

1 BERNSTEIN LITOWITZ BERGER  
& GROSSMANN LLP  
2 DAVID R. STICKNEY (Bar No. 188574)  
NIKI L. MENDOZA (Bar No. 214646)  
3 MATTHEW P. SIBEN (Bar No. 223279)  
TAKEO A. KELLAR (Bar No. 234470)  
4 12481 High Bluff Drive, Suite 300  
San Diego, CA 92130  
5 Tel: (858) 793-0070  
Fax: (858) 793-0323  
6 davids@blbglaw.com  
nikim@blbglaw.com  
7 matthews@blbglaw.com  
takeok@blbglaw.com  
8 -and-  
9 CHAD JOHNSON  
1285 Avenue of the Americas, 38th Floor  
New York, NY 10019  
10 Tel: (212) 554-1400  
Fax: (212) 554-1444  
11 chad@blbglaw.com

12 Attorneys for Lead Plaintiff Teachers' Retirement  
System of Oklahoma and Lead Counsel to the Class

13  
14 UNITED STATES DISTRICT COURT  
15 NORTHERN DISTRICT OF CALIFORNIA  
16 SAN FRANCISCO DIVISION

17 In re CONNETICS SECURITIES  
LITIGATION

Case No. C 07-02940 SI

**CLASS ACTION**

**LEAD PLAINTIFF'S OPPOSITION TO  
DEFENDANTS YAROSHINSKY'S AND  
ZAK'S MOTIONS TO STRIKE  
PORTIONS OF THE AMENDED  
CONSOLIDATED CLASS ACTION  
COMPLAINT**

Date: October 19, 2007  
Time: 9:00 a.m.  
Courtroom: 10  
Judge: Hon. Susan Illston

1 **I. INTRODUCTION**

2 Lead Plaintiff Teachers' Retirement System of Oklahoma ("Lead Plaintiff") respectfully  
3 submits this response in opposition to Defendant Alexander Yaroshinsky's Motion To Strike  
4 Portions Of The Amended Consolidated Class Action Complaint.<sup>1</sup>

5 On June 22, 2006, the United States Securities and Exchange Commission ("SEC") filed  
6 an amended complaint in the United States District Court for the Southern District of New York  
7 against defendants Alexander Yaroshinsky and Victor Zak for insider trading involving  
8 Connetics securities (the "SEC Complaint"). The Amended Consolidated Class Action  
9 Complaint (the "Complaint") in this action properly references certain specific facts contained in  
10 the SEC Complaint. *See In re Cylink Sec. Litig.*, 178 F. Supp. 2d 1077, 1080-81 (N.D. Cal.  
11 2001) (holding that a court properly considers allegations in a securities fraud class action  
12 complaint that were derived from a complaint filed by the SEC "when evaluating the sufficiency  
13 of plaintiffs' allegations under the PSLRA"). Given that the allegations in the Complaint that  
14 reference the specific facts in the SEC Complaint are material and have bearing on the subject  
15 matter of this litigation, Lead Plaintiff respectfully submits that defendants' motions to strike  
16 should be denied.

17 **II. ARGUMENT**

18 **A. Defendant Yaroshinsky's**  
19 **Motion To Strike Is Without Merit**

20 Federal Rule of Civil Procedure 12(f) authorizes the Court to strike from a pleading "any  
21 insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Fed. R.  
22 Civ. P. 12(f). However, "motions to strike should not be granted unless it is clear that the matter  
23 to be stricken could have no possible bearing on the subject matter of the litigation," and such  
24 motions are "regarded with disfavor." *Lilley v. Charren*, 936 F. Supp. 708, 713 (N.D. Cal.

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26 <sup>1</sup> In addition, on or about August 28, 2007, despite having previously filed an Answer that  
27 admits many of the allegations [Docket No. 20], defendant Victor E. Zak served a motion to  
28 strike, joining and adopting the arguments in defendant Yaroshinsky's motion to strike. [Filed  
September 11, 2007, Docket No. 41.] Lead Plaintiff submits this opposition in response to  
defendants Yaroshinsky's and Zak's motions to strike.

1 1996). The paragraphs in Lead Plaintiff’s Complaint contested by Yaroshinsky or Zak, which  
2 set forth information contained in the SEC Complaint, unquestionably have bearing upon  
3 defendants Yaroshinsky’s and Zak’s securities law violations at issue in this case.<sup>2</sup> The specific  
4 allegations detailed in the SEC Complaint against Yaroshinsky and Zak directly support Lead  
5 Plaintiff’s allegations that Yaroshinsky and Zak knowingly traded on material, non-public  
6 information. Accordingly, the facts contained in the SEC Complaint are not “immaterial” or  
7 “impertinent” material subject to Rule 12(f).

8 Contrary to defendants’ assertions, facts alleged in the SEC Complaint provide proper  
9 bases for the allegations against them in this action. Addressing precisely this issue, the  
10 Honorable Vaughn R. Walker of the Northern District of California upheld a securities fraud  
11 complaint which included allegations derived from an SEC complaint: “information ‘set forth’ in  
12 a complaint filed by the SEC” which “alleges fraudulent revenue recognition practices,” may be  
13 considered “when evaluating the sufficiency of plaintiffs’ allegations under the PSLRA.”  
14 *Cylink*, 178 F. Supp. 2d at 1080-81. Here too, Lead Plaintiff properly “set forth” information  
15 contained in the SEC Complaint, in addition to many other sources cited in the Complaint,  
16 including eight confidential witnesses and the investigation by counsel for Lead Plaintiff.

17 Defendant Yaroshinsky’s contention that the allegations from the SEC Complaint  
18 “constitute inadmissible hearsay” is off point. Motion to Strike (“MTS”) at 2. The PSLRA  
19 requires only that, “if an allegation regarding the statement or omission is made on information  
20 and belief, the complaint shall state with particularity all facts on which that belief is formed.”  
21 15 U.S.C. § 78u-4(b)(1). At the pleading stage, “plaintiffs are only required to plead facts, not to  
22 produce admissible evidence.” *In re McKesson HBOC, Inc. Sec. Litig.*, 126 F. Supp. 2d 1248,  
23 1272 (N.D. Cal. 2000). Thus, a properly pleaded complaint may be based on hearsay evidence.  
24 *Id.* Therefore, allegations based on information from a source, especially a reliable source like  
25 the SEC Complaint, are proper.

26 \_\_\_\_\_  
27 <sup>2</sup> Defendants seek to strike some, but not all, of the Complaint’s allegations that are based on the  
28 SEC Complaint. The paragraphs they seek to strike are as to Yaroshinsky and Zak only and thus  
such motion is irrelevant to the remaining allegations against the other defendants.

1           Indeed, courts in this Circuit and elsewhere have accepted allegations based on an SEC  
2 complaint in denying a motion to dismiss. *See, e.g., Cylink*, 178 F. Supp. 2d at 1080, 1089;  
3 *Carlson v. Xerox Corp.*, 392 F. Supp. 2d 267 (D. Conn. 2005); *Swack v. Credit Suisse First*  
4 *Boston*, 383 F. Supp. 2d 223 (D. Mass. 2004). Moreover, many courts have held that even a  
5 newspaper article can serve as a “reasonable source of information and belief allegations,”  
6 provided that the newspaper article includes “numerous factual particulars and is based on an  
7 independent investigative effort.”<sup>3</sup> In *McKesson*, defendants argued in their motion to dismiss  
8 that “newspaper articles should be discounted because they are hearsay.” *McKesson*, 126 F.  
9 Supp. 2d at 1272. The court rejected this argument, holding that “all pleadings on information  
10 and belief are hearsay . . . . if the newspaper article includes numerous factual particulars and is  
11 based on an independent investigative effort, it is a source that may be credited in determining  
12 whether plaintiffs have alleged facts sufficient to raise a strong inference of scienter.” *Id.*

13           The SEC, the very governmental agency charged with investigating and enforcing  
14 securities laws from a regulatory standpoint – even more so than a newspaper – unquestionably  
15 is in a position to “possess” the information attributed to it as a source and should therefore be  
16 “credited in determining whether plaintiffs have alleged [sufficient] facts” satisfying the PSLRA.  
17 *Id.*; *see also In re Lockheed Martin Corp. Sec. Litig.*, 272 F. Supp. 2d 928, 940 (C.D. Cal. 2002)  
18 (plaintiff may use a source to support allegations “provided the source is described in the  
19 complaint with sufficient particularity to support the probability that a person in the position  
20 occupied by the source would possess the information alleged”). As a reliable source, the SEC  
21 Complaint can form one of the many bases for allegations in Lead Plaintiff’s well pleaded  
22 Complaint. *Cf. De La Fuente v. DCI Telecomms., Inc.*, 259 F. Supp. 2d 250, 260 (S.D.N.Y.  
23 2003) (noting that “there is nothing improper about utilizing information from the SEC

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25 <sup>3</sup> *McKesson*, 126 F. Supp. 2d at 1272; *see also In re Initial Pub. Offering Sec. Litig.*, 241 F.  
26 Supp. 2d 281, 355 n.89 (S.D.N.Y. 2003) (newspapers, magazines, Internet sources, books,  
27 analyst reports, academic literature, congressional testimony, an SEC consent decree “can plainly  
28 form a basis for Plaintiffs’ beliefs” to satisfy the PSLRA pleading standard); *In re DaimlerChrysler AG Sec. Litig.*, 197 F. Supp. 2d 42, 78-81 (D. Del. 2002) (“allegations derived from reputable media sources and clearly identified as such in the Amended Class Complaint are sufficient to meet the [information and belief] requirement of the PSLRA”).

1 [complaint] as evidence to support private claims” because “[t]he PSLRA does not require that a  
2 plaintiff re-invent the wheel before filing a complaint; and one could argue that a complaint  
3 predicated on the results of an SEC investigation has far more ‘evidentiary support’ than one  
4 based on rumor and innuendo gleaned from ‘Heard on the Street’”).

5 **B. Defendant’s Out-Of-Circuit**  
6 **Cases Do Not Support Striking**  
7 **Paragraphs From The Complaint**

8 In support of his motion to strike, defendant Yaroshinsky cites only three out-of-circuit  
9 cases. MTS at 2. Defendant’s authority is easily distinguished.

10 Defendant Yaroshinsky cites a footnote in *Nolte v. Capital One Fin. Corp.*, 390 F.3d 311,  
11 317 n.\* (4th Cir. 2004), for his contention that “Courts regularly refuse to consider allegations  
12 from an SEC complaint against a defendant for the purpose of assessing whether a plaintiff has  
13 pled a private securities claim.” MTS at 2. In *Nolte*, shareholders appealed the district court’s  
14 dismissal of their securities fraud class action complaint for failure to plead fraud with  
15 particularity. *Nolte*, 390 F. 3d at 317 n.\*. ***While the appeal was pending***, the SEC commenced a  
16 civil action against one of the defendants in the shareholders’ action. *Id.* The shareholders,  
17 ***thereafter***, “asked the Court to take judicial notice of the [subsequently filed SEC] complaint and  
18 the facts alleged therein,” which were not contained in the class action complaint, which the  
19 court denied. *Id.* In stark contrast, Lead Plaintiff here is not requesting this Court take “judicial  
20 notice” of a later filed SEC complaint as evidence in support of its allegations, and indeed, the  
21 relevant specific facts contained in the SEC Complaint are already included in the Complaint in  
22 this case.

23 Defendant Yaroshinsky also relies on a footnote in a District Court of Minnesota case, *In*  
24 *re Buca Inc. Sec. Litig.*, 2006 WL 3030886, at \*1 n.1 (D. Minn. Oct. 16, 2006). *Buca* similarly  
25 dealt with a request for judicial notice. There, the plaintiffs requested at the motion to dismiss  
26 stage that the Court take judicial notice of 11 documents, all pertaining to separate actions  
27 brought by the SEC and United States Attorney’s Office, “includ[ing] two civil complaints filed  
28 by the SEC, documents reflecting the settlement of one of the SEC actions, two criminal  
complaints brought by the U.S. Attorney’s Office, and documents reflecting plea agreements in

1 the criminal proceedings.” *Id.* Unlike in *Buca* and *Nolte*, here, Lead Plaintiff is not requesting  
2 judicial notice of any evidence at the motion to dismiss stage. Rather, Lead Plaintiff properly  
3 uses specific facts detailed in the SEC Complaint as a source of pleading particular facts. *See*  
4 *McKesson*, 126 F. Supp. 2d at 1272 (at the pleading stage, “plaintiffs are only required to plead  
5 facts, not to produce admissible evidence”). For these reasons, *Buca* and *Nolte* are neither  
6 persuasive nor applicable to the instant case.

7 And finally, Yaroshinsky relies on a case from the Northern District of Illinois, *Geinko v.*  
8 *Padda*, 2002 WL 276236 (N.D. Ill. Feb. 27, 2002). In *Geinko*, however, “[t]he pervasive defect  
9 in the Amended Complaint . . . [was] that it [did] not make clear what Plaintiffs directly allege as  
10 fact, and what Plaintiffs merely are asserting that someone else has alleged.” *Id.*, at \*6. In  
11 contrast, here, counsel for Lead Plaintiff has conducted an independent investigation into the  
12 facts, and the Complaint details the numerous factual allegations and sources including, not only  
13 the SEC, but many other corroborating sources. Further, in *Geinko*, plaintiffs relied almost  
14 solely on allegations contained in three independent actions and attached over 300 pages  
15 consisting of the complaints in those other actions. *Id.*, at \*1. Unlike in *Geinko*, here, Lead  
16 Plaintiff’s counsel did not rely solely on the analysis of other attorneys, but rather, the specific  
17 allegations in the SEC Complaint provide support and corroborate the additional sources.

18 Accordingly, the paragraphs in the Complaint disputed by Yaroshinsky and Zak that  
19 reference the SEC Complaint are appropriate and should not be stricken. *See Cylink*, 178 F.  
20 Supp. 2d at 1080-81.

21 **III. CONCLUSION**

22 Based on the foregoing, Lead Plaintiff respectfully requests that this Court deny  
23 defendants Yaroshinsky’s and Zak’s motions to strike.

24 Dated: September 17, 2007

Respectfully submitted,

25 BERNSTEIN LITOWITZ BERGER  
26 & GROSSMANN LLP

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28 /s/ David R. Stickney  
DAVID R. STICKNEY

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DAVID R. STICKNEY  
NIKI L. MENDOZA  
MATTHEW P. SIBEN  
TAKEO A. KELLAR  
12481 High Bluff Drive, Suite 300  
San Diego, CA 92130  
Tel: (858) 793-0070  
Fax: (858) 793-0323

-and-

CHAD JOHNSON  
1285 Avenue of the Americas, 38th Floor  
New York, NY 10019  
Tel: (212) 554-1400  
Fax: (212) 554-1444

Attorneys for Lead Plaintiff Teachers' Retirement  
System of Oklahoma and Lead Counsel to the Class

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1 **CERTIFICATE OF SERVICE**

2 I, KAYE A. MARTIN, do hereby certify that on this 17th day of September, 2007, true  
3 and correct copies of the foregoing

4 **Lead Plaintiff's Opposition To Defendants Yaroshinsky's And Zak's Motions To**  
5 **Strike Portions Of The Amended Consolidated Class Action Complaint**

6 were filed electronically. Those attorneys who are registered with the Electronic Case Filing  
7 ("ECF") System may access this filing through the Court's system, and notice of this filing will  
8 be sent to the parties by operation of the Court's ECF System. Attorneys not registered with the  
9 Court's ECF system will be duly and properly served via facsimile and/or Federal Express (as  
10 indicated on the attached Service List), in accordance with the Federal Rules of Civil Procedure  
11 and the Court's Local Rules.

12 /s/ Kaye A. Martin

13 KAYE A. MARTIN

1 **Service List**

2 In re CONNETICS SECURITIES LITIGATION  
3 Case No.: 07-02940

4 **COUNSEL FOR CONSOLIDATED PLAINTIFF FISHBURY LIMITED**

5 Jean-Marc Zimmerman  
6 Eduard Korsinsky  
7 Pamela Lynam Mahon  
8 **ZIMMERMAN, LEVI**  
9 **& KORSINSKY LLP**  
10 39 Broadway, Suite 1601  
11 New York, NY 10006  
12 Tel: 212-363-7500  
13 Fax: 212-363-7171  
14 ek@zlk.com  
15 jmzimmerman@zlk.com  
16 pmahon@zlk.com

17 *Via ECF*

18 **COUNSEL FOR CONSOLIDATED PLAINTIFF BRUCE GALLANT**

19 Evan J. Smith  
20 **BRODSKY & SMITH LLC**  
21 240 Mineola Blvd.  
22 Mineola, NY 11501  
23 Tel: 516-741-4977

24 *Via FedEx*

25 **COUNSEL FOR CONSOLIDATED PLAINTIFF MARCUS A. SEIGLE**

26 Catherine A. Torell  
27 **COHEN MILSTEIN HAUSFELD**  
28 **& TOLL P.L.L.C**  
150 East 52<sup>nd</sup> Street  
New York, NY 10022  
Tel: 212-838-7797  
Fax: 212-383-7745

*Via FedEx*

1  
2  
3  
4  
**COUNSEL FOR DEFENDANTS CONNETICS CORPORATION, THOMAS G. WIGGANS, C. GREGORY VONTZ, JOHN HIGGINS, LINCOLN KROCHMAL, EUGENE A. BAUER, R. ANDREW ECKERT, CARL B. FELDBAUM, DENISE M. GILBERT, JOHN C. KANE, THOMAS D. KILEY, LEON E. PANETTA AND G. KIRK RAAB**

5 Susan S. Muck  
6 Dean S. Kristy  
7 Christopher J. Steskal  
8 Kalama M. Lui-Kwan  
9 Emily St. John Cohen  
10 **FENWICK & WEST**  
11 275 Battery Street, Suite 1600  
12 San Francisco, CA 94111  
13 Tel: 415-875-2300  
14 Fax: 415-281-1350  
15 smuck@fenwick.com  
16 dkristy@fenwick.com  
17 csteskal@fenwick.com  
18 klui-kwan@fenwick.com  
19 ecohen@fenwick.com

20 *Via ECF*

Gregory A. Markel  
**CADWALADER, WICKERSHAM  
& TAFT LLP**  
1 World Financial Center  
New York, NY 10281  
Tel: 212-504-6112  
Fax: 212-504-6666  
gregory.markel@cwt.com

*Via ECF*

21  
22  
23  
24  
**COUNSEL FOR DEFENDANT ALEXANDER J. YAROSHINSKY**

25 James P. Duffy IV  
26 **DLA PIPER US LLP**  
27 1251 Avenue of the Americas  
28 New York, NY 10020  
Tel: 212-335-4500  
Fax: 212-504-6666  
James.duffy@dlapiper.com

Alysson Russell Snow  
**DLA PIPER US LLP**  
401 B Street, Suite 1700  
San Diego, CA 92101  
Tel: 619-699-2858  
Fax: 619-699-2701  
Alysson.snow@dlapiper.com

*Via ECF*

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2  
3  
4  
5  
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23  
24  
25  
26  
27  
28

**Defendant Victor E. Zak**

Victor E. Zak (*pro se*)  
24 Oakmont Road  
Newton, MA 02459  
Tel: 617-610-2538  
zakvic@yahoo.com

***Via FedEx***