

1 LERACH COUGHLIN STOIA GELLER
 2 RUDMAN & ROBBINS LLP
 3 KIMBERLY EPSTEIN (169012)
 4 CHRISTOPHER P. SEEFER (201197)
 5 SHIRLEY H. HUANG (206854)
 6 100 Pine Street, Suite 2600
 7 San Francisco, CA 94111
 Telephone: 415/288-4545
 415/288-4534 (fax)
 kepstein@lerachlaw.com
 csefer@lerachlaw.com
 shuang@lerachlaw.com

Lead Counsel for Plaintiff

8 UNITED STATES DISTRICT COURT
 9 NORTHERN DISTRICT OF CALIFORNIA
 10 SAN JOSE DIVISION

11	In re UTSTARCOM, INC. SECURITIES)	Master File No. C-04-4908-JW(PVT)
12	LITIGATION)	
13	_____)	<u>CLASS ACTION</u>
14	This Document Relates To:)	PLAINTIFFS' OPPOSITION TO
15	ALL ACTIONS.)	UTSTARCOM DEFENDANTS' MOTION
16	_____)	FOR ORDER TO REPUBLISH CLASS
)	NOTICE AND REAPPOINT LEAD
)	PLAINTIFF

DATE: June 5, 2006
 TIME: 9:00 a.m.
 COURTROOM: The Honorable James Ware

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1 **I. INTRODUCTION**

2 Defendants have moved this Court for an order directing plaintiffs to republish notice to the
3 class, and convening a new lead plaintiff appointment process. Defendants assert that the Second
4 Amended Consolidated Complaint for Violations of the Federal Securities Laws (“SAC”)
5 purportedly presents a case that is substantially different than the case described in the prior notice to
6 UTStarcom, Inc. (“UTStarcom” or the “Company”) shareholders and in the First Amended
7 Consolidated Complaint for Violation of the Federal Securities Laws (“FAC”). In addition,
8 defendants contend that one of the current lead plaintiffs is no longer an adequate representative due
9 to the sale of its UTStarcom stock before part of the fraud alleged in the SAC. Both of these
10 contentions are incorrect for numerous reasons.

11 As an initial matter, however, defendants do not have standing to object to the lead plaintiff
12 selection process. Numerous courts have so ruled and defendants have not cited a single case where
13 the court ordered a new lead plaintiff appointment process in response to a *defendant’s* motion. In
14 this case, no potential *plaintiff* has filed suit or asked for a new lead plaintiff appointment process.
15 For this reason alone, defendants’ motion should be denied.

16 Substantively, a new lead plaintiff appointment process is not required because (1) most of
17 the allegations in the SAC are exactly the same as the allegations in the FAC, and (2) the new
18 allegations in the SAC are closely related to the allegations in the FAC. Defendants ignore – and do
19 not even cite – the numerous cases where courts have held that amending a complaint to extend the
20 class period and add new facts that are closely related to those alleged in the original complaint
21 provide no justification for a new lead plaintiff selection process.

22 Instead, defendants cite inapposite cases that actually support denial of their motion. As
23 explained below, defendants cite cases where the court required a new lead plaintiff appointment
24 process because plaintiffs either added new legal claims or new classes of securities that were not
25 included in the original complaint. Neither of those circumstances exists in this case. In addition,
26 defendants rely on *In re LeapFrog Enters., Inc. Sec. Litig.*, No. C-03-05421 RMW, slip op. at 4

27
28

1 (N.D. Cal. July 5, 2005)¹ where the court ordered a new lead plaintiff appointment process because
2 the amended complaint “vastly expand[ed]” and “dramatically alter[ed] the contours of the lawsuit”
3 by increasing the 21-page original complaint to 135 pages and by alleging facts that were not
4 included or closely related to the allegations contained in the original 21-page complaint. Here, the
5 150-page SAC is 60 pages shorter than the 210-page FAC and the allegations in the SAC are either
6 the same as those in the FAC or closely related to the allegations in the FAC.

7 Defendants’ assertion that a new lead plaintiff appointment process is required because one
8 of the Court-appointed lead plaintiffs is purportedly no longer an adequate representative due to the
9 sale of its UTStarcom stock before the end of the Class Period (February 21, 2003 through October
10 6, 2005) is nonsensical. Indeed, in *In re VeriSign Sec. Litig.*, No. C 02-02270 JW(PVT), 2005 U.S.
11 Dist. LEXIS 10439 (N.D. Cal. Jan. 13, 2005), a case defendants fail to mention in their brief, this
12 Court rejected the same argument:

13 Simply because certain class members were injured by misrepresentations that came
14 *after* the Lead Plaintiffs had already acquired VeriSign stock does not mean that the
15 Lead Plaintiffs cannot represent the class. Defendants’ arguments conflates Article
16 III’s standing requirements with Fed. R. Civ. P. 23’s class action requirements.

17 *Id.* at *14 (emphasis in original). In short, all of defendants’ contentions lack merit. Accordingly,
18 defendants’ motion should be denied.

19 **II. PROCEDURAL HISTORY**

20 Between November 17, 2004 and December 3, 2004, four complaints were filed against
21 UTStarcom that alleged varying class periods. Each of the four complaints alleged the class period
22 started on April 16, 2003, but alleged different ending dates. One complaint alleged the class period
23 ended on August 10, 2004, two complaints alleged the class period ended on August 11, 2004, and
24 one complaint alleged the class period ended on September 20, 2004.

25 On March 15, 2005, the Court issued an Order Consolidating Cases; Denying Request for
26 Preservation of Evidence; Appointing Operating Engineers Group as Lead Plaintiff; and Approving

27 ¹ Exhibit 1 to the Declaration of Christopher P. Seefer in Support of Plaintiffs’ Opposition to
28 UTStarcom Defendants’ Motion for Order to Republish Class Notice and Reappoint Lead Plaintiff
 (“Seefer Decl.”), filed concurrently herewith.

1 Lead Plaintiff's Choice of Lead Counsel ("March 15 Order"). The Operating Engineers Group
2 consists of an institution and an individual: Local 302 and 612 of the International Union of
3 Operating Engineers-Employers Construction Industry Retirement Trust ("Operating Engineers"),
4 and Mr. Erwin DeBruycker ("DeBruycker"). On June 30, 2005, lead plaintiff filed the Consolidated
5 Complaint for Violation of the Federal Securities Laws ("Consolidated Complaint"). On July 1,
6 2005, lead plaintiff filed a [Corrected] Consolidated Complaint for Violation of the Federal
7 Securities Laws. The Consolidated Complaint (and [Corrected] Consolidated Complaint) alleged an
8 extended class period of February 21, 2003 through September 20, 2004.

9 On July 26, 2005, pursuant to a stipulated order, plaintiffs filed a FAC that included
10 additional facts discovered through plaintiffs' investigation. The FAC alleged the same class period
11 of February 21, 2003 through September 20, 2004, but added (1) Banc of America Securities LLC,
12 Softbank Corporation, Softbank Holdings, Inc. and Softbank America, Inc. (collectively,
13 "Softbank") as defendants, and (2) allegations that defendants made false and misleading statements
14 in registration statements filed in August 2003 and September 2003. FAC, ¶¶43-45, 93-115. The
15 stipulated order required defendants to respond to the FAC by October 10, 2005.

16 On October 6, 2005, UTStarcom disclosed that its 3Q05 results would be less than guidance
17 because the Company could not recognize approximately \$40 million of revenue related to a contract
18 with an affiliate of defendant Softbank. SAC, ¶349. UTStarcom also disclosed that (i) additional
19 warranty reserves would be recorded in 3Q05, (ii) the Company might need to record impairment
20 charges to write off some or all of goodwill, and (iii) the Company had received a notice of a formal
21 inquiry from the Securities and Exchange Commission ("SEC") into certain aspects of UTStarcom's
22 financial disclosures during prior reporting periods. *Id.* As a result of these disclosures that had
23 been previously concealed by defendants' fraud, UTStarcom's stock declined 26% on October 7,
24 2005. SAC, ¶350.

25 On October 7, 2005, plaintiffs filed an *Ex Parte* Application to Stay Briefing on Motions to
26 Dismiss, Notice of Intent and Request to File Motion for Leave to Amend the Amended Complaint.
27 On October 26, 2005, the Court issued an Order Granting Lead Plaintiff's *Ex Parte* Application to
28 Stay Briefing on Motions to Dismiss ("October 26 Order.") The Court noted that "[s]ince

1 defendants do not object, and the Court concurs that any amended complaint would not be complete
2 without all of the available facts, Plaintiff's motion is granted." October 26 Order at 2.

3 On November 23, 2005, plaintiffs filed a Motion for Leave to File Second Amended
4 Complaint ("Motion for Leave"), along with a proposed complaint attached thereto. On December
5 20, 2005, defendants opposed the Motion for Leave, contending that: (1) the proposed complaint
6 violated Fed. R. Civ. P. 8 and (2) the 13-month extension of the class period and the additional
7 allegations in the proposed complaint warranted republication to the class and re-selection of the
8 lead plaintiff. On January 30, 2006, plaintiffs filed their reply in further support of the Motion for
9 Leave. The Court held a hearing on February 13, 2006, and issued an Order Granting Plaintiffs'
10 Motion for Leave to File Second Amended Complaint on March 1, 2006 ("March 1 Order").

11 In the March 1 Order, the Court directed plaintiffs to shorten the SAC to 150 pages and
12 suggested certain changes. In addition, the Court declined to address defendants' request to order
13 republication of notice and reappointment of new lead plaintiffs, but stated defendants could make a
14 separate motion seeking republication and reappointment after the filing of the SAC. March 1 Order
15 at 9.

16 On April 13, 2006, plaintiffs filed the SAC which complied with the directives and
17 incorporated the suggestions made by the Court in the March 1 Order. *See* Notice of Compliance
18 with March 1, 2006 Order, filed concurrently with the SAC.

19 Pursuant to the March 17, 2006 stipulated order, defendants are scheduled to file their
20 motions to dismiss the SAC no later than June 2, 2006.

21 **III. ARGUMENT**

22 **A. Defendants Do Not Have Standing to Object to the Lead Plaintiff**
23 **Selection Process**

24 Defendants assert a new lead plaintiff appointment process is required because one of the
25 Court-appointed lead plaintiffs is purportedly no longer an adequate representative due to the sale of
26 its UTStarcom stock before the end of the Class Period. UTStarcom Defendants' Motion for Order
27 to Republish Class Notice and Reappoint Lead Plaintiff ("Defs' Mem.") at 1-2, 9-12. This
28 contention is nonsensical and has been rejected by numerous courts, including this Court in

1 *VeriSign*, 2005 U.S. Dist. LEXIS 10439. In addition, defendants do not have standing to object to
2 the adequacy of a lead plaintiff. The plain language of the Private Securities Litigation Reform Act
3 of 1995 (“PSLRA”) only allows “a member of the purported plaintiff class” to challenge the
4 presumption that a lead plaintiff will adequately represent the class. 15 U.S.C.
5 §78u-4(a)(3)(B)(iii)(II); *see also California Pub. Employees’ Ret. Sys. v. Chubb Corp.*, 127 F. Supp.
6 2d 572, 575 n.2 (D.N.J. 2001) (“the majority of courts that have addressed the issue have held that
7 defendants lack standing to object to the adequacy of lead plaintiffs and their chosen counsel”);
8 *Gluck v. CellStar Corp.*, 976 F. Supp. 542, 550 (N.D. Tex. 1997) (defendants could not challenge the
9 appointment of a lead plaintiff, because “[t]he statute is clear that only *potential plaintiffs* may be
10 heard regarding appointment of a Lead Plaintiff”) (emphasis in original); *Greebel v. FTP Software,*
11 *Inc.*, 939 F. Supp. 57, 60 (D. Mass. 1996) (same).

12 During the lead plaintiff selection process in the case, defendants recognized their lack of
13 standing by taking no position and reserving their right to challenge the “typicality” or “adequacy”
14 of the selected lead plaintiff at the class certification stage pursuant to Fed. R. Civ. P. 23. *See*
15 *Statement of Certain Defendants in Response to Plaintiffs’ Motions for Consolidation of Actions,*
16 *Appointment of Lead Plaintiff and Approval of Lead Counsel* at 4 n.3, filed on February 11, 2005.
17 In *Wenderhold v. Cylink Corp.*, 188 F.R.D. 577, 579 (N.D. Cal. 1999), a case cited by defendants
18 (Defs’ Mem. at 6, 12), Chief Judge Walker also ruled defendants did not have standing to challenge
19 the selection of the most adequate lead plaintiff.

20 Defendants attempt to circumvent their lack of standing by contending the original notice
21 issued on November 17, 2004 was inadequate by failing to inform class members of the nature and
22 scope of the claims asserted in the SAC. *Id.* at 4-5. This is a red herring. Defendants did not object
23 to the notice following the filing of the Consolidated Complaint or the FAC – both of which
24 extended the class period and included new facts not alleged in the four original complaints. To the
25 extent the allegations in the SAC are also included in the prior two consolidated complaints but not
26 in the Notice of Publication, defendants have already conceded no republication is warranted
27 because they never asked for a renote based on the allegations set forth in the prior consolidated
28 complaints.

1 In addition, in the cases cited by defendants, the courts compared the amended complaint to
2 the original complaint – not the original notice. In *LeapFrog*, the court compared the original
3 complaint with the consolidated complaint to determine whether to order another lead plaintiff
4 selection process. Slip op. at 2 (Seefer Decl., Ex. 1). In *Teamsters Local 445 Freight Div. Pension*
5 *Fund v. Bombardier Inc.*, No. 05 Civ. 1898 (SAS), 2005 WL 1322721, at *1 (S.D.N.Y. June 1,
6 2005), the court compared the first amended complaint with the “first-filed complaint.” In *In re*
7 *White Elec. Designs Corp. Sec. Litig.*, 416 F. Supp. 2d 754, 776 (D. Ariz. 2006), the court compared
8 the consolidated amended complaint to the original notice and the four complaints that the court
9 consolidated because the consolidated amended complaint was the first complaint filed following the
10 appointment of the lead plaintiff, where the lead plaintiff sought to represent only claims pursuant to
11 §§10(b) and 20(a) of the Securities Exchange Act of 1934 (“1934 Act”).

12 In any event, as described herein, each of the claims described in the November 17, 2004
13 notice is alleged in both the FAC and the SAC.

14 **B. Because the Plain Language of the PSLRA Requires the Court to**
15 **Appoint the Lead Plaintiff “As Soon as Practicable,” the Lead**
16 **Plaintiff Selection Process Can Only Be Reopened in Rare**
17 **Circumstances that Do Not Exist in This Case**

18 The PSLRA requires courts to appoint the lead plaintiff “not later than 90 days after the date
19 on which a notice is published.” 15 U.S.C. §78u-4(a)(3)(B)(i). If a motion to consolidate multiple
20 actions asserting substantially the same claims has been filed, the PSLRA requires the court to
21 appoint the lead plaintiff “as soon as practicable” after deciding the consolidation motion. 15 U.S.C.
22 §78u-4(a)(3)(B)(ii). “The obvious intent of these provisions is to ensure that the lead plaintiff is
23 appointed at the earliest possible time and to expedite the lead plaintiff process.” *Miller v. LeapFrog*
24 *Enters. Inc., et al.*, No. C-03-05421 RWW, slip op. at 4 (N.D. Cal. Apr. 6, 2005) (Seefer Decl., Ex.
25 2) (citing *In re Telxon Corp. Sec. Litig.*, 67 F. Supp. 2d 803, 810-19 (N.D. Ohio 1999)); *see also*
26 Senate Report No. 104-98, at 704 (1995) (“Within 90 days of the published notice, the court *must*
27 consider motions made under this section and appoint the lead plaintiff.”) (emphasis added); *and*
28 H.R. Conference Report No. 104-369, at 733 (1995).

1 Because the plain language of the PSLRA requires the lead plaintiff to be appointed as “soon
2 as practicable,” the lead plaintiff selection process can only be reopened in rare circumstances that
3 do not exist in this case. Defendants contend the lead plaintiff selection process should be reopened
4 because the extension of the class period in the SAC resulted “in a major change in the case.” Defs’
5 Mem. at 5. Defendants are wrong.

6 Numerous courts hold that amending a class action complaint to extend the class period and
7 allege additional new facts that are closely related to those alleged for the original class period,
8 provide no justification to revisit the lead plaintiff contest. *See In re Rite Aid Corp. Sec. Litig.*,
9 Master File No. 99-CV-1349, 1999 U.S. Dist. LEXIS 19753, at *4 (E.D. Pa. Dec. 20, 1999)
10 (“[b]ecause of the similarity between the claims, the filing of the [longer class period] complaint
11 warrants neither publishing new class notice nor re-litigating the lead plaintiff and lead counsel
12 issues under 15 U.S.C. §78u-4(a)”); *Lax v. First Merchs. Acceptance Corp.*, Case No. 97 C 2716,
13 1997 U.S. Dist. LEXIS 12432, at *15 (N.D. Ill. Aug. 6, 1997) (“the court finds that requiring
14 published notices for complaints that merely expand the class period to inform class members that
15 they may move to be appointed lead counsel within sixty days of the *date of that published notice*
16 would be inconsistent with the purposes of the PSLRA”) (emphasis in original); *see also Greenberg*
17 *v. Bear Stearns & Co.*, 80 F. Supp. 2d 65, 69 (E.D.N.Y. 2000) (“[t]he [PSLRA] does not mandate,
18 nor does it suggest, that a Court approved lead plaintiff must re-publish a notice of the purported
19 class after an amended complaint is filed”; the court was “unable to locate any authority within this
20 Circuit or elsewhere, which stands for that proposition”); *In re Krispy Kreme Doughnuts, Inc. Sec.*
21 *Litig.*, 1:04CV00416, slip op. at 2-5 (M.D.N.C. Apr. 20, 2005) (Seefer Decl., Ex. 3); *Hevesi v. Merck*
22 *& Co., et al.*, No. 04-CV-5866 (SRC), Transcript of Proceedings at 6, 52-54 (D.N.J. Mar. 21, 2005)
23 (Seefer Decl., Ex. 4) (“[T]he mere fact that a plaintiff with greater losses than the originally
24 appointed lead plaintiff subsequently develops an interest in a lawsuit is an insufficient basis to
25 disturb the original appointment of the lead plaintiff. It would destroy the process which the PSLRA
26 was designed to initiate. It would, in fact, create the potential for continued unending struggles
27 between plaintiffs and their counsels to secure a piece of a litigation once it became clear that it had
28 more possible merit than was originally perceived.”).

1 In their brief, defendants did not cite any of the above cases and instead cited several
2 inapposite cases that actually support the denial of their motion. For example, in *Bombardier* (Defs’
3 Mem. at 8), the court required publication of a new notice and the reopening of the lead plaintiff
4 selection process because the amended complaint expanded the class from purchasers of one class of
5 securities (2000-A certificates) to purchasers of other entirely different securities. 2005
6 WL 1322721, at *1. In this case, no new classes of securities have been added.

7 In *In re Select Comfort Corp. Sec. Litig.*, Civil No. 99-884 (DSD/JMM), 2000 U.S. Dist.
8 LEXIS 22696, at **11-12 (D. Minn. May 12, 2000), the court required renote by a lead plaintiff
9 when subsequent to its appointment it filed a consolidated complaint alleging additional legal claims
10 for violations of the Securities Act of 1933 (“1933 Act”), while the original complaint contained no
11 such claims. Defs’ Mem. at 7. Similarly, in *White Elec. Designs*, the court granted defendants’
12 motion to strike claims alleging violations of the 1933 Act because they were raised for the first time
13 in the consolidated amended complaint and were not mentioned in the published notice to the class
14 or the original four complaints the court subsequently consolidated. 416 F. Supp. 2d at 777; Defs’
15 Mem. at 8-9. The published notice and the four complaints that were ordered consolidated were all
16 based on the 1934 Act.

17 By contrast, in *In re Portal Software, Inc. Sec. Litig.*, No. C-03-5138 VRW, 2005 U.S. Dist.
18 LEXIS 41178 (N.D. Cal. Mar. 9, 2005), Chief Judge Walker rejected defendants’ request for a
19 republication of notice to the class when plaintiff sought to add new legal claims (§§ 11, 12 and 15 of
20 the 1933 Act) in the amended complaint. The court stated the original notice – which only referred
21 to 1934 Act claims – was adequate to inform 1933 Act claimants of the pendency of an action
22 asserting 1933 Act claims because it identified the basis for bringing 1933 Act claims and because
23 the date of the offering was during the class period. *Id.* at **12-14. Although courts have reached
24 different conclusions on the addition of new legal claims, in this case no new legal claims have been
25 added to the SAC.

26 Defendants also rely on two inapposite opinions issued by Judge Whyte in *LeapFrog*. Defs’
27 Mem. at 7-8. In *LeapFrog*, Judge Whyte ordered the lead plaintiff to republish notice for a new lead
28 plaintiff selection process after the lead plaintiff filed a consolidated complaint that (i) increased the

1 21-page original complaint to 135 pages, (ii) extended the class period from July 24, 2003 through
2 February 10, 2004 to July 24, 2003 through October 18, 2004, and (iii) added new allegations about
3 the company's distribution and supply chain operations that were not included in or related to the
4 original complaint. Slip op. at 4 (Seefer Decl., Ex. 1). The court explained that the 21-page original
5 complaint alleged defendants made rosy statements about LeapFrog Enterprises, Inc.'s ("LeapFrog")
6 financial outlook when, in fact, retailers were not placing an expected number of orders and the
7 company stood to lose ground to a competitors products. The court concluded the consolidated
8 complaint "vastly expand[ed]" the original 21-page complaint and "dramatically alter[ed] the
9 contours of the lawsuit." *Id.*

10 *LeapFrog* is inapposite for several reasons. First, unlike this case, an institutional investor
11 (the Parnassus Fund) asserting \$10 million in losses that had filed a lawsuit against LeapFrog and
12 two of its officers – not defendants – asked the court to reopen the lead plaintiff selection process. In
13 *LeapFrog*, on April 6, 2005, the court appointed the Cupples movants as lead plaintiffs and
14 consolidated four actions against LeapFrog that alleged varying class periods with July 24, 2003
15 being the earliest beginning date and February 10, 2004 being the latest ending date. *Id.* at 2. While
16 the lead plaintiff motions were under submission, LeapFrog made more false statements that caused
17 the stock price to decline in March 2004 and October 2004. *Id.* On April 25, 2005, the Parnassus
18 Fund filed a complaint against LeapFrog and two of its officers alleging a class period of February
19 11, 2004 through October 18, 2004. On May 10, 2005, the lead plaintiff made a motion to relate the
20 cases and stated that the consolidated complaint to be filed on June 17, 2005 would allege a class
21 period of July 24, 2003 through October 18, 2004. The Parnassus Fund opposed and asked the
22 Court, *inter alia*, to reopen the lead plaintiff selection process. The fact that no other potential
23 plaintiff has sued UTStarcom or asked the Court to reopen the lead plaintiff selection process shows
24 there is no legitimate reason to do so now.

25 *LeapFrog* is also inapposite because the new facts alleged in the SAC are closely related to
26 the facts alleged in the FAC. In fact, most of the allegations in the two complaints are exactly the
27 same. Both the FAC and the SAC allege that:

28

- 1 • Defendants made false and misleading statements about the demand for and sales of the
2 Company's Personal Access System ("PAS") in China (*compare* FAC, ¶¶7, 125, 135, 143-
147, 149, 154, 170-171, 174-175, 177, 180-181 *with* SAC, ¶¶5-6, 156-199, 219-222, 226-
230, 238-239, 241-242, 244-249, 259-264, 269-271, 280-285);
- 3 • Defendants falsely assured investors UTStarcom would report margins of 30%-35%
4 throughout 2003 and into 2005 (*compare* FAC, ¶¶8, 128, 135, 150-151, 167, 169, 174, 176,
178-179, 191, 196 *with* SAC, ¶¶6, 156-199, 219-222, 226-230, 241-242, 244-249, 257, 259-
264, 269-271, 280-285);
- 5 • Defendants falsely represented the Company's backlog, inventories and deferred revenues
6 provided "tremendous visibility" into future results (*compare* FAC, ¶¶9, 136-137 *with* SAC,
7 ¶¶219-222, 226-230, 241-242, 244-249, 259-264, 269-271, 280-285);
- 8 • Defendants falsely represented Hong Liang Lu and Michael Sophie had evaluated the
9 Company's financial reporting controls and concluded they were effective (*compare* FAC,
10 ¶¶23, 118-119, 130-131, 162-163, 172-173, 183-184 *with* SAC, ¶¶3-4, 67-69, 217-218, 224-
225, 232-236, 251-252, 266-267, 273-274, 290-291);
- 11 • Defendants have admitted there are numerous material weaknesses in the Company's
12 financial reporting controls (*compare* FAC, ¶¶24, 202-206 *with* SAC, ¶¶4, 7, 12, 71-88);
- 13 • The restatement of the Company's financial statements is an admission the originally issued
14 financial statements were false and misleading (*compare* FAC, ¶¶25, 204 *with* SAC, ¶¶4, 89-
95, 318);
- 15 • The SEC is investigating the Company's financial disclosures including the related party
16 transaction with Japan Telecom (*compare* FAC, ¶26 *with* SAC, ¶¶4, 8, 109); and
- 17 • There were problems with the Company's PAS deployments that delayed final acceptance
18 and required additional time and costs to correct (*compare* FAC, ¶12 *with* SAC, ¶¶99-108,
219-222, 226-230, 241-242, 244-249, 259-264, 269-271, 280-285);
- 19 • Defendants engaged in the fraudulent scheme to sell \$58 million of UTStarcom stock and to
20 raise \$475 million from the sale of inflated Company stock (*compare* FAC, ¶¶13, 209-216
21 *with* SAC, ¶¶10, 203-215, 253);
- 22 • On July 27, 2004, UTStarcom reported disappointing gross margins and internal control
23 deficiencies that caused the price of the Company's stock to decline (*compare* FAC, ¶¶17,
186-187 *with* SAC, ¶¶7, 275-279);
- 24 • Defendants falsely reassured investors on July 27, 2004 that non-China revenues would
25 increase to \$600 million in 2004 primarily due to a sale of iAN-8000 broadband equipment
26 to related party Japan Telecom (*compare* FAC, ¶¶19, 189 *with* SAC, ¶¶7, 109-127, 200-202,
280-285);
- 27 • There were problems with the Company's broadband equipment that precluded the receipt of
28 final acceptance (*compare* FAC, ¶19 *with* SAC, ¶¶7, 109-127, 141-148);
- The Company's stock price declined on August 11, 2004 after UTStarcom announced a
delay in the filing of the 2Q04 Form 10-Q (*compare* FAC, ¶¶21, 198 *with* SAC, ¶¶286-287);
- On September 21, 2004, the Company's stock price declined after UTStarcom announced a
delay in recognizing revenue on the Japan Telecom sale (*compare* FAC, ¶¶22, 200-201 *with*
SAC, ¶¶7, 292-299); and

1 • On May 5, 2005, the Company reported a massive restructuring and a substantial decline in
2 2005 China PAS revenues (*compare* FAC, ¶¶28, 207 with SAC, ¶¶11, 149, 330).

3 Moreover, defendants' contentions that some of the new allegations were never mentioned in
4 the FAC are inaccurate. Defendants assert, for example, that the SAC alleges problems with new
5 products that were not mentioned in the FAC. Defs' Mem. at 4. But the FAC and SAC include
6 allegations that there were problems with the Company's iAN-8000 broadband product sold to Japan
7 Telecom – an affiliate of SoftBank. FAC, ¶19; SAC, ¶¶115-116, 142, 148. It is true that the SAC
8 also alleges problems with other broadband products including the mVision TVoIP product sold to
9 DSSI LLC and another affiliate of SoftBank. SAC, ¶¶142-148, 202. These new allegations are
10 additional examples of the broadband product problems alleged in the FAC and are therefore closely
11 related to the allegations contained in the FAC.

12 Similarly, the new allegations in the SAC that there were problems with the development of
13 ASIC equipped handsets (SAC, ¶¶173-185) and Code Division Multiple Access (“CDMA”) handsets
14 (SAC, ¶¶186-199) are closely related to the product problem allegations in the FAC. They are also
15 closely related to the allegations in the FAC (and SAC) that defendants falsely assured investors that
16 gross margins would improve in 2004 and 2005. FAC, ¶¶8, 178, 191, 193, 196; SAC ¶¶173-199.
17 Indeed, defendants told investors the development of the ASIC equipped handsets and CDMA
18 handsets would improve gross margins while concealing the development problems that delayed
19 their introduction. SAC, ¶¶173-199.

20 Defendants also erroneously contend that ¶¶170-171 in the SAC “fundamentally change the
21 allegations in this case” because plaintiffs asserted new acts of wrongdoing by alleging the Company
22 began selling handsets with SIM cards that allowed the PAS handsets to be used in prohibited
23 regions in violation of government restrictions on roaming. Defs' Mem. at 3-4. In fact, ¶170 of the
24 SAC includes the same allegations as ¶83 of the FAC – that defendants concealed the Chinese
25 Ministry of Information Industry (“MII”) allowed China Unicom to sell mobile services for 10% less
26 than the government set rate which provided China Unicom a competitive edge. Paragraph 171 of
27 the SAC includes facts alleged in ¶66 of the FAC – that the MII halted new PAS deployments in
28 May 2000 pending a review of the technology. The remaining allegations in ¶171 of the SAC – that

1 UTStarcom began selling handsets with SIM cards in violation of roaming regulations is therefore
2 closely related to the allegations in ¶¶66 and 83 of the FAC.

3 Defendants further contend that a new lead plaintiff appointment process is required because
4 the class period was extended by 13 months. *Id.* To the contrary, numerous cases cited above (*see*
5 *supra* at 7-8) hold that amendment of a complaint to extend the class period and add new facts
6 closely related to those alleged in the original class period does not provide any justification to
7 revisit the lead plaintiff selection process.

8 Defendants' contention that the new accounting allegations constitute dramatically different
9 claims is equally absurd. Defs' Mem. at 3-4. In the SAC, plaintiffs allege defendants caused
10 UTStarcom to (a) improperly recognize revenues on contingent sales, (b) understate costs of sales to
11 manipulate gross margins, (c) understate warranty and inventory reserves, and (d) not record
12 hundreds of millions of dollars in goodwill impairment charges.

13 These specific allegations are unquestionably closely related to the allegations in the FAC.
14 For example, the allegation that defendants caused the Company to improperly recognize revenue on
15 a contingent sale with related party Japan Telecom (SAC, ¶¶109-127) is closely related to the
16 allegations in the FAC that defendants falsely represented on July 27, 2004 that non-China revenue
17 in 2004 would be \$600 million – primarily due to the \$290 million Japan Telecom transaction – and
18 the representation on September 20, 2004 that the \$290 million would not be recognized in 2004.
19 FAC, ¶¶19, 22, 188-189, 200. The allegations about the Japan Telecom transaction in the SAC are
20 also closely related to the allegations in the FAC that the SEC's formal inquiry concerns, among
21 other things, the Company's financial disclosures about the Japan Telecom transaction. FAC, ¶26.
22 The new allegations are also closely related to the allegation in the FAC that there are material
23 weaknesses in the Company's financial reporting controls, including controls related to the
24 identification and accounting for related party transactions. FAC, ¶24(j). Indeed, the allegations
25 from the FAC and the new allegations regarding the Japan Telecom transaction are now combined in
26 a separate section. SAC, ¶¶109-127.

27 The allegation in the SAC that defendants have admitted the Company improperly
28 recognized \$22 million of revenue on a transaction with an Indian customer from 2003-2005 could

1 not have been included in the FAC (which was filed on July 26, 2005) because it was not disclosed
2 by defendants until February 9, 2006. SAC, ¶¶96-98. But this new allegation is closely related to
3 the allegation in the FAC that defendants admitted there are numerous material weaknesses in the
4 Company's financial reporting controls including controls over revenue. FAC, ¶24(a)-(b).

5 Similarly, the allegation the Company failed to record hundreds of millions of dollars in
6 goodwill impairment charges until after the class period could not have been included in the FAC
7 because the charges were not disclosed until November 3, 2005. SAC, ¶132. This allegation is also
8 closely related to the allegation in the FAC that defendants admitted there are numerous material
9 weaknesses in the Company's financial reporting controls including controls over accounting for
10 goodwill. FAC, ¶24(a), (d). The allegations in the SAC that the Company understated warranty and
11 inventory reserves is closely related to the allegations in the FAC that defendants have admitted
12 numerous material weaknesses in financial reporting controls related to inventory reserves and the
13 allegations about the broadband product quality problems. FAC, ¶¶19, 24(c).

14 In sum, renewed notice is not justified because the amended allegations are closely related to
15 the previous complaint.

16 **C. A Lead Plaintiff Is Not Required to Purchase Stock on Every Day of**
17 **the Class Period to Adequately Represent All Members of the Class**

18 Defendants also erroneously contend that a new lead plaintiff selection process is required
19 because one of the Court-appointed lead plaintiffs – the Operating Engineers – sold its stock before
20 the end of the Class Period and is therefore no longer an adequate representative. Defendants also
21 contend that a new lead plaintiff process is required because two additional plaintiffs – not lead
22 plaintiffs – are named in the SAC. Defs' Mem. at 1-2, 9-12. Again, both contentions are incorrect.

23 Without citing any *relevant* authority, defendants contend the Operating Engineers is no
24 longer an adequate representative because it sold all of its UTStarcom shares by September 23, 2004
25 and therefore could not have relied on or been harmed by any of the alleged false statements during
26 the extended portion of the class period. *Id.* at 9-10. That contention is nonsensical.

27 It is true the Operating Engineers could not have relied on, or been harmed by, any of the
28 allegedly false statements made after the sale of its UTStarcom stock. *VeriSign*, 2005 U.S. Dist.

1 LEXIS 10439. But the inability of a lead plaintiff to prove loss causation for certain false and
2 misleading statements does not mean the lead plaintiff cannot represent absent class members for
3 such claims. *Id.* Indeed, as defendants must know, this Court rejected the same argument in
4 *VeriSign*:

5 Defendants' argument is a non sequitur. Their starting point is sound, but
6 their conclusion is not. As a matter of logic, it is true that misrepresentations made
7 *after* a person's purchase of stock could not possibly have induced that person to
8 purchase that stock. However, as a matter of law, it does not follow that such a
9 person "cannot represent absent class members for such a claim." Simply because
10 certain class members were injured by misrepresentations that came *after* the Lead
11 Plaintiffs had already acquired VeriSign stock does not mean that the Lead Plaintiffs
12 cannot represent the class. Defendants' arguments conflates Article III's standing
13 requirements with Fed. R. Civ. P. 23's class action requirements.

14 *Id.* at *14 (citation omitted and emphasis in original). The Court explained that:

15 In the class action context, Article III standing simply requires that the class
16 representatives satisfy standing individually. No more is required. "Once threshold
17 individual standing by the class representative is met, a proper party to raise a
18 particular issue is before the court, and there remains no further separate class
19 standing requirement in the constitutional sense." Once the class representatives
20 individually satisfy standing, that is it: standing exists. "The presence of individual
21 standing is sufficient to confer the right to assert issues that are common to the class,
22 speaking from the perspective of any standing requirements."

23 *Id.* at *15 (citation omitted).

24 In *LeapFrog*, Judge Whyte also rejected the nonsensical argument proffered by defendants
25 here, citing this Court's opinion in *VeriSign* as follows:

26 "[B]ecause the PSLRA mandates that courts must choose a party who has, among
27 other things, the largest financial stake in the outcome of the case, it is inevitable
28 that, in some cases, the lead plaintiff will not have standing to sue on every claim."
... For example, in *In re VeriSign, Inc.*, 2005 U.S. Dist. LEXIS 10439, [at 14] (N.D.
Cal. 2005), defendants argued that the lead plaintiffs lacked standing to sue for
alleged misrepresentations that occurred *after* they had purchased stock. The court
rejected this argument, reasoning that the lead plaintiffs needed only to prove that
they suffered *a* concrete injury because of defendants' wrongdoing, not *every* injury
alleged by the class.

In re LeapFrog Enters. Inc. Sec. Litig., No. C-03-05421-RWW, 2005 U.S. Dist. LEXIS 40994, at
**11-12 (N.D. Cal. Nov. 23, 2005) (citation omitted and emphasis in original); *see also In re Smith
Barney Transfer Agent Litig.*, No. 05 Civ. 7583 (WHP), 2006 U.S. Dist. LEXIS 19728, at *10
(S.D.N.Y. Apr. 17, 2006) ("Nothing in the PSLRA requires that the lead plaintiffs have standing to

1 assert all of the claims that may be made on behalf of all of the potential classes and subclasses of
2 holders of different categories of security at issue in the case.”) (citation omitted).

3 Defendants assert the Operating Engineers were not harmed “to the extent” the SAC alleges
4 false statements during the original class period and that the “truth” about those statements was not
5 publicly disclosed until after September 23, 2004. Defs’ Mem. at 10. That assertion ignores the
6 allegations of several partial disclosures by defendants that proximately caused losses by (1)
7 revealing some, but not all, of UTStarcom’s true financial condition and (2) causing some, but not
8 all, of the artificial price inflation to come out of the Company’s stock. SAC, ¶¶250-251 (October
9 23, 2003), 256 (January 8, 2004), 268 (March 29, 2004), 272 (April 27, 2004), 278-279 (July 27,
10 2004), 298-299 (September 20, 2004), 353-357 (summary of loss causation allegations). In fact, the
11 Operating Engineers were damaged because they purchased 123,300 shares of UTStarcom stock
12 between January 15, 2004 and August 2, 2004 and held most of the stock when defendants made the
13 partial disclosures on March 29, 2004, April 27, 2004, July 27, 2004 and September 20, 2004. The
14 SAC’s loss causation allegations go far beyond the short and plain statement required by Fed. R.
15 Civ. P. 8 and provide defendants with “some indication of the loss and the causal connection that the
16 plaintiff has in mind.” *Dura Pharms, Inc. v. Broudo*, 544 U.S. 336, 125 S. Ct. 1627, 1634 (2005); *In*
17 *re Daou Sys., Inc.*, 411 F.3d 1006, 1025-27 (2005), *cert. denied*, 126 S. Ct. 1335 (2006).

18 Defendants provide no support for their contention that Mr. DeBruycker is an inadequate
19 lead plaintiff. Indeed, they only discuss Mr. DeBruycker in a footnote and assert that he would not
20 have had the largest loss among competing lead plaintiff movants without including the losses
21 incurred by the Operating Engineers. Defs’ Mem. at 11, n. 8. But defendants fail to explain how this
22 makes Mr. DeBruycker an inadequate lead plaintiff or why the Operating Engineers’ losses should
23 not be considered. Further, Mr. DeBruycker purchased an additional 23,500 shares of UTStarcom
24 stock during the extended portion of the Class Period.

25 Finally, defendants contend incorrectly that the addition of two plaintiffs (not lead plaintiffs)
26 in the SAC is a concession that the Court-appointed lead plaintiffs are inadequate. *Id.* at 11. Robert
27 Lee Weese and Gennadiy Sherman were added as named plaintiffs to aid lead plaintiff in
28 representing the class. This is permissible. *Portal Software*, 2005 U.S. Dist. LEXIS 41178, at *8

1 (“The PSLRA does not in any way prohibit the addition of named plaintiffs to aid the lead plaintiff
2 in representing a class.”) (quoting *Hevesi v Citigroup, Inc*, 366 F.3d 70, 83 (2d Cir. 2004)).

3 **IV. CONCLUSION**

4 Based on the foregoing, plaintiffs respectfully request that the Court deny defendants’
5 motion.

6 DATED: May 15, 2006

Respectfully submitted,

7 LERACH COUGHLIN STOIA GELLER
8 RUDMAN & ROBBINS LLP
9 KIMBERLY EPSTEIN
10 CHRISTOPHER P. SEEFER
11 SHIRLEY H. HUANG

11 _____/s/
CHRISTOPHER P. SEEFER

12 100 Pine Street, Suite 2600
13 San Francisco, CA 94111
14 Telephone: 415/288-4545
15 415/288-4534 (fax)

16 Lead Counsel for Plaintiff

16 T:\casesSF\utstarcom\BRF00030800.doc

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CERTIFICATE OF SERVICE

I hereby certify that on May 15, 2006, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses denoted on the attached Electronic Mail Notice List, and I hereby certify that I have mailed the foregoing document or paper via the United States Postal Service to the non-CM/ECF participants indicated on the attached Manual Notice List.

I further certify that I caused this document to be forwarded to the following designated Internet site at: <http://securities.lerachlaw.com/>.

/s/
CHRISTOPHER P. SEEFER
LERACH COUGHLIN STOIA GELLER
RUDMAN & ROBBINS LLP
100 Pine Street, 26th Floor
San Francisco, CA 94111
Telephone: 415/288-4545
415/288-4534 (fax)
E-mail: ChristopherS@lerachlaw.com

Mailing Information for a Case 5:04-cv-04908-JW

Electronic Mail Notice List

The following are those who are currently on the list to receive e-mail notices for this case.

- **Patricia I. Avery**
pavery@wolfpopper.com
- **Eric J. Belfi**
ebelfi@murrayfrank.com
- **Patrick J. Coughlin**
patc@lerachlaw.com e_file_sd@lerachlaw.com;e_file_sf@lerachlaw.com
- **STEPHANIE L. DIERINGER, ESQ**
sldieringer@hulettharper.com office@hulettharper.com
- **Kimberly C. Epstein**
kimcor@lerachlaw.com
e_file_sd@lerachlaw.com;e_file_sf@lerachlaw.com;mariam@lerachlaw.com
- **Boris Feldman**
boris.feldman@wsgr.com ncarvalho@wsgr.com;bhickman@wsgr.com
- **Vincent P. Finigan, Jr**
vfinigan@morganlewis.com
- **Cheryl W. Foug**
cfoug@wsgr.com bhickman@wsgr.com
- **Lionel Z. Glancy**
info@glancylaw.com
- **Michael M. Goldberg**
info@glancylaw.com
- **Shirley H. Huang**
shirleyh@lerachlaw.com e_file_sd@lerachlaw.com;e_file_sf@lerachlaw.com
- **Terry T. Johnson**
tjohnson@wsgr.com
fgallardo@wsgr.com;mevenson@wsgr.com;cfoug@wsgr.com;calendar@wsgr.com
- **Amanda Lenore Kosowsky**
amanda.kosowsky@cwt.com
- **Michael John Lawson**
michael.lawson@morganlewis.com rluke@morganlewis.com

- **William S. Lerach**
e_file_sd@lerachlaw.com e_file_sf@lerachlaw.com
- **Elizabeth P. Lin**
elin@milbergweiss.com crosete@milbergweiss.com
- **Gregory A. Markel**
gregory.markel@cwt.com
- **Rachele R. Rickert**
rickert@whafh.com
- **Darren J. Robbins**
e_file_sd@lerachlaw.com e_file_sf@lerachlaw.com
- **Amie Danielle Rooney**
rooneya@sullcrom.com
- **Robert A. Sacks**
sacksr@sullcrom.com
- **Christopher Paul Seefer**
chriss@lerachlaw.com
e_file_sd@lerachlaw.com;e_file_sf@lerachlaw.com;KiyokoF@lerachlaw.com
- **Ronit Setton**
ronit.setton@cwt.com
- **Bahram Seyedin-Noor**
bnoor@wsgr.com rlustan@wsgr.com
- **Sylvia Sum**
sylvias@lerachlaw.com e_file_sd@lerachlaw.com;e_file_sf@lerachlaw.com
- **Olga A. Tkachenko**
otkachenko@wsgr.com aerickson@wsgr.com
- **Jason de Bretteville**
debrettevillej@sullcrom.com powelllj@sullcrom.com

Manual Notice List

The following is the list of attorneys who are **not** on the list to receive e-mail notices for this case (who therefore require manual noticing). You may wish to use your mouse to select and copy this list into your word processing program in order to create notices or labels for these recipients.

Paul T. Curley
Murray Frank & Sailer LLP
275 Madison Avenue
Suite 801

New York, NY 10016

Philip H. Gordon
Gordon Law Offices
623 West Hays
Boise, ID 83702-5512

Christopher J. Keller
Goodkind Labaton Rudoff & Sucharow LLP
100 Park Avenue
New York, NY 10017

Dale MacDiarmid
Glancy Binkow & Goldberg LLP
1801 Avenue of the Stars, Suite 311
Los Angeles, CA 90067

Ronit Sutton's
Cadwalader, Wickersham & Taft LLP
One World Financial Center
New York, NY 10281