United States District Court
For the Northern District of California

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

In Re UTStarcom, Inc. Securities Litigation

NO. C 04-04908 JW

ORDER GRANTING PLAINTIFFS' MOTION FOR CLASS CERTIFICATION AS TO DEFENDANT SOFTBANK

_____/

I. INTRODUCTION

This is a putative securities fraud class action brought on behalf of investors who acquired UTStarcom, Inc. ("UTStarcom" or "USTI" or "Company") securities between February 21, 2003 and October 12, 2007 (the "Class Period"), against UTStarcom and certain of its officers and directors,[1] as well as Softbank Corporation ("SBC"), Softbank America, Inc. ("SBA"), and Softbank Holdings, Inc. ("SBH")[2] (collectively, "Defendants"). Plaintiffs allege that Defendant Softbank § 20(a) of the Securities Exchange Act of 1934 ("the Exchange Act").

Presently before the Court are (1) Plaintiffs' Motion for Class Certification as to Defendant Softbank[3] and (2) Plaintiffs' Motion to Strike Softbank Defendants' Affirmative Defenses.[4] The

---

[1] The four UTStarcom Individual Defendants are Hong Liang Lu ("Lu"), Michael J. Sophie ("Sophie"), Ying Wu ("Wu"), and Thomas J. Toy ("Toy"). Lu was UTStarcom's Chief Executive Officer; Sophie was the Company's Chief Financial Officer; Toy was a member of the Board of Directors, chairman of the compensation committee, and a member of the Audit Committee; Wu was the CEO of the Company's Chinese subsidiary, UTStarcom China Company, Ltd.

[2] SBA, SBH, and SBC are collectively referred to as "Softbank." Softbank was the Company's largest shareholder and third largest customer during the time period relevant to this case.

[3] (hereafter, "Motion," Docket Item No. 346.)

[4] (hereafter, "Motion to Strike," Docket Item No. 352.)

United States District Court
For the Northern District of California

Court conducted a hearing on May 10, 2010. Based on the papers submitted to date and oral argument, the Court GRANTS Plaintiffs' Motion for Class Certification as to Defendant Softbank and DENIES Plaintiffs' Motion to Strike.

II. BACKGROUND

A. Factual Background

In a Fourth Amended Complaint filed on May 14, 2008, Plaintiffs allege as follows:

Lead Plaintiffs are Locals 302 and 612 of the International Union of Operating Engineers-Employers Construction Industry Retirement Trust ("Operating Engineers") and Erwin DeBruycker.[5] Plaintiffs Robert Lee Weese and Gennadiy Sherman are individual investors. (Id.) Lead Plaintiffs purchased UTStarcom securities during the Class Period and suffered losses as a result of Defendants' actions.

Defendant UTStarcom is an Alamenda, California based company that designs, manufactures, and sells wireless, "limited mobility" telecommunications systems. (4AC ¶ 2.) Individual Defendants Hong Liang Lu, Michael J. Sophie, Ying Wu, and Thomas J. Toy were directors, officers, or high-ranking employees of UTStarcom during the Class Period. (Id. ¶ 3.) Softbank was UTStarcom's largest shareholder and third largest customer during the Class Period, and has signification influence over UTStarcom's management and affairs. (Id.) SBC is a Japanese corporation and SBA and SBH are Delaware corporations which are wholly owned by SBC.

From February 21, 2003 to August 9, 2006, UTStarcom reported false financial information via press releases, in company conference calls, and to the Securities and Exchange Commission ("SEC"). (4AC ¶ 66.) In these communications, UTStarcom overstated its revenue and net income, understated stock option compensation expenses, and

[5] (Plaintiffs' Fourth Amended Complaint for Violations of the Securities Laws ¶ 28, hereafter, "4AC," Docket Item No. 234.)

United States District Court
For the Northern District of California

failed to account for employee stock option grants.[6] Further, the exercise prices of stock options were not the market values of the stock on the dates of the grants, and the Sarbanes-Oxley certifications made by UTStarcom employees were false and misleading. (Id.)

Defendants never made a complete corrective disclosure regarding the false and misleading statements that concealed adverse financial information. (4AC ¶ 396.) However, partial disclosures were made from 2003 to 2007 that revealed some of the previously concealed problems and some of the impact of those misstatements on UTStarcom's financial condition. (Id.) These partial disclosures caused UTStarcom's stock to decline disproportionately to the NASDAQ Composite. (Id. ¶ 397.) UTStarcom has restated its financial statements three times and admitted it improperly recognized revenue and failed to record millions in stock compensation expenses. (Id. ¶ 22.)

From at least 2002 to 2004, UTStarcom publicly admitted that Softbank's stock ownership gave it the ability to significantly influence all matters submitted to the Company's stockholders for approval, as well as UTStarcom's management and affairs. (4AC ¶ 37.) Softbank had access to the adverse, undisclosed information described in the Complaint and deliberately ignored it. (Id. ¶ 408.) Since Softbank was a controlling entity in publicly-held UTStarcom, it had a duty to disseminate promptly and accurately truthful information with respect to the Company's financial condition. (Id. ¶ 409.)

The SEC has initiated multiple investigations of UTStarcom. (4AC ¶ 23.) The SEC found UTStarcom had been on notice since at least March 2003 of significant internal control weaknesses, including the use of side letters and contract amendments precluding revenue recognition that were not forwarded by sales offices to the contract and finance departments. (Id. ¶ 81.) The SEC further found that UTStarcom improperly and prematurely recognized $400 million in revenue based on these side agreements. (Id. ¶ 83.) On May 1, 2008, the SEC announced it had filed suit against UTStarcom based on the company's false financial

[6] (Id. ¶ 71.) The Court struck Plaintiffs' allegations of stock option backdating from the Fourth Amended Complaint. (See Docket Item No. 302 at 17.)

United States District Court
For the Northern District of California

reports and recurring internal control deficiencies. (Id. ¶¶ 23, 79.) The SEC and the United States Department of Justice are also investigating possible violations of the Foreign Corrupt Practices Act. (Id. ¶¶ 23, 105.)

On the basis of the allegations outlined above, Plaintiffs allege three causes of action: (1) Violation of § 10(b) of the Exchange Act and Rule 10b-5 against UTStarcom and the Individual Defendants; (2) Violation of § 14(a) of the Exchange Act and Rule 14a-19 against UTStarcom and the Individual Defendants; and (3) Violation of § 20(a) of the Exchange Act against the Individual Defendants and Softbank.

B. Procedural History

The Complaint in this case was filed on November 17, 2004. (See Docket Item No. 1.) The Court then consolidated several related cases and appointed Lead Plaintiffs. (See Docket Item Nos. 56, 57.) Lead Plaintiffs filed a Consolidated Complaint on July 1, 2005. (See Docket Item No. 66.) On May 14, 2008, Lead Plaintiffs filed a Fourth Amended Complaint. (See Docket Item No. 234.)[7] On March 27, 2009, the Court issued its Order Denying Defendants' Motions to Dismiss; Granting Defendants' Motions to Strike; Denying Motions to Intervene and to Strike as Moot. (hereafter, "May 27, 2009 Order," Docket Item No. 302.) In the Court's May 27, 2009 Order, it struck allegations of stock option backdating from the Fourth Amended Complaint. On May 8, 2009, UTStarcom, the Individual Defendants, and Softbank filed Answers to the Fourth Amended Complaint. (See Docket Item Nos. 310-313.)

On October 29, 2009, the Court granted Plaintiff Gennadiy Sherman's Motion to Withdraw as a Named Plaintiff. (See Docket Item No. 331.) On April 1, 2010, Lead Plaintiffs filed a Stipulation of Settlement indicating that they had tentatively reached a settlement with UTStarcom and Individual Defendants. (See Docket Item No. 358.) At this time, Softbank is the only non-settling Defendant.

---

[7] For further procedural history, see the Court's July 24, 2008 Order Overruling Defendants' Objections to Plaintiffs' Fourth Amended Complaint. (hereafter, "July 24, 2008 Order," Docket Item No. 242.)

United States District Court
For the Northern District of California

Presently before the Court is (1) Plaintiffs' Motion for Class Certification as to Defendant Softbank, and (2) Plaintiffs' Motion to Strike Softbank Defendants' Affirmative Defenses.

III. STANDARDS

The decision to certify a class is committed to the discretion of the district court within the guidelines of Federal Rule of Civil Procedure 23. See Fed. R. Civ. P. 23; Doninger v. Pac. Nw. Bell, Inc., 564 F.3d 1304, 1309 (9th Cir. 1977). The party seeking class certification bears the burden of establishing that each of the four requirements of Rule 23(a) and at least one requirement of Rule 23(b) have been met. Dukes v. Wal-Mart, Inc., 509 F.3d 1168, 1176 (9th Cir. 2007) (citing Zinser v. Accufix Research Institute, Inc., 253 F.3d 1180, 1186 (9th Cir. 2001), amended, 273 F.3d 1266 (9th Cir. 2001)). A district court may certify a class only if, after "rigorous analysis," it determines that the party seeking certification has met its burden. Gen. Tel. Co. of the Sw. v. Falcon, 457 U.S. 147, 158-61 (1982).

In reviewing a motion for class certification, the court generally is bound to take the substantive allegations of the complaint as true. In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litig., 691 F.2d 1335, 1342 (9th Cir. 1982) (citing Blackie v. Barrack, 524 F.2d 891, 901 (9th Cir. 1975)). However, the court may look beyond the pleadings to determine whether the requirements of Rule 23 have been met. Hanon v. Dataproducts Corp., 976 F.2d 497, 509 (9th Cir. 1992) (citation omitted). In fact, "courts are not only at liberty to but must consider evidence which goes to the requirements of Rule 23 [at the class certification stage] even [if] the evidence may also relate to the underlying merits of the case." Dukes, 509 F.3d at 1178 n.2 (internal quotations and citation omitted).

IV. DISCUSSION

A. Motion for Class Certification

Plaintiffs move to certify the following class: "All persons who purchased or otherwise acquired UTStarcom, Inc. securities between February 21, 2003 and July 23, 2007, inclusive, who were damaged thereby." (Motion at 1.) Plaintiffs seek appointment of Operating Engineers, Mr.

United States District Court
For the Northern District of California

DeBruycker and Mr. Weese as class representatives, and the appointment of Coughlin Stoia as class counsel. (Id.) The Court considers whether class certification is appropriate in this case.

1. Rule 23(a) Certification

Rule 23(a) provides four requirements that must be satisfied for class certification: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class. Fed. R. Civ. P. 23(a). These requirements are commonly referred to as numerosity, commonality, typicality, and adequacy of representation, respectively. See Hanlon v. Chrysler Corp., 150 F.3d 1011, 1019 (9th Cir. 1998) (citing Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997)).

a. Numerosity

Although Softbank does not contest class certification on the basis of numerosity, the Court examines this factor for completeness. (See Softbank's Opposition to Plaintiffs' Motion for Class Certification at 1-3, hereafter, "Opposition," Docket Item No. 360.)[8]

Rule 23(a)(1) requires that "the class is so numerous that joinder of all members is impracticable." Impracticable does not mean impossible, only that it would be difficult or inconvenient to join all members of the class. Harris v. Palm Springs Alpine Estates, Inc., 329 F.2d 909, 913-14 (9th Cir. 1964). A class of one thousand members "clearly satisfies the numerosity requirement." Sullivan v. Chase Inv. Servs., Inc., 79 F.R.D. 246, 257 (N.D. Cal. 1978). Some courts have assumed that the numerosity requirement is met in securities fraud suits involving nationally traded stocks. See Yamner v. Boich, No. C-92-20597 RPA, 1994 WL 514035, at *3 (N.D. Cal. Sept. 15, 1994) (citing Zeidman v. J. Ray McDermott & Co., 652 F.2d 1030, 1039 (5th Cir. 1981)).

---

[8] Federal Rule of Civil Procedure 23(c) "imposes an independent duty on the district court to determine by order that the requirements of Rule 23(a) are met regardless of the defendant's admissions." Davis v. Hutchins, 321 F.3d 641, 649 (7th Cir. 2003).

United States District Court
For the Northern District of California

In this case, UTStarcom's common stock traded on a national stock exchange with daily volume in the millions of shares.[9] The Court has previously found the numerosity requirement satisfied under highly similar facts. See In Re Juniper Networks, Inc. Securities Litigation, No. C 06-04327-JW, 2009 U.S. Dist. LEXIS 101192, at *13-14 (N.D. Cal. Oct. 16, 2009). Based on this information, the Court finds that Plaintiffs have sufficiently shown a nationwide class that is so numerous that joinder of all members is impracticable.

Accordingly, the Court finds that Plaintiffs have met the numerosity requirement of Rule 23(a).

b. Commonality

Softbank does not dispute commonality, but the Court will examine it for completeness. (See Opposition at 1-3.)

Rule 23(a)(2) requires that class certification be predicated on "questions of law or fact common to the class." This requirement "has been construed permissively." Hanlon, 150 F.3d at 1019. "All questions of fact and law need not be common to satisfy the rule." Id. "The existence of shared legal issues with divergent factual predicates is sufficient, as is a common core of salient facts coupled with disparate legal remedies within the class." Id. Repeated misrepresentations by a company to its stockholders satisfy the commonality requirement of Rule 23(a)(2). Blackie, 524 F.2d at 902.

In this case, the Court finds at least the following issues common to the entire class: (1) whether Defendants engaged in a fraudulent scheme and omitted or misrepresented material facts, (2) whether the prices of UTStarcom's publicly traded securities were artificially inflated, (3) whether Defendants' fraudulent scheme, misrepresentations and omissions caused class members to suffer economic losses, and (4) whether Softbank controlled UTStarcom and the Individual Defendants. Thus, the Court finds that Plaintiffs have shown the existence of questions of law and fact common to the class.

---

[9] (See Declaration of Jane D. Nettesheim in Support of Plaintiffs' Motion for Class Certification ¶ 22, hereafter, "Nettesheim Decl.," Docket Item No. 350.)

United States District Court
For the Northern District of California

Accordingly, the Court finds that Plaintiffs have met the commonality requirement of Rule 23(a).

c. Typicality

Plaintiffs contend that the typicality requirement of Rule 23(a) is met because the claims of all class members derive from the same legal theories and are based on the same set of operative facts—*i.e.*, each Plainitff purchased UTStarcom securities during the class period at prices artificially inflated by Defendants' misconduct and suffered losses as a result. (Motion at 9.) Softbank contends that each Plaintiff is atypical because it is susceptible to unique defenses. (Opposition at 1-3.) The Court examines each Plaintiff in turn.

Rule 23(a)(3) requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). Like the commonality requirement, the typicality requirement is permissive: "representative claims are 'typical' if they are reasonably co-extensive with those of absent class members; they need not be substantially identical." Hanlon, 150 F.3d at 1020. The test is whether "other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct." Hanon, 976 F.2d at 508. A court should not find typicality satisfied if "there is a danger that absent class members will suffer if their representative is preoccupied with defenses unique to it." Id. (internal citation omitted). Courts have held, however, that "where the fraud is only partially revealed (and the stock price only partially adjusted), or where factual uncertainty persists regarding the extent to which a disclosure revealed the fraud, the presumption [of reliance on the alleged misrepresentations] is not defeated and the class can contain members who purchased both before and after the alleged corrective disclosure." In re LDK Solar Sec. Litig., 255 F.R.D. 519, 528 (N.D. Cal. 2009).

i. Plaintiff Operating Engineers

Softbank contends that Operating Engineers is atypical because (1) it filed inaccurate sworn certifications in several other cases regarding the number of times it has served as lead plaintiff during the three years preceding each case, and (2) it purchased additional stock in UTStarcom after

United States District Court
For the Northern District of California

this lawsuit was filed and after some partial curative disclosures. (Opposition at 11-14.) Plaintiffs contend that these grounds do not destroy typicality and that Operating Engineers never made a false certification.[10]

The Private Securities Litigation Reform Act provides:

> *Restrictions on professional plaintiffs.* Except as the court may otherwise permit, consistent with the purposes of this section, a person may be a lead plaintiff, or an officer, director, or fiduciary of a lead plaintiff, in no more than 5 securities class actions brought as plaintiff class actions pursuant to the Federal Rules of Civil Procedure during any 3-year period.

15 U.S.C. § 78u-4(a)(3)(B)(vi).

The Court finds no authority for finding Plaintiff Operating Engineers atypical on the basis of an alleged false certification in a separate case. Defendants have not shown that this issue presents a unique defense that will "preoccupy" Plaintiff Operating Engineers at trial. As for Plaintiff Operating Engineers' purchase of certain stock in UTStarcom after the filing of this case and after two financial restatements by UTStarcom, the Court has previously recognized that the purchase of stock after partial curative disclosures does not destroy typicality. See In Re Juniper, 2009 U.S. Dist. LEXIS 101192, at *18. Thus, the Court finds that Plaintiffs have sufficiently shown Operating Engineers to be typical.

ii. Plaintiff DeBruycker

Softbank contends that Plaintiff DeBruycker is atypical because he is a "net seller" and a "net gainer" who profited from the alleged class period stock inflation. (Opposition at 10-11.) Plaintiffs contend that Softbank's expert has purposely employed a method of calculation that incorrectly shows a profit for Plaintiff DeBruycker when in fact, under a different method of calculation, Plaintiff DeBruycker suffered a loss. (Reply at 4-5.)

The dispute as to whether Plaintiff DeBruycker was damaged by the alleged stock inflation centers on the proper method of calculating his profit from buying and selling the stock. Plaintiffs represent that under a "first-in-first-out" ("FIFO") calculation, Plaintiff DeBruycker suffered a net

[10] (Plaintiffs' Reply in Support of Motion for Class Certification at 6-9, hereafter, "Reply," Docket Item No. 380, filed under seal.)

United States District Court
For the Northern District of California

loss in his trading of UTStarcom stock.[11] The Court has accepted calculations of harm under FIFO at the class certification stage and in appointing lead plaintiffs. See In Re Juniper Networks, Inc. Securities Litigation, No. C 06-04327-JW, 2006 U.S. Dist. LEXIS 86721, at *6 (N.D. Cal. Nov. 20, 2006); Plumbers & Pipefitters Local 572 Pension Fund v. Cisco Sys., Inc., No. C 01-20418-JW, 2004 WL 5326262, at *3 (N.D. Cal. May 27, 2004). Thus, the Court finds that Plaintiffs have sufficiently shown Plaintiff DeBruycker to be typical.

iii. Plaintiff Weese

Softbank contends that Plaintiff Weese is atypical because (1) he was a day trader of UTStarcom stock and therefore cannot rely on the fraud-on-the-market presumption, (2) his emails to the Securities and Exchange Commission show that he did not rely on the integrity of the market, and (3) he was not truthful in discovery regarding the fact that he had previously been sued for securities fraud. (Opposition at 6-10.) Plaintiffs contend that (1) Plaintiff Weese's trading patterns do not make him atypical, (2) there is sufficient evidence that Plaintiff Weese relied on public market information just like all class members, and (3) a fair reading of Plaintiff Weese's deposition shows that he was truthful regarding prior lawsuits and that no finding was ever made in the prior case that Plaintiff Weese made a false or misleading representation. (Reply at 10-12.)

Reliance on misstatements, including material omissions, is an element of a cause of action under Rule 10b-5. Basic, Inc. v. Levinson, 485 U.S. 224, 243 (1988). "Because most publicly available information is reflected in market price, an investor's reliance on any public material misrepresentations, therefore, may be presumed for purposes of a Rule 10b-5 action." Id. at 247. The fraud-on-the-market presumption of reliance is "based on the hypothesis that, in an open and developed securities market, the price of a company's stock is determined by the available material information regarding the company and its business. . . . Misleading statements will therefore defraud purchasers of stock even if the purchasers do not directly rely on the misstatements."

---

[11] (See Reply at 5; Declaration of Shirley H. Huang in Support of Plaintiffs' Reply in Support of Motion for Class Certification, Ex. Y, hereafter, "Huang Decl.," Docket Item No. 387, filed under seal.)

United States District Court
For the Northern District of California

Binder v. Gillespie, 184 F.3d 1059, 1064 (9th Cir. 1999) (quoting Basic, 485 U.S. at 241-42). "Thus, the presumption of reliance is available only when a plaintiff alleges that a defendant made material representations or omissions concerning a security that is actively traded in an 'efficient market,' thereby establishing a 'fraud on the market.'" Id.[12]

The presumption of reliance, however, is rebuttable. Basic, 485 U.S. at 248 ("Any showing that severs the link between the alleged misrepresentation and either the price received (or paid) by the plaintiff, or his decision to trade at a fair market price, will be sufficient to rebut the presumption of reliance."). A presumption of reliance cannot exist where such a presumption would be unreasonable in light of corrective information that has entered the market.[13] When the applicability of the fraud-on-the-market presumption of reliance is questioned at the class certification phase, a court "must conduct a rigorous examination into whether plaintiffs are entitled to use [the presumption]."[14] In re Micron, 247 F.R.D. at 633.

Here, Plaintiffs' expert opines that UTStarcom's stock traded in an open, developed and efficient market—a point that Softbank does not dispute. (See Reply at 10; Nettesheim Decl. ¶ 7.) However, Softbank contends that Weese was a so-called "day trader" who made 433 trades of

---

[12] The Ninth Circuit has endorsed the five factor test articulated in Cammer v. Bloom, 711 F. Supp. 1264, 1286-87 (D.N.J. 1989), when determining whether there is an efficient market. These factors include: (1) whether the stock trades at high weekly volume; (2) whether securities analysts follow and report on the stock; (3) whether the stock has market makers and arbitrageurs; (4) whether the company is eligible to file a Form S-3 registration statement with the SEC; and (5) whether there are "empirical facts showing a cause and effect relationship between unexpected corporate events or financial releases and an immediate response in the stock price." Binder, 184 F.3d at 1065 (quoting Cammer, 711 F. Supp. at 1286-87).

[13] See In re Fed. Nat'l Mortgage Ass'n Sec., Derivative and "ERISA" Litig., 247 F.R.D. 32, 38 (D.D.C. 2008) ("Examples include a lack of market response to the alleged misrepresentations, that the market was aware that the misrepresentations were false, or that investors would have purchased or sold the securities even with full knowledge of the misrepresentation.").

[14] Although courts must refrain from addressing the merits of a plaintiff's causes of action on a motion for class certification, courts must also "consider evidence which goes to the requirements of Rule 23 at the class certification stage even if the evidence may also relate to the underlying merits of the case." Dukes, 509 F.3d at 1177 n.2. In this case, the Court finds that the applicability of the fraud-on-the-market presumption must be considered in order to evaluate the predominance requirement of Rule 23(b)(3). See, e.g., In re Micron Techs., Inc. Sec. Litig., 247 F.R.D. 627, 633 (D. Idaho 2007); In re Fed. Nat'l Mortgage Ass'n, 247 F.R.D. at 38.

UTStarcom stock from February 7, 2005 to October 6, 2005. (Opposition at 8.) Softbank contends that as a day trader, Plaintiff Weese relied on market volatility, not market integrity. (Id. at 8-9.) The cases Softbank relies on where courts have found day traders to be atypical are distinguishable. For example, in Eichenholtz v. Verifone Holdings, Inc., the court found a day trader to be unsuitable to serve a lead plaintiff where it made "over eight trades a day for a significant portion of the class period" and relied upon market volatility. No. C 07-06140 MHP, 2008 WL 3925289, at *10 (N.D. Cal. Aug. 22, 2008). In contrast, Softbank calculates Weese's trading activity to be 2.6 trades per trading day during the period in which he traded UTStarcom stock.[15] Additionally, Plaintiff Weese has testified that he focused on publicly available information in deciding to purchase UTStarcom stock and that his investment objective was to build a long term position.[16] Plaintiff Weese's reliance on public information to build a long term position is sufficient to show him to be typical, notwithstanding whether he may be labeled a day trader. See Crossen v. CV Therapeutics, No. C 03-03709, 2005 U.S. Dist. LEXIS 2005, at *17 (N.D. Cal. Aug. 9, 2005).

Further, the Court finds that Plaintiff Weese's emails to the SEC complaining that he suspected illegal short-selling activity was affecting UTStarcom's stock price, and urging the SEC to look into the matter, do not show that Plaintiff Weese did not rely on public information in making his decision to purchase UTStarcom securities.[17] The emails do not "sever the link" between UTStarcom's representations and Plaintiff Weese's decision to purchase UTStarcom securities, but simply show that Plaintiff Weese had some concern about other forces that may have affected the stock price. See Malone v. Microdyne Corp., 148 F.R.D. 153, 159 (E.D. Va. 1993). In fact, some portions of the emails reinforce the notion that Plaintiff Weese was relying on public financial

---

[15] (See Declaration of Michael A. Keable in Support of Softbank's Opposition to Plaintiff's Motion for Class Certification ¶ 16, hereafter, "Keable Decl.," Docket Item No. 366.)

[16] (See Reply at 11; Declaration of Robert Lee Weese in Support of Plaintiffs' Motion for Class Certification ¶ 2, hereafter, "Weese Decl.," Docket Item No. 349.)

[17] (See Opposition at 6-7; Declaration of R. Jeremy Adamson in Support of Softbank's Opposition to Plaintiffs' Motion for Class Certification, Exs. 1-6, hereafter, "Adamson Decl.," Docket Item No. 361.)

United States District Court
For the Northern District of California

information reported by UTStarcom. (See, e.g., Adamson Decl., Ex. 2.) For example, Plaintiff Weese's email to the SEC on April 29, 2005, shows reliance on public data such as revenue, earnings estimates, and P/E ratio. (Id.) Finally, as to Plaintiff Weese's prior lawsuit, the Court finds that the deposition testimony of Plaintiff Weese reveals no lack of candor that would render Plaintiff Weese subject to a unique defense. (See Huang Decl., Ex. CC.) Thus, the Court finds that Plaintiffs have sufficiently shown Plaintiff Weese to be typical.

Accordingly, the Court finds that Plaintiffs have met the typicality requirement of Rule 23(a).

d. Adequacy

Plaintiffs contend that the adequacy requirement of Rule 23(a) is met because Plaintiffs have retained highly experienced counsel, Plaintiffs have prosecuted this case vigorously, and there are no conflicts of interest between Plaintiffs and the class members. (Motion at 9-11.) Softbank contends that Plaintiff Operating Engineers is not an adequate representative because it had a "portfolio monitoring" agreement with lead counsel under which lead counsel agreed to monitor Plaintiff Operating Engineers' securities portfolio for potential claims for damages as a result of breaches of securities laws or other fraud. (See Opposition at 15-18.)

Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." Two questions are considered when determining the adequacy of representation: "(1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" Hanlon, 150 F.3d at 1020.

Here, there is no evidence that Plaintiffs or their counsel have any conflicts of interest with other class members. Further, upon review of the law firm resume submitted by Plaintiffs' counsel, the Court finds that counsel has sufficient experience in securities litigation and class actions such

United States District Court
For the Northern District of California

that they are capable of adequately and vigorously prosecuting this litigation.[18] Moreover, the Court has previously rejected the contention that a portfolio monitoring agreement renders a plaintiff inadequate to represent a class. See Cisco, 2004 WL 5326262, at *4. Thus, the Court finds that Plaintiffs have sufficiently shown that they, along with lead counsel, are adequate to represent the class.

Accordingly, the Court finds that Plaintiffs and their counsel have met the adequacy of representation requirement of Rule 23(a).

2. Rule 23(b) Certification

In addition to meeting the requirements under Rule 23(a), Plaintiffs must establish that one or more of the grounds for maintaining the suit as a class action are met under Rule 23(b). Plaintiffs seek certification of a Rule 23(b)(3) class.

Under Rule 23(b)(3), a plaintiff seeking certification bears the burden of proving two conditions: (1) that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members; and (2) that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. Zinser, 253 F.3d at 1188-89 (citing Hanon, 976 F.2d at 508).

a. Predominance

Plaintiffs contend that common questions of law and fact predominate because Defendants' alleged conduct affected all members of the putative class by artificially inflating the price of UTStarcom's securities through misleading statements and material omissions. (Motion at 12-18.) Softbank does not directly contest predominance, but, as discussed above, Softbank has challenged Plaintiffs' reliance on UTStarcom's alleged misrepresentations. (See Opposition at 6-11.)

"The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." AmChem, 521 U.S. at 623. The question of predominance presumes the existence of common issues; thus, a mere showing of commonality is

[18] (See Declaration of Declaration of Shirley H. Huang in Support of Plaintiffs' Motion for Class Certification, Ex. A, Docket Item No. 351.)

United States District Court
For the Northern District of California

not enough. Hanlon, 150 F.3d at 1022; see also AmChem, 521 U.S. at 623-24 (predominance criterion is "far more demanding" than Rule 23(a)'s commonality requirement). Predominance focuses on the relationship between the common and individual issues. Hanlon, 150 F.3d at 1022. "When common questions present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication, there is clear justification for handling the dispute on a representative rather than on an individual basis." Id. The predominance requirement is readily met in securities fraud cases. See In re Verisign, Inc. Sec. Litig., No. C 02-02270-JW, 2005 U.S. Dist. LEXIS 10438, at *32 (N.D. Cal. Jan. 13, 2005) (citing Amchem Prods. v. Windsor, 521 U.S. 591 (1997)).

Here, Plaintiffs allege a common course of conduct affecting all purchasers of UTStarcom securities. In particular, Plaintiffs allege a series of misleading statements and omissions by Defendants that artificially inflated the price of UTStarcom stock. Plaintiffs contend that UTStarcom's stock was traded in an efficient market and that the fraud-on-the-market presumption establishes that Defendants' actions affected all purchasers of UTStarcom stock. Resolution of the common questions of Defendants' actions and its affect on the price of its stock can be resolved for all members of the class in a single adjudication. The Court has rejected Softbank's challenges to each Plaintiff's reliance on UTStarcom's public misstatements, and Softbank has not challenged other aspects of the predominance requirement. Thus, the Court finds that Plaintiffs have shown that common questions of law and fact predominate.

Accordingly, the Court finds that Plaintiffs have met the predominance requirement of Rule 23(b)(3).

b. Superiority

Softbank does not contest superiority. (See Opposition at 1-3.)

In determining superiority, courts must consider the four factors of Rule 23(b)(3): (1) the class members' interests in individually controlling a separate action; (2) the extent and nature of litigation concerning the controversy already begun by or against class members; (3) the desirability of concentrating the litigation in the particular forum; and (4) the manageability of a class action.

See Zinser, 253 F.3d at 1190; Hunt v. Check Recovery Sys., Inc., 241 F.R.D. 505, 514 (N.D. Cal. 2007). "A consideration of these factors requires the court to focus on the efficiency and economy elements of the class action so that cases allowed under subdivision (b)(3) are those that can be adjudicated most profitably on a representative basis." Zinser, 253 F.3d at 1190. The Court has previously found class treatment superior to individual actions in the context of securities litigation. See In Re Juniper, 2009 U.S. Dist. LEXIS 101192, at *28-29.

Here, the Court finds that the factors of Rule 23(b)(3) favor adjudication in a class setting as superior to individual actions. It is unlikely that the majority of investors suffered losses of a magnitude that would justify individual actions for securities fraud against corporate defendants, and Softbank does not contend otherwise.

Accordingly, the Court finds that Plaintiffs have met the superiority requirement of Rule 23(b)(3).

B. Class Definition

Softbank contends that the class definition is not sufficiently tethered to misstatements made in the period in which Softbank may have controlled UTStarcom, or that relate to subject matter relevant to Softbank. (Opposition at 19-22.) Plaintiffs contend that the stock price inflation caused by misrepresentations made during the period in which Softbank controlled UTStarcom was not fully corrected until the end of the class period. (See Reply at 12-13.)

In determining the duration of a securities fraud class based on a fraud-on-the-market theory, a court must determine whether "a curative disclosure had been made so as to render it unreasonable for an investor, or the market, to continue to be mislead by the defendants' alleged misrepresentations." In re Fed. Nat'l Mortgage Ass'n, 247 F.R.D. at 38 (citing cases). Where companies disclose accounting irregularities, courts generally find it unreasonable as a matter of law for investors to rely afterward on the company's prior financial statements.[19] "[A] class period

[19] Id. at 39; see also In re WorldCom, Inc. Sec. Litig., 219 F.R.D. 267, 307 (S.D.N.Y. 2003) (selecting date on which company first announced need for restatement as end of class period over defendants' request to shorten the period since questions remained about when and how the market

should not be cut off if questions of fact remain as to whether the disclosures completely cured the market." In re WorldCom, 219 F.R.D. at 307. "Whether a particular announcement (i.e., 'release') actually cured a prior misrepresentation is, of course, a sensitive issue to rule on at [the class certification] stage of the proceedings, because it comes so close to assessing the ultimate merits in the case." In re Fed. Nat'l Mortg. Ass'n, 247 F.R.D. at 39. Thus, courts have often limited their analysis to a determination of whether there is "a substantial question of fact as to whether the release cured the market or was itself misleading." Id.

Here, Plaintiffs' claim against Softbank is premised on allegations that Softbank controlled UTStarcom. The parties agree that Softbank held one of the seven board of director seats at UTStarcom from February 21, 2003 to September 15, 2004. (See Opposition at 20; Reply at 13.) Softbank contends that the class period cannot extend beyond September 15, 2004, because Softbank did not have control over UTStarcom beyond that date. (Opposition at 19-21.) Setting aside whether Softbank actually controlled UTStarcom beyond September 15, 2004,[20] Plaintiffs' expert opines that the inflationary effect of misrepresentations made during the period in which Softbank held a seat on the board was not cured until July 24, 2007, when UTStarcom issued a press release that it would restate certain of its financial reports. (See Nettesheim Decl. ¶ 90.) Softbank has not cited any authority to show that misleading statements made during a period of control could not affect the price of a company's stock beyond the period of actual control, and the Court is not aware of any. Namely, Softbank has provided no authority or evidence to support its vague contention that certain alleged misrepresentations do not "relate" to Softbank.[21]

---

was informed about the conduct at issue prior to that date); In re LTV Sec. Litig., 88 F.R.D. 134, 147-48 (N.D. Tex. 1980) (ending class period on day company requested suspension of trading and reported that adjustments would have a "materially adverse impact" on the company's results, even though the exact amount of the restatement was not known until later).

[20] To the extent that Softbank challenges whether it actually controlled UTStarcom for a particular period of time, the Court finds that this issue would be more appropriately the subject of a motion for summary judgment.

[21] To the extent that Softbank seeks a Court determination of the scope of its liability, if any, such request is more appropriate as the subject of a motion for summary judgment.

United States District Court
For the Northern District of California

Accordingly, the Court finds that Plaintiffs have adequately tied their putative class definition to Softbank's alleged control of UTStarcom.[22]

C. "In-Out" Traders

Softbank contends that Plaintiffs' proposed class definition should be modified to exclude investors who either sold their stock before the first corrective disclosure or bought and then sold their stock between any two corrective disclosures (so-called, "in-out" traders) since such investors, according to Softbank, have no damages. (Opposition at 24-25.) Plaintiffs contend that it is premature to exclude "in-out" traders at the class certification stage, and that if Softbank desires to show that particular investors were not harmed by the misstatements, they should do so at summary judgment or trial. (Reply at 13.)

Proof of causation of economic loss is an element of a cause of action for securities fraud. See Dura Pharms., Inc. v. Broudo, 544 U.S. 336, 338, 341 (2005). "Thus, in order to determine whether in-and-out traders should remain part of the proposed class, it is necessary to demonstrate that they might be able to prove a loss, i.e., damages." In re BearingPoint, Inc. Sec. Litig., 232 F.R.D. 534, 544 (E.D. Va. 2006) (discussing Dura).

The Court has previously accounted for in-out traders in fashioning an appropriate class definition in a securities class action. See In Re Juniper, 2009 U.S. Dist. LEXIS 101192, at *34. In Juniper, the Court modified the class definition to exclude purchasers who sold their stock prior to the first corrective disclosure on the basis that any purchaser in that category could not logically have been damaged by the defendant's conduct. The present case is highly analogous to Juniper and warrants similar modification of the class definition. However, the Court declines Softbank's further invitation to modify the class definition to exclude all class members who purchased and then sold stock in between any two of the approximately 20 alleged partial disclosures in this case.

---

[22] Since the Court has determined that the alleged harm to the class need not have ended on the date on which Softbank ceased to control UTStarcom, the Court rejects Softbank's contention that class members who purchased securities during the period of actual control will have conflicting interests with those who purchased securities after the period of Softbank's control of UTStarcom. (See Opposition at 22-23.)

United States District Court
For the Northern District of California

(See 4AC 396.) The Court finds that such modification would be premature at this stage, since no determination has been made whether each of the alleged partial disclosures was in fact a corrective disclosure.

Accordingly, the class shall exclude any person who sold their UTStarcom securities prior to October 23, 2003.

D. Motion to Strike

Plaintiffs move to strike certain affirmative defenses in Softbank's Answer on the grounds that the defenses fail to meet the requirements of Fed. R. Civ. P. 8, are deficient, not applicable in this case, or simply not recognized defenses. (Motion to Strike at 2.) Plaintiffs contend that their affirmative defenses are properly pleaded and provide sufficient notice to comport with Rule 8.[23]

Pursuant to Federal Rule of Civil Procedure 12(f), "the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." The Ninth Circuit has held that "[t]he function of a 12(f) motion to strike is to avoid the expenditure of time and money that must arise from litigating spurious issues by dispensing with those issues prior to trial." Fantasy, Inc. v. Fogerty, 984 F.2d 1524, 1527 (9th Cir. 1993) rev'd on other grounds, Fogerty v. Fantasy, Inc., 510 U.S. 517 (1994).

However, "[m]otions to strike are generally regarded with disfavor because of the limited importance of pleading in federal practice, and because they are often used as a delaying tactic." Neilson v. Union Bank of Cal., N.A., 290 F. Supp. 2d 1101, 1152 (C.D. Cal. 2003); See, e.g., Cal. Dep't of Toxic Substances Control v. Alco Pac., Inc., 217 F. Supp. 2d 1028 (C.D. Cal. 2002). Accordingly, such motions should be denied unless the matter has no logical connection to the controversy at issue and may prejudice one or more of the parties to the suit. SEC v. Sands, 902 F. Supp. 1149, 1166 (C.D. Cal. 1995); LeDuc v. Kentucky Central Life Ins. Co., 814 F. Supp. 820, 820 (N.D. Cal. 1992). When considering a motion to strike, the court "must view the pleading in a light

[23] (Softbank's Opposition to Plaintiffs' Motion to Strike Defendants' Affirmative Defenses to Plaintiffs' Fourth Amended Consolidated Complaint at 2, Docket Item No. 376.)

most favorable to the pleading party." In re 2TheMart.com, Inc. Securities Litig., 114 F. Supp. 2d 955, 965 (C.D. Cal. 2000).

Here, the Court finds that the affirmative defenses are not spurious or immaterial, and provide Plaintiffs with adequate notice of their nature.[24] Plaintiffs have not demonstrated how they will suffer prejudice if the Court permits Softbank to plead its affirmative defenses. Thus, the Court finds no basis to strike Softbank's affirmative defenses at this time.

Accordingly, the Court DENIES Plaintiffs' Motion to Strike.

V. CONCLUSION

The Court GRANTS Plaintiffs' Motion for Class Certification. The Court DENIES Plaintiffs' Motion to Strike. The Court appoints Coughlin Stoia as class counsel and certifies Plaintiffs' class as follows:

> All persons who purchased or otherwise acquired UTStarcom, Inc. securities between February 21, 2003 and July 23, 2007, inclusive, and who did not sell such acquired securities before October 23, 2003, who were damaged.

On or before **May 28, 2010**, the parties shall file a proposed form of class notice and a joint proposal for dissemination of notice.

Dated: May 12, 2010

JAMES WARE
United States District Judge

[24] For example, Softbank's fourth affirmative defense pertains to lack of the requisite mental state, the sixth pertains to waiver and estoppel, the seventh states that the alleged misstatements contained adequate warning of risks, and the eighth alleges lack of proximate cause. (See Docket Item No. 311 at 52.)

United States District Court
For the Northern District of California

THIS IS TO CERTIFY THAT COPIES OF THIS ORDER HAVE BEEN DELIVERED TO:

Bahram Seyedin-Noor bnoor@wsgr.com
Boris Feldman boris.feldman@wsgr.com
Bryan Jacob Ketroser bketroser@wsgr.com
Cheryl Weisbard Foung cfoung@wsgr.com
Christopher J. Keller ckeller@labaton.com
Dale MacDiarmid info@glancylaw.com
Daniel Jacob Pfefferbaum Dpfefferbaum@rgrdlaw.com
Darren Jay Robbins e_file_sd@rgrdlaw.com
Elizabeth K Tripodi ekt@ftllaw.com
Elizabeth Pei Lin elin@milberg.com
Eric J. Belfi ebelfi@labaton.com
Gregory Phillip Freemon Gfreemon@rgrdlaw.com
Jason de Bretteville debrettevillej@sullcrom.com
Keith F. Park kpark@rgrdlaw.com.com
Kimberly C. Epstein e_file_sf@csgrr.com
Lionel Z. Glancy info@glancylaw.com
Louis David Nefouse dnefouse@wsgr.com
Mark Punzalan mpunzalan@finkelsteinthompson.com
Marvin L. Frank mfrank@murrayfrank.com
Michael M. Goldberg info@glancylaw.com
Nicole M. Healy nhealy@wsgr.com
Patricia I. Avery pavery@wolfpopper.com
Patrick J. Coughlin PatC@rgrdlaw.com
Philip Howard Gordon pgordon@gordonlawoffices.com
Rachele R. Rickert rickert@whafh.com
Robert Andrew Sacks sacksr@sullcrom.com
Robert Jeremy Adamson adamsonrj@sullcrom.com
Shawn A. Williams shawnw@rgrdlaw.com
Shirley H. Huang shirleyh@rgrdlaw.com
Stephanie L. Dieringer sldieringer@hulettharper.com
Sylvia Sum Ssum@csgrr.com
Terry T. Johnson tjohnson@wsgr.com
William S. Lerach e_file_sf@lerachlaw.com

Dated: May 12, 2010

Richard W. Wieking, Clerk

By: /s/ JW Chambers
Elizabeth Garcia
Courtroom Deputy

United States District Court
For the Northern District of California