

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

SECURITIES AND EXCHANGE COMMISSION,	:	
	:	
Plaintiff,	:	
	:	
v.	:	Civil Action No.
	:	
APOGEE TECHNOLOGY, INC.,	:	
DAVID B. MEYERS, and	:	
ANNETTE JAYNES,	:	
	:	
Defendants.	:	

COMPLAINT

Plaintiff Securities and Exchange Commission (the "Commission") alleges that:

SUMMARY

1. During at least June 2003 through December 2004 ("the relevant period"), Defendants Apogee Technology, Inc. ("Apogee"), a publicly traded company based in Massachusetts, David B. Meyers ("Meyers"), Apogee's former Chief Operating Officer, and Annette Ben-Menachem, who uses the name Annette Jaynes for business purposes ("Jaynes"), Apogee's Controller, engaged in a scheme to inflate the revenue and receivables reported in Apogee's financial statements filed with the Commission. During the relevant period, Meyers approved several transactions with certain of Apogee's customers, which resulted in Apogee improperly recognizing revenue even though the transaction terms did not comply with the company's revenue recognition policies or Generally Accepted Accounting Principles ("GAAP"). Apogee's recognition of revenue from these transactions did not comport with GAAP or Apogee's accounting policies because, among other things, the transactions included provisions

that permitted Apogee's distributors to return the products, forego payment until they had sold the products to their end users, or exchange parts for substitute parts. As part of the scheme and with knowledge of certain facts that negated Apogee's ability to recognize revenue from the transactions, Jaynes improperly recorded revenue on Apogee's books and records and subsequently prepared Apogee's financial statements that contained the materially misstated revenue and receivables figures.

2. As a result, Apogee's Forms 10-QSB for the quarters ended June 30, 2003, March 31, 2004, June 30, 2004, and September 30, 2004, contained material misstatements. Apogee's Form 10-KSB for the year ended December 31, 2003, also contained material misstatements. Apogee overstated its revenue by between approximately 7% to 45% in these quarters and improperly recognized revenue in amounts ranging from \$232,000 to \$1,416,927 per quarter.

3. Unless enjoined, the Defendants will continue to engage in acts, practices, and courses of business as set forth in this Complaint or in acts, practices, and courses of business of similar object and purpose.

4. Accordingly, the Commission seeks: (i) entry of permanent injunctions prohibiting each Defendant from further violations of the relevant provisions of the Securities Act of 1933 ("Securities Act") and Securities Exchange Act of 1934 ("Exchange Act"); (ii) disgorgement of ill-gotten gains from sale of stock during the relevant period from Defendant Meyers; (iii) the imposition of civil monetary penalties against Defendants Meyers and Jaynes; (iv) entry of an order barring Meyers from serving as an officer or director of a public company; and (v) such other equitable relief as the Court deems just and appropriate.

JURISDICTION

5. This Court has jurisdiction over this action under Section 22 of the Securities Act [15 U.S.C. § 77v] and Sections 21 and 27 of the Exchange Act [15 U.S.C. §§ 78u and 78aa]. Additionally, the acts and practices alleged herein occurred primarily within the District of Massachusetts.

6. The Commission brings this action pursuant to the authority conferred upon it by Section 20 of the Securities Act [15 U.S.C. § 77t] and Section 21 of the Exchange Act [15 U.S.C. § 78u].

7. In connection with the conduct alleged, the Defendants, directly or indirectly, made use of the means or instrumentalities of interstate commerce, of the mails, the facilities of national securities exchanges, and/or of the means or instruments of transportation or communication in interstate commerce.

DEFENDANTS

8. Apogee, a Delaware corporation with headquarters in Norwood, Massachusetts, during the relevant period *designed, developed and sold semiconductor audio components*, and sold its products to end users and distributors. In October 2005, Apogee sold its semiconductor business. The company's stock has been registered with the Commission pursuant to Section 12 of the Exchange Act since 2000.

9. Meyers, of Walpole, Massachusetts, was appointed as Apogee's Chief Operating Office ("COO") in February 2001, and served as COO and then Vice President until he left the company in April 2009. Meyers joined Apogee as an employee in 1996, and he served in various engineering and development roles at Apogee.

10. Jaynes, of Sharon, Massachusetts, has served as Apogee's controller from 2002 to the present. Prior to serving as Apogee's controller, Jaynes joined Apogee's predecessor from 1981 to 1995 as an officer manager, and then worked part time at Apogee as the Finance Manager from 1995 through 2002.

FACTS

11. During the relevant period, Apogee, through Meyers and Jaynes, engaged in a scheme to inflate revenues and receivables reported in the company's financial statements. Below are examples of violative transactions entered into by Apogee, recorded in its books and records, and reported in its financial statements.

A. Second Quarter 2003 – Apogee Overstated Its Revenue by 7% from Two Transactions.

(i) The First Transaction Included Rights of Return

12. Apogee improperly recognized \$73,000 in revenue from a transaction with a distributor in the quarter ended June 30, 2003.

13. On June 27, 2003, the distributor sent a purchase order to Apogee for \$138,920 in parts to be delivered by June 30, 2003.

14. As part of the purchase order, Apogee and the distributor entered into a side agreement whereby the distributor agreed to buy the \$138,920 in parts if it could return \$73,000 in parts in the third quarter of 2003. On June 27, 2003, Meyers received an email from Apogee's head of sales that outlined the right to return parts. On June 30, 2003, Meyers and Jaynes received a further email outlining the terms of the order.

15. Meyers and Jaynes knew or were reckless in not knowing that \$73,000 in revenue from this transaction should not have been recorded in the second quarter of 2003 because the distributor had been granted the right to return parts. Nevertheless, with the

knowledge of Meyers and Jaynes, Apogee recorded the revenue in its books and records and reported it in its financial statements filed with the Commission.

(ii) The Second Transaction Involved Shipping after Quarter End and Included Rights of Return

16. Apogee improperly recognized \$159,000 in revenue from a June 30, 2003 transaction with another distributor.

17. On June 30, 2003, the distributor sent Apogee a purchase order for \$159,000 in parts. However, Apogee agreed that the actual delivery of parts would not occur until July 2003. Meyers was made aware of this in an email dated June 30, 2003. As a result, Meyers knew that Apogee did not ship parts to the distributor pursuant to the distributor's order until July 2003.

18. Jaynes generated an invoice to the distributor dated June 30, 2003 for \$159,000, and as a result, Apogee improperly recorded in its books and records and reported revenue from the transaction in its financial statements for the quarter ended June 30, 2003. Meyers knew or was reckless in not knowing that the revenue had been improperly recognized in that quarter because shipment of parts had not occurred until after the end of the quarter.

19. In addition, Apogee agreed through side letters that the distributor was accepting delivery of these parts that were really intended for sale to another customer at a later date. The agreement allowed for the distributor to return the parts and be paid a 1% commission for the service. Meyers and Jaynes knew or were reckless in not knowing the terms of this transaction by September 16, 2003, at the latest.

20. Meyers and Jaynes knew or were reckless in not knowing that the distributor had been shipped parts to hold for another customer. Under GAAP, it was improper for Apogee to recognize revenue on the transaction in the quarter ended June 30, 2003, because the distributor had the right to return the parts the following quarter. Revenue recognition was also

improper because the distributor did not have an obligation to pay for the product which meant that Apogee could not have determined that collectability was reasonably assured.

(iii) Effect on Financial Statements

21. On August 14, 2003, Apogee filed a 10-QSB with the Commission that included financial statements for the quarter ended June 30, 2003. Apogee reported revenue of \$3,032,627, which included \$73,000 and \$159,000 from the transactions above that were not eligible for revenue recognition in that quarter. As a result of improperly recognizing this revenue, Apogee overstated its revenue by 7.6%.

B. Fourth Quarter 2003 – Apogee Overstated Its Revenue by 45% from Three Transactions

(i) Goods in the First Transaction Was Shipped After End of Quarter and Documents were Backdated

22. For the quarter ended December 31, 2003, Apogee improperly recognized \$178,901 in revenue from a sale to a customer.

23. On December 30 and 31, 2003, Meyers received emails from Apogee's Hong Kong sales manager indicating that he was making a sale to a customer by December 31, 2003, that the parts from the sale would not be shipped until January 2, 2004, but that the customer would backdate the cargo receipt to December 31, 2003. Jaynes received an email from the Hong Kong sales manager about the shipping date and backdated cargo receipt.

24. On January 2, 2004, Apogee's Hong Kong sales manager emailed Meyers and Jaynes and indicated that the transaction was not yet complete and the parts would not in fact be shipped until January 5, 2004. Meyers and Jaynes knew or were reckless in not knowing that the shipment did not occur until January 2004.

25. According to email correspondence, Apogee originally received a cargo receipt dated January 5, 2004. However, Apogee's inventory control manager wrote an email to an employee of Apogee's Hong Kong office indicating that Apogee needed the receipt to be dated December 31, 2003. Apogee subsequently received a cargo receipt dated December 31, 2003.

26. The cargo receipt confirming shipment of the parts was backdated to December 31, 2003. In addition, Jaynes generated and dated an invoice as December 31, 2003, for the sale of \$178,901, even though Jaynes knew or was reckless in not knowing that the transaction was not completed until January 2004.

27. Because the transaction was not completed and shipment of parts did not occur until after December 31, 2003, Apogee improperly recorded in its books and records and reported revenue pursuant to this transaction in its 2003 financial statements contained within its 10-KSB filed with the Commission on March 30, 2004. Meyers and Jaynes both knew or were reckless in not knowing that \$178,901 in revenue was improperly recorded in Apogee's books and records and reported in its financial statements because the transaction was not complete and shipment of parts did not occur by December 31, 2003.

(ii) The Second Transaction Included Rights of Return

28. Apogee improperly recognized \$226,210 in revenue from a transaction with another distributor in the quarter ended December 31, 2003.

29. The transaction with this distributor included a right to return the parts. However, in a December 30, 2003 email, Meyers instructed Apogee's Hong Kong sales manager that the distributor should not include any comments about the right of return in the distributor's purchase order.

30. The Hong Kong sales manager, pursuant to Meyers' instructions, wrote an email to the distributor on December 31, 2003 confirming that Apogee would include a right to return the parts if the distributor could not sell them to end users within a particular time period and instructed the distributor that the right to return parts could not be included on the purchase order.

31. On December 31, 2003, the Hong Kong sales manager forwarded the December 31, 2003 email between Apogee and the distributor to Meyers. Meyers, in turn, forwarded the email to Jaynes on the same day.

32. On December 31, 2003, Jaynes improperly recorded \$226,210 in revenue on Apogee's books and records pursuant to this transaction.

33. GAAP precluded recognition of revenue on this transaction. As a result, Apogee improperly reported \$226,210 in revenue in its 2003 financial statements, filed with its 10-KSB with the Commission on March 30, 2004. Meyers and Jaynes knew or were reckless in not knowing that Apogee improperly recorded in its books and records and reported \$226,210 in revenue in its financial statements because the distributor had been granted rights to return the parts.

(iii) The Third Transaction Included Undefined Payment Terms

34. Apogee improperly recognized \$1,012,020 in revenue in a transaction with another distributor in the quarter ended December 31, 2003.

35. At the end of December 2003, Apogee entered into transactions with a distributor worth \$315,000 and \$697,020 where the terms of the transaction allowed the distributor to pay Apogee 30 days after it sold parts to an end user in the first quarter of 2004, with a payment plan to be discussed for the second quarter of 2004 and payment to be finalized

by the end of the second quarter. The distributor could also return parts it purchased in exchange for different parts. Meyers was made aware of these terms.

36. On December 30, 2003, Jaynes recorded \$315,000 and \$697,020 in revenue from these transactions on Apogee's books and records. The invoices that Jaynes generated on December 30, 2003, listed payment terms due in sixty days, contrary to documented terms between Apogee and the distributor.

37. On February 5, 2004, Jaynes received an email from the distributor indicating that at least one transaction document listed payment terms that were for "audit purposes only," and on February 11, 2004 and March 7, 2004, Jaynes was emailed the documented payment terms between Apogee and the distributor.

38. Jaynes knew or was reckless in not knowing that the payment terms she entered on Apogee's books and records on December 30, 2003, were inaccurate. In addition, Meyers and Jaynes knew or were reckless in not knowing that Apogee took steps to conceal true payment terms from its auditors.

39. Jaynes provided Apogee's external auditors with internal ledgers that reflected payment being due within 60 days of the sale. Despite Jaynes' receipt of numerous documents which indicated that she had improperly recorded the payment terms from these transactions on Apogee's books and records and that she provided auditors with documents reflecting these incorrect payment terms, Jaynes failed to bring the other payments terms to the auditors' attention.

40. GAAP precludes recognition of revenue unless persuasive evidence of an arrangement exists. Payment terms pursuant to the above transaction were undefined as of December 31, 2003, and therefore persuasive evidence of an arrangement did not exist. The

terms, on their face, allowed for the distributor and Apogee to negotiate final payment terms in the second quarter of 2004. In other words, payment terms were not finalized as of December 31, 2003. In addition, the distributor's right to return parts precluded recognition of revenue in the quarter ended December 31, 2003. Meyers and Jaynes knew or were reckless in not knowing that Apogee improperly reported in its books and records and reported \$1,012,020 in revenue in its financial statements because payment terms were undefined and Apogee granted the right to return parts.

(iv) Effect on Financial Statements

41. Apogee reported revenue for the quarter ended December 31, 2003 of \$3,147,513, which included \$178,901, \$226,210, and \$1,012,020 from the three transactions above that were not eligible for revenue recognition in that quarter. As a result of improperly recognizing this revenue, Apogee overstated its quarterly revenue by 45.0%.

C. First Quarter 2004 – Apogee Overstated Its Revenue by 10%

42. On March 30, 2004, Meyers and Jaynes were included on email correspondence between Apogee and a distributor concerning the terms of a transaction. The distributor initially wanted to place a purchase order for parts that Apogee did not have in stock.

43. Instead, Apogee requested that the distributor place an order for substitute parts for a total cost of \$250,560. According to the terms of the agreement, which were contained within the March 30, 2004 email chain on which Meyers and Jaynes were included, the distributor could later fully exchange the substitute parts.

44. On March 30, 2004, the distributor placed a purchase order with Apogee for the substitute parts at a cost of \$250,560.

45. On March 31, 2004, Jaynes, despite knowing or being reckless in not knowing that the distributor had the right to exchange the parts, recorded \$250,560 in revenue pursuant to this transaction on Apogee's books and records.

46. GAAP precluded recognition of revenue of this transaction in the first quarter of 2004. As a result, Apogee's financial statements contained within its 10-QSB filed with the Commission on May 17, 2004, which listed revenues as \$2,326,232, were materially misstated. The improper recognition of \$250,560 in revenue resulted in a material misstatement in quarterly revenues of 10.7%. Meyers and Jaynes knew or were reckless in not knowing that the revenue had been improperly recorded on Apogee's books and records and recognized in its financial statements because Apogee granted the right to return parts in the future.

D. Second Quarter of 2004 – Apogee Overstated its Revenue by 31% in Two Transactions

(i) The First Transaction Involved Substituting Parts and Rights of Return

47. In the quarter ended June 30, 2004, Apogee improperly recognized \$265,080 in revenue from a transaction with another distributor.

48. On June 28, 2004, Meyers received an email from Apogee's Hong Kong sales manager that outlined proposed terms of an order with the distributor. One of the proposals allowed Apogee to ship substitute parts to the distributor and Apogee would exchange these parts for the parts originally ordered by the distributor in the next quarter. If Apogee could not exchange the parts, the proposal allowed the distributor to return the substitute parts for a full credit. Upon reviewing this proposal, Meyers wrote: "[w]e cannot take returns until after August 15 due to the audit issue."

49. On June 29, 2004, Jaynes was asked to prepare an invoice for this distributor for a total of \$265,080, and was informed of the terms of the sale. According to the terms, Apogee agreed to replace substitute parts within July and August 2004, and allow the distributor to return the parts if Apogee could not replace them with the parts originally by the distributor.

50. Meyers drafted and signed a side letter dated June 29, 2004, that documented the terms of the agreement between Apogee and the distributor.

51. On June 30, 2004, Meyers emailed Apogee's Hong Kong sales manager and reminded him that: "we cannot state on the invoice that the parts can be exchanged for other parts. This will have to be stated in the letter only. Regarding the [return rights] nothing can be returned prior to the end of August."

52. On June 30, 2004, Jaynes generated an invoice to the distributor for \$265,080 and recorded revenue from this transaction into Apogee's books and records. However, GAAP precluded recognition of the \$265,080 in revenue. Meyers and Jaynes knew or were reckless in not knowing that Apogee improperly recorded in its books and records and reported \$265,080 in revenue in its financial statements because Apogee granted the right to return the substitute parts. In addition, Meyers took steps to conceal the true terms of the transaction from Apogee's independent auditors.

(ii) The Second Transaction Involved a Sham Sale to One Distributor to Hold the Product Until a Second Distributor Was Ready to Purchase

53. In the quarter ended June 30, 2004, Apogee improperly recognized \$253,430 in a transaction with a distributor ("Distributor A").

54. In the second quarter of 2004, Apogee was in the process of negotiating an agreement with a different distributor ("Distributor B"), but the order could not be finalized by the end of the quarter.

55. In order to give the appearance of a sale, for the period ended June 30, 2004, Apogee sought a distributor who would hold the parts until Distributor B was ready to purchase the parts. Meyers and Jaynes were included in June 28, 2004 email correspondence discussing potentially shipping the parts to a distributor for this purpose.

56. The next day, Apogee's Hong Kong sales manager sent an email to Apogee personnel, including Meyers, concerning the status of the order and wrote: "I am getting [Distributor A] to hold the inventory for [Distributor B]." The email was forwarded to Jaynes on that day.

57. Meyers drafted and signed a side letter dated June 29, 2004, which documented this agreement. The side letter granted Distributor A the right to return parts if Distributor B did not purchase the parts by the end of July 2004.

58. On June 30, 2004, Jaynes generated an invoice for \$253,430 to Distributor A and recorded the \$253,430 as revenue on Apogee's books and records. Jaynes knew or was reckless in not knowing that Apogee merely shipped the product to Distributor A to hold until Apogee could finalize a deal with Distributor B, that Distributor A's obligation to pay was contingent on Distributor B's ultimate purchase of the product and payment, and that Distributor A had the ability to return the product after 30 days if Distributor B did not buy the product.

59. Under GAAP, it was improper for Apogee to recognize revenue on the transaction in the second quarter of 2004 because Apogee had a continuing obligation to sell the product to another buyer and Distributor A had the right to return the product the following quarter. Revenue recognition was also improper because *Distributor A's obligation to pay for the product was contingent on Distributor B's ultimate purchase of the product and payment.* Jaynes and Meyers knew or were reckless in not knowing the terms of the transaction and as a

result, knew or were reckless in not knowing recording the revenue in Apogee's books and records and reporting revenue from the transaction in its financial statements was improper in the second quarter of 2004.

(iii) Effect on Financial Statements

60. On August 17, 2004, Apogee filed a 10-QSB with the Commission that included financial statements for quarter ended June 30, 2004, Apogee reported revenue of \$1,672,261, including \$265,080 and \$253,430 from the above two transactions that were not eligible for revenue recognition in that quarter. As a result of improperly recognizing this revenue from the second quarter of 2004 transactions, Apogee materially overstated its revenue by 31.0%.

F. Third Quarter 2004 – Apogee Overstated its Revenue by 15% by Failing to Record Two Returns

61. On or about August 18, 2004, Meyers approved and signed a Return Material Authorization ("RMA"), dated August 18, 2004, that authorized a distributor to return certain parts at a value of \$104,580 and others at a value of \$128,820.

62. On or about August 20, 2004, the distributor returned the \$233,400 in parts to Apogee's Hong Kong warehouse. Jaynes was forwarded an email in which the distributor confirmed that it had returned the parts.

63. Jaynes generated a credit memo, dated August 24, 2004, which credited the distributor \$233,400 for the returned parts. Apogee's books and records, for the week ended August 27, 2004, reflected the \$233,400 in returns.

64. On or about September 22, 2004, Meyers approved and signed an RMA, dated September 22, 2004, which authorized the distributor to return additional parts for a value of \$94,800.

65. On or about September 27, 2004, the distributor returned the \$94,800 in parts to Apogee. Jaynes generated a credit memo, dated September 27, 2004, which credited the distributor \$94,800 for the returned parts. Jaynes was forwarded an email which confirmed that the distributor had returned the products to Apogee.

66. Apogee generated an internal company report for the week ended September 30, 2004, included the returns of \$233,400 and \$94,800. However, in a different version of the September 30, 2004 report, the returns of \$233,400 and \$94,800 were not included.

67. In the course of Apogee's independent auditors' review of the company's financial statements for the quarter ended September 30, 2004, Jaynes provided the auditors with a schedule for the third quarter of 2004 which detailed sales and credits for the quarter, but did not include the above returns. The schedule listed total revenues for the quarter as \$1,132,222.

68. Jaynes also provided the auditors with a receivable "aging report," as of September 30, 2004, which listed the outstanding accounts receivables balance by Apogee customer or distributor. The report provided to the auditors did not include the above returns. The auditors were not informed by Meyers or Jaynes that the distributor returned parts on two occasions in the third quarter of 2004, and that those returns were not recorded on Apogee's books and records.

69. Meyers and Jaynes each knew, or were reckless in not knowing, that Apogee did not properly record \$328,200 in returns in the third quarter of 2004.

70. Apogee's quarterly revenues, according the financial statements contained within the September 30, 2004 10-QSB, were \$2,083,691. The stated revenues were materially overstated by \$328,200 or approximately 15.7%.

71. Apogee's accounts receivable balance, according to financial statements contained with the September 30, 2004 10-QSB, was \$3,296,494. This balance was calculated based on the distributor's accounts receivable balance of \$659,714.00, which did not reflect the returns of \$328,200. The result was a material overstatement of Apogee's accounts receivables by \$328,200, or approximately 9.9%.

**FIRST CLAIM
(Apogee, Meyers and Jaynes)
Fraud in the Offer or Sale of Securities in Violation of
Section 17(a) of the Securities Act**

72. Plaintiff Commission repeats and realleges paragraphs 1 through 71 above.

73. By reason of the foregoing, Apogee, Meyers and Jaynes, directly and indirectly, in the offer or sale of securities by the use of the means or instruments of transportation or communication in interstate commerce or by the use of the mails: (a) acting knowingly or recklessly, have employed devices, schemes or artifices to defraud; (b) have obtained money or property by means of untrue statements of material fact or omissions to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; or (c) have engaged in transactions, practices or courses of business which operated as a fraud or deceit upon purchasers of the securities, in violation of § 17(a) of the Securities Act [15 U.S.C. §77q(a)].

74. The conduct of Apogee, Meyers and Jaynes involved fraud, deceit, manipulation, or deliberate or reckless disregard of regulatory requirements and directly or indirectly resulted in substantial losses to other persons.

SECOND CLAIM
(Apogee, Meyers and Jaynes)
Fraud in Connection with the Purchase or Sale of Securities in Violation of
Section 10(b) of the Exchange Act and Rule 10b-5 Thereunder

75. Plaintiff Commission repeats and realleges paragraphs 1 through 71 above.

76. By reason of the foregoing, Apogee, Meyers and Jaynes, directly or indirectly, acting knowingly or recklessly, in connection with the purchase or sale of securities, by the use of means and instrumentalities of interstate commerce, or of the mails, or a facility of a national securities exchange: (a) have employed devices, schemes or artifices to defraud; (b) have made untrue statements of material fact or have omitted to state a material fact necessary to make the statement made, in light of the circumstances on which they were made, not misleading; and (c) have engaged in acts, practices or courses of business which operated as a fraud or deceit upon certain persons, in violation of 10(b) of the Exchange Act [15 U.S.C. §78j(b)] and Rule 10b-5 [17 C.F.R. §240.10b-5] thereunder.

77. The conduct of Apogee, Meyers and Jaynes involved fraud, deceit, manipulation, or deliberate or reckless disregard of regulatory requirements and directly or indirectly resulted in substantial losses to other persons.

THIRD CLAIM
(Meyers and Jaynes)
Circumventing Internal Accounting Controls and/or Falsifying Books and Records in
Violation of Section 13(b)(5) of the Exchange Act

78. Plaintiff Commission repeats and realleges paragraphs 1 through 71 above.

79. By reason of the foregoing, Meyers and Jaynes knowingly circumvented Apogee's internal controls and/or, directly or indirectly, knowingly falsified, or caused to be falsified, Apogee's books, records and accounts reflecting the transactions and dispositions of Apogee's assets in violation of Section 13(b)(5) of the Exchange Act [15 U.S.C. § 78m(b)(5)].

**FOURTH CLAIM
(Meyers and Jaynes)**

Falsification of Accounting Records in Violation of Exchange Act Rule 13b2-1

80. Plaintiff Commission repeats and realleges paragraphs 1 through 71 above.

81. By reason of the foregoing, Meyers and Jaynes knowingly circumvented Apogee's internal controls and/or, directly or indirectly, falsified, or caused to be falsified, Apogee's books, records and accounts reflecting the transactions and dispositions of Apogee's assets in violation of Exchange Act Rule 13b2-1 [17 C.F.R. §240.13b2-1].

**FIFTH CLAIM
(Meyers and Jaynes)**

**Providing False and Misleading Information to Accountants in Violation of
Exchange Act Rule 13b2-2**

82. Plaintiff Commission repeats and realleges paragraphs 1 through 71 above.

83. By reason of the foregoing, Meyers and Jaynes, officers of Apogee, directly or indirectly, made or caused to be made a materially false or misleading statement, or omitted to state, or caused another person to omit to state, a material fact necessary in order to make statements made, in light of the circumstances under which the statements were made, not misleading, to an accountant in connection with (i) a required audit or examination of Apogee's financial statements required or (ii) the preparation or filing of a document or report required to be filed with the Commission, in violation of Rule 13b2-2 promulgated under the Exchange Act [17 C.F.R. § 240.13b2-2].

**SIXTH CLAIM
(Apogee)**

**Reporting of False and Misleading Information in Annual Statements in Violation of
Exchange Act § 13(a) and Rules 12b-20 and 13a-1.**

84. Plaintiff Commission repeats and realleges paragraphs 1 through 71 above.

85. By reason of the foregoing, Apogee materially misstated the company's revenue figures in its Form 10-KSB for the year ended 2003, in violation of Section 13(a) of the Exchange Act [15 U.S.C. § 78m(a)] and Rules 12b-20 and 13a-1 thereunder [17 C.F.R. §§ 240.12b-20 and 240.13a-1].

SEVENTH CLAIM

(Apogee)

Reporting of False and Misleading Information in Annual Statements in Violation of Exchange Act § 13(a) and Rules 12b-20 and 13a-13.

86. Plaintiff Commission repeats and realleges paragraphs 1 through 71 above.

87. By reason of the foregoing, Apogee materially misstated the company's revenue figures in its Forms 10-QSB for the quarters ended June 30, 2003, March 31, 2004, June 30, 2004, and September 30, 2004, in violation of Section 13(a) of the Exchange Act [15 U.S.C. § 78m(a)] and Rules 12b-20 and 13a-1 thereunder [17 C.F.R. §§ 240.12b-20 and 240.13a-13].

88. By reason of the foregoing, Apogee materially misstated the company's receivables in its Forms 10-QSB for the quarters ended March 31, 2004, June 30, 2004, and September 30, 2004, in violation of Section 13(a) of the Exchange Act [15 U.S.C. § 78m(a)] and Rules 12b-20 and 13a-1 thereunder [17 C.F.R. §§ 240.12b-20 and 240.13a-13].

EIGHTH CLAIM

(Apogee)

Books and Records Violations under Sections 13(b)(2)(A) of the Exchange Act

89. Plaintiff Commission repeats and realleges paragraphs 1 through 71 above.

90. Apogee maintained false and misleading books and records, which, among other things, materially overstated the company's net income and revenue.

91. By reason of the foregoing, Apogee violated Section 13(b)(2)(A) of the Exchange Act [15 U.S.C. § 78m(b)(2)(A)]

NINTH CLAIM

(Apogee)

Books and Records Violations under Sections 13(b)(2)(B) of the Exchange Act

92. Plaintiff Commission repeats and realleges paragraphs 1 through 71 above.

93. Apogee failed to devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that the company's transactions were recorded as necessary to permit preparation of financial statements in conformity with GAAP.

94. By reason of the foregoing, Apogee violated Section 13(b)(2)(B) of the Exchange Act [15 U.S.C. § 78m(b)(2)(B)].

TENTH CLAIM

(Meyers and Jaynes)

Aiding and Abetting Apogee's Books and Records Violations Under Section 13(b)(2)(A) of the Exchange Act

95. Plaintiff Commission repeats and realleges paragraphs 1 through 71 above.

96. Apogee maintained false and misleading books and records, which, among other things, materially overstated the company's net income and revenue.

97. Meyers and Jaynes knew or recklessly disregarded that Apogee's conduct was improper and each knowingly rendered to Apogee substantial assistance in this conduct.

98. By reason of the foregoing, Meyers and Jaynes aided and abetted Apogee's violations of Section 13(b)(2)(A) of the Exchange Act [15 U.S.C. § 78m(b)(2)(A)], and therefore are liable pursuant to Section 20(e) of the Exchange Act [15 U.S.C. § 78t(e)].

ELEVENTH CLAIM

(Meyers and Jaynes)

Aiding and Abetting Apogee's Books and Records Violations Under Section 13(b)(2)(B) of the Exchange Act

99. Plaintiff Commission repeats and realleges paragraphs 1 through 71 above.

100. Apogee failed to devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that the company's transactions were recorded as necessary to permit preparation of financial statements in conformity with GAAP.

101. Meyers and Jaynes knew or recklessly disregarded that Apogee's conduct was improper and each knowingly rendered to Apogee substantial assistance in this conduct.

102. By reason of the foregoing, Meyers and Jaynes aided and abetted Apogee's violations of Section 13(b)(2)(B) of the Exchange Act [15 U.S.C. § 78m(b)(2)(B)], and therefore is liable pursuant to Section 20(e) of the Exchange Act [15 U.S.C. § 78t(e)].

TWELFTH CLAIM
(Meyers and Jaynes)
Aiding and Abetting Apogee's Fraud in Connection with the Purchase and Sale of
Securities in Violation of Section 10(b) of the Exchange Act and Rule 10b-5
Thereunder

103. Plaintiff Commission repeats and realleges paragraphs 1 through 71 above.

104. As set forth above, Apogee, directly or indirectly, acting knowingly or recklessly, in connection with the purchase or sale of securities, by the use of means and instrumentalities of interstate commerce, or of the mails, or a facility of a national securities exchange: (a) have employed devices, schemes or artifices to defraud; (b) have made untrue statements of material fact or have omitted to state a material fact necessary to make the statement made, in light of the circumstances on which they were made, not misleading; and (c) have engaged in acts, practices or courses of business which operated as a fraud or deceit upon certain persons, in violation of 10(b) of the Exchange Act [15 U.S.C. §78j(b)] and Rule 10b-5 [17 C.F.R. §240.10b-5] thereunder.

105. As set forth above, Meyers and Jaynes knew or recklessly disregarded that Apogee's conduct was improper and each knowingly rendered to Apogee substantial assistance in this conduct.

106. By reason of the foregoing, Meyers and Jaynes aided and abetted Apogee's violations of Section 10(b) of the Exchange Act [15 U.S.C. § 78j(b)] and Rule 10b-5 [17 C.F.R. § 240.10b-5] thereunder, and therefore are liable pursuant to Section 20(e) of the Exchange Act [15 U.S.C. § 78t(e)].

107. The conduct of Meyers and Jaynes involved fraud, deceit, manipulation, or deliberate or reckless disregard of regulatory requirements and directly or indirectly resulted in substantial losses to other persons.

THIRTEENTH CLAIM

(Meyers and Jaynes)

Aiding and Abetting Apogee's False Filing of Annual Report with the Commission in Violation of Section 13(a) of the Exchange Act and Rules 12b-20 and 13a-1 Thereunder

108. Plaintiff Commission repeats and realleges paragraphs 1 through 71 above.

109. As set forth above, Apogee materially misstated the company's revenue figures in its Form 10-KSB for the year ended 2003, in violation of Section 13(a) of the Exchange Act [15 U.S.C. § 78m(a)] and Rules 12b-20 and 13a-1 thereunder [17 C.F.R. §§ 240.12b-20 and 240.13a-1].

110. Meyers and Jaynes knew or recklessly disregarded that Apogee's conduct was improper and each knowingly rendered to Apogee substantial assistance in this conduct.

111. As a result, Meyers and Jaynes each aided and abetted Apogee's violations of Section 13(a) of the Exchange Act and Rules 12b-20 and 13a-1 thereunder.

FOURTEENTH CLAIM

(Meyers and Jaynes)

Aiding and Abetting Apogee's False Filing of Quarterly Report with the Commission in Violation of Section 13(a) of the Exchange Act and Rules 12b-20 and 13a-13 Thereunder

112. Plaintiff Commission repeats and realleges paragraph 1 through 71 above.

113. As set forth above, Apogee materially misstated the company's revenue figures in its Forms 10-QSB for the quarters ended March 31, 2003, June 30, 2003, September 30, 2003, March 31, 2004, June 30, 2004, and September 30, 2004, in violation of Section 13(a) of the Exchange Act [15 U.S.C. § 78m(a)] and Rules 12b-20 and 13a-1 thereunder [17 C.F.R. §§ 240.12b-20 and 240.13a-13].

114. As set forth above, Apogee materially misstated the company's receivables in its Forms 10-QSB for the quarters ended March 31, 2004, June 30, 2004, and September 30, 2004, in violation of Section 13(a) of the Exchange Act [15 U.S.C. § 78m(a)] and Rules 12b-20 and 13a-1 thereunder [17 C.F.R. §§240.12b-20 and 240.13a-13].

115. Meyers and Jaynes knew or recklessly disregarded that Apogee's conduct was improper and each knowingly rendered to Apogee substantial assistance in this conduct.

116. As a result, Meyers and Jaynes each aided and abetted Apogee's violations of Section 13(a) of the Exchange Act and Rules 12b-20 and 13a-13 thereunder.

PRAYER FOR RELIEF

WHEREFORE, the Commission respectfully requests that this Court issue a Final Judgment:

A. Permanently enjoining Apogee from violating, directly or indirectly:

1. Section 17(a) of the Securities Act [15 U.S.C. § 77q(a)];

2. Section 10(b) of the Exchange Act [15 U.S.C. § 78j(b)] and Rule 10b-5 thereunder [17 C.F.R. §240.10b-5];
 3. Section 13(a) of the Exchange Act [15 U.S.C. §78m(a)] and Rules 12b-20, 13a-1 and 13a-13 thereunder [17 C.F.R. §§ 240.12b-20, 240.13a-1, and 240.13a-13];
 4. Section 13(b)(2)(A) of the Exchange Act [15 U.S.C. § 78m(b)(2)(A)]; and
 5. Section 13(b)(2)(B) of the Exchange Act [15 U.S.C. § 78m(b)(2)(B)];
- B. Permanently enjoining Meyers and Jaynes from violating, directly or indirectly:
1. Section 17(a) of the Securities Act [15 U.S.C. § 77q(a)];
 2. Section 10(b) of the Exchange Act [15 U.S.C. § 78j(b)] and Rule 10b-5 thereunder [17 C.F.R. §240.10b-5];
 3. Section 13(b)(5) of the Exchange Act [15 U.S.C. § 78m(b)(5)];
 4. Exchange Act Rule 13b2-1 thereunder [17 C.F.R. § 240.13b2-1]; and
 5. Exchange Act Rule 13b2-2 thereunder [17 C.F.R. § 240.13b2-2];
- C. Permanently enjoining Meyers and Jaynes from aiding and abetting any violation of:
1. Section 13(a) of the Exchange Act [15 U.S.C. §78m(a)] and Rules 12b-20, 13a-1 and 13a-13 thereunder [17 C.F.R. §§ 240.12b-20, 240.13a-1, and 240.13a-13];
 2. Section 13(b)(2)(A) of the Exchange Act [15 U.S.C. § 78m(b)(2)(A)]; and
 3. Section 13(b)(2)(B) of the Exchange Act [15 U.S.C. § 78m(b)(2)(B)];
- D. Ordering Meyers to disgorge his ill-gotten gains, as well as prejudgment interest thereon;

- E. Ordering Meyers and Jaynes to pay civil monetary penalties;
- F. Barring Meyers, pursuant to Section 20(e) of the Securities Act [15 U.S.C. 77t(e)] and Section 21(d)(2) of the Exchange Act [15 U.S.C. § 78u(d)(2)], from serving as an officer or director of any issuer required to file reports with the Commission pursuant to Sections 12(b), 12(g) or 15(d) of the Exchange Act (15 U.S.C. §§ 781(b), 781(g) and 78o(d));
- G. Retaining jurisdiction over this action to implement and carry out the terms of all orders and decrees that may be entered; and
- H. Ordering such other further relief as this case may require and the Court deems appropriate.

Respectfully submitted,

**SECURITIES AND EXCHANGE
COMMISSION**

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