

COPY

FILED
CLERK'S OFFICE
UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

2007 JUL 25 P 3: 32

SECURITIES AND EXCHANGE COMMISSION

U.S. DISTRICT COURT
DISTRICT OF MASS.
JURY TRIAL DEMANDED

Plaintiff,

v.

Case No.

ROBERT J. THERRIEN,

07 CA 11364 RCL

Defendant.

COMPLAINT

1. Plaintiff Securities and Exchange Commission ("Commission"), for its Complaint against defendant Robert J. Therrien ("Therrien"), alleges the following:

SUMMARY

2. This Commission enforcement action concerns a fraudulent stock options backdating scheme perpetrated from at least 1999 through 2005 by Therrien, the former Chairman of the Board and Chief Executive Officer of Brooks Automation, Inc. ("Brooks" or the "Company"), a Chelmsford, Massachusetts-based supplier of software and related services to manufacturers of computer chips.

3. Under well-settled accounting principles in effect throughout the relevant period, Brooks was required to record an expense in its financial statements for any stock options granted below the current market price ("in-the-money"), while the Company did not need to record an expense for options granted to employees at the current market price ("at-the-money"). In order to provide Brooks' employees and executives, including himself, with lucrative in-the-money options (which result in an immediate financial benefit to recipients), while avoiding having to inform shareholders of the millions of

dollars in compensation expenses thereby incurred and the resulting impact on the Company's financial statements, Therrien engaged in a scheme to falsify company records to create the false appearance that the options granted in-the-money actually had been granted at-the-money on an earlier date. Therrien's scheme involved choosing purported grant dates with the benefit of hindsight in order to grant options at a lower price than the current market price at the time of the actual grant determination. Therrien personally benefited by more than \$10 million from his fraudulent conduct.

4. As part of the scheme, Therrien, in or about November 1999, created and signed false documents resulting in the issuance of in-the-money options to himself, which he immediately exercised, to purchase 225,000 shares of Brooks' common stock. Therrien signed these false documents after learning that his options to purchase the shares had expired unexercised a few months earlier in or about August 1999. The documents Therrien signed falsely indicated that he had actually exercised his options before they expired. As a result, Therrien received approximately \$5.8 million in undisclosed compensation from Brooks. Brooks failed to report this compensation in its Commission filings.

5. As a result of this and other transactions, Therrien and Brooks concealed millions of dollars in expense from investors, materially understating Brooks' expenses and overstating the Company's income, by falsifying records and failing to maintain records relating to stock option grants and exercises. During the period from May 1999 to September 2005, Therrien signed numerous public filings by Brooks that he knew or was reckless in not knowing materially misrepresented its financial results.

6. On or about May 11, 2006, Brooks announced that it intended to restate its financial statements contained in filings with the Commission for some or all of the periods between 1999 and 2005, and that those financial statements should not be relied upon. The announcement stated that “[t]he Company believes that it accounted for certain matters concerning stock options incorrectly, and as a result recognized less compensation expense than it should have in periods prior to fiscal 2006.”

7. On or about July 31, 2006, Brooks announced that “[d]riven by matters related to past stock option grants, the Company has revised its financial statements for the fiscal years 1996 through 2005 to record cumulative additional non-cash, pre-tax stock-based compensation expense of \$64.5 million.” In effect, Brooks restated its results and wrote off more than \$64 million that had been reported as profit during that period. At least \$54 million of Brooks’ restatement is attributable to Therrien’s fraudulent conduct.

8. By engaging in the acts alleged in this Complaint, Therrien violated Section 17(a) of the Securities Act of 1933 (“Securities Act”) [15 U.S.C. § 77q(a)], Sections 10(b), 13(b)(5), 14(a), and 16(a) of the Securities Exchange Act of 1934 (“Exchange Act”) [15 U.S.C. §§ 78j(b), 78m(b)(5), 78n(a) and 78p(a)] and Exchange Act Rules 10b-5, 13a-14, 13b2-1, 13b2-2, 14a-9 and 16a-3 [17 C.F.R. §§ 240.10b-5, 240.13a-14, 240.13b2-1, 240.13b2-2, 240.14a-9 and 240.16a-3] thereunder. Through his conduct, Therrien aided and abetted Brooks’ uncharged violations of Exchange Act Sections 13(a), 13(b)(2)(A) and 13(b)(2)(B) [15 U.S.C. §§ 78j(b), 78m(a), 78m(b)(2)(A) and 78m(b)(2)(B)] and Exchange Act Rules 12b-20, 13a-1 and 13a-13 [17 C.F.R. §§ 240.12b-20, 240.13a-1, and 240.13a-13] thereunder.

9. For the reasons discussed herein, the Commission seeks all of the relief sought herein.

JURISDICTION AND VENUE

10. The Commission is an agency of the United States of America established by Section 4(a) of the Exchange Act [15 U.S.C. §78d(a)].

11. This Court has jurisdiction over this action pursuant to Sections 20(d) and 22(a) of the Securities Act [15 U.S.C. §§77t(d) and 77v(a)] and Sections 21(d), 21(e) and 27 of the Exchange Act [15 U.S.C. §§78u(d), 78u(e) and 78aa]. Venue is proper in the District of Massachusetts because Brooks is a Chelmsford, Massachusetts-based company and the defendant resides within the district and committed many of the acts and/or omissions discussed herein within the district.

12. The defendant, directly or indirectly, has made use of the means and instrumentalities of interstate commerce, of instruments of transportation or communication in interstate commerce, of the mails, or of the facilities of a national securities exchange in connection with the acts, practices and courses of business alleged in this complaint.

DEFENDANT

13. **Therrien**, of Osterville, Massachusetts, served as the President and Chief Executive Officer (“CEO”) of Brooks between at least 1989 and 2004, and as Chairman of the Board (“Chairman”) between at least 1989 and March 2006. Therrien asserted his Fifth Amendment privilege against self-incrimination during investigative testimony before the Commission staff in response to all substantive questions concerning the matters discussed in this Complaint.

RELEVANT ENTITY

14. **Brooks** is a Delaware corporation with its principal place of business in Chelmsford, Massachusetts. Brooks is a supplier of, among other things, software and related services to manufacturers of computer chips. Since 1995, Brooks' common stock has been registered with the Commission pursuant to Sections 12(g) or 12(b) of the Exchange Act, as appropriate, and is traded on the Nasdaq National Market System. Brooks' fiscal year ends on September 30.

FACTS

Brooks' Procedures for Option Grants

15. At relevant times, Brooks' Board of Directors used a unanimous written consent procedure to approve option grants. Thus, Brooks' primary record of Board authorization to issue options was typically a document captioned "Written Consent in Lieu of Special Meeting of Board of Directors." Therrien routinely signed such written consents throughout the relevant period.

16. Brooks was a Delaware corporation, and Delaware law provided, at relevant times, that such consents were effective when signed. Therrien knew, or was reckless in not knowing, that Brooks routinely failed to maintain a record of when written consents were signed. Rather, Brooks' record typically was a signed copy faxed from its outside law firm, often received several weeks to months after the putative date of the option award.

GAAP Requirements for Stock-Based Compensation Accounting

17. In its annual reports on Form 10-K filed with the Commission, Brooks falsely represented that it accounted for its stock-based compensation in accordance with

Accounting Principles Board Opinion No. 25 (“APB 25”), *Accounting for Stock Issued to Employees*, one of two alternative available methods under generally accepted accounting principles (“GAAP”) to account for stock-based compensation that were in effect throughout the time period discussed in this Complaint.

18. Under APB 25, an employer must expense the “intrinsic” value of a fixed stock option on its “measurement date.” APB 25 defines the measurement date as the first date that both the number of options an individual employee is entitled to receive and the exercise price are *known*. APB 25 ¶10 (emphasis added). A fixed stock option has intrinsic value if the exercise price of the option is less than the “quoted market price” of the underlying stock on the measurement date. If so, a corporation must record the difference between the exercise price and the quoted market price as a compensation expense over the expected life of the option, typically the option vesting period. APB 25 ¶10.

19. Brooks’ financial statements, which were included or incorporated by reference in filings with the Commission, generally represented that it accounted for its stock compensation plans in accordance with APB 25 and stated that no compensation expense on stock option grants to employees is recorded as long as the exercise price equals or exceeds the market price of the underlying stock on the date of the grant. None of Brooks’ filings throughout the period, however, reflected any compensation expense that should have been recorded as a result of the issues described in this Complaint.

20. Therrien signed annual reports filed on Form 10-K for the company’s fiscal years ended September 30, 1999 through September 30, 2005, quarterly reports filed on Form 10-Q for quarters ended March 31, 1999 through June 30, 2004 and

registration statements on dates set forth below. These filings were materially misleading because they falsely represented that compensation expense for options grants would be recorded when the exercise price of the grant was lower than the market price of Brooks' stock on the grant date. The filings contained materially misleading financial results because they failed to reflect the compensation expenses incurred in grants of in-the-money options. Therrien knew or was reckless in not knowing that these filings were materially misleading. He knew or was reckless in not knowing that compensation expenses must be recorded for grants of in-the-money options. He knew or was reckless in not knowing that Brooks had granted in-the-money options but had not recorded expenses attributable to these grants. Therrien also signed false certifications of Brooks' 2002 and 2003 Forms 10-K and Forms 10-Q for periods ended June 30, 2002 through June 30, 2004, which stated that each report "fairly presents in all material respects the financial condition and results of operations of Brooks, Inc." and did not contain any misleading statements or omissions of material fact, although he knew or was reckless in not knowing that the certifications were not true.

Therrien Receives A New Option in November 1999 Via Backdated Documents

21. On or about August 15, 1994, Therrien was granted an option to purchase 75,000 shares of Brooks' common stock at a price of \$7.30 per share pursuant to a Unanimous Consent in Lieu of a Special Meeting of Board of Directors. Brooks' stock thereafter underwent a stock split, as a result of which Therrien held an option to purchase 225,000 shares of Brooks' stock at a price of \$2.43 per share (or for an aggregate price of \$546,750). The option was good for a five-year period and therefore expired on or about August 15, 1999.

22. In or about early November 1999, Brooks' finance department personnel discovered, and informed Therrien, that his option to purchase the 225,000 shares of Brooks' common stock had expired unexercised on or about August 15, 1999.

23. In or about November 1999, three out of the four members of Brooks' Board (including Therrien) signed a document entitled "Directors Ratification," which was dated November 11, 1999 ("Directors Ratification"). Among other things, the Directors Ratification stated that it was intended to "ratify, approve and confirm . . . [that] in connection with telephone conversations between and among . . . Therrien [and the other two Board members] in mid-June 1999, the then board of directors authorized the Company to extend a loan in the amount of \$546,750 to . . . Therrien . . . for the purpose of paying the exercise price due from Mr. Therrien to the Company to exercise certain options held by Mr. Therrien to purchase 225,000 shares of the Company's common stock" In fact, Brooks' Board did not authorize any loan to Therrien in or about June 1999 to pay the exercise price for his option.

24. The November 11, 1999 "Directors Ratification" also attached a promissory note, dated August 13, 1999, which obliged Therrien to pay back the \$546,750 which the Board had purportedly agreed to lend him in mid-June 1999 ("Promissory Note"). The Promissory Note was signed by Therrien. In fact, Therrien did not sign the Promissory Note on August 13 or on any other date prior to the expiration of his option.

25. On or about November 18, 1999, Therrien exercised the option to purchase the 225,000 shares of Brooks' stock, conducted "as of" August 13, 1999. By exercising as of August 13, Therrien was able to purchase the shares at approximately

10% of the then current market price of approximately \$28 per share. In fact, Therrien did not exercise the option to purchase the 225,000 shares on August 13 or on any other date before the option expired.

26. On or about November 19, 1999, Therrien repaid the loan which the Board had purportedly authorized in mid-June 1999 be made to him for the purpose of exercising the option to purchase the 225,000 Brooks' common stock shares.

27. Therrien was charged \$13,211.88 in interest on the purported loan from August 13, 1999 to November 19, 1999. As a result, he was charged a total of \$559,961.88 (\$546,750 plus \$13,211.88) for the 225,000 shares of Brooks' common stock. At the time, the 225,000 shares had a market value of approximately \$6.3 million.

28. On or about November 15, 1999, Therrien filed an "Annual Statement of Changes in Beneficial Ownership" on a Form 5 with the Commission ("Form 5"). Among other things, the Form 5 falsely stated that Therrien had acquired 225,000 shares of Brooks' common stock on August 13, 1999.

29. Therrien knew, or was reckless in not knowing, when he signed the Directors Ratification, that the option to purchase the 225,000 shares of Brooks' common stock had expired in August 1999 and that he did not discuss a potential loan with anyone during the summer of 1999. Therrien also knew, or was reckless in not knowing, when he signed the Promissory Note, that Brooks did not extend a loan to him on or about August 13, 1999. Therrien signed the Promissory Note in November 1999 but it was purposefully backdated to August 13, 1999. Therrien knew, or was reckless in not knowing, that the purpose of the purported loan was to try to salvage his expired stock option. Therrien also knew, or was reckless in not knowing, at the time he signed the

Form 5, that he had not exercised his option on August 13 or on any other date before it expired.

30. Therrien received a substantial undisclosed benefit from re-issuance of the option to purchase the 225,000 shares of Brooks' common stock in or about November 1999. The option had an exercise price of \$2.43 per share, and had a cost basis of \$559,962, including interest accrued on the loan. Using Brooks' November 18, 1999 closing stock price of \$28.06, the option had a market value of \$6,313,500. The value of the shares Therrien received upon exercising the option, representing compensation to him, was \$5,753,538.

Effect of the November 1999 Option Grant on Brooks' Financial Reporting

31. In accordance with APB 25, Brooks should have recorded compensation expense of approximately \$5.8 million, representing the intrinsic value of the option that was effectively granted to Therrien on or about November 18, 1999.

32. As a result of the November 1999 option grant to Therrien, Brooks, which reported pre-tax net income of approximately \$25.2 million for the year ended September 30, 2000 in its annual report on Form 10-K filed with the Commission on or about December 22, 2000, overstated its actual pre-tax income by approximately \$5.8 million, or approximately 30%. Therrien knew or was reckless in not knowing that the company's financial results contained in the Form 10-K were materially misstated because of his options transaction. Nevertheless, he signed the Form 10-K as a director and President of the Company.

33. The compensation charge for the Therrien option exercise should have been recorded in the quarter ended December 31, 1999, Brooks' first quarter of fiscal

2000. In its Form 10-Q for the quarter ended December 31, 1999, signed by Therrien as a director and President, and filed with the Commission on or about February 14, 2000, Brooks reported pre-tax net income of approximately \$4.6 million. Had the Company recorded the correct compensation charge related to the Therrien option exercise, Brooks would have reported a pre-tax loss of approximately \$1.2 million. Therrien knew or was reckless in not knowing that the company's financial results contained in the Form 10-Q were materially misstated because of his options transaction.

34. In addition, Brooks understated its accumulated deficit by approximately \$5.8 million during subsequent reporting periods, continuing through at least September 30, 2005, due to the impact of the uncorrected entry on Brooks' quarterly and annual filings after November 1999. For the year ended September 30, 2000, Brooks reported an accumulated deficit of approximately \$16.4 million. An additional \$5.8 million charge would have increased the accumulated deficit to approximately \$22.2 million, or approximately 26%. Therrien signed annual reports on Form 10-K for the fiscal years ended September 30, 1999 through September 30, 2005 and quarterly reports on Form 10-Q for quarters ended March 31, 1999 through June 30, 2004. Therrien knew or was reckless in not knowing that each of these reports was materially misleading because it did not accurately reflect the expense that should have been recorded attributable to his November 1999 option transaction.

35. In addition to the annual and quarterly filings affected by the November 1999 option grant, Brooks also filed registration statements for the offer and sale of additional securities, including a Form S-3 filed on or about February 14, 2000 and another Form S-3 filed on or about March 7, 2001 that incorporated by reference the false

Form 10-Q for the quarter ended December 31, 1999 and the false Form 10-K for the year ended September 30, 2000, respectively. Therrien signed both of these Form S-3 filings as a director, CEO and President of Brooks. Therrien knew or was reckless in not knowing that each of these filings was materially misleading because it did not accurately reflect the expense that should have been recorded attributable to his November 1999 option transaction.

36. In proxy materials related to an upcoming annual stockholders' meeting filed with the Commission on or about January 18, 2000, Brooks falsely reported that the \$546,750 loan to Therrien had occurred on August 13, 1999. In addition, the filing failed to disclose that Therrien's option to purchase the 225,000 shares of Brooks' common stock had expired on or about August 15, 1999 and that Brooks had, in essence, granted him a new option in or about November 1999. Information concerning Therrien's executive compensation in the proxy materials was incorporated prospectively by reference in Brooks' Form 10-K for the year ended September 30, 1999 and filed with the Commission on or about December 29, 1999. Therrien signed the Form 10-K as a director and President of Brooks. Therrien knew or was reckless in not knowing that the proxy materials and the Form 10-K incorporating them by reference were materially misleading because they did not accurately reflect his compensation attributable to his November 1999 option transaction.

37. In proxy materials related to an upcoming annual stockholders' meeting filed with the Commission on or about January 24, 2001, Brooks did not disclose Therrien's receipt of \$5,753,538, representing the difference between the market value of the new option he was granted in or about November 1999 and the cost to exercise the

