

1 Robert A. Sacks (SBN 150146) (sacksr@sullcrom.com)
SULLIVAN & CROMWELL LLP
2 1888 Century Park East
Los Angeles, CA 90067
3 Telephone: (310) 712-6600
Facsimile: (310) 712-8800

4 Jason de Bretteville (SBN 195069) (debrettevillej@sullcrom.com)
5 R. Jeremy Adamson (SBN 251380) (adamsonrj@sullcrom.com)
SULLIVAN & CROMWELL LLP
6 1870 Embarcadero Road
Palo Alto, California 94303
7 Telephone: (650) 461-5600
Facsimile: (650) 461-5700

8 Attorneys for Defendants SOFTBANK HOLDINGS, INC.
9 SOFTBANK AMERICA, INC. and SOFTBANK
CORPORATION

10
11
12 **UNITED STATES DISTRICT COURT**
13 **NORTHERN DISTRICT OF CALIFORNIA**
14

15 IN RE UTSTARCOM, INC. SECURITIES)
16 LITIGATION)

Master File No. C-04-4908-JW (PVT)

17) **DEFENDANTS SOFTBANK HOLDINGS,**
18) **INC., SOFTBANK AMERICA, INC. AND**
19) **SOFTBANK CORPORATION'S REPLY**
20) **IN SUPPORT OF THEIR MOTION TO**
21) **DISMISS PLAINTIFFS' FOURTH**
22) **AMENDED CONSOLIDATED**
23) **COMPLAINT**

20 This Document relates to:
21 ALL ACTIONS

21 Judge: Hon. James A. Ware
22 Hearing: January 16, 2009
23 Time: 9:00 a.m.

24
25 Defendants Softbank Holdings, Inc., Softbank America, Inc., and Softbank Corporation
26 (the "Softbank Defendants ") submit this Reply Memorandum of Points and Authorities in support of
27 their Motion to Dismiss Plaintiffs' Fourth Amended Consolidated Complaint ("4AC ").
28

1 Plaintiffs concede in their Opposition to the Softbank Defendants’ Motion to Dismiss (the
2 “Opposition) that this Court’s determination as to whether any Softbank Defendant is a “control
3 person requires judicial “scrutiny of the defendant’s participation in the day-to day affairs of the
4 corporation. (Opposition at 7) (citing *No. 84 Employer-Teamster Joint Council Pension Trust Fund v.*
5 *Am. West Holding Corp.*, 320 F.3d 920 (9th Cir. 2003)). Even after four tries, Plaintiffs’ complaint does
6 not begin to allege facts that show participation by any Softbank Defendant in, or actual control by any
7 Softbank Defendant over, the day-to-day affairs of UTStarcom – not by a long shot. Even if the three
8 Softbank Defendants could be viewed collectively – and as a matter of law they are separate
9 corporations and may not be so treated – the 4AC alleges merely that the Softbank Defendants had a
10 minority ownership interest in UTStarcom that was 14.1% or less during the class period; appointed one
11 of seven UTStarcom directors during the first 18 months of the class period but did not have any
12 representative on UTStarcom’s board during the last three years of the class period; and had affiliates
13 who were substantial customers of UTStarcom. Rhetoric aside, there are no facts in the 4AC showing
14 that any of the Softbank Defendants actually exercised or even had the power to exercise control over
15 UTStarcom’s day-to-day business decisions, over UTStarcom’s financial reporting and/or accounting
16 for its financial results, or over UTStarcom’s public statements about its business and financial results.

17 Plaintiffs have caused the Softbank Defendants to spend hundreds of thousands of dollars
18 addressing successive iterations of complaints that do not come close to alleging facts that could meet
19 the legal standard for asserting a claim for control person liability. None of the consecutive complaints
20 even purport to offer any new facts, let alone facts that might begin to justify Plaintiffs’ decision to
21 continue with their claims. Plaintiffs’ 4AC should be dismissed with prejudice as to the Softbank
22 Defendants, and the Court should consider assessing sanctions against Plaintiffs for their continued
23 assertion of specious arguments and failure voluntarily to withdraw a claim that has no reasonable basis.

1 Third, even ignoring Plaintiffs’ mischaracterization of the facts they have alleged in the
2 4AC, the notion that minority stock ownership and a concomitant power to appoint a director somehow
3 renders an investor a control person is on its face a legally unfounded proposition. No court has ever
4 held that minority stock ownership and the appointment of a single person occupying a minority position
5 on a board is sufficient to allege control person liability. To the contrary this Court has previously held
6 that “section 20(a) is not aimed at minority shareholders who possess only limited and indirect power to
7 influence the management and policies of the securities violator. *In re Genentech, Inc. Sec. Litig.*, No.
8 C-88-4038-DLJ, 1989 WL 201577, at *7 (N.D. Cal. Dec. 11, 1989) (J. Jensen) (finding that the
9 defendants’ minority stock ownership and ability to appoint a member of the board insufficient to allege
10 control).¹

11 The insufficiency of minority stock ownership as basis for control person liability flows
12 from the fact that Section 20(a) requires the pleading of facts that establish actual day-to-day control.
13 The Ninth Circuit has repeatedly held that whether a defendant is a control person involves “scrutiny of
14 the defendant’s participation in the day-to-day affairs of the corporation and the defendant’s power to
15 control corporate actions. *Am. West*, 320 F.3d 920,945 (9th Cir. 2003) (internal citations omitted).
16 Even after the Ninth Circuit’s decision in *Howard v. Everex Sys. Inc.*, 228 F.3d 1057 (9th Cir. 2000),
17 this Court has held that “plaintiffs must still plead and prove that [the defendant] exercised ‘a significant
18 degree of day-to-day operational control, amounting to the power to dictate another party’s conduct or
19 operations’ at the time of the alleged misstatements. *In re McKesson HBOC, Inc. Sec. Litig.*, 126 F.
20 Supp. 2d 1248, 1277 (N.D. Cal. 2000) (J. Whyte) (quoting *In re ZZZZ Best Sec. Litig.*, No., CV-87-
21 3574-RSWL (BX), 1994 WL 746649, at *6 (C.D. Cal. Oct. 16, 1994). The 4AC does not come close to
22 alleging that the Softbank Defendants exercised any control, much less day-to-day control over
23 UTStarcom, or that they even theoretically had the power to do so as a result of their 14.1% or less stock
24 ownership and appointment of one (and later none) director to the seven- member UTStarcom board.

25
26 ¹ Plaintiffs incorrectly argue that *Genentech* is “inapposite because it was decided before
27 *Hollinger*. (Opposition at 13.) The language from the *Genentech* decision cited by the Softbank
28 Defendants relates to the court’s determination that the defendants did not have control over
Genentech and was independent of the “culpable participation analysis questioned by *Hollinger*.”

1 Not even *America West*, the decision on which Plaintiffs exclusively rely, supports their
2 position. The court in *America West* did *not* hold, as Plaintiffs suggest, that shareholders who lack “day-
3 to-day control of the company [can] be liable under §20(a) if there [is] some ‘traditional indicia of
4 control.’ (Opposition at 9.) To the contrary, as quoted above, *America West* held that control person
5 liability requires “the defendant’s participation in the day-to-day affairs of the corporation and the
6 defendant’s power to control corporate actions. *Am. West*, 320 F.3d at 945. Plaintiffs attempt to read
7 *America West* as holding that any quantum of stock ownership, or the power to appoint single director,
8 or any other “traditional indicia of control is sufficient on its face to establish control. That is simply
9 untrue. Rather, the court conducted the same intensely factual analysis engaged in by all courts
10 evaluating allegations of control person liability, and held that the defendants controlled of a *majority* of
11 stockholder voting power during the class period and the power to elect the *majority* of the members of
12 America West’s Board of Directors was sufficient. *Id.*

13 Here, Plaintiffs do not allege either majority ownership or majority control of the board.
14 The 4AC’s allegations that the Softbank Defendants’ owned between 12.8% and 14.1% of UTStarcom’s
15 stock during the class period, and 21.2% at the start of and in the year immediately prior to the class
16 period, and could appoint a single member to a seven person board do not come close to pleading the
17 level of control present in *America West*, much less the “culpable participation that this Court has twice
18 ruled in the last year is required. *See In re Maxim Integrated Products, Inc., Derivative Litig.*, 574 F.
19 Supp. 2d 1046, 1067 (N.D. Cal. 2008) (J. Ware) (In order “to state a claim for control person liability, a
20 plaintiff must allege that . . . the defendant actively used [their] influence or control so as to be a
21 culpable participant in the primary violation.); *In re Juniper Networks, Inc. Sec. Litig.*, 542 F. Supp. 2d
22 1037, 1053 (N.D. Cal. 2008) (J. Ware) (same). Whether under a culpable participation standard or a
23 day-to-day operational control standard, Plaintiffs’ complaint falls miserably short.

24 **B. UTStarcom’s Disclosure Regarding the Softbank Defendants’ One-Time Power to**
25 **Influence Does Not Establish the Softbank Defendants’ Control Over UTStarcom**

26 Plaintiffs attempt to salvage their complaint by referencing UTStarcom’s statement in
27 SEC filings that the Softbank Defendants had “influence over UTStarcom. (Opposition at 12-14.)
28 Plaintiffs begin by mischaracterizing this statement as an “admission by the Softbank Defendants. It is

1 not a statement by any Softbank Defendant. Moreover, even if UTStarcom’s statement could be
2 attributed to Softbank – and it cannot – such an admission of influence is not tantamount to an admission
3 of control. Again, as this Court has previously explained, minority shareholders “who possess only
4 limited and indirect power to influence the management and policies of the securities violator are not
5 liable as control persons. *In re Genentech, Inc. Sec. Litig.*, No. C-88-4038-DLJ, 1989 WL 201577, at *7
6 (N.D. Cal. Dec. 11, 1989) (J. Jensen). UTStarcom’s disclosure regarding the Softbank Defendants’
7 power to influence cannot stand in the place of the allegation of facts suggesting that the Softbank
8 Defendants at least possessed if not “exerted real control. *In re Gupta Corp. Sec. Litig.*, 900 F. Supp.
9 1217, 1243 (N.D. Cal. 1994) (J. Smith).

10 **C. Softbank’s Nomination of Masayoshi Son to UTStarcom’s Seven-Member Board**
11 **Does Not Establish Control**

12 In the course of four rounds of briefing, Plaintiffs have failed to cite a single case for the
13 proposition that Son’s actions as a UTStarcom director – even during the scant 18 months he was a
14 UTStarcom director out of the almost five-year class period alleged in the complaint – can be imputed to
15 each of the Softbank Defendants merely because Softbank America appointed Son to the board. Rather,
16 the law states quite the opposite. *See, e.g., In re Global Crossing Ltd. Sec. Litig.*, No. 02 Civ. 910, 2005
17 WL 1881514, at *3-*4, *9-*10, *12-*13 (S.D.N.Y. Aug. 5, 2005) (holding that defendants Microsoft
18 and Softbank could not be held liable for actions of designees on ACG’s Board, emphasizing that
19 directors “had fiduciary duties to act on behalf of the shareholders of ACG itself, not on behalf of the
20 entities that appointed them, and that “the mere fact that they held high positions with Microsoft and
21 Softbank, and were appointed to the ACG board by those corporations, cannot, standing alone, establish
22 that they acted as agents . . . of Microsoft and Softbank); *see also In re Silicon Graphics Inc. Sec.*
23 *Litig.*, 183 F.3d 970, 990 (9th Cir. 1999) (“At the pleading stage, Board independence and compliance
24 with the business judgment rule are presumed.). Son is not a named defendant in this action, and his
25 actions as a director, including the signing of UTStarcom filings during that 18-month period, simply are
26 not imputable to the Softbank Defendants.

27 Moreover, the 4AC alleges no actions on the part of Son that might begin to rebut the
28 presumption of his independence or establish his control over UTStarcom. The 4AC merely states that

1 Son was an outside director for eighteen of the fifty-five months of the class period, that he signed
2 certain UTStarcom filings in his capacity as an outside director, and that he resigned from UTStarcom’s
3 board to “minimize conflicts of interest and improve corporate governance. Such allegations could not
4 sustain a control-person claim against him, let alone do so against any Softbank Defendant. *See, e.g., In*
5 *re Gupta Corp.*, 900 F. Supp. at 1241-43 (finding allegations that a defendant was an outside director
6 and had signed a company’s allegedly false Annual Report on Form 10-K insufficient to state a claim
7 for control person liability because such allegations “are simply conclusory allegations unsupported by
8 assertions of specific day-to-day involvement in the management of [the company]). Plaintiffs’
9 reliance on *Howard* as support for their argument to the contrary is misplaced. The defendant in
10 *Howard* was not an outside director, let alone a corporation with the power to appoint an outside
11 director, but the issuer’s CEO. The *Howard* court explicitly distinguished its finding of control person
12 liability from other cases involving directors “not involved in the corporation’s day-to-day business.
13 *Howard*, 228 F.3d at 1066. Here, there is no evidence that Son was involved in, let alone had authority
14 over, UTStarcom’s day-to-day business during his limited time on the seven-member board. *Id.* To
15 even begin to state a claim against any Softbank defendant through Son, Plaintiffs must allege facts
16 showing that Son had day-to-day operational control over UTStarcom. *See In re McKesson HBOC*, 126
17 F. Supp. 2d at 1277. After four rounds of briefing, Plaintiffs remain unable to allege any such facts and
18 the 4AC must be dismissed with prejudice.

19 **D. Plaintiffs’ Allegations That the Softbank Defendants Sold a Portion of Their Stock**
20 **to UTStarcom, Had Affiliates That Engaged In “Related Party” Transactions, And**
21 **Were UTStarcom’s Customers Do Not Establish Control Person Liability**

22 Unable to allege any facts that might begin to evidence actual control by any Softbank
23 Defendant, Plaintiffs instead point to a series of facially routine business transactions and argue that they
24 somehow evidence control. Specifically, Plaintiffs assert that the 4AC’s allegations that the Softbank
25 Defendants: (1) sold UTStarcom stock back to UTStarcom; (2) had affiliates that engaged in “related
26 party transactions with UTStarcom; and (3) were customers of UTStarcom, somehow collectively show
27 that the Softbank Defendants “exercised control over UTStarcom. (Opposition at 5-6.) None of this
28 has any nexus to a claim of actual control by the Softbank Defendants over UTStarcom and Plaintiffs do
not make any such connection. Moreover, the alleged sale of stock by the Softbank Defendants and the

1 purchase of UTStarcom product by Softbank affiliates appear on their face to be legitimate arm's length
2 transactions. Plaintiffs identify no facts that might indicate that UTStarcom would not have engaged in
3 such transactions absent the purported exertion of control by the Softbank Defendants. In the absence of
4 such facts, Plaintiffs' argument is that an investor who is also a customer takes on a duty to ensure that
5 its counterparty is properly accounting for and disclosing information to its investors. That argument is
6 ridiculous and specifically barred by the Supreme Court's recent decision in *Stoneridge Inv. Partners,*
7 *LLC v. Scientific-Atlanta, Inc.*, 128 S.Ct. 761 (2008).

8 **II. THE COURT SHOULD CONSIDER AWARDING SOFTBANK ITS FEES**

9 After several years and four rounds of briefing, Plaintiffs have yet to identify facts that
10 could plausibly be construed to give rise to a claim of control person liability against any of the Softbank
11 Defendants. Plaintiffs do not address this in their Opposition. (Opposition at 14.) Rather than defend
12 their continued failure to state facts resembling those required to state a control person claim, Plaintiffs
13 instead contend that the Softbank Defendants' request that this Court consider levying sanctions against
14 them is procedurally flawed and that the Softbank Defendants are required to make a formal motion for
15 an award of their fees. Plaintiffs are incorrect. This Court has the authority to impose sanctions *sua*
16 *sponte*, see, e.g., *Chambers v. Nasco, Inc.*, 111 S.Ct. 2123, 2135-2136 (1991), so long as the court first
17 issues an Order to Show Cause why the sanctions should not be imposed, thereby providing Plaintiffs
18 with an opportunity to respond to the Court's concerns. *Navellier v. Sletten*, 262 F.3d 923, 943 (9th Cir.
19 2001).

20 The threshold proceedings in this case have gone far beyond the norm given the number
21 of complaints Plaintiffs have filed, their multiple failures even to comply with the Court's instructions
22 on pleading clarity and form, and their unwillingness to drop the Softbank Defendants from this action
23 given their inability to meet the legal standard this Court has clearly set out for them in ruling on prior
24 motions. However, having already been subjected by Plaintiffs to four rounds of briefing and hundreds
25 of thousands of dollars in costs, the Softbank Defendants have no interest in further multiplying
26 proceedings or requiring the Court to consider a motion if the Court does not regard this as a case where
27 sanctions may be appropriate. The Court is in an appropriate position to assess whether this is such a
28 case. If so, the Softbank Defendants request that the Court enter an Order to Show Cause why sanctions

1 in the form of requiring Plaintiffs to reimburse some portion of Softbank's legal fees should not be
2 assessed against Plaintiffs.

3

4 Dated: November 24, 2008

5

/s/ Robert A. Sacks
Robert A. Sacks (SBN 150146)
SULLIVAN & CROMWELL LLP
1888 Century Park East
Los Angeles, CA 90067
Telephone: (310) 712-6600
Facsimile: (310) 712-8800

6

7

8

9

Jason de Bretteville (SBN 195069)
R.Jeremy Adamson (SBN 251380)
SULLIVAN & CROMWELL LLP
1870 Embarcadero Road
Palo Alto, California 94303
Telephone: (650) 461-5600
Facsimile: (650) 461-5700

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

Attorneys for Softbank Holdings, Inc.
Softbank America, Inc. and Softbank
Corporation