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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. GREGORY L. REYES. Defendant.	CASE NO. CR 06 0556 CRB **(1) GREGORY L. REYES'S NOTICE OF MOTION AND MOTION FOR JUDGMENT OF ACQUITTAL;** **(2) MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF; and** ***FILED UNDER SEPARATE COVER*: (3) DECLARATION OF RONDA J. MCKAIG IN SUPPORT THEREOF** Hearing Date: July 6, 2007 Time: 10:30 a.m. Judge: Hon. Charles R. Breyer Courtroom: 8, 19th Floor

NOTICE OF MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that defendant Gregory L. Reyes hereby moves for a judgment of acquittal, pursuant to Federal Rule of Criminal Procedure 29(a), on the grounds that the prosecution has failed to introduce sufficient evidence to prove that defendant is guilty beyond a reasonable doubt of any of the counts charged in the indictment.

The Motion is based on this Notice, the Memorandum of Points and Authorities attached hereto, the testimonial and documentary evidence adduced at trial, excerpts of which are attached to the Declaration of Ronda J. McKaig filed concurrently herewith, all matters of which this Court may take judicial notice, and such other documents and argument as may be presented to the Court.

DATED: July 3, 2007

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MEMORANDUM OF POINTS AND AUTHORITIES

I. PRELIMINARY STATEMENT

A. The Build Up to Trial

On July 20, 2006, the prosecution announced that it had filed criminal securities charges in this action with press conferences and media fanfare. The prosecutor alleged that Gregory Reyes and Stephanie Jensen had conspired to defraud Brocade and its shareholders by using hindsight to price employee stock options, and had "backdated" option grant paperwork in order to intentionally avoid compensation expenses associated with granting "in-the-money" options. The prosecution further alleged that Mr. Reyes was aware that the Company's financial statements were materially inaccurate, and that its public disclosures were materially incorrect.

In pre-trial proceedings, the defense argued that the stock option granting process at Brocade had one purpose and one purpose only -- to benefit the Company and its shareholders by attracting and retaining talented employees. There was no scheme to deceive or to cheat shareholders. No one intended to falsify the financial statements of the Company, and no one intended to misstate any information in the Company's public disclosures. The defense further argued that Brocade, like many of the approximately 250 companies who misapplied APB 25, had a good faith misunderstanding of the accounting principles set forth in that now-discredited accounting opinion. The defense also argued that the accounting charges at issue -- stock option compensation expenses -- were non-cash accounting entries, were not material to reasonable investors, and were factored out by analysts and investment managers in making their investment recommendations and decisions.

B. After Two Weeks of Trial, the Prosecution Rests: Where Are We?

Now, for the first time in this case, the Court has the opportunity to compare and evaluate the rhetoric spoken about this case against the sworn testimony and documentation introduced in the trial. The evidence has shown: (1) that from 2000 to 2004, Brocade at times priced stock options to new employees using a look-back process in an attempt to obtain more favorably-priced options for its rank and file employees (not one witness or one document suggests that the intent was anything different); (2) the retroactive pricing of stock options was done openly and transparently within Brocade's Human

Resources Department; (3) Brocade's Finance Department was fully aware of the retroactive pricing, and specifically advised HR that they could look back for an option price within the quarter; (4) Mr. Reyes's sole role in the process, as delegated by the Board of Directors, was to make option grants effective by signing the option paperwork; (5) Brocade's Finance Department misapplied APB 25 and incorrectly accounted for certain of Brocade's option grants; (6) as a result, the Company had to file a restatement to correct the accounting mistakes, which it did on January 24, 2005; and (7) investment analysts routinely factor out non-cash expenses (like stock option expenses) from their evaluation of a company's earnings per share ("EPS"). At its core, this is the prosecution's case after fourteen witnesses, access to 2.4 million documents, and two weeks of trial.

C. What the Prosecution Has Failed to Prove

The prosecution's proof is deficient on virtually every substantive element of every count of the indictment. It is this failure of proof, when measured against the applicable legal standard on Rule 29, that requires the granting of Mr. Reyes's motion for judgment of acquittal on all counts of the indictment.

1. Scheme to Defraud

The prosecution did **not** prove that:

- Any agreement existed between Mr. Reyes and Stephanie Jensen to defraud Brocade's shareholders and others or to falsify the Company's financial statements and public disclosures;
- Mr. Reyes acted with a criminal intent to deceive or to cheat the shareholders.

2. Mr. Reyes's Knowledge of the Relevant Accounting Principles

The prosecution did **not** prove that:

- Mr. Reyes understood the accounting implications of APB 25 or FAS 123;
- Mr. Reyes was specifically aware that Brocade's stock option granting practices required the Company to take an accounting charge in the form of an increase in the amount of its stock option compensation expenses in Brocade's financial statements;
- Mr. Reyes was aware that the Company's Finance Department did not properly apply APB 25 and failed to correctly account for the stock option grants in Brocade's financial statements.

3. Mr. Reyes's Involvement in the Financial Disclosure Process

The prosecution did **not** prove that:

- Mr. Reyes played any role in compiling and preparing Brocade's Form 10-Ks for fiscal years 2001-2003;
- Mr. Reyes reviewed and understood Brocade's Form 10-Ks for fiscal years 2001-2003;
- Mr. Reyes was aware that Brocade's Form 10-Ks for fiscal years 2001-2003 failed to accurately account for stock option expenses;
- Mr. Reyes was aware that Brocade's Finance Department misapplied APB 25, and failed to properly disclose the non-cash expenses associated with the stock option grants in Brocade's public filings and disclosures.

4. False Statements to Auditors

The prosecution did **not** prove that:[1]

- Mr. Reyes had any involvement in preparing, or reviewed Brocade's management representation letters for fiscal years 2002-2003;
- Mr. Reyes was aware that management representation letters for fiscal years 2002-2003 made inaccurate representations about Brocade's stock-option process, or its compliance with APB 25.

5. Books and Records

The prosecution did **not** prove that:

- Mr. Reyes was aware that Brocade's books and records did not adequately reflect stock option compensation expenses;
- Mr. Reyes was aware that the Finance Department misapplied APB 25 and thus did not correctly record stock option compensation expenses on the books and records, under APB 25.

6. Materiality

The prosecution did **not** prove that:

- The non-cash stock option expenses under APB 25 that Brocade mistakenly failed to include in its financial statements and public disclosures were material to reasonable investors;

[1] The prosecution did not elicit any evidence of the circumstances of Mr. Reyes signing the management representation letters; indeed the prosecution did not even elicit evidence establishing that Mr. Reyes's signature on the document was genuine, a significant issue given Elizabeth Moore's testimony about people forging his signature.

- There was any connection between the announcement of restated stock option compensation expenses on January 24, 2005 and a decline in Brocade's stock price;
- There was any connection between the omission of non-cash expenses and Brocade's stock price.

The failure of the prosecution to prove each of the above-referenced facts strikes a fatal blow to each count of the indictment. Without this critical evidence, the prosecution is unable to prove, much less prove beyond a reasonable doubt: (1) a conspiracy between Mr. Reyes and Ms. Jensen; (2) the existence of a scheme to defraud; (3) the knowing and willful falsification of the Company's SEC filings and its books and records; (4) the knowing and willful falsification of statements to the Company's auditors; or (5) the materiality of the non-cash stock option expenses at issue in this action. Accordingly, the Court should grant a judgment of acquittal on each count of the indictment.

The investigation and prosecution of this case has lingered for over two years. It caused Mr. Reyes to have to resign from the Company that he loved and helped build into the industry leader it is today. It has inflicted tremendous hardship on Mr. Reyes and his entire family. Mr. Reyes is not a criminal. He did not commit a crime. No rational juror could find guilt beyond a reasonable doubt on this factual record. This case does not belong in a criminal courtroom, and we respectfully urge the Court to end it now.

II. SUMMARY OF THE ARGUMENT

The prosecution has alleged that Greg Reyes and Stephanie Jensen engaged in a conspiracy from 2000 to 2004 to defraud Brocade and its shareholders by intentionally, knowingly, and *wrongfully* filing false financial statements with the Securities and Exchange Commission ("SEC"), and lying to Brocade's auditors, as a way to artificially inflate Brocade's stock price. The evidence adduced at trial, however, tells a very different story. While the prosecution has shown that Brocade's HR Department, pursuant to its own written process guidelines, routinely "looked back" to earlier dates to select favorable stock option stock prices for Brocade's new hires, the prosecution has not proved that Mr. Reyes's involvement in the process extended beyond his mere signing of the option grant paperwork, a responsibility delegated to him by the Board. **The prosecution has not introduced evidence of a single conversation between Mr. Reyes and any Brocade employee relating to**

accounting for stock options. The prosecution has not introduced evidence of any conversation or any document showing that Mr. Reyes understood the relevant accounting opinions; that he knew that Brocade's financial statements contained any material omissions or misrepresentations; or that he acted *wrongfully* with the intent to defraud the shareholders. In short, what the prosecution has proved is that, with respect to a portion of the 143 grants at Brocade, there was retroactive pricing, which was not accounted for properly under APB 25, leading to an accounting restatement; the prosecution has proved no more. And retroactive pricing, even when it is not properly accounted for under APB 25, is not illegal.

Now that the prosecution has concluded its case, Mr. Reyes moves for a judgment of acquittal on all counts in the indictment, pursuant to Rule 29 of the Federal Rules of Criminal Procedure, because no rational juror could find guilt, let alone guilt beyond a reasonable doubt, on a record as porous and insubstantial as set forth here. Relying primarily on the testimony of low-level to mid-level HR witnesses, and offering no evidence from the people who were responsible for, and involved in, the accounting and disclosure issues relating to Brocade's stock option program (Byrd, Bossi, Canova, Deranaleau), the prosecution seeks to convict Mr. Reyes based on little more than speculation that he must be guilty because as Brocade's Chief Executive Officer ("CEO") he signed the option paperwork, as well as the financial disclosures that incorrectly reported Brocade's stock option compensation expenses, which led to a Restatement. In contrast to almost every other major securities fraud prosecution of the last decade, from Enron to WorldCom, however, the prosecution has failed to call a single senior member of Brocade's Finance or Accounting Departments to testify whether Mr. Reyes knew or believed that the Company's financial statements and SEC filings were inaccurate, or that he acted with the intent to defraud. No witness has testified to a conspiratorial meeting; no document suggests a scheme to defraud. No witness has testified to the circumstances surrounding the preparation or filing of the financial documents at the core of this case -- the 10Ks and management representation letters. All the jury has on these points is speculation.

It is well-settled that such a prosecution "based on speculation and surmise alone cannot stand," *United States v. D'Amato*, 39 F.3d 1249, 1256 (2d Cir. 1994). "[W]hen there is an innocent

explanation for a defendant's conduct as well as one that suggests that the defendant was engaged in wrongdoing, *the Government must produce evidence that would allow a rational jury to conclude beyond a reasonable doubt that the latter explanation is the correct one*." *United States v. Delgado*, 357 F.3d 1061, 1068 (9th Cir. 2004) (emphasis added). Because the prosecution has not elicited such evidence (and none exists), this Court should grant Mr. Reyes's motion for acquittal.

An even more serious flaw in the prosecution's case, however, is that the prosecution has failed to introduce *any* evidence that Mr. Reyes understood APB 25 or the other relevant accounting opinions at the time of the alleged scheme, that he understood that Brocade's option granting practices constituted the granting of "in-the-money" options under APB 25, or that he understood or believed that Brocade was required to take compensation charges for these practices, or that, with such an understanding, he willfully and intentionally filed or caused to be filed the offending financial statements.

Nor has the prosecution adduced *any* evidence establishing that Mr. Reyes knew or believed that Brocade's financial statements, Form 10-Ks, certifications, or management representations letters contained any material misrepresentations or omissions. Indeed, despite putting two of Brocade's former CFOs, Mike Byrd and Antonio Canova, and its former controller, Robert Bossi, on its witness list, the prosecution failed to call a *single* witness from Brocade's Finance Department who could explain the complex process of compiling and preparing Brocade's financial statements, SEC filings, and management representation letters.[2] **Not a single witness has testified that he or she told Mr. Reyes about the relevant accounting opinions or that he or she informed Mr. Reyes that the financial statements or the Form 10-Ks were inaccurate.** Indeed, to the contrary, the emails and other documentary evidence demonstrate that Brocade's Finance Department was aware of, condoned, and approved the look-back practice conducted by Brocade's HR Department, and never raised a red

[2] The prosecution knows full well what these witnesses would say, and emails from these witnesses largely tell the story: Brocade's Accounting Department believed in good faith that new hire grants could be retroactively priced, and the Accounting Department misapplied APB 25 (along with the accounting departments of approximately 250 other companies during the same time period), in accounting for these open and transparent option grants.

flag to Mr. Reyes or anyone else. That the Finance Department incorrectly applied APB 25 may be clear now through the prism of 20/20 hindsight; it certainly was not clear then.

The prosecution also failed to prove that the stock option granting process was designed, or was carried out with the intent, to cheat or deceive Brocade, its Board, or its investors. (*See* Indictment, ¶ 16). Indeed, the evidence has uniformly shown that the principal goal in administering the stock option program was to recruit and retain talented employees for the good of Brocade *and* its shareholders. That may have resulted in flawed accounting, but it does not amount to a scheme to defraud. Not one witness, and not one document, has even suggested that the motive or intent of Brocade's stock option program was to artificially inflate Brocade's stock price, or to intentionally conceal non-cash stock compensation expenses on the GAAP financials.

Finally, the prosecution failed to prove that the understatement of non-cash stock option expenses at issue were material to investors, in other words that it would have affected investors' decisions of whether to buy or sell Brocade stock. Despite having almost three years to find a single investor to whom these non-cash expenses were material, the prosecution was unable to find even one witness to testify that the omission of non-cash stock option expenses would have made a difference in his or her Brocade investment decisions. The prosecution's two witnesses on materiality fell far short of the mark. Robert McCormick of Fidelity Investments ("Fidelity") admitted that he had no involvement in Fidelity's investment decisions related to Brocade and did not know what factors Fidelity looked at when determining whether to buy or sell Brocade stock; indeed, he worked in Fidelity's proxy department and was uninvolved in the investment decisions regarding Brocade.

Steven Catricks from Delaware Investments ("Delaware") was even more damaging to the prosecution's case. He admitted he had no knowledge of any of the investment decisions regarding Brocade since he did not cover Brocade for his fund; his two colleagues did. Moreover, he admitted that Delaware used pro-forma earnings, which stripped out non-cash expenses (like stock option expenses), when analyzing companies for its funds, thus demonstrating that Delaware did not view non-cash stock option compensation expenses as being important to Delaware's decision to buy or sell a company's stock. He also admitted that Delaware held and continues to hold stock in several

companies that have been the subject of stock option accounting investigations and restatements like Brocade, belying the claim that non-cash stock option compensation expenses are "material" to Delaware or to other investors.[3]

The prosecution has presented a case that is deficient on every offense alleged in the indictment. No rational juror could find beyond a reasonable doubt any of the charges filed against Mr. Reyes. The Court should therefore grant a judgment of acquittal on all counts of the indictment.

III. FACTUAL RECORD

A. The Indictment

The indictment alleges that from 2000 to 2004, Greg Reyes and Stephanie Jensen engaged in a scheme to defraud Brocade's shareholders and others by the "backdating" of company records relating to stock option grants, and by making or causing to be made false statements to the Company's shareholders, auditors and others. The indictment includes the following counts:

Count One — Conspiracy to Commit Securities and Mail Fraud, in violation of 18 U.S.C. § 371.

Count Two — Fraud in Connection with Brocade Stock, in violation of 15 U.S.C. §§ 78j(b) and 78ff.

Counts Five, Six and Seven — False SEC Filings, in violation of 15 U.S.C. §§ 78j(b) and 78ff.

Count Eight — Falsifying Books, Records, and Accounts, in violation of 15 U.S.C. §§ 78m(b)(2)(A), 78m(b)(5).

Counts Nine through Twelve — False Statements to an Accountant, in violation of 15 U.S.C. §§ 78ff.[4]

B. The Trial

The trial in this matter commenced on June 18, 2007. The prosecution called 14 witnesses in its case-in-chief, including five former members of Brocade's HR Department (Colleen Burgess,

[3] Included among Delaware's holdings is Broadcom, which publicly announced a restatement of every stock option grant from 1998, when it went public, to 2005 -- a restatement calculation of $2.5 billion in non-cash stock compensation expenses. Broadcom's stock rose 4% on the announcement of the $2.5 billion restatement. (6/29/07 RT 1904:11-1905:15).

[4] Counts Three and Four were dismissed by the prosecution prior to the start of trial.

Stephen Beyer, Margie Lee, June Weaver, and Patricia Kada); Brocade's stock administrator (Elizabeth Moore); witnesses from NASDAQ (Deborah Oremland) and two mutual funds, Fidelity and Delaware (Robert McCormick and Steven Catricks); a former KPMG Audit Partner (Neil Miotto); a former member of Verisign's Board of Directors (James Bidzos); a purported accounting expert (John Garvey); the former lawyer for an employee named Dan Cudgma (Peter Haley); and one of the attorneys who conducted the internal review for Brocade's Audit Committee (Craig Martin). Conspicuously absent from the prosecution's proof at trial was any member of Brocade's Board of Directors, or Accounting, Finance or Legal Departments, except Elizabeth Moore, the stock administrator. In a case alleging accounting errors and false statements in the Company's public disclosures, this is frankly unprecedented and underscores the fundamental flimsiness of the prosecution.

In contrast to its allegations that the scheme to misstate Brocade's Financials lasted from 2000 to 2004, the prosecution only offered evidence that the Financials were incorrect for fiscal years 2001 and 2002. Thus, at the outset, the case against Mr. Reyes was cut in half.

1. The Prosecution Has Failed to Prove that the Option Granting Process Was Part of a Criminal Scheme to Defraud

The indictment alleges that "[b]eginning in or about 2000 and continuing to in or about 2004," Mr. Reyes and Ms. Jensen "knowingly and intentionally devised . . . a scheme and artifice to defraud Brocade, its Board, is shareholders, its auditors, the public, and the SEC as to a material matter." (Indictment, ¶¶ 16-17). The prosecution, however, failed to prove the existence of such a "scheme" by Mr. Reyes or anyone else. No one testified that there was a criminal scheme or plan at Brocade. Ms. Jensen didn't say so; no one else said so. And no documents suggest or imply a criminal scheme.

What has the evidence really shown? It has merely shown that the HR Department developed, over time, a practice of grouping new employees into pools and then, using the benefit of hindsight within the quarter, selecting favorable dates (generally within the same quarter) on which to price options, all in the open, and always with the intent to benefit the employee. (*See, e.g.,* Devine:

6/18/07 RT 108:22-111:19; Weaver: 6/20/07 RT 601:7-20. Ex. 944).[5] While these employees were sometimes purportedly instructed to "price" options by Ms. Jensen, they had little or no contact with Mr. Reyes and *not a single one of these witnesses has testified that he or she was ever directed by Mr. Reyes to "backdate" an option grant, committee minute, offer letter, or any other corporate document or paperwork.* (*See, e.g.,* Devine: 6/18/07 RT 197:17-19; Weaver: 6/20/07 RT 580:24-581:7; Kada: 6/25/07 RT 865:18-866:5; Beyer: 6/18/07 RT 210:4-15; Beyer: 6/19/07 RT 334:8-10; 335:1-10; 313:6-21; Lee: 6/19/07 RT 409:21-24).

The HR employees have uniformly testified that the purpose of the stock option pricing process was to benefit employees by providing them with the best option prices possible, and was not as any part of a scheme to falsify the financial statements or mislead investors; there was absolutely no connection made by any of the witnesses or documents between the pricing process and the accounting or disclosure process. (*See, e.g.,* Devine: 6/18/07 RT 111:12-19). Indeed, HR's pricing process was openly memorialized in a memorandum prepared by Colleen Devine (*see* Ex. 944 (the "New Hiring Pricing" Memo)) as a training tool for other employees on how to prepare grant lists, which she circulated by email to her HR colleagues. (Devine: 6/18/07 RT 147:2-13). Nothing in the New Hire Pricing Memorandum suggests that anyone believed that there was anything wrong or nefarious about this pricing method, and no efforts were made to hide the memorandum, or the process. (Weaver: 6/25/07 RT 739:4-7; 772:16-773:5; Kada: 6/25/07 RT 863:22-24).[6]

While some of the employees testified that they felt "discomfort" about some of the policies, that discomfort was never communicated to Mr. Reyes or anyone in the Finance or Legal Department, and was, in part, prompted by the administrative burden of the process. (Devine: 6/18/07 RT 120:1-15) ("The whole process was just very cumbersome to transact."). None of the employees testified that

[5] "RT" refers to the Record of Transcript for the trial in this matter, and is preceded by the date of the relevant proceeding. "Ex." refers to the Trial Exhibit Number. The pages of the RT cited herein as well as the cited Trial Exhibits are attached to the Declaration of Ronda J. McKaig, filed concurrently herewith.

[6] There is no evidence that this memo was ever circulated to Mr. Reyes or Ms. Jensen; indeed, when confronted with the memo for the first time during the investigation, Mr. Reyes said he had no recollection of HR's pricing process. (Martin: 7/2/07 RT 2210:21-2211:5).

he or she believed, or that anyone ever told him or her, that the process for pricing options was part of a scheme to defraud shareholders, or was used to falsify the financial statements of the Company.

The degree to which HR employees (rather than Mr. Reyes, or even Ms. Jensen) directed and controlled Brocade's options pricing practices is nowhere better illustrated than by Weaver's unilateral decision to drastically shorten the "look-back" period from within the quarter to within the week. (Weaver: 6/19/07 RT 454:20-455:5). Weaver testified that she changed the policy **on her own initiative**; she did not ask for anyone's permission, including Mr. Reyes, Ms. Jensen, or Ms. Jensen's successor, Mike Vescuso. (*Id.* 748:9-749:3). Nor did Mr. Reyes object or even appear to realize that Weaver shortened the look-back period from within the quarter to within the week. Weaver testified as follows:

> Q: And did Mr. Reyes object to the new process that you had implemented?
> A: No.
>
> * * * *
>
> Q: Well to the best of your knowledge, in other words, he never told you, in words or substance, "June, I see you have implemented a new pricing process from the old one." He never said anything like that to you, did he?
> A: No.

(*Id.* 749: 4-14). Indeed, Weaver further testified that she had the "authority" to change or end the options pricing policy whenever she wanted.

> Q: You believe you had the authority or ability to do that [i.e., change the pricing policy] on your own, did you not?
> A: Yes.

(*Id.* 750: 14-16).

> * * * *
>
> Q: Now, you could have, if you wanted, changed the look-back pricing totally, and just had Mr. Reyes sign on the date of the date of the document; isn't that right?
> A: Yes.

(*Id.* 751: 21-24).

Thus, in the middle of this alleged criminal scheme between Mr. Reyes and Ms. Jensen to criminally backdate option grants with the intent to falsify Brocade's financial statements, a mid-level HR employee, who had recently joined Brocade, changed the entire stock option pricing process of HR

on her own with no direction from or complaint by the alleged masterminds of the scheme. What does this tell us about the alleged criminal scheme? It did not exist.

2. The Prosecution Has Failed to Prove that Mr. Reyes and Ms. Jensen Entered Into Any Criminal "Agreement" or Conspiracy

The prosecution failed to elicit any admissible evidence demonstrating that Mr. Reyes and Ms. Jensen entered into an agreement to accomplish an unlawful objective.[7] Ms. Jensen has not testified, and not a single other witness testified that they were privy to any conversations or discussions between Ms. Jensen and Mr. Reyes involving stock options. The prosecution introduced no documentary evidence demonstrating, or even suggesting, the existence of an agreement which any one would rationally view as criminal in nature. Faced with a complete absence of evidence, the prosecution will presumably ask the jury to infer the existence of a criminal conspiracy to falsify the financial statements and management representation letters simply from the fact that Mr. Reyes received and -- on those occasions when his signature was not forged or "cut and pasted" by someone in the HR Department -- signed the stock option paperwork. As discussed below, however, the law does not allow the jury to infer the existence of a criminal conspiracy based on such conjecture and speculation.

3. The Prosecution Has Failed to Prove that Mr. Reyes Understood The Applicable Accounting Opinions; or that Mr. Reyes Knew Brocade's Option Granting Practices Resulted in Grants of "In-the-Money" Options

The prosecution did not call a single witness who testified that Mr. Reyes was specifically aware that the stock options granting practices at Brocade required the Company to take an accounting charge that would increase the non-cash stock option compensation expenses in the financial statements.[8] No document admitted into evidence proves that Mr. Reyes had such knowledge during

[7] Evidence of Ms. Jensen's hearsay statements are inadmissible because of a lack of independent evidence of a conspiracy. Moreover, the substance of the statements fall far short of establishing a conspiracy or scheme to commit accounting fraud.

[8] Neil Miotto ("Miotto"), the engagement partner responsible for KPMG's audits of Brocade, testified that he only met with Mr. Reyes on two occasions during Mr. Reyes's career at Brocade -- once in connection with KPMG's 2003 audit and once in connection with KPMG's 2004 audit. (Miotto: 6/27/07 RT 1363:14-1364:25; 1386:8-1387:5; 1405:4-6). Mr. Miotto acknowledged that he

(cont'd)

1 the relevant time period. The prosecution failed to introduce any evidence showing that Mr. Reyes
2 knew, read or understood APB 25 -- the accounting principle the prosecution claims was violated.
3 **Knowledge of stock option accounting and APB 25 is central to all counts of the**
4 **indictment. If Mr. Reyes was not specifically aware that the stock option practices at Brocade**
5 **required the Company to take a compensation charge under APB, he could not have (1) engaged**
6 **in a scheme to defraud; (2) falsified the Company's financial statement and disclosures; (3)**
7 **caused the books and records to be misstated; or (4) made false statements to Brocade's auditors.**
8 In lieu of any testimony from an accountant or finance expert who would have been in a
9 position to understand and explain the complex accounting opinions governing stock option expensing
10 to Mr. Reyes,[9] the prosecution has tried to prove Mr. Reyes's knowledge through an email attachment
11 described by Ms. Weaver, a mid-level employee in the Human Resources Department with no
12 accounting background, and the testimony of Craig Martin ("Martin"), one of the attorneys involved in
13 the investigation of the options practices at Brocade.
14
15
(cont'd from previous page)
16 did not even address stock option compensation at these meetings and that he never gave Mr. Reyes (or anyone else at Brocade) any guidance or advice on how to price options or document stock option
17 grants. (*Id.* 1406:2-15; 6/28/07 RT 1656:5-12). And contrary to the prosecution's claims about the clarity of APB 25, Mr. Miotto acknowledged that APB 25 does not expressly prohibit looking back to
18 select an "as of" grant date, and admitted that the opinion does not even define how to determine the
19 grant date. (6/27/07 RT 1445:17-20)("Q: Tell me whether you can find a definition of grant date anywhere in APB 25…. A: No, I don't see the definition of grant date."); *see also* 6/28/07 RT 1659:18-
20 1660:11. (According to Miotto, the grant date is implied in APB 25.)

21 [9] Mike Byrd, Bob Bossi, Tony Canova and Richard Deranleau were the relevant Finance Department employees during the alleged criminal conspiracy to falsify the accounting at Brocade.
22 **Each was interviewed by the government and by the Morrison & Foerster internal investigators**. None has testified. One would think that if this were an accounting fraud, the Finance Department
23 would be front and center in court, unless the allegation is that HR and Mr. Reyes hid the pricing practices from Finance. But, as the documents clearly demonstrate, there was no hiding here. Key
24 personnel in Brocade's Finance Department knew about the new hire pricing processes at Brocade, as did everyone who had involvement in the process in the HR Department. (*See, e.g.*, Exs. 167, 168).
25 Thus, the absence of Finance department witnesses means only one thing: they would not support the
26 government's theory of accounting fraud. And a review of the emails from the Finance employees makes it perfectly clear that they knew of, and advised on, Brocade's pricing practices. (*See, e.g.*, Exs.
27 134, 135, 167, 168).
28

Weaver testified that she sent an email to Mr. Reyes attaching a 45-page power-point presentation from i-Quantic, which contained a single page about stock option expensing, with cursory descriptions of APB 25 and FAS 123. (6/20/07 RT 553:22-554:14 & Ex. 187). There is no evidence, however, that Mr. Reyes ever reviewed that email or the attachment, let alone that he studied the specific page referencing APB 25 or understood its contents. There is no evidence he ever discussed the email or its attachment with anyone. Moreover, Weaver testified that she never discussed APB 25, FAS 123 or stock option accounting with Mr. Reyes. (*Id.* 571:24-572:1; 575: 1-7).

Martin, a lawyer with Morrison & Forester, the law firm that served as counsel for Brocade's Audit Committee, participated in two interviews of Mr. Reyes. (Martin: 7/2/07 RT 2150:7-8). The first interview occurred on November 10, 2004; the second on January 3, 2005. (*Id.* 2150:9-11; 2150:17-19). Mr. Martin testified that he did not discuss APB 25 or FAS 123 with Mr. Reyes. (*Id.* 2203:17-18; 2203:23-24).

Instead, based upon a review of a memorandum prepared over year after the interview, Martin testified that Mr. Reyes indicated that he first learned that "in-the-money" options had "accounting implications" at some point during his "tenure as CEO." (*Id.* 2201:23-2202:2). Martin further testified that Mr. Reyes did not recall when he learned that fact. (*Id.* 2202:3-5). Thus, Martin's testimony sheds no light on whether Mr. Reyes came to the purported understanding that "in-the-money" options had "accounting implications" *after* the initiation of Brocade's audit committee's internal review, and what, if any, accounting implications they had. The vague statement that Mr. Reyes "understood" some unknown "accounting implications" at some unspecified time during his "tenure as CEO" is not competent evidence to support a beyond a reasonable doubt finding that during the period of the alleged scheme (2000-October 2004), Mr. Reyes had the requisite knowledge of APB 25 or FAS 123, which neither defines "in-the-money" option or "grant date." Accordingly, there is insufficient evidence for a rational juror to conclude beyond a reasonable doubt that Mr. Reyes had the requisite knowledge of the accounting principles set forth in APB 25.

4. The Prosecution Has Failed to Prove That Mr. Reyes Knew or Believed That Brocade's Financial Statements Were Inaccurate or Failed to Properly Record Expenses for "In-The-Money" Options

The prosecution also failed to elicit *any* testimony from *any* witness, or introduce *any* e-mail, memorandum, or other document, demonstrating that Mr. Reyes *knew* that Brocade's voluminous Form 10-Ks and complex management representation letters and certification letters were inaccurate. Indeed, although the responsibility for preparing these documents and dealing with the auditors is generally the domain of a company's finance department (*see, e.g.,* Miotto: 6/27/07 RT 1411:10-1412:19) (Brocade's Finance Department negotiated the representation letter and Mr. Reyes was not involved), the prosecution did not call a single witness from Brocade's finance or legal departments who could explain how Brocade's Form 10-Ks or other SEC filings and financial documents were prepared and whether Mr. Reyes read them or formally approved them before his electronic signature was added to the Form 10-K.[10]

Accordingly, there is no evidence that:

- Mr. Reyes prepared, reviewed or even read the Form 10-Ks.
- He personally signed the Form 10-K or authorized that his electronic signature be placed on the document.

In a financial fraud case involving financial statements and management representation letters, the prosecution needs evidence to demonstrate that a crime was intended; indeed, each public filing represents a separate felony charge. This requires more than just showing the financial statements and management representation letters are incorrect, or that they were signed. The prosecution needs evidence explaining a defendant's role in, and knowledge of, the alleged falsity. Here, there is none. No witness; no document. Nothing.

5. The Prosecution Failed to Prove That the Misrepresentations or Omissions in the Financial Statements Were Material to Investors

The prosecution also failed to prove that the non-cash stock option charges at issue were "material" to investors -- i.e., that they would have affected investors' decisions of whether to buy or

[10] While Elizabeth Moore, the stock administrator, worked in the Finance Department, she had no accounting responsibilities; that was the domain of Byrd, Canova, Bossi and Deranaleau.

1 sell Brocade securities. The prosecution has known for over two years that the defense contended that
2 the alleged omissions from the financial statements of Brocade were not material. In response, the
3 prosecution presented the testimony of two witnesses, one from Fidelity Investment and one from
4 Delaware Investments. These two funds were among the institutional investors of Brocade. A careful
5 review of their testimony reveals that the only thing the prosecution elicited from these witnesses was
6 their vague and general feeling that they "would have liked to know" that Brocade was purportedly
7 granting "in-the-money" options. However, as the Court correctly pointed out as sidebar (6/29/07 RT
8 1878:10-15; 1878:22-24; 1878:25-1879:3; 1879:7-9), "would have liked to know" is not the legal
9 standard. Neither witness testified that the failure to record non-cash stock option compensation
10 charges in Brocade's financial statements would have affected their decision to purchase or sell
11 Brocade securities -- that is the legal standard of materiality in the Ninth Circuit and the prosecution
12 has not proven that element beyond a reasonable doubt. *Livid Holdings, Ltd v. Salomon Smith Barney,*
13 *Inc.*, 416 F.3d 940, 946 (9th Cir. 2005) ("[f]or the purposes of a 10b-5 claim, a misrepresentation or
14 omission is material if there is a substantial likelihood that a reasonable investor would have acted
15 differently if the misrepresentation had not been made or the truth had been disclosed").

16 Prosecution witness McCormick from Fidelity admitted that he had no involvement in
17 Fidelity's investment decisions relating to Brocade (6/28/07 RT 1668:24-1669:10) and that he had no
18 familiarity with any of the decision-making process relating to Fidelity's investments. (*Id.* 1721:5-7).
19 He also admitted that he had no knowledge about what motivated a Fidelity analyst to recommend to a
20 Fidelity portfolio manager whether to buy or sell Brocade securities. (*Id.* 1708:16-23). He therefore
21 had nothing probative to add to the issue of materiality.

22 The prosecutor came a little closer to potentially relevant testimony by calling Catricks of
23 Delaware, but not much. At least Mr. Catricks is a portfolio manager and investment analyst with
24 Delaware. The problem is, Catricks was not **the** portfolio manager or investment analyst for Brocade;
25 his colleagues, "Jeff" and "Jerry" were. Catricks admitted that he was not the person from Delaware
26 responsible for analyzing Brocade, and that he did very little to research Brocade during the relevant
27 time period. (Catricks: 6/29/07 RT 1856:24-1857:1; 1828:8-10, 1845:19-1846:3). He also admitted
28

that he never purchased or sold Brocade stock. (*Id.* 1813:1-2). He was apparently called just to testify that he "likes to know" whether a company is granting "in-the-money" options and he likes to know whether a company's financial statements are consistent with GAAP. (*Id.* 1819:10-1820:21; 1932:9-15). His testimony suffered from the same factual and legal defects as McCormick's testimony.

Catricks, however, provided affirmative evidence that Delaware did not view non-cash stock option expenses as relevant to its decision to buy or sell a company's stock. Catricks testified that: (1) he factors out non-cash expenses when he analyzes companies, which other analysts do as well (*Id.* 1847:20-1848:12; 1884:1-3); (2) Delaware factored out non-cash expenses and used pro-forma earnings to analyze Brocade, including the calculation of Earnings Per Share (EPS) using non-GAAP financial information from the company (*id.* 1897:3-4; and Ex. 4081); and (3) Delaware held and continues to hold stock in several companies even after these companies restated their financial statements to account for additional non-cash stock option charges including: (a) Broadcom, which announced the largest restatement of non-cash stock option expenses in U.S. history -- $2.5 billion -- reflecting an acknowledgement that Broadcom misapplied APB 25 to every stock option grant in their history; (b) Activision; (c) Monster; (d) F5 Networks; (e) L-3 Communications; (f) Trident Microsystems; (g) Foundry Networks; (h) THQ; (i) Wind River; and (j) Barnes & Noble. (*Id.* 1904:11-1915:18).

The sum and substance of the government's materiality witnesses were that: (1) they did not know anything about the investment decisions regarding Brocade stock; and (2) analysts "factor out" non-cash expenses from the analysis of a company's financial statements. The substance of Mr. Catricks's testimony on "materiality" is perhaps illustrated best by the following testimony:

> Q: When you analyzed companies, are you saying that you cared about the non-cash expenses being put into the income statement? Is that what you are saying?
> A: No.
>
> **Q: In fact, when you did your analytics, you took that stuff [i.e., non-cash expenses] out, didn't you?**
> **A: Yes.**
>
> Q: You took it out because you wanted to get a real picture of the Company, right?
> A: I would say I took it out because it was common practice amongst analysts.

Q: That's right. And the reason it was common practice among analysts was because you wanted to see the real picture of the Company. You wanted to see their cash in the banks. You wanted to see their cash flows. You wanted to see their profitability. You wanted to see what the Company was -- really looked like, right?
A: Yes, more or less.

* * * *

Q: My question was: Isn't it a fact that investment analysts like yourself pro forma'd out the noncash expenses?
A: Yes.

(*Id.* 1847:20-1848:12; 1884:1-3).

Defendant's expert witnesses could not have made the point more clearly -- analysts and reasonable investors were simply not concerned about non-cash expenses, such as stock compensation expenses. That is why when valuing or analyzing a company, non-cash expenses, like stock option expenses, are factored out of the analysis. Accordingly, because no rational juror could find the essential element of materiality beyond a reasonable doubt, an order granting the judgment of acquittal is required.

IV. ARGUMENT

A. Rule 29 Requires the Court to Enter A Judgment Where the Government's Evidence is Insufficient to Sustain a Conviction

Rule 29(a) of the Federal Rules of Criminal Procedure provides that upon motion by the defendant following the close of the prosecution's case-in-chief, the court "must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction." While the evidence adduced at trial must be viewed in the light most favorable to the prosecution, *see United States v. Capati*, 980 F. Supp. 1114, 1121 (S.D. Cal. 1997), it is well-settled in the Ninth Circuit and elsewhere that "when there is an innocent explanation for a defendant's conduct as well as one that suggests that the defendant was engaged in wrongdoing, *the Government must produce evidence that would allow a rational jury to conclude beyond a reasonable doubt that the latter explanation is the correct one*." *United States v. Delgado*, 357 F.3d 1061, 1068 (9th Cir. 2004) (emphasis added). *See also United States v. Bishop*, 959 F.2d 820, 831 (9th Cir. 1992) ("When a defendant's behavior is entirely consistent with innocence, the government must 'produce evidence that would allow a rational

jury to conclude beyond a reasonable doubt that the defendant [in fact engaged in criminal conduct].""") (citation omitted) (alteration in original); *United States v. Glenn*, 312 F.3d 58, 70 (2d Cir. 2002) ("if the evidence viewed in the light most favorable to the prosecution gives 'equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence', then 'a reasonable jury must necessarily entertain a reasonable doubt'") (citation omitted); *Curley v. United States*, 160 F.2d 229, 232-33 (D.C. 1947) ("if, upon the whole of the evidence, a reasonable mind must be in balance as between guilt and innocence, a verdict of guilt cannot be sustained"); *United States v. Outer Harbor Dock & Wharf Co.*, 124 F. Supp. 337, 339 (S.D. Cal. 1954) (granting defendants' 29(a) motion) ("the judge cannot let a case go to the jury unless there is evidence of some fact which to a reasonable mind fairly excludes the hypothesis of innocence") (*quoting Curley* 160 F.2d at 232-33).

We respectfully submit that the Court's role in assessing the sufficiency of the prosecution's case in a Rule 29 motion is especially important in an unprecedented case like this, alleging complex accounting issues, where there is no direct evidence of the defendant's actual involvement in the alleged conduct or knowledge of the pertinent accounting opinions and disclosure rules, and the prosecution is asking the jury to convict largely, if not solely, on speculation and thin circumstantial evidence. "[A] conviction based on speculation and surmise alone cannot stand." *United States v. D'Amato*, 39 F.3d 1249, 1256 (2d Cir. 1994).

The Second Circuit's recent decision in *United States v. Cassese* is instructive here. 428 F.3d 92 (2d Cir. 2005)(affirming district court's grant of Rule 29 motion). The defendant in *Cassese* was prosecuted, under Section 14(e) of the Exchange Act, for purchasing stock of a competitor's company based on inside information of a pending acquisition. Although the prosecution's circumstantial evidence of criminal intent was far stronger than here – among other things, Cassese had purchased the stock in two different accounts, later tried to "undo" his trade, and afterwards told a business acquaintance that "he had made a stupid mistake" – the district court granted a Rule 29 motion, reversing a jury verdict. *Id.* at 97. The Second Circuit affirmed, holding that even when viewed in the light most favorable to the government, the prosecution's evidence "was characterized by modest evidentiary showings, equivocal or attenuated evidence of guilt or a combination of all three." *Id.* at

103 (because the prosecution's evidence, at best, "gives 'equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence,'" a reasonable jury "'must necessarily entertain a reasonable doubt'")(*citing Glenn*, 312 F. 3d at 70). The same can be said here.

Although the government may rely on reasonable inferences from the evidence, those inferences must in fact be reasonable, as opposed to speculative and conjectural. *See Galloway v. United States*, 319 U.S. 372, 395, 64 S. Ct. 1077, 1089 (1943); *see also United States v. Jones*, 49 F.3d 628, 632 (10th Cir. 1995) (vacating conviction; "[w]e cannot permit speculation to substitute for proof beyond a reasonable doubt").

B. The Prosecution Has Failed to Prove the Existence of a Conspiracy Between Mr. Reyes and Ms. Jensen (Count One)

1. Governing Law

Count One of the indictment charges that from approximately the beginning of 2000 through 2004, Mr. Reyes knowingly and willfully conspired with Ms. Jensen to commit securities fraud, make false representations in Brocade's Form 10-Ks, and falsify Brocade's books and records. (Indictment, ¶¶ 33-35).

In order to establish the existence of a conspiracy, the prosecution has the burden of proving beyond a reasonable doubt that (1) there was an agreement between Ms. Jensen and Mr. Reyes; (2) Mr. Reyes became a member of the conspiracy, knowing that the objects of the conspiracy were to commit securities fraud or to falsify Brocade's books and records; and (3) that at least one of the members of the conspiracy performed at least one overt act for the purpose of carrying out the conspiracy. 18 U.S.C. § 371; *United States v. Crooks*, 804 F.2d 1441, 1448 (9th Cir. 1986); *United States v. Kaiser*, 660 F.2d 724, 730 (9th Cir. 1981); Ninth Circuit Model Criminal Jury Instructions §8.16 (Conspiracy). Judgment of acquittal is appropriate when the prosecution is unable to identify substantial evidence from which to infer the existence of a conspiracy and the participation of a particular defendant in the conspiracy. *Crooks*, 804 F. 2d at 1448; *see also United States v. Garcia*, 151 F.3d 1243, 1245 (9th Cir. 1998) ("[i]n order to prove a conspiracy, the government must present sufficient evidence to demonstrate both an overt act and an agreement to engage in the specific criminal activity charged in

the indictment."). Because the prosecution is unable to meet its burden, the Court should grant Mr. Reyes's motion for acquittal on Count One of the indictment.

2. The Prosecution Has Not Introduced Sufficient Evidence Demonstrating the Existence of a Criminal Conspiracy Involving Mr. Reyes and Ms. Jensen

The prosecution has failed to introduce any evidence that there was an agreement between Mr. Reyes and Ms. Jensen to "backdate" stock options or falsify corporate records, much less to attempt to defraud, *i.e., to cheat and deceive*, Brocade's investors by submitting false financial statements or Form 10-Ks to the SEC. Not one witness said there was such an agreement; not one document suggests such an agreement. The only evidence that even comes close to proving the existence of an agreement between Mr. Reyes and Ms. Jensen in connection with the stock option granting process are Ms. Jensen's own alleged co-conspirator statements, and even those do not speak to an illicit agreement to commit securities fraud.[11] These statements fall far short of proving the existence of a conspiracy to commit securities fraud or falsify Brocade's book and records.

The prosecution cannot now rely on speculation and unsubstantiated inferences in an effort to somehow connect the dots of its conspiracy charge from evidence of innocent acts of trying to get employees favorable options prices, to criminal fraud. In the absence of such evidence, no rational juror could find that Mr. Reyes and Ms. Jensen entered into a criminal conspiracy to commit securities fraud and to criminally falsify the Company's books and records, much less find those facts beyond a reasonable doubt. Accordingly, the prosecution has failed to meet its burden and the Court should enter a judgment of acquittal for Mr. Reyes on Count One of the indictment.

C. The Prosecution Has Failed to Prove that Reyes Committed Securities Fraud or Made False Statements to the SEC (Counts Two, Five–Seven)

1. Governing Law

Counts Two, and Counts Five through Seven of the indictment charge Mr. Reyes with committing securities fraud, in violation of Section 10(b) of the Securities and Exchange Act, 15

[11] For reasons articulated in our motion to strike those statements, they should not even be considered by the Court on Rule 29.

U.S.C. § 78j(b), and SEC Rule 10b-5, 17 C.F.R. § 240.10b-5. "The purpose of § 10(b) and Rule 10b-5 is to protect persons who are deceived in securities transactions -- to make sure that buyers of securities get what they think they are getting . . . ." *Chemical Bank v. Arthur Anderson & Co.*, 726 F.2d 930, 943 (2d Cir. 1984) (Friendly, J.). Accordingly, "a defendant may be convicted of committing securities fraud only if the government proves specific intent to defraud, mislead, or deceive" investors. *United States v. Tarallo*, 380 F.3d 1174, 1181 (9th Cir. 2004).

In order to prove a violation of Section 10(b) and Rule 10b-5, the prosecution must prove the following elements, among others, beyond a reasonable doubt.

First, the prosecution must prove that Mr. Reyes (a) employed a device, scheme or artifice to defraud someone, in connection with the purchase or sale of a security; (b) made or caused someone to make a false statement of material fact, or omission of material fact, including in one of Brocade's Form 10-Ks; or (c) engaged in any act, practice, or course of business which operated as a fraud or deceit. 15 U.S.C. § 78j(b); 17 C.F.R. § 240.10b-5.

Second, the prosecution must prove that Mr. Reyes either knew that the statements or omissions he made (or caused to be made), to investors, were false, or that he made them with reckless disregard or indifference with respect to the truth or falsity of such statements. *Tarallo*, 380 F.3d at 1188; *United States v. Farris*, 614 F.2d 634, 638 (9th Cir. 1979); *Ninth Circuit Manual of Model Criminal Jury Instructions*, Instruction No. 9.7 (2000 ed.)[12]

Third, the prosecution must prove that Mr. Reyes acted *willfully and knowingly*. *Tarallo*, 380 F.3d at 1181, 1188.; 15 U.S.C. § 78j(b). In this context, "willfully" means "intentionally undertaking an act that one knows to be *wrongful*." *Tarallo*, 380 F. 3d at 1188 (emphasis added).

Fourth, the prosecution must prove that Mr. Reyes acted with the *specific intent* to cheat, deceive, manipulate or defraud buyers or sellers of Brocade securities. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193, 96 S. Ct. 1375, 1381 (1976) ("scienter" under Section 10(b) "refers to a mental state

[12] To constitute "recklessness," the prosecution must prove that Mr. Reyes's conduct was "highly unreasonable," and involved "not merely simple, or even inexcusable negligence, but an extreme departure from the standards of ordinary care." *Howard v. Everex Sys*., 228 F.3d 1057, 1063 (9th Cir. 2000).

embracing intent to deceive, manipulate, or defraud); *Tarallo*, 380 F.3d at 1181 (government must prove "specific intent to defraud, mislead, or deceive"); *Ninth Circuit Model Criminal Jury Instructions,* Instruction No. 3.17 ("An intent to defraud is an intent to deceive or cheat.") (2000 ed.)

Fifth, the prosecution must prove that the purportedly false statements or omissions that Mr. Reyes made, or caused to be made, were "material" to investors. *Basic Inc. v Levinson*, 485 U.S. 224, 231-238, 108 S. Ct. 978, 983-87 (1988); O'Malley, Grenig and Lee, *Federal Jury Practice and Instructions: Criminal* § 62.14 (5th ed. 2000). In order to satisfy this standard, the prosecution must prove beyond a reasonable doubt that it was substantially likely that a reasonable investor would have acted differently (in his buying or selling of Brocade securities) if the alleged misrepresentations about Brocade and its options granting process had not been made or if the facts had been fully disclosed. *Livid Holdings Ltd. v. Salomon Smith Barney, Inc.,* 416 F.3d 940, 946 (9th Cir. 2005); *Vaughn v. Teledyne, Inc.*, 628 F.2d 1214, 1221 (9th Cir. 1980).

As demonstrated below, the prosecution has failed to elicit evidence proving any of these five elements, let alone evidence sufficient for a rational juror to find guilt beyond a reasonable doubt.

2. The Prosecution Has Failed to Prove that Reyes Engaged in a Scheme to Defraud or that He Made or Caused Anyone To Make Any False Statements

As demonstrated above, the prosecution has failed to prove the existence of any scheme or artifice to defraud, or that Mr. Reyes caused any one to make any false statements or omissions of material fact in the Form 10-Ks or elsewhere. Not one witness and not one document supports the scheme element. There is no evidence of any meeting between Greg Reyes and Stephanie Jensen where they discussed this alleged scheme. There is no evidence that Greg Reyes talked to anyone about Brocade's 10-Ks, financial statements or management letters. There is no shred of evidence that Greg Reyes talked with anyone, including Stephanie Jensen, about Brocade's stock options program or the relevant accounting rules. And there is no shred of evidence that Greg Reyes asked anyone to make a false statement, create a false document or do anything which could even be construed as improper, let alone criminal.

3. The Prosecution Has Failed to Prove that Reyes Knew that Brocade's Financial Statements Contained Any Material Misstatements or Omissions

or That He Caused Others To Make Any False Statements or Misrepresentations

The indictment alleges in Counts Five, Six and Seven that Mr. Reyes knowingly and willfully made and caused Brocade to (a) make untrue statements of material fact and (b) omit to state material facts necessary to make the statements made not misleading in the Company's Form 10-K for fiscal years 2001-2003. (Indictment ¶¶ 41-48). The prosecution contends that the purported untrue statements and omissions included the following: (1) Brocade did not incur compensation expenses in connection with its stock option grants; (2) Brocade did not disclose that it granted stock options with exercise prices that were below the market value of Brocade's stock on the grant dates; (3) Brocade represented that it accounted for its stock option grants in accordance with the provisions of APB 25; and (4) Brocade did not disclose that fraudulent entries relating to stock option grants were made in the books and records of the Company. (*Id.*).

The prosecution has the burden of establishing beyond a reasonable doubt that Mr. Reyes (1) was aware that the stock option grants were not being reported properly on the Company's SEC filings; (2) acted willfully and knowingly; and (3) acted with the intent to defraud shareholders and investors. *Tarallo*, 380 F.2d at 1188.

As set forth previously, there is no evidence demonstrating beyond a reasonable doubt that Mr. Reyes was aware that Brocade's stock option practices required Brocade to record compensation expenses on its financial statements or that Brocade was not properly reporting these expenses on its financial statements and Form 10-Ks.

The prosecution did not call a single witness who testified regarding, or a single document which shows, Mr. Reyes's involvement, if any, in the preparation and review of Brocade's SEC filings.

The prosecution apparently hopes the jurors will leap to the conclusion that because Mr. Reyes's electronic signature is on Brocade's Form 10-Ks, that he carefully read and reviewed, and understood these documents. The law does not allow a jury to convict based on such idle and unfounded speculation, however. *D'Amato*, 39 F.3d at 1256. As set forth above, the prosecution did not present any evidence demonstrating Mr. Reyes's involvement in the preparation or review of the SEC filings. Nor did the prosecution elicit any evidence showing that Mr. Reyes authorized the

placement of his electronic signature on the Form 10-Ks for fiscal years 2001-2003. Given the complete absence of such evidence, the mere fact that an electronic signature appears on the relevant SEC filings does not prove that Mr. Reyes received, reviewed, approved or understood the substance of any of those filings, or of any particular statement or representation contained therein.

A cursory review of Brocade's SEC filing demonstrates why the prosecution's evidence is insufficient to withstand a judgment of acquittal. Each of the SEC filings is over 55 pages in length and addresses in detail a broad range of industry, product, operations, financial, and accounting information. (Exs. 22, 27, 32).[13] Therefore, for Mr. Reyes, or anyone else, to evaluate whether Brocade properly accounted for stock option grants would have required both a careful review of each sentence of each page of the SEC filings, as well as a detailed understanding of APB 25. During this trial, however, the prosecution has offered no evidence that Mr. Reyes **ever looked** at the SEC filings, much less reviewed them with the degree of attention necessary to reach an informed conclusion regarding the Company's stock option accounting. Nor is there any evidence that Mr. Reyes discussed Brocade's Form 10-Ks with anyone, including any representative of Brocade's finance organization. The government is trying to sell a strict liability theory of securities fraud: if there are "in-the-money" options that are not accounted for properly under APB 25, then there must be a securities fraud. This has never been, and is not, the law.

As set forth above, the government also failed to introduce any evidence that Mr. Reyes understood APB 25 or its application to the Company's stock option granting process. Not a single witness testified that Greg Reyes (1) knew what an "in-the-money" option was; (2) knew that APB 25 existed; (3) knew what APB 25 required in terms of accounting for "in-the-money" options; or (4) knew that the requisite APB 25 accounting for Brocade was not reported accurately on Brocade's

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[13] On page 20 of the 2001 Form 10-K, for example, the company recorded over $1 million in non-cash stock option compensation expenses and reported those charges in the Amortization of Deferred Stock Compensation line item. (Ex. 22). That figure appears again on page 31. However, the non-cash stock option compensation expenses are not explained as pertaining to stock options granted in 1999 until page 46 of the Notes to the Financial Statements. On page 48, the company disclosed approximately $600 million in stock option compensation charges pursuant to its FAS 123 disclosures. It further described how GAAP net income and EPS would be impacted by those expenses. *Id.*

financial statements and Form 10-Ks. There are no documents which support any of these points either.

The prosecution's failure to introduce *any* testimony or documents showing that Mr. Reyes understood that Brocade's stock option practices required the Company to record compensation expenses on its GAAP income statements is especially fatal to the prosecution's case here because it has become clear during the prosecution's case-in-chief that the senior members of Brocade's Finance Department, upon whom Mr. Reyes relied for accounting guidance, were fully aware of the Company's stock option granting practices, including the look backs, and took no steps to account differently for those grants.[14] On November 6, 2001, for instance, Brocade's then CFO Tony Canova sent Mr. Reyes an email requesting that two employees be removed from the October 1, 2001 grant list and that the Company add Elizabeth Moore to the list. (Ex. 2487). Despite the fact that APB 25 would have required a compensation charge for the granting of "in-the-money" options to Ms. Moore, no such charge was ever taken. Yet, there is no evidence that Canova told Mr. Reyes that the Company did not properly account for that grant or disclose it on its financial statements, or that he interpreted APB 25 to require any accounting charge whatsoever. *See also* (Lee: 6/19/07 RT 376:3-7; 406: 24-407:1)(demonstrating that Brocade's former CFO Mike Byrd was involved in the "look back" practice with Stephanie Jensen); (Ex. 168 (B. Bossi 4/22/03 email to Weaver)("New hire grants can happen whenever you want. Just bear in mind that after this week you can't go back and use a date pre 4/25 [i.e, the end of a quarter]")). On these facts, why should Mr. Reyes know or believe that the accounting was wrong?

The above-referenced testimony and documents demonstrate that the very individuals responsible for the Company's accounting and financial disclosures had specific knowledge and direct involvement in the look-back pricing of stock options. These individuals were all interviewed during the internal investigation by Morrison & Foerster. **Prior to trial, the prosecution spoke with each of those individuals, some on multiple occasions. Yet, the prosecution called none of them in its**

[14] The only reasonable inference from these facts is that the Finance Department, like the finance departments of many other companies, at times misapplied APB 25.

case-in-chief. This speaks volumes about the quality of the government's case and about what they would say about Finance's application (or misapplication) of APB 25 in this matter. There is not a scintilla of evidence demonstrating that any of those employees told Mr. Reyes that Brocade was not properly accounting for, or disclosing in its SEC filings, non cash stock option expenses. Because the prosecution failed to establish beyond a reasonable doubt that Mr. Reyes was aware that the stock option grants were not being reported properly on the Company's SEC filings, an order dismissing Counts Five, Six and Seven is required.

4. The Prosecution has Failed to Prove That Reyes Intended to Cheat or Deceive Brocade's Shareholders or That He Acted "Willfully"

The prosecution has also failed to prove beyond a reasonable doubt that Mr. Reyes acted "willfully" and with a specific intent to defraud. *Tarallo*, 380 F.2d at 1188 (noting that in the "securities law context, "willfully" means "intentionally undertaking an act that one knows to be wrongful").[15] An intent to defraud is defined by the Ninth Circuit as an intent to deceive or cheat. *Ninth Circuit Model Crim. Jury Instructions* § 3.17. An honest or good faith belief by a defendant that no false or fraudulent statements or omissions were made is a complete and total defense to fraud charges because such an honest or "good faith" belief is inconsistent with fraudulent intent. *Sand, Modern Federal Rule Instructions*, No. 8-1 (2006).

Here, there is no evidence that Mr. Reyes did something that he knew was wrongful -- much less nefarious, reprehensible, or obviously evil. Nor is there any evidence that Mr. Reyes acted with the specific intent to cheat or deceive.

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[15] While "wrongful" does not necessarily mean "unlawful," it must mean something more than simply improper or ill-advised. Central to the *Tarallo* decision was the fact that the defendant was involved in a blatantly fraudulent scheme when he ran afoul of the securities laws. Even if he did not know his actions violated particular sections of Title 15, he had to know that what he was doing was objectively wrong. This builds on a long line of cases holding that one acts "willfully" only when engaged in conduct that is "inevitably nefarious," clearly "reprehensible" or "obviously evil." *See Ratzlaf v. United States*, 510 U.S. 135, 137 (1994); *United States v. English, 92 F.3d 909, 916 (9th Cir. 1996)*. As the Ninth Circuit has warned, where the case is a "prosecution under complex regulatory schemes," it "ha[s] the potential of snaring unwitting violators." *United States v. Fierros*, 692 F.2d 1291, 1294-95 (9th Cir. 1982).

Over the last two weeks, not one of the prosecution witnesses has testified that Mr. Reyes engaged in conduct designed to, or with the intent to, deceive or to cheat Brocade's shareholders, its Board of Directors or anyone else. In fact, the universally understood purpose and goal of the stock option granting process at Brocade was to benefit the employees, whose hard work and talent would benefit the Company, and therefore benefit the shareholders and investors. The prosecution called five HR employees to testify regarding the stock option granting process. Each of those employees testified that the look-back pricing process was intended to benefit the Company by helping to attract and to retain employees -- a perfectly lawful and desirable goal. Not a single one of those employees testified that he or she believed that the process was designed to falsify the Company's financial statements, to falsify the Company's public disclosures or to deceive or cheat the shareholders. Not a single document has been introduced into evidence that suggests that the process was designed for a wrongful or illegal purpose.

In an attempt to inject a whiff of wrongfulness into the proceedings, the prosecution suggested in its opening that Mr. Reyes somehow personally benefited from the alleged conduct. The prosecution failed completely in its efforts to prove this, however. Personal financial gain -- or avoiding financial loss -- is the most powerful of motives in a fraud case. It exists in virtually every criminal fraud case. Here, however, there is no evidence of (1) personal gain; (2) motive to avoid financial loss; (3) intent to prop up the stock price; (4) any other improper motive or purpose. Not a single stock option at issue in this case was granted to Mr. Reyes -- not one. Indeed, the government conceded through the testimony of its expert, John Garvey, that options to 16b officers, including Greg Reyes, were not backdated, and that Mr. Reyes did not grant options to himself. (6/29/07 RT 1966:11-14; 1967:6-9). Nor is there any evidence that the alleged conduct impacted, in any way, the operating performance of the Company or the price of its stock. Indeed, the evidence is to the contrary: Catricks testified that analysts routinely omitted non-cash expense from their calculations of a company's true

earnings per share. (6/29/07 RT 1847:20-1848:12). Thus the omission of these expenses would never have been intended to prop up the stock price of Brocade.[16]

The prosecution's suggestion in opening statements that Mr. Reyes benefited from the conduct because he held company stock is completely unsupported by the factual record.[17] Indeed, all the prosecution has on this point, and on many other elements of the offenses charged, is speculation and conjecture -- precisely the sort of impermissible inferences that courts have steadfastly rejected when considering pre or post verdict motions for acquittal. *See, e.g., United States v. Finnerty*, 474 F.Supp. 2d 530, 540 (S.D.N.Y. 2007) (trial court set aside jury verdict and granted motion for acquittal because only evidence of deception was based on jury speculation).[18]

5. The Prosecution has Failed to Prove That The Alleged Misrepresentations and Omissions Were "Material" to Investors

The prosecution has also failed to prove that Brocade's failure to record charges for the "backdated" option grants on its income statements was "material" to investors -- i.e., that it would have affected investors' decisions of whether to buy or sell Brocade securities. *Livid*, 416 F.3d at 946. Indeed, although Mr. Reyes has put the government on notice since the outset of this case -- and in the parallel SEC proceedings -- that "non-cash" compensation expenses are not material to investors

[16] The prosecution's attempt to taint Mr. Reyes with Ms. Weaver's claim that Mr. Reyes once told her "It's not illegal, if you don't get caught" (Weaver: 6/20/07 RT 567:1-4; 571-72; 574-75) is similarly unavailing. Weaver conceded on cross-examination that she had no recollection of the context of this purported statement, therefore rendering the statement irrelevant for assessing Mr. Reyes' intent in this case. One thing was clear: it did not relate to Brocade's financial statements, management representation letters or stock option accounting practices. (*Id.*).

[17] Mr. Reyes's holdings of BRCD securities proves nothing. NASD witness didn't know whether Mr. Reyes's' stock holdings resulted from anything other than open market purchases. Purchases of BRCD securities at prevailing market prices would be directly contrary to a belief that BRCD's share price was artificially inflated.

[18] Even if the prosecution's inferences of intent were permissible (which they are not), the Court must still grant Mr. Reyes's motion because those inferences pale in comparison to the overwhelming evidence that the options program was conducted in "good faith" and with no intent to defraud. *See United States v. Martha Stewart*, 305 F. Supp. 2d 368 at 377 (S.D.N.Y. 2004)(granting motion for judgment of acquittal)(when "competing intentions appear to be nearly in equipoise," the prosecution must introduce additional evidence that "tips the balance in favor of a rational finding of criminal intent beyond a reasonable doubt").

because they do not reflect the fundamental value or financial strength of the Company, the prosecution failed to elicit testimony from a *single* investor (or analyst) that the disclosure of the stock option expenses in Brocade's income statement would have affected his decision of whether to buy or sell Brocade stock. The prosecution offered no expert testimony on the point, even though an economist was on its witness list. In lieu of such testimony, the prosecution called witnesses from two mutual fund companies, Fidelity and Delaware , which held stock in Brocade during the relevant time period, but neither of these witnesses testified that the disclosure of these expenses would have affected their investment decisions.

The prosecution's use of McCormick and Catrick (*see* 6/29/07 RT 1878:10-15; 1878:22-24; 1878:25-1879:3;1879:7-9) was an attempt to confuse the legal concept of materiality and transform it into a "would have liked to have known" standard. In so doing, the prosecution is writing out the materiality requirement from the relevant statute. In making an investment decision, investors would want to know all the information they can about the Company, but only certain information is important enough to impact their investment decisions. Materiality pertains to that narrower category of information. Neither McCormick nor Catricks spoke to that issue.

Any attempt by the prosecution to prove materiality by relying on the stock charts placed in evidence by prosecution witness Debra Oremland will be plainly insufficient. There is no evidence explaining the cause of the stock decline on January 6, 2005, the date the internal review of Brocade's stock option granting practices was announced publicly. It cannot be the additional non-cash stock option compensation charges -- they were not announced until January 24, 2005. It cannot be what the prosecution has termed stock option "backdating" -- the January 6, 2005 press release did not even suggest the possibility of backdating. Rather, it discussed the accounting related to the offer-acceptance and part-time programs -- programs which were defended by company management, and which were approved by the Company's former auditors. (Miotto: 6/27/07 RT 1448:19-1449:3; 1449:19-24; 1450:22-24; 1484:7-11).

In the absence of any testimony relating to the cause of the stock decline, it is susceptible to many non-nefarious explanations. For example, it could be explained by concerns relating to the delay

in the filing of the Form 10-K, a fact announced in the headline of the release (Catricks: 6/29/07 RT 1918:2-11; 1919:6-9) or concerns relating to the initiation of the internal review. It could also be explained by general market conditions. The government elicited no evidence to explain what caused the stock drop. The government offered no event study, the commonly accepted scientific methodology for assessing the significance, if any, of the movement of the price of the security. *See Dura Pharmaceuticals v. Broudo*, 544 U.S. 336, 346 (2005)(dismissing securities fraud claim for failure to adequately allege or prove proximate causation of economic loss). None of those equally plausible explanations suggest that investors were concerned about the inclusion of additional non-cash stock option compensation charges on the Company's financial statements. Indeed, the stock price rebounded quickly after the total restatement number was announced to the public on January 24, 2005. (Ex. 3848)(Oremland: 6/26/07 RT 1242:8-12).

Moreover, Brocade disclosed in the Notes to the Financial Statements, the fair value of stock options granted under the Black-Scholes methodology. Brocade also described in chart form the impact of that valuation on the Company's GAAP net income and earnings per share. The investors' lack of concern relating to non-cash stock option expenses is nowhere better illustrated than by these disclosures, which totaled in the hundreds of millions. Yet, investors did not sell Brocade stock on that information. They ignored that information because it did not speak to what is important to investors in a rapidly growing technology company -- revenues and cash expenses.

The prosecution cannot rely on the fact that a restatement was issued or on Miotto's opinion that the restatement was necessary because the non-cash stock option charges associated with the grants at issue had a material impact on the GAAP financial statements. This is because the restatement involved "materiality" from an accountant's perspective, and not an investor's perspective. Accordingly, the prosecution cannot rely on the mere need to restate financials under GAAP to prove that the non-cash stock option compensation charges were material to a reasonable investor.[19]

[19] The expertise of an accountant in calculating non-cash compensation figures and making related accounting judgments for adjusting financial statement line terms does not imply expertise in assessing whether those accounting adjustments are important to investors' decisions to buy or sell stock. (6/29/07 RT 2954:6-12).

The prosecution lastly cannot bolster its materiality proof by claiming that investors would generally be interested in management integrity issues. As the Court correctly ruled in connection with Mr. Reyes's Motion for Summary Judgment: "[T]he SEC has suggested that investors punished Brocade's stock simply because the company's financial statements had been inaccurate, or in other words, because they believed Brocade's executives had lied. This observation may be true, too, but it is a woefully insufficient basis for finding that the misrepresentations are "material" as a matter of law. If a misrepresentation is deemed material simply because it is a misrepresentation, then the law's materiality requirement is altogether meaningless." (McKaig Decl. Ex. A May 17, 2007 Order at 9 n.6).

Based upon the evidence presented by the prosecution, no reasonable juror could find beyond a reasonable doubt that the failure to include non-cash stock option compensation charges in the Company's financial statements was material to the investment decisions of a reasonable investor.

D. The Prosecution Has Failed to Prove That Reyes Criminally Falsified Brocade's Books And Records (Count Eight)

The prosecution has also failed to prove that Mr. Reyes willfully and criminally falsified, or aided or abetted others to falsify the books or records of Brocade, as alleged in Count Eight of the indictment. The "books and records" provisions of the Securities Exchange Act require public companies like Brocade to "*make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer*." 15 U.S.C. § 78m(b)(2)(A) (emphasis added).

To prove that Mr. Reyes is guilty of Count Eight, the prosecution must prove beyond a reasonable doubt, among other things:

(1) Mr. Reyes "knowingly falsif[ied]" Brocade's books, records or accounts reflecting the transactions and dispositions of Brocade's assets (15 U.S.C. § 78m(b)(5));

(2) Mr. Reyes acted "willfully" (15 U.S.C. § 78ff(a)); and

(3) The falsification concerned a material fact (*id*. (requiring that the "statement was false or misleading with respect to any material fact")).[20]

The statute makes clear that absent proof that the defendant "knowingly falsif[ied]" the Company's books, records or accounts, "[n]o criminal liability shall be imposed for failing to comply with the requirements of [section 78m(b)(2)(A)]." 15 U.S.C. § 78m(b)(2)(4). As Congress explained, the knowledge requirement "is meant to ensure that criminal penalties would be imposed where acts of commission or omission in keeping books or records or administering accounting controls *have the purpose of falsifying books, records or accounts*, or of circumventing the accounting controls set forth in the Act. This would include the deliberate falsification of books and records and other conduct calculated to evade the internal accounting controls requirement." H.R. Conf. Rep. No. 100-576, 1988 U.S.C.C.A.N. 1547, at 1949-50 (emphasis added).

Here, for the reasons discussed above, the prosecution has failed to adduce any evidence showing that Mr. Reyes "knowingly" or "willfully" falsified any books or records, that he did so to circumvent any accounting regulations of which he was aware, or that the purported mistakes in the books are records were material or unreasonable in any manner, let alone any evidence that would allow a rational juror to find guilt beyond a reasonable doubt. The only evidence of Mr. Reyes's involvement at all with the books and records of Brocade is his signing grant lists. There is no evidence that when he did so, he believed he was falsifying the books and records of the Company. Merely signing the documents does not come close to satisfying the intent element. The prosecution has elicited no testimony regarding Mr. Reyes's signing these documents with the intent to falsify the books of the Company. Accordingly, the Court should grant Mr. Reyes's motion for judgment of acquittal as to Count Eight of the indictment.

[20] In support of its proposed jury instruction that materiality is not required for Count Eight, the prosecution cites *SEC v. World-Wide Coin Investments, Ltd.*, 567 F. Supp. 724 (N.D. Ga. 1983). *World-Wide Coin* is inapposite, however, because it was a civil enforcement action. Therefore, unlike this case, *World-Wide Coin* did not involve 15 U.S.C. section 78ff(a) -- the criminal penalty provision of the Securities Exchange Act -- which independently requires proof of materiality.

E. The Prosecution Has Failed to Prove that Reyes Made False Statements to its Accountants (Counts Nine–Twelve)

The prosecution alleges in Counts Nine through Twelve of the indictment that false statements or omissions of material fact were made to the Company's outside auditors in connection with Brocade's 2002 and 2003 management representation letters and certifications filed with its Form 10-Ks for fiscal years 2002 and 2003, in violation of 15 U.S.C. §78ff. The prosecution has the burden of proving beyond a reasonable doubt, among other things, that Mr. Reyes willfully made or caused others to make a materially false or misleading statement or omission, which Mr. Reyes knew to be false, to Brocade's auditors and accountants. (17 C.F.R. §240.15b2-2; 15 U.S.C. §78ff(a)).

Courts which have interpreted the false statements to accountants provisions have required the plaintiff to demonstrate that the defendant had specific knowledge of falsity of the statements at issue. *SEC v. Todd*, 2007 WL 1574756 (S.D. Cal. 2007) (granting motion for judgment post jury verdict because plaintiff failed to show substantial evidence demonstrating defendants knew when they signed the management representation letters that the form 10-Q was not prepared in accordance with GAAP); *see also*, *SEC v. Cohen*, 2007 WL 1192438 (E.D. Mo. April 19, 2007) (District court jury's judgment in favor of defendants because no evidence that defendant knew management representation letter was false).

As set forth previously, the prosecution failed to elicit evidence demonstrating that Mr. Reyes (1) was aware of APB 25; (2) was aware that the Company's Finance Department was not properly accounting for stock option grants under APB 25; and (3) was aware that the Company was not properly disclosing non-cash stock option expenses in its SEC filings. Accordingly, a rational juror could not find beyond a reasonable doubt that Mr. Reyes violated 15 U.S.C. §78ff.

In addition, a careful review of the evidence reveals that the prosecution has failed to prove certain basic foundational facts relating to these counts. For example, not a single witness testified that Mr. Reyes reviewed, and was aware of, the contents of the management representation letters before he signed them. The prosecution did not even call a witness to testify regarding the general process by which management representation letters were prepared, reviewed and signed. In fact, the prosecution

never called a witness to authenticate that it was Mr. Reyes's signature in the management representation letter.

In the absence of such testimony, the mere fact that Mr. Reyes's signature purportedly appears on the management representation letters means nothing. The 2002 letter is nine pages in length and contains 32 separate representations. (Ex. 44). It is replete with accounting and legal representations about which Mr. Reyes would have no independent knowledge. For example, representation 7 states that the Company "has satisfactory title to all owned assets, and there are no liens or encumbrances on such assets nor has any asset been pledged as collateral."[21] Representation 9 states that the Company's "estimates of required bad debt, sales return, warranty, purchase commitments, and inventory reserves are complete and reasonable." Representation 11 states the Company has properly recorded "related party transactions and related amounts receivable or payable, including sales, purchases, loans, transfers, leasing arrangements, and guarantees." It goes on for pages and pages with representations about which there is no evidence in this record that Mr. Reyes had knowledge, nor would he have been expected to have knowledge about those subjects. Prosecution witness Neil Miotto ("Miotto") put it best when he testified that the representations in the letters pertain to accounting and legal matters, and he did not expect "the CEO to go dig up that information." (6/27/07 RT 1415:19-1417:16).

Even paragraph 31, which deals with the Company's accounting for stock options, does not address the process in which stock options were granted or priced. Rather, it relates to whether "[s]tock-related awards to employees have been accounted for in accordance with the provisions of APB Opinion No. 25. . . ." As set forth previously, no witness testified that he/she explained the accounting principles underlying APB 25 to Mr. Reyes. And no document that Mr. Reyes read suggests any knowledge of APB 25.

Put simply, Mr. Reyes's purported signature on the management representation letters has no evidentiary value without some evidence establishing that Mr. Reyes reviewed and understood its contents. But there is no such evidence in the record. The evidence does, however, reflect that the

[21] Could anyone ever argue that, if Brocade did not have satisfactory title to a piece of property, that someone who signed the management letter should be labeled a felon?

1 management representation letters were also signed by the Company's Chief Financial Officer,
2 Antonio Canova, whose job it was to ensure the accuracy and completeness of every single
3 representation contained in the letters. The evidence further reflects that management representation
4 letters are agreed upon between an auditor and a company through a process of back and forth
5 negotiation, usually with the Finance Department. (Miotto: 6/27/07 RT 1411:10-1412:19). Here,
6 Miotto testified that Brocade's Finance Department negotiated the terms of the representation letter.
7 Mr. Reyes had no involvement in that process. (*Id.*).
8 Mr. Reyes relied on his Chief Financial Officer to ensure that the proper accounting controls
9 and processes were in place to properly account for the Company's operations. (*Id.* at 1415:6-13).
10 Because no rational juror could find beyond a reasonable doubt that Mr. Reyes willfully made or
11 caused others to make a materially false or misleading statement or omission in the management
12 representation letters, which Mr. Reyes knew to be false, an order granting the Motion for Acquittal
13 with respect to Counts Nine and Eleven is required.
14 Moreover, as set forth previously, the prosecution failed to elicit any testimony or evidence
15 suggesting that Mr. Reyes had the requisite knowledge of the accounting principles underlying APB
16 25. The prosecution further failed to elicit any testimony or evidence suggesting that Mr. Reyes even
17 reviewed the voluminous SEC filings, much less reviewed them with the attention that would have
18 been necessary to alert him to accounting deficiencies relating to stock option grants. Because no
19 rational juror could find beyond a reasonable doubt that Mr. Reyes willfully made or caused others to
20 make a materially false or misleading statement or omission in connection with the certifications
21 relating to Brocade's SEC filings, which Mr. Reyes knew to be false, an order granting the Motion for
22 Acquittal with respect to Counts Ten and Twelve is required.

23 **V. CONCLUSION**

24 The prosecution's evidence in this case has failed to satisfy virtually every element of each
25 offense beyond a reasonable doubt.
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1 By this motion for acquittal, we are not asking the Court to end all 257 stock option accounting
2 investigations. What we are respectfully asking is that, on this evidentiary record, in this case, for this
3 defendant, Rule 29 is not only appropriate and just, it is required.
4 For all of the reasons set forth above, Mr. Reyes respectfully requests that the Court grant this
5 motion and enter a judgment of acquittal for Counts 1, 2, and 5 through 12 of the indictment.
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DATED: July 3, 2007

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