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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

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

Lead Plaintiffs James P. Levy ("Levy") and David M. Simon ("Simon") (collectively, "Plaintiffs") are prosecuting this securities fraud class action on behalf of all persons who purchased the common stock (the "Shares") of Netopia, Inc. ("Netopia" or the "Company") from November 6, 2003 through and including August 16, 2004 (the "Class" or the "Class Period"), alleging violations of Sections 10(b) and 20(a) of the Securities Exchange Act of 1934 (15 U.S.C. §§78j(b), 78t(a)), and Rule 10b-5 promulgated by the SEC (17 C.F.R. §240.10b-5), against Defendants Netopia, Alan B. Lefkof ("Lefkof"), William D. Baker ("Baker"), David A. Kadish ("Kadish"), and Thomas A. Skoulis ("Skoulis"). Pursuant to Orders dated December 15, 2005 and January 11, 2006, this Court, *inter alia*, sustained the sufficiency of Plaintiffs' Section 10(b) claims against all Defendants (except Kadish), and sustained the sufficiency of the Section 20(a) claims against all Defendants arising out of Defendants' material misrepresentations throughout the Class Period concerning Netopia's business and financial results. Plaintiffs now seek an Order certifying this action as a class action pursuant to Rule 23(a) and 23(b)(3) of the Federal Rules of Civil Procedure, appointing Plaintiffs as Class representatives, and appointing Schatz & Nobel, P.C. as Lead Counsel and the Braun Law Group, P.C. as Liaison Counsel for the Class (hereinafter, "Plaintiffs' Counsel"), pursuant to Rule 23(g)(C)(i).

Plaintiffs have met all of the requirements for class certification under Rule 23. As discussed below, Plaintiffs have satisfied Rule 23(a) because the Class is so numerous that it would be impracticable to join the claims of all Class members in one suit, there are questions of law and/or fact that are common to the Class, Plaintiffs' claims are typical of the claims of the Class, and Plaintiffs will fairly and adequately protect the interests of the Class. Moreover, Plaintiffs have satisfied Rule 23(b)(3) because common questions of law and/or fact predominate, and a class action is the superior method to resolve the claims alleged in Plaintiffs' Second Consolidated Amended Class Action Complaint (the "Complaint"). Finally, the Court should appoint Plaintiffs' Counsel as counsel for the Class pursuant to Rule 23(g)(C)(i) because they have (i) done extensive work to date in identifying and investigating potential claims in this action, (ii) extensive experience

in handling class actions, complex litigation, and claims of the type asserted in this action, and (iii) knowledge of the federal securities laws.

Class actions have long been considered a necessary and effective vehicle for resolution of securities law claims (*see, e.g., Blackie v. Barrack,* 524 F.2d. 891, 903 (9th Cir. 1975)), and the Court should grant Plaintiffs' Motion to permit Plaintiffs and the Class to recover for the harm caused by Defendants' violations of the federal securities laws during the Class Period.

II. PROCEDURAL HISTORY OF THE LITIGATION

A. The Court's Decision To Appoint Plaintiffs As Lead Plaintiffs

This litigation was commenced by Valentin Serafimov in August 2004, following the public announcement that the Audit Committee of Netopia's Board of Directors had commenced an internal investigation with respect to the propriety of Netopia's financial results.[1] In October 2004, Levy and Simon (in addition to other groups of class members) filed a motion for appointment of Lead Plaintiff pursuant to the Private Securities Litigation Reform Act of 1995. Briefing in connection with the competing Lead Plaintiff motions was completed in November 2004, and oral argument before the Court took place on December 3, 2004.

By an Order dated December 3, 2004, the Court appointed Levy and Simon as Lead Plaintiffs, and approved their selection of Schatz & Nobel P.C. as Lead Counsel and the Braun Law Group, P.C. as Liaison Counsel. *Serafimov v. Netopia. Inc.,* No. C-04-03364 (RMW) (N.D. Cal. Dec. 3, 2004) (Order Consolidating Related Cases, Appointing Lead Plaintiff, And Approving Selection Of Lead Counsel) (hereinafter, the "*Lead Plaintiff Order*").[2] In connection with the Lead Plaintiff motions, one of the competing Lead Plaintiff movants (the "Renzulli Group") argued, *inter alia,* that Levy and Simon should not be appointed as Lead Plaintiffs because Levy had engaged in "extensive day trading" (i.e., buying and selling Netopia securities on the same day). *Lead Plaintiff Order* at 8-10. According to the Renzulli Group, a "day trader" could not satisfy the "typicality"

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[1] The litigation was initiated by Schatz & Nobel P.C. and the Braun Law Group, P.C. on behalf of Mr. Serafimov.

[2] The *Lead Plaintiff Order* is attached as Exhibit A to the Declaration of Jeffrey S. Nobel in Support of Lead Plaintiffs' Motion for Class Certification ("*Nobel Declaration* Exhibit __").

and "adequacy" requirements of Rule 23 "because day traders are subject to unique defenses regarding reliance and materiality." *Id.* at 8-9. In appointing Levy and Simon as Lead Plaintiffs, the Court ruled that the claims of Levy and Simon appeared to be typical of the claims of the Class within the meaning of F.R.C.P. 23(a)(3) (*Lead Plaintiff Order* at 7-8); the Court also rejected the argument that Levy's "day trading" would prevent Plaintiffs from adequately representing the interests of the Class under Fed. R. Civ. P. 23(a)(4), or would subject Plaintiffs to "unique defenses" that could become the focus of the litigation. *Id.* at 8-10. The Court further ruled that it was "satisfied" that Levy and Simon had "selected highly qualified, experienced counsel who will adequately represent the interests of the class." *Id.* at 10.[3]

B. The Claims And Allegations Against Defendants

In their Second Consolidated Amended Complaint, filed January 3, 2006 (the "Complaint"), Plaintiffs allege that Defendants artificially inflated the price of Netopia securities through a series of related misrepresentations throughout the course of the Class Period concerning Netopia's business and financial results. Complaint, ¶¶ 21-48, 66-72. Specifically, Defendants artificially inflated the price of Netopia securities throughout the Class Period by reporting overstated financial results attributable to a purported "contingent sale" transaction with a customer, Interface Computer Communications, Inc. ("ICC"), to supply Netopia's products to the School District of Philadelphia, Pennsylvania ("Philadelphia"), and by making material misrepresentations concerning the circumstances underlying Netopia's revenue from Swisscom, its largest customer. Complaint, ¶¶ 53-72. Plaintiffs seek to recover the losses suffered by all Class Members that were caused by Defendants' misrepresentations. Complaint, ¶¶ 13-19.

On August 29, 2005, Defendants moved to dismiss and/or strike Plaintiffs' Consolidated Amended Complaint (the "First Complaint"). In its Order dated December 15, 2005 (the "December 15 Order"), this Court, *inter alia*, sustained the sufficiency of Plaintiffs' Section 10(b) claims against all Defendants (except Kadish), and sustained the sufficiency of the Section 20(a)

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[3] Defendants Netopia, Lefkof and Baker took no position with respect to the merits of the competing Lead Plaintiff motions. *Lead Plaintiff Order* at 1. At that time, Kadish and Skoulis had not been named as Defendants.

Class Period.[4] Defendants subsequently filed a motion for leave to file a motion for reconsideration of the December 15 Order, which the Court denied by an Order dated January 9, 2006. All Defendants have since filed Answers to the Complaint.

III. THE MOTION FOR CLASS CERTIFICATION SHOULD BE GRANTED

A. The Legal Standards Governing Motions For Class Certification

Class actions have long been considered a necessary and effective vehicle for resolution of securities law claims. *See, e.g., Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 809 (1985) (class actions allow "plaintiff to pool claims which would be uneconomical to litigate individually . . . [M]ost of the plaintiffs would have no realistic day in court if a class action were not available"). The maintainability of class actions is generally favored in securities fraud actions. *Blackie v. Barrack*, 524 F.2d 891, 903 (9th Cir. 1975), *cert. denied*, 429 U.S. 816 (1976). Indeed, "the law in the Ninth Circuit is very well established that the requirements of Rule 23 should be liberally construed in favor of class action cases brought under the federal securities laws." *In re THQ, Inc., Sec. Litig.*, 2002 WL 1832145, at *2 (C.D. Cal. Mar. 22, 2002), quoting *Schneider v. Traweek*, 1990 WL 132716, at *6 (C.D. Cal. July 31, 1990), and citing *Blackie,* 524 F.2d at 902; *see Epstein v. MCA, Inc.,* 50 F.3d 644, 668 (9th Cir. 1995), *rev'd on other grounds sub nom., Matsuhita Elect. Indus. Co. v. Epstein,* 516 U.S. 367 (1996); *Yamner* v. *Boich*, 1994 WL 514035, at *2 (N.D. Cal. Sept. 15, 1994) (finding that the "Ninth Circuit favors a liberal use of class actions to enforce federal securities laws"); *Welling v. Alexy,* 155 F.R.D. 654, 656 (N.D. Cal. 1994) (same), citing *In re Worlds of Wonder Sec. Litig.,* 1991 WL 61951, at * 1 (N.D. Cal. Mar. 23, 1990).

The determination of whether a class should be certified is not an inquiry into the merits of the plaintiffs' case, but is limited to whether the allegations in the Complaint satisfy the requirements of Rule 23. *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156, 177-78 (1974).

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[4] The December 15 Order also required that Plaintiffs file a "streamlined version" of the First Complaint (not to exceed thirty-five pages); Plaintiffs complied with the December 15 Order by filing the Complaint.

Accordingly, the allegations of the Complaint are considered to be true for the purposes of deciding a motion for class certification. *Blackie,* 524 F.2d at 901 n.17; *see Westways World Travel, Inc.* v. *AMR Corp.*, 218 F.R.D. 223, 231 (C.D. Cal. 2003).

Class certification is a two step analysis under Rule 23 of the Federal Rules of Civil Procedure. First, Plaintiffs must meet the requirements of Fed. R. Civ. P. 23(a)(1)-(4). These requirements are commonly known as "numerosity," "commonality," "typicality" and "adequacy of representation." Fed. R. Civ. P. 23(a)(1)-(4); *In re Mego Fin. Corp. Sec. Litig.,* 213 F.3d 454, 462 (9th Cir. 2000). Second, Plaintiff must satisfy one of the requirements of Fed. R. Civ. P. 23(b), which plaintiff can satisfy by establishing that (i) questions of law or fact common to the members of the class predominate over any questions affecting only individual members and (ii) a class action is superior to other available methods for the fair and efficient adjudication of the controversy. Fed. R. Civ. P. 23(b)(3); *In re Mego*, 213 F.3d at 462; *see Crossen* v. *CV Therapeutics*, 2005 WL 1910928, at *2 (N.D. Cal. Aug. 10, 2005). As discussed below, Plaintiffs have satisfied all of the requirements under Rule 23(a) and 23(b)(3).

B. The Requirements Of Fed. R. Civ. P. 23(a) Are Satisfied

Each of the requirements contained in Fed. R. Civ. P. 23(a) – commonly referred to as "numerosity," "commonality," "typicality," and "adequacy of representation" – have been satisfied in this action.

1. The Class Is So Numerous That Joinder Of All Members Is Impracticable

Rule 23(a)(1) requires that a class be sufficiently numerous such "that joinder of all members is impractical." In order to satisfy this requirement, Plaintiffs are not required to precisely quantify the number of class members, but are entitled to rely on "reasonable inferences drawn from the available facts in estimating the size of the class." *Westways World Travel*, 218 F.R.D. at 233-34. In securities fraud cases involving nationally traded securities, courts draw the "reasonable inference" that joinder of the class is impractical without requiring any additional proof. *See, e.g., In re THQ*, 2002 WL 1832145, at *3; *In re Emulex Corp. Sec. Litig.*, 210 F.R.D. 717, 719 (C.D.

Cal. 2002); *Naiditch* v. *Applied Micro Circuits Corp.*, 2001 WL 1659115, *4 (S.D. Cal. Nov. 5, 2001).

In this case, although the exact size of the Class is not yet known, the facts alleged in the Complaint easily show that joinder of the claims of all Class Members would be impracticable. The Complaint alleges that there are thousands of members of the Class located throughout the United States (Complaint, ¶14), and, as set forth in Netopia's annual report for the year ended September 30, 2003 (filed with the SEC on December 19, 2003), the Company had over 22 million shares of its common stock outstanding. Complaint, ¶14. Moreover, Netopia's stock traded on the NASDAQ National Market during the Class Period. Complaint, ¶14. These factual allegations amply demonstrate that the size of the Class is sufficiently numerous that it would be impractical to join all of the claims of Class members in one lawsuit. *See, e.g., Zhu v. The Fujitsu Group 401(k) Plan,* 2004 WL 3252573, at *5 (N.D. Cal. Mar. 3, 2004) (Whyte, J.) (class of approximately 139 members sufficient to meet numerosity requirement); *In re THQ,* 2002 WL 1832145, at *3 (joinder impracticable where there are more than 35 class members); *In re Emulex,* 210 F.R.D. at 719; *In re Adobe Systems, Inc. Sec. Litig.*, 139 F.R.D. 150, 153 n.4 (N.D. Cal. 1991) (numerosity requirement clearly satisfied by allegation that hundreds if not thousands of class members traded Adobe securities during class period).

2. There Are Common Questions Of Law Or Fact

Rule 23(a)(2) is satisfied if there are questions of law or fact that are common to the class. "Courts have taken a common sense approach in determining whether the class is united by common questions of law or fact." *Zhu,* 2004 WL 3252573, *5, citing *Blackie,* 524 F.2d at 903. The "commonality" requirement "has been construed permissively. All questions of fact and law need not be common to satisfy the rule." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998); *see Westways World Travel*, 218 F.R.D. at 234. "In fact, several courts have found that a single issue common to the proposed class satisfies Rule 23(a)(2)." *In re THQ*, 2002 WL 1832145, at *3, citing *Haley v. Medtronic*, 169 F.R.D. 643, 648 (C.D. Cal. 1996), and *In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1080 (6th Cir. 1996). As this Court explained in *Zhu,* in securities class actions, "'questions common to all investors will be relatively substantial'" where "'the complaint alleges a

common course of conduct over the entire period directed against all investors, generally relied upon, and violating common statutory provisions.'" 2004 WL 3252573, at *5, quoting *Blackie*, 524 F.2d at 902-03.

The "commonality" requirement has been satisfied in this case, as the Complaint identifies several questions of law or fact that are common to the Class, including:

a. whether the federal securities laws were violated by Defendants' acts alleged in the Complaint;

b. whether Defendants issued false and misleading statements during the Class Period;

c. whether Defendants acted knowingly and/or recklessly in issuing false and misleading statements;

d. whether the market price of Netopia common stock during the Class Period was artificially inflated because of Defendants' conduct alleged in the Complaint; and

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

Complaint, ¶15. Such common questions have been previously found sufficient to establish commonality in this Circuit. *See Blackie*, 524 F.2d at 902-03 (complaint met commonality requirement by alleging "a common course of conduct over the entire period directed against all investors, generally relied upon, and violating common statutory provisions"), citing *Harris* v. *Palm Springs Alpine Estates*, 329 F.2d 909, 914 (9th Cir. 1964); *In re THQ*, 2002 WL 1832145, at *3 (same); *In re Emulex Corp. Sec. Litig.*, 201 F.R.D. 717 (C.D. Cal. 2002) (commonality requirement satisfied where complaint alleged that specific acts committed by Defendants during class period violated federal securities law; "Defendants' alleged conduct and the legality of this conduct are questions of law or fact common to the class").

3. Plaintiffs' Claims Are Typical Of The Claims Of The Class

Rule 23(a)(3) is satisfied where the plaintiffs' claims are "typical of the claims" of the class. "The typicality requirement of Rule 23 is satisfied if the claim of the named class representative arises from the same event or course of conduct that gives rise to the claims of other class members and the claims are based on the same legal theory." *Adam v. Silicon Valley Bancshares,* 1994 WL

374314, at *2 (N.D. Cal. Apr. 18, 1994) (Whyte, J.); *Zhu,* 2004 WL 3252573, *6 (same); *Hanon* v. *Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992) ("typicality" test is whether members of proposed class "have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct"); *Schlagel* v. *Learning Tree, Int'l*, 1999 WL 672306, at *5 (C.D. Cal. Feb. 23, 1999) (typicality requirement satisfied where class members may have "relied on different documents, purchased different amounts of stock or sold or bought stock on different days," because the class representatives were still "victims of the same course of Defendants' conduct."); *see In re THQ*, 2002 WL 1832145 at *3 (same). The Ninth Circuit has described the standard for satisfying the "typicality" requirement as a "permissive" one, and held that "representative claims are 'typical' if they are reasonably co-extensive with those of absent class members; they need not be substantially identical." *Hanlon,* 150 F.3d at 1020.

Plaintiffs' claims here are typical of the claims of the Class under Rule 23(a)(3) because their claims arise from the same course of conduct that give rise to the claims of the Class, and Plaintiffs' claims are based on the same legal claims as the Class. Plaintiffs -- like all Class Members -- allege that they purchased Netopia securities at prices that were artificially inflated pursuant to an ongoing scheme to inflate the price of Netopia stock through related misrepresentations over the course of the Class Period, claim that these misrepresentations constituted violations of Sections 10(b) and 20(a) of the Securities Exchange Act of 1934, and claim that their losses were caused by these violations of the securities laws. As Plaintiffs and the Class have the same or similar injuries from Defendants' securities law violations that arise from the same course of conduct, the "typicality" requirement of Rule 23(a)(3) is satisfied.[5]

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[5] As discussed above, this Court previously ruled that Plaintiffs' claims appeared typical of the claims of the Class within the meaning of Rule 23(a)(3) (*Lead Plaintiff Order* at 7-8), and rejected arguments that Levy's trading of Netopia securities rendered him "atypical." *Id.* at 8-10. Other courts have also held that the claims of "in-and-out" purchasers are not "atypical" under Rule 23(a)(3), and should be appointed as class representatives under Rule 23. *See, e.g., Freeland v. Iridium World Communications, Ltd.,* --- F.R.D. ----, 2006 WL 56536 (D.D.C. Jan. 9, 2006) (in granting motion for class certification, court rejected argument that, under *Dura Pharmaceuticals, Inc. v. Broudo*, 125 S. Ct. 1627 (2005), "in-and-out" status of plaintiff rendered him "atypical" and

4. Plaintiffs Will Fairly and Adequately Protect The Interests Of The Class

Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." In the Ninth Circuit, Rule 23(a)(4) is satisfied where (i) counsel for the class is qualified and competent to vigorously prosecute the action and (ii) the interests of the proposed class representative are not antagonistic to the interests of the Class. *See, e.g., Staton v. Boeing,* 327 F.3d 938, 957 (9th Cir. 2003); *Lerwill v. Inflight Motion Pictures, Inc.*, 582 F.2d 507, 512 (9th Cir. 1978); *Lead Plaintiff Order* at 7. Once a *prima facie* showing has been made that these tests have been met, the burden shifts to the defendants to prove that the class representative will not fairly and adequately protect the interests of the Class. *Armour v. Network Assocs., Inc.*, 171 F. Supp. 2d at 1053 (N.D. Cal. 2001).

The requirements of Rule 23(a)(4) are easily satisfied in this case. First, Plaintiffs' Counsel are qualified and experienced in class action litigation (*see Nobel Declaration, Exhibits B-C*), were the law firms that initiated this litigation, and have vigorously litigated this action from the outset (including preparing a class action complaint which all defendants conceded had properly alleged securities laws violations in compliance with the strict pleading requirements of the PSLRA). Indeed, after examining the resumes of Schatz & Nobel, P.C. and the Braun Law Group, P.C., this Court previously ruled in this case that it was "satisfied that [Plaintiffs] has selected highly qualified, experienced counsel who will adequately represent the interests of the Class." *See Lead Plaintiff Order* at 10; *Emulex,* 210 F.R.D. at 720 ("In evaluating the adequacy of attorneys representing the class, a court may examine the attorneys' professional qualifications, skill, experience, and resources. The court may also look at the attorneys' demonstrated performance in the suit itself").[6]

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would subject plaintiff to unique defenses).

[6] For these same reasons, the Court should appoint Schatz & Nobel, P.C. as Lead Counsel, and the Braun Law Group, P.C. as Liaison Counsel pursuant to Rule 23(g)(C)(i). Plaintiffs' Counsel have done extensive work to date in identifying and investigating potential claims in this action, including locating and interviewing witnesses, and obtaining critical documents evidencing the wrongdoing of Defendants. In addition, as evidenced by their firm resumes, Plaintiffs' Counsel

Second, there is no conflict between Plaintiffs' interests and the interests of the Class Members. As discussed above, Plaintiffs and the members of the Class assert the same legal claims, and their losses arise out of the same course of conduct and securities law violations by Defendants during the Class Period. Accordingly, Plaintiffs will fairly and adequately protect the interests of the Class under Rule 23(a)(4).[7]

C. The Requirements Of Rule 23(b)(3) Have Been Satisfied

Plaintiffs have also satisfied the requirements of Rule 23(b)(3). First, common questions of law or fact predominate over any purported individual questions. Second, a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

1. Common Questions Of Law Or Fact Predominate

Questions that are common to the class predominate over individual questions where plaintiff alleges a common course of conduct of misrepresentations, omissions, and other wrongdoing that allegedly affect all the class members in the same or similar manner. *Blackie,* 524 F.2d at 905-08. Courts generally focus on this issue of the defendants' liability in deciding whether the "predominance" standard is met, and if the liability is common to the class, common questions are held to predominate over individual questions. *Blackie,* 524 F.2d at 902. In *Blackie*, the Ninth Circuit held that common questions clearly predominated in a securities fraud case, despite the defendants' claims that the amount of damages and degree of reliance were individual issues. *Id.* at 905-06; *see In re United Energy Corp. Solar Power Modules Tax Shelter*, 122 F.R.D. 251, 256 (C.D. Cal. 1988) (where plaintiff alleges common nucleus of misrepresentations, common questions predominate over any purported differences between individual class members with respect to

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have extensive experience handling class actions, complex litigation, and claims of the type asserted in this action. And, Plaintiffs' Counsel have extensive knowledge concerning the federal securities laws applicable to this litigation.

[7] As discussed above, this Court previously rejected arguments that Plaintiffs would not fairly and adequately represent the interests of the Class under Rule 23(a)(4), and rejected the argument that Plaintiffs were subject to "unique defenses" that could become the focus of the litigation. *Lead Plaintiff Order* at 8-9.

damages, causation and reliance). As the Supreme Court has observed, the predominance test is "readily met in certain cases alleging consumer or securities fraud." *Amchem Prods. v. Windsor,* 521 U.S. 591, 623 (1997).

Common questions of law or fact predominate over any individual questions within the meaning of Rule 23(b)(3). There are many common issues of fact or law in this case, including whether Defendants overstated Netopia's financial results through the inclusion of a purported "contingent sale" transaction with ICC to supply Netopia's products to Philadelphia, whether Defendants made misrepresentations concerning Netopia's revenue from Swisscom, whether Defendants' misrepresentations violated the federal securities laws, whether Defendants' misrepresentations artificially inflated the price of Netopia stock during the Class Period, whether Defendants acted with scienter, and whether Defendants' securities law violations caused Class Members to suffer losses. Complaint, ¶¶21-80. *See THQ,* 2002 WL 1832145, at *8 ("Plaintiffs' claim – which is based on a series of misrepresentations and market manipulations – clearly satisfied the requirement that common questions predominate"). Moreover, the commonality requirement has been met here because the claims of the Class are based upon the "fraud-on-the-market" doctrine, which provides a rebuttable presumption that Class Members relied upon the "integrity of the market price" which reflected the misstatements, thereby obviating the need for Class Members to prove individualized reliance on the Defendants' misrepresentations. *See, e.g., Basic, Inc. v. Levinson,* 485 U.S. 224, 241-43, 247 (1988).[8] As a result, common issues of fact or

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[8] Plaintiffs specifically alleged (¶19) the factors demonstrating that the "fraud-on-the-market" doctrine applies to the trading of Netopia securities during the Class Period. *See, e.g., Cammer v. Bloom*, 711 F. Supp. 1264, 1287 (D.N.J. 1989). Netopia securities traded in an "efficient market" during the Class Period because the market price of Netopia securities fully reflected all publicly available information concerning Netopia. For example, the Complaint describes how Netopia's stock price rapidly increased or decreased in response to the issuance of important positive and negative information about Netopia's business and financial results on significant volume (¶¶55, 58, and 60-65). *See, e.g., Cammer*, 711 F. Supp. at 1287 ("cause-and-effect" relationship between company disclosures and immediate response in company's stock price is "the essence of an efficient market and the foundation of the fraud on the market theory"); *see Nobel Declaration,* Exhibit D (chart listing stock price activity and trading volume for Netopia during the Class Period). In addition, Netopia stock traded at a high weekly volume (¶19c; *Nobel Declaration,* Exhibit D), numerous analysts followed Netopia (¶¶19c, 42-44, 58, 69; *Nobel*

law conduct, clearly "predominate" over any purported individual issues. *See, e.g., In re Bearingpoint Sec. Litig.*, 2006 WL 141667 (E.D. Va. Jan. 17, 2006) (in granting motion for class certification, court ruled that issues concerning whether "in and out" class members can show "loss causation" do not predominate over common issues of law or fact, and rejected argument that under *Dura*, "in and out" traders cannot demonstrate loss causation; instead, "loss causation" was question going to the merits on summary judgment).

2. A Class Action Is Superior To Individual Actions

Rule 23(b)(3) also provides that the Court has to determine whether "a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Rule 23(b)(3) provides the following nonexclusive factors to guide the Court in determining "superiority":

> (A) the interest of members of the class in individually controlling the prosecution . . . of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by… member of the class; (C) the desirability . . . of concentrating the litigation of the claims in the particular forum; and (D) the difficulties likely to be encountered in the management of a class action.

As the Ninth Circuit explained in holding that a class action would be superior to other available methods for the fair and efficient adjudication of the controversy, it is "difficult to imagine a case where class certification would be more appropriate. Without it, thousands of identical complaints by former shareholders would have to be filed – the very result the class action mechanism was designed to avoid." *Epstein,* 50 F.3d at 668; *see In re Emulex*, 210 F.R.D. at 721 (citing *Epstein*). As discussed below, consideration of the factors enumerated in Rule 23(b)(3)(A)-(D) confirm that a class action is the superior method for the fair and efficient adjudication of the claims of wrongdoing alleged in the Complaint.

Declaration, Exhibits E-J), there were many "market makers" with respect to Netopia stock (¶19c; *Nobel Declaration,* Exhibit K), and Netopia was entitled to file a Form S-3 Registration Statement in connection with public offerings (¶19(c); *Nobel Declaration*, Exhibit L). *See Cammer*, 711 F. Supp. at 1286-87.

a. Rule 23(b)(3)(A)

The first factor (the interest of each class member in controlling the prosecution of separate actions) supports the superiority of a class action here. Rule 23(b)(3)(A). In a case with thousands of claimants, a class member's interest in having the claims of the class aggregated in a single class action lawsuit substantially outweighs the interest of a class member in individual control of the litigation. Where the damages suffered by each class member are not large, the application of Rule 23(b)(3)(A) weighs in favor of class certification. *Zinser v. Accufix Research Institute,* 253 F.3d 1180, 1190 (9th Cir. 2001), amended and superseded by *Zinser v. Accufix Research Institute,* 273 F.3d 1266 (9th Cir. 2001); *see, e.g., Carnegie v. Household Int'l, Inc.,* 376 F.3d 656, 661 (7th Cir. 2004) ("The more claimants there are, the more likely a class action is to yield substantial economies in litigation").

As the Supreme Court has observed, class actions permit plaintiffs to pool claims which would be uneconomical to litigate individually, and "most of the plaintiffs would have no realistic day in court if a class action were not available." *Phillips*, 472 U.S. at 809; *see Carnegie,* 376 F.3d at 661 ("The realistic alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or fanatic sues for $30"). In a securities class action where thousands of persons are damaged by fraudulent conduct, none but the very largest individual investors have the capital to prosecute the claims individually. *See, e.g., In re Worldcom Sec. Litig.,* 219 F.R.D. 267, 304 (S.D.N.Y. 2003) ("Few individuals could even contemplate proceeding with this litigation in any context other than through their participation in a class action, given the expense and burden that such litigation would entail"). However, when investors' claims are aggregated in a class action, even an investor who bought a single share has the opportunity to recover for the defendants' securities law violations. This benefit of the class action mechanism is extremely compelling, and clearly outweighs any speculative interest of each class member in controlling the prosecution of separate actions.

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b. Rule 23(b)(3)(B)

Plaintiffs' Counsel are not aware of any pending litigation in which the claims at issue in this case are being separately pursued by any class members. As a result, the second factor (the extent and nature of any litigation concerning the controversy already commenced by members of the class) also supports the conclusion that a class action is the superior method for the resolution of the claims in the Complaint.

c. Rule 23(b)(3)(C)

Consideration of the third factor (the desirability of concentrating the litigation of the claims in the particular forum) further demonstrates that a class action is superior. As Netopia has its corporate headquarters in this District and several of the individual Defendants reside in this District, many of the witnesses and most of the documentary evidence is located within this forum. Moreover, Netopia reported an investigation concerning Netopia is being conducted by the U.S. Attorney for the Northern District of California, and a Netopia shareholder derivative suit is also being prosecuted in this Court. As a result, this forum is the most efficient forum to litigate the claims alleged in the Complaint.

d. Rule 23(b)(3)(D)

Finally, an analysis of the fourth factor (the difficulties that are likely to be encountered in the management of a class action) confirms the superiority of having the claims of the Class resolved in a class action. Rule 23(b)(3)(D). The mere possibility of complexity or unmanageability does not defeat a class action. *See, e.g., In re VisaCheck/MasterMoney Antitrust Litig.*, 280 F.3d 124, 140 (2d Cir. 2001); *Maneely v. City of Newburgh*, 208 F.R.D. 69, 78 (S.D.N.Y. 2002). Because a securities fraud class action provides the opportunity to redress wrongs where the victims would otherwise be effectively unable to prosecute their claims, "a class action has to be unwieldy indeed before it can be pronounced and inferior alternative – no matter how massive the fraud or other wrongdoing that will go unpunished if class treatment is denied – to no litigation at all." *Carnegie,* 376 F.3d at 661.

In this case, all of the claims alleged in the Complaint will be governed by a single federal law (Sections 10(b) and 20(a) of the Securities Exchange Act of 1934). Similarly, as discussed above, as this is a "fraud-on-the-market" case, reliance is presumed, and there will be no need to resolve whether each Class Member relied on Defendants' misrepresentations. As there is no reason to believe that the prosecution of the claims of Class Members in a single class action will create *more* management problems than the alternative (*i.e.,* the prosecution of thousands of separate lawsuits by each class member), class adjudication is clearly superior to any other form of adjudication. Indeed, denial of class certification in clearly appropriate cases like this one on "superiority" grounds would effectively render meaningless the causes of action under the Securities Exchange Act of 1934. As a result, a class action is not only the superior, but perhaps the only, way to litigate the claims alleged in this action.

IV. CONCLUSION

For the reasons discussed above, Plaintiffs respectfully request that this Court (a) certify this action as a class action pursuant to Rules 23(a) and 23(b)(3) of the Federal Rules of Civil Procedure, (b) certify the Class, (c) appoint Plaintiffs as Class representatives, and (d) appoint Schatz & Nobel, P.C. as Lead Counsel for the Class, and appoint the Braun Law Group, P.C., as Liaison Counsel for the Class, pursuant to Rule 23(g).

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