

1 TERRY T. JOHNSON, State Bar No. 121569 (tjohnson@wsgr.com)
 2 BORIS FELDMAN, State Bar No. 128838 (boris.feldman@wsgr.com)
 3 BAHRAM SEYEDIN-NOOR, State Bar No. 203244 (bnoor@wsgr.com)
 4 CHERYL W. FOUNG, State Bar No. 108868 (cfoung@wsgr.com)
 5 BRYAN J. KETROSER, State Bar No. 239105 (bketros@wsgr.com)
 6 L. DAVID NEFOUSE, State Bar No. 243417 (dnefouse@wsgr.com)
 7 WILSON SONSINI GOODRICH & ROSATI
 650 Page Mill Road
 Palo Alto, CA 94304-1050
 Telephone: (650) 493-9300
 Facsimile: (650) 565-5100
 tjohnson@wsgr.com

8 Attorneys for Defendants
 9 UTSTARCOM, INC. HONG LIANG LU,
 MICHAEL J. SOPHIE, YING WU, and
 THOMAS J. TOY

10
 11
 12 UNITED STATES DISTRICT COURT
 13 NORTHERN DISTRICT OF CALIFORNIA
 14 SAN JOSE DIVISION

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

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

17)
 18)
 19)
 20)
 21)
 22)
 23)
 24)
 25)
 26)
 27)
 28)

**UTSTARCOM DEFENDANTS'
 STATEMENT OF RECENT NINTH
 CIRCUIT DECISION**

19 This Document Relates to:
 20 ALL ACTIONS.

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

1 Pursuant to Northern District of California Rule 7-3(d), defendants UTStarcom, Inc.
2 (“UTStarcom or the “Company), Hong Liang Lu, Michael J. Sophie, Ying Wu, and Thomas J.
3 Toy (collectively “Defendants), respectfully submit the Ninth Circuit’s published decision in
4 *Zucco Partners, LLC v. Digimarc Corp.*, – F.3d –, 2009 WL 57081 (9th Cir. Jan. 12, 2009)
5 (attached hereto as Exhibit A), in support of Defendants’ Motion to Dismiss Plaintiff’s Fourth
6 Amended Consolidated Complaint. That motion is scheduled to be heard on January 16, 2009.

7 This Ninth Circuit decision is relevant to the pending motion in the following respects:

8 The *Digimarc* Court’s holding that under the Supreme Court’s decision in *Tellabs*, “[a]
9 court must compare the malicious and innocent inferences cognizable from the facts pled in the
10 complaint, and only allow the complaint to survive a motion to dismiss if the malicious inference
11 is at least as compelling as any opposing innocent inference, 2009 WL 57081, at *5, is relevant
12 to Defendants’ argument that Plaintiffs’ fraudulent concealment theory cannot be reconciled with
13 the Company’s repeated negative disclosures, including, *inter alia*, internal control problems.
14 Motion to Dismiss Plaintiffs’ Fourth Amended Consolidated Complaint (“Motion) (Docket
15 #257) at 9, 22-24; Reply in Support of Motion to Dismiss Fourth Amended Consolidated
16 Complaint (“Reply) (Docket #280) at 7-8, 10-11, 20.

17 The *Digimarc* Court’s holding that a restatement only gives rise to a strong inference of
18 scienter where there are “allegations regarding a management’s role in the company that are
19 particular and suggest that the defendant had actual access to the disputed information, and where
20 the nature of the relevant fact is of such prominence that it would be ‘absurd’ to suggest that
21 management was without knowledge of the matter, 2009 WL 57081, at *14 (internal quotation
22 marks and citation omitted), is relevant to Defendants’ argument that the Company’s management
23 is located in Alameda, and Defendants had no knowledge of the side letters in India, or
24 accounting for historical sales for one region in China. Motion at 20-22, 30; Reply at 3-7, 13, 15-
25 16 & n.17.

26 The *Digimarc* Court’s rejection of a witness’s statement that the CFO ordered the witness
27 not to write down obsolete inventory because it would result in the company missing market
28 expectations, where the company “*did* write down significant amounts of obsolete inventory,

1 *Digimarc*, 2009 WL 57081, at *13, is relevant to Defendants’ argument that Plaintiffs’ citation to
2 the Administrative Order in their Complaint ignores that the SEC found no fraud. Motion at 5-8,
3 20; Reply at 3-7.

4 The *Digimarc* Court’s holding that “[b]oilerplate language in a corporation’s 10-K form,
5 or required certifications under Sarbanes-Oxley section 302(a) . . . add nothing substantial to the
6 scienter calculus, 2009 WL 57081, at *18, is relevant to Defendants’ argument that Sarbanes-
7 Oxley certifications do not support an inference of scienter. Motion at 27; Reply at 11-12.

8 The *Digimarc* Court’s holding that “[a]bsent allegations that the resignation at issue was
9 uncharacteristic when compared to the defendant’s typical hiring and termination patterns or was
10 accompanied by suspicious circumstances an inference of scienter “will never be as cogent or as
11 compelling as the inference that the employees resigned or were terminated for unrelated personal
12 or business reasons, 2009 WL 57081, at *16, is relevant to Defendants’ argument that the
13 departures of Messrs. Sophie and Wu during the class period do not support an inference of
14 scienter. See Motion at 29-30; Reply at 13.

15 The *Digimarc* Court’s holding that the plaintiffs failed to plead scienter where the
16 accounting issues involved complexity and judgment and required “subtle differentiations, 2009
17 WL 57081, at *1, is relevant to Defendants’ argument that Plaintiffs failed to show knowledge
18 that goodwill should have been written off earlier. Motion at 30-32; Reply at 13-15.

19 The *Digimarc* Court’s rejection of witness allegations where the witnesses “report only
20 conclusory assertions about the defendants’ scienter and lack “reliable personal knowledge of
21 the defendants’ mental state, 2009 WL 57081, at *12, is relevant to Defendants’ argument that
22 no witness in finance reported to any defendant or purported to address what the Individual
23 Defendants knew. Motion at 39-41; Reply at 24.

24 The *Digimarc* Court’s rejection of witness statements where they were based on hearsay
25 or where the witnesses were not at the company at the time, or did not hold positions that would
26 enable them to speak to a particular issue, 2009 WL 57081, at *11, is relevant to Defendants’
27 argument that the Plaintiffs’ confidential witness allegations are insufficient to meet their
28 pleading burden. Motion at 38-39.

1 The *Digimarc* Court’s holding that stock sale allegations fail to give rise to a strong
2 inference of scienter where plaintiffs fail to identify the defendants’ trading history, and that
3 “[e]ven if the defendant’s trading history is simply not available, for reasons beyond a plaintiff’s
4 control, the plaintiff is not excused from pleading the relevant history, 2009 WL 57081, at *20,
5 is relevant to Defendants’ argument that Plaintiffs’ stock sale allegations are insufficient because
6 they failed to provide a comparable 4 ½ year pre-class period to show how stock sales compared
7 during the Class Period. Motion at 29; Reply at 12-13.

8 The *Digimarc* Court’s holding that a company’s single private placement of stock during
9 the class period, without accompanying allegations that the offering was “significant enough and
10 uncharacteristic enough to cast doubt on the defendant company’s motives, 2009 WL 57081, at
11 *20, is relevant to Defendants’ argument that the January 2004 equity offering does not support
12 an inference of scienter. See Reply at 15.

13
14 Dated: January 14, 2009

WILSON SONSINI GOODRICH & ROSATI
Professional Corporation

15
16 By: /s/ TERRY T. JOHNSON
TERRY T. JOHNSON

17
18 Attorneys for Defendants UTStarcom Inc., Hong
19 Liang Lu, Michael J. Sophie, Ying Wu, and Thomas
20 Toy