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 THOMAS J. TOY

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 11  
 12 UNITED STATES DISTRICT COURT  
 13 NORTHERN DISTRICT OF CALIFORNIA  
 14 SAN JOSE DIVISION  
 15

16 IN RE UTSTARCOM, INC.  
 17 SECURITIES LITIGATION

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

) **UTSTARCOM DEFENDANTS' REPLY**  
 ) **IN SUPPORT OF REQUEST FOR**  
 ) **JUDICIAL NOTICE RE MOTION TO**  
 ) **DISMISS; REQUEST FOR JUDICIAL**  
 ) **NOTICE OF ADDITIONAL**  
 ) **DOCUMENTS**

18  
 19 \_\_\_\_\_ )  
 20 This Document Relates to: )

21 ALL ACTIONS. )  
 22 )  
 23 )  
 24 \_\_\_\_\_ )

) Hearing Date: Jan. 16, 2009  
 ) Hearing Time: 9:00 a.m.  
 ) Courtroom: Hon. James Ware

1 Defendants UTStarcom, Inc. (“UTStarcom” or the “Company”), Hong Liang Lu, Michael  
2 J. Sophie, Ying Wu, and Thomas J. Toy (collectively the “UTStarcom Defendants”) submit this  
3 Reply in Support of Defendants’ Request for Judicial Notice and Request for Judicial Notice of  
4 Additional Documents submitted as exhibits to the Supplemental Declaration of Cheryl Fount in  
5 Support of UTStarcom Defendants’ Motions to Dismiss and Strike the Fourth Amended  
6 Consolidated Complaint.

7 Plaintiffs concede that every exhibit defendants have submitted should be considered by  
8 the Court, either as a matter of judicial notice or under the incorporation by reference doctrine.  
9 Plaintiffs’ argument that certain exhibits may be considered but not for the truth of their contents  
10 should be rejected where plaintiffs themselves have relied on those same documents for the truth  
11 of their contents. Exhibit (“Ex.”) 54, a newspaper article, is the proper subject of judicial notice  
12 for the limited purpose of showing that the statements contained therein were made.

13 **I. PLAINTIFFS CONCEDE THAT VIRTUALLY EVERY DOCUMENT SUBMITTED**  
14 **CAN AND SHOULD BE CONSIDERED BY THE COURT**

15 Plaintiffs have written a confusing, contradictory Response to Defendants’ Request for  
16 Judicial Notice (“Pls.’ Response”). Plaintiffs appear to single out specific exhibits (7-9, 11-12,  
17 14-19, 20-49, and 52), but conclude that the Court may consider them in their entirety. *See* Pls.’  
18 Response at 7 (“Accordingly, the Court can consider the entirety of Exhibits 7-9, 11-12, 14-19,  
19 20-49, and 52 under the incorporation doctrine but not take judicial notice of them.”).<sup>1</sup> Thus,  
20 there is no dispute that the Court may consider these documents.

21 The dispute between the parties appears to be the purpose for which the Court may  
22 consider the documents and the information in those documents. Plaintiffs argue that it is error to  
23 take judicial notice of the “truth” of the contents of documents. Pls.’ Response at 3. For many  
24 documents, such as the press releases and conference calls where Safe Harbor warnings were  
25 made, the defendants do not ask the Court to consider the truth of the contents, but rather that

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26 <sup>1</sup> Plaintiffs appear to concede that Exhibits 1-6, 10, 13, 51 and 53, all of which were cited in  
27 the Complaint, are also to be considered under the incorporation doctrine. Defendants did not  
28 include them in the Request for Judicial Notice for that very reason.

1 certain statements and disclosures were made. Plaintiffs do not challenge the fact of these  
2 disclosures.

3 Federal Rule of Evidence 201 permits the Court to judicially notice facts that are not  
4 subject to reasonable dispute. Plaintiffs concede that Exhibits 7-9, 11-12, 14-19, 20-49, and 52  
5 are properly before the Court but object to notice of the “truth of the contents.” Pls.’ Response at  
6 1. With limited exception,<sup>2</sup> plaintiffs do not identify any particular fact contained in any of these  
7 Exhibits which is subject to reasonable dispute, or cite to specific portions of any document or  
8 give examples where they contend defendants are improperly asking the Court to notice the truth  
9 of certain facts.

10 This material omission is exacerbated by the fact that plaintiffs themselves have relied on  
11 some of these same documents for the truth of their contents. Plaintiffs argue that Exhibits 14-17,  
12 the Form 4s, should not be considered for the truth of their contents because they “are capable of  
13 ‘reasonable dispute.’” Pls.’ Response at 4-5. Plaintiffs do not explain what that dispute is. They  
14 ignore that they have cited the defendants’ stock sales as evidence of scienter (although  
15 inappropriately, given that the stock sales were pursuant to Rule 10b5-1 trading plans). *See*  
16 Fourth Amended Consolidated Complaint (“4-AC”) ¶ 135. Plaintiffs necessarily relied on Form  
17 4s (Exs. 14-19) in determining the details of the defendants’ stock sales, such as timing, number  
18 of shares, and price. Courts clearly consider the contents of Form 4s in such circumstances. *In re*  
19 *Silicon Graphics Inc. Sec. Litig.*, 183 F.3d 970, 986-87 (9th Cir. 1999); *In re TIBCO Software,*  
20 *Inc. Sec. Litig.*, No. C 05-2146, 2006 WL 1469654, at \*17 (N.D. Cal. May 25, 2006) (“court may  
21 take judicial notice of Forms 4 filed with the SEC . . . when a plaintiff’s allegations rely on a  
22 defendant’s stock sales”); *Wietschner v. Monterey Pasta Co.*, 294 F. Supp. 2d 1102, 1109 (N.D.  
23 Cal. 2003) (taking judicial notice of Form 4s where integral to stock sale allegations); *In re*  
24 *Copper Mountain Sec. Litig.*, 311 F. Supp. 2d 857, 863-64 (N.D. Cal. 2004) (taking judicial  
25 notice of Forms 3 and 4 and stock price); *Plevy v. Haggerty*, 38 F. Supp. 2d 816, 821 (C.D. Cal.

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26 <sup>2</sup> Plaintiffs dispute certain financial results reported which were later restated. Pls.’ Response  
27 at 2 n.2. Defendants are not seeking judicial notice of the truth of those financial figures that  
28 were eventually restated.

1 1998) (taking judicial notice of SEC filings, annual reports, Form 4s, SEC filings of other  
2 companies not parties, and tabular representation of stock price).

3 Similarly, plaintiffs have relied on stock price charts to allege that the Company's stock  
4 was at a certain price on a certain date. Are the plaintiffs contending that the Court may not rely  
5 on the stock price chart (Ex. 52) for the purpose of determining the price at which the stock in  
6 fact?

7 Plaintiffs have also relied on SEC filings and the SEC's Administrative Order to assert  
8 various "facts," including findings and conclusions drawn by the SEC and the independent  
9 committee that UTStarcom appointed. Having relied on these documents to establish some  
10 "truth," plaintiffs cannot then disavow other "truths" in the same document which plaintiffs wish  
11 to avoid. Plaintiffs cannot seriously contend that "judicial notice would be reversible error," Pls.'  
12 Response at 1, in such circumstances.

## 13 **II. JUDICIAL NOTICE OF THE NEWSPAPER ARTICLE IS APPROPRIATE**

14 Plaintiffs object to judicial notice of Exhibit 54, a newspaper article, Zusha Elinson,  
15 *UTStarcom Execs Settle SEC Charges*, The Recorder, May 5, 2008, wherein the then co-acting  
16 regional director in the SEC's San Francisco office stated, "We did not sue them for fraud; this  
17 was more of a negligence-type case." Plaintiffs argue that judicial notice is improper where the  
18 accuracy is questioned and where the article was not referenced in the Complaint and is not  
19 crucial to plaintiffs' claims. Pls.' Response at 2-3, 6-7. Plaintiffs attempt to distinguish the  
20 authorities that defendants cited in support of judicial notice, arguing that three of the five cited  
21 cases were decided in the summary judgment context, rather than on dismissal. *Id.* at 7.

22 Recently, in *Patel v. Parnes*, – F.R.D. –, 2008 WL 2803076 (C.D. Cal. May 19, 2008), the  
23 court considered the propriety of judicially noticing newspaper articles in reviewing defendants'  
24 motion to dismiss a securities class action complaint. The court made clear that judicial notice of  
25 newspaper articles does not turn on whether the complaint cites to the article. *Id.* at \*17. The  
26 court held that it "is appropriate for the court to take judicial notice of news articles regarding  
27 defendants' stock or corporate activities." *Id.* (citing *Heliotrope Gen., Inc. v. Ford Motor Co.*,  
28 189 F.3d 971, 981 n.18 (9th Cir. 1999) (affirming grant of judgment on the pleadings; "We take

1 judicial notice that the market was aware of the information contained in news articles submitted  
2 by the defendants.”)). Although plaintiffs do not cite to the newspaper article, they cite  
3 extensively to the SEC’s Administrative Order Instituting Cease-and-Desist Proceedings brought  
4 before the SEC on May 1, 2008 (“Administrative Order,” Ex. 53), the subject of the article. *See*,  
5 *e.g.*, 4-AC ¶¶ 8-9, 23, 78-84, 100, 113, 125-27, 156, 161, 173, 254, 291. Exhibit 54 is not only  
6 specific and exclusive to UTStarcom, it concerns the same transactions underlying the Complaint  
7 and the Administrative Order on which plaintiffs extensively rely. Defendants simply seek notice  
8 of the article for the fact that the statements were made, not for their underlying truth. Judicial  
9 notice of the article for this purpose is proper.

10 **III. THE COURT SHOULD TAKE JUDICIAL NOTICE OF THE ADDITIONAL**  
11 **DOCUMENTS SUBMITTED IN SUPPORT OF THE REPLY RE MOTION TO**  
12 **DISMISS**

13 Courts “may take judicial notice of records and reports of administrative bodies.”  
14 *Interstate Natural Gas Co. v. S. Cal. Gas. Co.*, 209 F.2d 380, 385 (9th Cir. 1953) (taking judicial  
15 notice of contract filed with Federal Power Commission, certificate of public convenience).

16 Accordingly, defendants request that the Court take judicial notice of the following  
17 additional documents:

- 18 1. Excerpts from U.S. GAO Financial Restatements: Update of Public Company  
19 Trends, Market Impacts, and Regulatory Enforcement Activities, reissued March 5, 2007, Fong  
20 Supp. Dec., Ex. 55;
- 21 2. SEC press release dated May 27, 2003, titled “SEC Implements Internal Control  
22 Provisions of Sarbanes-Oxley Act,” Fong Supp. Dec., Ex. 56.

23 **CONCLUSION**

24 For the reasons stated, defendants’ Request for Judicial Notice and Request for Judicial  
25 Notice of additional documents should be granted.

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Dated: November 24, 2008

WILSON SONSINI GOODRICH & ROSATI  
Professional Corporation

By: /s/ TERRY T. JOHNSON  
TERRY T. JOHNSON

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