8 "on any given business day, the range of phony dates is restricted
9 to only two for those who file [their Form 4s] *on time*." Id. at
10 1066. Of the six post-SOX grants discussed in Zoran, the court held
11 that plaintiff had not sufficiently pled backdating as to three of
12 those grants solely because, as here, the directors who received
13 those grants timely filed their Form 4s. Id. at 1007 - 1008.
14 Indeed, the only one of the six grants to survive defendants' motion
15 to dismiss in Zoran was the grant where, *inter alia*, the Form 4s
16 were filed three business days late. Id. at 1008. Clearly, Zoran
17 does nothing to advance plaintiff's argument herein that it has
18 sufficiently pled backdating as to the October 20, 2003 grants,
19 despite the timely filing with the SEC of the Form 4s.

20 Plaintiff's reliance upon Finisar I, 542 F.Supp.2d 980, is
21 similarly unavailing. As plaintiff mentions, the Finisar I court
22 did observe: "The *delay* in filing a Form 4 with the SEC reporting
23 option grants *may* support an *indication* of backdating in that it is
24 *theoretically possible* to manipulate the grant date during the
25 window between the grant date and the public reporting of the option
26 grant to the SEC." Id. at 994 (citations omitted) (emphasis added).
27 Plaintiff is ignoring both the plain language of that observation
28 and the broader context in which it was made.

1 First, the Finisar I plaintiffs alleged that "of the 12
2 purportedly backdated stock options, the Form 4s related to 9 of
3 them were filed late." Id. (citation omitted) (emphasis added). It
4 is in the context of those allegedly late filed Form 4s that the
5 court made the above observation which the plaintiff herein quotes.
6 Here, there was no delay in the filing of the Form 4s as to the
7 October 20, 2003 grants. Thus, the Finisar I court's recognition
8 that it is "theoretically possible" to backdate where Form 4s are
9 late, has no bearing on the October 20, 2003 grants at issue where,
10 undisputably, the Form 4s were timely filed.

11 Second, even as to the one grant date in Finisar I where the
12 Form 4s were timely filed, the court found that the totality of
13 plaintiffs' allegations as to those grants did "not support a
14 finding that th[ose] . . . option grants were backdated." Finisar
15 I, 542 F.Supp.2d at 990. Moreover, even as to the untimely filed
16 Form 4s, the Finisar I court found that plaintiffs' complaint
17 "otherwise fail[ed] to support a clear showing that th[o]se grants
18 were backdated" because "the allegations d[id] not support a
19 conclusion that the Form 4s were late because the late-reported
20 grants were backdated." Id. at 994. The court thus "conclude[d]
21 that, without more, plaintiffs' allegations do not support" a
22 finding "that the 12 grants to directors and officers identified in
23 the complaint were backdated or indicate[d] a pattern of backdating
24 of grants to directors and officers." Id. Thus, plaintiff's single
25 quote from Finisar I regarding the "theoretical possib[ility]" of
26 backdating within the two day window for filing with the SEC does
27 not, without more, mandate a finding that backdating occurred as to
28 the October 20, 2003 grants. Nor does such a possibility warrant a

1 strong inference of scienter to engage in intentional backdating.

2 To salvage the October 20, 2003 grant allegations, plaintiff
3 contends that in its motion "Apollo *admits* that for one grant date,
4 there was in fact a possibility that such grant was backdated by a
5 single day." Resp. (Doc. 129) at 22:22-23 (emphasis added)
6 (citation omitted). Based upon that purported "admission,"
7 plaintiff surmises that "[i]t is entirely plausible, and consistent
8 with Apollo's admissions, that on October 21, 2003, [defendant and
9 former CEO] Nelson retroactively selected the October 20 grant date,
10 giving himself almost \$1 million of unvested and undisclosed gains,
11 and then reported such grants to the SEC on October 22, 2003." Id.
12 at 23:5-8. Notably, the SAC is void of any such allegations.
13 Nonetheless, plaintiff argues that "the 2003 grant only further
14 supports an inference of scienter with respect to defendants'
15 backdating[.]" Id. at 23:8-9.

16 Apollo's supposed admission that for one grant date there is a
17 possibility of backdating by a *single day* is important for two
18 reasons, plaintiff suggests. First, it "directly contradicts
19 [defendants'] . . . assertions that backdating within a two-day
20 window would be impossible." Id. at 23:3-4 (footnote omitted).
21 Second, this purported admission renders "inapplicable" the case law
22 upon which Apollo is relying "for the proposition that backdating by
23 two days would be unlikely[.]" Id. at 23:21-22, n. 8. Plaintiff's
24 reasoning is based upon the faulty premise that in its motion Apollo
25 admitted backdating; it did not.

26 As plaintiff construes Apollo's motion, it "states 'a grant
27 date may have been retroactively selected for three grants (**one, by**
28 **a day**).'" Id. at 22:23 - 23:1 (quoting Mot. (Doc. 122) at 3)

1 (emphasis added by plaintiff). Quoting from the SAC, which in turn
2 quotes from Apollo's Form 10-K for the period ending August 31,
3 2006, Apollo's motion actually states:

4 The Special Committee . . . reported that, after
5 analyzing all 100 grants between 1994 and 2006,
6 it 'found no direct evidence that the grant dates
7 for any of the large Management Grants were selected
8 with the benefit of hindsight,' and that of the 100
9 grants, *at most, there was a 'possibility' that a grant*
10 *date may have been retroactively selected for three*
11 *grants (one, by a day), but there 'was insufficient*
12 *evidence to reach such a conclusion.'*"

13 Defs'. Mot. (Doc. 122) at 3:22-24 (quoting SAC at ¶ 96 and citing
14 Farrell Decl'n (Doc. 126), exh. 19 thereto at 50) (emphases added).
15 By omitting the phrases in italics and bold font, and disregarding
16 the equivocal nature of that statement as a whole, plaintiff
17 mischaracterizes Apollo's motion as containing an "admission" of
18 backdating when it does not.

19 Additionally, the same SEC filing which forms the basis for the
20 SAC's allegation that "another grant . . . may have been
21 retroactively selected by a day," also alleges that for grants such
22 as the October 20, 2003 grant, where Form 4s were timely filed, "the
23 *original stated grant date is the most likely measurement date[.]*"
24 SAC (Doc. 112) at ¶ 96, 47:12-13; and 47:26-27 (emphasis added).
25 Therefore, the SEC filing "that raises questions whether another
26 grant (in addition to the two grants referenced in a previous Form
27 8-K dated November 6, 2006), may have been retroactively selected by
28 a day," cannot be referring to the October 20, 2003 grants. See id.
at ¶ 96, 44:18-20. For these reasons, the court finds no merit to
plaintiff's argument that in its motion Apollo admitted backdating.
That contrived admission therefore does not cure the SAC's pleading
deficiencies as to the October 20, 2003 grants.

1 It is clear to this court, as it has been to others, that it is
2 "theoretically possible" to backdate even within the narrow two day
3 window between the grant date and the filing of the Form 4 with the
4 SEC. See Finisar I, 542 F.Supp.2d at 994 (citing cases).
5 Undoubtedly, it takes more than the "theoretical possibility" of
6 backdating to survive a motion to dismiss. The allegations in the
7 SAC pertaining to the October 20, 2003 grants do not support a
8 strong inference of scienter to backdate those grants, especially as
9 discussed, taking into account the timely filing of the Form 4s as
10 to those grants. The timely filing of those Forms is not the only
11 factor undermining plaintiff's reliance upon that grant date, as
12 discussed next.

13 2. Time Frame

14 The SAC alleges in relevant part that:

15 Defendants dated certain of Apollo's 2003 option
16 grants on October 20, 2003 at \$60.90 per share -
17 **not only the low of the month but also the low for the**
18 **entire year.** The stock traded as high as \$68.51 per
share in October and as high as \$97.93 per share in the
[sic] 2003.

19 SAC (Doc. 112) at 19:2-5, ¶ 44 (underline emphasis added).
20 Defendants assert that the allegation that the October 20th
21 "grant[s] w[ere] made at 'the low of the entire year' is
22 contrived[,] " further undermining any inference of backdating as to
23 those grants. See Defs'. Mot. (Doc. 120) at 5:12-13. Reconciling
24 paragraph 44 with Apollo's stock chart, defendants explain that the
25 alleged \$60.90 price per share "purportedly" would be "the low for
26 fiscal year 2004, which ran from September 1, 2003 until August 31,
27 2004." Mot. (Doc. 120) at 5: 16-17 (citations omitted) (emphasis in
28 original). Defendants stress that they "could not have used

1 hindsight for most of th[at] time period[]" though "because most of
2 [it] (e.g., from October 22, 2003 until August 31, 2004), took place
3 **after** the grant was reported to the SEC." Id. at 5:18-20 (emphasis
4 in original). Defendants thus claim that plaintiff is
5 "manipulat[ing] the time period to make the [October 20, 2003]
6 grant[s] appear more improbable." Id. at 5:20-21.

7 Assuming that paragraph 44 is referring to calendar year 2003,⁸
8 Apollo similarly argues that that paragraph contains two "false"
9 allegations. Apollo's Mot. (Doc. 122) at 7:24. First, Apollo
10 points out that because its "stock closed lower on 116 of the 252
11 trading days in 2003 (46% of the time)[,]" id. at 7:24-25 (citation
12 omitted), and because its "average closing price in 2003 was
13 \$58.26[,]" id. at 8:1, the allegation that the October 20, 2003

15 ⁸ On its face, the SAC does not indicate whether the allegations as to
16 the other five grant dates are referring to calendar or fiscal years. Apollo's
17 assumption that the SAC is referring to calendar years is reasonable though because
18 those other five grant date allegations comport with Apollo's stock chart only if
19 they are read as referring to calendar years - not fiscal years.

20 For example, the SAC alleges that the grants dated December 15, 2000, "at
21 \$14.84 per share (split adjusted)" were, *inter alia*, "**the low for the fourth
22 quarter of 2000.**" SAC (Doc. 112) at 16:23-24, ¶ 42. The SAC further alleges that
23 Apollo's stock "hit its high for the year at \$22.14 per share . . . on December 28,
24 2000[.]" Id. at 16:28-17:1, ¶ 42 (emphasis added). Only if those allegations are
25 read as referring to calendar year 2000 do they correspond to Apollo's stock chart.

26 The same is true of the January 12, 2000 grant allegations. The allegations
27 of \$8.39 per share as the "**low of the year[,]**" and \$22.14 per share as the "high
28 . . . during the year[,]" only correlate to Apollo's stock chart if "year" refers
to calendar year 2000. See id. at 15:20-22, ¶ 41.

With respect to the September 21, 2001 grants, the SAC alleges that "at
\$23.33 per share" those grants were "**the low for the second half of 2001.**" Id. at
17:26-27 - 18:1, ¶ 43. Again, that allegation correlates to Apollo's stock chart
only if it is referring to the 2001 calendar year. However, if the SAC is
referring to fiscal year 2001, the alleged "low for the second half of 2001" would
be inaccurate because Apollo's stock traded at less than \$23.33 per share numerous
times during that time frame. See Farrell Decl'n (Doc. 125), exh. 20 thereto at
15-20. Regardless, \$23.33 could not be the low for fiscal year 2001 because
September 21, 2001 does not fall within that fiscal year. Thus, the SAC's
allegations as to the September 21, 2001 grants also comport with Apollo's stock
chart only if "**the second half of 2001[,]**" means calendar year 2001. Neither the
court nor the defendants should have to go through this exacting exercise to
ascertain whether the SAC's grant allegations are based upon a calendar or a fiscal
year, however.

1 grant was the "'low for the entire year'" is "false." Id. at 7:24.
2 Next, Apollo argues that because "[t]he highest closing price [in
3 the 2003 calendar] year was \$72.72 on December 2, 2003, \$25 lower
4 than what Plaintiff alleges[,]" id. at 8:2-3 (citation omitted), the
5 SAC falsely alleges that its "'stock traded . . . as high as \$97.93
6 per share in the [sic] 2003.'" Id. at 7:22-23 (quoting SAC (Doc.
7 112) at ¶ 44) (sic added by Apollo).

8 Based upon the foregoing, Apollo contends that the SAC's
9 "description of the October 20, 2003 grant is replete with
10 errors[.]" Id. at 7:17 (emphasis omitted). The court agrees, and
11 finds that those errors, taken together with the timely filing of
12 the Form 4s, "undermin[e] any claim of intentional 'backdating'" as
13 to the October 20, 2003 grants. See id. at 7:17-18 (emphasis
14 omitted).

15 Attempting to clarify matters, plaintiff acknowledges an
16 unspecified "inadvertent omission of the word 'fiscal' in the
17 [SAC][.]" Resp. (Doc. 129) at 21, n. 6. Significantly, inserting
18 "fiscal" into paragraph 44 does not rectify the ambiguity
19 surrounding the phrases "entire year" or "the [sic] 2003." See SAC
20 (Doc. 112) at 19:3 and 5, ¶ 44. Based upon Apollo's stock chart,
21 the allegation of "\$60.90 per share" as "**the low [price] for the**
22 **entire year**[]" is only accurate if paragraph 44 is referring to
23 fiscal year 2004, as earlier noted. See Farrell Decl'n (Doc. 125),
24 exh. 20 thereto at 29-34. Further, paragraph 44 pertains strictly
25 to "**2003 Stock Options**[]" it does not mention 2004 - either as a
26 calendar or a fiscal year. SAC (Doc. 112) at 19:1. So, despite
27 plaintiff's urging, paragraph 44 cannot be made consistent with
28 Apollo's stock chart by merely inserting the word "fiscal."

1 Plaintiff compounds the confusion as to the exact meaning of
2 the time frames paragraph 44 alleges by stating that "the
3 individual[s] . . . correctly recognized [] the strike price on
4 October 20, 2003, \$60.90, was the lowest price that Apollo's stock
5 traded during the entire 2003 **fiscal** year." Resp. (Doc. 129) at
6 21:25, n. 6 (underlined emphasis added). That misstates the
7 individual defendants' position; they did not recognize that \$60.90
8 was the lowest trading price of fiscal year 2003. Indeed, Apollo's
9 stock chart shows that during fiscal year 2003 the trading price for
10 its stock fell well below \$60.90 to a low of \$40.10 on December 13,
11 2002. See Farrell Decl'n (Doc. 125), exh. 20 thereto at 26.
12 Instead, as defendants already clarified, and as Apollo's stock
13 chart reflects, that \$60.90 was "purportedly . . . the low for
14 *fiscal* year **2004**[" Defs'. Mot. (Doc. 120) at 5:16 (bold emphasis
15 added).

16 Paragraph 44's allegation that Apollo stock traded "as high as
17 \$97.93 per share in the [sic] **2003**[" adds yet another layer of
18 confusion. See SAC (Doc. 112) at 19:4-5, ¶ 44 (emphasis added).
19 Regardless of whether that allegation is referring to the 2003
20 fiscal or calendar year, still, it does not comport with Apollo's
21 stock chart. Scrutinizing that chart reveals that \$97.93 per share
22 was the high for fiscal year 2004. See Farrell Decl'n (Doc. 125),
23 exh. 20 thereto at 33. As already mentioned though, paragraph 44
24 does not refer to the year 2004 in any form. Indeed, the SAC limits
25 its specific allegations of backdating stock options to the years
26 from 1998 - 2001, inclusive, and the October 20, 2003 grants. The
27 foregoing makes the SAC's references to \$97.93 per share all the
28 more perplexing. Defendants strongly insinuate that plaintiff had

1 some nefarious motive in making the allegations in paragraph 44; but
2 it strikes the court that those allegations are nothing more than
3 the product of inexact pleading.

4 In sum, the Apollo stock chart confirms that contrary to the
5 SAC's allegations: (1) \$60.90 per share was not the "low for the
6 entire year[]" of 2003 - whether read as a fiscal or calendar year;
7 and (2) Apollo's stock price did not trade "as high as \$97.93 per
8 share in . . . 2003[]" - again, whether for that calendar or fiscal
9 year. See SAC (Doc. 112) at 19:3-4 (emphasis omitted). Thus, due
10 to the timely filing of Form 4s for each of the alleged October 20,
11 2003 grants, and the factual inaccuracies in paragraph 24 detailed
12 above, the court disagrees with plaintiff; the 2003 grant
13 allegations do not "further support an inference of scienter with
14 respect to defendants' backdating[]" - either from a legal or a
15 factual standpoint. See Resp. (Doc. 129) at 23:8-9. Accordingly,
16 plaintiff cannot, as it is seeking to do, rely upon the October 20,
17 2003 grants "as a circumstance contributing to a strong inference of
18 scienter[.]"⁹ See id. at 20:13.

19 **B. Backdating Allegations**

20 Reasoning that because "'backdated' stock option grants[]" are
21 "a necessary predicate to all of Plaintiff's claims," and because
22 the SAC does not allege "*particular facts* to support its conclusion
23 that Apollo 'backdated' stock option grants[,]" defendants argue
24

25 ⁹ It is possible to construe the SAC as alleging an independent claim of
26 backdating based upon the October 20, 2003 grants. Plaintiff disavows that
27 construction though, as indicated above. Presumably this allays Apollo's concern
28 that "Plaintiff is attempting to resuscitate a claim of fraud based on alleged
backdating of the five time-barred grants[.]" See Apollo Mot. (Doc. 122) at 7:27
n. 12.

1 that dismissal is mandated. Apollo Mot. (Doc. 122) at 13:18-20
2 (emphasis added); see also Defs'. Mot. (Doc. 120) at 7:26-27
3 (dismissal is proper because the SAC does not "plead necessary facts
4 . . . to establish that the six grants were suspicious[.]"). In
5 making this argument, defendants claim that the SAC's backdating
6 allegations are "rife with errors[.]" Apollo Reply (Doc. 132) at
7 3:6.

8 Plaintiff's first response to these defense arguments is to
9 distance itself from the backdating aspect of this action.
10 Plaintiff stresses that "[a]s [it] [has] made clear[,] this case is
11 based on defendants' knowingly false and misleading statements about
12 Apollo's financial results and stock option granting practices."
13 Resp. (Doc. 129) at 20:10-12 (citations omitted). Plaintiff thus
14 maintains that in Apollo I, this court "correctly analyzed
15 backdating as contributing to a strong inference of scienter, not an
16 independent claim[.]" and that [n]othing in the [SAC] changes th[at]
17 analysis." Id. at 20:12-14(citation omitted); and at 20:26. In
18 light of the foregoing, by challenging the sufficiency of the SAC's
19 backdating allegations, plaintiff asserts that defendants "appear
20 intent on repeatedly advancing *rejected* theories." Id. at 19:22
21 (emphasis added). Plaintiff thus objects to what it views as
22 "renewed attacks on issues this Court has already decided, and . . .
23 *issues that were previously raised[.]*" Id. at 19:15-16; and 19:18
24 (emphasis added).

25 As plaintiff strongly implies, with a few exceptions not
26 applicable here, the law of the case doctrine precludes
27 consideration of previously resolved issues. That doctrine "posits
28 that 'when a court decides upon a rule of law, that decision should

1 continue to govern the same issues in subsequent stages in the same
2 case[.]’” United States v. Park Place Assoc., Ltd., 563 F.3d 907,
3 918 (9th Cir. 2009) (quoting Arizona v. California, 460 U.S. 605,
4 618, 103 S.Ct. 1382, 75 L.Ed.2d 318 (1983)); see also United States
5 v. Phillips, 367 F.3d 846, 856 (9th Cir. 2004) (footnotes omitted)
6 (emphasis added) (“The law of the case doctrine precludes a court
7 from reconsidering an issue that it has *already resolved*. Issues
8 that a district court *determines* during pretrial motions become law
9 of the case.”)

10 The law of the case doctrine is not as all encompassing as
11 plaintiff urges, however. It does not preclude a court from
12 subsequently addressing issues that were merely raised before, but
13 not resolved. “For a prior ruling to become law of the case as to a
14 particular issue, that issue must have been decided explicitly or by
15 necessary implication in the previous disposition.” Park Place, 563
16 F.3d at 925 (citations and quotation marks and alteration omitted).
17 Likewise, the “‘law of the case’ does *not* apply to issues or claims
18 that were *not actually decided*.” Mortimer v. Baca, 594 F.3d 714,
19 720 (9th Cir. 2010) (citations and internal quotation marks omitted)
20 (emphasis added).

21 This court held in Apollo I that the five specifically pled
22 grants in the FAC were time-barred. Apollo I, 633 F.Supp.2d at 782
23 n. 4. Therefore, the court did not address various defense
24 arguments such as the lack of specificity as to the FAC’s “roughly
25 100 unidentified grants[,]” or issues as to the measurement
26 standards for the five grants identified therein. See Apollo I, 633
27 F.Supp.2d at 782 n.4. Thus, the law of the case doctrine does not
28 preclude the court from now resolving those previously raised but

1 unresolved defense arguments.

2 Bolstering that conclusion is the fact that the operative
3 complaint now is the SAC, the filing of which this court expressly
4 permitted in Apollo I. See Apollo I, 633 F.Supp.2d at 834.
5 Although they are similar, there are important differences between
6 the Apollo I complaint and the SAC. One, as already discussed, is
7 the addition of the October 20, 2003 grant date. In Apollo I, the
8 court accepted at face value the accuracy of the FAC's allegations
9 pertaining to the five grant dates therein. The ambiguous,
10 inconsistent and sometimes erroneous allegations of the October 20,
11 2003 grants, however, has magnified the court's concern, *inter alia*,
12 regarding the factual accuracy of allegations as to those same five
13 grant dates.

14 Moreover, despite the slight shift in focus from the FAC, the
15 allegations in the SAC show that a critical part of the alleged
16 fraudulent scheme is backdating.¹⁰ The SAC explicitly alleges three
17 "circumstances" where "stock option manipulation," *i.e.*, backdating,
18 is "fraudulent[,]" and that "[a]ll three . . . circumstances existed
19 here." SAC (Doc. 121) at 2:18-19; and 2:22-23. Indeed, the SAC
20 goes so far as to specifically allege that "defendants' manipulation
21 of Apollo's stock option grants was *the linchpin* of a broader
22 fraudulent scheme[.]" Id. at 2:26-27, ¶ 6 (emphasis added). As the

23
24 ¹⁰ The "crux of the fraudulent scheme" in the FAC "was a *practice* whereby
25 defendants *intentionally manipulated stock option grants* to [Apollo's] officers,
26 directors and employees in order to provide the recipients with a more profitable
27 exercise price and to under-report [Apollo's] expenses and thereby overstate
28 [Apollo's] earnings." FAC (Doc. 71) at 1:10-13, ¶ 2. Slightly shifting the
emphasis, the SAC now alleges that "the crux of the fraudulent scheme was a
practice whereby defendants *overstated Apollo's earnings and income* by failing to
report compensation expenses associated with granting in-the-money stock options,
which had been intentionally manipulated in order to provide the recipient with a
more profitable exercise price." SAC (Doc. 112) at 1:9-12, ¶ 2 (emphasis added).

1 SAC makes abundantly clear, there are several aspects to the alleged
2 fraudulent scheme and backdating is an integral part of that scheme.
3 Thus, “[b]ecause a § 10(b) claim alleges fraud, Plaintiff[] must
4 plead with particularity the circumstances constituting the
5 fraud[,]’” including, in this case, backdating which is a critical
6 part of the alleged fraudulent scheme. See In re Washington Mutual
7 Securities Litig., 649 F.Supp.2d 1192, 1207 (W.D.Wash. 2009)
8 (quoting FED.R.CIV.P. 9(b)). Accordingly, the court will examine
9 the sufficiency of the SAC’s backdating allegations because: (1) the
10 operative complaint here differs from that in Apollo I; (2) the
11 issues which these motions now raise were not actually decided in
12 Apollo I; (3) backdating is a critical component of the SAC’s
13 alleged fraudulent scheme; (4) and the factual inaccuracies in the
14 October 20, 2003 grant allegations mandate closer examination of the
15 other five grant date allegations.

16 Defendants offer several reasons as to why the specific grant
17 allegations are insufficient. Some of those reasons pertain to a
18 lack of facts and others pertain to purported errors in the facts as
19 alleged. Significantly, plaintiff offers very little substantively
20 to refute any of defendants’ arguments, as will quickly become
21 evident.

22 1. Measuring Standards

23 Defendants contend that the SAC uses inconsistent measuring
24 standards “because use of consistent [ones] would undercut
25 Plaintiff’s case by showing that not all of the [alleged] grants had
26 positive returns[.]” Apollo Reply (Doc. 132) at 3:10-11 (citation
27 omitted).

28 The SAC, in calculating the return for the six identified

1 grants, does employ three different return dates. For the 1998
2 grants, it uses a ten day return; for the 2003 grants, it uses a two
3 day return;¹¹ and for the other four grants, it uses a five day
4 return. SAC (Doc. 112) at ¶¶ 39-44. This lack of internal
5 consistency is troubling. If the SAC had used the same five day
6 return for the December 18, 1998 grants as it did for the other pre-
7 SOX grants, the result would have been a "5 day return" of nothing
8 - \$0.00. That is because, as Apollo's stock price reflects, its
9 stock price closed at the exact same price - \$11.39 - on December
10 18, 1998 and five trading days later, on December 28, 1998. See
11 Farrell Decl'n (Doc. 125), exh. 20 thereto at 6. Similarly, given
12 that the October 20, 2003 grants were post-SOX, plaintiff's choice
13 of a two day return does not seem coincidental; but use of a ten or
14 two day return would also undercut plaintiff's backdating theory
15 because it would provide returns after the filing of the Form 4s.
16 The court thus finds that plaintiff's "choice of comparison dates
17 and prices is inconsistent and therefore arbitrary." See Nach v.
18 Baldwin, 2008 WL 410261, at *6 (N.D.Cal. Feb. 12, 2008) (variously
19 comparing grants with stock prices ten days later; six and five
20 months later and one month later).

21 Even if the SAC had used the same five day return for all six
22 grants, without any explanatory allegations, it would be
23 problematic. Cf. Hansen, 527 F.Supp.2d at 1156 (citation omitted)
24 ("Plaintiff does not explain why a higher stock price on the tenth
25 day after a stock option grant date is significant, or how it gives
26

27 ¹¹ Use of a two day return date for those 2003 grants is fully consistent
28 with the fact, as explained herein, that by that time SOX had been enacted, almost,
but not completely eliminating the possibility of backdating.

1 rise to a strong inference of scienter.") The use of two, five or
2 10 day returns is all the more questionable given the SAC's
3 allegation that "Apollo's stock options typically vested over a four
4 year period." SAC (Doc. 112) at 20:9, ¶ 46; see In re Finisar
5 Deriv. Litig., 2009 WL 3072882, at *12 (N.D.Cal. Sept. 22, 2009)
6 ("Finisar II") (use of a 20 day return was "uninformative" in part
7 because it was "untethered to any realistic scenario of exercising
8 the options[]"). The seeming arbitrariness or selective nature of
9 those dates is heightened because the SAC's representative sampling
10 of grants is so small.

11 Plaintiff's silence on the issue of inconsistent measurements
12 is deafening. "By failing to at least meaningfully summarize and
13 combat" this sound defense argument, plaintiff has "essentially
14 abdicated [its] responsibility to rebut defendants' dismissal
15 arguments, and conceded th[is] point." See In re Bare Escentuals,
16 Inc. Sec. Litig., 2010 WL 3893622 (N.D.Cal. Sept. 30, 2010).

17 **2. Lack of Other Grant Date Allegations**

18 Quoting from the Restatement, the SAC alleges that "'57 of the
19 100 total grants made [between FY94 and September 2006] used
20 incorrect measurement dates for accounting purposes.'" SAC (Doc.
21 112) at 13:8-9, ¶ 37. The SAC further alleges that "[w]hile many of
22 these grants were not publicly reported, several¹² grants reported
23 in Apollo's Forms 10-K had purported grants dates so improbable that
24 backdating is the only plausible explanation." Id. at 13:10-12,
25 ¶ 38. Defendants challenge the fact that, aside from the six grants
26 discussed herein, the SAC does not include any allegations as to the

27
28 ¹² The FAC had alleged that "some" of those grants had not been "publicly
reported[.]" FAC (Doc. 71) at 17:25, ¶ 48.

1 94 other grants which are the subject of the Restatement. Instead
2 the SAC relies upon only six grants (one of which the court has now
3 found was not backdated). Defendants thus claim that plaintiff
4 engaged in "cherry-pick[ing]," relying upon only a few selected
5 grants to allege backdating. See Apollo Mot. (Doc. 122) at 9:6.

6 Plaintiff dismissively replies:

7 Far from cherry-picking grants, the [SAC] alleges
8 that, between 1998 and 2003, **all but one** (six out
9 of seven) of Apollo's stock options reported in
10 Apollo's Forms 10-K were backdated. . . This is
systematic and considered fraudulent conduct by and
for the benefit of Apollo's most senior executives,
not 'cherry-picking.'

11 Resp. (Doc. 129) 25:13-17 (citation and footnote omitted).

12 Plaintiff then resorts to claiming that "most" of the 100 grants at
13 issue for purposes of the Restatement "were never publicly
14 disclosed[.]" Id. at 24:20. Plaintiff asserts that "even under the
15 PSLRA, [it] is not required to provide details of improper
16 transactions known only to the defendants." See id. at 25:6-7.

17 The supposed lack of publicly available grant details would
18 carry far more weight if plaintiff had not ignored at least two
19 other publicly reported grants, which undermine rather than support
20 its backdating theory. To illustrate, as the publicly filed Form 4s
21 indicate, Apollo made grants to defendants Govenar, Norton, Blair
22 and DeConcini on September 10, 2005. See Farrell Decl'n (Doc. 125),
23 exhs. 14-17 thereto. Apollo's stock chart shows that whether using
24 a two, five or ten day "return," as in the SAC, Apollo's stock
25 closed lower, not higher, than that September 10th grant date. See
26 id., exh. 20 thereto at 39. In fact, the "10 day return" there was
27 a negative 14%. The same is true of the October 22, 2002 grants to
28 defendants Noone, Bachus, Peter Sperling, John Sperling, Nelson and

1 Gonzales. See id., exhs. 1-6 thereto. Under a two, five, or ten
2 day "return" scenario, those stocks closed lower not higher. "The
3 '2 day return' was -2.34%; the '5 day return' was -.14% and the '10
4 day return' was -2.62%." Apollo Mot. (Doc. 122) at 12:5-6.
5 Defendants surmise, and it certainly appears, that plaintiff
6 deliberately chose to ignore these publicly reported grants because
7 they do not conform to its backdating theory.

8 Remarkably, once again plaintiff's response is silent as to
9 this argument. Plaintiff concedes in its response that it was aware
10 of one such grant, however. Plaintiff declares that "the [SAC]
11 alleges that, between 1998 and 2003, **all but one** (six out of seven)
12 of Apollo's stock options reported in Apollo's Forms 10-K were
13 backdated, but the SAC does not include any such allegation. See
14 Resp. (Doc. 129) at 25:13-15 (citing SAC (Doc. 121) at ¶¶ 37-44).
15 Moreover, the SAC is also void of any allegations regarding how many
16 publicly reported stocks there were between 1994 to September 2006.
17 Cf. City of Westland Police and Fire Ret. Sys. v. Sonic Solutions,
18 2009 WL 942182, at *7 (N.D.Cal. April 6, 2009) ("In the absence of
19 further information as to why these fourteen grants are
20 distinguishable from thousands of other grants made by [defendant],
21 these fourteen grants must be viewed as a small unrepresentative
22 sample of all stock option grants.") "Plaintiff thus appears to
23 focus on a subset of [six] option grants, and . . . fails to explain
24 why this subset is analytically important, and why he has not
25 included data on *all* grants[,] including the two other known
26 publicly disclosed grants, "during the relevant time period." See
27 Nach, 2008 WL 410261, at *5. In any event, because plaintiff's
28 response wholly disregards the two publicly reported grants which,

1 defendants have shown, undercut plaintiff's backdating theory,
2 plaintiff has "failed to discharge [its] burden to successfully
3 rebut" defendants' arguments and thus "conceded the point." See
4 Bare Escentuals, 2010 WL 3893622, at *21 and *22.

5 Returning briefly to the claimed lack of publicly disclosed
6 grant data, plaintiff's cited cases bear no resemblance to the
7 present situation. Hence they do not provide a means to circumvent
8 plaintiff's pleading obligations under either the PSLRA or Rule
9 9(b). In Pirraglia v. Novell, Inc., 339 F.3d 1181 (10th Cir. 2003),
10 the Tenth Circuit merely held that plaintiff did not have "to
11 describe in detail documents and paperwork that would presumably be
12 kept, if at all, in [defendant's] private files." Id. at 1193 n.
13 14. That is far different than the present case where the SAC lacks
14 the necessary specificity to support its backdating allegations, and
15 in fact, disregards available information which detracts that
16 theory. The manufacturer's complaint in United Technologies Corp.
17 v. Mazer, 556 F.3d 1260 (11th Cir. 2009), contained far more detail
18 than the SAC, to support its claim that the president of the company
19 was acting within the scope of his employment regarding the theft
20 and sale of aircraft blueprints. The Eleventh Circuit also relied
21 upon the fact that plaintiff was "at a *clear* informational
22 disadvantage." Id. at 1273 (emphasis added). The same cannot be
23 said of the plaintiff herein.

24 Finally, "Rule 9(b) does not permit a party to make conclusory
25 allegations and then," as plaintiff herein strongly implies,
26 "through the discovery process, gain more specific information and
27 amend its pleadings to satisfy the particularity requirement." See
28 Periquerra v. Meridas Capital, Inc., 2010 WL 395932, at *5 (N.D.Cal.

1 Feb. 1, 2010) (citation omitted). "Allowing Plaintiff[] to conduct
2 discovery in order to comport with heightened pleading
3 requirement[s] applicable to fraud-based claims is directly contrary
4 to the purpose of Rule 9(b); namely, that plaintiff[] show[s] that
5 there is some substance to [its] claim of fraud before subjecting a
6 defendant to the rigors of the discovery process." Id. (citation
7 omitted).

8 Furthermore, allowing discovery under these circumstances also
9 would contradict the PSLRA's "Stay of Discovery" provision,¹³ and
10 contravene Congressional intent. That stay provision was "intended
11 to prevent unnecessary imposition of discovery costs on defendants."
12 SG Cowen Sec. Corp. v. U.S. Dist. Court, 189 F.3d 909, 911 (citing
13 H.R. Conf. Rep. No. 104-369, 104th Cong. 1st Sess. at 32 (1995),
14 reprinted in 1995 U.S.C.C.A.N. Sess. 731)). The Ninth Circuit has
15 held that the PSLRA's stay of discovery provision "clearly
16 contemplated that 'discovery should be permitted in securities class
17 actions *only after the court has sustained the legal sufficiency of*
18 *the complaint.*'" Id. at 913 (quoting S.Rep. No. 104-98, at 14 (1995)
19 reprinted in U.S.C.C.A.N. 693 (emphasis added by Ninth Circuit)).
20 By suggesting that it should have access to Apollo grants which were
21 not publicly disclosed to enhance the SAC's allegations, plaintiff
22 is putting the proverbial cart before the horse, at least when it
23 comes to the PSLRA's clear pleading requirements and stay of
24 discovery provision.

25 3. "Lows"

26
27 ¹³ Under the PSLRA, "all discovery and other proceedings shall be stayed
28 during the pendency of any motion to dismiss, unless the court finds upon the
motion of any party that particularized discovery is necessary to preserve evidence
or to prevent undue prejudice to that party." 15 U.S.C. § 78u-4(b)(3)(B).

1 Accepting at face value the truth of allegations in the FAC as
2 to the "lows" for the five grants specified therein, this court
3 found that the alleged dates, "with one exception, appear to reflect
4 at a minimum the lowest price of the month, and in one instance the
5 lowest price for the year." Apollo I, 633 F.Supp.2d at 793
6 (emphasis added). Especially in light of the factual inaccuracies
7 pertaining to the October 20, 2003 grants, the court has scrutinized
8 Apollo's stock chart in terms of both the backdating and false
9 statement allegations. Apparently plaintiff took some liberties in
10 construing Apollo's historical trading history.

11 The SAC alleges that the December 18, 1998 grants at "\$11.39
12 per share" were "nearly the low for the month of December[.]" SAC
13 (Doc. 112) at 13:15-16, ¶ 39. As defendants emphasize, however, the
14 stock price was lower the day before, December 17, 1998 at \$11.17.
15 Farrell Decl'n (Doc. 125), exh. 20 thereto at 6. The price was also
16 lower on the four trading days after: \$10.22 on December 21, 1998;
17 \$10.42 on December 22, 1998; \$11.28 on December 23, 1998 and \$10.89
18 on December 24, 1998. Id. Apollo's stock was also at \$11.39 per
19 share on December 28, 1998 - the fifth trading date after the
20 alleged December 18, 1998 grants. Id. So, as alleged, the December
21 18, 1998 grant was actually the sixth lowest price of the month.
22 That seems inconsistent with plaintiff's backdating theory. See
23 Finisar I, 542 F.Supp.2d at 989 (an option "dated at the fifth
24 lowest price seem[s] at least equally plausible the result of
25 chance[]").

26 The SAC's allegation that defendants dated the April 19, 1999
27 grant to defendant Gonzales at \$10.22 per share, "the low of the
28 month," SAC (Doc. 112) at 14:23-24, ¶ 40 (emphasis added), creates

1 the inaccurate impression that April 19th was the only day that
2 month where Apollo stock traded at that price. It was not.
3 Apollo's stock chart shows that its stock actually traded at that
4 price two other times that month - on April 13th and April 20th.
5 Farrell Decl'n (Doc. 125), exh. 20 thereto at 8. To be sure, a
6 stock "need not be priced at the lowest price of the month . . . to
7 support an inference of backdating[.]" Finisar I, 542 F.Supp.2d at
8 992 (citation omitted) (emphasis added). But the allegation that
9 the April 19, 1999 grants were made at "the low of the month," SAC
10 (Doc. 112) at 14:23-24, ¶ 40, "may be misleading because," on two
11 other "instances, the stock traded at the same price" in April,
12 1999. See City of Westland, 2009 WL 942182, at *7. However,
13 because the SAC relies upon so few specific grants, and some contain
14 factual inaccuracies, this allegation further demonstrates the need
15 for particularity.

16 **4. Stock Price Charts**

17 The stock price charts in the SAC have differing y-axes
18 representing the "Dollars Per Share" price. Compare SAC (Doc. 112)
19 at 14:2-13 with SAC (Doc. 112) at 18:6-17. Based upon the court's
20 observation in Goodman, 595 F.Supp.2d 1253, supra, defendants argue
21 that because of those differing axes, plaintiff is "apparent[ly]
22 'attempt[ing] to 'magnify' the depth of the 'suspicious' fall and
23 subsequent rise in the share price coinciding with option grants to
24 the defendants." Defs'. Mot. (Doc. 120) at 7:22-23 (quoting
25 Goodman, 595 F.Supp.2d at 1274 n. 10). The plaintiff herein
26 offhandedly remarks "that Apollo's stock option granting history
27 speaks for itself, and is 'suspicious' enough on its own." Resp.
28 (Doc. 129) at 23:12-14. Plaintiff does not even bother to address

1 defendants' substantive challenge to the SAC's charts. Especially
2 under these circumstances, this court agrees with the Goodman
3 court's astute observation that "[t]his convenient (but obvious)
4 manipulation of scale - disguising the weakness of the
5 plaintiff['s] claims of suspicious timing - taints the plaintiff['s]
6 allegations." See Goodman, 595 F.Supp.2d at 1275 n.10.

7 The court continues to adhere to the view that "lack of a sound
8 financial analysis" is not critical or necessarily dispositive at
9 the pleading stage when backdating is a part of an alleged section
10 10(b) fraudulent scheme. See Apollo I, 633 F.Supp.2d at 793-794.
11 From closely examining the SAC's six specifically identified grants,
12 however, it is not readily apparent that the backdating allegations
13 therein are not lacking merely due to the "lack of a sound financial
14 analysis[.]" See id. Rather, it is a culmination of pleading
15 deficiencies which compels the conclusion that the SAC's backdating
16 allegations are not plead with the requisite particularity. This is
17 evidenced by internal inconsistencies, ambiguities, and erroneous
18 and misleading factual allegations which do not comport with
19 Apollo's own stock chart. Even if the SAC had adequately plead
20 backdating, nonetheless, as discussed next, it fails to plead
21 falsity with the requisite particularity. Thus, in any event, the
22 SAC cannot withstand these motions to dismiss.

23 **C. "Material Misrepresentations or Omissions"**¹⁴

24 **1. Pleading Standards**

25 A securities fraud plaintiff, as Apollo I discusses, must
26 satisfy Rule 9(b)'s particularity requirements, as well as the

27
28 ¹⁴ For the sake of brevity, hereinafter these claims shall be referred to
as "false statements."

1 PSLRA's "exacting requirements for pleading falsity." Metzler,
2 540 F.3d at 1070. The court incorporates by reference that prior
3 discussion of particularity pleading standards. See Apollo I,
4 633 F.Supp.2d at 783-784. Several principles bear repeating and
5 expansion though.

6 Under the PSLRA's "heightened pleading standard[s][,] . . .
7 'the complaint shall specify each statement alleged to have been
8 misleading, the reason or reasons why the statement is misleading,
9 and, if an allegation regarding the statement or omission is made on
10 information and belief, the complaint shall state with particularity
11 all facts on which that belief is formed." In re Cutera Secs.
12 Litig., 610 F.3d 1103, 1107 (9th Cir. 2010) (quoting 15 U.S.C.
13 § 78u-4(b)(1)(B)). "Thus, a plaintiff must plead falsity with
14 particularity[.]" Rubke v. Capitol Bancorp Ltd., 551 F.3d 1156, 1164
15 (9th Cir. 2009) (citation omitted). Similarly, Rule 9(b) requires
16 that "[i]n all averments of fraud or mistake, the circumstances
17 constituting fraud or mistake shall be stated with particularity."
18 FED.R.CIV.P. 9(b).

19 The PSLRA could not be more clear: "If a plaintiff fails to
20 plead the alleged misleading statements or omissions or the
21 defendant's scienter with particularity, the complaint *must* be
22 dismissed." Nursing Home Pension v. Oracle Corp., 380 F.3d 1226,
23 1231 (9th Cir. 2004) (citing 15 U.S.C. § 78u-4(b)(3)(A)). The
24 purpose of those "heightened pleading requirements is 'to give
25 defendants notice of the particular misconduct which is alleged to
26 constitute the fraud charged so that they can defend against the
27 charge and not just deny that they have done anything wrong.'" Apollo I,
28 633 F.Supp.2d at 783 (quoting Neubronner v. Milken,

1 6 F.3d 666, 671 (9th Cir. 1993) (internal quotations and citation
2 omitted)).

3 Agreeing with defendants, in Apollo I this court found that
4 plaintiff's false statements were not pled with the requisite
5 particularity in accordance with the principles just outlined. Not
6 only was the FAC "a puzzle-like pleading which the court [could] not
7 countenance[,]" but the FAC's "cut and paste nature" was also
8 "troubling." Apollo I, 633 F.Supp.2d at 786. To this court
9 though, "[p]erhaps the most troubling aspect of the FAC" was "that
10 the 'vague allegations of deception' [we]re 'unaccompanied by a
11 particularized explanation stating *why* the defendant's alleged
12 statements or omissions are deceitful." Id. (quoting Metzler, 540
13 F.3d at 1061 (citation omitted) (emphasis added by Metzler Court)).
14 Despite those glaring deficiencies, the court declined to dismiss
15 the FAC based upon its form. Following the Ninth Circuit's
16 "recommend[ation][,]" this court instead "require[d] . . . plaintiff
17 to streamline and reorganize the [FAC][.]" Id. (citations and
18 internal quotation marks omitted). More specifically, the court
19 directed plaintiff to "be clear and concise in identifying the false
20 statements and articulating the factual allegations supporting an
21 inference that the statement is false or misleading." Id. at 786-
22 787 (citation and internal quotation marks omitted)). The SAC's
23 changes in form only highlight the substantive deficiencies of the
24 SAC, though, revealing that it does not plead falsity with the
25 requisite degree of particularity.

26 . . .

27

28

1 With the exception of the fiscal year 2001 Form 10-K, for the
2 35 false statements pertaining to Apollo's "earnings and financial
3 results," the SAC follows a distinct pleading pattern. Each such
4 allegedly false statement consists of three subparagraphs.

5 In the first, the SAC alleges that approximately one month
6 before Apollo filed its Form 10-Qs and Form 10-Ks, it would make
7 "Earnings Announcement[s]" in the form of press releases. See,
8 e.g., SAC (Doc. 112) at ¶¶ 50(a); 61(a); exh. 2 at 686; and exh. 24
9 at 3-4. Thereafter, the SAC alleges that either a Form 10-Q or a
10 Form 10-K, or both, were filed with the SEC. Those forms
11 "reaffirmed the previously announced financial results[.]" See,
12 e.g., id. at 22:21, ¶ 51(b). The SAC identifies by name the
13 individuals who signed the Form 10-Qs and Form 10-Ks,¹⁷ but only
14 generically alleges that Apollo issued the earnings announcements.
15 The third part of each "earnings and financial results" allegation
16 is a separate paragraph entitled "**Reasons Why the Statement Was**
17 **False and Misleading[.]**" See, e.g., id. at ¶¶ 49(b) (emphasis in
18 original). For 17 of these 35 statements, the SAC relies
19 exclusively upon the Restatement to support its allegations as to
20 why those statements are false. For the other 18 statements, the
21 SAC does not refer to any source in alleging why a given statement
22 was false.

23 Apollo's 10-Ks are the source of the second group of alleged
24 false statements - those pertaining to compliance with IRS Code
25
26

27 ¹⁷ The Form 10-Qs were signed by two section 10(b) defendants, Gonzales
28 and Nelson, and defendant Bachus. Those 10-Ks were signed by nine of the 11
individuals, four of whom are section 10(b) defendants.

1 § 162(m)¹⁸ and APB 25.¹⁹ Insofar as compliance with section 162(m)
2 is concerned, the SAC alleges that in Apollo's Form 10-Ks for fiscal
3 years 2002 - 2005:

4 Apollo stated that 'The company's policy is to
5 comply with the requirements of Section 162(m)
6 and maintain deductibility for all executive
7 compensation, except in circumstances where we
8 conclude on an informed basis that it is in the
best interest of the Company and the shareholders
to take actions with regard to the payment of
executive compensation which do not qualify for
tax deductibility.'

9 Id. at 32:17-21, ¶ 67(a) (quoting exh. 9 thereto at 27). Likewise,
10 in Apollo's Form 10-Ks for fiscal years 2002-2005, as to compliance
11 with APB 25, the SAC alleges:

12 'The Company applies the recognition and
13 measurement principles of [APB] Opinion No.
14 25, Accounting for Stock Issued to Employees,
15 and related interpretations in accounting
16 for those plans. Stock-based employee
17 compensation expense is not reflected in the
18 Consolidated Statement of Operation as all options
19 granted under those plans had an exercise price
equal to the market value of the underlying common
stock on the date of grant.'

20 ¹⁸ Very basically, that section of the Internal Revenue Code "prohibits
21 a federal income tax deduction to publicly held companies for compensation paid to
22 certain executive officers, to the extent that compensation exceeds \$1.0 million
per covered officer in any fiscal year." Middlesex, 527 F.Supp.2d at 1174; see
also SAC (Doc. 112) at 49:11-13, ¶ 96

23 ¹⁹ "Accounting for employee stock options is governed by prescribed
24 methodology and measurement standards." S.E.C. v. Pattison, 2011 WL 723588, at
*5 (N.D.Cal. Feb. 22, 2011). The SAC alleges:

25 Pursuant to [APB] Opinion No. 25, *Accounting for Stock Issued to*
26 *Employees* ("APB 25"), which was in effect through June 2005,
27 [Apollo] was obligated to recognize this gain [from "options
. . . priced below a stock's fair market value when they are
awarded[]"] as compensation expense over the vesting period of
the option.

28 SAC (Doc. 112) at 3:6-10, ¶ 6(a).

1 Id. at 34:14-19, ¶ 68(b) (quoting exh. 9 thereto at 18).²⁰ The
2 Restatement is the SAC's primary basis for alleging why the
3 statements as to compliance with section 162(m) and APB 25 were
4 false.

5 The third category of false statements pertaining to "internal
6 controls relating to stock option grants and related financial
7 reporting" are in the SOX certifications for fiscal years 2002-2005,
8 signed by section 10(b) defendants Nelson and Gonzales. Again, the
9 SAC relies upon the Restatement in alleging why those certifications
10 were false. The fourth category of allegedly false statements
11 comprises a relatively small part of the SAC. The SAC alleges six
12 statements wherein certain defendants denied any wrongdoing as to
13 Apollo's stock option practices. The Restatement is not a basis for
14 alleging why these six statements are false, but the SAC continues
15 the pattern of separately pleading "why" such statements were false.

16 For analytical purposes, Apollo divides the 54 allegedly false
17 statements into two groups - "accounting statements" (Nos. 1-48) and
18 backdating denials (Nos. 49-54); so, too, will this court.

19 **3. "Accounting Statements"**

20 Together, Apollo and the individual defendants offer a host of
21 reasons as to why the accounting statements are not plead with the
22 necessary degree of particularity. The Restatement is an integral
23

24 ²⁰ The statement regarding compliance with APB 25 differed slightly in the
25 fiscal year 2001 Form 10-K:

'The Company applies APB No. 25 and related
26 interpretations in accounting for its stock-based
27 compensation, and has adopted the disclosure-only
28 provisions of SFAS No. 12. Accordingly, no compensation
cost has been recognized for these plans.'

SAC (Doc. 112) at 34:7-10, ¶ 68(a) (quoting exh. 1 thereto at 107).

1 part of most of these defense arguments. Likewise, the Restatement
2 is at the heart of plaintiff's response. This is so even though, as
3 mentioned at the outset of this section, not all of the accounting
4 statements rely upon the Restatement as the source for alleging
5 falsity. Overlooking that fact, viewing the Restatement as "an
6 admission that [Apollo's] reported financial results . . . were
7 false and misleading when made[,]" plaintiff maintains that the SAC
8 "alleges falsity with particularity." Resp. (Doc. 129) at 11:3-5
9 (citation omitted); and at 10:10 (emphasis omitted). The defendants
10 did not directly address the issue of whether the Restatement is an
11 admission of falsity. Instead, essentially they argue, among other
12 things, that the SAC does not allege falsity with the requisite
13 particularity due to a lack of allegations showing a sufficient
14 nexus between the Restatement and the purportedly false accounting
15 statements.

16 The court will address these Restatement arguments momentarily,
17 but first it will examine the SAC's allegedly false statements which
18 undermine rather than advance plaintiff's fraud theory herein.

19 **a. Fiscal Year 2004 Understatement**

20 The "crux of the fraudulent scheme[,]" according to the SAC, is
21 that "defendants overstated Apollo's earnings and income by failing
22 to report compensation expenses associated with granting in-the-
23 money stock options," which in turn led to "an artificial inflation
24 of [Apollo's] stock[.]" SAC (Doc. 112) at 1:9-11; and 16, ¶ 2
25 (emphasis added). Nonetheless, as to Apollo's fiscal year 2004 Form
26 10-K and its related "Earnings Announcement," the SAC alleges that
27 Apollo "misstated" rather than overstated its net income and
28 earnings per share and compensation expenses. Id. at 28:13-28 -

1 29:1-3, ¶¶ 61(a)-(c). Allegedly, that misstatement was "as a result
2 of Apollo's failure to account for compensation and tax expenses
3 associated with stock options priced below the fair market value of
4 Apollo's common stock on the date of the grant."²¹ Id. at 29:16-19,
5 ¶ 61(c).

6 To be compatible with the SAC's theory of fraud quoted above,
7 however, the "misstatement" would necessarily have to be an
8 overstatement. The SAC explicitly refers to overstatements,
9 understatements and misstatements, so presumably plaintiff knew the
10 difference and intended to distinguish among them.

11 Moreover, the SAC also alleges that the Restatement "admits"
12 that Apollo's net income was "*understated* . . . during FY04 due to
13 Apollo's failure to properly account for in-the-money stock option
14 grants." Id. (emphasis added). This understatement allegation
15 makes no sense if, as the SAC explicitly alleges, a critical aspect
16 of the purported "fraudulent scheme" was overstating earnings. See
17 id. at ¶ 2. Thus the court agrees with Apollo that an
18 understatement of net income is "incompatible" with the plaintiff's
19 fraud theory as the SAC defines it. See Apollo Mot. (Doc. 122) at
20 16:3.

21 Plaintiff ignores the argument that the allegations outlined
22 above do not comport with plaintiff's theory of fraud set forth in
23 the SAC. As to the alleged understatement of net income, plaintiff
24 weakly counters that such an understatement "could merely have been
25 caused by the cancellation of previously issued backdated stock
26 options." Resp. (Doc. 129) at 16:4-5. This is pure, unpled

27
28 ²¹ The other 34 accounting statements include this exact same allegation.
See, e.g., SAC (Doc. 112) at ¶¶ 49(b); and 54(c).

1 conjecture. The SAC does not allege how understating net income
2 could have been part of an alleged "fraudulent scheme" to
3 "overstate[] Apollo's earnings and income by failing to report
4 compensation expenses associated with granting in-the-money stock
5 options[.]" Id. at 1:9-11, ¶ 2; cf. McCasland v. Formfactor Inc.,
6 2009 WL 2086168, at *8 (N.D.Cal. 2009) (SAC did not plead scienter
7 where it did not "advance any persuasive theory of how understating
8 gross margins and earnings could have been part of defendants'
9 fraudulent scheme[]" to "deliberate[ly] understate[] . . . the costs
10 of revenue and overstate[] . . . gross margins[)"). It defies logic
11 that Apollo would intentionally *understate* its *net income* as part of
12 a scheme to artificially *inflate* its *stock price*. That, combined
13 with the fact that the SAC does not allege how a misstatement of net
14 income supports a fraudulent theory to overstate net income warrants
15 granting defendants' motion to dismiss insofar as it is premised
16 upon false statements No. 24 (¶ 61(a)) and No. 25 (¶ 61(b)).²²
17 False statements 24 and 25 can be dismissed for the additional
18 reason that although they rely upon the Restatement as the sole
19 basis for alleging falsity, as discussed herein, the SAC does not
20 adequately correlate the Restatement to these allegations, among
21 others.

22 **b. Overstatement of Compensation Expenses**

23 The false statements discussed in the preceding section are not
24 the only allegedly false statements directly contradicting
25 plaintiff's theory of securities fraud as pled in the SAC. The SAC
26

27 ²² Because there is no correlation between the SAC's paragraphs and the
28 number of a given alleged false statement, for clarity's sake this decision will
cite to both.

1 alleges that Apollo's Form 10-K for fiscal year 2005, its Form 10-Q
2 for the first quarter of fiscal year 2002, and their corresponding
3 earnings announcements, overstated both Apollo's net income and its
4 compensation expenses. See id. at ¶ 65(c).²³ Supposedly the
5 Restatement "admits" that "Apollo's net income was overstated by
6 \$6.4 million, or 1.5%, during FY05 due to Apollo's failure to
7 properly account for in-the-money stock option grants." Id. The
8 SAC does not allege, however, the amount of the overstatement in
9 this particular Form 10-Q.

10 Much like the alleged 2004 understatement of net income, there
11 is nothing in the SAC alleging how an overstatement of a
12 compensation expense could result in an increase in net income, and
13 the court is at a loss as to how this could be so. "Logically, such
14 [an] overstatement [of compensation expenses] would mean that the
15 price of [Apollo] stock purchased by Plaintiff[] was deflated rather
16 than inflated." See Kelly v. Rambus, Inc., 2008 WL 5170598, at *5
17 (N.D.Cal. Dec. 9, 2008). What is more, plaintiff's response is
18 conspicuously silent on this issue as well. The PSLRA's stringent
19 standard for pleading falsity is not met absent "*specific facts*
20 *indicating why those statements were false[.]*" See Metzler, 540
21 F.3d at 1070 (citation omitted) (emphasis added). These bare
22

23 ²³ More specifically, paragraph 65(c) alleges that the preceding
24 statements were:

25 false and misleading because they overstated Apollo's
26 net income and earnings per share and Apollo's
27 compensation expenses as a result of Apollo's failure
28 to account for the compensation and tax expenses associated
with stock options granted at a price below the fair
market value of Apollo's common stock on the date of the
grant.

28 SAC (Doc. 112) at 31:17-20, ¶ 65(c) (emphasis added); at 22:9-12, ¶ 50(c) (same).

1 allegations as to misstatements of net income, an understatement of
2 net income in 2004, and an overstatement of compensation expenses
3 which are facially inconsistent with the SAC's fraud theory,
4 vividly show the need for "'articulating the factual allegations
5 supporting an inference that the statement is false or misleading.'"'
6 See Apollo I, 633 F.Supp.2d at 786- 787 (quoting Patel v. Parnes,
7 253 F.R.D. 531, 554 (C.D.Cal. 2008) (internal quotation marks and
8 citation omitted)).

9 Statement number three pertaining to the 10-Q for the first
10 quarter of fiscal year 2002 is lacking in particularity for the
11 additional reason that it does not allege the amount of the
12 purported overstatement. See Hansen, 527 F.Supp.2d at 1153
13 (citations omitted) (plaintiff insufficiently plead financial
14 statements were false and misleading where, *inter alia*, the
15 complaint did not allege "the amount by which th[ose] . . .
16 statements were misstated[]"). Accordingly, the court grants
17 defendants' motion to dismiss to the extent it is premised upon a
18 failure to plead falsity with particularity as to false statements
19 Nos. 2-3 (¶¶ 50(a)(b); and Nos. 32-33, (¶¶ 65(a)(b)).²⁴

20 **c. Misstatements**

21 The SAC also alleges that four 10-Qs, and their corresponding
22 earnings announcements, were false and misleading because they
23 "misstated Apollo's net income and earnings per share and Apollo's
24 compensation expenses as a result of Apollo's failure to account for
25 compensation and tax expenses associated with stock options granted
26

27 ²⁴ Plaintiff's reliance upon the Restatement, especially the method by
28 which it calculated the amounts of the alleged overstatement, as explained herein,
provides another reason for dismissing false statements 32 and 33.

1 at a price below the fair market value of Apollo's common stock on
2 the date of the grant." See SAC (Doc. 112), at ¶¶ 58(a)-(c);
3 ¶¶ 59(a)-(c); ¶¶ 60(a)-(c); and ¶¶ 66(a)-(c) (emphasis added).
4 Once again, because plaintiff's fraud theory is premised upon
5 Apollo's overstatement of earnings and income, on the face of it,
6 these misstatement allegations do not support that theory. See id.
7 at ¶ 2. What is more, the SAC also does not include the amount of
8 those purported misstatements. As set forth above, that omission is
9 legally significant. See Hansen, 527 F.Supp.2d at 1153.
10 For both of these reasons, the court grants defendants' motions to
11 dismiss to the extent that it is premised upon false and misleading
12 statements Nos. 18-23 (¶¶ 58(a)(b); ¶¶ 59(a)(b); ¶¶ 60(a)(b); and
13 Nos. 34-35 (¶¶ 66(a)(b)).

14 **d. Restatement**

15 Paragraph 48 aside,²⁵ the SAC expressly relies upon the

16
17 ²⁵ The FAC did not include any allegations as to the purported import of
the Restatement, but the SAC does. The SAC generally alleges:

18 *Apollo's May 22, 2007 restatement is an admission*
19 *that the Company's previously filed and announced*
20 *financial statements alleged herein were materially*
21 *false and misleading. A restatement admits that*
22 *previously filed financial statements were materially*
23 *false when they were issued. The restatement means*
24 *that facts existed and were known to [Apollo] at the*
25 *time the financial statements were issued that rendered them false.*

26 SAC (Doc. 112) at 20-21, ¶ 48 (emphasis added). Additionally, as discussed herein,
27 the Restatement is the sole basis for alleging falsity as to a number of the SAC's
28 false statements (*i.e.*, 28).

Whether the Restatement is an admission is a legal conclusion, as discussed
above. Legal conclusions couched as factual allegations "are not entitled to the
assumption of truth," Ashcroft v. Iqbal, 556 U.S. ___, 129 S.Ct. 1937, 1950, 173
L.Ed.2d 868 (2009), and therefore are "'insufficient to defeat a motion to dismiss
for failure to state a claim,'" In re Cutera Sec. Litig., 610 F.3d 1103, 1108 (9th
Cir. 2010) (citation omitted). As such, this court is "'not bound to accept as
true'" those "'legal conclusion[s] couched as . . . factual allegation[s]'"
Iqbal, 129 S.Ct. at 1950 (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544,
555, 127 S.Ct. 1955, 1965 (2007)); see also Freedman v. Louisiana-Pac. Corp., 922
F.Supp. 377, 392 (D.Or. 1996) (internal quotation marks omitted) (striking

1 Restatement to plead why slightly more than half (or 28 of 48) of
2 the accounting statements were false. For example, the SAC alleges
3 that in Apollo's 10-Ks for fiscal years 2001-2005, and in its 10-Qs
4 for fiscal year 2005, the "restatement admits" overstating or, in
5 one instance, understating Apollo's net income. See, e.g., SAC
6 (Doc. 112) at ¶ 49(b). Some courts have found, as plaintiff urges,
7 "that the mere fact that financial results are restated is
8 sufficient at the pleading stage to establish that the results were
9 false when originally made." Beaver County Retirement Bd. v. LCA-
10 Vision Inc., 2009 WL 806714, at *16 (S.D.Ohio March 25, 2009)
11 (citations omitted); see also In re Enron Corp. Sec. Litig., 2010
12 WL 5100809, at *25, n. 25 (W.D.Tex. Dec. 8, 2010) (citing, *inter*
13 *alia*, In re Atlas Air Worldwide Holdings, Inc. Sec. Litig., 324
14 F.Supp.2d 474, 486-87 (S.D.N.Y. 2004) ("[a]lthough a restatement is
15 not an admission of wrongdoing, the mere fact that financial results
16 were restated is sufficient basis for pleading that those statements
17 were false when made."), citing In re Cylink Sec. Litig., 178
18 F.Supp.2d 1077, 1084 (N.D.Cal. 2001) ("existence of restated
19 financial results is sufficient to support plaintiff's belief that
20 the statements were misstated[]"); but see In re Atlas Mining Co.

21 _____
22 paragraph alleging "a legal conclusion regarding the existence and scope of
23 defendants' duty to disclose" information "that would materially affect the present
24 and true financial operating results"). Indeed, "merely alleg[ing] [those] legal
25 conclusion[s]" only "confuses the issues." See Freedman, 922 F.Supp. at 396.
Thus, in resolving these motions, the court will disregard paragraph 48 to the
extent it contains legal conclusions as to the import of restatements generally or
Apollo's Restatement in particular.

26 The court hastens to add that given the broad nature of paragraph 48, and the
27 lack of "further factual enhancement[s][,]" Iqbal, 129 S.Ct. at 1949 (citation and
28 internal quotation marks omitted), even if the court were to consider that
paragraph, the result would not change here. That is because, as explained herein,
the SAC still does not allege falsity with sufficient particularity.

1 Sec. Litig., 670 F.Supp.2d 1128, 1133-1134 (D.Idaho 2009) (rejecting
2 plaintiffs' theory that "a restatement of audited financial
3 statements constitutes an admission of falsity and materiality[,]")
4 (citing In re Metawave Communications Corp. Sec. Litig., 298
5 F.Supp.2d 1056, 1079 (W.D.Wash. 2003) ("Plaintiff's contention that
6 Metawave's restatement is an admission that Defendants issued false
7 and misleading financial reports is without merit."))

8 Even assuming *arguendo* that Apollo's Restatement is an
9 admission that certain accounting statements were false when made,
10 that assumption cannot cure the SAC's failure to plead falsity with
11 particularity. The lack of particularity primarily arises from the
12 manner in which the SAC relies upon the Restatement. It is not
13 enough to simply allege that a given statement is false and
14 misleading and then baldly rely upon a restatement. Rule 9(b) and
15 the PSLRA demand more. That is especially so here where the
16 Restatement does not always support the SAC's allegations and, on
17 its face, the correlation between the Restatement and the false
18 statements is fairly attenuated.

19 The SAC includes a nine page, single spaced, block quote from
20 the Restatement. Only a few aspects of the Restatement factor into
21 the court's analysis at this juncture. Quoting directly from the
22 Restatement, the SAC alleges that Apollo "determined that 57 of
23 the 100 total grants made during this time period [*i.e.*, "fiscal
24 year 1994 through September 2006"] used incorrect measurement dates
25 for accounting purposes." SAC (Doc. 112) at 44; see also Farrell
26 Decl'n (Doc. 126), exh. 19 thereto at 3 (same). Continuing to quote
27 directly from the Restatement, the SAC alleges that "revised
28 measurement dates were selected for many grants and resulted in

1 exercise prices that were less than the fair market value of the
2 stock on the most likely measurement dates." Id. Consequently, as
3 the Restatement indicates and the SAC alleges, Apollo "recorded pre-
4 tax compensation expense of \$52.9 million (\$59.9 million after-tax)
5 in the aggregate over the fiscal years 1994 through 2005." Id.

6 In arguing that the SAC does not plead falsity with
7 particularity, Apollo contends that it "does not allege which
8 portion of the restatement relates to allegedly backdated grants."
9 Apollo Mot. (Doc. 122) at 14:14-15. Or, as the individual
10 defendants put it, the SAC does not "draw a nexus between the option
11 grants [it] [is] challenging in this action' and the additional
12 compensation expenses recognized in the Restatement." Defs'. Mot.
13 (Doc. 120) at 10:5-8 (citation and internal quotation marks
14 omitted). Nor, Apollo argues, does the SAC allege "which part [of
15 the restatement] pertained to accounting errors and conduct during
16 the class period." Apollo Mot. (Doc. 122) at 14:20-21 (emphasis
17 omitted). In sum, "[p]laintiff makes no effort to plead properly
18 (because it cannot) that the alleged falsehood actually arose from
19 the wrongdoing alleged in the SAC." Defs'. Mot. (Doc. 120) at 2:18-
20 19. Defendants thus argue that they lack "notice of the particular
21 misconduct which is alleged to constitute the fraud charged." See
22 Apollo I, 633 F.Supp.2d at 783 (citation and internal quotation
23 marks omitted).

24 Emphasizing that it "has never claimed that the entirety of
25 Apollo's restatement was caused by" the six options which the SAC
26 identifies, plaintiff retorts that "the fact that the [SAC] only
27 identifies [those] six specific backdated grants does not make
28 defendants' statements any less false." Resp. (Doc. 129) at 14:14-

1 15; and at 14:12-13 (citation omitted). This is not responsive to
2 defendants' lack of particularity and lack of notice arguments.

3 As Apollo points out, and plaintiff disregards, the SAC is void
4 of any allegations regarding "how much of the \$52.9 million
5 restatement resulted from allegedly backdated grants - much less the
6 six grants at issue" herein. Apollo Mot. (Doc. 122) at 14:26-28.
7 Exacerbating that omission is, as the SAC alleges, the fact that the
8 Restatement spanned 12 years, yet plaintiff did not plead how much
9 of that "12-year adjustment pertained to accounting errors that
10 occurred **during the class period**[,]" *i.e.*, between November 28, 2001
11 and October 18, 2006. Id. at 15:2-3 (emphasis in original). That
12 is a significant pleading omission because the Restatement indicates
13 that \$31.8 million of the \$52.9 million pre-tax adjustment - or
14 about 60% - pertained to fiscal years 1995 through 2001, which ended
15 on August 31, 2001 - nearly three months prior to the commencement
16 of the class period. See Farrell Decl'n (Doc. 126), exh. 19 thereto
17 at 56. Necessarily then, by Apollo's estimation, 60% of the
18 Restatement "applies to pre-class period financials, and . . .
19 relates to options granted well before the beginning of the class
20 period." See Apollo Mot. (Doc. 122) at 15:6-8.

21 Of course, because allegedly "Apollo's stock options typically
22 vested over a four year period[,]" SAC (Doc. 112) at 20:9, ¶ 46,
23 conceivably there could have been accounting and tax consequences
24 during the class period although the grants were made prior thereto.
25 Rather than undermining Apollo's argument, this only highlights the
26 SAC's lack of particularity in failing to correlate any backdated
27 stock options - much less the grants which the SAC identifies - to
28 Apollo's purported failure to properly account for compensation

1 expenses. See In re PMC-Sierra, Inc., 2007 WL 2427890, at *5
2 (N.D.Cal. Aug. 22, 2007) ("the fact that PMC . . . admitted to
3 erroneously record[ing] some option grant dates d[id] not create an
4 inference that the challenged options were intentionally and
5 fraudulently backdated[]" where plaintiffs did not "draw[] [any]
6 nexus between the option grants they [we]re challenging . . . and
7 PMC's 'admission'").

8 Further, due to the four year vesting period, the largest
9 adjustment of slightly more than 28 million dollars for fiscal year
10 2001, apparently resulted from options granted prior to the class
11 period. See RJN (Doc. 126), exh. 19 thereto at 56. The same is
12 true, but to a much lesser extent, of the nearly 22.8 million dollar
13 adjustment for fiscal year 2002. While the bulk of that adjustment
14 was within the class period (*i.e.*, approximately 10 months), not all
15 of it was.

16 Without regard to the foregoing, plaintiff contends that the
17 SAC "clearly identifies why [Apollo's] financial statements were
18 false and misleading[]" in that they "overstated Apollo's net income
19 and understated Apollo's compensation expenses as a result of
20 Apollo's failure to account for compensation and tax expenses
21 associated with stock options priced below the fair market value of
22 Apollo's common stock on the date of the grant." Resp. (Doc. 129)
23 at 11:9-13 (citations omitted). With a few slight variations, the
24 SAC alleges that the just quoted statement is the reason "why" every
25 one of the 35 alleged earnings releases and financial filings is
26 purportedly false. Rote repetition of that conclusory allegation
27 does not satisfy the PSLRA's particularity requirement. See In re
28 Ferro Corp., 2007 WL 1691358, at *20 (N.D. Ohio June 11, 2007)

1 ("because the 'substance of why' amount[ed] to little more than a
2 repetitive series of vague, redundant, and conclusory
3 allegations[,]” plaintiff “did not me[e]t its burden under the PSLRA
4 of establishing that the challenged statements were false or
5 misleading because the SAC lacks the requisite particularity as a
6 matter of law[.]”). Although the form has changed, plaintiff did not
7 cure what this court previously found to be “[p]erhaps the most
8 troubling aspect of the fact” - “the ‘vague allegations of
9 deception’ [were] “unaccompanied by a particularized explanation
10 stating why the defendant's alleged statements or omissions [we]re
11 deceitful.” Apollo I, 633 F.Supp.2d at 786 (quoting Metzler, 540
12 F.3d at 1061 (citation omitted)).

13 The fact, as plaintiff mentions, that the SAC “details,
14 wherever possible, the exact amount of net income overstated[.]” does
15 not rectify the SAC’s lack of particularity. Resp. (Doc. 129) at
16 11:14. The difficulty arises because close scrutiny of the alleged
17 “details” and the Restatement, which is the basis for those
18 “details,” shows several discrepancies and inconsistencies.

19 To show that the SAC provides details, plaintiff refers to
20 paragraph 49(b) wherein it alleges that Apollo’s fiscal year 2001
21 Form 10-K was false because as the “restatement admits, Apollo’s net
22 income was overstated by \$20.5 million, or 23.6%, during FY01 due to
23 Apollo’s failure to properly account for in-the-money stock option
24 grants.” SAC (Doc. 112) at 21:18-19, ¶ 49(b). The SAC includes
25 three nearly identical allegations pertaining to the 10-Ks for
26 fiscal years 2002, 2003 and 2005, but with differing amounts. The
27 SAC claims that “[a]s Apollo’s [R]estatement admits . . . Apollo’s
28 net income was overstated” by the following amounts: (1) \$17.2

1 million or 12% in fiscal year 2002; (2) \$11.1 million or 4.7% in
2 fiscal year 2003; and (3) \$6.4 million or 1.5% in fiscal year 2005.
3 Id. at 24:7-9, ¶ 53(c); at 26:20-22, ¶ 57(c); and at 31:20-22,
4 ¶ 65(c).

5 Although the SAC includes numbers, as Apollo convincingly
6 argues, plaintiff's method of calculating those dollar amounts and
7 percentages "demonstrates a failure to plead fraud with
8 particularity[.]" Apollo Mot. (Doc. 122) at 17:18. This is yet
9 another defense argument which, for the most part, plaintiff chose
10 to ignore.

11 Alleging that the "[R]estatement admits" that Apollo's net
12 income was overstated by the dollar amounts just enumerated, leaves
13 the impression that those amounts are actually in the Restatement.
14 Tellingly, though, the SAC does not cite to any specific part of the
15 roughly 500 page Restatement as the basis for those amounts.
16 "[T]he only possible source" for those amounts, as Apollo points out
17 and plaintiff does not dispute, is a chart in the Restatement
18 entitled "Summary of Impact Restatement Adjustments[.]" See Apollo
19 Mot. (Doc. 122) at 17:27, n. 24. Comparing that chart to the SAC's
20 allegations of net income overstatements, as Apollo did,
21 demonstrates that plaintiff inconsistently calculated those amounts,
22 resulting in a lack of particularity.

23 For fiscal years 2001, 2002 and 2005, plaintiff arrived at the
24 net income overstatement amounts by adding three line items - "Share
25 Based Compensation Expense[s,]" "Income Tax Provision (Benefit) -
26 Related to Share Based Compensation Expense" and "Tax Effect of
27 162(m) Limitation[.]" See id. at 17:1-3; see also RJN (Doc. 126),
28 exh. 19 thereto at 56. In calculating the net income overstatement

1 for 2003 and the understatement for 2004, however, besides those
2 three categories, plaintiff included "Bad Debt Expense[s,]" "Other
3 Adjustments[,]" and "Penalty and Interest on Exercises[.]" Id.
4 Plainly, the adjustments for bad debt expenses and the unspecified
5 "Other Adjustments" are irrelevant here.

6 Additionally, if plaintiff had used the same three factors for
7 its 2003 and 2004 calculations as it used for fiscal years 2001,
8 2002 and 2005, as Apollo asserts, it would have "yield[ed] a much
9 smaller overstatement of net income in 2003 (2.1% versus 4.7%
10 claimed in the SAC) and a much larger **understatement** of net income
11 in 2004 (2.8% versus 0.8% claimed in the SAC)." Id. at 17:20-22
12 (emphasis in original). Thus, Apollo argues, the SAC "uses
13 inconsistent measuring standards, which exaggerate the impact of the
14 Restatement[,]" hence "demonstrat[ing] a failure to plead fraud with
15 particularity[.]" Id. at 16:7-8 (emphasis omitted); and at 17:18.

16 Plaintiff does not deny using the method Apollo suggests to
17 calculate these dollar amounts. Included in a footnote, plaintiff
18 even "agrees that . . . bad debt expenses do not appear to be the
19 result of Apollo granting options below fair market value." Resp.
20 (Doc. 129) at 16:26, n. 5. Presumably then, plaintiff also agrees
21 that the SAC improperly relies upon such expenses in alleging the
22 amount by which the Restatement purportedly "admitted" to
23 understating net income in fiscal year 2004 and overstating net
24 income in 2005. Regardless, plaintiff further remarks in passing
25 that "the inclusion of th[o]se [bad debt expense] numbers does not
26 provide a basis for dismissal." Id. at 16:26-27, n. 5 (citing
27 Maniscalco v. Brother Int'l Corp., 627 F.Supp.2d 494, 497 n. 1
28 (D.N.J. 2009)).

1 The court cannot overlook the SAC's inclusion of those bad debt
2 expenses as a means of finding particularity where none exists.
3 First, even if the court were inclined to disregard those bad debt
4 expenses, the SAC still relies upon "other adjustments" in the
5 Restatement which on the face of it are unrelated to the alleged
6 fraudulent accounting scheme. Second, neither the court nor the
7 defendants should be expected to recalculate (or second-guess) the
8 amounts which the SAC alleges to bring those amounts into conformity
9 with the Restatement. That would entirely defeat the "notice
10 pleading . . . theory of Rule 8(a) and of the federal rules in
11 general[.]" See Starr v. Baca, 2011 WL 477094, at *10 (9th Cir.
12 Feb. 11, 2011).

13 Third, although plaintiff attempts to liken this case to
14 Maniscalco, there are fundamental differences between that case and
15 the present one rendering Maniscalco wholly inapposite. There,
16 purchasers brought a putative class action against a printer
17 manufacturer alleging violations of the New Jersey Consumer Fraud
18 Act and unjust enrichment. The Maniscalco complaint alleged one
19 purchase date, which "[p]laintiff's counsel represent[ed] . . . was
20 a "typographical error[.]" Maniscalco, 627 F.Supp.2d at 497 n. 1.
21 Nonetheless, in moving to dismiss and refusing to consent to correct
22 the date, the defendant manufacturer insisted that the court use the
23 purchase date alleged in the complaint. The court refused,
24 explaining that it would "adjudicate[] the claims on the merits
25 rather than on . . . mere technicalities[]" where the defendant had
26 become aware of the correct date during discovery. Id. (citation
27 omitted).

28 Unlike Maniscalco, there has been no suggestion here (and the

1 court fails to see how there could be) that the amounts alleged in
2 the SAC were due to typographical errors. Nor is this a situation
3 where the numbers in the SAC are a "mere technicality." Plaintiff's
4 allegations as to the amounts by which the Restatement purportedly
5 overstated (and in 2004 understated) Apollo's net income go to the
6 very crux of the SAC's alleged fraudulent scheme, in sharp contrast
7 to Maniscalco. Further, the heightened pleading standards of a
8 federal securities fraud action were not invoked in Maniscalco,
9 alleging violations of a state consumer fraud statute. Plaintiff,
10 therefore, cannot rely upon Maniscalco to circumvent the clear
11 mandate of both the PSLRA and Rule 9(b) that falsity be pled with
12 particularity.

13 The SAC's broad, conclusory allegations that Apollo overstated
14 its net income and understated its compensation expenses as a result
15 of granting stock options below the fair market value of Apollo's
16 common stock on the date of the grant do not satisfy the exacting
17 pleading standards of the PSLRA and Rule 9(b). The SAC's reliance
18 on the Restatement does not provide the necessary particularity
19 because it does not "draw a specific nexus between the allegedly
20 fraudulent statement and the facts upon which the allegation of
21 fraud is dependent[,]" i.e. the Restatement, "or, at least, a clear
22 statement of why and how the plaintiff has reached the conclusion
23 that a particular statement is fraudulent." See Ferro, 2007 WL
24 1691358, at *19 (citation, internal quotation marks and emphasis
25 omitted). Even if the SAC provided that missing link, it still
26 could not withstand these dismissal motions because in relying upon
27 the Restatement as a basis for falsity, the SAC does not always
28 comport with the Restatement. Consequently, the court grants

1 defendants' motions to dismiss insofar as it is predicated upon
2 those false and misleading statements where the Restatement is the
3 sole basis for pleading falsity (No. 1, ¶ 49; Nos. 8-9, ¶¶ 53(a)(b);
4 Nos. 16-17, ¶¶ 57(a)(b); Nos. 24-33, ¶¶ 61(a)(b); ¶¶ 62(a)(b);
5 ¶¶ 63(a)(b); ¶¶ 64(a)(b); ¶¶ 65(a)(b); and ¶¶ 66(a)(b)). That
6 includes the allegations pertaining to compliance with IRS Code
7 § 162(m) and APB No. 25, and the SOX certifications (Nos. 36-48,
8 ¶¶ 67(a)-(d); ¶¶ 68(a)-(e); and ¶¶ 69(a)-(d)).

9 **e. Non-Restatement Based Allegations**

10 In addition to the Form 10-Qs relying upon the Restatement
11 discussed above, the SAC alleges that five others and their related
12 press releases contained false statements. The SAC alleges the
13 exact same reason as to why those Forms and press releases were
14 false and misleading:

15 because they overstated Apollo's net income
16 and earnings per share and understated Apollo's
17 compensation expenses as a result of Apollo's
18 failure to account for the compensation and tax
expenses associated with stock options granted
at a price below the fair market value of Apollo's
common stock on the date of the grant.

19 SAC (Doc. 112) at ¶¶ 51(c); 52(c); 54(c); 55(c); and 56(c). The SAC
20 further alleges that section 10(b) defendants Gonzales and Nelson,
21 and defendant Bachus signed the Form 10-Qs. The "financial results"
22 were simply "announced" by Apollo though. See, e.g., id. at
23 ¶¶ 51(a); and (b). That is the total of the allegations as to these
24 particular Form 10-Qs and related earnings announcements.

25 Even in the face of those rote and conclusory allegations,
26 without any analysis, plaintiff baldly declares that "[t]hese
27 allegations of falsity are as detailed, if not far more detailed,
28 than allegations that have been upheld in comparable stock option

1 backdating cases, and cases involving restatements." Resp. (Doc.
2 129) at 11:17-19 (citations omitted). Careful review of plaintiff's
3 cited authority belies this assertion, and conveniently disregards
4 case law supporting the contrary point of view, *i.e.*, the foregoing
5 falsity allegations do not satisfy the PSLRA.

6 Indeed, the allegation quoted is strikingly similar to the
7 complaint in Hansen which alleged:

8 [A]ll of the . . . financial statements
9 and press releases issued by Hansen were
10 false and misleading when issued because
11 the Company did not reveal that it had
12 engaged in the practice of backdating option
grants, had understated its compensation expenses
and potential tax liabilities and overstated
its net income.

13 Hansen, 527 F.Supp.2d at 1152 (citation omitted). The Hansen court
14 held that the complaint "violat[ed] . . . the [PSLRA]'s requirement
15 that a complaint must specify the reasons why *each* statement is
16 alleged to have been misleading[]" because, *inter alia*, "nowhere"
17 therein did plaintiff "explain in which of th[ose] . . . ways . . .
18 each of the 17 pages of allegedly false statements [we]re false."
19 Id.

20 To be sure, in contrast to Hansen, here the SAC does number
21 each false statement and alleges that "misleading statements were
22 false individually or by category[.]" See id. Those stylistic
23 differences do not render the reasoning of Hansen any less
24 applicable here though because the fundamental pleading shortfall is
25 the same - lack of particularity as to falsity. The allegations as
26 to these Form 10-Qs and their related press releases lack a
27 foundation in particular facts. Cf. In re Daou Systems, Inc., 411
28 F.3d 1006, 1017 (9th Cir. 2005) (citation and internal quotation

1 marks omitted) (in pleading irregularities in revenue recognition,
2 "[a] general allegation that the practices at issue resulted in a
3 false report of company earnings is not a sufficiently particular
4 claim of misrepresentation to satisfy Rule 9(b)[]"). The SAC does
5 not include details such as the amounts of the alleged
6 overstatements or understatements, or what compensation expenses
7 were associated with the backdating.

8 Plaintiff's cited authority does nothing to dispel this court
9 of its view that the SAC does not plead falsity with the necessary
10 particularity as to the Form 10-Qs and press releases discussed in
11 this section. For example, in Middlesex Retirement System v. Quest
12 Software Inc., 527 F.Supp.2d 1164 (C.D.Cal. 2007), the court found,
13 albeit in the context of scienter, that investors did not state with
14 sufficient particularity the allegation that the company's financial
15 statements failed to report \$150 million as a result of backdated
16 stock option grants where the complaint did not "state what the
17 unreported expense was for each individual year that improperly
18 granted options were given." Id. at 1189. Therefore, rather than
19 supporting plaintiff's position herein, Middlesex actually supports
20 the defense argument as to lack of particularity.

21 Plaintiff fares no better with its reliance upon In re Cylink
22 Sec. Litig., 178 F.Supp.2d 1077 (N.D.Cal. 2001). The Cylink court
23 was considering the issue of what satisfies the PSLRA's requirement
24 that "if an allegation regarding the statement or omission is made
25 on information and belief, the complaint shall state with
26 particularity all facts on which that belief is formed." See 15
27 U.S.C. § 17u-4(b)(1). In addressing that narrow issue, the court
28 held that "the existence of restated financial results [wa]s

1 sufficient to support plaintiffs' belief that the statements were
2 false." Id. at 1084. Significantly, however, none of the
3 allegations in the SAC are based upon information and belief.

4 This is yet another instance where the SAC contains merely
5 "[a] litany of alleged false statements "unaccompanied by the
6 pleading of *specific facts* indicating why those statements were
7 false[.]" See Metzler, 540 F.3d at 1070 (emphasis added) (citing
8 Falkowski v. Imation Corp., 309 F.3d 1123, 1133 (9th Cir. 2002)
9 ("Although the allegations here are voluminous, they do not rise to
10 the level of specificity required under the PSLRA. The allegations
11 consist of vague claims about what statements were false or
12 misleading, how they were false, and why we can infer intent to
13 mislead. We have dismissed much more specific and compelling
14 allegations.")). The blanket assertion of falsity as to overstating
15 Apollo's net income and earnings per share and understating Apollo's
16 compensation and tax expenses associated with backdated stock
17 options, quite simply, does not meet the PSLRA's "exacting
18 requirements for pleading 'falsity.'" See id. Thus, to the extent
19 defendants are seeking dismissal of false and misleading statements
20 Nos. 4-7, ¶¶ 51(a)(b); and ¶¶ 52(a)(b); Nos. 10-15, ¶¶ 54(a)(b);
21 ¶¶ 55(a)(b); and ¶¶ 56(a)(b), they are entitled to such relief.

22 **f. Earnings Announcements**

23 The individual defendants are entitled to dismissal of the 17
24 earnings announcement allegations because, critically, they are not
25 specifically identified therein, much less that they made, prepared
26 or disseminated those earnings announcements.

27 This is a significant omission for two reasons. First,
28 "[g]enerally, only those defendants who actually make a false or

1 misleading statement can be held liable under section 10(b) or Rule
2 10b-5." Downey, 2009 WL 736802, at *5 (citation omitted). Second,
3 as the individual defendants are quick to point out, to satisfy the
4 particularity requirements for pleading falsity, among other things,
5 "'a pleader must identify the individual who made the alleged
6 representation[.]" Apollo I, 633 F.Supp.2d at 783 (quoting Hansen,
7 527 F.Supp.2d at 1151). Defendants argue that the SAC's press
8 release allegations do not meet that standard because they do not
9 "identify any particular [individual] Defendant[s] responsible for
10 the preparation and dissemination of th[os]e statements[.]" Mot.
11 (Doc. 120) at 8:23-24. Instead, the SAC generally alleges that
12 "Apollo announced financial results." Id. at 9:1 (citation and
13 internal quotation marks omitted) (emphasis added).

14 Plaintiff retorts that the SAC alleges "who made . . . false
15 and misleading earnings release[s][.]" Resp. (Doc. 129) at 11:6-7
16 (citing [SAC (Doc. 112) at] ¶¶ 49-66; [SAC], Exh. 1-35) (emphasis
17 added). Citing to those same 17 paragraphs, earlier in its
18 response, plaintiff similarly declares that the SAC complies with
19 Rule 9(b) and the PSLRA in that, *inter alia*, it "alleges . . . who
20 made ["false and misleading . . . financial statements][.]" Id. at
21 1:20-22 (citations omitted) (emphasis added). Plaintiff does not
22 specify where in any of the SAC's cited paragraphs, or in the 17
23 earnings announcement exhibits, totaling 177 pages, the name of a
24 single individual defendant can be found. After closely reviewing
25 each of the paragraphs to which plaintiff cites and the
26 corresponding press releases, it is obvious why plaintiff resorted
27 to such vague declarations in its response. The SAC is void of any
28 allegations as to exactly who made, prepared or disseminated the

1 purportedly misleading press releases. Merely because plaintiff
2 claims that the SAC contains such allegations does not make it so.

3 Moreover, as this court previously noted, individual defendants
4 such as corporate officers like Nelson and Gonzales, "cannot . . .
5 be liable for . . . press releases, except to the extent that there
6 are specific statements attributed to them, or the press releases
7 are otherwise connected to them[.]" Apollo I, 633 F.Supp.2d at 808,
8 n. 13 (citation and internal quotation marks omitted). The SAC
9 likewise is void of any allegations that the 17 press releases or
10 earnings announcements at issue contain "specific statements" which
11 may be "attributed" to any of the individual defendants. Nor does
12 the SAC contain any other allegations "connecting" the press
13 releases to those defendants. Finally, the general allegations that
14 "Apollo announced financial results[,]" see, e.g., SAC (Doc. 112) at
15 ¶ 50(a), "cannot be attributed to the Individual Defendants under
16 the group pleading doctrine because, as this Court . . . previously
17 held,"²⁶ that "doctrine did not survive the PSLRA." See Downey,
18 2009 WL 736802, at *7 (footnote and citation omitted). For these
19 reasons, the court grants the individual defendants' motion to
20 dismiss insofar as it is directed to allegedly false and misleading
21 earnings announcements, i.e., the even numbered (two through thirty-
22 four inclusive) alleged false and misleading statements.

23 Finally, because the court has found that the SAC does not
24 sufficiently plead falsity with respect to any statements which were
25 preceded by an earnings announcement, the SAC's allegations as to
26

27 ²⁶ Apollo I, 633 F.Supp.2d at 809 (citation and internal quotation marks
28 omitted) ("This court [j]oin[s] the majority of other courts in this Circuit,
. . . hold[ing] that group pleading is no longer viable under the PSLRA.")

1 Apollo making those announcements is not a form of actionable
2 conduct under section 10(b). Apollo is thus entitled to dismissal
3 of these 17 earnings announcement statements referenced above.

4 4. Backdating Denials

5 Lastly, the SAC includes six allegedly false statements wherein
6 plaintiff claims that certain defendants denied any wrongdoing as to
7 Apollo's stock option practices. More specifically, the SAC alleges
8 that a section 10(b) defendant Norton, then Chairmen of Apollo's
9 Compensation Committee, denied backdating stock options. See SAC
10 (Doc. 112) at ¶ 72 (No. 49). Further, the SAC alleges that after a
11 June 8, 2006 report of a Lehman Brothers' analyst, "Apollo continued
12 to issue false statements and half-truths about the backdating at
13 the Company[]" on five different occasions. Id. at ¶ 70; and at
14 ¶¶ 73-91 (Nos. 50-54).

15 The individual defendants offer several reasons why the court
16 should dismiss these six statements pertaining to backdating
17 denials. First, they argue that four of these denial allegations
18 are inadequately pled because they are not attributable to any of
19 the individual section 10(b) defendants. Second, there are no
20 allegations that any particular section 10(b) defendant was
21 instrumental in preparing or disseminating these statements. Third,
22 the individual defendants contend that the two statements which the
23 SAC directly attributes to section 10(b) defendants are,
24 nonetheless, deficient. One statement, "fails to plead falsity
25 adequately[,]" while the other "fails to plead the requisite
26 particulars" in that it "pleads only the date, nothing more."
27 Defs'. Mot. (Doc. 120) at 13:15 (citation omitted); and at 14:4-5.

28 Apollo makes a single, temporal argument, noting that two of

1 the six denial statements, *i.e.*, Nos. 53 (¶ 86) and 54 (¶ 54) were
2 made after the class period. Apollo thus baldly asserts that
3 “[p]laintiff cannot predicate claims of fraud on [either of those]
4 statements[.]” Apollo Mot. (Doc. 122) at 18:23.

5 At the risk of repetition, plaintiff did not directly respond
6 to any of these defense arguments. It merely offers this one
7 sentence declaration: “[T]he [SAC] alleges that certain of Apollo’s
8 denials of misconduct throughout the Class Period were materially
9 false and misleading because *defendants* knew or were deliberately
10 reckless in not knowing that Apollo had in fact engaged in the very
11 conduct that they were denying.” Resp. (Doc. 129) at 13:15-19
12 (citations omitted) (emphasis added). That sweeping declaration,
13 void of any legal analysis,²⁷ and failing to identify *any* particular
14 defendant, or the six statements at issue, is hardly a meaningful
15 response to defendants’ arguments. Moreover, this retort does not
16 in any way elucidate plaintiff’s conclusory assertion that the SAC
17 “explains why the denials of misconduct were false when made.” *Id.*
18 at 13:14-15 (emphasis omitted). Thus, “because plaintiff d[id] not
19 bother to address any of th[ese] other” allegedly false statements
20 addressed by defendants, plaintiff has “failed to discharge [its]
21 burden to successfully rebut defendants’ . . . arguments.” See Bare
22 Escentuals, 2010 WL 3893622, at *22. While that is a sufficient
23 reason in and of itself to grant defendants’ motions to dismiss to
24 the extent they are directed at the six backdating denial false
25 statements, as outlined below, there are additional substantive

26
27 ²⁷ Plaintiff cites to Institutional Investors Group v. Avaya, Inc., 564
28 F.3d 242, 270 (3rd Cir. 2009), which obviously is of limited precedential value
given that it is outside the Ninth Circuit. Moreover, without the benefit of any
legal analysis whatsoever from plaintiff, the relevance of the cited page is not
apparent.

1 reasons also warranting dismissal.

2 **a. Post-Class Period Statements**

3 Here, as the SAC alleges, the class period is between
4 November 28, 2001 and October 18, 2006. SAC (Doc. 112) at 1, ¶ 1.
5 Among other things, the SAC premises section 10(b) liability
6 expressly upon “defendants’ false and misleading statements *issued*
7 *during the class period[.]*” Id. at 20:3-4 (bold and capitalized
8 emphasis omitted) (italicized emphasis added). Despite that, the
9 SAC includes two allegedly false statements made on November 3, 2006
10 - roughly two and a half weeks after the class period. See id. at
11 ¶ 86 (No. 53); and ¶ 90 (No. 54).

12 In a securities fraud action, “[t]he class period defines the
13 time during which defendants’ fraud was allegedly alive in the
14 market[.]” In re Clearly Canadian Sec. Litig., 875 F.Supp. 1410,
15 1420 (N.D.Cal. 1995). Thus, “a defendant may be held liable, . . .
16 *only* for the statements made during the class period.” In re REMEC
17 Inc. Sec. Litig., 702 F.Supp. 1201, 1223 (S.D.Cal. 2010) (citations
18 omitted) (emphasis added); see also Hodges v. Akeena Solar, Inc.,
19 2010 WL 3705345, at *2 (N.D.Cal. 2010) (striking “allegedly false
20 and misleading statements . . . made prior to the start of the Class
21 Period” because they could “not serve as a basis for liability as a
22 matter of law”; Clearly Canadian, 875 F.Supp. at 1420 (striking as
23 “irrelevant to plaintiffs’ fraud claims . . . statements made . . .
24 before or after the purported class period”). Consequently, because
25 the class period here, November 28, 2001 through October 18, 2006,
26 dictates the period of liability, defendants cannot be liable for
27 the two allegedly false statements, *i.e.*, Nos. 53 and 54, made after
28 the class period. Perhaps plaintiff realizes this because nowhere

1 in its response does it even cite to these statements, let alone
2 argue that they can form the basis for a section 10(b) misleading
3 statement claim. Accordingly, the court grants defendants' motion
4 to dismiss to the extent it is based upon false statements No. 53
5 (¶ 86); and No. 54 (¶ 90).

6 **b. Lack of Attribution**

7 Of the four remaining backdating denial statements, the SAC
8 attributes two of them strictly to Apollo. See id. at ¶¶ 74 (No.
9 50); and 76 (No. 51). The SAC alleges that on June 9, 2006, "the
10 Company issued a news release denying that it had backdated stock
11 options." Id. at 38:24-25, ¶ 74. Further, the SAC alleges:

12 Apollo claimed that it had reviewed its
13 stock option practices 'including reviewing
14 documents and interviewing employees,' and
15 that Apollo's management believed that Apollo
had 'complied with all applicable laws . . .
in granting options to officers and it has not
backdated options.'

16 Id. at 38:25-28, ¶ 74. Likewise, the SAC alleges:

17 [Apollo] issued a press release disclosing
18 that it had received a subpoena from the U.S.
19 Attorney for the Southern District of New
20 York requesting documents relating to Apollo's
21 stock option grants. Apollo again denied
22 impropriety, stating that 'Apollo's board of
directors had hired an outside firm to review
and confirm [the company's] initial conclusions
that [the Company] acted appropriately regarding
its stock option practices.'

23 Id. at 39:6-11, ¶ 76. As to these denial allegations, the SAC does
24 not include even the most basic details the identity, *i.e.*, the
25 "who" of any of the individual defendants, Blair, Gonzales, Nelson
26 or Norton. Thus, the SAC does not adequately allege that any of
27 them made a false statement on the basis of those two press releases
28 attributable solely to Apollo.

1 Not only does the SAC fail to name any of the section 10(b)
2 individual defendants in those allegations, it also does not allege
3 that they "played any role whatsoever in the preparation or
4 dissemination of" those two press releases. See Hansen, 527
5 F.Supp.2d at 1153. Finally, to the extent plaintiff is attempting
6 to rely upon the group pleading doctrine, it cannot. "[T]he general
7 allegations against [Apollo] cannot be attributed to the Individual
8 Defendants under th[at] . . . doctrine, because, as this Court . . .
9 previously held, the group pleading doctrine did not survive the
10 PSLRA." See In re Downey Sec. Litig., 2009 WL 736802, at *7
11 (C.D.Cal. 2009) (citation and footnote omitted); Apollo I, 633
12 F.Supp.2d at 809; see also Hansen, 527 F.Supp.2d at 1153-54 ("A
13 defendant must actually make a false or misleading statement in
14 order to be held liable under Section 10(b)."). In light of the
15 foregoing, the court grants the individual defendants' motion to
16 dismiss insofar as it is based upon false statement No. 50
17 (¶ 74) and No. 51 (¶ 76).

18 **c. Form 8-K**

19 The SAC does specifically identify one of the section 10(b)
20 defendants, Ms. Gonzales, as having made an allegedly false
21 statement in a Form 8-K. "[A] Form 8-K filing is required from an
22 issuer of securities when substantial events occur[.]" S.E.C. v.
23 Gemstar-TVGuide Intern., Inc., 401 F.3d 1031, 1059 (9th Cir. 2005)
24 (citation and internal quotation marks omitted). The SAC alleges
25 that "[o]n June 20, 2006, Apollo filed a Form 8-K signed by
26 Gonzales[]" and two other non-section 10(b) defendants, Bachus and
27 Mueller. SAC (Doc. 112) at 39, ¶ 77 (No. 52). That Form repeated
28 Apollo's prior statement that its "board of directors has hired an

1 outside firm to review and confirm [Apollo's] initial conclusions
2 that [Apollo] acted appropriately regarding its stock option
3 practices.'" Id. at 39, ¶ 76 (No. 51). That statement was allegedly
4 "false and misleading" because "Apollo had not 'acted appropriately
5 regarding its stock option practices[.]'" Id. at 39,
6 ¶ 78.

7 That allegation ignores the broader context of the
8 Form 8, however. It is self-evident that the purpose of that Form
9 was to announce that Apollo had hired an outside firm. Moreover,
10 the outside firm was tasked with "'review[ing] and confirm[ing]
11 [Apollo's] *initial* conclusions that [Apollo] had acted
12 appropriately regarding its stock option practices.'" Id. at 39,
13 ¶ 76 (emphasis added). As worded, this Form left open the
14 possibility that those "initial conclusions" could be changed at a
15 later date, depending upon the outcome of the outside review. Thus,
16 on the face of it there is nothing false or misleading about
17 statement 52, and the SAC does not suggest otherwise. This
18 allegation also lacks specific facts indicating why that Form 8 was
19 false at the time it was signed. See In re Vantive Corp. Sec.
20 Litig., 283 F.3d 1079, 1086 (9th Cir. 2002) (falsity not established
21 due to lack of particularity where "much of the complaint fail[ed]
22 to allege any facts indicat[ing] why th[e] statement would have been
23 misleading at the several points at which it was alleged to have
24 been made[.]"). The foregoing provides an alternative basis for
25 granting defendants' motion to dismiss to the extent it is premised
26 upon false statement No. 52 (¶ 77).

27 **d. Norton's Denial of Backdating**

28 The SAC alleges that "[o]n June 7, 2006, in response to [the

1 Lehman Brothers'] report . . . question[ing] the timing of Apollo's
2 stock option grants, Norton, the Chairman of Apollo's Compensation
3 Committee[,] and a section 10(b) defendant, "stated that 'Our
4 option policies are clean and straightforward. We never backdated
5 options. Never once.'" SAC (Doc. 112) at 38, ¶ 72 (No. 49).
6 Defendant Norton argues that these allegations are "insufficient[]"
7 because they do not include "the requisite particulars[.]" Defs'.
8 Mot. (Doc. 120) at 14:7 and 14:4. It is impossible to discern from
9 the SAC whether Mr. Norton's alleged remark was publicly made and,
10 if so, under what circumstances. Without factual allegations such
11 as the "time[,], . . . , place[,], . . . benefits received, and other
12 benefits of the alleged fraudulent activity[.]" this allegation does
13 not comport with either the PSLRA or Rule 9(b). Hence, defendant
14 Norton does not have notice of the "particular misconduct . . . so
15 that []he[] can defend against the charge and not just deny that
16 []he[] has done anything wrong." See Apollo I, 633 F.Supp.2d at 783
17 (citations and internal quotation marks omitted). For these
18 reasons, coupled with plaintiff's failure to counter defendant
19 Norton's argument, the court grants his motion to the extent it is
20 based upon false statement No. 49 (¶ 72)).

21 As with the SAC's backdating allegations, it is a culmination
22 of factors - not the omission of a single factor - which leaves the
23 court with the firm conviction that the SAC does not plead falsity
24 in accordance with the requisite degree of particularity. The
25 hallmark of the SAC continues to be what was "[p]erhaps the most
26 troubling aspect of the FAC[.]" See Apollo I, 633 F.Supp.2d at 786.
27 That is, even with amendment, the SAC's false and misleading
28 statements remain nothing more than "vague allegations of

1 deception' . . . 'unaccompanied by a particularized explanation
2 stating *why* the defendant's alleged statements or omissions are
3 deceitful." Id. (quoting Metzler, 540 F.3d at 1061 (citation
4 omitted) (emphasis added by Metzler Court). Additionally, plaintiff
5 disregarded Apollo I because the SAC, like the FAC, is not "clear
6 and concise in identifying the false statements and *articulating the*
7 *factual allegations supporting an inference that the statement is*
8 *false or misleading.*" Id. at 786-787 (citation and internal
9 quotation marks omitted)) (emphasis added).

10 Seemingly, plaintiff has mistaken quantity for quality. Here,
11 quantity did not cure the deficits in the FAC. In fact, especially
12 with respect to the addition of the October 20, 2003 grants, if
13 anything, quantity made the weaknesses all the more appreciable. In
14 short, this prolix and discursive complaint does not satisfy the
15 PSLRA's stringent pleading standards. As the Fifth Circuit has
16 pointedly observed, a "long-winded, even prolix" style of pleading
17 "is not an uncommon mask for an absence of detail." Williams v. WMX
18 Techologies, Inc., 112 F.3d 175, 178 (5th Cir. 1997). Here, as in
19 Williams, the SAC, "although long, states little with
20 particularity." See id. Likewise, the Ninth Circuit's comment in
21 Zucco Partners, LLC v. Digimarc Corp., 552 F.3d 981 (9th Cir. 2009),
22 albeit in the scienter context, is an apt description of the SAC.
23 "The plaintiff[] . . . assume[s] that compiling a large quantity of
24 otherwise questionable allegations" will satisfy the particularity
25 pleading requirements. See id., at 1008. It does not. Succinctly
26 put, the SAC falls far short of satisfying the stringent pleading
27 standards of the PSLRA and Rule 9(b).

28 Because the court has expressly found that at least one of the

1 elements of plaintiff's section 10(b) claim is missing, *i.e.*,
2 falsity, that claim fails, and there is no need for the court to
3 consider defendants' loss causation and scienter arguments. See
4 Cutera, 610 F.3d at 1108 n. 1; accord In re 2007 Novastar Fin., Inc.
5 Sec. Litig., 579 F.3d 878, 884 n. 5 (8th Cir. 2009) ("Because we
6 conclude that the district court properly dismissed the complaint
7 for failing to comply with the PSLRA's pleading requirements
8 concerning falsity under § 78u-4(b)(1), we need not address . . .
9 additional arguments concerning . . . compliance with the PSLRA's
10 pleading requirements concerning scienter under § 78u-4(b)(2).")

11 **III. Section 20A Claim**

12 The FAC alleged that all defendants violated section 20(A)'s
13 proscription against "contemporaneous" insider trading, 15 U.S.C.
14 § 78t-1(a), but now the SAC names only one defendant, John Blair, in
15 this claim. In Apollo I, this court found that the insider trading
16 claim against defendant Blair was "lacking" because the FAC did not
17 plead such facts. Id.

18 Defendant Blair continues to argue that the SAC "fail[s] to
19 describe [his] prior history[,]" and hence it does not state a
20 section 20A(a) claim against him. Defs'. Mot. (Doc. 120) at
21 14:15-16. Plaintiff disagrees that allegations of Blair's prior
22 trading history are necessary to state a section 20A(a) claim
23 against him. Plaintiff readily concedes, though, that one can be
24 liable under section 20A "only where an independent violation of
25 another provisions of securities law has occurred[.]" Resp. (Doc.
26 129) at 18:22-23 (citation and internal quotation marks omitted)
27 (emphasis added).

28 That is an accurate statement of the law in this Circuit.

1 "Claims under Section 20A are derivative and therefore require an
2 independent violation of the Exchange Act." In re Oracle Sec.
3 Litig., 627 F.3d 376, 394 (9th Cir. 2010) (citation and internal
4 quotation marks omitted). Consequently, regardless of whether the
5 SAC includes allegations of defendant Blair's trading history,
6 because the court has found that plaintiff's section 10(b) claim
7 must be dismissed, that finding requires dismissal of the section
8 20A claim against defendant Blair. See id. (plaintiffs'
9 contemporaneous trading claims "end[ed]" because they could not
10 establish a triable issue on loss causation as to their other
11 Exchange Act claims).

12 **IV. Section 20(a) Claim**

13 After reciting section 20(a) of the Exchange Act, the Ninth
14 Circuit in Zucco Partners, reiterated that "a defendant employee of
15 a corporation who has violated the securities law will be jointly
16 and severally liable to the plaintiff, as long as the plaintiff
17 demonstrates 'a primary violation of federal securities law' and
18 that 'the defendant exercised actual power or control over the
19 primary violator.'" Zucco Partners, 552 F.3d at 990 (citing America
20 West, 320 F.3d at 945) (quoting Howard v. Everex Sys., Inc., 228
21 F.3d 1057, 1065 (9th Cir. 2000) (quotation marks omitted)) (other
22 citations omitted) (emphasis added). Put differently, "[c]ontrol
23 person liability is secondary only and cannot exist in the absence
24 of a primary violation." In re Silicon Storage Technology, Inc.
25 Deriv. Litig., 2009 WL 1974535, at *11 (N.D.Cal. July 7, 2009)
26 (citations and internal quotation marks omitted). So where, as
27 here, the section 10(b) claims have been dismissed, "the § 20(a)
28 claims [a]re also properly dismissed." See Cutera, 610 F.3d at 1113

1 n. 6.

2 **V. Motion to Strike**

3 Having granted defendants' motion to dismiss, there is no need
4 to consider their request for alternative relief pursuant to
5 FED.R.CIV.P. 12 (f). Indeed, dismissal renders moot that
6 alternative motion to strike.

7 **VI. Amendment**

8 Lastly, plaintiff perfunctorily "requests leave to amend . . .
9 [s]hould the Court grant any portion of defendants' motions to
10 dismiss[.]" Resp. (Doc. 129) at 32:20-22. Defendants did not
11 address this one sentence "request."

12 In granting plaintiff's "'request' for leave [to amend][,]" in
13 Apollo I, this court explained that "[t]he pleading deficiencies" in
14 the FAC did not lie "in the raw content of the FAC, but in the
15 absence of rigorously particularized allegations in accordance with
16 the PSLRA." Apollo I, 633 F.Supp.2d at 832 (citation and internal
17 quotation marks omitted). In allowing amendment, the court
18 expressly "advised" plaintiff "that failure to cure the pleading
19 deficiencies identified therein, *and* failure to comply with the
20 relevant case law in that regard, *may well lead to dismissal* of
21 these claims *in the future*." Id. (emphasis added). Thereafter,
22 plaintiff acknowledged "that it [was] '[m]indful that [Apollo I]
23 required [it] to amend [its] Complaint to more particularly allege[]
24 the falsity of the alleged misstatements[.]'" Apollo II,
25 690 F.Supp.2d at 981 (quoting Mot. (Doc. 107) at 3). Nonetheless
26 even after amendment, as thoroughly discussed herein, the hallmark
27 of the SAC is, still, the "absence of rigorously particularized
28 allegations in accordance with the PSLRA[]" and Rule 9(b). See

1 Apollo I, 633 F.Supp.2d at 832 (citation and internal quotation
2 marks omitted).

3 Denial of leave to amend is subject to an abuse of discretion
4 standard of review. See Telesaursus VPC, LLC v. Power, 623 F.3d
5 998, 1003 (9th Cir. 2010). “[W]here the plaintiff has previously
6 been granted leave to amend and has subsequently failed to add the
7 requisite particularity to its claims, [t]he district court’s
8 discretion to deny leave to amend is particularly broad.” Zucco
9 Partners, 552 F.3d at 1007 (citations and internal quotation marks
10 omitted). Moreover, as the Ninth Circuit has repeatedly recognized,
11 “[t]he fact that [plaintiff] failed to correct the deficiencies in
12 its [FAC] is ‘a strong indication that the plaintiffs have no
13 additional facts to plead’.” See id., (quoting Vantive Corp., 283
14 F.3d at 1098). For that reason, the Zucco Partners Court held that
15 the “district court did not err when it dismissed the SAC with
16 prejudice, since it was clear that the plaintiffs had made their
17 best case and had been found wanting.” Id. (citing Metzler, 540
18 F.3d at 1072 (“upholding a dismissal with prejudice where, *inter*
19 *alia*, the deficiencies at issue ‘persisted in every prior iteration
20 of the [complaint]’”). Likewise, “[w]here the plaintiff fails to
21 set forth any additional facts that could save the complaint,
22 . . . , dismissal with prejudice is appropriate.” Finisar II, 2009
23 WL 3072882, at *15 (citing, *inter alia*, In re Silicon Graphics Inc.
24 Sec. Litig., 183 F.3d 970, 991 (9th Cir. 1999), *abrogated on other*
25 *grounds*, Tellabs, 551 U.S. at 322-24, 127 S.Ct. 2499, 168 L.Ed.2d
26 179)).

27 Application of those rules to the present case mandates that
28 the SAC be dismissed without prejudice to renew. Plaintiff has been

1 given the opportunity to amend once, following a fairly
2 comprehensive analysis of the FAC's deficiencies and overall
3 weaknesses. The SAC did not correct those deficiencies; nor has
4 plaintiff offered any additional facts in its response that could
5 be alleged in a third amended complaint, and that would save the SAC
6 from dismissal with prejudice.²⁸ See In re MIPS Techs., Inc.
7 Deriv. Litig., 2008 WL 3823726, at *8 (N.D.Cal. Aug. 13, 2008)
8 (dismissing without leave to amend derivative shareholder suit where
9 plaintiff did not "set forth additional facts he could plead in
10 either his briefing or at argument[]). Further, in contrast to
11 "many securities fraud cases," plaintiff's allegations herein are
12 not based upon "the statements of confidential witnesses and/or
13 employees and former employees[.]" See Hansen, 527 F.Supp.2d at
14 1163. Therefore, as in Hansen, "it is difficult to imagine what
15 additional facts Plaintiff could allege to satisfy the strict
16 pleading requirements of the PSLRA and Rule 9(b)." Id. Plaintiff,
17 represented by experienced counsel who routinely practice in the
18 area of securities class action litigation,²⁹ were given an adequate
19 opportunity to file an amended complaint addressing this court's
20 concerns in Apollo I, and satisfying the governing pleading

21

22 ²⁸ Plaintiff did not move to amend under FED.R.CIV.P. 15. Instead, it
23 simply "request[ed] leave to amend." Resp. (Doc. 129) at 32:22. This is a
24 somewhat telling, although not entirely dispositive, distinction. Because
25 plaintiff sought leave to amend in the form of a request, arguably it was not
26 required to attach a proposed amended complaint or otherwise comply with the
27 dictates of LRCiv 15.1. Among other things, that Rule requires that if "[a] party
28 moves for leave to amend," it "must attach a copy of the proposed amended
pleading[.]" and it "must indicate in what respect it differs from the pleading
which it amends, by bracketing or striking through the text to be deleted and
underlining the text to be added." LRCiv 15.1 (emphasis added). Perhaps plaintiff
made this "request" as a means of circumventing that Local Rule and because it does
not have any additional facts. Otherwise, surely plaintiff would have brought them
to the attention of the court and defendants.

28

²⁹ See Salcido Decl'n (Doc. 33), exh. D thereto.

1 standards as developed in the applicable case law. Plaintiff did
2 not avail itself of that opportunity. Accordingly, the court denies
3 plaintiff's "request" for leave to amend and grants defendants'
4 motions to dismiss in their entirety with prejudice and without
5 leave to amend.

6 **Conclusion**³⁰

7 "To be successful, a securities class-action plaintiff must
8 thread the eye of a needle made smaller and smaller over the years
9 by judicial decree and congressional action." Alaska Elec. Pension
10 Fund v. Flowserve Corp., 572 F.3d 221, 235 (5th Cir. 2009) (*per*
11 *curiam*) (Hon. Sandra Day O'Connor, Associate Justice of the U.S.
12 Supreme Court (Ret.), sitting by designation pursuant to 28 U.S.C.
13 § 294(a)). In the present case, even with the opportunity for
14 amendment, plaintiff was unable to thread that needle.

15 For all of the reasons set forth herein, IT IS ORDERED that:

16 (1) the "Motion to Dismiss . . . Lead Plaintiff's Second
17 Amended Complaint for Violations of the Federal Securities Laws" by
18 individual defendants John G. Sperling, Todd S. Nelson, Kenda B.
19 Gonzales, Daniel E. Bachus, John Blair, John R. Norton III, Hedy
20 Govenar, Brian E. Mueller, Dino J. DeConcini, Peter Sperling, and
21 Laura Palmer Noone (Doc. 120) is GRANTED;

22 (2) the "Alternative[] [Motion] to Strike Portions of Lead
23

24 ³⁰ On March 29, 2011, plaintiff filed a Notice of Supplemental Authority
25 (Doc. 141), "appris[ing]" this court of the recent Supreme Court decision, Matrixx,
26 supra, 2011 WL 977060. Not. (Doc. 141) at 1:1. Plaintiff asserts that Matrixx
27 "holdings regarding [the] materiality" element of a section 10(b) claims lend
28 "further support" for its opposition arguments herein. Id. at 1:13. In their
Reply of that same date, the individual defendants contend, and the court agrees,
that Matrixx has "no bearing" on the primary issue herein - plaintiff's alleged
"failure to meet the pleading standard for falsity under the PSLRA[.]" See Reply
(Doc. 142) at 1:14-16. The court thus finds that no supplemental briefing of
Matrixx is necessary.

1 Plaintiff's Second Amended Complaint for Violations of the Federal
2 Securities Laws[]" (Doc. 120) by the defendants listed in paragraph
3 (1) above is DENIED as MOOT;

4 (3) the "Motion to Dismiss by Defendant Apollo Group, Inc.
5 (Doc. 122) is GRANTED; and

6 (4) the "Motion for Judicial Notice in Support of Lead
7 Plaintiff's Omnibus Opposition to Defendants' Motion to Dismiss the
8 Second Amended Complaint for Violations of the Federal Securities
9 Laws by Plaintiff Pension Trust Fund for Operating Engineers" (Doc.
10 131) is GRANTED.

11 IT IS FURTHER ORDERED that the Second Amended Complaint (Doc.
12 112) is DISMISSED WITH PREJUDICE. The Clerk of the Court is
13 directed to enter JUDGMENT in favor of defendants and terminate the
14 case.

15 DATED this 31st day of March, 2011.

16

17

18

19

20

21

22

23 Copies to counsel of record

24

25

26

27

28



Robert C. Broomfield
Senior United States District Judge