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8 NOT FOR CITATION
9 IN THE UNITED STATES DISTRICT COURT
10 FOR THE NORTHERN DISTRICT OF CALIFORNIA
11 SAN JOSE DIVISION

12 IN RE ATMEL CORPORATION DERIVATIVE
13 LITIGATION

Case Number C 06-4592 JF (HRL)

14 ORDER¹ (1) GRANTING WITH
15 LEAVE TO AMEND MOTIONS TO
16 DISMISS FOR FAILURE TO STATE
17 A CLAIM; (2) DEFERRING MOTION
18 TO DISMISS FOR FAILURE TO
19 MAKE DEMAND

[re: docket nos. 52, 53, 54, 58]

20 I. BACKGROUND

21 1. Procedural Background

22 On July 27, 2006, Plaintiff James Juengling filed a shareholder derivative complaint
23 against a number of the directors and officers of nominal defendant Atmel Corporation (“Atmel”
24 or “the Company”), which designs, develops, manufactures and sells a wide variety of integrated
25 circuit products, including microcontrollers, advanced logic, mixed-signal, non-volatile memory,
26 and radio frequency components. The complaint alleged improper backdating of stock options

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28 ¹ This disposition is not designated for publication and may not be cited.

1 and asserted three claims: (1) breach of fiduciary duty; (2) violation of Section 10(b) of the
 2 Securities Exchange Act and Rule 10b-5 promulgated thereunder; and (3) restitution/unjust
 3 enrichment. On October 4, 2006, the Court consolidated the Juengling action with two other
 4 derivative actions² and appointed a leadership structure for the consolidated action (“the
 5 Consolidated Plaintiffs”).

6 On November 3, 2006, the instant consolidated complaint (“the Complaint”) was filed.
 7 The Complaint names eighteen individual defendants (“the Individual Defendants”) who served
 8 as officers or directors of Atmel. The Complaint separates those eighteen defendants into two
 9 categories: the “Option Recipient Defendants” (Gust Perlegos, Tsung-Ching Wu (“Wu”), Kris
 10 Chellam (“Chellam”), Jack Peckham (“Peckham”), Donald Colvin (“Colvin”), Mike Sisois
 11 (“Sisois”), B. Jeffrey Katz (“Katz”), Francis Barton (“Barton”), Graham Turner (“Turner”),
 12 Bernard Pruniaux (“Pruniaux”), and Steven Schumann (“Schumann”)) and the “Director
 13 Defendants” (George Perlegos, T. Peter Thomas (“Thomas”), Chaiho Kim (“Kim”), Pierre
 14 Fougere (“Fougere”), Norman Hall (“Hall”), David Sugishita (“Sugishita”), and Steven Laub
 15 (“Laub”)). It asserts eleven claims: (1) violation of §10(b) and Rule 10b-5 of the Securities
 16 Exchange Act;³ (2) violation of §14(a) of the Securities Exchange Act; (3) violation of §20(a) of
 17 the Securities Exchange Act (against Chellam, Barton, Wu and the Director Defendants); (4)
 18 accounting; (5) breach of fiduciary duty and/or aiding and abetting; (6) unjust enrichment
 19 (against the Option Recipient Defendants); (7) rescission (against the Option Recipient
 20 Defendants); (8) constructive fraud; (9) corporate waste; (10) breach of contract (against the
 21

22 ² The plaintiff in *Noble v. Perlegos, et al.*, Case No. C 06-4973 JF brought claims for: (1)
 23 violation of Section 14(a) of the Exchange Act; (2) breach of fiduciary duty; (3) gross
 24 mismanagement; (4) waste of corporate assets; and (5) unjust enrichment and breach of the duty
 of loyalty.

25 The plaintiff in *Kelley v. Perlegos, et al.*, Case No. C 06-4680 JF brought claims for: (1)
 26 breach of fiduciary duty; (2) violation of Section 10(b) of the Securities Exchange Act and Rule
 10b-5 promulgated thereunder; and (3) restitution/unjust enrichment.

27 ³ Those claims without notation as to specific defendants are asserted against all the
 28 Individual Defendants.

Option Recipient Defendants); and (11) violation of California Corporation Code § 25402 (against the Individual Defendants, with the exception of Barton, Fougere, Kim, Laub and Sugishita). No demand has been made upon Atmel's Board of Directors ("the Board"). The Consolidated Plaintiffs allege that such demand would be a futile and useless act because the Board is incapable of making an independent and disinterested decision to institute and vigorously prosecute this action. Complaint ¶ 153.

On January 29, 2007, three motions to dismiss were filed. Fifteen of the Individual Defendants moved to dismiss for failure to state a claim upon which relief may be granted ("the Barton Motion"). Defendants Gust Perlegos and George Perlegos also moved to dismiss, joining the Barton Motion with limited exceptions. Atmel moved to dismiss for failure to make demand. On January 30, 2007, defendant Sisois moved to dismiss, joining the Barton Motion with limited exceptions. The Consolidated Plaintiffs have filed an omnibus opposition to the four motions to dismiss. The Court heard oral argument on April 27, 2007.

2. Factual Allegations

The Complaint alleges that the Individual Defendants had the following relationships with Atmel:

Defendant	Role with Atmel
George Perlegos	President, CEO, ⁴ & director from Atmel's inception in 1984 to August 2006.
Gust Perlegos	Executive VP Office of the President, 2001 to August 2006. Director, January 1985 to August 2006. Executive VP & GM, January 1996 to 2001. VP, GM, January 1985 to January 1996.
Wu	Executive VP, Office of the President since 2001. Director since 1985. Executive VP & GM, January 1996 to 2001. VP, Technology, January 1986 to January 1996.

⁴ CEO refers to Chief Executive Officer, VP refers to Vice President, and GM refers to General Manager.

1	Thomas	Director since December 1987. Member of the Compensation Committee & the Audit Committee since at least 1996.
2		
3	Hall	Director from August 1992 until in or about 2005. Member of the Compensation Committee from 1997 to 2004, & member of the Audit Committee from 1997 to 2003.
4		
5	Fougere	Director, member of the Audit Committee, & member of the Compensation Committee since February 2001.
6		
7	Kim	Director & member of the Audit Committee since September 2002. Member of the Compensation Committee from September 2002 through 2003.
8	Sugishita	Director, Chairman of Audit Committee, & Chairman of Corporate Governance & Nominating Committee, February 2004 to present.
9	Laub	Director since February 10, 2006. Appointed President & CEO in August 2006.
10		
11	Chellam	Chief Financial Officer & VP, Finance & Administration, September 1991 to July 1998.
12	Peckham	GM, ASIC Operations, January 1992 to 1998. VP, Sales, January 1986 to January 1992. Director of Sales, June 1985 to January 1986.
13		
14	Colvin	Chief Financial Officer, & VP, Finance, March 1998 to January 2003. Chief Financial Officer, Atmel Rousset S.A. 1995 to 1998.
15	Sisois	VP, Planning & Information Systems, 1986 to August 2006. Director of Information Systems, February 1985 to 1986.
16		
17	Katz	VP, Marketing, November 1998 to about 2005.
18	Barton	Executive VP & Chief Financial Officer, May 2003 to July 2005.
19	Turner	VP and GM, Microcontroller Segment since October 2001. Joined the Company in 1989.
20	Pruniaux	VP and GM, ASIC Segment since November 2001. CEO of Atmel Rousset S.A., May 1995 to November 2001.
21	Schumann	VP and GM, Non-Volatile Memory Segment since January 2002. Joined the Company in 1985.
22		

23 Complaint ¶¶ 22-76.

24 As summarized below, the Complaint alleges that the Option Recipient Defendants
25 received twenty-one backdated option grants on eleven dates.

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Recipient	Purported Grant Date	Shares	Share Price
Turner	February 4, 1994	160,000* ⁵	\$2.29
Schumann	February 22, 1994	192,000*	\$3.8516
Gust Perlegos	April 11, 1997	40,000	\$6.0938
Wu	April 11, 1997	40,000	\$6.0938
Chellam	April 11, 1997	40,000	\$6.0938
Peckham	April 11, 1997	40,000	\$6.0938
Turner	October 9, 1998	100,000*	\$1.9844
Pruniaux	October 9, 1998	200,000*	\$1.9844
Schumann	October 9, 1998	192,000*	\$1.9844
Colvin	February 12, 1999	20,000	\$3.6719
Sisois	June 11, 1999	40,000	\$5.9063
Colvin	July 16, 1999	40,000	\$7.8281
Katz	July 16, 1999	10,000	\$7.8281
Turner	July 16, 1999	40,000*	\$7.8281
Colvin	November 17, 2000	40,000	\$12.125
Colvin	September 17, 2001	100,000	\$7.12
Gust Perlegos	November 14, 2002	50,000	\$2.11
Wu	November 14, 2002	100,000	\$2.11
Colvin	November 14, 2002	50,000	\$2.11
Sisois	November 14, 2002	40,000	\$2.11
Barton	April 30, 2003	500,000	\$1.81

Complaint ¶¶ 24-62, 103.

The Complaint alleges the following: The Company's stock option plans require that the exercise price of an option be no less than the fair market value on the date of the grant.

Complaint ¶ 91. However, in "a striking pattern that could not have been the result of chance," all the grants listed above purportedly were granted at some of the lowest prices of the year in which they fell. Complaint ¶ 109. The purported grant dates were not the actual grant dates.

⁵ An asterisk indicates that the option grant was "At least" the number stated here.

1 Complaint ¶ 110. “Rather, at the behest of the Option Recipient Defendants, the Director
2 Defendants improperly backdated the stock option grants to make it appear as though the grants
3 were made on dates when the market price of Atmel stock was lower than the market price on the
4 actual grant dates.” *Id.* “From 1994 to 2003, the Compensation Committee granted . . .
5 backdated Atmel stock options to the Option Recipient Defendants” Complaint ¶ 103.
6 After the Sarbanes-Oxley Act became effective, the Compensation Committee granted
7 backdated options to Gust Perlegos, Wu, Colvin, Sisois, and Barton. Complaint ¶¶ 114-15.
8 “From 1998 to 2003, the Company, with the knowledge, approval and participation of each of
9 the Individual Defendants, for the purpose and with the effect of concealing the improper option
10 backdating, disseminated to shareholders and filed with the SEC annual proxy statements that
11 falsely reported the dates of stock option grants to the Option Recipient Defendants”
12 Complaint ¶ 126.

13 The Complaint alleges the following with respect to Atmel’s announced discovery of
14 backdating: On July 25, 2006, Atmel issued a press release announcing that the Audit
15 Committee was reviewing the Company’s practices relating to its stock options grants with the
16 assistance of independent legal counsel and independent accountants. Complaint ¶ 96. The
17 Company failed to file a timely Form 10-Q for the quarter ending June 30, 2006. Complaint ¶
18 97. On August 15, 2006, the Company announced that it had received a request for information
19 from the SEC relating to its past stock option grants. *Id.* On August 17, 2006, Atmel issued a
20 press release announcing that its investigation was ongoing and that it was still unable to provide
21 financial information for the quarter ending June 30, 2006. Complaint ¶ 98. On October 30,
22 2006, the Company issued a press release reporting the Audit Committee’s preliminary
23 conclusion that “the actual measurement dates for certain stock options differed from the
24 recorded measurement dates for such stock options.” Complaint ¶ 99. The release stated that the
25 Company’s prior financial statements could not be relied upon. *Id.* As of the filing of the
26 Complaint, the Company had yet to issue its Form 10-Q for the quarter ending June 30, 2006,
27 and faced possible delisting by NASDAQ. Complaint ¶ 101.

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1 The Complaint also alleges the following: On August 6, 2006, Laub, Fougere, Thomas,
2 Kim, and Sugishita elected Sugishita as Chairman and canceled the stockholders' meeting
3 George Perlegos had called for the day before, which had sought their removal. Complaint ¶ 92.
4 The Board then fired George and Gust Perlegos, as well as two other executives, citing misuse of
5 corporate travel funds. *Id.* On August 25, 2006, George Perlegos submitted a letter of
6 resignation to the Board. Complaint ¶ 95. On August 28, 2006, the Company announced that it
7 had received a notice from NASDAQ that it was not in compliance with the director
8 independence listing requirement, but that it had come back into compliance with the
9 requirement after the resignation of George Perlegos. *Id.*

10 II. LEGAL STANDARD

11 1. Motion to Dismiss

12 For purposes of a motion to dismiss, the plaintiff's allegations are taken as true, and the
13 Court must construe the complaint in the light most favorable to the plaintiff. *Jenkins v.*
14 *McKeithen*, 395 U.S. 411, 421 (1969). Leave to amend must be granted unless it is clear that the
15 complaint's deficiencies cannot be cured by amendment. *Lucas v. Department of Corrections*,
16 66 F.3d 245, 248 (9th Cir. 1995). When amendment would be futile, however, dismissal may be
17 ordered with prejudice. *Dumas v. Kipp*, 90 F.3d 386, 393 (9th Cir. 1996). On a motion to
18 dismiss, the Court's review is limited to the face of the complaint and matters judicially
19 noticeable. *North Star International v. Arizona Corporation Commission*, 720 F.2d 578, 581
20 (9th Cir. 1983); *MGIC Indemnity Corp. v. Weisman*, 803 F.2d 500, 504 (9th Cir. 1986); *Beliveau*
21 *v. Caras*, 873 F.Supp. 1393, 1395 (C.D. Cal. 1995). However, under the "incorporation by
22 reference" doctrine, the Court also may consider documents that are referenced extensively in the
23 complaint and are accepted by all parties as authentic, even though the documents are not
24 physically attached to the complaint. *In re Silicon Graphics, Inc. Securities Litigation*, 183 F.3d
25 970 (9th Cir. 1999).

26 2. Demand Requirement

27 A derivative complaint must "allege with particularity the efforts, if any, made by the
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1 plaintiff to obtain the action the plaintiff desires from the directors or comparable authority and,
 2 if necessary, from the shareholders or members, and the reasons for the plaintiff's failure to
 3 obtain the action or for not making the effort.” Fed. R. Civ. P. 23.1. The existence and
 4 satisfaction of a demand requirement is a substantive issue governed by state law. *See Kamen v.*
 5 *Kemper Financial Services, Inc.*, 500 U.S. 90, 96-97 (1991).⁶ When the challenged decision is
 6 that of the board in place at the time of the filing of the complaint, failure to make demand may
 7 be excused if a plaintiff can raise a reason to doubt that a majority of the board is disinterested or
 8 independent or that the challenged acts were the product of the board’s valid exercise of business
 9 judgment. *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984); *see also Ryan v. Gifford*, 918 A.2d
 10 341, 352 (Del. Ch. 2007) (discussing *Aronson*). However, “[w]here there is no conscious
 11 decision by the corporate board of directors to act or refrain from acting, the business judgment
 12 rule has no application.” *Rales v. Blasband*, 634 A.2d 927, 933 (Del. 1993); *see also Ryan*, 918
 13 A.2d at 352 (discussing *Rales*). In such a situation, demand may be excused only if a plaintiff
 14 “can create a reasonable doubt that, as of the time the complaint is filed, the board of directors
 15 could have properly exercised its independent and disinterested business judgment in responding
 16 to a demand.” *Id.* at 353 (citing *Rales*, 634 A.3d 933-34).

17 III. DISCUSSION

18 1. The Barton Motion to Dismiss for Failure to State a Claim

19 a. Claim One: Violation of Section 10(b) and Rule 10b-5

20 i. Sufficiency of the Allegations

21 The Consolidated Plaintiffs allege securities fraud in violation of Section 10(b) of the
 22 Securities Exchange Act and Rule 10b-5 promulgated thereunder. Section 10(b) makes it
 23 unlawful

24 [t]o use or employ, in connection with the purchase or sale of any security
 25 registered on a national securities exchange or any security not so registered . . .
 any manipulative or deceptive device or contrivance in contravention of such rules

27 ⁶ The parties agree that Delaware law applies to the instant action because Ditech is
 28 incorporated in Delaware.

1 and regulations as the Commission may prescribe as necessary or appropriate in
2 the public interest or for the protection of investors.

3 15 U.S.C. § 78j(b). Rule 10b-5 makes it unlawful for any person to use interstate commerce

- 4 (a) To employ any device, scheme, or artifice to defraud,
- 5 (b) To make any untrue statement of a material fact or to omit to state a material
6 fact necessary in order to make the statements made, in the light of the
7 circumstances under which they were made, not misleading, or
- 8 (c) To engage in any act, practice, or course of business which operates or would
9 operate as a fraud or deceit upon any person, in connection with the purchase or
10 sale of any security.

11 17 C.F.R. § 240.10b-5. In cases involving publicly-traded securities and purchases or sales in
12 public securities markets, the elements of an action under Section 10(b) and Rule 10b-5 are: (1)
13 a material misrepresentation or omission, (2) scienter, (3) a connection with the purchase or sale
14 of a security, (4) reliance, (5) economic loss, and (6) loss causation. *Dura Pharmaceuticals, Inc.*
15 *v. Broudo*, 544 U.S. 336, 341-42 (2005).

16 The Consolidated Plaintiffs must meet two heightened pleading standards. Fed. R. Civ.
17 P. 9(b) requires that “the circumstances constituting fraud . . . be stated with particularity.” The
18 Ninth Circuit has explained that a “plaintiff must include statements regarding the time, place,
19 and nature of the alleged fraudulent activities, and that mere conclusory allegations of fraud are
20 insufficient.” *In re GlenFed, Inc. Securities Litigation*, 42 F.3d 1541, 1548 (9th Cir. 1994). A
21 plaintiff asserting fraud “must set forth an explanation as to why the statement or omission
22 complained of was false or misleading.” *Id.* (internal quotation marks omitted); *see also Yourish*
23 *v. California Amplifier*, 191 F.3d 983, 992-93 (9th Cir. 1999). The Private Securities Litigation
24 Reform Act (“PSLRA”) raises the pleading standard further:

- 25 (1) Misleading statements and omissions
26 In any private action arising under this chapter in which the plaintiff alleges that
27 the defendant–
28 (A) made an untrue statement of a material fact; or
(B) omitted to state a material fact necessary in order to make the statements
made, in the light of the circumstances in which they were made, not misleading;
the complaint shall specify each statement alleged to have been misleading, the
reason or reasons why the statement is misleading, and, if an allegation regarding
the statement or omission is made on information and belief, the complaint shall
state with particularity all facts on which that belief is formed.
- (2) Required state of mind
In any private action arising under this chapter in which the plaintiff may recover

1 money damages only on proof that the defendant acted with a particular state of
2 mind, the complaint shall, with respect to each act or omission alleged to violate
3 this chapter, state with particularity facts giving rise to a strong inference that the
4 defendant acted with the required state of mind.

5 15 U.S.C. § 78u-4b(1)-(2).

6 The Consolidated Plaintiffs allege the following with respect to the Section 10(B) claim:

7 159. Throughout the relevant period, the Individual Defendants individually and
8 in concert, directly and indirectly, by the use and means of instrumentalities of
9 interstate commerce and/or of the mails, intentionally or recklessly employed
10 devices, schemes and artifices to defraud and engaged in acts, practices and a
11 course of business which operated as a fraud and deceit upon the Company.

12 160. The Individual Defendants, as top executive officers and/or directors of the
13 Company, are liable as direct participants in the wrongs complained of herein.
14 Through their positions of control and authority as officers and/or directors in the
15 Company, each of the Individual Defendants was able to and did control the
16 conduct complained of herein.

17 161. The Individual Defendants acted with scienter in that they either had actual
18 knowledge of the fraud set forth herein, or acted with reckless disregard for the
19 truth in that they failed to ascertain and to disclose the true facts, even though
20 such facts were available to them. The Individual Defendants were among the
21 senior management and/or directors of the Company and were therefore directly
22 responsible for the fraud alleged herein.

23 162. The Company relied upon the Individual Defendants' fraud in granting the
24 Option Recipient Defendants options to purchase shares of the Company's
25 common stock, as alleged herein.

26 163. As a direct and proximate result of the Individual Defendants' fraud, the
27 Company has sustained millions of dollars in damages, including, but not limited
28 to, the additional compensation expenses and tax liabilities the Company will be
required to incur, the costs associated with the Company's internal investigation,
the loss of funds paid to the Company upon the exercise of stock options, costs
and expenses incurred in connection with the Company's restatement of historical
financial results, and costs and expenses incurred in connection with the SEC
investigation of the Company.

Complaint ¶¶ 159-163.

These allegations do not satisfy the specificity requirement of Rule 9(b) or of the PSLRA.
They neither identify what roles each defendant played in the alleged back-dating scheme nor
allege facts giving rise to a strong inference of scienter on the part of each defendant. In light of
the public statement by Atmel, it appears almost certain that some of the options at issue here
were backdated. However, that apparent fact does not permit the Consolidated Plaintiffs to name
any number of individual defendants without providing adequate detail regarding their role and

1 knowledge of the alleged backdating.⁷ This is not a case in which requiring further detailed
 2 allegations of the roles played by individual defendants would lead to an unreasonably
 3 cumbersome complaint. *See In re Washington Public Power Supply System Securities*
 4 *Litigation*, 623 F.Supp. 1466, 1472 (W.D.Wash. 1985). Accordingly, this claim will be
 5 dismissed with leave to amend to the extent that it is not time-barred.

6 ii. Statute of Limitations

7 [A] private right of action that involves a claim of fraud, deceit, manipulation, or
 8 contrivance in contravention of a regulatory requirement concerning the securities
 9 laws, as defined in section 3(a)(47) of the Securities Exchange Act of 1934 (15
 10 U.S.C. § 78c(a)(47)), may be brought not later than the earlier of –

- 9 (1) 2 years after the discovery of the facts constituting the
 10 violation; or
 (2) 5 years after such violation.

11 28 U.S.C. § 1658(b); *see e.g. In re Heritage Bond Litig.*, 289 F.Supp.2d 1132, 1147-48 (C.D.Cal.
 12 2003). This statute of limitations is not subject to equitable tolling. *Durning v. Citibank, Int'l*,
 13 990 F.2d 1133, 1136-37 (9th Cir. 1993).

14 The parties agree that the five-year period of repose⁸ applies to the first claim for
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16 ⁷ Nor are the Consolidated Plaintiffs relieved of the requirement that they allege facts
 17 raising an inference that a particular option grant was backdated. While the Court need not
 18 decide the sufficiency of such allegations in the instant complaint, it notes that other courts
 19 within this district have considered the presence or absence of a pattern of backdating, primarily
 20 in the context of the demand futility requirement. *See e.g. In re Zoran Corp. Deriv. Litig.*, 2007
 21 WL 1650948 (N.D.Cal. June 5, 2007); *In re Openwave Systems Inc. Deriv. Litig.*, 2007 WL
 22 1456039 (N.D.Cal., May 17, 2007); *In re CNET Networks, Inc. Deriv. Litig.*, 483 F.Supp.2d 947
 23 (N.D.Cal. 2007); *In re Linear Tech. Corp. Deriv. Litig.*, 2006 WL 3533024 (N.D.Cal. Dec. 7,
 24 2006). This Court also has provided a non-exclusive list of facts that, if alleged, would
 25 strengthen allegations that a grant was backdated. *See Order Re Motions to Dismiss 11-12, In re*
 26 *Ditech Derivative Litigation*, Case No. C 06-5157 JF (listing the following factors: “the degree to
 which the options were granted at the discretion of the compensation committee or the board,
 versus at fixed, preestablished times; the actual grant dates of the options and the appropriate
 price of the options; the date that the options were exercised; whether required performance goals
 were met before the options were granted; the presence or absence of other major corporate
 events, such as an acquisition, at the time of the grants; and the results of any requests by
 Plaintiff for information.”).

27 ⁸ “A statute of repose is a fixed, statutory cutoff date, usually independent of any
 28 variable, such as claimant’s awareness of a violation.” *Munoz v. Ashcroft*, 339 F.3d 950, 957

1 violations of Section 10(b) and Rule 10b-5 of the Securities and Exchange Act. The
2 Consolidated Plaintiffs argue that their claims fall within the five-year period of repose. While
3 only a limited number of the alleged stock grant dates fall within this period, the Consolidated
4 Plaintiffs do allege a series of false financial statements within the five-year period and argue that
5 the period of repose begins no earlier than the latest such financial statement, which was filed on
6 March 15, 2003. This argument raises the question as to whether such subsequent false financial
7 statements preserve claims for options manipulation that occurred outside the five-year period of
8 repose. The Court concludes that in light of the statute's focus on the "violation," the Court must
9 consider the statute of limitations in terms of the specific violations alleged. To the extent that
10 the claim is based upon the backdating itself, the period of repose starts on the date that the
11 option grant was made. *See Durning*, 990 F.2d at 1136 (noting that the federal rule is that a
12 cause of action accrues at the completion of the sale of the instrument); *Falkowski v. Imation*
13 *Corp.*, 309 F.3d 1123, 1130 (9th Cir. 2002) (describing the grant of an option as "a purchase or
14 sale" under the Securities Litigation Uniform Standards Act). The Consolidated Plaintiffs may
15 be able to state a claim under Section 10(b) and Rule 10(b)(5) for dissemination of fraudulent
16 financial statements, but such statements must fall within the five-year period of repose.⁹ The
17 Consolidated Plaintiffs may not avoid the effect of the statute of limitations by combining
18 allegations of recent financial statements and time-barred option back-dating. Because the first
19 claim, as currently pled, depends upon such a combination, it will be dismissed. The Court will
20 grant leave to amend so that the Consolidated Plaintiffs may allege independent wrongful acts
21 that occurred on or after July 27, 2001.

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(9th Cir. 2003) (citing *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350,
363 (1991)).

25 ⁹ The Court is skeptical of a continuing wrong theory that would create liability under
26 Section 10(b) upon the issuance of a financial statement that merely fails to correct a prior false
27 statement. Such a theory appears to approximate the effects of the fraudulent concealment
28 doctrine in relation to equitable tolling, a doctrine that does not apply in the Section 10(b)
context.

1 b. Claim Two: Violation of Section 14(a)

2 Rule 14a-9 provides:

3 No solicitation subject to this regulation shall be made by means of any proxy
4 statement, form of proxy, notice of meeting or other communication, written or
5 oral, containing any statement which, at the time and in the light of the
6 circumstances under which it is made, is false or misleading with respect to any
7 material fact, or which omits to state any material fact necessary in order to make
8 the statements therein not false or misleading or necessary to correct any
9 statement in any earlier communication with respect to the solicitation of a proxy
10 for the same meeting or subject matter which has become false or misleading.

11 17 C.F.R. § 240.14a-9(a). To state a claim under Rule 14a-9 and Section 14(a), a plaintiff must
12 allege a false or misleading statement or omission of material fact; that the misstatement or
13 omission was made with the requisite level of culpability; and that it was an essential link in the
14 accomplishment of the transaction. *Desaigoudar v. Meyercord*, 223 F.3d 1020, 1022 (9th Cir.
15 2000).

16 The Individual Defendants argue that the Section 14(a) claim is time-barred because it
17 must be filed within one year after discovery of the facts constituting the violation, and in no
18 event more than three years following publication of the proxy statement. Barton Motion 23.
19 The Consolidated Plaintiffs argue that Section 14(a) claims fall within the two-year/five-year
20 scheme that applies to a Section 10(b) claim. *See* Opposition 18. The Court concludes that the
21 one-year/three-year scheme applies to the Section 14(a) claim because such a claim does not
22 sound in fraud. *See In re Exxon Mobil Corp. Sec. Litig.*, 387 F.Supp.2d 407, 424 (D.N.J. 2005);
23 *In re Global Crossing, Ltd. Sec. Litig.*, 313 F.Supp.2d 189, 196-97 (S.D.N.Y. 2003); *In re Zoran*
24 *Corp. Derivative Litig.*, 2007 WL 1650948 * 24. As currently pled, the Section 14(a) claim
25 alleges false statements made more than three years prior to the filing of this action.
26 Accordingly, the claim will be dismissed with leave to amend. Any amended claim must allege
27 wrongful acts that occurred on or after July 27, 2003 and not later than one year after discovery
28 of the violation.

 In light of the foregoing discussion, the Court need not reach the challenges to the
sufficiency of the allegations. However, assuming without deciding that the PSLRA also applies
to Section 14(a) claims, *see e.g. In re Textainer Partnership Securities Litig.*, 2005 WL 3801596

1 (N.D.Cal. March 8, 2005), *In re McKesson HBOC, Inc. Sec. Litig.*, 126 F.Supp.2d 1248, 1267
 2 (N.D.Cal. 2000)., greater specificity likely would strengthen this claim considerably.¹⁰

3 c. Claim Three: Violation of Section 20(a)

4 Section 20(a) provides:

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

9 15 U.S.C. § 78t(a). “To establish ‘controlling person’ liability, the plaintiff must show that a
 10 primary violation was committed and that the defendant ‘directly or indirectly’ controlled the
 11 violator.” *Paracor Finance, Inc. v. General Elec. Capital Corp.*, 96 F.3d 1151, 1161 (9th Cir.
 12 1996). As discussed above, the Consolidated Plaintiffs have failed to state a claim for a primary
 13 violation of the securities laws. However, it is possible that they may be able to do so in an
 14 amended pleading. Accordingly, the Section 20(A) claim will be dismissed with leave to
 15 amend.¹¹

16 d. Claims Four to Eleven: The State Law Claims

17 i. Claims Under Delaware Law (Claims Four to Eleven)

18 (1) Statute of Limitations

19 The parties agree that a three-year statute of limitations applies to each claim under
 20 Delaware law. *See* 10 Del. C. § 8106 (2006). The Consolidated Plaintiffs contend that the

21
 22 ¹⁰ This Court has held in another action that the PSLRA has foreclosed the application of
 23 the “group published pleading” doctrine, which provides that when false or misleading
 24 information is conveyed in group published statements, it is reasonable to presume that the
 25 statements are the result of the collective actions of the company’s officers. *In re Nextcard, Inc.*
Sec. Litig., 2006 WL 708663 *2-3 (N.D.Cal. March 20, 2006). This holding likely will be
 relevant to the sufficiency of an amended claim under Section 14(a).

26 ¹¹ The parties agree that the statute of limitations analysis for claim three is the same as
 27 for claim one. *See also In re Heritage Bond Litigation*, 289 F.Supp.2d at 1148. Accordingly,
 28 amendment of claim three should comply with the limitations articulated in the Court’s analysis
 of claim one.

1 statute was tolled in the instant case “based upon the doctrines of inherently unknowable injuries
 2 and fraudulent concealment.” Opposition 20. “Fraudulent concealment requires an affirmative
 3 act of concealment by a defendant-an actual artifice that prevents a plaintiff from gaining
 4 knowledge of the facts or some misrepresentation that is intended to put a plaintiff off the trail of
 5 inquiry.” *Ryan*, 2007 WL 1018208 *13 (quotation marks omitted). “Inaccurate public
 6 representations as to whether directors are in compliance with shareholder-approved stock option
 7 plans constitute fraudulent concealment of wrongdoing sufficient to toll the statute of
 8 limitations.” *Id.* Because the Consolidated Plaintiffs allege such inaccurate public
 9 representations, *see* Complaint ¶ 126, the three-year statute of limitations is tolled as to the
 10 Delaware state law claims.

11 (2) Claim Five: Breach of Fiduciary Duty

12 The Consolidated Plaintiffs allege the following:

13 179. As alleged in detail herein, each of the Individual Defendants had a fiduciary
 14 duty to, among other things, refrain from unduly benefiting themselves and other
 Company insiders at the expense of the Company.

15 180. As alleged in detail herein, the Individual Defendants breached their
 16 fiduciary duties by, among other things, engaging in a scheme to grant backdated
 stock options to themselves and/or certain other officers and directors of the
 Company and cover up their misconduct.

17 181. In breach of their fiduciary duties of loyalty and good faith, the Individual
 18 Defendants agreed to and did participate with and/or aided and abetted one
 another in a deliberate course of action designed to divert corporate assets to
 themselves and/or other Company insiders.

19 182. The Individual Defendants’ foregoing misconduct was not, and could not
 20 have been, an exercise of good faith business judgment. Rather, it was intended
 to and did, unduly benefit the Option Recipient Defendants at the expense of the
 Company.

21 Complaint ¶¶179-82.

22 The Individual Defendants argue that their actions are protected by the business judgment
 23 rule. However, where a defendant acts in bad faith and commits a breach of loyalty, the business
 24 judgment rule does not apply. *See Ryan*, 2007 WL 1018208 *11. The Individual Defendants
 25 also argue that the fiduciary duty claim is not stated with sufficient particularity. This argument
 26 is well taken, as the Complaint does not put the Individual Defendants, and particularly the non-
 27 officer defendants, on notice as to how they are alleged to have violated their fiduciary duties.

28

1 *See York Linings v. Roach*, 1999 WL 608850 *2 (Del. Ch. July 28, 1999) (unpublished). The
2 Consolidated Plaintiffs refer to detailed allegations elsewhere in the Complaint, but, as discussed
3 above, necessary detail is largely absent. Accordingly, this claim will be dismissed with leave to
4 amend.

5 (3) Claim Six: Unjust Enrichment

6 The Individual Defendants move to dismiss the unjust enrichment claim on a number of
7 bases. The Consolidated Plaintiffs respond by citing to *Ryan*, 2007 WL 1018208 *14, in which
8 the Delaware Chancery indicated that an unjust enrichment claim may be viable in the context of
9 options backdating. The Court need not resolve the legal challenges to this claim, as amendment
10 of the complaint is required on other bases. The Court notes that more detailed allegations of
11 options backdating will strengthen any claim that the recipients of such options were unjustly
12 enriched.

13 (4) Claims Four and Seven: Remedies Pled as Claims

14 The Individual Defendants move to dismiss the claims for accounting and rescission on
15 the basis that accounting and rescission are remedies, not separate claims for relief. The
16 Consolidated Plaintiffs effectively concede as much, but argue that it is inconsequential whether
17 accounting and rescission are pled as remedies or claims for relief. Opposition 48. The Court
18 concludes that the Consolidated Plaintiffs should include accounting and rescission as remedies
19 sought in any amended complaint.

20 (5) Claims Eight and Nine: Constructive Fraud and Corporate Waste

21 The Individual Defendants argue that constructive fraud and corporate waste are merely
22 types of breaches of fiduciary duty, not separate torts. Barton Motion 17 n.10. The Consolidated
23 Plaintiffs do not respond to this specific argument, which is well taken as to the constructive
24 fraud claim. The Court will dismiss that claim, which should be restated in any amended
25 complaint as a “straightforward fiduciary duty claim[.]” *See Parfi Holding AB v. Mirror Image*
26 *Internet, Inc.*, 794 A.2d 1211, 1236 (Del. Ch. 2001) (“[Plaintiff] should amend the complaint to
27 transform its derivative constructive fraud counts into straightforward breach of fiduciary duty
28

1 counts.”).

2 The corporate waste claim also will be dismissed. “To support a claim [for corporate
3 waste], a shareholder must demonstrate that the transaction in question either served no purpose
4 or was so completely bereft of consideration that the transfer is in effect a gift.” *Lewis v.*
5 *Vogelstein*, Del. Ch., 699 A.2d 327, 336 (1997). A plaintiff must allege facts that, if true,
6 establish that the defendant directors “authorize[d] an exchange that is so one sided that no
7 business person of ordinary, sound judgment could conclude that the corporation has received
8 adequate consideration.” *Glazer v. Zapata Corp.*, Del. Ch., 658 A.2d 176, 183 (1993). The
9 Consolidated Plaintiffs have not alleged such facts here; instead, they have alleged a grant of
10 equity-compensation. As the Individual Defendants assert, these grants may well have been in
11 consideration for the recipients remaining in Atmel’s employ. Accordingly, the claim will be
12 dismissed with leave to amend.

13 (6) Claim Ten: Breach of Contract

14 The Individual Defendants move to dismiss the breach of contract claim on the grounds
15 that it is not pled with sufficient particularity, that no employment agreements existed between
16 Atmel and the “option recipient defendants,” that the Consolidated Plaintiffs have not alleged
17 any act of breach, and that the directors ratified any breach. The Consolidated Plaintiffs respond
18 briefly that “[t]he terms of the Atmel stock option plans were blatantly violated when the
19 Director Defendants approved backdated stock option grants.” Opposition 47. However, the
20 Consolidated Plaintiffs have not alleged which, if any, of the defendants entered into a binding
21 contract that incorporates the terms of an option plan. Accordingly, this claim will be dismissed
22 with leave to amend.

23 ii. Claim Eleven: Insider Trading Under California Law

24 (1) Statute of Limitations

25 A Section 25402 claim must be brought “before the expiration of five years after the act
26 or transaction constituting the violation or the expiration of two years after the discovery by the
27 plaintiff of the facts constituting the violation, whichever shall first expire.” Cal. Corp. Code §
28

1 25506(b). While the Consolidated Plaintiffs argue that this period should be equitably tolled, the
2 Court concludes that the five-year period since the violation is a strict limit that may not be
3 tolled. *See SEC v. Seaboard Corp.*, 677 F.2d 1301, 1308 (9th Cir. 1982) (concluding that the
4 four-year bar under an earlier version of the statute was a strict limit). The insider trading
5 allegations refer to sales as early as 1997. Accordingly, portions of the claim are barred as
6 currently pled. Any amended claim should allege violations that occurred on or after July 27,
7 2001 and discovery of which occurred on or after July 27, 2004.

8 (2) Sufficiency of the Allegations

9 Cal. Corp. Code § 25402 provides that

10 [i]t is unlawful for an issuer or any person who is an officer, director or
11 controlling person of an issuer or any other person whose relationship to the issuer
12 gives him access, directly or indirectly, to material information about the issuer
13 not generally available to the public, to purchase or sell any security of the issuer
14 in this state at a time when he knows material information about the issuer gained
15 from such relationship which would significantly affect the market price of that
16 security and which is not generally available to the public, and which he knows is
17 not intended to be so available, unless he has reason to believe that the person
18 selling to or buying from him is also in possession of the information.

19 A claim under Section 25402 must be pled with particularity under Rule 9(b). *In re RasterOps*
20 *Corp. Sec. Litig.*, 1993 WL 476651 *5 (N.D.Cal. Sep. 10, 1993).

21 The Consolidated Plaintiffs allege the following:

22 202. At the time that the Insider Selling Defendants sold their Atmel common
23 stock as set forth herein at ¶¶ 135-49, by reason of their high executive and/or
24 directorial positions with Atmel, the Insider Selling Defendants had access to
25 highly material information regarding the Company, including the information set
26 forth herein regarding the true adverse facts of Atmel's option backdating,
27 improper accounting, and false financial statements.

28 203. At the time of such sales, that information was not generally available to the
public of the securities markets. Had such information been generally available, it
would have significantly reduced the market price of Atmel shares at the time.

204. The Insider Selling Defendants had actual knowledge of material, adverse
non-public information and thus sold their Atmel common stock in California in
violation of California Corporations Code §25402.

Complaint ¶¶ 202-04. The Court concludes that like the other claims, the insider trading claim
is not pled with sufficient particularity and should be dismissed with leave to amend. An
amended claim should allege facts specific to each of the Individual Defendants.

1 e. Motions to Dismiss Joining in the Barton Motion

2 The Court has reviewed the two additional motions to dismiss that join in the Barton
3 Motion. The Court concludes that the dismissal of the claims on the basis of the arguments made
4 in the Barton Motion renders it unnecessary to address the separate arguments asserted in the
5 Sisois and Perlegos motions.

6 **2. The Atmel Motion to Dismiss for Failure to Make Demand**

7 The Delaware Court of Chancery¹² recently explained:

8 [I]n an effort to balance the interest of preventing strike suits motivated by the
9 hope of creating settlement leverage through the prospect of expensive and
10 time-consuming litigation discovery [with the interest of encouraging] suits
11 reflecting a reasonable apprehension of actionable director malfeasance that the
12 sitting board cannot be expected to objectively pursue on the corporation's behalf,
13 Delaware law recognizes two instances where a plaintiff is excused from making
14 demand. Failure to make demand may be excused if a plaintiff can raise a reason
15 to doubt that: (1) a majority of the board is disinterested or independent or (2) the
16 challenged acts were the product of the board's valid exercise of business
17 judgment.

18 The analysis differs, however, where the challenged decision is not a decision of
19 the board in place at the time the complaint is filed. In *Rales v. Blasband*[, 634
20 A.2d 927 (Del. 1993)], the Supreme Court of Delaware held that [w]here there is
21 no conscious decision by the corporate board of directors to act or refrain from
22 acting, the business judgment rule has no application. Stated differently, the
23 absence of board action . . . makes it impossible to perform the essential inquiry
24 contemplated by *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984)].

25 Accordingly, where the challenged transaction was not a decision of the board
26 upon which plaintiff must seek demand, plaintiff must create a reasonable doubt
27 that, as of the time the complaint is filed, the board of directors could have
28 properly exercised its independent and disinterested business judgment in
responding to a demand.

Where at least one half or more of the board in place at the time the complaint
was filed approved the underlying challenged transactions, which approval may be
imputed to the entire board for purposes of proving demand futility, the *Aronson*
test applies.

Ryan v. Gifford, 918 A.2d 341, 352-53(Del. Ch. 2007) (citations and quotation marks omitted).

¹² The parties agree that Delaware law governs the instant dispute. Because California courts follow Delaware law in demand futility cases, this is true even if California law applies due to Atmel's asserted prior incorporation in California. See *Oakland Raiders v. National Football League*, 93 Cal.App.4th 572, 586 n.5 (2001) ("The parties agree that we may properly rely on corporate law developed in the State of Delaware given that it is identical to California corporate law for all practical purposes.").

1 The parties dispute whether the Court should consider the eight-member Board that was
 2 in place at the time that the initial complaint was filed¹³ or the six-member Board that was in
 3 place at the time that the Complaint was filed.¹⁴

4 [W]hen an amended derivative complaint is filed, the existence of a new
 5 independent board of directors is relevant to a Rule 23.1 demand inquiry only as
 6 to derivative claims in the amended complaint that are not already validly in
 7 litigation. Three circumstances must exist to excuse a plaintiff from making
 8 demand under Rule 23.1 when a complaint is amended after a new board of
 directors is in place: first, the original complaint was well pleaded as a derivative
 action; second, the original complaint satisfied the legal test for demand excusal;
 and third, the act or transaction complained of in the amendment is essentially the
 same as the act or transaction challenged in the original complaint.

9 *Braddock v. Zimmerman*, 906 A.2d 776, 786 (Del. 2006); *see also Harris v. Carter*, 582 A.2d
 10 222, 228 (Del. Ch. 1990) (“Demand futility is assessed as of the time that the original complaint
 11 was filed, not as of the filing of an amended complaint containing further factual allegations in
 12 support of the same claims.”). However, Delaware courts have not explained whether the three
 13 circumstances for excuse of a new demand requirement apply to a *consolidated* complaint.

14 In light of the dismissal for failure to state a claim, the Court concludes that it is
 15 premature to resolve this question, or the subsequent questions as to whether *Aronson* or *Rales*
 16 applies, and what result the appropriate test dictates. Accordingly, the motion to dismiss for
 17 failure to make demand will be deferred.

18 IV. ORDER

19 Good cause therefor appearing, IT IS HEREBY ORDERED that the motions to dismiss
 20 for failure to state a claim are GRANTED with leave to amend and that the motion to dismiss for
 21 failure to make demand is DEFERRED.

22 DATED: July 16, 2007.

23
 24 
 25 JEREMY FOGEL
 United States District Judge

26 ¹³ George & Gust Perlegos, Wu, Fougere, Thomas, Kim, Laub, and Sugishita.

27 ¹⁴ The original eight-person Board, less George and Gust Perlegos.

1 This Order has been served upon the following persons:

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