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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

IN RE NETOPIA, INC. SECURITIES LITIGATION	Case No.: C 04-3364 RMW And Related Cases
This Document Relates to: All Actions	**DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO LEAD PLAINTIFFS' MOTION FOR CLASS CERTIFICATION** Judge: Ronald M. Whyte Date: June 9, 2006 Time: 9:00 a.m. Courtroom: 6, Fourth Floor

ISSUES TO BE DECIDED

(LOCAL RULE 7-4(a)(3))

1. Whether common questions of law or fact predominate such that certification of a single class of purchasers of Netopia securities between November 6, 2003 and August 16, 2004 satisfies the requirements of Federal Rule of Civil Procedure 23(b)(3)?

2. Whether the class period for individuals who allegedly purchased Netopia securities in reliance upon alleged misstatements regarding the September 2003 transaction with Interface Computer Corporation ("ICC") should end on January 20, 2004, rather than August 16, 2004?

Table of Contents

Table of Authorities

Page(s)

Cases

Rules

Defendants Netopia, Inc. ("Netopia," or the "Company"), Alan B. Lefkof, and David A. Kadish[1] respectfully submit this Memorandum of Points and Authorities in opposition to Lead Plaintiffs' Motion for Class Certification (cited herein as "Mot.").

I. INTRODUCTION

Plaintiffs seek certification of a single class of individuals who purchased shares of Netopia securities between November 6, 2003 and August 16, 2004. Such a broadly defined class may be appropriate in a typical securities action, but this is not a typical securities action. This case involves two distinct claims of securities fraud based on two discrete allegations of misconduct: (1) the allegedly premature recognition of revenue from Netopia's September 2003 sale of $750,000 of software to Interface Computer Corporation ("ICC"), a software reseller (the "ICC claim"); and (2) the supposed overstatement of hardware sales forecasts due to alleged "channel stuffing" of the sales pipeline to Swisscom, A.G. (the "Swisscom claim"). This Court has already recognized that the ICC claim is "the main event" of Plaintiffs' case. 12/15/05 Order Denying In Part and Granting In Part Defendants' Motion to Dismiss or Strike at 2.

There is no evidence – or even an allegation – that the conduct underlying these two sets of allegations was at all related: the transactions involved different Netopia employees, different customers, different products, and different types of alleged misconduct. Those who claim to have purchased Netopia stock in reliance on the Company's statements about ICC revenue ("ICC purchasers") present distinct legal and factual questions regarding falsity, materiality, scienter and damages than do those who claim to have purchased in reliance on Netopia's statements about sales to Swisscom ("Swisscom purchasers"). Because these two groups of purchasers present substantially different questions of law and fact, certification of a single class of plaintiffs is inappropriate.

[1] Alan Lefkof is Netopia's President and David Kadish is its General Counsel. Plaintiffs' Second Consolidated Amended Complaint ("SCAC") ¶¶ 8, 10. Plaintiffs have also sued William Baker, who was the Chief Financial Officer during the purported class period, and Tom Skoulis, who was the Vice President of Sales. *Id*. ¶¶ 9, 11.

II. BACKGROUND

A. The Price of Netopia Securities Is Driven By the Company's Hardware Sales

Based in Emeryville, California, Netopia develops, markets and supports broadband wireless products and services. SCAC ¶¶ 7, 20; Declaration of Jeffrey S. Nobel in Support of Lead Plaintiffs' Motion for Class Certification ("Nobel Dec.") ¶ 6, Ex. E at 2. Netopia sells both hardware and software. SCAC ¶ 20.

On November 5, 2003, analyst Brean Murray reported that Netopia's hardware business had accounted for approximately 78% of sales for the first three quarters of fiscal 2003, and that hardware sales would be Netopia's "growth driver." Nobel Dec. ¶ 6, Ex. E. at 8, 10. On November 6, 2003, analyst WR Hambrecht + Co. reported that hardware sales had accounted for 82% of Netopia's fourth quarter 2003 sales. *Id.*, Ex. F at 2. Brean Murray echoed this report, stating fourth quarter "revenue improvements were driven by strong hardware sales." *Id.*, Ex. G at 2.

Netopia announced its results for the first quarter of fiscal 2004 on January 20, 2004. SCAC ¶ 66. Analyst Needham & Co. reported that Netopia's "strong quarter," was driven by hardware sales as "software sales remained flat yet again." Nobel Dec. ¶ 6, Ex. H at 1; *see also id.*, Ex. I at 2 (analyst WR Hambrecht + Co. reporting "flat" software sales). Analyst Brean Murray reported that software sales were unchanged and Netopia's hardware products "should remain a key driver." *Id.*, Ex. J at 1-2.

B. Plaintiffs' Claim that Netopia Prematurely Recognized Revenue From the ICC Transaction

In Spring 2003, Peter Frankl, a Netopia sales representative in Dallas, Texas, began negotiating a deal with ICC to sell Netopia software through ICC to the School District of Philadelphia. SCAC ¶¶ 21, 26. On September 30, 2003, Mr. Frankl received an executed purchase order from ICC in the amount of $750,400. *Id.* ¶¶ 25-26. Netopia recognized the revenue from the ICC transaction in the fourth quarter of fiscal 2003, ending September 30, 2003. *Id.* ¶ 39.

During the third quarter of fiscal 2004 (April - June), Netopia was engaged in efforts to collect on the $750,400 purchase order executed by ICC. *See id.* ¶ 47. On July 2, 2004, after months of negotiation, ICC informed Netopia's executives that it believed payment on the purchase order was contingent upon ICC receiving a purchase order from the Philadelphia school system. *Id.* ¶ 48. On July 7, 2004, Netopia announced that it would likely take a bad debt charge of approximately $700,000. *Id.* ¶ 61. On July 22, 2004, Netopia announced that the Audit Committee of its board of directors was investigating the ICC transaction. *Id.* ¶ 62. The SEC initiated an investigation of the ICC transaction on August 17, 2004. *Id.* ¶ 63. On February 1, 2005, Netopia restated revenue related to the ICC transaction. *Id.* ¶ 65.

C. Plaintiffs' Claim that Netopia Failed to Disclose the "True Nature" of its Sales to Swisscom

On January 20, 2004, Netopia announced its results for the first quarter of fiscal 2004, which included $8.232 million in hardware sale to Swisscom, at the time Netopia's largest customer. SCAC ¶¶ 53, 66. After this disclosure, Netopia's stock dropped from $19.90 to close at $16.75 on January 21, 2004. *Id.* ¶ 58. The stock price dropped again after these results were repeated in Netopia's 10-Q, filed February 17, 2004. *Id.* ¶ 59.

Despite the steadily *declining* price of Netopia stock, Plaintiffs maintain that these announcements caused artificial inflation. *Id.* ¶ 69. According to Plaintiffs, Netopia failed to disclose "the true nature" of the Swisscom revenue, *id.* ¶ 70, even though Netopia informed the market that the Swisscom revenue was largely due to year-end promotions and that it did *not* expect the high sales trend to continue in the March 2004 quarter, *id.*¶ 66. Plaintiffs allege that Netopia's statements were misleading because Netopia did not disclose that – at Swisscom's request – it shipped a portion of Swisscom's order by "boat." *Id.* ¶ 68.

As Netopia predicted, Swisscom-related revenues decreased in the second quarter of fiscal 2004. *Id.* ¶ 70. After Netopia announced its second quarter results on April 19, 2004, the stock price dropped from $11.35 per share on April 19 to $7.17 on April 20. *Id.*

III. ARGUMENT

Plaintiffs seek class certification under Federal Rule of Civil Procedure 23(b)(3). Mot. at 10. Plaintiffs therefore bear the burden of establishing that questions of law or fact common to the class predominate over any questions affecting only certain individuals or groups of individuals. "The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1022 (9th Cir. 1998), quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997). The predominance question requires a more stringent analysis than that required under Rule 23(a) because "the presence of commonality alone is not sufficient to fulfill Rule 23(b)(3)." *Id.*

Although Plaintiffs contend that many commonalities exist, their laundry list of common questions is described in the most generic of terms and without reference to a single substantive allegation. Mot. at 6-7; SCAC ¶ 15. The likely reason for this boilerplate list is that Plaintiffs would need to make two *separate* lists of questions to adequately describe any purported commonalities arising from the their allegations: one list for the ICC claim and one list for the Swisscom claim.

A. Plaintiffs Have Failed to Establish that Common Questions Predominate.

Plaintiffs' list of questions is really just a recitation of the elements of a securities fraud cause of action. Plaintiffs fail to apply the facts of this case to their list of elements. This failure is significant because the "class certification decision requires a thorough examination of the factual and legal allegations." *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 166 (3d Cir. 2001); *see also In re THQ Inc. Sec. Litig.*, No. CV 00-1783, 2002 U.S. Dist. LEXIS 7753, at *5 (C.D. Cal. Mar. 22, 2002) ("the trial court must conduct a 'rigorous analysis' to determine whether the party seeking certification has met the prerequisites of Federal Rule of Civil Procedure 23"), quoting *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1186 (9th Cir. 2001).

The Court should look beyond the generic formulation of Plaintiffs' purported common questions and "consider the nature and range of proof necessary to establish those

allegations." *In re Coordinated Pretrial Proceedings in Petroleum Prod. Antitrust Litig.*, 691 F.2d 1335, 1342 (9th Cir. 1982). Such a review reveals that both the factual and legal analysis necessary to establish the essential elements of Plaintiffs' separate and distinct claims differs depending upon whether each particular element is considered from the viewpoint of an ICC purchaser or a Swisscom purchaser. This Court should accordingly deny Plaintiffs' motion to certify their proposed class. *See Mularkey v. Holsum Bakery, Inc.,* 120 F.R.D. 118, 122 (D. Ariz. 1988) ("As a general rule, liability must be capable of class wide determination in order for a 23(b)(3) class to be certified, otherwise no class based issue predominates individual issues.").

1. Common questions may predominate within subgroups, but predominance has not been established for the proposed class.

a. "Whether the federal securities laws were violated by Defendants' alleged acts in the Complaint."

Plaintiffs contend that whether the securities laws have been violated is a question common to the entire putative class. Mot. at 7. Such a generic question is useless for purposes of a class certification analysis unless all members of the proposed class are concerned with the same type of misconduct. Plaintiffs' allegations, however, are not amenable to such broad phrasing; the question of whether the "alleged acts" violate the securities laws is therefore not common to the entire proposed class.

The bulk of Plaintiffs' complaint is devoted to allegations describing how Defendants prematurely recognized revenue from an allegedly contingent sale of Netopia software to ICC. SCAC ¶¶ 20-65. The overriding legal question the ICC purchasers must answer is straightforward: whether recognizing all of the revenue from this $750,400 software sale in the September 2003 fiscal quarter violated the federal securities laws. The Swisscom claim does not involve a "contingent sale;" nor, as Plaintiffs admitted in their opposition to Defendants' motion to dismiss, does the Swisscom claim involve questions of accounting or revenue recognition. Plaintiffs' Opposition to Motion to Dismiss at 24 ("it is wholly irrelevant whether Netopia 'properly' recognized revenue for the product that it shipped by boat to Netopia"). Accordingly, whether Defendants violated the securities laws

by prematurely recognizing revenue from the ICC transaction is not a question common to Swisscom purchasers.

In stark contrast to the ICC claim, Plaintiffs' ill-defined Swisscom claim is that Defendants failed to adequately disclose that Swisscom's future demand for Netopia hardware was likely to decrease and failed to disclose that Swisscom asked Netopia to ship a portion of its December 2003 order by "boat." SCAC. ¶¶ 66-72. The Swisscom claim raises at least two legal questions that are distinct from, and not as straightforward as, the questions raised by the ICC claim: (1) whether the securities laws impose a duty to forecast customer demand levels; and (2) whether the securities laws impose a duty to disclose a major customer's chosen method of shipment when that method is irrelevant to the timing of the recognition of revenue. Neither of these questions are implicated by the ICC allegations – which focus solely on revenue timing – and the Swisscom disclosure questions are therefore not common to the ICC purchasers.

Once the generic phrase "alleged acts" is replaced with language specific to Plaintiffs' allegations in *this* case, even Plaintiffs' most basic "common question" is *not* common to all members of Plaintiffs' proposed class.

b. "Whether Defendants issued false and misleading statements during the Class Period."

Plaintiffs claim that the alleged falsity of Defendants' statements raises a question common to all members of the class. Mot. at 7. Falsity, however, is not even at issue for the class of purchasers who relied upon statements related to the ICC transaction. According to Plaintiffs' allegations, the Company has publicly restated its accounting for the ICC transaction. SCAC ¶ 65. Under these circumstances, Netopia's restatement was an admission that the Company's prior statements concerning ICC revenue were inaccurate.[2] *See In re Ramp Networks, Inc. Sec. Litig.*, 201 F. Supp. 2d 1051, 1064-66 (N.D. Cal. 2002).

[2] The fact of a restatement alone is not sufficient to create liability under the federal securities laws. To prevail, Plaintiffs will also have to prove that (1) the ICC statements concerned a material fact; (2) Defendants knew (or acted with extreme recklessness in ignoring) the falsity of the statements (scienter); and that (3) Plaintiffs suffered economic loss as a direct result of the

(Footnote continued)

On the other hand, and after thorough investigations by the Audit Committee and the SEC, Netopia did not restate a penny of revenue related to any of its sales to Swisscom, SCAC ¶ 65, n.1, and Plaintiffs will have to labor to demonstrate that Defendants made any false statements about the Swisscom transactions. Indeed, whether Defendants' alleged statements about Swisscom sales were false or misleading is the *key* question facing the Swisscom purchasers.[3] A question that does not even exist for one class of purchasers can hardly be deemed "common" for the purpose of an Rule 23 analysis.

c. "Whether Defendants acted knowingly and/or recklessly in issuing false and misleading statements."

Plaintiffs state that whether Defendants acted with scienter is a question common to the putative class. Mot. at 7. A review of Plaintiffs' scienter allegations, however, reveals that even Plaintiffs recognize that the ICC claim and the Swisscom claim raise distinct questions of scienter. For example, Plaintiffs' chart of alleged insider selling is broken out into two distinct time periods: one period that is relevant only to the ICC purchasers (11/06/2003 - 12/10/2003) and one that is relevant only to the Swisscom purchasers (01/23/04 - 04/19/04). SCAC ¶ 73. The remainder of Plaintiffs' scienter allegations are relevant only to the ICC claim. *Id.* ¶¶ 78-80.

In fact, the vast majority of Plaintiffs' factual allegations are devoted to ICC, while a mere seven paragraphs discuss Swisscom. *Id.* ¶¶ 66-72. Moreover, every individual defendant is alleged to have participated in the ICC misstatements, yet the only individual defendant alleged have made a misstatement regarding Swisscom is Mr. Lefkof. *Id.* ¶¶ 66-68. Because this Court has already ruled that Plaintiffs cannot establish scienter under the group publication doctrine, 12/15/05 Order at 7-8, the ICC purchasers and the Swisscom purchasers will face substantially different questions regarding scienter.

misstatements. *See Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 125 S. Ct. 1627 (2005); *DSAM Global Value Fund v. Altris Software, Inc.*, 288 F.3d 385, 388 (9th Cir. 2002).

[3] Defendants have already raised this issue in a motion to dismiss and the falsity issue will also be the focus of a soon-to-be-filed summary judgment motion.

d. "Whether the market price of Netopia's common stock during the Class Period was artificially inflated because of Defendants' conduct alleged in the Complaint."

Plaintiffs also contend that the materiality of the alleged misleading statements is a question common to the whole putative class. Mot. at 7. As with Plaintiffs' other questions, however, the lack of commonality on this point is revealed once Plaintiffs' generic language is replaced with specific allegations. A statement can only be deemed material under the federal securities laws if there is "a substantial likelihood that the disclosure of the omitted fact would have been viewed by a reasonable investor as having significantly altered the 'total mix' of information made available." *Basic Inc. v. Levinson*, 485 U.S. 224, 231-32 (1998). Even a cursory review of the numbers involved in the two transactions reveals that the materiality question differs dramatically between the ICC purchasers and the Swisscom purchasers.

The ICC claim is centered around a $750,400 transaction that was reported in a quarter where Netopia recognized $25.5 million in revenue. SCAC ¶ 53. In other words, the ICC revenue represented a mere 2.9% of Netopia's total revenues for the quarter, which is hardly substantial. *See, e.g., Shuster v. Symmetricom, Inc.*, No. C 94-20024, 1997 U.S. Dist. LEXIS 14007, at *23-24 (N.D. Cal. Feb. 25, 1997) ($600,000 contingent transaction representing only 2% of quarterly revenue immaterial). Moreover, the ICC claim involves a single sale of *software* – an area of Netopia's business that was largely ignored by the market. *See generally* Nobel Dec. ¶ 6, Exs. E-J (analyst reports discuss Netopia's hardware prospects and customers in detail, but make little mention of Netopia's software offerings). Not one of the analyst reports Plaintiffs have presented to the Court in support of their class certification motion directly discusses either ICC as a customer or the September 2003 ICC transaction. *Id.* Under these circumstances, it will be difficult for the ICC purchasers to establish that a reasonable investor would find this transaction to be material. *Basic*, 485 U.S. at 231-32.

On the other hand, materiality presents a substantial question in the context of the Swisscom transaction. The Swisscom claim potentially implicates more than $8 million in

revenue from Netopia's "largest customer." SCAC ¶ 66. Each of the analyst reports Plaintiffs' cite specifically mentions the Swisscom account at least once. *See* Nobel Dec. ¶ 6, Ex. E at 1 & 2; Ex. F at 1 &2; Ex. G at 1; Ex. H at 1 & 2; Ex. I at 1 & 2; Ex. J at 1. In addition, the Swisscom revenue was from the sale of hardware; the segment of Netopia's business that drives the market's evaluation of Netopia's stock. *See id.*, Ex. E. at 8, 10; Ex. F at 2; Ex. G at 2; Ex. H at 1; Ex. J at 1-2; *see also* Q1 2004 Netopia, Inc. Earnings Conference Call January 20, 2004, cited in the SCAC ¶ 66 (15 of 21 questions related to Netopia's hardware business, six of which specifically discussed Swisscom).[4]

Materiality will be a critical question for the ICC class of purchasers, but materiality will barely register on the radar screen for the Swisscom purchasers. Such a lopsided inquiry does not present a question common to the class and cannot satisfy Rule 23.

e. "Whether members of the Class have sustained damages and, if so, what is the proper measure of damages."

Finally, Plaintiffs contend that questions related to damages are common to the class. Mot. at 7. Of course, the broad question of whether class members sustained damages is an issue in every securities class action, but that does not make the specific question of the damage caused by the alleged misstatements a common question. Here loss causation – often the most important damages question presented in a securities case – is not a question common to the class. Rather, as with every other element of Plaintiffs' purported "single" cause of action, the ICC purchasers face a substantially different loss causation inquiry than that faced by the Swisscom purchasers.

As the Supreme Court recently explained, Plaintiffs must establish a specific causal link between Defendants' alleged false statements and Plaintiffs' purported economic loss. *See Dura*, 125 S. Ct. at 1633. Merely establishing "an inflated purchase price will not itself constitute or proximately cause the relevant economic loss." *Id.* at 1631. In their complaint, Plaintiffs list a series of statements that were followed by stock price declines,

[4] The transcript of the January 20, 2004 conference call was attached as Exhibit 2 to Defendants' Request for Judicial Notice in Support of Motion to Dismiss, or in the Alternative Strike Allegations From, Plaintiffs' Consolidated Amended Complaint. A copy of this exhibit is attached as Exhibit A to this Opposition for the Court's convenience.

including a January 20, 2004 conference call, a February 17, 2004 filing of Netopia's quarterly report on Form 10-Q, and an April 19, 2004 press release and conference call. SCAC ¶¶ 58-60.

All three of these statements expressly discuss Swisscom. *Id.* ¶¶ 66-68. But not one of these statements *even mentions* any irregularity regarding the ICC transaction, or demonstrates any concern about the viability of any of the software revenue associated with the sale to ICC – indeed, the first hint of trouble was not disclosed until July 2004. *Id.* ¶ 61. Plaintiffs fail to explain how the premature recognition of revenue from a single software transaction could or did cause a decrease in Netopia's stock price up to seven months later. *Dura*, 125 S. Ct. at 1632 ("lower price may reflect, not the earlier misrepresentation, but changed economic circumstances"); *see also In re Teco Energy Sec. Litig.*, Case No. 8:04-CV-1948-T-27EAJ, 2006 U.S. Dist. LEXIS 18101, at *20 (M.D. Fla. Mar. 30, 2006) (plaintiffs failed to establish loss causation because there was no connection between prior misstatements and later announcements of poor financial results).

While the Swisscom purchasers will also need to establish loss causation, they do not face the same type of loss causation inquiry because they allege a single, completely curative disclosure followed by a single decline in stock price. SCAC ¶ 70. In fact, the Swisscom loss causation allegations are directly at odds with the ICC allegations. According to the Swisscom claim, Netopia's January 20 and February 17 public statements caused the artificial inflation of Netopia's stock price. *Id.* ¶¶ 66-69. The ICC purchasers, however, allege that, with these *exact same* statements, "information was issued to the public that *decreased* and ultimately eliminated the artificial inflation caused by Defendants' overstatement of Netopia's financial results for the quarter ended September 30, 2003 … due to the inclusion of the $750,400 fraudulently recognized as revenue from the 'contingent sale' with ICC." *Id.* ¶ 57 (emphasis added); *see also* ¶¶ 58-59.

Furthermore, the Swisscom purchasers will want to argue that the entire drop in Netopia's stock price following the April 17 announcement was caused by Swisscom statements, while the ICC purchasers will have to demonstrate that this same drop was

caused by ICC statements made five months earlier. Although Plaintiffs acknowledge that this will create an issue of proof requiring expert testimony "concerning the portion of the April 20, 2004 loss caused by each misrepresentation," they ignore the inherent conflict between the two groups of purchasers. Plaintiffs' Opposition to Motion to Dismiss at 23 n. 11.

2. Plaintiffs have not and cannot allege that this is a "course of conduct case.

Plaintiffs gloss over the fact that the ICC transaction bears no relationship to the Swisscom transaction by citing to the "common course of conduct" line of cases. Mot. at 6-7, 10-11. These cases are readily distinguished, however, because they make clear that this rule only applies "where members of a class are subject to the *same* misrepresentations and omissions, and where alleged misrepresentations *fit within a common course of conduct*." *In re United Energy Corp. Solar Power Modules Tax Shelter Inv. Sec. Litig.*, 122 F.R.D. 251, 254 (C.D. Cal. 1988) (emphasis added).

The court in *United Energy* found the rule applicable because the case involved allegations surrounding a specific type of tax shelter that were made "in a common core of documents." *Id.* In Plaintiffs' lead case, *Blackie v. Barrack*, 524 F.2d 891, 902 (9th Cir. 1975), the court found a predominance of common issues based on misrepresentations that it characterized as "repeated" and "similar." After considering that the alleged misrepresentations took place over a two year period wherein the company went from a reported $12 million profit to a $90 million loss, the court agreed that the plaintiffs "had alleged a common course of conduct over the entire period." *Id.*

Plaintiffs' two other cases also include allegations of "repeated" misrepresentations on a single subject. *See In re THQ,nc. Sec. Litig.*, 2002 U.S. Dist. LEXIS 7753 and *In re Emulex Corp. Sec. Litig.*, 210 F.R.D. 717 (C.D. Cal. 2002). In *THQ* and *Emulex*, even the defendants agreed that the plaintiffs had alleged a common course of conduct. This concession is not surprising considering that both cases involved allegations of a series of related misrepresentations. The allegation in *THQ* was that defendants had generated a

false earnings forecast followed by false financial reports regarding game sales. *THQ*, 2002 U.S. Dist. LEXIS, at *4. Likewise, the allegation in *Emulex* was that defendants had announced increased quarterly earnings while knowing that several customers had delayed and cancelled their orders. *Emulex*, 210 F.R.D. at 718. Because the claims presented by the class members were "identical," the court deemed class certification to be appropriate. *Id.* at 721.

By contrast, Plaintiffs' complaint does not include a single fact that connects the ICC statements to the Swisscom statements. The alleged conduct (a GAAP violation versus a failure to disclose information), the product (software versus hardware), the customer (ICC, a minor software reseller, versus Swisscom, Netopia's largest customer), the sales office (Texas versus Europe), and the amount of revenue ($750,000 versus $8 million) establish that the two transactions were not related. Plaintiffs have not cited a single case to support their assumption that allegations of two wholly dissimilar sets of misstatements constitute a "common course of conduct" sufficient to establish predominance. Because the ICC claim and the Swisscom claim are unrelated, a single class encompassing both sets of purchasers fails to satisfy FRCP 23(b)(3).

B. The ICC Class Period Must End With the January 20, 2004 Earnings Announcement.

As this Court has already acknowledged, the ICC claim is the "main event" for purposes of this action. *See* 12/15/05 Order at 2. It is important to properly define the class of ICC purchasers because class definition will have a significant impact on settlement efforts and the course and scope of any future trial. Plaintiffs seek to certify a single class of purchasers between November 6, 2003 and August 16, 2004. Mot. at 1. Putting aside the fact that the class is composed of two distinct sets of purchasers, each of which present unique (and sometimes diametrically opposed) questions of law and fact, the proposed class also fails because it improperly includes purchasers who could not have reasonably relied upon either the ICC statements *or* the Swisscom statements, namely, individuals who purchased Netopia stock between April 20 and August 16, 2004.

Plaintiffs allege that on November 6, 2003, the day Netopia announced software revenues for the fourth quarter of fiscal 2003, the stock price rose $1.38 (11.4%) to close at $13.48 per share. *Id.* ¶ 40. Plaintiffs' theory is that the inclusion of ICC revenue in the fourth quarter numbers increased the market's expectations for future software revenues and artificially inflated the stock price. *Id.* ¶ 58. Plaintiffs then admit that on January 20, 2004: (1) Netopia announced that its software revenue for the quarter did not meet analysts' expectations; (2) analysts responded to this announcement by "re-setting" revenue expectations, and (3) the stock price subsequently lost $3.15 per share (15.8%). SCAC ¶ 58, citing Needham & Co.'s January 21, 2004 Research Equity Note.

Despite the market's immediate reaction to the December 2003 results, Plaintiffs' proposed class period is based upon the premise that ICC purchasers continued to rely on September 2003 statements for an additional *seven months*. This contention, however, severely undercuts Plaintiffs' ability to resort to the fraud-on-the-market theory of reliance. Mot. at 11. If, as Plaintiffs appear to be alleging, purchasers in February, June and even August continued to rely upon expectations supposedly created by a single $750,000 software transaction recorded in September 2003, then the market price for Netopia's securities either did not reflect "all publicly available information" – *i.e.* the intervening quarterly reports – or these purchasers did not rely upon "market integrity" when making their purchase. Either way, individuals who purchased stock after the January 20, 2004 earnings announcement cannot prove reliance and therefore are not properly members of the ICC class of purchasers.

Reliance issues aside, in light of the fact that the price dropped on January 20, 2004 by well more than it had increased on November 6, 2003, post-January 20 ICC purchasers could not, as a practical matter, have suffered compensable damages. It defies logic to believe that significant price inflation caused by ICC software revenues remained in Netopia's stock price after January 20. This is particularly true given that the alleged misstatement concerns a single, insignificant transaction. Accordingly, the ICC class period cannot properly extend beyond January 20, 2004.

IV. CONCLUSION

For all of the foregoing reasons, Netopia, Mr. Lefkof and Mr. Kadish request that Plaintiffs' motion to certify a single class of purchasers between November 6, 2003 and August 16, 2004 be denied. In the alternative, Defendants propose that the court certify two classes: an ICC class encompassing those who purchased Netopia stock between November 6, 2003 and January 19, 2004 and a Swisscom class encompassing those who purchased Netopia stock between January 20, 2004 and April 19, 2004.

DATED: April 28, 2006

Respectfully submitted,
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