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July 22, 2002

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Hon. Shira A. Scheindlin
United States District Court Judge
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street
Room 1050
New York, New York 10007

Re: *In re Initial Public Offering Securities Litigation*, 21 MC 92 (SAS)
Errata to Issuer Defendants' Motion to Dismiss

Dear Judge Scheindlin:

Enclosed please find corrections to the Issuer Defendants' Motion to Dismiss and accompanying Memorandum of Law, appendices and exhibits served on July 15, 2002. These corrections are made to account for plaintiffs' July 10, 2002 "addenda" to Paragraph 34 and Exhibit B to the Master Allegations, and to amend "Attachments A" to add issuer's counsel who now join the motion and brief. A complete listing of all changes is attached.

Respectfully submitted,

Hilary M. Williams

cc: Liaison Counsel (via messenger)
All Counsel (via Verilaw)

Hon. Shira A. Scheindlin
July 22, 2002
Page Two

CORRECTIONS

Location

Correction

Page 9, footnote 10, third sentence:

Change “. . . no allegations of Undisclosed Compensation are made in connection with 4 offerings and no allegations of Tie-Ins are made in connection with 34 offerings . . . ”

to

“no allegations of Undisclosed Compensation are made *in Exhibit B* in connection with 3 offerings and no allegation of Tie-Ins are made *in Paragraph 34* in connection with 32 offerings.”

Page 39, footnote 47:

Change “34 offerings” to “31 offerings”

Page 46, first paragraph, fourth sentence:

Change “*and for 34 offerings . . .*” to “*and for 31 offerings . . .*”

Appendix Exhibit 2

Remove GT Group Telecom, Inc. and SMTC Corp. (the latter from both lists);
Add “but see Am. Compl. ¶ 32” next to VA Linux Systems, Inc.

Attachment A to Notice of Motion

Add entry for Foley & Lardner

Attachment A to Memorandum of Law

Add entry for Foley & Lardner

CORRECTED



**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

**IN RE INITIAL PUBLIC OFFERING
SECURITIES LITIGATION**

Master File No. 21 MC 92 (SAS)

**THIS DOCUMENT RELATES TO
ALL ACTIONS**

**MEMORANDUM OF LAW IN SUPPORT OF ISSUER DEFENDANTS'
MOTION TO DISMISS THE CONSOLIDATED AMENDED COMPLAINTS**

to the public.⁹ The table is typically prefaced by language noting that it sets forth the compensation and other expenses that the *issuer and selling shareholders* will pay to the underwriters. (*See, e.g.*, Williams Decl. Ex. C (excerpts from registration statements and prospectuses for Digimarc Corp., Razorfish, Inc., and Saba Software, Inc. initial public offerings).) Plaintiffs allege, however, that the failure to list commissions that the Underwriter Defendants supposedly received *from third-party brokerage customers* who bought *unrelated securities* rendered the table in each Issuer's registration statement false and misleading.

Plaintiffs purport to quantify their allegations of Undisclosed Compensation in Exhibit B to the Master Allegations, which sets out lists of "shares allocated" by certain Underwriter Defendants in certain offerings.¹⁰ These lists are all followed by the virtually identical allegation describing *total* excess commissions paid "during 1999 and 2000" and "generated from trades . . . which were created *predominately* for the purpose of compensating" the Underwriter Defendant in question for IPO allocations. (*See* MA Ex. B (emphasis added).) By its own terms, Exhibit B purports to describe commissions generated from "open market transactions involving *other securities*," not the securities that were issued in each of the listed

⁹ This is required by Regulation S-K Item 508(e), 17 C.F.R. § 229.508(e). The table usually is reproduced on the front page of the registration statement. *See* Regulation S-K Item 501(b)(3), 17 C.F.R. § 229.501(b)(3) (forepart of registration statement must disclose "the price to the public of the securities, the underwriter's discounts and commissions, the net proceeds [the registrant] receive[s], and any selling shareholder's net proceeds").

¹⁰ As late as July 12, 2002 — just two days prior to the deadline set by the Court for service of the Issuer Defendants' motion to dismiss and well after the Underwriter Defendants' service of their Briefs on July 1, 2002 — plaintiffs were *still* amending the Master Allegations, without leave of the Court. These amendments include a revised Exhibit B, which adds allegations of Undisclosed Compensation for 28 new offerings, and a revised Paragraph 34, which adds allegations of supposed Tie-Ins for 23 new offerings. Thus, as of July 14, 2002, no allegations of Undisclosed Compensation are made in Exhibit B in connection with 3 offerings and no allegations of Tie-Ins are made in Paragraph 34 in connection with 32 offerings. (*See* App. Ex. 2.) The Issuer Defendants have accounted for these last-minute amendments in this Memorandum of Law, however, the Issuer Defendants reserve their right to object to these amendments, the impropriety of which is discussed more fully, *infra*, Part V.

is all that plaintiffs are seemingly able to muster.⁴⁷ *In re WRT Energy Sec. Litig.*, No. 96 Civ. 3610 (JFK), 1997 U.S. Dist. LEXIS 14009, at *42 (S.D.N.Y. Sept. 15, 1997) (rejecting allegations of scienter based on senior management's access to information, and finding that "[a]llowing actions to proceed on such a theory, without more, would expose top-level managers to suit merely by virtue of the positions they hold in a corporation which experiences an economic downturn").

Additionally, the Second Circuit in *Novak* specifically noted that "there are limits to the scope of liability for failure to monitor adequately the allegedly fraudulent behavior of others." 216 F.3d at 309. Indeed, as this Court has held, "[w]here the allegations of recklessness pertain to third-party advisers, such as underwriters or accountants, plaintiffs' allegations must be commensurately stronger, 'approximating an actual intent to aid in the fraud being perpetrated . . .'" *In re Independent Energy Holdings PLC Sec. Litig.*, 154 F. Supp. 2d 741, 764 (S.D.N.Y. 2001) (citing *WRT Energy Sec. Litig.*, No. 96 Civ. 3610, 96 Civ. 3611 (JFK), 1999 U.S. Dist. LEXIS 3883, at *31 (S.D.N.Y. Mar. 31, 1999)). In these cases, the Issuer Defendants are quite clearly third parties to the Underwriter Defendants' alleged misconduct, and, as was the case in the *Independent Energy* case, "[p]laintiffs fail to state any particularized facts that might support their assertion that [the Issuer Defendants were] [] so intimately familiar with the [Underwriters] that [they] knew of the fraud being perpetrated on the public." *Id.* The Road Show Allegations are nothing more than bare accusations of 'guilt by association,' without any particularized facts to support plaintiffs' theory.

⁴⁷ By failing to specify what each group of Issuer Defendants is alleged to have been told, plaintiffs end up by asserting patently inconsistent allegations. For example, plaintiffs do not allege that any Tie-Ins occurred in at least 31 offerings, but then purport to assert in the context of the Road Show Allegations that all Issuer Defendants in these cases knew or recklessly disregarded this particular 'misconduct.' (See Airspan CAC ¶ 108.)

2. The Pleadings Fail to Allege that Tie-In Agreements Were Entered Into In Any Case.

The multiple defects inherent in plaintiffs' allegation that Tie-Ins occurred in each of the 309 offerings at issue are also outlined in full in the Underwriter Defendants' Briefs. (*See, e.g.,* Und. Brief 1 at 24-34.) Of particular note, however, is Paragraph 34 of the Master Allegations, which represents plaintiffs' attempt to show that Tie-Ins occurred in each of these cases, but which simply repeats the same allegation that “*one customer*, in order to obtain shares of the [IPO security] was *required or induced to* and did purchase from [an Underwriter Defendant] in the aftermarket, at prices substantially above the IPO price [some unspecified amount of IPO shares].” (*See* MA ¶ 34.) As with the Undisclosed Compensation allegations, there is no way for the Issuer Defendants to determine what exactly is alleged to have happened in their respective offerings. There are no particulars about the total number of shares purchased, the time that the purchase occurred, the price paid by the “one customer” or the effect on the market price of the securities in question (and for at least 31 offerings, there is no allegation that a Tie-In occurred *at all*). (*See* MA ¶ 34; App. Ex. 2.) Because any of these transactions could have occurred at market price and/or at minimal quantities, it is impossible to conclude that any such transaction, even assuming it occurred, would have had *any* effect on stock price, much less the manipulative, escalating effect posited by plaintiffs. (*See* MA ¶ 14.)

Plaintiffs also make no effort to describe the impact of any of the alleged underlying misconduct on stock price beyond the blanket assertion that the stock was “inflated” throughout each respective class period. (Airspan CAC ¶ 114.)⁵⁴ But, for the stock price to

⁵⁴ Plaintiffs' conclusory allegations are not saved by their broad contention (represented graphically in charts without reference to a single offering) that the securities at issue “performed in a drastically different manner than prior [IPO] markets . . . or the broader IPO market between 1998 and
(Footnote continues on following page.)



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE INITIAL PUBLIC OFFERING
SECURITIES LITIGATION

Master File No. 21 MC 92 (SAS)

THIS DOCUMENT RELATES TO
ALL ACTIONS

**THE ISSUER DEFENDANTS'
MOTION TO DISMISS**

APPENDIX

**LIST OF 32 OFFERINGS NOT INCLUDED IN
PARAGRAPH 34 OF MASTER ALLEGATIONS AS OF JULY 14, 2002**

1. Accelerated Networks, Inc.
2. Akamai Technologies, Inc.
3. Ariba, Inc.
4. AsiaInfo Holdings, Inc.
5. Avici Systems, Inc.
6. chinadotcom corporation
7. Dice, Inc.
8. Exchange Applications, Inc.
9. EXFO Electro Optical Engineering, Inc.
10. Expedia, Inc.
11. FreeMarkets, Inc.
12. Inforte Corp.
13. Interwoven, Inc.
14. iVillage, Inc.
15. Jazztel PLC
16. JNI Corp.
17. Lexent Inc.
18. Loudeye Technologies, Inc.
19. MarketWatch.com, Inc.
20. OpenTV Corp.
21. PurchasePro.com, Inc.
22. Quest Software, Inc.
23. Redback Networks, Inc.
24. Silicon Laboratories, Inc.
25. TeleCorp PCS, Inc.
26. theglobe.com, Inc.
27. Ticketmaster Online-CitySearch, Inc.
28. Transmeta Corp.
29. VA Linux Systems Inc. (*but see* Am. Compl. ¶ 32).
30. Valley Media, Inc.
31. Virage, Inc.
32. webmethods, Inc.



CORRECTED

**LIST OF 3 OFFERINGS NOT INCLUDED IN
EXHIBIT B TO MASTER ALLEGATIONS AS OF JULY 14, 2002**

1. OTG Software, Inc.
2. Register.com, Inc.
3. Silicon Laboratories, Inc.

**CORRECTED ATTACHMENT A
TO ISSUER DEFENDANTS' NOTICE OF MOTION
TO DISMISS THE CONSOLIDATED AMENDED COMPLAINTS**

CORRECTED

ATTACHMENT A
Issuer Defendants' Joining Motion to Dismiss
The Consolidated Amended Complaints Dated July 15, 2002 and
Accompanying Memorandum of Law

Movants listed herein include certain defendants who appear specially in bringing this motion and who reserve their challenges to insufficient service of process and personal jurisdiction per the Court's ruling of July 9, 2002.

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**CORRECTED ATTACHMENT A
TO MEMORANDUM OF LAW IN SUPPORT OF
ISSUER DEFENDANTS' MOTION TO DISMISS
THE CONSOLIDATED AMENDED COMPLAINTS**

CORRECTED

ATTACHMENT A
Issuer Defendants' Joining Motion to Dismiss
The Consolidated Amended Complaints Dated July 15, 2002 and
Accompanying Memorandum of Law

Movants listed herein include certain defendants who appear specially in bringing this motion and who reserve their challenges to insufficient service of process and personal jurisdiction per the Court's ruling of July 9, 2002.

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