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9 UNITED STATES DISTRICT COURT
 10 NORTHERN DISTRICT OF CALIFORNIA
 11 SAN JOSE DIVISION

12
 13 IN RE NETOPIA, INC. SECURITIES
 LITIGATION

CASE NO.: C 04-3364 RMW
 And Related Cases

CLASS ACTION

14
 15 This Document Relates to:

16 All Actions

**DEFENDANT WILLIAM D. BAKER'S
 (1) NOTICE OF JOINDER AND
 JOINDER TO DEFENDANTS'
 NOTICE OF MOTION AND MOTION
 TO DISMISS, OR IN THE
 ALTERNATIVE TO STRIKE
 ALLEGATIONS FROM, PLAINTIFFS'
 CONSOLIDATED AMENDED
 COMPLAINT AND (2) NOTICE OF
 MOTION AND MOTION TO DISMISS
 ALLEGATIONS FROM PLAINTIFFS'
 CONSOLIDATED AMENDED
 COMPLAINT; MEMORANDUM OF
 POINTS AND AUTHORITIES**

Judge: Hon. Ronald M. Whyte
 Date: December 9, 2005
 Time: 9:00 A.M.
 Courtroom: No. 6

1 Computer Company ("ICC") for resale to the Chicago public school systems in 2002 (the
2 "Chicago Transaction") and (2) revenue from Netopia's from its customer Swisscom AG
3 ("Swisscom").

4 **MEMORANDUM OF POINTS & AUTHORITIES**

5 **I. INTRODUCTION AND SUMMARY**

6 While Plaintiffs allege a class period from November 6, 2003 to August 16, 2004, and
7 purport to focus on a September 30, 2003 transaction between Netopia and ICC, they devote a
8 significant portion of the CAC to events that bear no relevance to that transaction. Additionally,
9 they do not establish loss causation for certain instances in which Netopia made a public
10 statement and its stock price fell. For those reasons, Defendant William D. Baker, who served as
11 Netopia's Senior Vice President and Chief Financial Officer, joins in the Motion to Dismiss, or in
12 the Alternative to Strike Allegations From, Plaintiffs' Consolidated Amended Complaint
13 submitted on behalf of Netopia, Mr. Lefkof, and Mr. Kadish.¹

14 The allegations concerning the Chicago Transaction and Swisscom are also patently
15 deficient as to Mr. Baker because they do not meet the Reform Act's stringent requirement for
16 pleading scienter. Missing are requisite particularized facts demonstrating Mr. Baker's
17 contemporaneous knowledge or deliberate disregard of any allegedly improper conduct
18 concerning the Chicago Transaction. Absent are any allegations linking Mr. Baker to any
19 allegedly improper revenues received from Swisscom. This is fatal to their claims.

20 Plaintiffs hope to fill in these blanks with conclusions that Mr. Baker must be liable for
21 securities fraud because (1) he was Netopia's CFO at the time of the original accounting for those
22 transactions and (2) he later resigned from Netopia. The Reform Act demands far more. These
23 unsupported presumptions can never substitute for facts necessary to support the requisite strong
24 inference that Mr. Baker possessed the requisite mental state. Accordingly, the allegations
25 concerning the Chicago Transaction and Swisscom must be dismissed as to Mr. Baker.

26
27 ¹ Mr. Baker incorporates the Statement of Facts set forth in pages 2-8 of Netopia's Motion to Dismiss.

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2 **II. THE ALLEGATIONS CONCERNING THE CHICAGO TRANSACTION AND**
3 **SWISSCOM DO NOT SUPPORT A STRONG INFERENCE OF SCIENTER**
4 **AGAINST MR. BAKER**

5 The Reform Act requires that a complaint "state with particularity facts giving rise to a
6 strong inference that the defendant acted with the required state of mind." 15 U.S.C. § 78u-
7 4(b)(2). To adequately allege scienter under the Reform Act's heightened pleading standard,
8 plaintiffs must plead "in great detail, facts that constitute strong circumstantial evidence of
9 deliberately reckless or conscious conduct." *In re Silicon Graphics Inc., Sec. Litig.*, 183 F.3d
10 970, 974 (9th Cir. 1999). This means that a complaint must "allege contemporaneous facts in
11 sufficient detail and in a manner that would create a strong inference that the alleged adverse facts
12 were known at the time of the challenged statements." *In re Vantive Corp. Sec. Litig.* 283 F.3d
13 1079, 1085 (9th Cir. 2002).

14 The Court may not substitute conclusory allegations of law and unsupported inferences
15 for particularized facts. *In re Verifone Sec. Litig.*, 11 F.3d 865, 8686 (9th Cir. 1993); *In Re*
16 *Calpine Corp. Sec. Litig.*, 288 F.Supp. 2d 1054, 1075 (N.D. Cal. 2003) ("the Court need not
17 accept as true unreasonable inferences or conclusory legal allegations cast in the form of factual
18 allegations"). "When determining whether plaintiffs have shown a strong inference of scienter,
19 the court must consider *all* reasonable inferences to the drawn from the allegations, including
20 inferences unfavorable to the plaintiffs." *Gompper v. VISX, Inc.*, 298 F.3d 893, 897 (9th Cir.
21 2002) (emphasis in original). The allegations concerning the Chicago Transaction and Swisscom
22 fail to meet these requirements.

23 **A. The Allegations Concerning the Chicago Transaction and Swisscom Lack**
24 **Requisite Particularity as to Mr. Baker's State of Mind**

25 **1. The Chicago Transaction**

26 The allegations concerning Mr. Baker's role in the Chicago Transaction are, at best, bare-
27 boned. For example, the CAC alleges that Mr. Skoulis (Senior Vice President and General
28 Manager) advised Mr. Frankl (Salesperson) that he would inform members of the Executive Staff

1 – which included Mr. Baker – of the *possibility* that Chicago public schools might purchase
2 Netopia’s software (CAC ¶ 24). However, nothing is alleged that any such discussion occurred at
3 any meeting, much less that Mr. Baker was even present.

4 Absent are facts demonstrating that Mr. Baker was ever aware of the terms of the deal or
5 that he participated in any communications concerning the purchase order. Bare allegations that
6 "everyone knew" about the alleged "whiting out" of the purchase order by former salesperson
7 Deckard (CAC ¶ 31) do not form the factual basis for an inference, much less the requisite *strong*
8 inference of scienter on the part of Mr. Baker. See *Wietschchner v. Monterey Pasta Co.*, 294
9 F.Supp. 2d 1102, 1115 (N. D. Cal. 2003) (finding insufficient “blanket statements” that defendant
10 “knew” or “should have known” statement was false or misleading). Similarly, bare conclusions
11 that revenue from the Chicago Transaction was restated do not provide contemporaneous,
12 particularized facts demonstrating his knowledge or reckless disregard of any alleged improper
13 accounting for that transaction. See *DSAM Global Value Fund v. Altris Software, Inc.*, 288 F.3d
14 385, 390 (9th Cir. 2002). The allegations concerning the Chicago Transaction should, therefore,
15 be dismissed.²

16 2. Swisscom

17 The CAC alleges that a January 20, 2004 press release and February 17, 2004 Form 10-Q
18 filed with the SEC contain false and misleading information concerning revenue from Netopia's
19 customer, Swisscom. (CAC ¶¶ 113-18). As set forth in pages 9-11 of Netopia's Motion to
20 Dismiss, Plaintiffs fail to allege any actionable misstatements concerning Swisscom. Moreover,
21 no facts suggest any scienter on the part of Mr. Baker as to Swisscom. He is not even mentioned
22 in those five paragraphs.

23 Plaintiffs' only reference to Mr. Baker in connection with the Swisscom transaction is his
24 alleged participation in the drafting of a press release for the first fiscal quarter ended December
25 31, 2003. *Id.* ¶ 100(c). That is insufficient. See *In re Splash Tech. Holdings, Inc. Sec. Litig.*, No.

26 _____
27 ² As set forth at page 9 of Netopia’s Motion to Dismiss, Plaintiffs have also failed to allege any damages relating to
28 the Chicago Transaction.

1 C 99-00109, 2000 WL 1727405, at *14 (N. D. Cal. Sept 29, 2000) (conclusory allegations that
2 “defendants participated in the drafting and reviewing of the misleading statements” failed to
3 meet Reform Act and 9(b) standards). To meet the Reform Act's requirements, a complaint "must
4 contain allegations of specific 'contemporaneous statements or conditions' that demonstrate the
5 intentional or the deliberately reckless false or misleading nature of the statements when made."
6 *In re Read-Rite Corp.*, 335 F.3d 843, 846 (9th Cir. 2003) (quoting *Ronconi v. Larkin*, 253 F.3d
7 423, 432 (9th Cir. 2003)). No such facts are present as to Mr. Baker in connection with
8 Swisscom.³

9 **B. Plaintiffs Cannot Plead Scienter Based on Mr. Baker's Position as CFO or
10 His Resignation from Netopia**

11 In the absence of particularized contemporaneous facts demonstrating Mr. Baker's scienter
12 concerning the Chicago Transaction and Swisscom, plaintiffs hope that Mr. Baker's position as
13 CFO will save the day. They are wrong. Courts have repeatedly warned that a securities fraud
14 plaintiff cannot allege scienter by reference to a defendant's position or job responsibilities. *See,*
15 *e.g., In re Autodesk, Inc. Sec. Litig.*, 132 F. Supp.2d 833, 844-45 (N.D. Cal. 2000), *In re Read-*
16 *Rite Corp.*, 335 F.3d at 848-49 (job duties do not establish a strong inference of scienter); *Adecco*,
17 371 F. Supp.2d at 1217 ("defendant's position in the company does not, without more, create a
18 strong inference of scienter."); *In re Splash Tech. Holdings Inc. Sec. Litig.*, 160 F. Supp.2d 1059,
19 1080-81 (N.D. Cal. 2001) (general allegations of inside knowledge insufficient to show strong
20 inference of scienter). Therefore, plaintiffs cannot rely on Mr. Baker's title or position to bolster
21 deficient Chicago Transaction and Swisscom allegations..

22 Similarly, Plaintiffs' allegations concerning Mr. Baker's resignation from Netopia fail to
23 plead a strong inference of scienter. (CAC ¶ 98). *See In re U.S. Aggregates Inc. Sec. Litig.*, 235
24 F. Supp.2d 1063, 1074 (N.D. Cal. 2002), *In re Cornerstone Propane Partners L.P. Sec. Litig.*,

25 ³ Plaintiffs clearly hope to rely on the group pleading doctrine to allege Mr. Baker's scienter as to Swisscom. A
26 number of courts suggest this was abolished by the Reform Act. *See, e.g., Alaska Elect. Pension Fund v. Adecco*
27 *S.A.*, 371 F.Supp. 2d 1203, 1220-21 (S.D. Cal. 2005) ("Recognition of the group pleading doctrine would be at odds
28 with the PSLRA's pleading requirements regarding scienter...") (*citing Southland Sec. Corp. v. Inspire Ins. Solutions,*
Inc., 365 F.3d 353, 363-65 (5th Cir. 2004)).

