



October 31, 2007

The Honorable James Ware
United States District Court
Northern District of California
280 South 1st Street
San Jose, CA 95113

Re: *In re UTStarcom, Inc. Securities Litigation*
U.S. District Court, Master File No. C-04-4908-JW (PVT) (N.D. Cal.)

Dear Judge Ware:

Plaintiff Peter Rudolph¹, by his counsel, hereby submits this letter in response to Lead Plaintiffs'² letter of October 30, 2007 regarding the Administrative Motion to Consider Whether Cases Should be Related Pursuant to Civil Local Rules 3-12 and 7-11. Plaintiff Rudolph respectfully reiterates that the administrative motion requesting relation of these cases should be denied. First, the *Rudolph* action is not appropriate for relation under Rule 3-12(a) as it concerns different parties, property, transactions and events than the *UTStarcom* action. Second, ordering the relation of these unrelated cases would severely prejudice the *Rudolph* plaintiffs. Finally, Lead Plaintiffs have not pled loss causation based on the options backdating scheme in any of their filed complaints. Allowing the stock options backdating allegations set forth in the *Rudolph* case to proceed separately before Judge Illston would provide the only means for ensuring that Mr. Rudolph and the class he seeks to represent are not severely prejudiced.

In their letter of October 30th, Lead Plaintiffs implicitly concede that options backdating is not truly a part of their case, but rather serves as just one more allegation bolstering their contention that UTStarcom's financial reports misrepresented the

¹ *Peter Rudolph v. UTStarcom, Hong Liang Lu, Michael Sophie, Thomas Toy and Francis Barton*, Case No. C-07-4578-SI ("*Rudolph*")

² *In re UTStarcom Sec. Litig.*, Master File No. c-04-4908-JW (PVT) ("*UTStarcom*")



Company's financial status and abounded with a myriad of insufficient controls and accounting errors. This stands in stark contrast with the *Rudolph* action, which is based solely on options backdating allegations arising out of the Company's recent disclosures that, in fact, stock option grant dates were found to be in error. Plainly, these are different cases, arising from different facts and circumstances.

Indeed, it is clear that Lead Plaintiffs have failed to plead any loss arising from UTStarcom's options backdating. The class period defined in Lead Plaintiffs' Third Amended Complaint (their fifth complaint filed) ends years prior to any corrective disclosures relating to backdating. In *Dura Pharmaceuticals*, the Supreme Court mandated that, to state a 10b-5 claim, plaintiffs must adequately allege a diminishment in the price of the underlying security upon the dissipation of artificial inflation. *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 345 (2005). Although they filed their Third Amended Complaint months after UTStarcom's November 7, 2006 corrective disclosure, Lead Plaintiffs nevertheless ended their class period on October 6, 2005. Obviously, because their class period ends well ahead of any corrective disclosures relating to options backdating, Lead Plaintiffs have pled no loss caused thereby. Shoehorning the *Rudolph* action into the *UTStarcom* litigation would thus likely result in these claims lying fallow and unasserted.

Where the Lead Plaintiffs declined to do so, the *Rudolph* action plainly alleges that the losses were caused when UTStarcom's share price dropped following the Company's November 7, 2006 and July 24, 2007 disclosures. While Lead Plaintiffs mention the November disclosure in their Third Amended complaint, they did not extend the class period to encompass shareholders who held at that time. The *Rudolph* action class period covers both corrective disclosures. Thus, the *Rudolph* action, based solely on options backdating allegations, has pled loss causation through these corrective disclosures and the subsequent share price drops. The Lead Plaintiffs have not.

In order to plead the *Rudolph* claims, Lead Plaintiffs in *UTStarcom* would need to seek leave of the Court in order to file a sixth complaint. The *UTStarcom* litigation has already had multiple bites at the proverbial pleading apple. Such repeated efforts at



pleading a claim often are held to preclude further repleading.³ Burdening Plaintiff Rudolph and the class he seeks to represent with this baggage clearly would unduly prejudice these claims.

In sum, *UTStarcom* and *Rudolph* involve different classes of plaintiffs, different class periods, different defendants, different shares of common stock and different underlying events comprising the fraud. Thus, the two actions do not concern “substantially similar facts, markets, conduct and analyses” as required for relation under Local Rule 3-12(a). This Court should permit Plaintiff Rudolph to pursue the options backdating allegations separately in the case currently assigned to Judge Illston.

Respectfully submitted,

Mark Punzalan, Esq.

Counsel for Plaintiff Peter Rudolph

³ See *In re Fritz Co. Sec. Litig.*, 282 F. Supp.2d 1105, 1109 (N.D.Ca. 2003); see also *DCD Programs Ltd. v. Leighton*, 833 F.2d 183, 186 n.4 (9th Cir. 1987); *Sisseton-Wahpeton Sioux Tribe v. United States*, 90 F.3d 351, 355 (9th Cir. 1996)



CERTIFICATE OF SERVICE

I hereby certify that on October 31, 2007, 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 address 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 certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on October 31, 2007.



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