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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

IN RE NETOPIA, INC. SECURITIES LITIGATION

This Document Relates to:

All Actions

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

CLASS ACTION

REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF LEAD PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

DATE: **June 9, 2006**
TIME: **9:00 a.m.**
CTRM: **6, 4th Floor**

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I. INTRODUCTION

Defendants' Opposition to Plaintiffs' Motion for Class Certification ("Opposition" or "Opp.") does not dispute that this case is appropriate for class treatment. *See* Opp. at i, 1, 14. Nor do Defendants dispute that the Lead Plaintiffs, James P. Levy ("Levy") and David M. Simon ("Simon"), are appropriate class representatives. Instead, Defendants' Opposition erroneously argues that common questions of law or fact do not predominate over purported individual questions of law or fact within the meaning of Rule 23(b)(3), and therefore that there should be ***two*** classes: one class related to Defendants' misrepresentations and overstated revenue, earnings and accounts receivable attributable to Netopia's bogus contract with Interface Computer Corporation ("ICC"); and a second class with respect to Defendants' misrepresentations concerning Netopia's relationship with Swisscom. However, Defendants' argument is premised upon their position that their ICC fraud somehow ended on January 19, 2004 (at the same time as the misrepresentations were made about Swisscom), which is not only illogical and directly contrary to the factual allegations of Plaintiffs' Second Amended Consolidated Class Action Complaint (the "Complaint"), but it is diametrically opposed to Defendants' own representations and positions previously taken in this Court in support of their motion to dismiss the Complaint. Defendants' position is beyond the bounds of permissible advocacy and should be forcefully rejected by the Court.

II. DEFENDANTS' MATERIAL MISREPRESENTATIONS DURING THE CLASS PERIOD

The Class Period begins on November 6, 2003. ¶1.[1] After the close of the market on November 5, 2003, Netopia reported materially overstated financial results for the fourth quarter and year ended September 30, 2003. ¶39. Specifically, Defendants reported overstated revenue, net income and accounts receivable that was attributable to a bogus $750,400 sale between Netopia and ICC. ¶39, 53(a). The improper inclusion of $750,400 in revenue had gross margin of approximately 95%, which thereby enabled Netopia to report net income for the ***first*** time in twenty (20) quarters. ¶39. Defendants repeated these false financial results in Netopia's annual report for

[1] All cites to "¶__" and "¶¶__" are to paragraphs in the Complaint.

the fiscal year ended September 30, 2003, which was filed on Form 10-K with the SEC on December 19, 2003 (¶53(b)), and reported overstated net income and accounts receivable amounts for the quarters ended December 31, 2003 (first reported on January 20, 2004) and March 31, 2004 (first reported on April 19, 2004) by improperly continuing to include the $750,400 in Netopia's accounts receivable (¶¶53(c)-(e)). The Complaint expressly alleges that these false financial results inflated Netopia's stock price throughout the Class Period (*i.e.,* through August 16, 2004). ¶¶56-65.[2]

Beginning on January 20, 2004, Netopia's stock price was not only inflated due to Defendants' ICC fraud but also was inflated by additional material misrepresentations on January 20, 2004, concerning (i) the nature of Netopia's sales to Swisscom (its largest customer) for the (prior) quarter ended December 31, 2003; and (ii) Defendants' expectations concerning Netopia's sales to Swisscom for the (current) quarter ending March 31, 2004. ¶¶66-72. Specifically, in a January 20, 2004 conference call, Defendants reported stellar revenue of $8.232 million from Swisscom and misrepresented that (i) Netopia's revenues from Swisscom for the quarter ended December 31, 2003 were "strong" because Swisscom "had a very, very good year-end" and had increased sales due to "year-end promotions," when Defendants knew that much of the revenue for the December quarter was not to satisfy current demand but was merely stuffing the distribution channels; and (ii) Netopia's revenues from Swisscom for the quarter ending March 31, 2003, would be approximately the same as Netopia had recognized for the previous quarter ($8.232 million), despite the fact that Defendants already knew by January 19, 2004, that Swisscom had significantly reduced its orders and was not going to place orders for the quarter ended March 31, 2004 that

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[2] The inflation caused by these misrepresentations was partially removed from Netopia's stock price at various times from January 2004 through February 2005, first as analysts and investors discovered that Netopia was unable to meet the revenue expectations generated by the fraudulent ICC revenue (¶¶58-60), and later as Netopia disclosed that it would have to write-off $750,000 due to "non-payment by a software reseller" (July 6, 2004) (¶61); that Netopia's audit committee had launched an investigation of that transaction (July 22, 2004) (¶62); that the SEC had launched an investigation of Netopia (August 17, 2004) (¶63); that KPMG was resigning as Netopia's independent auditor (September 10, 2004) (¶64), and, ultimately, that Netopia's recognition of revenue from ICC violated GAAP and that a restatement was necessary (February 1, 2005) (¶65).

would even remotely approach what Swisscom had ordered in the December 31, 2003, quarter.[3] ¶¶66, 68.[4]

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[3] Defendants' attack on the merits of these allegations (Opp. at 3, 6-12) is not only improper on a motion for class certification (*see In re Worldcom, Inc. Sec. Litig.*, 219 F.R.D. 267, 298-99 (S.D.N.Y. 2003) ("The motion for class certification is simply not the correct forum to resolve hotly contested factual disputes")), but is actually contrary to the evidence produced to date in this litigation. The evidence demonstrates that Defendants knew by January 20, 2004 that Swisscom had ordered more product during the quarter ended December 31, 2003 (including an order shipped at the very end of December 2003) than it had needed for that quarter (and thus already had excess inventory in place for the quarter ended March 31, 2004). Moreover, starting in June 2003, and continuing through the rest of the year, Swisscom repeatedly warned Netopia that by the start of 2004 Swisscom was going to shift to a much cheaper line of Netopia modem (which would dramatically decrease Netopia's revenues from Swisscom). In early January 2004 (prior to the January 20, 2004 conference call), Netopia's head of European sales told Defendants that, consistent with Swisscom's warnings, revenues from Swisscom would fall dramatically for the quarter ending March 31, 2004. However, Defendants refused to accept their sales manager's conclusion and forced him to try to convince Swisscom to change its decision. Internal Netopia documents make clear that, at a January 19, 2004 meeting, Swisscom rejected Defendants' request that Swisscom purchase a large number of the expensive modems, and held firm on its ordering only cheaper modems (which would generate significantly lower Swisscom revenues than in the previous quarter ended December 31, 2003). Moreover, Defendants also knew that the $8.232 million in Swisscom revenue in the quarter ended December 31, 2003, had included almost $2.5 million of "backlog" sales placed at the end of the quarter ending September 30, 2003, but which had not shipped until the December quarter. However, for the quarter ending March 31, 2004, Netopia had only $400,000 in "backlog" sales from the quarter ended December 31, 2003. Nonetheless, on January 20, 2004, Defendants falsely misrepresented that Swisscom revenues for the March 31, 2004 quarter would be at the same level as the previous quarter. ¶66. In addition, Defendants are completely incorrect that "Netopia informed the market . . . that it did *not* expect the high sales trend to continue in the March 2004 quarter" and that Netopia "predicted [that] Swisscom-related revenues" would "decrease." Opp. at 3 (emphasis in original). To the contrary, Defendants did ***not*** announce that they expected a "***decrease***" in Swisscom sales, and stated only that they did not expect a "sequential ***increase***" (emphasis added) (¶66). Notably, Defendants sold large numbers of their shares of Netopia stock immediately after their January 20, 2004 announcement. ¶73.

[4] On April 19, 2004, Netopia reported disastrous revenue of $3.4 million from Swisscom for the quarter ended March 31, 2004, which was significantly below the $8.2 million referred to in the January 20, 2004 conference call. ¶70. On April 20, 2004, the price of Netopia's stock dropped from $11.35 to $7.17 per share. *Id.* Plaintiffs allege that this drop was attributable to disclosures related to both the Swisscom fraud and the ICC fraud (including the disclosure of the rising DSO (Days Sales Outstanding), a measure of the length of time for which accounts receivable remain uncollected). ¶¶60, 70. Defendants' argument that Netopia's Swisscom misrepresentation could not have inflated Netopia's shares because Netopia's stock price decreased on January 20, 2004 (Opp. at 10) is frivolous; as demonstrated by the precipitous stock drop that occurred when

III. ARGUMENT

Defendants' argument that the ICC fraud ended on January 19, 2004 – the premise for Defendants' entire brief – simply ignores the allegations of the Complaint (and plain logic). As Plaintiffs expressly alleged, Netopia's financial results were artificially inflated ***throughout the entire Class Period*** as a result of the fabricated sale between Netopia and ICC. *See* ¶¶56-65. Moreover, Defendants themselves previously made the opposite argument – that the artificial inflation from the ICC fraud was ***not*** removed from the stock price ***until*** July 2004, and losses from the stock price in January 2004 was ***not*** caused by Defendants' false representations beginning on November 5, 2003 (*i.e.,* no artificial inflation was removed from Netopia's stock price when the stock dropped on January 20, 2004). Thus, Defendants' arguments are not only meritless, but completely contrary to their prior positions. Defendants' liability for the ICC fraud applies to ***every*** Class Member, and, therefore, common questions predominate over any purported individual questions.

A. The Standard For Predominance Under Rule 23(b)(3)

Under Rule 23(b)(3), the predominance requirement is met when common questions "predominate over any questions affecting only individual members."[5] As the Supreme Court has observed, this predominance standard is generally "readily met" in securities cases. *Amchem Prods.*

Defendants revealed the truth about Swisscom on April 19, 2004, Netopia's stock would have dropped ***further*** on January 20 had Defendants not engaged in the Swisscom fraud.

[5] Defendants do not dispute that all of the other requirements of Rule 23(a) and (b)(3) have been satisfied. Specifically, with respect to the requirements of Rule 23(a), Defendants do ***not*** dispute that (i) that the size of the Class is sufficiently numerous such that joinder of all Class members "is impractical" within the meaning of Rule 23(a)(1), (ii) there are questions of law and fact that are common to the Class within the meaning of Rule 23(a)(2), (iii) the claims of Lead Plaintiffs Levy and Simon are "typical" of the claims of ***all*** class members within the meaning of Rule 23(a)(3), and (iv) Plaintiffs will "fairly and adequately" represent the interests of ***all*** Class members under Rule 23(a)(4) (*i.e.,* Defendants acknowledge that there is ***no*** conflict of interest between the claims of Plaintiffs and the claims of ***all*** Class members). Similarly, with respect to the requirements of Rule 23(b)(3), Defendants do ***not*** dispute that a class action is "superior to other available methods for the fair and efficient adjudication" of ***all*** of the claims in this litigation the controversy" under Rule 23(b)(3)(A)-(D).

v. Windsor, 521 U.S. 591, 624 (1997); *In re The Loewen Group Inc. Sec. Litig.*, 233 F.R.D. 154, 167 (E.D. Pa. 2005) (citing *Amchem*).

Even assuming, *arguendo*, that Defendants' misrepresentations about its Swisscom revenue could be deemed "distinct" from their misrepresentations about ICC (Opp. at 1), courts routinely find that common issues predominate even when a plaintiff alleges multiple "unrelated" frauds so long as one of those frauds extends throughout the Class Period. *Blackie v. Barrack*, 524 F.2d 891, 902-06 (9th Cir. 1975) (common questions predominate where defendants engaged in "complicated and imaginative scheme" to inflate company's financial results through differing misrepresentations concerning accounts receivable, guaranteed royalty payments and inventory in 45 documents over 27 month class period); *In re the Loewen Group, Inc. Sec. Litig.*, 233 F.R.D. at 168 (where plaintiff alleged three distinct and progressively shorter frauds, with each shorter fraud wholly contained within the time period of the next longer one, court rejected defendants' argument that a separate class should be certified for each fraud because "plaintiffs have every incentive to prove the existence" of the overall inflationary scheme "throughout the Class Period"); *Dietrich v. Bauer*, 192 F.R.D. 119, 124, 127-28 (S.D.N.Y. 2000) (finding predominance and certifying class notwithstanding "significant differences" between two alleged frauds, one of which spanned entire two year class period and second and other of which spanned only one week within those two years, because "many of the victims of one [scheme] will also be victims of the other" and so common questions "abound").[6]

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[6] By contrast, Defendants are completely unable to cite even a single case holding that the predominance standard cannot be met simply because a defendant artificially inflated stock by making false statements concerning two (ostensibly) different subjects. In *In re Coordinate Pretrial Proceeding in Petroleum Prod. Antitrust Litig.*, 691 F.2d 1335, 1342 (9th Cir. 1982) (Opp. at 4-5), the court held that common issues did not predominate in consumers' antitrust action regarding gas price fixing because "[n]one of the leases or supply agreements at issue here . . . purport to allow the defendant oil companies to fix the retail dealers' prices to the public" and therefore individual issues would predominate as to the pricing set by each gas station. In every other case cited by Defendants (Opp. at 5, 11-12) the court certified the class after concluding that common issues ***did*** predominate, and none of those cases support the argument that class certification is improper when ***every*** putative Class Member is harmed by at least one common fraud. In *In re THQ Inc. Sec. Litig.*, No. CV 00-1783AHM(EX), 2002 WL 1832145, at *1 (C.D. Cal. March 22, 2002), defendants did not even contest predominance where defendants issued "a false earnings forecast for fiscal year 2000," and then within that fiscal year also "reported false

B. Common Questions of Law and Fact Concerning Defendants' ICC Fraud Predominate For All Class Members

Common questions of law and fact concerning the ICC fraud predominate over any purported individual questions because the impact of Defendants' ICC fraud extended throughout (and beyond) the Class Period and harmed ***every*** Class Member who purchased during that time. Contrary to Defendants' arguments (Opp. at 4-5, 12-13), no Class Member was just a "Swisscom purchaser;" rather, ***every*** Class Member purchased Netopia stock inflated by – and was harmed by – the ICC scheme.

Defendants first inflated Netopia's stock price on November 5, 2003, when they overstated Netopia's financial results by reporting revenue, net income and accounts receivable attributable to a fake $750,400 sale between Netopia and ICC. ¶39. The Complaint specifically alleges that Defendants continued to overstate Netopia's financial results throughout the Class Period by reporting the financial results for the quarters ended December 31, 2003, and March 31, 2004, that continued to include the bogus ICC transaction and that these reported overstatements continued to artificially inflate the price of Netopia stock throughout the Class Period. ¶¶53, 56-65.

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financial results and made false statements as to [the company's] game sales." The court in *In re Emulex Corp. Sec. Litig.*, 210 F.R.D. 717, 718, 721 (C.D. Cal. 2002), likewise found common issues predominated where the defendants issued inflated earnings reports for the year ended December 31, 2000, and then subsequently issued false projections for the first quarter of 2001 even as the misrepresentations about fiscal year 2000 remained uncorrected. Defendants' citations to *In re United Energy Corp. Sec. Litig.*, 122 F.R.D. 251, 252-53, 256 (C.D. Cal. 1988) (common issues predominate where defendants misrepresented tax shelter over a four year class period) and *Mularkey v. Holsum Bakery, Inc.*, 120 F.R.D. 118, 122 (D. Ariz. 1988) (certifying an antitrust class where plaintiff alleged that distributor forced retailers to sign agreements setting prices) are equally mysterious, as neither case concluded that certification would have been improper had plaintiff alleged additional, misrepresentations concerning different subjects. Defendants' inability to find case law to support their position is unsurprising. Courts generally find that common issues do ***not*** predominate only when truly "***individual***" issues render ***each*** plaintiff's claims entirely separate and unique (for example, where the "fraud on the market" presumption of reliance is inapplicable so each plaintiff must individually show reliance), which is not even arguably an issue in this case, as Defendants do not dispute that the market for Netopia's stock was "efficient" throughout the Class Period. *See* Plaintiffs' Motion for Class Certification (Doc. #130) at 11-12 and n.8.

Because Defendants' ICC fraud persisted through the entire Class Period, common questions concerning Defendants' liability for the ICC fraud clearly predominate for ***every*** Class Member who purchased at any time during the entire Class Period (including the so-called "Swisscom purchasers"). ***Every*** Class Member is concerned with whether Defendants violated the securities laws by issuing overstated financial statements attributable to ICC.[7] ***Every*** Class Member is concerned with proving Defendants' scienter in issuing the false financial statements that were overstated due to the bogus ICC "sale." ***Every*** Class Member is concerned with proving that Defendants' fraud with respect to ICC inflated Netopia's share price.[8] And, ***every*** Class Member is

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[7] The fact that Defendants ***admit*** in their Opposition (at 6) that the financial results attributable to ICC included in Netopia's financial results throughout the Class Period were false does not mean that falsity is no longer a common issue for class certification purposes, as Defendants disingenuously claim. To the contrary, it confirms that common issues predominate because those admittedly false financial results were issued throughout the CLass Period. Moreover, if Defendants' argument were adopted, defendants could automatically defeat any class action complaint by admitting liability.

[8] The mere fact that Defendants dispute the materiality of their ICC fraud (Opp. at 2, 8) plainly cannot mean – as Defendants imply – that the common issue does not "predominate." In any event, Defendants' argument that the ICC fraud was immaterial borders on the frivolous. Although Defendants attempt to minimize the impact of their fraud by focusing on the size of the ***revenue*** they improperly booked, they ignore the significant impact of their fraud on Netopia's reported ***earnings***. As discussed above, approximately 95% of the $750,400 went straight to Netopia's bottom line. ¶39. Indeed, courts have repeatedly recognized that any evaluation of the materiality of overstatements and revenue must examine the impact of the overstatement in relation to the reported earnings, and must take into account ***qualitative***, not just quantitative, factors. *See, e.g.*, *Ganino v. Citizens Utils. Co.*, 228 F.3d 154, 162-63 (2d Cir. 2000) (reversible error for district court to evaluate materiality based on size of revenue, as size of overstatement must be compared to effect on earnings); *Gebhardt v. ConAgra Foods, Inc.*, 335 F.3d 824, 829 (8th Cir. 2003) (same); *In re Royal Ahold N.V. Securities & ERISA Litig.*, No. CIV.1:03-MD-01539, 2004 WL 2955934, at *48 (D. Md. Dec. 21, 2004) ("'[q]ualitative factors may cause misstatements of quantitatively small amounts to be material'") (quoting *Ganino*). A relatively modest manipulation of ***revenues*** can have a tremendous impact on ***earnings***. *See* SEC Staff Accounting Bulletin ("SAB") No. 99, 64 Fed.Reg at 45152, 17 C.F.R. pt. 211, subpt. B (1999) (1% or less revenue inflation may be material if it is used to achieve analysts' earnings estimates). Here, Netopia recognized $222,000 in income for the quarter ended September 30, 2003 (*i.e.,* the quarter in which the ICC transaction was booked) – the first quarter in three years in which Netopia had recognized positive earnings. ¶39. However, Defendants had recognized approximately $700,000 in earnings from the $750,400 ICC sale – more than ***triple*** the ***entire*** $222,000 in income Netopia recognized for the quarter. *Id.* Investors would likely have considered it "important" that Netopia's ***entire earnings*** for the quarter were false. Moreover, the ICC fraud led to, *inter alia*, an investigation by the SEC and the United

concerned with proving that the inclusion of the bogus ICC sale in Netopia's financial results caused the Class to suffer damages.

C. Defendants' Argument That The ICC Fraud Ended On January 20, 2004 Is Frivolous

Defendants' argument that the inflation caused by their ICC fraud was fully removed from Netopia's stock price by January 20, 2004, and thus that Plaintiffs cannot establish "loss causation" in connection with any of the stock drops that took place afterwards (Opp. at 12-13), is frivolous.[9] Not only did the ICC fraud artificially inflate the price of Netopia stock through the $750,400 overstatement of accounts receivable in the quarters ended December 31, 2003, and March 31, 2004, as discussed above, but the Complaint specifically explains how much of that inflation remained in Netopia's stock until removed by a series of disclosures directly related to that fraud near and at the end of the Class Period. On July 6-7, 2004, Netopia's shares dropped 15% when Defendants disclosed that Netopia would have to write-off $750,000 due to "non-payment by a software reseller" (the ICC "sale," although not specifically described as such at that time). ¶61. On July 22, 2004, Netopia's shares dropped a further 16% when Defendants announced that Netopia's audit committee had begun an internal investigation of Netopia's accounting and reporting practices with respect to revenue recognition of software licenses and fees in a transaction with a software reseller (again, the ICC transaction, although not specifically identified at that time). ¶62. Netopia's shares fell by an additional 20% when Netopia disclosed on August 17, 2004, that the SEC had launched an investigation of Netopia (again, relating to the ICC transaction, although not specifically disclosed).[10]

States Attorney, the resignation of Netopia's auditors, the termination of the employment of several of the Defendants, and a restatement. ¶¶49-52, 63-65.

[9] Moreover, Defendants' argument about loss causation is premature because "loss causation is a fact intensive inquiry which is best resolved by the trier of fact." *E.P. Medsystems Inc. v. EchoCath, Inc.*, 235 F.3d 865, 884 (3rd Cir. 2000); *see Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336, 125 S.Ct. 1627, 1634 (2005) (plaintiff need only allege "some indication of the loss and the casual connection that the plaintiff has in mind").

[10] Although Defendants disclosed the need to write-off the $750,000 and the investigations, Defendants did ***not*** restate its financial reports at that time or admit that the revenue had been

Moreover, Defendants' current argument is ***directly*** contrary to the position Defendants took in their motion to dismiss. Defendants' own "loss causation" arguments made to the Court just a few months ago asserted that the artificial inflation in the price of Netopia stock was ***not*** removed ***until*** a series of partial disclosures that took place on July 6, 2004, July 22, 2004 and August 17, 2004, and that any drops in the price of Netopia stock that occurred ***prior*** to July 2004 were not related to Defendants' ICC-related fraud. *See* Defendants' Notice of Motion and Motion to Dismiss (Doc. #82) at 14; Defendants' Reply Memorandum in Further Support of Motions to Dismiss (Doc. #102) at 14-15 (Defendants "dispute the sufficiency, under *Dura*, of all of plaintiffs' [loss causation] allegations ***relating to pre-July 2004 disclosures***" (emphasis added). Thus, Defendants previously argued – directly contrary to what they now assert – that ***none*** of the inflation from the ICC fraud was removed by the January 2004 announcement, and that the inflation was removed ***only*** by the disclosures beginning in July 2004. *Id.* Defendants' sudden reversal speaks volumes about the speciousness of their current argument and raises the question of whether one or the other of Defendants' positions has any legitimate basis in law or fact.[11]

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improperly recognized. Thus, inflation continued to come out of Netopia's stock after the Class Period as further disclosures were made. Netopia's stock price fell by 31% when Netopia announced on September 10, 2004, that KPMG was resigning as Netopia's independent auditor. ¶¶63-64. And, on February 1, 2005, Netopia's share price dropped 12% when Defendants finally admitted that Netopia's accounting treatment of the bogus ICC sale violated GAAP and that a restatement was necessary. ¶65.

[11] Moreover, Defendants do not explain – or offer any authority – for their proposition that because ***some of*** the inflation in Netopia's stock came out on January 20, 2004, ***all of it*** necessarily did. Courts – including the Ninth Circuit Court of Appeals – have consistently recognized that inflation can come out of the price of a stock over substantial periods of time as new information or disclosures enter the market. *In re Daou Sys., Inc.*, 411 F.3d 1006, 1026 (9th Cir. 2005) (loss causation adequately pled where stock price repeatedly dropped following multiple disclosures); *In re NTL, Inc. Sec. Litig.*, No. 02 Civ.3013 LAK AJP, 2006 WL 330113, at *9 and n.14 (S.D.N.Y. Feb. 14, 2006) (plaintiffs adequately alleged loss causation where series of "disclosing events slowly revealed the false information regarding NTL and have tied some if not all of the dissipation in the value of NTL's stock to those events"); *see Dura*, 125 S.Ct. at 1631-32 (disclosures can "leak out" over time). In light of this consistent recognition that inflation of price in an efficient market may dissipate through multiple disclosures over time, Defendants understandably cite no support for their bizarre argument (Opp. at 13) that if the market did not ***completely*** correct the price of Netopia's stock based upon the ***incomplete*** information that entered the market on January 20, 2004, Plaintiffs cannot rely on the "fraud on the market" doctrine.

Defendants' argument that there is somehow a conflict between the "Swisscom purchasers" and "ICC purchasers" regarding how much of the April 20, 2004, stock drop was attributable to the Swisscom fraud and how much to the ICC fraud (Opp. at 10-11) is also without merit. Significantly, Defendants acknowledge that Lead Plaintiffs Simon and Levy have no conflict of interest with any member of the Class and are capable of representing the entire Class adequately and fairly. Indeed, both Simon and Levy purchased Netopia shares both before January 19, 2004, and also during the period between January 20, 2004, and April 19, 2004, and therefore have no conflict regarding proof of loss causation. At the appropriate time (*i.e.,* at summary judgment or trial), Plaintiffs will present expert analysis and testimony supporting Plaintiffs' allegations concerning the cause of the April 20, 2004 stock drop.

Finally, artificially separating the purported "Swisscom purchasers" from the rest of the Class would, in addition to being inefficient and duplicative (and, indeed, impossible), potentially give rise to inconsistent adjudications and due process violations. Because ***every*** investor who purchased during the putative Class Period was adversely affected by the ICC fraud, both the (ostensible) "ICC class" and the (ostensible) "Swisscom class," if separated, would need to litigate Defendants' ICC fraud, and would risk being barred from that claim by *res judicata* if the other "class" went to judgment first.[12]

[12] The fact that Defendants do not contest that Lead Plaintiffs Levy and Simon, as purchasers of Netopia shares both before and after January 20, 2004, can fairly and adequately represent the interests of all purchasers during the Class Period further confirms that separate classes are unnecessary. There would be no impediment to Lead Plaintiffs Levy and Simon representing both classes, yet nothing would be gained. Although a formal subclass of purchasers from January 20, 2004, through April 19, 2004, could be appointed in the future if a true conflict were somehow to arise (even though the existence of subsumed claims does not itself require a formal subclass), in the absence of such an actual conflict, it would be premature (and potentially harmful) to take that step now. *See In re the Loewen Group, Inc. Sec. Litig.*, 233 F.R.D. at 168 (declining defendants' request to appoint a separate subclass for each of plaintiffs' three distinct fraud claims because lead plaintiffs had "every incentive" to prove the existence of each of the frauds, but noting that court would revisit the decision "in the future" if "necessary").

D. Defendants' Misrepresentations Attributable To ICC and Swisscom Constitute a Common Course of Conduct

The predominance of the ICC fraud warrants certification of a single Class even if the Swisscom fraud were wholly "discrete" from the ICC fraud and not subsumed within the ICC Class Period. The Swisscom fraud and the ICC fraud were part of a common course of conduct designed to inflate Netopia's stock price. Netopia had not recorded positive net income for over three years when Defendants began the ICC fraud with the November Press Release. ¶39. The fraudulent recognition of the $750,400 from the bogus ICC sale allowed Netopia to recognize positive net income for the first time since June 2000, bolstering Netopia's share price. Defendants' false statements concerning Netopia's Swisscom revenue perpetuated the artificial inflation in Netopia's stock.

Indeed, Defendants' scheme to inflate Netopia's stock price allowed each of the Individual Defendants to profit handsomely from illegal insider stock sales. Each of the Individual Defendants sold shares for hundreds of thousands of dollars in the month immediately following the November 5, 2003, issuance of Netopia's financial results, and likewise each sold hundreds of thousands of dollars of additional inside shares immediately following January 20, 2004. ¶73.[13]

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[13] Contrary to Defendants' argument (Opp. at 7), the fact that Plaintiff has listed the stock sales of each Individual Defendant both at the start of the Class Period (after the inception of the ICC fraud) and during the period when the Swisscom fraud also inflated Netopia's stock price (¶73) does not imply that the two frauds are discrete, but rather illustrates that Defendants were acting with a common, overarching scheme of personal profit through their various misrepresentations and throughout the Class Period.

IV. CONCLUSION

For the foregoing reasons and the reasons set forth in Plaintiffs' opening memorandum, Plaintiffs respectfully request that their Motion for Class Certification be granted.

Dated: May 26, 2006

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)ss.:
COUNTY OF LOS ANGELES)

I am employed in the county of Los Angeles, State of California, I am over the age of 18 and not a party to the within action; my business address is 12400 Wilshire Boulevard, Suite 920, Los Angeles, CA 90025.

On May 26, 2006, using the Northern District of California's Electronic Case Filing System, with the ECF ID registered to Michael D. Braun, I filed and served the document(s) described as:

REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF LEAD PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

The ECF System is designed to automatically generate an e-mail message to all parties in the case, which constitutes service. According to the ECF/PACER system, for this case, the parties served are as follows:

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Attorneys for Defendants

On May 26, 2006, I served the document(s) described as:

REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF LEAD PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

by placing a true copy(ies) thereof enclosed in a sealed envelope(s) addressed as follows:

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Aaron Brody, Esq.
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Attorneys for Plaintiffs

I served the above document(s) as follows:

BY MAIL. I am familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in an affidavit.

I further declare, pursuant to Civil L.R. 23-2, that on the date hereof I served a copy of the above-listed document(s) on the Securities Class Action Clearinghouse by electronic mail through the following electronic mail address provided by the Securities Class Action Clearinghouse:

scac@law.stanford.edu

I further that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

I further declare under penalty of perjury under the laws of the United States that the above is true and correct.

Executed on May 26, 2006, at Los Angeles, California 90025.

/S/ LEITZA MOLINAR
Leitza Molinar