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11 UNITED STATES DISTRICT COURT
12 NORTHERN DISTRICT OF CALIFORNIA
13 SAN JOSE DIVISION
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15 IN RE UTSTARCOM, INC.)
16 SECURITIES LITIGATION)

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

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18)
19 This Document Relates to:)
20 ALL ACTIONS.)

**REQUEST FOR JUDICIAL NOTICE IN
SUPPORT OF UTSTARCOM
DEFENDANTS' MOTIONS TO
DISMISS FOURTH AMENDED
CONSOLIDATED COMPLAINT FOR
VIOLATION OF THE FEDERAL
SECURITIES LAWS AND TO STRIKE
OPTIONS ALLEGATIONS**

Hearing Date: Dec. 8, 2008
Hearing Time: 9:00 a.m.
Courtroom: Hon. James Ware

1 UTStarcom, Inc. (“UTStarcom or the “Company), Hong Liang Lu, Michael J. Sophie,
2 Ying Wu, and Thomas J. Toy (collectively, “UTStarcom Defendants), hereby request that this
3 Court take judicial notice pursuant to Rule 201 of the Federal Rules of Evidence of certain
4 documents submitted in support of the UTStarcom Defendants’ Motion to Dismiss the Fourth
5 Amended Consolidated Complaint for Violation of the Federal Securities Laws (“Complaint or
6 “4-AC).

7 **Safe Harbor Warnings Provided With Statements Cited in the Complaint**

8 The Reform Act provides:

9 On any motion to dismiss based upon subsection (c)(1) of this section, the court
10 shall consider any statement cited in the complaint and any cautionary statement
11 accompanying the forward-looking statement, which are not subject to material
dispute, cited by the defendant.

12 15 U.S.C. § 78u-5(e). Based on this statute, Judge Walker has twice reiterated that the court “is
13 required to consider the safe harbor warnings. *In re Portal Software, Inc. Sec. Litig.*, No. C-03-
14 5139 VRW, 2005 WL 1910923, at *4 (N.D. Cal. Aug. 10, 2005); *In re Copper Mountain Sec.*
15 *Litig.*, 311 F. Supp. 2d 857, 864 (N.D. Cal. 2004). Accordingly, the Court should take notice of
16 the following documents which include safe harbor warnings, statements cited in the complaint,
17 or both:

- 18 1. UTStarcom’s press release dated April 16, 2003, cited at 4-AC ¶ 142, Fount Dec.
19 Ex. 20.
- 20 2. Excerpts from the transcript from UTStarcom’s Conference Call held on April 16,
21 2003, cited at 4-AC ¶ 181, Fount Dec. Ex. 21.
- 22 3. UTStarcom’s press release dated July 17, 2003, cited at 4-AC ¶ 181, Fount Dec.
23 Ex. 22.
- 24 4. Excerpts from the transcript from UTStarcom’s Conference Call held on July 17,
25 2003, cited at 4-AC ¶ 181, Fount Dec. Ex. 23.
- 26 5. UTStarcom’s press release dated September 25, 2003, cited at 4-AC ¶ 193, Fount
27 Dec. Ex. 24.

1 6. Excerpts from the transcript from UTStarcom's Conference Call held on
2 September 25, 2003, cited at 4-AC ¶ 193, Foug Dec. Ex. 25.

3 7. UTStarcom's press release dated October 1, 2003, cited at 4-AC ¶ 199, Foug
4 Dec. Ex. 26.

5 8. UTStarcom's press release dated October 23, 2003, cited at 4-AC ¶ 205, Foug
6 Dec. Ex. 27.

7 9. Excerpts from the transcript from UTStarcom's Conference Call held on October
8 23, 2003, cited at 4-AC ¶ 205, Foug Dec. Ex. 28.

9 10. UTStarcom's press release dated January 22, 2004, cited at 4-AC ¶ 236, Foug
10 Dec. Ex. 29.

11 11. Excerpts from the transcript from UTStarcom's Conference Call held on January
12 22, 2004, cited at 4-AC ¶ 236, Foug Dec. Ex. 30.

13 12. UTStarcom's press release dated April 27, 2004, cited at 4-AC ¶ 248, Foug Dec.
14 Ex. 31.

15 13. Excerpts from the transcript from UTStarcom's Conference Call held on April 27,
16 2004, cited at 4-AC ¶ 248, Foug Dec. Ex. 32.

17 14. UTStarcom's press release dated July 27, 2004, cited at 4-AC ¶ 268, Foug Dec.
18 Ex. 33.

19 15. Excerpts from the transcript from UTStarcom's Conference Call held on July 27,
20 2004, cited at 4-AC ¶¶ 269-272, Foug Dec. Ex. 34.

21 16. UTStarcom's press release dated September 20, 2004, titled "UTStarcom Adjusts
22 Financial Guidance for 2004 and Gives Update on Globalization Strategy, cited at 4-AC ¶ 300,
23 Foug Dec. Ex. 35.

24 17. UTStarcom's press release dated September 20, 2004, titled "UTStarcom Signs
25 Contract to Deliver New iAN-8000 Multi-Service Access Node and Promotional Services to
26 Japan Telecom, cited at 4-AC ¶¶ 296, 300, Foug Dec. Ex. 36.

27 18. Excerpts from the transcript from UTStarcom's Conference Call held on
28 September 20, 2004, cited at 4-AC ¶ 300, Foug Dec. Ex. 37.

1 19. UTStarcom's press release dated October 26, 2004, cited at 4-AC ¶ 317, Foug
2 Dec. Ex. 38.

3 20. Excerpts from the transcript from UTStarcom's Conference Call held on October
4 26, 2004, cited at 4-AC ¶ 317, Foug Dec. Ex. 39.

5 21. UTStarcom's press release dated January 6, 2005, cited at 4-AC ¶ 332, Foug Dec.
6 Ex. 40.

7 22. Excerpts from the transcript from UTStarcom's Conference Call held on January
8 6, 2005, cited at 4-AC ¶¶ 332-333, Foug Dec. Ex. 41.

9 23. UTStarcom's press release dated May 5, 2005, cited at 4-AC ¶¶ 350-351, Foug
10 Dec. Ex. 42.

11 24. Excerpts from the transcript from UTStarcom's Conference Call held on May 5,
12 2005, cited at 4-AC ¶ 350, Foug Dec. Ex. 43.

13 25. UTStarcom's press release dated August 2, 2005, cited at 4-AC ¶ 362, Foug Dec.
14 Ex. 44.

15 26. Excerpts from the transcript from UTStarcom's Conference Call held on August 2,
16 2005, cited at 4-AC ¶ 362, Foug Dec. Ex. 45.

17 27. UTStarcom's press release dated November 3, 2005, cited at 4-AC ¶ 377, Foug
18 Dec. Ex. 46.

19 28. Excerpts from the transcript from UTStarcom's Conference Call held on
20 November 3, 2005, cited at 4-AC ¶ 377, Foug Dec. Ex. 47.

21 29. UTStarcom's press release dated August 9, 2006, cited at 4-AC ¶ 385, Foug Dec.
22 Ex. 48.

23 30. Excerpts from the transcript from UTStarcom's Conference Call held on August 9,
24 2006, cited at 4-AC ¶ 385, Foug Dec. Ex. 49.

25 **Documents Integral To Plaintiffs' Claims**

26 The Ninth Circuit has held that documents crucial to plaintiff's claims but not attached to
27 the pleading may be considered at the pleading stage if their authenticity is not disputed. *See*

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1 *Parrino v. FHP, Inc.*, 146 F.3d 699, 705-706 (9th Cir. 1998); *Wietschner v. Monterey Pasta Co.*,
2 294 F. Supp. 2d 1102, 1109 (N.D. Cal. 2003).

3 It is appropriate to consider on a motion to dismiss SEC filings, including those that
4 reflect defendants' stock holdings. See *In re Silicon Graphics Inc. Sec. Litig.*, 183 F.3d 970, 986-
5 87 (9th Cir. 1999); *Wietschner*, 294 F. Supp. 2d at 1109 (taking judicial notice of Forms 4 where
6 integral to stock sale allegations); *Copper Mountain*, 311 F. Supp. 2d at 863-64 (taking judicial
7 notice of Forms 3 and 4 and stock price); *Plevy v. Haggerty*, 38 F. Supp. 2d 816, 821 (C.D. Cal.
8 1998) (taking judicial notice of SEC filings, annual reports, Form 4s, SEC filings of other
9 companies not parties, and tabular representation of stock price).

10 Accordingly, defendants request that the Court take judicial notice of the following:

- 11 31. Form 4s filed by defendant Hong Liang Lu, Foug Dec. Ex. 14.
- 12 32. Form 4s filed by defendant Michael J. Sophie, Foug Dec. Ex. 15.
- 13 33. Form 4s filed by defendant Thomas J. Toy, Foug Dec. Ex. 16.
- 14 34. Form 4s filed by defendant Ying Wu, Foug Dec. Ex. 17.
- 15 35. UTStarcom, Inc.'s Proxy Statement dated April 2, 2003, Foug Dec. Ex. 18.
- 16 36. UTStarcom, Inc.'s Proxy Statement dated April 18, 2005, Foug Dec. Ex. 19.
- 17 37. Excerpts from UTStarcom's Form 10-Q/A for the fiscal quarter ending March 31,
18 2004, filed with the SEC on June 6, 2005, Foug Dec. Ex. 7.
- 19 38. Excerpts from UTStarcom's Form 10-Q/A for the fiscal quarter ending June 30,
20 2004, filed with the SEC on June 6, 2005, Foug Dec. Ex. 8.
- 21 39. Excerpts from UTStarcom's Form 10-Q/A for the fiscal quarter ending September
22 30, 2004, filed with the SEC on June 6, 2005, Foug Dec. Ex. 9.
- 23 40. Excerpts from UTStarcom's Form 10-Q for the fiscal quarter ending September
24 30, 2006, filed with the SEC on October 10, 2007, Foug Dec. Ex. 11.
- 25 41. Excerpts from UTStarcom's Form 10-K for the fiscal year ended December 31,
26 2006, filed with the SEC on October 10, 2007, Foug Dec. Ex. 12.
- 27 42. UTStarcom's stock prices from February 21, 2003 through October 12, 2007,
28 Foug Dec. Ex. 52.

Recorder Article: Capable of Accurate and Ready Determination

The Court may also take judicial notice of the May 5, 2008 Recorder article entitled “UTStarcom Execs Settle SEC Charges. Courts may take judicial notice of information from news articles and other outside sources “not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. Fed. R. Evid. 201(b); *see also Ritter v. Hughes Aircraft Co.*, 58 F.3d 454, 458-59 (9th Cir. 1995) (affirming the decision of the district court to take judicial notice under Fed. R. Evid. 201(b) of a newspaper article because the article was a fact that would be generally known); *Crowder v. Kitagawa*, 81 F.3d 1480, 1491 n.10 (9th Cir. 1996) (recognizing that a court “may take judicial notice of adjudicative facts appearing in newspapers); *United States v. Alisal Water Corp.*, 326 F. Supp. 2d 1032, 1036 n.5 (N.D. Cal. 2004) (judicially noticing of articles and publications downloaded from the websites of the EPA, the California DHS and newspapers where the documents were introduced for the purpose of demonstrating facts not reasonably subject to dispute), *aff’d*, 431 F.3d 643 (9th Cir. 2005); *Contreras v. Metropolitan Life Ins. Co.*, No. C 07-02597, 2007 WL 4219167 at *2 (N.D. Cal. Nov. 29, 2007) (taking judicial notice of an outside insurance report because the report came from “an accepted and respected source, which is capable of accurate and ready determination.); *In re Merrill Lynch & Co. Research Reports Sec. Litig.*, 289 F. Supp. 2d 416, 425 n.15 (S.D.N.Y. 2003) (holding that court may take judicial notice of fact of article’s publication even if article was not attached to complaint or incorporated therein by reference).

Here, the May 5, 2008 Recorder article directly relates to the SEC’s Administrative Order Instituting Cease-and-Desist Proceedings brought before the SEC on May 1, 2008. *See, e.g.*, 4-AC ¶¶ 8-9, 79-84. The information from the article comes from a respected source, which is capable of accurate and ready determination. Accordingly, defendants request that the Court take judicial notice of the following:

43. A true and correct copy of the newspaper article, Zusha Elinson, *UTStarcom Execs Settle SEC Charges*, The Recorder, May 5, 2008, Foun Dec. Ex. 54.

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Dated: Sept. 8, 2008

WILSON SONSINI GOODRICH & ROSATI
Professional Corporation

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

Attorneys for Defendants UTStarcom Inc.,
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