

## **Judge tosses Broadcom case, saying government 'distorted the truth-finding process'**

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December 15, 2009

A federal judge on Tuesday dismissed the entire criminal stock-options backdating case against two former Broadcom Corp. executives, concluding that the government's handling of the case "distorted the truth-finding process" and made a "mockery" of the defendants' due process rights.

Before a courtroom packed with observers and other parties in the case, U.S. District Court Judge Cormac Carney of Santa Ana, Calif., entered a judgment of acquittal for former Chief Financial Officer William Ruehle, who has been in trial since Oct. 23.

"For these constitutional rights to have true meaning, the government must not do anything to intimidate and improperly influence witnesses," Carney said. "Sadly, they did so in this case."

Carney also dismissed backdating charges against Henry Nicholas, the co-founder and former chief executive officer of Broadcom, who was named in the same indictment. His trial had been scheduled for early 2010. Carney ordered the government to show cause on Feb. 2 why a separate indictment alleging narcotics crimes against Nicholas should not be dismissed as well.

Carney dismissed without prejudice the U.S. Securities and Exchange Commission's backdating case against Ruehle, Nicholas, Broadcom co-founder Henry Samueli and David Dull, Broadcom's former general counsel.

Carney's decision was met at first with stunned silence.

George Cardona, the U.S. attorney for the Central District of California, making his first appearance at the trial, told the judge that the prosecutors "respectfully disagree" with his ruling and would assess their options.

Defense counsel took turns praising Carney.

Brendan Sullivan Jr., a partner at Washington's Williams & Connolly who represents Nicholas, told Carney that he "stood in awe" of the judge's decision. "The message delivered by this court today will be heard throughout our country by all who enforce the law."

Samueli's lawyer, Gordon Greenberg, a partner in the Los Angeles office of McDermott Will & Emery and a former federal prosecutor, expressed a similar sentiment.

"This truly is a turning point to be heard throughout this country," he said, noting that several unrelated cases recently have been dismissed on prosecutorial misconduct ground. "Your honor has set the record straight."

**James Asperger**, a partner at Los Angeles-based **Quinn Emanuel Urquhart Oliver & Hedges** who represents Dull, said Carney's decision showed courage.

Ruehle's lawyer, Richard Marmaro, head of the West Coast SEC enforcement and white-collar defense practice at New York's Skadden, Arps, Slate, Meagher & Flom, struggled to speak. Wiping away tears, he said, "You have said all along you wanted to hear the whole story. But if it weren't for what you did, we would not have had the whole story."

Carney's move capped almost two weeks of testimony that dramatically shifted the focus from backdating to alleged misconduct by the government. Defense counsel rested their case on Dec. 10.

The prosecutorial misconduct claims emerged after Carney made an unusual grant of immunity to Dull and Samueli on Nov. 30 at the request of Ruehle's lawyers, who wanted them to rebut the testimony of government witness Nancy Tullos, the former chief of human resources at Broadcom.

Carney found that prosecutors had improperly influenced the testimony of Samueli, Dull and Tullos, who pleaded guilty in 2007 to obstruction of justice.

In the case of Samueli, Carney said he had difficulty finding that the former Broadcom executive had committed a crime.

Samueli had been awaiting sentencing after pleading guilty to making a false statement to the SEC when, during an evidentiary hearing on Dec. 9, Carney abruptly set aside Samueli's guilty plea following his testimony in the Ruehle case.

On Tuesday, Carney admonished the government for leaking misleading information about grand jury proceedings to the news media, pressuring Broadcom to terminate Samueli's employment while the investigation was under way, and leading Samueli to believe that the lead prosecutor in the case, Assistant U.S. Attorney Andrew Stolper, had been replaced.

"The government's treatment of Samueli was shameful," Carney said, declaring prosecutors' tactics in inducing Samueli's plea agreement "unconscionable." The tone was in striking contrast to Carney's pronouncements last year, when he rejected the plea deal on the ground that it gave the impression that "justice is for sale." Under the deal, Samueli would have paid \$12 million to the U.S. Treasury but served no jail time.

Also last year, Carney rejected claims that Stolper had leaking misleading information about grand jury proceedings to reporters at the Los Angeles Times and The Wall Street Journal. But during the Dec. 9 hearing, Stolper acknowledged that he had spoken with reporters, calling it the "stupidest thing I have done in my career."

Regarding Dull, Carney complained that the government left him "hanging in the wind" for two years by not charging him while treating him as a co-conspirator in the case. Two weeks ago, Asperger told the judge that Stolper had threatened to charge his client with perjury based on statements that Dull planned to make when he took the stand in the Ruehle case. Subsequently, prosecutors reached a nonprosecution agreement with Dull.

"The lead prosecutor somehow forgot that truth is not negotiable," Carney said.

In the case of Tullos, he said, prosecutors inappropriately contacted the general counsel of the company she went to work for after leaving Broadcom, causing her to lose that job. Carney found her plea deal "unusual" in that, after a "grueling interrogation," she admitted ordering the deletion of an e-mail message seven years before the Broadcom investigation began.

"I have absolutely no confidence that Tullos's testimony was based on her own recollection of events," the judge said.

Tullo's lawyer, Jason de Bretteville of the Palo Alto, Calif., office of New York's Sullivan & Cromwell, informed Ruehle's lawyers that prosecutors had made threats similar to those against Dull to his client — suggesting that she "could be charged if she did or did not testify in a particular manner," according to Ruehle's motion to dismiss.

Carney concluded that the government's misconduct would deprive Ruehle of a fair trial, but he also cited "considerable debate" about whether the accounting practices at issue, which are used by major companies including Microsoft Corp. and Apple Inc., constitute a crime.

As for Nicholas, Carney dismissed the backdating charges because that case relied on the same three witnesses at issue in the Ruehle case. He set a hearing for the government to prove why a separate narcotics case against Nicholas should not be dismissed, saying that it could raise new allegations of prosecutorial misconduct, including a claim that prosecutors forced Nicholas's 13-year-old son to testify against his father.

Carney lifted the stay in the related SEC civil securities fraud case and dismissed that action. The agency can refile its case, he said, but could "have great difficulty" in making it stick.

SEC spokesman John Heine declined comment.

The government filed its case against Nicholas and Ruehle after the company restated its earnings by \$2.2 billion in 2006, when the backdating came to light. It was the largest restatement on record in the United States.

The prosecutorial misconduct claims in the Broadcom case came as federal prosecutors in San Francisco attempted to revive their stock-options backdating case against the former chief executive of Brocade Communications Systems Inc., according to The Recorder, an affiliate of the NLJ. In that case, the U.S. Court of Appeals for the 9th Circuit reversed the 2007 conviction of that executive, Gregory Reyes, on prosecutorial misconduct ground. In particular, the

appellate court found that one of the prosecutors had incorrectly claimed during his closing arguments that Brocade's finance department didn't know about backdating.

Marmaro represented the defendant in both trials.

Outside court on Tuesday, Marmaro declined to comment, stating he was "just overwhelmed."

Skadden Arps issued a statement soon after the ruling: "Judge Carney's ruling was the right result. What happened today was not just an important day for Bill Rühle and Broadcom, it was an important day for justice; justice was served today."