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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

In re UTSTARCOM, INC. SECURITIES
LITIGATION

NO. C 04-04908 JW

**ORDER GRANTING PLAINTIFFS'
MOTION FOR LEAVE TO FILE
SECOND AMENDED COMPLAINT**

This Order relates to ALL ACTIONS.

I. INTRODUCTION

Before the Court is a Motion for Leave to File the Second Amended Complaint brought by Lead Plaintiffs, Locals 302 and 612 of the International Union of Operating Engineers-Employers Construction Industry Retirement Trust and Erwin DeBruycker (collectively "Plaintiffs"). This case involves a federal securities fraud action brought on behalf of purchases of publicly traded securities against UTStarcom, Inc. ("UTStarcom"), various officers and directors, SOFTBANK Corporation, SOFTBANK America, SOFTBANK Holdings, Inc., and Banc of America Securities LLC (collectively "Defendants"). A hearing was held on February 13, 2006. Based on the parties' papers and on the arguments of counsel at the hearing, the Court GRANTS Plaintiffs' Motion for Leave to Amend, but orders Plaintiffs to file and serve the Second Amended Complaint in compliance with this Order on or before April 3, 2006.

II. BACKGROUND

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2 Lawrence Joseph filed the first complaint in this action on November 17, 2004. Following
3 an Order Relating Cases on December 7, 2005, numerous parties filed motions to be appointed as
4 Lead Plaintiff. Following the appointment, Plaintiffs filed a Consolidated Complaint on June 30,
5 2005 and a Corrected Consolidated Complaint on July 1, 2005. Defendants later stipulated to
6 Plaintiffs' filing of the First Amended Consolidated Complaint ("FACC"), filed on July 26, 2005,
7 which alleged that Defendants defrauded investors by making a series of materially false and
8 misleading statements regarding UTStarcom's business and financial condition in violation of
9 §§10(b) and 20(a) of the Securities Exchange Act of 1934 ("SEA").

10 Based on information made public by UTStarcom on October 6, 2005 ("October
11 disclosures"), Plaintiffs filed an Ex Parte Application to Stay Briefing on Motion to Dismiss prior to
12 the Court's October 10, 2005 deadline for Defendants' motion. The Court stayed briefing and
13 granted leave for Plaintiffs to file a motion to amend the FACC, which Plaintiffs filed on November
14 23, 2005. Defendants filed its Opposition to Plaintiffs' Motion for Leave to File the Second
15 Amended Complaint on December 20, 2005.

III. STANDARDS

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17 Leave to amend a pleading "shall be freely given when justice so requires." FED. R. CIV. P.
18 15(a). Generally, leave to amend is "to be applied with extreme liberality." Owens v. Kaiser Found.
19 Health Plan, Inc., 244 F.3d 708, 712 (9th Cir. 2001) (quoting Morongo Band of Mission Indians v.
20 Rose, 893 F.2d 1074, 1079 (9th Cir. 1990)). Factors weighed in determining whether leave should
21 be granted include undue delay, bad faith, futility, and prejudice to the opposing party. Griggs v.
22 Pace Am. Group, Inc., 170 F.3d 877, 880 (9th Cir. 1999). In considering these factors, the
23 consideration of prejudice to the opposing party carries the greatest weight. Eminence Capital,
24 L.L.C. v. Aspeon, Inc., 316 F.3d 1048, 1052 (9th Cir. 2003). Absent undue prejudice or a strong
25 showing of any other factors, "there exists a *presumption* under Rule 15(a) in favor of granting leave
26 to amend. Id. (emphasis in original); see also In re Fritz Co. Sec. Litig., 282 F. Supp. 2d 1105, 1109

1 (N.D. Cal. 2003).

2 **IV. DISCUSSION**

3 **A. Rule 15(a) Analysis**

4 Plaintiffs argue that the Proposed Second Amended Complaint ("PSAC") is necessary
5 because the information released by UTStarcom in the October disclosures provides the basis for
6 adding new claims to the FACC concerning fraudulent concealment, additional false statements, and
7 the mechanics of Defendants' fraud. (Plaintiffs' Notice of Motion and Motion for Leave to File the
8 Second Amended Complaint and Memorandum of Points and Authorities in Support Thereof
9 ("Mem."), Docket Item No. 93, at 4:18-25.) Specifically, the SAC would plead factual allegations
10 with greater specificity (Mem. at 4:16-27), extend the period in which the allegedly fraudulent
11 conduct occurred (Mem. at 5:24-6:2), and add additional named plaintiffs with standing to sue in
12 this extended period (Mem. at 6:7-14).

13 Plaintiffs contend that Defendants have failed to carry its burden of showing the existence of
14 undue delay, bad faith, futility, and prejudice. (Plaintiffs' Reply in Further Support of Motion for
15 Leave to File the Second Amended Complaint ("Reply"), Docket Item No. 110, at 2:19-24.)
16 Plaintiffs emphasize that absent prejudice, the most important factor, there is a presumption in favor
17 of granting the motion. (Mem. at 4:9-13.) On the other hand, Defendants argue that Plaintiffs'
18 inability to follow FED. R. CIV. P. 8(a) and 8(e) is evidence of futility weighing strongly against
19 granting the Motion. (Defendants' Opposition to Motion for Leave to File the Second Amended
20 Consolidated Complaint for Violation of Federal Securities Laws ("Opp'n"), Docket Item No. 102, at
21 9:10-18.) In the alternative, Defendants argue that Plaintiffs' proposed changes necessitate re-
22 publication of notice to allow another selection of Lead Plaintiffs. (Opp'n at 12:15-16.)

23 1. Undue delay

24 Plaintiffs have not been dilatory in seeking this amendment. The day after learning the new
25 details of Defendants' alleged fraud, Plaintiffs notified Defendants of their intent to amend the
26 FACC. (Reply at 3:4-6.) Plaintiffs then promptly complied with this Court's Order granting leave to
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1 file a Motion to Amend.

2 2. Bad Faith

3 Plaintiffs emphasize that the October disclosures provided more detail about the nature and
4 scope of the fraud previously asserted in the FACC. (Reply at 3:10-11.) Both the FACC and the
5 PSAC contain similar allegations regarding false and misleading statements and improper
6 accounting practices. (Reply at 3:18-24.) Plaintiffs argue that amendment of the FACC is proper
7 because Defendants chose to make the October disclosures and the disclosures themselves
8 necessitate the amendment. (Reply at 4:4-6.)

9 While Defendants assert the PSAC violates Rule 8 on its face (Opp'n at 1:19) and that the
10 PSAC differs significantly from the FACC (Opp'n at 1:12-13), Defendants do not expressly argue
11 that Plaintiffs have acted in bad faith. There is nothing to indicate Plaintiffs have filed this Motion
12 for any other reason than to respond to the October disclosures by bolstering previous claims with
13 more information and to add similar claims.

14 3. Futility

15 Defendants' primary contention is that the Court "should reject amendment on the basis of
16 futility for failure to comply with Rule 8." (Opp'n at 9:17-18.) The Court recognizes Defendants'
17 concern regarding the length and manner in which Plaintiffs have constructed the PSAC. However,
18 the Court agrees with Plaintiffs that a Motion for Leave to Amend is not the proper place to attack
19 the PSAC. In granting Lead Plaintiffs' Ex Parte Application to Stay Briefing on Motion to Dismiss,
20 the Court acknowledged that based on the public disclosures by UTStarcom, Plaintiffs had a valid
21 reason to seek amendment. Moreover, the Ninth Circuit has referred to futility "in the sense of not
22 being able to save the complaint." Griggs v. Pace American Group, Inc., 170 F.3d 877, 881 (9th Cir.
23 1999). Because the Court has not yet had the opportunity to examine the sufficiency on the merits
24 of the FACC, there is no reason to believe the FACC is not a viable complaint.

25 4. Prejudice

26 The Ninth Circuit has held that in order for a Court to justify denying leave to amend, the
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1 prejudice to the opposing party must be substantial. Morongo Band of Mission Indians v. Rose, 893
2 F.2d 1074, 1079 (9th Cir. 1990). Plaintiffs assert that Defendants will not suffer prejudice from the
3 amendment because the litigation is in its very early stages and Defendants will have the opportunity
4 to respond to the SAC. (Mem. at 2:7-12.) Without undue prejudice, Plaintiffs assert that Defendants'
5 Opposition must fail. (Reply at 2:22-24.)

6 As required by the Rule 15(a) analysis, the Court focuses its inquiry on the propriety of
7 granting the Motion for Leave to Amend and not the PSAC itself. Keeping in mind that granting
8 leave to amend should be applied with extreme liberality, Owens, 244 F.3d at 712, the Court does
9 not find that the prejudice factor weighs so heavily as to require denying the Motion. However, the
10 Court does find that the amendment would create a substantial burden for Defendants, such that the
11 Plaintiffs' are ordered to shorten the PSAC.

12 **B. Proposed Second Amended Complaint**

13 The heightened pleading standard in Rule 9(b) and the Private Securities Litigation Reform
14 Act ("PSLRA") does not negate the commands of Rule 8. See Copperstone v. TCSI Corp., 1999
15 WL 33295869, at *3 (N.D. Cal. Jan. 19, 1999) (stating that "[t]he heightened pleading standard of
16 Rule 9(b) is not an invitation to disregard the requirement of simplicity, directness, and clarity of
17 Fed. R. Civ. P. 8") (citing McHenry v. Renne, 84 F.3d 1172, 1178 (9th Cir. 1996)); see also In re
18 Westinghouse Sec. Litig., 90 F.3d 696, 703 (3d Cir. 1993) (quoting Vicom, Inc. v. Harbridge
19 Merchant Services, Inc., 20 F.3d 771, 776 (7th Cir. 1994)). Plaintiffs are required to craft a
20 complaint in such a way that does not cause Defendants "undue effort" in attempting to identify
21 allegedly fraudulent statements and the factual basis for the allegation. See In re Splash Tech.
22 Holdings, Inc. Sec. Litig., 160 F. Supp. 2d 1059, 1075 (N.D. Cal. 2001). The PSAC raises serious
23 concerns of puzzle-style pleading and length, in which Plaintiffs "apparently [expect Defendants and
24 the Court] to sort out and pair each statement with a supposedly relevant 'true fact.'" Wenger v.
25 Lumisys, Inc., 2 F. Supp. 2d 1231, 1243-44 (N.D. Cal. 1998).

1 1. Puzzle-Style Pleading

2 This district recognizes that lengthy and confusingly organized "puzzle-style" pleadings
3 impose a significant burden upon the opposing party and the Court to decipher the complaint. See,
4 e.g., In re Cornerstone Propane Partners, L.P. Sec. Litig., 355 F. Supp. 2d 1069, 1080-1081 (N. D.
5 Cal. 2005). Defendants contend that the PSAC is a puzzle-style pleading which places an
6 unnecessary burden on Defendants and the Court because of its length at 209 pages (Opp'n at 4:20-
7 5:2) and the fact that Plaintiffs reference hundreds of prior paragraphs in order to assert its fraud
8 claims (Opp'n at 5:11-21). Even after Defendants have followed Plaintiffs' cross-references in the
9 PSAC, Defendants contend that "the reasons for a statement's supposed falsity do not match up with
10 the challenged statement." (Opp'n at 8:1-4.) Further, Defendants have identified paragraphs in the
11 PSAC that discuss events outside of the proposed class period and characterize these as irrelevant.
12 (Opp'n at 5:3-9.)

13 In response to these arguments, Plaintiffs emphasize that "[i]t is improper to adjudicate the
14 sufficiency of the pleading before plaintiffs are even allowed to file the pleading" (Reply at 4:14-
15 15) because Defendants' cited cases involve pleadings at the motion to dismiss stage (Reply at 4:16-
16 19). Plaintiffs argue that the pleading standard for a securities claim should not bear on granting an
17 amendment. (Opp'n at 5:10-15.) If Defendants contest the sufficiency of the PSAC and its ability to
18 comply with pleading requirements, Plaintiffs submit that a Motion to Dismiss is the proper way to
19 address this concern.

20 While the Court agrees with Plaintiffs that an inability to comply with Rule 8 is not sufficient
21 to deny the present motion for leave to amend, the structure of the PSAC is not irrelevant to the
22 Court's management of this case. In its current form, the PSAC requires both Defendants and this
23 Court to determine "what the misleading statements are, and to match the statements up with the
24 reasons they are false or misleading." In re Autodesk, Inc. Sec. Litig., 132 F. Supp. 2d 833, 842
25 (N.D. Cal. 2000). Defendants have stated that they were in the process of preparing a Motion to
26 Dismiss when the Plaintiffs sought the Stay (Opp'n at 2:19-22), and the Court recognizes that while
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1 Plaintiffs criticize Defendants for bringing these arguments at an improper time, it is because of the
2 Court's Stay that Defendants have not yet brought these claims in a motion to dismiss.

3 2. Length

4 Plaintiffs assert that the length of the PSAC can be attributed to the heightened pleading
5 standard required under FED. R. CIV. P. 9(b) and the PLSRA, as well as the duration and extent of
6 Defendants' fraud. (Reply at 1:18-22.) Plaintiffs further defend against Defendants' assertion that
7 the PSAC's internal cross-references are confusing by arguing that the cross-references avoid
8 duplicating allegations through the Complaint to provide a short and plain statement consistent with
9 Rule 8(a). (Reply at 2:4-6.)

10 The Court notes that although Plaintiffs criticize Defendants' citations to cases involving
11 sufficiency of securities complaints at the motion to dismiss stage, Plaintiffs have failed to identify a
12 single case in which the Court permitted a complaint as long as the PSAC to proceed. See In re
13 Merrill Lynch & Co. Research Reports Sec. Litig, 218 F.R.D. 76, 78-79 (S.D.N.Y. 2003) (striking
14 portions of a 98 page amended complaint and permitting refile of the non-stricken portions that
15 were dismissed); United States v. Lockheed-Martin Corp., 328 F.3d 374, 376 (7th Cir. 2003)
16 (affirming dismissal of third amended complaint of 109 pages for failure to conform with pleading
17 requirements). Plaintiffs' failure to cite to this Court any case involving a complaint as long as the
18 PSAC that was not dismissed, in conjunction with the fact that many securities complaints of a
19 shorter length have been dismissed for failing to comply with Rule 8, are significant factors in this
20 Court's decision to order Plaintiffs to modify the PSAC.

21 3. Burden on Defendants

22 Defendants will be forced to bear an undue burden if Plaintiffs submit an amended complaint
23 that runs 209 pages and 392 paragraphs. In addition to the burden of responding to a complaint of
24 such length, "[j]udicial resources are too scarce and worthy cases too pressing for a court to spend its
25 time rooting around in bloated complaints drafted by experience lawyers." In re Conner Peripherals,
26 Inc., 1996 WL 193811, *1 (N.D. Cal. 1996). Because this Court recognizes that Defendants will be

1 significantly burdened by the second amended complaint as proposed, the Court GRANTS the
2 Motion for Leave to Amend but directs Plaintiffs to file an amended complaint no longer than 150
3 pages¹ on or before April 3, 2006.

4 In an attempt to prevent prejudice that may result from the length of the amended complaint,
5 the Court has several suggestions on how Plaintiffs can shorten the PSAC. First, as suggested at the
6 hearing and conceded by Plaintiffs, the background section could be shortened by excluding
7 portions detailing the objective history of the telecommunications industry in China. To the extent
8 that Plaintiffs allege a particular defendant had specific knowledge regarding telecommunications in
9 China that is relevant to this action, Plaintiff should so state. Second, the Court requests that
10 Plaintiffs refrain from including sections of the SEA verbatim, (See, e.g., PSAC at ¶ 114²), and
11 refrain from summarizing provisions of the Sarbanes-Oxley Act. Plaintiffs may assume that the
12 Court has a certain familiarity with the law, and may simply provide a brief citation to the relevant
13 sections if appropriate.

14 Third, the Court finds it unnecessary for Plaintiffs to include Defendants' signed
15 certifications, in their entirety, pursuant to § 302 of the Sarbanes-Oxley Act. (See PSAC at 80, 90,
16 128, 141 & 172.) In fact, in a section of the PSAC entitled "False Statements in the Stock and Notes
17 Registration Statement Concerning the Company's Lack of Internal and Disclosure Controls,"
18 Plaintiffs state that *each* SEC filing contained an attached certification similar to one listed directly
19 below. (See PSAC at 68-70.) The signed certifications appearing later in the PSAC are virtually
20 identical to the certification claimed to be attached to each SEC filing; the only differences are the
21 specific SEC Form to which the certification is attached (¶ 1 of the certifications) and the relevant
22 SEA Rules (¶ 4 of the certifications).

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24 ¹ At the hearing, Plaintiffs' counsel suggested that the PSAC could be shortened to 150
pages.

25 ² While the Court directs Plaintiffs' attention to specific pages where the PSAC can be
26 shortened, Plaintiffs' responsibility is not limited to the Court's citations in this Order. Plaintiff must
27 review the entire complaint to identify places where the SAC can be shorted to comply with the
Court's directions.

1 Fourth, the Court notes that Plaintiffs have chosen to include lengthy SEC Forms filed by
2 Defendants in which Defendants allegedly admit wrongdoing. (See PSAC at 77-79.) In doing so,
3 Plaintiffs emphasize specific portions of the Forms with bold and italicized font, but leave a
4 significant portion without emphasis. (See PSAC at 79 (the entire page consists of three paragraphs,
5 of which only three sentences are emphasized.)) To the extent that Plaintiffs believe the highlighted
6 portions are admissions necessary to show fraud, the Court directs Plaintiffs to exclude the portions
7 of the Forms which are not necessary to plead its claims.

8 With regard to the puzzle-style pleading, Plaintiffs cannot rely solely on internal cross-
9 references to show how statements are misleading. Defendants should not be forced to root through
10 hundreds of prior paragraphs to decipher Plaintiffs' claims. Should Plaintiffs find it appropriate to
11 use cross-references in their amended complaint, Plaintiffs must ensure that the internal cross-
12 references correctly pair the allegedly misleading statement with the reasons the statement is
13 misleading. The Court further directs Plaintiffs to provide *short* and *concise* paragraphs in
14 compliance with Rule 8 supporting the strong inference of scienter.

15 **C. Republication of Notice and Reappointment of New Lead Plaintiffs**

16 With regard to Defendants' request that this Court order republication of notice and
17 reappointment of new lead plaintiffs, the Court finds these requests to be outside the scope of a
18 Motion for Leave to Amend the FACC. In light of the fact that this Court orders Plaintiffs to file a
19 shortened amended complaint, the Court declines to address Defendants' arguments regarding notice
20 and lead plaintiff appointment at this time. Should Defendants wish to seek republication and
21 reappointment after Plaintiffs have filed the shortened amended complaint, they shall make a
22 separate motion at that time.

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V. CONCLUSION

For the foregoing reasons, the Court GRANTS Plaintiffs' Motion for Leave to File the Second Amended Complaint, but instructs Plaintiffs to modify the PSAC in compliance with this Court's instructions.

Dated: March 1, 2006

04cv4908amend

/s/ James Ware
JAMES WARE
United States District Judge

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21 **Dated: March 1, 2006**

Richard W. Wieking, Clerk

23 **By: /s/ JW Chambers**
Melissa Peralta
Courtroom Deputy