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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
 14 LITIGATION

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

CLASS ACTION

15 This Document Relates to:
 16 All Actions

**DEFENDANT WILLIAM D. BAKER'S
 REPLY IN SUPPORT OF MOTION TO
 DISMISS ALLEGATIONS FROM
 PLAINTIFFS' CONSOLIDATED
 AMENDED COMPLAINT**

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

1 **I. INTRODUCTION**

2 Plaintiffs' Opposition underscores the Complaint's failure to plead facts which
3 demonstrate contemporaneous knowledge or reckless disregard by Netopia, Inc's ("Netopia")
4 former CFO, William Baker, of allegedly improper revenue recognition practices concerning a
5 transaction between Netopia and its customer, Swisscom. Rather than pointing to particularized
6 facts, Plaintiffs ask the Court to *assume* that Mr. Baker must have known that statements in a
7 press release and in an analyst conference call were false and misleading because of his position
8 and because he was listed as the "contact person" in the press release. Taken separately or with
9 allegations of Mr. Baker's post-press release stock sales, a strong inference of scienter cannot be
10 drawn from the Swisscom allegations. They must, therefore, be dismissed.

11 Similarly, Plaintiffs' factually bare allegations concerning a May 2002 transaction do not
12 provide strong evidence of Mr. Baker's scienter concerning an entirely different September 2003
13 transaction. The Private Securities Litigation Reform Act of 1995 ("Reform Act") does not
14 permit such sweeping inferences. Accordingly, the allegations concerning the Chicago
15 Transaction must be dismissed.¹

16 **II. THE SWISSCOM AND CHICAGO TRANSACTION ALLEGATIONS DO NOT**
17 **SUPPORT A STRONG INFERENCE OF MR. BAKER'S SCIENTER**

18 **A. The Swisscom Allegations do not Come Close to Meeting the Reform**
19 **Act's Stringent Pleading Standards**

20 The Ninth Circuit has not faltered from holding that the Reform Act demands
21 particularized, contemporaneous facts demonstrating that Mr. Baker knew or deliberately
22 disregarded that statements in a January 20, 2004 press release and in an investor conference call
23 concerning Netopia's revenue from Swisscom were false or misleading when made. *See In re*
24 *Daou Systems, Inc. Sec. Litig.*, 411 F.3d 1006, 1014-15 (9th Cir. 2005); *In re Silicon Graphics*
25 *Inc. Sec. Litig.*, 183 F.3d 970, 985 (9th Cir. 1999) (same). Plaintiffs themselves *admit* that a
26 strong inference of scienter must be demonstrated with facts alleging "direct involvement in a

27 ¹ As set forth in Mr. Baker's Opening Memorandum, Mr. Baker joins in and incorporates the arguments made by
28 Netopia and Alan Lefkof ("Defendants") in their Combined Reply Memorandum. The Chicago Transaction is also
described and addressed by Defendants in pages 16-17 of their Opening Memorandum.

1 transaction." Opp. At 15. Moreover, "the lenient inferences in plaintiff's favor that are normally
2 *de riguer* in considering a motion to dismiss cannot paper over key factual deficiencies in a
3 securities fraud complaint." *In re Northpoint Commun. Group, Inc. Sec. Litig.*, 221 F.Supp. 2d
4 1090, 1094 (N.D. Cal. 2002).

5 The Swisscom allegations fly in the face of these well-settled principles. First, Plaintiffs
6 try to make up for the lack of particularized facts by peppering the Complaint and their
7 Opposition with unsupported characterizations of the Swisscom revenue being the result of
8 "excess product" being "placed on a 'boat'" (Complaint ¶116, Opp. at 11), "early shipments by
9 Netopia of product that were (sic) not needed by Swisscom" (*id.*), and "channel stuffing." (Opp. at
10 20). These unsupported and unwarranted inferences and conclusions cannot withstand a motion
11 to dismiss. *Epstein v. Washington Energy Co.*, 83 F.3d 1136, 1139 *8th Cir. 1996); *Gompper v.*
12 *VISX, Inc.*, 298 F.3d 893, 897 (9th Cir. 2002) (court need not accept plaintiff's suggested
13 inferences if defendant's inferences are more plausible).²

14 Even if Plaintiffs properly pled their Swisscom allegations (which they did not), the
15 Complaint offers no facts demonstrating Mr. Baker's awareness—much less "direct
16 involvement"—in the allegedly improper revenue recognition of Swisscom. Instead, Plaintiffs
17 attempt to infer scienter on the grounds that, Mr. Baker, as CFO, was listed as the "contact
18 person" in Netopia's January 20, 2004 press release. Opp. At 26. The Reform Act forbids such
19 scienter-by-position inferences. A Court may not "presume individual officer and director
20 defendants must have known about a fraud by virtue of their positions within the defendant
21 company." *Alaska Elec. Pension Fund v. Adecco S.A.*, 371 F. Supp.2d 1203, 1217 (S.D. Cal.
22 2005); *see In re Read-Rite Corp. Sec. Litig.*, 335 F.3d 843, 848-49 (9th Cir. 2003) (job duties do
23 not establish a strong inference of scienter); *In re Autodesk, Inc. Sec. Litig.*, 132 F. Supp. 2d 833,
24 844-45 (N.D. Cal. 2000); *In re Splash Tech. Holdings Inc. Sec. Litig.*, 160 F. Supp. 2d 1059,
25 1080-81 (N.D. Cal. 2001) (general allegations of inside knowledge is insufficient to show strong

26
27 ² See Defendants' Reply Memorandum, at Section I.B.

1 inference of scienter).³

2 Moreover, Plaintiffs seek to infer Mr. Baker's scienter by pointing to post-press release
3 stock sales. Opp. At 26. This is insufficient, particularly since no particularized facts
4 demonstrate Mr. Baker's awareness of alleged "true circumstances" concerning the recognition of
5 revenue from Swisscom. See *In re Business Objects S.A. Sec. Litig.*, No. C 04-2401 MJJ, 2005
6 WL 1787860, at * 8 (N.D. Cal. July 27, 2005) (no inference of scienter could be drawn because,
7 in part, "Plaintiffs have failed to explain how these [stock] sales, each of which occurred after
8 Business Objects announced earnings results, could raise an inference of fraudulent intent"). The
9 totality of allegations against Mr. Baker concerning Swisscom is woefully inadequate and
10 supports dismissal of these allegations. See *Ronconi v. Larkin*, 253 F.3d 423, 429 (9th Cir. 2001).

11 **B. A Strong Inference of Scienter Cannot be Drawn from Allegations**
12 **Concerning the Chicago Transaction**

13 Plaintiffs argue that the allegations concerning Netopia's May 2002 purchase order from
14 ICC to provide software to the Chicago Public School Systems establish Mr. Baker's scienter
15 concerning Netopia's September 2003 purchase order from ICC for the Philadelphia Public
16 School Systems. See Opp. at 17. They leap to the conclusion that the Chicago and Philadelphia
17 transactions were identical and that Mr. Baker had to have known all of the details of the Chicago
18 transaction. However, no particularized facts are alleged which demonstrates that Mr. Baker was
19 aware of the so-called "contingent" nature of the Chicago transaction. These inferences, based on
20 illusory and irrelevant allegations, even if plausible, stretch the Reform Act well beyond its
21 boundaries. *In re Verifone Sec. Litig.*, 11 F.3d 865, 866 (9th Cir. 1993); *In Re Calpine Corp. Sec.*
22 *Litig.*, 288 F.Supp. 2d 1054, 1075 (N.D. Cal. 2003) ("the Court need not accept as true
23 unreasonable inferences or conclusory legal allegations cast in the form of factual allegations").

24 ³ Similarly, alleging scienter on a "group pleading" theory, i.e., defendants are liable based on statements in SEC
25 filings (Complaint ¶ 114), conflicts with the scienter requirement of the Reform Act. Even if an officer's position
26 supports a reasonable inference that he likely would be negligent in not being involved in the preparation of a
27 document or aware of its contents, the Reform Act's state of mind requirement is severe recklessness or actual
28 knowledge. See *Southland Securities Corp. v. INSpire Solutions, Inc.*, 365 F.3d 353, 365 (5th Cir. 2004); *Allison v.*
Brooktree Corp., 999 F. Supp. 1342, 1350 (S.D. Cal. 1998) (rejecting group published doctrine because it "permits an
inference of wrongdoing not based on a defendant's conduct, but based solely on an officer's status as an officer or
director of a corporation").

