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NOT FOR CITATION  
IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

LAWRENCE JOSEPH, On Behalf of  
Himself and All Others Similarly Situated,

NO. C 04-04908 JW

Plaintiff,

**ORDER CONSOLIDATING CASES;  
DENYING REQUEST FOR  
PRESERVATION OF EVIDENCE;  
APPOINTING OPERATING ENGINEERS  
GROUP AS LEAD PLAINTIFF; AND  
APPROVING LEAD PLAINTIFF'S  
CHOICE OF LEAD COUNSEL**

v.

UTSTARCOM, INC., et al.,

Defendants.

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**I. INTRODUCTION**

There are presently four federal securities fraud class action lawsuits (the "Actions") pending in this District against Defendants UTStarcom, Inc. ("UTStarcom" or "Company") and several of its executive officers and directors (collectively "Defendants").<sup>1</sup> The Actions are brought on behalf of purported classes of investors claiming to have sustained financial losses due to Defendants' alleged misrepresentations. The Actions allege slightly different Class Periods. Plaintiff in this case alleges a Class Period between April 16, 2003 and August 11, 2004.

After Plaintiff, the first filed plaintiff, published notice of the pendency of his lawsuit to prospective class members, several parties filed and withdrew motions to consolidate the Actions, to

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<sup>1</sup> Lawrence Joseph v. UTStarcom, Inc., et al., No. CV-04-4908 (filed November 17, 2004); Keith D. Schwanz v. UTStarcom, Inc., et al., No. CV-04-4991 (filed November 24, 2004); Jeffrey D. Lebzetter v. UTStarcom, Inc., et al., No. CV-04-5136 (filed December 2, 2004); and Carla Tiemann v. UTStarcom Inc., et al., No. CV-04-5132 (filed December 3, 2004).

1 appoint themselves as lead plaintiff and to approve their respective choices of lead counsel. Presently  
2 before this Court are three motions to consolidate (filed by the Operating Engineers Group, the  
3 UTStarcom Investors Group, and the Ostroff Group) and three motions to appoint lead plaintiff and  
4 lead counsel (filed by the same). In its Motion to Consolidate, the Operating Engineers Group also  
5 requests that this Court order the preservation of documents.

6 Defendants agree that the Actions should be consolidated, but oppose an order for preservation  
7 of documents. (Statement of Certain Defendants In Response to Plaintiffs' Motions at 2:5-6, 3:1-2.)  
8 Defendants also request a schedule for briefing and hearing any motions to dismiss the amended  
9 consolidated complaint. At this time, Defendants take no position with respect to the Motions for  
10 Appointment as Lead Plaintiff or Approval of Lead Counsel.

11 For the reasons set forth below, this Court consolidates the Actions, appoints the Operating  
12 Engineers Group as Lead Plaintiff, and approves the Operating Engineers Group's choice of the law  
13 firm Lerach Coughlin Stoia Geller Rudman & Robbins LLP ("Lerach Coughlin") as Lead Counsel.

## 14 II. BACKGROUND

15 UTStarcom manufactures and sells telecommunications equipment and products, and provides  
16 services associated with their operations. On November 17, 2004, Lawrence Joseph filed the first of  
17 the above-mentioned Actions. His complaint alleges that between April 16, 2003 and August 11,  
18 2004 (the "Class Period"), Defendants issued false and misleading financial statements, and thereby  
19 caused UTStarcom's shares to trade at artificially inflated levels in violation of the Securities  
20 Exchange Act of 1934.

21 On November 18, 2004, Mr. Joseph caused a notice to be published over *Business Wire*  
22 setting forth the pendency of his action, the claims alleged therein, the purported class action period  
23 and the right of any class member to seek appointment as lead plaintiff.

24 On January 14, 2005, six purported class members filed timely motions with this Court seeking  
25 consolidation of the Actions, appointment of themselves as lead plaintiff and approval of their  
26 respective choices of lead counsel. Three of these six movants have since withdrawn their motions.

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1 The remaining moving parties are the Operating Engineers Group, the UTStarcom Investors Group,  
2 and the Ostroff Group.

3 The Operating Engineers Group is comprised of an institutional investor (Locals 302 and 612  
4 of the International Union of Operating Engineers-Employers Construction Industry Retirement Trust)  
5 and an individual investor (Erwin Debruyker).

6 The UTStarcom Investors Group is comprised of five individual investors (Lawrence Sands,  
7 John Storer, Chandra Panchmia, Walter Alster and Daniel Robards) as well as Robards, Inc. (of  
8 which Daniel Robards is the principal and sole shareholder).

9 The Ostroff Group is comprised of two individual investors (Irwin Ostroff and Wayne  
10 Mendoza).

### 11 III. STANDARDS

#### 12 A. Consolidation

13 This Court has broad discretion to consolidate actions involving "common issues of law or  
14 fact." FED. R. CIV. P. 42(a); see also In re Equity Funding Corp. of Am. Sec. Litig., 416 F. Supp. 161,  
15 175 (C.D. Cal. 1976). Consolidation serves the interests of judicial economy and is "particularly  
16 appropriate in the context of securities class actions if the complaints are based on the same public  
17 statements and reports and defendants will not be prejudiced." Malasky v. IAC/InteractiveCorp.,  
18 Fed. Sec. L. Rep. (CCH) P93,059; 2004 U.S. Dist. LEXIS 25832, at \*5-\*6 (S.D.N.Y. 2004) (internal  
19 citations and quotations omitted).

#### 20 B. Preservation of Evidence

21 The Private Securities Litigation Reform Act (PSLRA) imposes a duty on a defendant to  
22 preserve evidence when the defendant receives actual notice of the complaint. The statute provides,  
23 in relevant part, that

24 [d]uring the pendency of any stay of discovery pursuant to this paragraph, unless  
25 otherwise ordered by the court, any party to the action with actual notice of the  
26 allegations contained in the complaint shall treat all documents, data compilations  
(including electronically recorded or stored data), and tangible objects that are in the  
27 custody or control of such person and that are relevant to the allegations, as if they were  
the subject of a continuing request for production of documents from an opposing party

1 under the Federal Rules of Civil Procedure.

2 15 U.S.C. § 78u-4(b)(3)(C)(i).

3 Generally, courts will not issue a preservation order absent some evidence of non-compliance.  
4 See, e.g., Ferrari v. Gisch, 2004 U.S. Dist. LEXIS 26737, at \*40-\*45 (C.D. Cal. 2004) ("Given that  
5 the statute specifically imposes a duty on Defendants to preserve evidence, that Defendants represent  
6 they have complied and will comply with the statute, and that plaintiffs have adduced no evidence of  
7 non-compliance, the court declines to enter an order mandating the preservation of evidence"); see  
8 also In re Grand Casinos, Inc. Secs. Litig., 988 F. Supp. 1270, 1273 (D. Minn. 1997) (declining to  
9 order the preservation of evidence because "the preservation of evidence in the possession of parties  
10 is statutorily automatic").

### 11 **C. Appointment of Lead Plaintiff**

12 The PSLRA provides that after the consolidation decision is rendered, the court shall appoint a  
13 lead plaintiff in a timely fashion. 15 U.S.C. § 78u-4(a)(3)(B)(ii). The PLSRA provides a three-step  
14 process for identifying the lead plaintiff in a securities fraud case. Serafimov v. Netopia, Inc., 2004  
15 U.S. Dist. LEXIS 25184, at \*7 (N.D. Cal. 2004). First, the first-filed plaintiff publishes notice setting  
16 forth the pendency of the action, the claims made, and the purported class period and announces the  
17 right of any member of the class to move for appointment as lead plaintiff within 60 days. Id. Second,  
18 the court selects the plaintiff with the "largest financial interest" and who meets the Rule 23  
19 requirements as the presumptive lead plaintiff. Id. Third, the court allows other plaintiffs the  
20 opportunity to rebut the presumptive lead plaintiff's showing that it satisfies the Rule 23 typicality and  
21 adequacy requirements. Id.

#### 22 ***I. Notice***

23 In a securities class action governed by the PSLRA, the first plaintiff to file a complaint must,  
24 within 20 days of filing the complaint, post a qualifying notice setting forth the pendency of the action,  
25 the claims made, the purported class period and the right of any member of the class to move for  
26 appointment as lead plaintiff within 60 days. 15 U.S.C. § 78u-4(a)(3)(A)(i).

1 **2. Largest Financial Interest and Rule 23 Requirements**

2 Courts must "appoint as lead plaintiff the member or members of the purported plaintiff class  
3 that the court determines to be most capable of adequately representing the interests of class  
4 members." 15 U.S.C. § 78u-4(a)(3)(B)(i). In selecting the lead plaintiff,

5 the court shall adopt a presumption that the most adequate plaintiff in any private action  
6 arising under this chapter is the person or group of persons that –

- 7 (aa) has either filed the complaint or made a motion in response to a notice . . . ;
- 8 (bb) in the determination of the court, has the largest financial interest in the relief  
sought by the class; and
- 9 (cc) otherwise satisfies the requirements of Rule 23 of the Federal Rules of Civil  
Procedure.

10 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I).

11 With respect to Rule 23, only a preliminary showing of typicality and adequacy is necessary at  
12 this stage of the litigation. Ferrari, 2004 U.S. Dist. LEXIS 26737, at \*25. The typicality requirement  
13 is satisfied where 1) the representative plaintiff's claim arises from the same course of events from  
14 which the claims of the other class members arise, and 2) the representative plaintiff's claim and other  
15 class members claims involve similar legal theories. See Malasky, 2004 U.S. Dist. LEXIS 25832, at  
16 \*11 (citing Sczesny Trust v. KPMG LLP, 223 F.R.D. 319, 323-324 (S.D.N.Y. 2004)); see also  
17 Ferrari, 2004 U.S. Dist. LEXIS 26737, at \*25.

18 Rule 23 also requires the representative plaintiff be able to "fairly and adequately protect the  
19 interests" of all members of the class. FED. R. CIV. P. 23(a)(4). In evaluating adequacy, courts  
20 consider factors such as: 1) the size, available resources and experience of the proposed lead  
21 plaintiff; 2) the qualifications of the proposed class counsel; and 3) any potential conflicts or  
22 antagonisms rising among purported class members. Ferrari, 2004 U.S. Dist. LEXIS 26737, at \*12  
23 (internal citations omitted).

24 A group of investors may be appointed as lead plaintiff under the PSLRA. 15 U.S.C. § 78u-  
25 4(a)(3)(B)(iii)(I) (the "most adequate plaintiff" may be a person or group of persons). This Court  
26 requires members of a plaintiff group to have "a meaningful relationship preceding the litigation, and  
27

1 be united by more than the happenstance of having bought the same securities." Serafimov, 2004 U.S.  
 2 Dist. LEXIS 25184, at \*10 at fn 4 (quoting Aronson v. McKesson HBOC, Inc., 79 F. Supp. 2d 1146,  
 3 1154 (N.D. Cal. 1999); see also In re Critical Path, Inc., Sec. Litig., 156 F. Supp. 2d 1102, 1111  
 4 (N.D. Cal. 2001) (a preexisting relationship is paramount in determining whether to accept a group as  
 5 lead plaintiff); In re Network Associates, Inc., 76 F. Supp. 2d 1017, 1022-1026 (N.D. Cal. 1999)  
 6 (denying appointment of investor group as lead plaintiff where the only thing the investors have in  
 7 common is their lawyer, they have no link to each other, they have no cohesive identity, and they are  
 8 not organized with any group decisionmaking apparatus).

### 9 **3. *Rebuttal of Presumptive Lead Plaintiff's Showing of Typicality and Adequacy***

10 The court must give other class members the opportunity to rebut the presumptive lead  
 11 plaintiff's showing that it satisfies the typicality and adequacy requirement of Rule 23. This  
 12 presumption may be rebutted

13 only upon proof by a member of the purported plaintiff class that the presumptively most  
 14 adequate plaintiff –

15 (aa) will not fairly and adequately protect the interests of the class; or

16 (bb) is subject to unique defenses that render such plaintiff incapable of adequately  
 representing the class.

17 15 U.S.C. § 78u-4(a)(3)(B)(iii)(II).

18 If the challenging plaintiff successfully rebuts the presumptive lead plaintiff's showing, the  
 19 court determines whether the plaintiff with the next highest stake in the litigation has made a prima  
 20 facia showing of typicality and adequacy. Serafimov, 2004 U.S. Dist. LEXIS 25184, at \*16. "If so, it  
 21 must declare that plaintiff the presumptive lead plaintiff and repeat step three of the process by giving  
 22 other plaintiffs an opportunity to rebut that showing. This process must be repeated sequentially until  
 23 all challenges have been exhausted." Id. (quoting In re Cavanaugh, 306 F.3d 726, 731 (9th Cir.  
 24 2002)).

### 25 **D. Approval Of Lead Counsel**

26 The PLSRA provides that "the most adequate plaintiff shall, subject to the approval of the  
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1 court, select and retain counsel." 15 U.S.C. § 78u-4(a)(3)(B)(v). "A court may disturb the Lead  
 2 Plaintiff's choice of counsel only if it appears necessary to 'protect the interests of the class.'" Ferrari,  
 3 2004 U.S. Dist. LEXIS 26737, at \*40-\*41 (citing 15 U.S.C. § 78u-4(a)(3)(B)(iii)(II)(aa)).

#### 4 IV. DISCUSSION

##### 5 A. Consolidation Is Proper Because The Actions Involve Similar Questions Of Law And Fact

6 Pursuant to Fed. R. Civ. P. 42(a), this Court has discretion to consolidate actions involving  
 7 similar questions of fact and law for purposes of efficiency. In re Equity Funding, 416 F. Supp. at  
 8 175. Consolidation is particularly appropriate in securities class actions where the complaints are  
 9 based on the same public statements and reports. Malasky, 2004 U.S. Dist. LEXIS 25832, at \*5-\*6.

10 The four securities class action cases before this Court present substantially similar questions  
 11 of law and fact. Each alleges violations of the same sections of the Exchange Act, and each action  
 12 names the same defendants. Because these actions are based on the same facts and involve the same  
 13 subject matter, the same discovery will be relevant to all lawsuits. Consolidation is therefore proper.

##### 14 B. A Preservation Order Is Unnecessary Because Defendants Are Already Statutorily 15 Obligated to Preserve Evidence

16 The Operating Engineers Group requests in its Motion to Consolidate an order for the  
 17 preservation of documents in accordance with 15 U.S.C. § 78u-4(b)(3)(C)(i). (Operating Engineers  
 18 Group's Motion to Consolidate at 6:16-18.) Defendants, however, are already statutorily obligated to  
 19 preserve evidence. See 15 U.S.C. § 78u-4(b)(3)(C)(i); see also In re Tyco Int'l, Ltd., Sec. Litig., 2000  
 20 D.N.H. 268; 2000 U.S. Dist. LEXIS 11659, at \*6 (D.N.H. 2000) ("[A]bsent a showing that defendants  
 21 are not acting in accordance with their statutory duty, the PSLRA's preservation provision should be  
 22 sufficient to ensure the preservation of relevant evidence in the defendant's control"). Absent  
 23 evidence of non-compliance, this Court adopts the reasoning shared by other district courts and  
 24 declines to enter an order mandating preservation of evidence.

##### 25 C. The Operating Engineers Group Is the Most Adequate Plaintiff to Bring this Action on 26 Behalf of the Class Members

27 As discussed above, the PSLRA provides a three-step procedure for selecting the lead  
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1 plaintiff in a securities class action. The first step, requiring published notice by the first-filed  
2 complaint, was satisfied on November 18, 2004 when Mr. Joseph caused a notice to be published in  
3 *Business Wire*.

4 Second, this Court must determine which movant possesses the largest financial interest in the  
5 relief sought by the class. 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I). Based upon their motions and  
6 supporting declarations, it is clear that the Operating Engineers Group suffered the greatest financial  
7 loss.<sup>2</sup>

8 The Operating Engineers Group has also made a preliminary showing that it satisfies the  
9 requirements of Rule 23. Typicality is satisfied because its claims arise from the same course of  
10 conduct and the same operative facts which damaged the entire class. Adequacy is satisfied because  
11 its interests are not antagonistic to those of the class and it has proposed as lead counsel a law firm  
12 experienced in securities litigation and well-suited to prosecute this action on behalf of the class.  
13 Furthermore, the Operating Engineers Group is composed of an insitutional investor (Locals 302 and  
14 612 of the International Union of Operating Engineers-Employers Construction Industry Retirement  
15 Trust) and an individual investor (Erwin Debruyker). The Operating Engineers Group's size,  
16 sophistication, and resources are factors that contribute to their adequacy.

17 The PSLRA expressly contemplates the appointment of groups as lead plaintiff. 15 U.S.C. §  
18 78u-4(a)(3)(A)(i) (the lead plaintiff may be a "person or group of persons"). Also, Congress, in  
19 enacting the PSLRA, "expected that the lead plaintiff would normally be an institutional investor with  
20 a large stake in the outcome" and the ability to "monitor, manage and control the litigation." In re  
21 Network Assoc., 76 F. Supp. 2d at 1020. In selecting a group as lead plaintiff, this Court favors those  
22 groups small enough to effectively manage the litigation and the lawyers, or those who have  
23 meaningful prelitigation relationships. Id. at 1026. "Artificial aggregation . . . should never be

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25 <sup>2</sup> Each movant's claimed losses are as follows: the Operating Engineers Group,  
26 \$1,421,641.80 (Memorandum of Points and Authorities in Support of Motion to Appoint the Operating  
27 Engineers Group as Lead Plaintiff at 6:10-11); the UTStarcom Investors Group, \$659,089.88 (Motion  
to Appoint UTStarcom Investors Group as Lead Plaintiff at 3:15-16); the Ostroff Group, \$515,059.17  
(Motion to Appoint the Ostroff Group as Lead Plaintiff at 2:12-13).

1 allowed for any purpose, including to serve as lead plaintiff." *Id.* at 1027. In this Court's opinion, the  
2 Operating Engineers Group will effectively manage the litigation and the lawyers, and will  
3 competently pursue litigation in the best interests of the class.

4 Because the Operating Engineers Group possesses the largest financial interest in this  
5 litigation and because it satisfies the requirements of Rule 23, this Court views it as the presumptive  
6 lead plaintiff.<sup>3</sup>

#### 7 **D. The Court Approves Operating Engineers Group's Choice of Lead Counsel**

8 As discussed above, the PSLRA provides that "the most adequate plaintiff shall, subject to the  
9 approval of the court, select and retain counsel." 15 U.S.C. § 78u-4(a)(3)(B)(v). "A court may  
10 disturb the Lead Plaintiff's choice of counsel only if it appears necessary to 'protect the interests of the  
11 class.'" *Ferrari*, 2004 U.S. Dist. LEXIS 26737, at \*40-\*41 (citing 15 U.S.C. § 78u-  
12 4(a)(3)(B)(iii)(II)(aa)).

13 The Operations Engineers Group has selected Lerach Coughlin to represent them. The Court  
14 has reviewed Lerach Coughlin's resume and is satisfied that it is capable of serving competently in the  
15 role of Lead Counsel. The firm has extensive experience in prosecuting securities class actions and a  
16 litigation team consisting of attorneys, investigators and forensic accountants. Thus, this Court  
17 approves the Operating Engineers Group's choice of Lerach Coughlin as Lead Counsel.

#### 18 **V. CONCLUSION**

19 For the reasons set forth above, the Operating Engineers Group's, the Ostroff Group's, and the  
20 UTStarcom Investors Group's Motions to Consolidate are GRANTED; the Operating Engineers  
21 Group's request for a Preservation of Evidence order is DENIED; the Operating Engineers Group's  
22 Motion for Appointment as Lead Plaintiff and Approval of Lead Counsel is GRANTED; and the  
23 UTStarcom Investors Group's and the Ostroff Group's Motions for Appointment as Lead Plaintiff

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27 <sup>3</sup>At this time, the Operation Engineers Group's Motion is unopposed.

1 and approval of Lead Counsel is DENIED.

2 Dated: March 14, 2005

/s/James Ware  
JAMES WARE  
United States District Judge

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15 **Dated: March 14, 2005**

**Richard W. Wieking, Clerk**

17 **By: /s/ JWchambers**  
 18 **Ronald L. Davis**  
 19 **Courtroom Deputy**