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8 UNITED STATES DISTRICT COURT  
9 NORTHERN DISTRICT OF CALIFORNIA

10  
11 IN RE SIPEX CORPORATION  
12 SECURITIES LITIGATION

13  
14 This Document Relates To:  
15 ALL ACTIONS

Master File No. 05-CV-00392 (WHA)

CLASS ACTION

**DEFENDANT WALID MAGHRIBI'S  
RESPONSE TO SEPTEMBER 29, 2005  
REQUEST FOR INFORMATION**

Revised date: November 17, 2005  
(per Court order)  
Time: 8:00 a.m.  
Courtroom: 9

The Honorable William H. Alsup

1 Defendant Walid Maghribi respectfully submits this memorandum in response to the  
2 questions presented in the Court's September 29, 2005 Request for Information.

3 1. Sipex's motion to dismiss contends that the absence of restated financial  
4 statements is one reason why Plaintiffs' Complaint does not state a Section 10(b) claim, and Mr.  
5 Maghribi's motion to dismiss the Section 20(a) claim depends on the success of Sipex's motion.  
6 If the Court finds that the absence of restated financials is either dispositive of the present  
7 motions or a meaningful factor in ruling upon them, it makes sense for the Court to grant the  
8 motions on that basis, with leave to amend upon completion of the restatement. This would  
9 produce an additional benefit: should the restatement produce numbers that are not materially  
10 different, or changes to the timing but not the amount of reported revenue, the significance, if  
11 any, of Plaintiffs' contention that there was a substantial fraud at Sipex would be weakened for  
12 lack of a factual predicate. If the Court does not agree the absence of restated numbers has any  
13 significance to the motions to dismiss, it makes sense to consider the motions on other grounds.

14 2. Mr. Maghribi respectfully suggests that if the Court grants the present motions to  
15 dismiss with leave to amend upon the completion of the restatement (or for other reasons), its  
16 order to that effect require that any amended complaint name those sources who are no longer  
17 employed at Sipex. The Court has ample authority to require that Plaintiffs name anonymous  
18 sources as a condition of proceeding in this litigation. 15 U.S.C. § 78u-4(b)(1) requires that a  
19 securities complaint state "all facts" supporting its information and belief allegations, at penalty  
20 of dismissal. The statutory text does not exempt the names of sources from this requirement; it  
21 uses the phrase "all facts." *Accord, In re Initial Public Offering Sec. Litig.*, 241 F. Supp. 2d 281,  
22 383 & n.256 (S.D.N.Y. 2003) (interpreting an NASD regulation that is key to allegations of  
23 securities case) ("All means *all*; any means *any*"; finding absurd any contrary reading).

24 The all facts requirement did not go unchallenged. In debating the Reform Act, the  
25 House of Representatives considered an amendment that would have removed the following  
26 provision of the bill as it was then under consideration: "If an allegation is made on information  
27 and belief, the complaint shall set forth with specificity all information on which that belief is  
28 formed." 141 CONG. R. H2760, H2769 (Mar. 7, 1995) (H.R. 1058 as introduced in House); 141

1 CONG. R. H2818, H2848 (Mar. 8, 1995) (amendment). Representative Bryant, the sponsor of the  
2 amendment, explained that protecting the identity of whistleblowers was a prime reason for it:

3 Again, at the beginning of the case the plaintiff would have to set forth “with specificity  
4 all information,” they have to give all the information in advance that forms the basis for  
5 the allegations of the plaintiff, meaning any whistle-blower within a securities firm  
involved would have to be uncovered in the pleadings in the very, very beginning.

6 *Id.* Representative Dingell agreed, opining that as the bill was drafted, securities plaintiffs “must  
7 literally, in your pleadings, include the names of confidential informants, employees, competitors,  
8 Government employees, members of the media, and others who have provided information  
9 leading to the filing of the case. And even where they have requested anonymity, oftentimes out of  
10 fear of retaliation you must submit those names.” *Id.* at H2849.

11 The amendment was defeated. *Id.* at H28551-52. The all facts text of the present statute  
12 was included in the final bill as reported by the Conference Committee. A law professor urged  
13 that President Clinton veto the bill, citing as among his reasons: “The proposed legislation also  
14 does considerable damage to notions of privilege and confidence by demanding that allegations  
15 on information and belief must be accompanied by a particularization of ‘all facts on which that  
16 belief is formed.’” 141 CONG. R S19034, S19040 (Dec. 21, 1995) (quoting letter from Arthur  
17 Miller). The bill was enacted over the President’s veto. The Second Circuit, in *Novak v. Kasaks*,  
18 cited below, regarded these statements from the opponents of the Reform Act as “hyperbolic” and  
19 irrelevant. While Mr. Maghribi agrees that the opponents of a piece of legislation are not the best  
20 source of its meaning, this rule shouldn’t be inverted into the proposition that the position of the  
21 opponents – the losing side – becomes the law. *See In re Nice Sys., Ltd. Sec. Litig.*, 135 F. Supp.  
22 2d 551, 570-72 (D.N.J. 2001) (crediting legislative history set forth above in criticizing *Novak*).

23 Nevertheless, the Second Circuit fashioned a carve-out to 15 U.S.C. § 78u-4(b)(1) in  
24 *Novak v. Kasaks*, 216 F.3d 300 (2000). It concluded that “all facts” does not mean “all facts.”  
25 *Id.* at 313-14. Its primary basis was that the Reform Act merely carried over the previous  
26 securities jurisprudence of the Second Circuit and Rule 9(b). *Id.* The Ninth Circuit rejected this  
27 philosophy in *Silicon Graphics*, with good reason. *Novak* also decided that the “facts” upon  
28 which information and belief allegations are made do not include the identities of the sources of

1 those allegations. *Id.* at 313. This purported irrelevance of the names of sources to the basis of  
2 the allegations provided by those sources is difficult to understand: a securities case cannot be  
3 litigated to the merits on the basis of allegations from purported witnesses whose identities  
4 remain secret. The identities of sources also could be relevant at the pleading stage; for example,  
5 if a source filed a separate wrongful termination lawsuit, the judicially noticeable record of that  
6 case may contain admissions relevant to the allegations in the securities complaint.

7 In the final analysis, *Novak* holds that courts *may* conclude that a complaint need not  
8 name its sources in order to satisfy 15 U.S.C. § 78u-4(b)(1). *See also In re Daou Sys., Inc. Sec.*  
9 *Litig.*, 411 F.3d 1006, 1015-16 (9th Cir. 2005) (following *Novak* without statutory analysis;  
10 complaint in that case did not need to name sources in order to satisfy 15 U.S.C. § 78u-4(b)(1)).  
11 This implies that courts may reach the opposite conclusion, and may require disclosure as a  
12 condition of proceeding in a litigation. Here, in particular, the Court may require disclosure with  
13 the assurance that there is no need to protect the CWs from retaliation, as they are no longer with  
14 Sipex. Indeed, there is even less of a need today than there may have been in 1995 (when the  
15 Reform Act was debated) or 2000 (when *Novak* was decided) for courts to exclude key facts  
16 regarding the basis of information and belief allegations from the “all facts” that must be  
17 disclosed by statute in order to protect purported whistleblowers. *See Sarbanes-Oxley Act § 806*  
18 *(giving purported whistleblowers private right of action against their employers).* Beyond this,  
19 sources who are no longer employees have no legitimate right to further protection from  
20 disclosure. Allegations of securities fraud are serious. It’s not too much to require the persons  
21 who make those allegations to stand behind them.

22 Respectfully submitted,

23 October 5, 2005

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24 By /s/ DAVID PRIEBE

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