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10 UNITED STATES DISTRICT COURT  
11 NORTHERN DISTRICT OF CALIFORNIA  
12 SAN FRANCISCO DIVISION

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| 13 SECURITIES AND EXCHANGE COMMISSION,<br>14 Plaintiff,<br>15 vs.<br>16 JAY LAPINE,<br>17 Defendant. | Civil Action No. C-01-3650 VRW<br><br>COMPLAINT |
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18 Plaintiff Securities and Exchange Commission (the "Commission") alleges:

19 **SUMMARY OF THE ACTION**

20 1. In 1998 and 1999, defendant Jay Lapine was general counsel to a leading  
21 vendor of computer software for the health care industry. Lapine engaged in financial accounting  
22 fraud by misrepresenting and withholding information concerning two significant sales transactions  
23 from his company's accounting employees. As a result of his conduct, the company substantially  
24 overstated revenue and net income in financial statements, reports and press announcements.

25 2. The Commission seeks to enjoin Lapine from future violations of the federal  
26 securities laws, to enjoin him from serving as directors or officers of companies reporting to the  
27 Commission, to obtain disgorgement of all benefits received by Lapine from his violations of the  
28 securities laws and to require Lapine to pay civil money penalties for the violations.

1   **JURISDICTION, VENUE AND INTRADISTRICT ASSIGNMENT**

2                     3.        The Commission brings this action pursuant to Sections 21(d), 21(e), and 21A  
3 of the Securities Exchange Act of 1934 (“Exchange Act”) [15 U.S.C. §§ 78u(d), 78u(e), and 78u-  
4 1(a)]. This Court has jurisdiction over this action pursuant to Sections 21(e) and 27 of the Exchange  
5 Act [15 U.S.C. §§ 78u(e) and 78aa].

6                     4.        Lapine, directly or indirectly, made use of the means and instrumentalities of  
7 interstate commerce, of the mails, or of the facilities of a national securities exchange, in connection  
8 with the acts, practices, and courses of business and transactions alleged herein.

9                     5.        This district is an appropriate venue for this action under Section 27 of the  
10 Exchange Act [15 U.S.C. § 78aa]. Certain of the transactions, acts, practices and courses of business  
11 constituting the violations alleged herein occurred within the Northern District of California.

12                    6.        Assignment to the San Francisco Division is appropriate pursuant to Civil  
13 Local Rule 3-2(e) because a substantial part of the events that give rise to the claims herein occurred  
14 in San Francisco County, California.

15   **THE DEFENDANTS**

16                    7.        **Jay Lapine**, age 50, is a resident of Alpharetta, Georgia and an attorney  
17 licensed in the states of Texas and Ohio. He served as Associate General Counsel from 1994 to 1997  
18 and served as General Counsel of HBOC from 1997 to 1999. After the merger with McKesson,  
19 Lapine was named Vice President and General Counsel of the HBOC division of McKesson HBOC.  
20 McKesson HBOC terminated Lapine’s employment in June 1999.

21   **THE COMPANIES**

22                    8.        **HBO & Company** was a corporation organized under Delaware law with its  
23 principal place of business in Atlanta, Georgia. HBOC developed, marketed and sold computer  
24 software for patient care, clinical, financial, managed care and other management data for the health  
25 care industry. At all times relevant to this action, HBOC common stock was traded on the NASDAQ  
26 National Market System.

27                    9.        **McKesson HBOC, Inc.** is a corporation organized under Delaware law with  
28 its principal place of business in San Francisco, California. Prior to its acquisition of HBOC on

1 January 12, 1999, McKesson HBOC was known as McKesson Corporation. The company was  
2 primarily engaged in the manufacture and distribution of health care supplies, pharmaceuticals and  
3 drinking water. Following the acquisition, McKesson HBOC continued in these businesses. The  
4 computer software business of the former HBOC became a wholly-owned subsidiary of McKesson  
5 HBOC. McKesson HBOC and its subsidiaries report their financial results to the Commission on a  
6 consolidated basis. At all times relevant to this action, the common stock of McKesson HBOC was  
7 traded on the New York Stock Exchange and Pacific Stock Exchange.

8 **ALLEGATIONS COMMON TO ALL CLAIMS FOR RELIEF**

9 **Misrepresentations Concerning HBOC's Results For the Quarter Ended**  
10 **June 30, 1998**

11 10. From January 1998 through November 1998, Lapine served as general counsel  
12 of HBOC, reporting directly to Jay Gilbertson and Albert Bergonzi who shared the positions of  
13 president and chief operating officer for HBOC. Gilbertson and Bergonzi were responsible for  
14 HBOC's software product sales. Bergonzi and Gilbertson also had final authority to approve all sales  
15 contracts.

16 11. During a period from at least January 1995 through January 1998, HBOC's  
17 senior management approved and issued a series of quarterly announcements of revenue and earnings  
18 per share of common stock. Except for the first quarters of 1996 and 1997, the announced revenue  
19 from product sales in each quarter was higher than the previous quarter. HBOC's stock price rose  
20 steadily throughout the period from January 1995 through January 1998, except for a period of  
21 decline during the first quarter of 1997.

22 12. During the period from January 1995 through January 1998, most stock  
23 analysts who reported on HBOC predicted an unbroken series of increases in revenue from product  
24 sales. In press releases and public filings, HBOC consistently announced results that met or  
25 exceeded analysts' predictions in all quarters except the first quarter of 1997.

26 13. By at least the quarter ended December 31, 1997, HBOC's senior  
27 management, including Gilbertson and Bergonzi, became aware that the company's product sales  
28 growth was declining. Beginning not later than December 1997, Gilbertson, Bergonzi and others

1 | agreed, either explicitly or by conduct, to misrepresent HBOC's financial condition. Lapine joined in  
2 | the scheme later, as described below.

3 |           14.     During each quarter of 1998, Gilbertson, Bergonzi and other HBOC managers,  
4 | monitored the progress of software sales generally and assessed the likelihood that particular sales  
5 | would close within the quarter. They obtained this information through reports and meetings. In the  
6 | last days of each quarter, these defendants and other managers closely monitored potential sales. As  
7 | a result, Gilbertson, Bergonzi and other managers were keenly aware of the amount of sales the  
8 | company was likely to report in each quarter and how the sales would compare to the predictions of  
9 | analysts. Throughout 1998, Bergonzi shared this information with Lapine.

10 |           15.     To increase the reported sales in each quarter of 1998, Bergonzi and other  
11 | HBOC employees negotiated, executed or approved product sale transactions in which the sale was  
12 | contingent upon future events or actions by the buyer. Bergonzi and Gilbertson directed or approved  
13 | of a practice in which HBOC employees excluded these contingencies from the terms contained in  
14 | the company's formal sales contracts and instead provided for the contingencies in separate writings,  
15 | known as "side-letters."

16 |           16.     In the performance of his duties as general counsel of the company, Lapine  
17 | became aware of the company's policies and procedures for revenue recognition in conformance with  
18 | generally accepted accounting principles. Not later than June 1998, Lapine learned that some of the  
19 | company's employees were using side letters to evade these policies and procedures. Lapine knew,  
20 | or was reckless in not knowing, that these side letters were not being forwarded to HBOC's Contract  
21 | Accounting department and that the failure to report all of the terms of the transactions to that  
22 | department resulted in improper recording of sales in the company's accounting books and records  
23 | and improper recognition of revenue on sales that did not conform with generally accepted  
24 | accounting principles.

25 |           17.     Beginning in June 1998, Lapine caused HBOC to recognize revenue  
26 | improperly on a sales transaction between HBOC and UPMC Health System. HBOC sold product to  
27 | UPMC Health System under a contract that was subject to a side letter giving the buyer 30 days to  
28 | cancel the sale following legal review of the contract. Lapine assisted in the negotiations and writing

1 of the contract documents, attempting to close the transaction by June 30. On June 26, Lapine sent a  
2 draft of a side letter with cancellation terms to counsel for UPMC Health System. Although a sales  
3 contract was signed on June 30, 1998, subject to a side letter, the parties continued to negotiate a  
4 “final” contract after that date. Lapine and Bergonzi represented HBOC in these continued  
5 negotiations. During these negotiations, the buyer’s right to cancel was extended through October  
6 1998 on three separate occasions. Lapine received copies of each extension letter. Lapine withheld  
7 information concerning these contingencies from the company’s Contract Accounting department.  
8 As a result, HBOC improperly recognized revenue from the sale in the amount of \$6.99 million in the  
9 quarter ended June 30, 1998. The amount represented approximately 4.8 percent of the net income  
10 for the quarter.

11           18. On July 13, 1998, HBOC publicly announced in writing the company’s  
12 preliminary operating results for the period ended June 30, 1998. The announcement stated that the  
13 company had software sales revenue of \$130.4 million, total revenue of \$376.7 million and net  
14 income of \$75.6 million in the quarter. These figures included the purported sale to UPMC Health  
15 System.

16           19. On August 3, 1998, HBOC filed with the Commission a report on Form 10-Q  
17 for the period ended June 30, 1998. The financial statements filed in HBOC’s Form 10-Q included  
18 the overstated revenue and net income of \$376.7 million and \$75.6 million respectively. These  
19 figures included the purported sale to UPMC Health System.

20           20. Lapine was aware of the company’s July 13, 1998 public announcement and  
21 the company’s August 3, 1998 quarterly report. He knew, or was reckless in not knowing, that the  
22 announcement and report were materially false and misleading when issued because the company  
23 improperly recorded the revenues and expenses described above.

24           21. Lapine sold HBOC stock in August 1998 at a time when the stock price was  
25 artificially inflated as a result of misrepresentations concerning the company’s financial performance.  
26 By selling the stock, Lapine avoided losses and therefore was unjustly enriched.

27                           **Misrepresentations Concerning McKesson HBOC’s Results For the Fiscal**  
28                           **Year and Quarter Ended March 31, 1999**

1                   22.     In January 1999, McKesson completed an acquisition of HBOC, which  
2 subsequently became a wholly-owned subsidiary of McKesson HBOC. Lapine became a vice  
3 president and general counsel of the HBOC subsidiary.

4                   23.     During the evening of March 31, 1999, the last day of McKesson HBOC's  
5 fourth quarter, Bergonzi learned that the HBOC division had fallen significantly short of its projected  
6 revenue goal for software sales.

7                   24.     On April 1, 1999, in an effort to deceive the company's shareholders and the  
8 public, Bergonzi and Lapine embarked upon a campaign to create a sales transaction that the  
9 company could report as having occurred in the quarter that had just ended. Beginning that day,  
10 Bergonzi and Lapine and other employees of the HBOC division commenced negotiation of a  
11 transaction with Data General Corporation. Those negotiations resulted in McKesson HBOC  
12 entering into a contract with Data General for an exchange of product and services. Although  
13 executed in its entirety on April 5, 1999, the written contract was separated into two documents. The  
14 first document appeared to be a reseller license and distribution agreement backdated to March 31,  
15 1999, in which Data General purchased a license for McKesson HBOC software that Data General  
16 would resell to other customers. Data General agreed to pay \$20 million for the software. Lapine  
17 drafted this first document. The second document was dated April 5, 1999 and written as an  
18 amendment to an existing reseller agreement between HBOC and Data General. The amendment  
19 provided for purchase by McKesson HBOC of hardware from Data General that McKesson HBOC  
20 would resell to other customers. McKesson HBOC agreed to pay \$25 million for the hardware. This  
21 "amendment" also provided that McKesson HBOC would assist Data General in reselling the  
22 software that Data General had purchased from McKesson HBOC and gave Data General an  
23 unconditional right to return any software it was unable to resell by September 30, 1999. The right of  
24 return and McKesson HBOC's obligation to assist in the resale effort precluded revenue recognition  
25 under generally accepted accounting principles. Bergonzi and Lapine knew that these provisions, if  
26 included in the first contract, would prevent McKesson HBOC from recognizing revenue in the  
27 March 31 quarter, so they placed those provisions in a separate agreement to conceal them from the  
28 Contract Accounting department and the company's auditors.

1                   25.     Lapine knew, or was reckless in not knowing, that the fraudulent  
2 documentation of the Data General transaction would cause the company to recognize revenue from  
3 the transaction for the quarter ended March 31, 1999 and that such revenue recognition was  
4 inconsistent with generally accepted accounting principles.

5                   26.     McKesson HBOC recognized revenue on the Data General sale in the amount  
6 of \$20 million in the quarter ended March 31, 1999 which was inconsistent with generally accepted  
7 accounting principles.

8                   27.     On April 19, 1999, McKesson HBOC's Chief Executive gave an interview to  
9 the Dow Jones news service in which he released preliminary financial results for the quarter and the  
10 fiscal year ended March 31, 1999. According to the Chief Executive, McKesson HBOC had  
11 exceeded analysts' consensus estimates of 60 cents per share. He also was quoted as stating that  
12 software sales growth in the HBOC unit had exceeded 20 percent for the quarter.

13                   28.     On April 22, 1999, McKesson HBOC issued a written press release reporting  
14 preliminary financial results to the public for the quarter and year ended March 31, 1999. The press  
15 release stated quarterly revenues of \$6.4 billion, including software revenues of \$121.2 million. The  
16 press release highlighted a software sales growth increase of 21 percent. The company also reported  
17 net income of \$177.1 million and earnings per share of 62 cents. The press release touted the fact  
18 that the reported earnings per share figure of 62 cents "exceeded the financial community's  
19 consensus earnings per share estimates by two cents." All of these amounts included the revenue  
20 from the Data General transaction that accounted for \$20 million, or 16.5 percent, of the total  
21 software revenue reported in the press release for McKesson HBOC.

22                   29.     Without the fraudulent Data General transaction, McKesson HBOC would not  
23 have met the analysts' consensus earnings per share expectation. Moreover, absent the Data General  
24 deal, McKesson HBOC's software sales growth would have been only approximately 1 percent, as  
25 opposed to the reported 21 percent.

26                   30.     Lapine knew, or was reckless in not knowing, that McKesson HBOC's press  
27 release announcing financial results for the quarter and fiscal year ending March 31, 1999 was false  
28 and materially misleading for the reasons described above.

**FIRST CLAIM FOR RELIEF**

*Violations of Section 10(b) of the Exchange Act  
and Rule 10b-5*

31. The Commission incorporates by this reference Paragraphs 1 through 34 above.

32. Lapine, HBOC and McKesson HBOC, directly or indirectly, in connection with the purchase or sale of securities, by the use of means or instrumentalities of interstate commerce, or of the mails, with scienter:

- (a) employed devices, schemes, or artifices to defraud;
- (b) made untrue statements of material facts or omitted to state material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; and
- (c) engaged in acts, practices, or courses of business which operated or would operate as a fraud or deceit upon other persons, including purchasers and sellers of securities.

33. Lapine knowingly provided HBOC and McKesson HBOC substantial assistance with respect to their violations of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, and therefore is further liable as an aider and abettor pursuant to Section 20(f) of the Exchange Act, 15 U.S.C. § 78t(f).

34. Lapine violated and, unless restrained and enjoined, will continue to violate Section 10(b) of the Exchange Act, 15 U.S.C. § 78j(b), and Rule 10b-5, 17 C.F.R. § 240.10b-5.



1 **SECOND CLAIM FOR RELIEF**

2 *Violations of Section 13(b)(5) of the*  
3 *Exchange Act and Rule 13b2-1*

4 35. The Commission incorporates by this reference Paragraphs 1 through 34  
5 above.

6 36. By engaging in the conduct described above, Lapine knowingly circumvented  
7 the system of internal accounting controls of HBOC and McKesson HBOC and caused those  
8 companies to falsify their accounting books, records and accounts.

9 37. Lapine knowingly provided HBOC and McKesson HBOC substantial  
10 assistance with respect to their violations of Section 13(b)(5) of the Exchange Act and Rule 13b2-1  
11 thereunder, and therefore is further liable as an aider and abettor pursuant to Section 20(f) of the  
12 Exchange Act, 15 U.S.C. § 78t(f).

13 38. Lapine violated and, unless restrained and enjoined, will continue to violate  
14 Section 13(b)(5) of the Exchange Act, 15 U.S.C. 78m(b)(5), and Rule 13b2-1, 17 C.F.R. §  
15 240.13b2-1.

16 **THIRD CLAIM FOR RELIEF**

17 *Violations of Section 13(a) of the Exchange Act*  
18 *And Rules 12b-20 and 13a-13*

19 39. The Commission incorporates by this reference Paragraphs 1 through 34  
20 above.

21 40. By engaging in the conduct described above, HBOC filed false and misleading  
22 periodic reports with the Commission.

23 41. By engaging in the conduct described above, defendants Lapine knowingly  
24 provided HBOC substantial assistance with respect to the violation by that company of Sections  
25 13(a) of the Exchange Act and Rules 12b-20 and 13a-13, and therefore is liable as aiders and abettors  
26 pursuant to Section 20(e) of the Exchange Act, 15 U.S.C. § 78t(e).

27 42. Lapine violated and, unless restrained and enjoined, will continue to violate  
28 Section 13(a) of the Exchange Act, 15 U.S.C. 78m(a), and Rules 12b-20 and 13a-13, 17 C.F.R. §§  
240.12b-20 and 240.13a-13.

**FOURTH CLAIM FOR RELIEF**

*Violations of Section 13(b)(2)(A) of the Exchange Act*

43. The Commission incorporates by this reference Paragraphs 1 through 34 above.

44. By engaging in the conduct described above, HBOC and McKesson HBOC failed to make and keep books, records and accounts which, in reasonable detail, accurately and fairly reflected the transactions of those companies in violation of Section 13(b)(2)(A) of the Exchange Act.

45. By engaging in the conduct described above, Lapine knowingly provided HBOC and McKesson HBOC substantial assistance with respect to their violations of Section 13(b)(2)(A) of the Exchange Act, and therefore is liable as an aider and abettor pursuant to Section 20(e) of the Exchange Act, 15 U.S.C. § 78t(e).

46. Lapine violated and, unless restrained and enjoined, will continue to violate Sections 13(b)(2)(A) of the Exchange Act, 15 U.S.C. 78m(b)(2)(A).

**PRAYER FOR RELIEF**

WHEREFORE, the Commission respectfully requests that this Court:

I.

Permanently enjoin Lapine from engaging in future conduct that violates the statutes and rules described above.

II.

Permanently enjoin Lapine from serving as an officer or director of any entity having a class of securities registered with the Commission pursuant to Section 12 of the Exchange Act [15 U.S.C. §78l] or that is required to file reports pursuant to Section 15(d) of the Exchange Act [15 U.S.C. §78o(d)].

III.

Order Lapine to disgorge any wrongfully obtained benefit from his violations, including prejudgment interest.

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IV.

Order Lapine to pay civil money penalties.

V.

Retain jurisdiction of this action in accordance with the principles of equity and the Federal Rules of Civil Procedure in order to implement and carry out the terms of all orders and decrees that may be entered, or to entertain any suitable application or motion for additional relief within the jurisdiction of this Court.

VI.

Grant such other and further relief as this Court may determine to be just and necessary.

Dated: September 27, 2001

Respectfully submitted,

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Michael S. Dicke  
Attorney for Plaintiff  
SECURITIES AND EXCHANGE COMMISSION