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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 DENYING MOTION FOR
ORDER TO REPUBLISH CLASS
NOTICE AND REAPPOINT LEAD
PLAINTIFF**

This Order relates to ALL ACTIONS.
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I. INTRODUCTION

This is a federal securities fraud action brought on behalf of purchasers 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"). Before the Court is Defendants' Motion for Order to Republish Class Notice and Reappoint Lead Plaintiff. A hearing was held on June 9, 2006. Based on the parties' papers and on the arguments of counsel at the hearing, the Court DENIES Defendants' Motion.

II. BACKGROUND

Lawrence Joseph filed the first complaint in this case on November 17, 2004, and published notice purporting to advise members of the putative class of the pendency of the securities fraud action. Other complaints were filed thereafter and this Court entered an Order Relating Cases on December 7, 2004. On January 14, 2005, the Court received motions from parties requesting

1 appointment as lead plaintiff. The Court subsequently appointed Locals 302 and 612 of the
2 International Union of Operating Engineers-Employers Construction Industry Retirement Trust and
3 Erwin DeBruycker as lead plaintiffs on March 15, 2005.

4 Plaintiffs filed a Consolidated Complaint on June 30, 2005, a Corrected Consolidated
5 Complaint on July 1, 2005, and a First Amended Consolidated Complaint ("FACC") on July 26,
6 2005. The FACC alleged that Defendants defrauded class members by concealing declining
7 demand, sales, and profitability of UTStarcom's wireless and telecommunications products in China.
8 The FACC also alleged that Defendants falsely represented and certified that UTStarcom had
9 adequate internal controls, and that Defendants represented and certified materially false and
10 misleading financial results.

11 Prior to the filing of Defendants' motion to dismiss the FACC, Plaintiffs sought Leave to File
12 a Second Amended Consolidated Complaint ("SACC"). Defendants filed an opposition on
13 December 20, 2005 to Plaintiffs' Motion for Leave to File, arguing in part that Plaintiffs were
14 required to republish notice and seek reappointment under Section 21D(a) of the Exchange Act. 15
15 U.S.C. § 78u-4(a)(3)(A). Defendants argued that the assertion of a longer class period and of new
16 claims in the SACC affected the rights of absent class members who never had notice or an
17 opportunity to seek appointment as lead plaintiff. At that time, this Court declined to address the
18 issues of the republication of notice and the reappointment of lead plaintiff until Plaintiffs filed the
19 SACC. The SACC was filed on April 13, 2006. Defendants renew their arguments to republish
20 class notice and to reappoint lead plaintiff in the present motion.

21 **III. STANDARDS**

22 Where FED. R. CIV. P. 23 is silent as to the procedures regarding a class within the scope of
23 the Private Securities Litigation Reform Act of 1995 ("PSLRA"), the PSLRA and applicable case
24 law govern. See Teamsters Local 445 Freight Div. Pension Fund v. Bombardier Inc., No. 05 Civ.
25 1898 (SAS), 2005 WL 1322721, at *1 (S.D.N.Y., June 1, 2005). The PSLRA requires that potential
26 class members be given notice of the pendency of a class at an early stage in the litigation: "[N]ot
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1 later than 20 days after the date on which the complaint is filed, the plaintiff or plaintiffs shall cause
2 to be published. . . a notice advising members of the purported plaintiff class. . . of the pendency of
3 the action, the claims asserted therein, and the purported class period." 15 U.S.C. §
4 78u-4(a)(3)(A)(i). The PSLRA at 15 U.S.C. § 78u-4(a)(3)(B)(iii)(II) also requires that the lead
5 plaintiff be selected early in the litigation.

6 IV. DISCUSSION

7 A. Republication of Class Notice

8 Defendants argue that republication of class notice is required given the thirteen-month
9 extension in the length of the class period, and the additional allegations that Plaintiffs assert in the
10 SACC.

11 1. Extension in Class Period

12 Republication of class notice is not required following plaintiffs' amendment of their
13 complaint where the amended complaint involves common questions of law and fact as the original
14 complaint, and where the only material change lies in the length of the class period. See, e.g.,
15 Greenberg v. Bear Stearns & Co., 80 F. Supp. 2d 65, 2000 WL 85284 *4 (E.D.N.Y. 2000) (neither
16 Rule 23 nor the PSLRA requires a lead plaintiff republish class notice after filing an amended
17 complaint naming a new defendant); In re Rite Aid Corp. Sec. Litig., No. 99-CV-1349, 1999 U.S.
18 Dist. LEXIS 19753, at *4 (E.D. Pa. 1999). Where, in these types of cases, the primary allegations
19 are of fraudulent inflation of stock price followed by a successive decline in stock price as the true
20 economic condition of the company is released into the market, an extension of the class period is
21 less likely to affect the fraudulent stock price inflation period, and more likely to simply affect
22 damages. Even where the original class period is extended at the beginning, extension of the class
23 period alone may not require republication of class notice. See Cheney v. Cyberguard Corp., 213
24 F.R.D. 484, 503 (S.D. Fla. 2002). In Cheney, the court found that "relevant case law has held that
25 additional notice is not required where the original complaint is amended to include, in part, an
26 extension of the class period" and held that the plaintiffs' publication of notice that failed to include
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1 an eleven-month extension in class period did not prejudice class members. Id.

2 Here, Plaintiffs have extended their class period by thirteen months. Based on the extended
3 class period alone, the Court declines to visit a significant delay on this litigation by requiring
4 republication of class notice.

5 2. New Legal Theories or if the Allegations Related to Separate Transactions

6 Where an amended complaint asserts new theories or legal claims, republication of notice
7 may be necessary to notify the absent class members so as not to exclude entire classes of potential
8 lead plaintiffs from the notice procedure. See In re Select Comfort Corp. Sec. Litig., No. 99-884,
9 2000 U.S. Dist. LEXIS 22697, at *22 (D. Minn. Jan. 27, 2000) (noting that republication is generally
10 appropriate where an amended complaint asserts new theories or legal claims).

11 Plaintiffs' new allegations in the SACC are not as wildly different from previous allegations
12 as Defendants would have this Court believe. These new allegations include UTStarcom's
13 concealment of its understatement relating to the cost of its goods in order to manipulate gross
14 margins, failure to adequately reserve for warranty costs and obsolete inventory as well as its
15 overstatement of the value of long-lived assets and goodwill. These new accounting allegations
16 arguably arose from the same pattern of conduct as the Plaintiffs' previous allegations in the FAC,
17 and certainly involve the same claims against UTStarcom and its management under Section 10(b)
18 and 20(a) of the Exchange Act and Rule 10(b)(5). The same is true with Plaintiffs' new claim that
19 UTStarcom violated the Chinese government's restriction on roaming. This claim is very much
20 intertwined with Plaintiffs' other allegations regarding the Company's concealment of its various
21 other activities such that it is unlikely that adding this allegation would affect a new class of
22 plaintiffs. As such, the Court denies Defendants' request for a republication of notice.

23 **B. Lead Plaintiff Reappointment**

24 Defendants have moved the Court to reopen the lead plaintiff selection process on grounds
25 that Lead Plaintiffs are inadequate to assert the new claims raised in the SAC. Defendants do not
26 have standing to challenge the lead plaintiff selection process under 15 U.S.C.

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1 § 78u-4(a)(3)(B)(iii)(II). The plain language of the PSLRA only allows "a member of the purported
2 plaintiff class" to challenge the presumption that a lead plaintiff will adequately represent the class.
3 15 U.S.C. § 78u-4(a)(3)(B)(iii)(II). The majority of courts that have addressed the issue have held
4 that defendants lack standing to object to the adequacy of lead plaintiffs and their chosen counsel.
5 See, e.g., In re Lucent Tech. Sec. Litig., 194 F.R.D. 137, n.17 (D.N.J. 2000); In re Nice Systems Sec.
6 Litig., 188 F.R.D. 206, n. 11 (D.N.J. 1999); In re Milestone Scientific Sec. Litig., 183 F.R.D. 404,
7 414-15, n. 14 (D.N.J. 1998); Cal. Pub. Employees' Ret. Sys. v. Chubb Corp., 127 F. Supp. 2d 572,
8 575 n.2 (D.N.J. 2001), Gluck v. CellStar Corp., 976 F. Supp. 542, 550 (N.D. Tex. 1997) (finding that
9 defendants could not challenge the appointment of a lead plaintiff, because "[t]he statute is clear that
10 only potential plaintiffs may be heard regarding appointment of a lead plaintiff") (emphasis in
11 original), Greebel v. FTP Software, Inc., 939 F. Supp. 57, 60 (D. Mass. 1996) (same).

12 The Court concurs with the weight of authority on this issue, and finds that Defendants do
13 not have standing to challenge Lead Plaintiffs in this case. A plain reading of the statute where the
14 Court is directed to "consider any motion made by a purported class member" to determine the most
15 adequate plaintiff. 15 U.S.C. § 78u-4(a)(3)(B)(i), indicates that only potential plaintiffs may be heard
16 regarding appointment of a Lead Plaintiff. Furthermore, rebuttal of the most adequate plaintiff
17 presumption is limited to "proof by a member of the purported plaintiff class." 15 U.S.C. §
18 78u-4(a)(3)(B)(iii)(II), and discovery regarding the issue "may be conducted by a plaintiff" only if
19 "the plaintiff first demonstrates a reasonable basis" for finding the presumptively most adequate
20 plaintiff inadequate. 15 U.S.C. § 78u-4(a)(3)(B)(iv). See Greebel, 939 F. Supp. at 60.

21 Although Defendants do not have standing to challenge whether the current Lead Plaintiffs
22 satisfy the criteria set forth in section 21D(a)(3)(B), the Court makes this determination without
23 prejudice to the possibility of revisiting similar issues in considering a motion for class certification.
24 See Greebel, 939 F. Supp. at 60-61.

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V. CONCLUSION

For the foregoing reasons, the Court DENIES Defendants' Motion without prejudice to raise similar issues during class certification.

Dated: June 26, 2006

04cv4908repub

/s/ James Ware
JAMES WARE
United States District Judge

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1 **THIS IS TO CERTIFY THAT COPIES OF THIS ORDER HAVE BEEN DELIVERED TO:**

- 2 Amie Danielle Rooney rooneya@sullcrom.com
- 3 Bahram Seyedin-Noor bnoor@wsgr.com
- 4 Boris Feldman boris.feldman@wsgr.com
- 5 Cheryl W. Foung cfoung@wsgr.com
- 6 Darren J. Robbins e_file_sd@lerachlaw.com
- 7 Elizabeth P. Lin elin@milbergweiss.com
- 8 Eric J. Belfi ebelfi@murrayfrank.com
- 9 Gregory A Markel gregory.markel@cwt.com
- 10 Kimberly C. Epstein kimcor@lerachlaw.com
- 11 Lionel Z. Glancy info@glancylaw.com
- 12 Michael M. Goldberg info@glancylaw.com
- 13 Olga A. Tkachenko otkachenko@wsgr.com
- 14 Patricia I. Avery pavery@wolfpopper.com
- 15 Patrick J. Coughlin patc@lerachlaw.com
- 16 Rachael E. Meny rem@kvn.com
- 17 Rachele R. Rickert rickert@whafh.com
- 18 Robert A. Sacks sacksr@sullcrom.com
- 19 Stephanie L. Dieringer sldieringer@hulettharper.com
- 20 Shirley H. Huang shirleyh@lerachlaw.com
- 21 Sylvia Sum sylvias@lerachlaw.com
- 22 Terry T. Johnson tjohnson@wsgr.com
- 23 William S. Lerach billl@lerachlaw.com

14 **THIS IS TO CERTIFY THAT COPIES OF THIS ORDER HAVE BEEN MAILED TO:**

- 15 Christopher J. Keller
- 16 Goodkind Labaton Rudoff & Sucharow LLP
- 17 100 Park Avenue
- 18 New York, NY 10017
- 19 Philip H. Gordon
- 20 Gordon Law Offices
- 21 623 West Hays
- 22 Boise, ID 83702-5512

21 **Dated: June 26, 2006**

Richard W. Wieking, Clerk

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