

1 C. P. Bartholomew (State Bar No. 211425)  
Mark Punzalan (State Bar No. 247599)  
2 FINKELSTEIN THOMPSON LLP  
100 Bush Street, Suite 1450  
3 San Francisco, California 94104  
Telephone: (415) 398-8700  
4 Facsimile: (415) 398-8704

5 [Additional Counsel Listed on Signature Page]

6 Attorneys for *Plaintiff*

7  
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)  
LITIGATION )

12 **CLASS ACTION**

13 This Document Relates to:

14 ALL ACTIONS

13 ) **PLAINTIFF PETER RUDOLPH'S**  
14 ) **OPPOSITION TO LEAD PLAINTIFFS**  
15 ) **THE OPERATING ENGINEERS**  
16 ) **GROUP'S ADMINISTRATIVE MOTION**  
17 ) **TO CONSIDER WHETHER CASES**  
18 ) **SHOULD BE RELATED PURSUANT TO**  
19 ) **CIVIL LOCAL RULES 3-12 AND 7-11**

18 **INTRODUCTION**

19 Currently pending in this jurisdiction are two actions filed against UTStarcom, Inc.  
20 ("UTStarcom" or the "Company"): *In re UTStarcom Sec. Litig.*, Master File No. C-04-4908-  
21 JW(PVT) ("*UTStarcom*"), and *Peter Rudolph v. UTStarcom, Hong Liang Lu, Michael Sophie,*  
22 *Thomas Toy and Francis Barton*, Case No. C-07-4578-SI ("*Rudolph*"). On September 20, 2007,  
23 lead plaintiffs in the *UTStarcom* action submitted an administrative motion to this Court  
24 requesting that the *Rudolph* case be related to their action, and thereby automatically consolidated  
25 therewith pursuant to the Court's Order dated March 16, 2005. Plaintiff Rudolph respectfully  
26 submits this memorandum in opposition to the administrative motion to relate the cases pursuant  
27 to Local Rules 3-12 and 7-11. Although both actions allege violations of the securities laws under  
28 §§10(b) and 20(a) by an overlapping, but not identical, group of defendants, the *UTStarcom* case

1 and the *Rudolph* case do not meet the criteria for relation of cases under Civil Local Rule 3-12.<sup>1</sup>

2 *UTStarcom* and *Rudolph* involve different classes of plaintiffs, different class periods,  
3 different defendants, different shares of common stock, and different underlying events  
4 comprising the fraud. Consequently, a denial of the motion would pose little risk of burdensome  
5 duplication of labor or of conflicting results. Furthermore, the *Rudolph* action, defined by an  
6 entirely different time period, would be severely prejudiced if melded into the *UTStarcom* action.  
7 For these reasons, the *Rudolph* action should not be related to *UTStarcom* and the administrative  
8 motion requesting relation of these cases should be denied.

9 **II. ARGUMENT**

10 **A. The *Rudolph* Actions Concerns Different Parties, Property, Transactions or  
11 Events than *UTStarcom*.**

12 **1. The Class Periods in the Two Actions Are Entirely Different.**

13 Differing class periods militate against relating putative class actions pursuant to Local  
14 Rule 3-12.<sup>2</sup> Here, Plaintiff Rudolph brought the action on behalf of a class of purchasers of  
15 *UTStarcom* common stock between July 24, 2002 through September 4, 2007 inclusive (the  
16 “Class Period”). In contrast, the *UTStarcom* action only includes purchasers of *UTStarcom*  
17 common stock between February 21, 2003 and October 6, 2005 (the “*UTStarcom* Class Period”).<sup>3</sup>  
18 Thus, the *Rudolph* Class Period extends for almost *two years* beyond the end date of the  
19 *UTStarcom* Class Period and therefore, seeks to represent class members not included in the  
20 *UTStarcom* litigation. Significantly, the *UTStarcom* lead plaintiffs have now filed their third  
21 amended complaint (“TAC”), and accordingly have limited leeway to seek leave to amend their

22  
23 <sup>1</sup> Rule 3-12(a) provides that cases are related if: (1) the actions concern substantially the same  
24 parties, property, transaction or event; and (2) it appears likely that there will be an unduly  
burdensome duplication of labor and expenses or conflicting results if the cases are conducted  
before different judges.

25 <sup>2</sup> See *Weinstein v. MetLife Inc.*, No. C-06-04444-SI, 2006 WL 3201045 \*4 (N.D. Cal. Nov. 6,  
26 2006) (comparing the definitions of the classes in the proposed related actions to determine if the  
27 classes differ); cf. *In re Leapfrog Enters., Inc. Sec. Litig.*, No. C-03-05421-RMW, 2005 WL  
5327775 \*2 (N.D. Cal. July 5, 2005) (holding that one of the reasons the cases should be related is  
that the first filed complaint encompasses the class period of the second filed complaint).

28 <sup>3</sup> See *In re UTStarcom Third Amended Complaint* (“TAC”) at ¶ 1.

1 TAC a fourth time to include putative members of the *Rudolph* class. See TAC; see also § C,  
 2 *supra*. The *Rudolph* Class Period includes shareholders who held their stock through the  
 3 Company's July 24, 2007 announcement that it would have to restate its financials to reflect  
 4 approximately \$28 million in options compensation expenses between the years 2000 and 2006  
 5 due to incorrect measurement dates for historic stock option grants. Following this revelation, the  
 6 Company's stock price plummeted by 22%. *Rudolph* Complaint at ¶70. The *UTStarcom* Class  
 7 Period does not cover shareholders who held their stock through this disclosure. Indeed, although  
 8 it was filed after UTStarcom's initial November 7, 2006 disclosure concerning options backdating,  
 9 the TAC ends its class period over a year prior to that event. Thus, the *Rudolph* case concerns a  
 10 harm that was inflicted nearly two years after the end of the class period defined in the *UTStarcom*  
 11 litigation.

12 **2. The "Property, Transaction or Events" At Issue in the Two Actions are**  
 13 **Unrelated.**

14 While lead plaintiffs in the *UTStarcom* action assert that the actions involve substantially  
 15 similar fact, conduct and events, it is clear from the complaints that the only relationship between  
 16 the two is that both generally allege violations of the federal securities laws. In all other respects,  
 17 the actions are completely different.

18 The claims in *Rudolph* center solely on the Company's options backdating practices and  
 19 2006 and 2007 corrective disclosures. By contrast, the *UTStarcom* TAC alleges a host of  
 20 violations by defendants, including violations of GAAP, ineffective controls and procedures, false  
 21 representations regarding the profitability of the Company's PAS network equipment in China,  
 22 and options backdating. These claims have little in common with the claims presented by  
 23 *Rudolph*, and nothing to do with the actual harm and damage caused by the Company's options  
 24 backdating disclosures *that took place two years after the close of the TAC's class period*.

25 In contrast, the *Rudolph* complaint is premised on just these disclosures<sup>4</sup> and on the  
 26 subsequent drop in stock price caused thereby. Indeed, it appears that the *UTStarcom* plaintiffs

27  
 28 <sup>4</sup> These disclosures began on November 7, 2006 and culminated with the Company's July 24, 2007 statement that it would be necessary to restate its financials

1 deliberately chose to leave at least one of these disclosures out of the TAC. For example, the TAC  
2 references the November 7, 2006 disclosure, but fails to incorporate this disclosure into the Class  
3 Period, thereby failing to provide any remedy for individuals who held the artificially inflated  
4 stock through that date. TAC ¶541. Rather, the TAC pleads loss causation based on disclosures  
5 beginning on October 23, 2003 and continuing through October 6, 2005. In other words, the lead  
6 plaintiffs have already had the opportunity to include the backdating disclosures and the  
7 consequent loss into the TAC, and have declined to do so. Shoehorning the *Rudolph* action into  
8 the *UTStarcom* litigation would thus likely result in these claims lying fallow and unasserted.

9 In short, the *Rudolph* action is based purely on options backdating allegations arising out  
10 of the Company's recent disclosure that in fact, stock option grant dates were found to be in error.  
11 Its class includes purchasers through the July 24, 2007 disclosure. The *UTStarcom* action did not  
12 initially allege options backdating practices, and still fails to allege any harm to their class from  
13 such backdating. The class they seek to represent ends years prior to any corrective disclosures  
14 relating to UTStarcom's backdating.<sup>5</sup> Thus, the two actions do not concern "substantially similar  
15 facts, markets, conduct and analyses" as required under Rule 3-12(a).

16 **B. There is No Risk of Unduly Burdensome Duplication or Conflicting Results**

17 Here, there would be nothing unduly burdensome about having different judges make the  
18 legal and factual determinations in the two sets of cases and little, if any, risk of conflicting  
19 decisions. These cases involve different claims of wrongdoing involving different plaintiffs  
20 during different times. They will necessarily require determination of different legal and factual  
21 issues as the *UTStarcom* action does not include the corrective disclosures made by the Company  
22 regarding its options granting practices and does not include the losses alleged by the *Rudolph*  
23 plaintiffs following these disclosures.

24  
25  
26  
27 <sup>5</sup> By failing to allege any corrective disclosure or consequent share price decrease, *In re*  
28 *UTStarcom* fails to allege any cognizable securities fraud claims arising from such backdating.  
*See Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 348 (2005) (finding that inflated share price alone  
is insufficient to state a claim).



1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

Facsimile: 415.398.8704

- and -

Donald J. Enright  
Elizabeth K. Tripodi  
FINKELSTEIN THOMPSON LLP  
1050 30<sup>th</sup> Street, NW  
Washington, D.C. 20007  
Telephone: 202.337.8000  
Facsimile: 202.337.8090

*Counsel for Plaintiff Peter Rudolph*