| | Case 5:04-cv-03364-RMW | Document 85 | Filed 09/06/2005 | Page 1 of 7 | | | |
|----------|--|-----------------|--|--|--|--|--|
| | | http://www.idsu | pra.com/post/documentViewer.asr | Document hosted at JDSUPRA x?fid=d7583f5b-96f3-4794-886e-f8442503a70a | | | |
| 1 | WALTER F. BROWN, JR. (E | | P | | | | |
| 2 | SUSAN D. RESLEY (Bar No. 161808) | | | | | | |
| 3 | LAURA GRAD (Bar No. 114869) DOMINIQUE N. THOMAS (Bar No. 231464) ORRICK, HERRINGTON & SUTCLIFFE LLP 1000 Marsh Road | | | | | | |
| 4 | | | | | | | |
| 5 | Menlo Park, CA 94025 Tel: (650) 614-7400 | | | | | | |
| 6 | Fax: (650) 614-7401 | | | | | | |
| 7 | Attorneys for Defendant WILLIAM D. BAKER | | | | | | |
| 8 | | | | | | | |
| 9 | UNITED STATES DISTRICT COURT | | | | | | |
| 10 | NORTHERN DISTRICT OF CALIFORNIA | | | | | | |
| 11 | SAN JOSE DIVISION | | | | | | |
| 12 | | | | | | | |
| 13 | IN RE NETOPIA, INC. SECU LITIGATION | JRITIES | CASE NO.: C 04- And Related Cases | | | | |
| 14 | | | CLASS ACTION | | | | |
| 15 16 | This Document Relates to: | | DEFENDANT W (1) NOTICE OF J | ILLIAM D. BAKER'S IOINDER AND | | | |
| 10 | All Act | ions | JOINDER TO DE | CFENDANTS' TION AND MOTION | | | |
| 18 | | | TO DISMISS, OR ALTERNATIVE | TO STRIKE | | | |
| 19 | | | CONSOLIDATE | | | | |
| 20 | | | MOTION AND M | ND (2) NOTICE OF IOTION TO DISMISS FROM PLAINTIFFS' | | | |
| 21 | | | CONSOLIDATE | | | | |
| 22 | | | POINTS AND AU | | | | |
| 23 | | | Judge: Hon. Ronal Date: December 9, | | | | |
| 24 | | | Time: 9:00 A.M. Courtroom: No. 6 | | | | |
| 25 | | | | | | | |
| 26 | | | | | | | |
| 27 | | | | | | | |
| 28 | | | | VILLIAM D. BAKER'S (1) NOTICE OF R AND (2) NOTICE OF MOTION AND | | | |
| | | | | DISMISS – CASE NO. C 04-3364 RMW | | | |
| | 1 | | | | | | |

Document hosted at JDSUPRA

http://www.jdsupra.com/post/documentViewer.aspx?fid=d7583f5b-96f3-4794-886e-f8442503a70a

1 2

3 TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that defendant William D. Baker hereby joins in the Notice of
Motion and Motion to Dismiss, or in the Alternative to Strike Allegations from, Plaintiffs'
Consolidated Amended Complaint filed by defendants Netopia, Inc., Alan Lefkof, and David
Kadish and pending before this Court ("Netopia's Motion to Dismiss"). Mr. Baker respectfully
requests that any relief ordered by the Court relative to Netopia's Motion to Dismiss be ordered in
favor of Mr. Baker.

NOTICE OF (1) JOINDER AND JOINDER AND (2) MOTION AND MOTION TO

DISMISS

10 Additionally, PLEASE TAKE NOTICE on December 9, 2005 at 9:00 a.m., or as soon 11 thereafter as the matter may be heard by the Court in the courtroom of the Honorable Ronald M. 12 Whyte, Courtroom 6, Fourth Floor, United States District Court, 280 South First Street, San Jose, 13 California 95113, Mr. Baker will, and hereby does, move the Court for an order dismissing 14 certain allegations against him in the Consolidated Amended Complaint ("CAC") concerning a 15 transaction with the Chicago public schools and sales to Netopia's customer Swisscom AG. This motion is made pursuant to 15 U.S.C. § 78u-4(b) and Federal Rules of Civil Procedure 12(b)(6) 16 17 and 9(b).

This Motion is based on this Notice and Motion, the attached Memorandum of Points and
Authorities in support of the Motion, the other pleadings and papers comprising the record in this
action, and such other matters as may be presented in connection with the hearing of this matter.

ISSUE TO BE DECIDED

(Local Rule 7-4(a)(3))

Does the Consolidated Amended Complaint (the "CAC") state facts with the level of
particularity required by the Private Securities Litigation Reform Act of 1995 ("PSLRA" or
"Reform Act") to support a strong inference that Mr. Baker knew or was reckless in not knowing
that statements were allegedly false or misleading concerning (1) the sale of software and
maintenance by Netopia, Inc. ("Netopia" or the "Company") to software reseller Interface

21

22

| ĺ | Case 5:04-cv-03364-RMW Document 85 Filed 09/06/2005 Page 3 of 7 | | | | | |
|----|---|--|--|--|--|--|
| | تِّDocument hosted at JDSUPRA http://www.jdsupra.com/post/documentViewer.aspx?fid=d7583f5b-96f3-4794-886e-f8442503a70a | | | | | |
| 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. | | | | | |
| 28 | DOCSSV1:423840.1 - 2 - DEFENDANT WILLIAM D. BAKER'S (1) NOTICE OF JOINDER AND (2) NOTICE OF MOTION AND | | | | | |

MOTION TO DISMISS - CASE NO. C 04-3364 RMW

http://www.jdsupra.com/post/documentViewer.aspx?fid=d7583f5b-96f3-4794-886e-f8442503a70a

II. <u>THE ALLEGATIONS CONCERNING THE CHICAGO TRANSACTION AND</u> <u>SWISSCOM DO NOT SUPPORT A STRONG INFERENCE OF SCIENTER</u> <u>AGAINST MR. BAKER</u>

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

The Court may not substitute conclusory allegations of law and unsupported inferences 13 for particularized facts. In re Verifone Sec. Litig., 11 F.3d 865, 8686 (9th Cir. 1993); In Re 14 Calpine Corp. Sec. Litig., 288 F.Supp. 2d 1054, 1075 (N.D. Cal. 2003) ("the Court need not 15 accept as true unreasonable inferences or conclusory legal allegations cast in the form of factual 16 allegations"). "When determining whether plaintiffs have shown a strong inference of scienter, 17 the court must consider *all* reasonable inferences to the drawn from the allegations, including 18 inferences unfavorable to the plaintiffs." Gompper v. VISX, Inc., 298 F.3d 893, 897 (9th Cir. 19 2002) (emphasis in original). The allegations concerning the Chicago Transaction and Swisscom 20 fail to meet these requirements. 21

22

1

2

3

4

5

6

7

8

9

10

11

12

23

24

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

1. The Chicago Transaction

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

http://www.jdsupra.com/post/documentViewer.aspx?fid=d7583f5b-96f3-4794-886e-f8442503a70a

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

3

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 inference of scienter on the part of Mr. Baker. See Wietschchner v. Monterey Pasta Co., 294 8 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 385, 390 (9th Cir. 2002). The allegations concerning the Chicago Transaction should, therefore, 14 be dismissed.² 15

16

2. Swisscom

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

- 23
- 24 25

26

- 31, 2003. Id. ¶ 100(c). That is insufficient. See In re Splash Tech. Holdings, Inc. Sec. Litig., No.
- 27 ² As set forth at page 9 of Netopia's Motion to Dismiss, Plaintiffs have also failed to allege any damages relating to the Chicago Transaction.

alleged participation in the drafting of a press release for the first fiscal quarter ended December

Plaintiffs' only reference to Mr. Baker in connection with the Swisscom transaction is his

http://www.idsupra.com/post/documentViewer.aspx?fid=d7583f5b-96f3-4794-886e-f8442503a70a

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 Swisscom.³ 8

9

B.

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

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

21

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

24

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

| | Case 5 | 5:04-cv-03364-RMW Document 85 Filed 09/06/2005 Page 7 of 7 | | | | | |
|----|---|---|--|--|--|--|--|
| | | Document hosted at JDSUPRA® http://www.jdsupra.com/post/documentViewer.aspx?fid=d7583f5b-96f3-4794-886e-f8442503a70a | | | | | |
| 1 | 355 F | 355 F. Supp.2d 1069, 1092-93 (N.D. Cal. 2005) (rejecting termination of senior executives as | | | | | |
| 2 | evidence of scienter). ⁴ | | | | | | |
| 3 | III. | CONCLUSION | | | | | |
| 4 | | For the foregoing reasons, Mr. Baker requests an Order from this Court providing him | | | | | |
| 5 | with all relief granted to Defendants Netopia, Lefkof and Kadish and dismissing (1) all claims | | | | | | |
| 6 | against him based on Netopia's statements concerning revenue from the Chicago Transaction, and | | | | | | |
| 7 | (2) all claims against him based on Netopia's statements regarding revenue from Swisscom. | | | | | | |
| 8 | Respectfully submitted, | | | | | | |
| 9 | | | | | | | |
| 10 | Dated | : September 6, 2005 ORRICK, HERRINGTON & SUTCLIFFE, LLP | | | | | |
| 11 | | | | | | | |
| 12 | By/s/ | | | | | | |
| 13 | | Attorneys for Defendant WILLIAM D. BAKER | | | | | |
| 14 | | | | | | | |
| 15 | | | | | | | |
| 16 | | | | | | | |
| 17 | | | | | | | |
| 18 | | | | | | | |
| 19 | | | | | | | |
| 20 | | | | | | | |
| 21 | | | | | | | |
| 22 | | | | | | | |
| 23 | | | | | | | |
| 24 | | | | | | | |
| 25 | ⁴ See al | so In re Read-Rite Corn Sec. Litig. 115 F. Sunn. 2d 1181 1184 (N.D. Cal. 2000) ("[t]he resignation of a high | | | | | |
| 26 | ⁴ See also <i>In re Read-Rite Corp. Sec. Litig., 115 F.Supp. 2d 1181, 1184 (N.D. Cal. 2000)</i> ("[t]he resignation of a high level executive, by itself, surely cannot be taken to strongly imply the requisite scienter"); <i>Abrams v. Baker Hughes, Inc., 292 F.3d 424, 434 (5th Cir. 2002)</i> (generalized allegations of the resignation of CFO and Controller do not demonstrate scienter); <i>Branca v. Paymentech, Inc., No. CIV. A.3:97-CV-2507-L, 2000 WL 145083, *11 (N.D. Ter. Feb. % 2000)</i> (without facts supporting informed of CFO) knowledge of allegad accounting malfacesnes | | | | | | |
| 27 | | | | | | | |
| 28 | <i>Tex. Feb. 8, 2000)</i> (without facts supporting inference of CFO's knowledge of alleged accounting malfeasance, scienter cannot be inferred from CFO's resignation for "personal reasons"). DOCSSV1:423840.1 | | | | | | |
| | 20000 | - 6 - DEFENDANT WILLIAM D. BAKERS (I) NOTICE OF JOINDER AND (2) NOTICE OF MOTION AND MOTION TO DISMISS – CASE NO. C 04-3364 RMW | | | | | |
| | | | | | | | |