LERACH COUGHLIN STOIA
& ROBBINS LLP
WILLIAM S. LERACH (68581)
TRAVIS E. DOWNS III (148274)
DOUGLAS R. BRITTON (188769)
BRIAN O. O'MARA (229737)
401 B Street, Suite 1700
San Diego, CA 92101
Telephone: 619/231-1058
619/231-7423 (fax)

SCHATZ & NOBEL, P.C.
ANDREW M. SCHATZ
JEFFREY S. NOBEL
SETH KLEIN
One Corporate Center
20 Church Street. Suite 1700
Hartford, CT 06103
Telephone: 860/493-6292
860/493-6290 (fax)

Co-Lead Counsel for Lead Plaintiffs

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

In re SUREBEAM CORPORATION SECURITIES LITIGATION This Document Relates To: ALL ACTIONS.	Master File No. 03-CV-01721-JM(POR) CLASS ACTION PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS THE TITAN CORPORATION, DR. GENE W. RAY AND SUSAN GOLDING'S MOTION TO DISMISS PURSUANT TO FED. R. CIV. P. 12(b)(6) DATE: September 17, 2004 TIME: 11:00 a.m. COURTROOM: 6; The Honorable Jeffrey T. Miller

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Page

Page

STATUTES, RULES AND REGULATIONS

Page

I. INTRODUCTION

Plaintiffs respectfully submit this opposition to the motion to dismiss the Consolidated Complaint for Violation of the Federal Securities Laws (the "Complaint") filed by defendants The Titan Corporation ("Titan"), the parent of SureBeam Corporation ("SureBeam"), and Gene W. Ray ("Ray") and Susan Golding ("Golding"), directors of SureBeam (the "Director Defendants" and, together with Titan, the "Titan Defendants").[1] The Titan Defendants' motion to dismiss the well-pled claims in the Complaint should be denied in its entirety. Putting aside their improper factual arguments, the Titan Defendants' motion to dismiss utterly fails to demonstrate that the Complaint fails to state any actionable claims against them. Indeed, the Complaint properly alleges that: (i) the Director Defendants are liable under §11 of the Securities Act of 1933 (the "Securities Act") for the misstatements and omissions of material fact contained in a Registration Statement and Prospectus filed by SureBeam in connection with its initial public offering of stock ("IPO"); (ii) Titan is liable under §15 of the Securities Act for those material misstatements and omissions as a "controlling person" of SureBeam; and (iii) Titan is also liable as a "control person" under the Securities Exchange Act of 1934 (the "Exchange Act") for the fraudulent misstatements and omissions made by SureBeam from March 16, 2001, through and including August 27, 2003 (the "Class Period"). Defendants cannot alter this result by ignoring the incriminating facts pled in the Complaint and/or by improperly inviting this Court to draw inferences against the plaintiffs and in favor of defendants. Accordingly, the instant motion fails and the Titan Defendants should be ordered to answer the Complaint.

II. THE FACTUAL ALLEGATIONS OF THE COMPLAINT

On the date of SureBeam's IPO, Titan was in tremendous financial straits. Titan had incurred extraordinary (and increasing) losses beginning in the first quarter of 2000 and had

---

[1] Plaintiffs also incorporate into the instant memorandum of law all of the arguments made in each of plaintiffs' other memoranda filed on this date in opposition to the various defendants' motions to dismiss the Complaint.

dramatically increased its debt levels. ¶15.[2] Titan's non-operating debt had increased from $15 million to nearly $590 million between January 1996 and March 2001. *Id.*

Among Titan's money-losing enterprises was its SureBeam subsidiary. ¶¶13-15, 91, 99, 102. Since 1997, SureBeam was in the business of building irradiators that scanned electron beams across various products, including food items, to destroy or prevent the reproduction of organisms that cause infestation, contamination, spoilage or disease. ¶14. Titan did not want to keep funding SureBeam's business and looked to the IPO in March 2001 to provide necessary funding for SureBeam. ¶15. However, SureBeam could not successfully complete an offering unless it appeared that the business was successful and generating revenue.

The material misrepresentations and omissions that form the core of this case stem from a joint venture which Titan arranged for SureBeam in May 2000 with Tech Ion Industrial Brazil ("Tech Ion"), a Brazilian company. The joint venture was to create a new company, SureBeam Brasil (2), which would provide irradiation services to food producers who were storing their product in Rio de Janeiro's CEASA, a large distribution warehouse that provided most of the produce for Rio's ten million residents. ¶¶28, 30.

Most importantly, SureBeam (Titan) was able to show revenues on its financial statements for the year ending December 31, 2000, issued to the public in connection with the IPO, based on SureBeam's "sale" of 11 irradiators to Tech Ion for use by SureBeam Brasil (the joint venture). ¶¶2, 20, 38. As a result, SureBeam's financial statements for fiscal 2000 showed food irradiation revenue of $25.2 million, of which $15.5 million (*i.e.*, 61%) was from the Tech Ion "sale" (¶38) and accounts receivable of $17.678 million, of which $15.5 million was from the Tech Ion "sale."[3] However,

---

[2] All "¶__" and "¶¶___" references are to the Complaint, unless otherwise stated.

[3] As acknowledged in Defendants The Titan Corporation, Dr. Gene Ray and Susan Golding's Memorandum of Points and Authorities in Support of Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(6) ("Titan Br.") at 6 n.7, the Court may properly consider the full text of the Prospectus which is attached to the Declaration of Douglas R. Britton in Support of Plaintiffs' Memorandum in Opposition to Defendants The Titan Corporation, Dr. Gene W. Ray and Susan Golding's Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(6) ("Britton Decl.") as Exhibit A, while evaluating the Titan Defendants' motion to dismiss. *See In re Silicon Graphics Sec. Litig.*, 183 F.3d 970, 986 (9th Cir. 1999).

Tech Ion was insolvent (it had only ***$1,753*** in available assets and ***$2.2 million*** in liabilities). ¶22. Therefore, the joint venture agreement recognized that SureBeam Brasil would pay for the irradiators, but ***only if and when*** SureBeam Brasil obtained ***outside*** funding sufficient to pay for the irradiators, as well as for its initial day-to-day operating expenses ¶¶20-22.

However, by December 2000, the date of SureBeam's financial statements, and March 2001, the date of the IPO, attempts to obtain outside funding for the joint venture had failed. Not only was SureBeam Brasil unable to obtain financing from the World Bank, but Delphos International ("Delphos"), which had been hired to assist SureBeam Brasil with securing funding, reported in November 2000 that "lenders secured only by the project's assets ***need greater assurances that there will be customers to generate revenue to pay the debt***." ¶25. In December 2000, Delphos reiterated that in order to attract any lender to finance SureBeam Brasil, "we need to justify the revenues and construct a plausible business case for marketing the SureBeam services (*i.e.*, letters of interest from potential customers, alliances, etc.)." ¶27. However, SureBeam recognized by this time that there would be no customers, because the fundamental economic premise of SureBeam Brasil's business plan was fatally flawed. As Jose Francisco Medeiros ("Medeiros"), a Tech Ion executive, reported to SureBeam in December 2000, SureBeam's accelerators could not profitably operate at the prices SureBeam Brasil would be forced to charge to attract customers. ¶30.

As SureBeam now had no reasonable basis for recognizing the revenue from the "sale" of the irradiators, the joint venture thereafter took desperate measures by seeking financing from SUDAM, a Brazilian government agency established to fund development in the Amazon. This required that the irradiators be shipped through Manaus, a city in the Amazon. ¶¶32-33. As a result, instead of shipping the irradiators to Rio, the ostensible base of SureBeam Brasil's operations, the irradiators were shipped to a warehouse in Manaus in the Amazon, nearly 2000 miles from Rio, even though (i) the transportation and storage could cause the irradiators to deteriorate (¶¶32, 25) and (ii) SureBeam had to defraud the government to even qualify for SUDAM funding by falsely marking the irradiator invoices as "prepaid" (¶34). Moreover, SureBeam and Tech Ion artificially inflated the price of the irradiators from $5 million to $6.5 million to try to obtain more money from SUDAM. ¶36. However, on March 12, 2001, four days before the IPO, SUDAM suddenly and

completely collapsed as a result of a probe into government corruption. ¶37. SureBeam's prospects for collecting on its sale to Tech Ion were still negligible – and the joint venture itself likely doomed.

Thereafter, SureBeam went public based on a materially false and misleading Prospectus. ¶¶38-39.[4] SureBeam did not disclose that SureBeam Brasil's entire business plan had proved invalid in late 2000. SureBeam did not disclose that SureBeam Brasil's anticipated funding source had collapsed four days before the IPO or that SureBeam Brasil had no funding for operations (much less to pay for the irradiators). Instead, SureBeam improperly recognized the $15.5 million for the "sale" of the irradiators as revenue and as an account receivable in its financial statements issued in the Prospectus even though collection was not reasonably assured as of December 2000 – and did not disclose the impairment to that revenue and receivable as of the IPO. Indeed, not only did SureBeam put forth financial statements which purported to comply with generally accepted accounting principles ("GAAP"), but SureBeam specifically claimed in the Prospectus that "[o]ur accounting policies comply with the provisions of SAB 101" (¶85), even though SAB 101 and GAAP require that revenue cannot be recognized unless, *inter alia*, collection is "reasonably assured" (¶157). Moreover, in the "Management Discussion & Analysis" portion of the Prospectus, SureBeam continued to misleadingly emphasize the viability of the SureBeam Brasil joint venture with Tech Ion and the importance of the revenue recognized from the "sale" to Tech Ion:

> In May 2000, we received purchase orders from Tech Ion Industrial Brasil S.A. for eleven electronic food irradiation systems ***which we expect to result in approximately $55.0 million in sales revenues to us over the next three years***. We began construction of these systems in July 2000, and have ***recorded revenues of $15.5 million under the percentage-of-completion method for the year ended December 31, 2000***.

---

[4] The Director Defendants signed the Registration Statement, which contained the Prospectus. ¶¶75-76. Titan was not only shown as the owner of SureBeam (100% before the IPO and 84% afterwards) (¶¶2, 14-16, 38, 59) but also as having indemnified the underwriters along with SureBeam – indicating Titan's control of SureBeam and the IPO. Britton Decl., Ex. A at 49.

¶38. SureBeam Brasil never obtained the financing and, in April 2002, SureBeam wrote off all $22.4 million in trade receivables it had booked to that point from the "sale" to Tech Ion. ¶¶44-45. SureBeam subsequently filed for bankruptcy. ¶64.[5]

III. THE TITAN DEFENDANTS' MOTION TO DISMISS MUST BE DENIED

A. The Applicable Standard on a Motion to Dismiss

The Private Securities Litigation Reform Act of 1995 ("PSLRA") did not alter the standards applicable to a Fed. R. Civ. P. 12(b)(6) motion to dismiss. As the Ninth Circuit confirmed in *Am. West*, the factual allegations of a complaint must be taken as true and the complaint, as a whole, must be considered in the light most favorable to plaintiffs. All reasonable inferences must be drawn in favor of the plaintiffs and against defendants. *See No. 84 Employer-Teamster Joint Council Pension Trust Fund v. Am. West Holding Corp.*, 320 F.3d 920, 931 (9th Cir. 2003), *cert denied*, 2003 U.S. LEXIS 7727 (2003). Trial courts should not weigh facts or accept innocent explanation for the defendants' alleged misconduct at the pleading stage. *Id.* ("All allegations of material fact made in the complaint are taken as true and construed in the light most favorable to the plaintiff."). Thus, the Titan Defendants' motion to dismiss must be denied unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).[6]

---

[5] The Prospectus also misstated that SureBeam had "acquired a 19.9% equity interest in SureBeam Brasil ***without charge***," and that SureBeam Brasil was created "***with no initial capital contribution from either party***," when in fact Titan had contributed $5 million to SureBeam Brasil. ¶40. Although this contribution was ostensibly a loan in the form of a line-of-credit, the Prospectus failed to disclose that the agreement made no provision obligating Tech Ion or SureBeam Brasil to repay the line of credit under any particular parameters. *Id.*

[6] The Titan Defendants do ***not*** dispute that the Court must "draw all reasonable inferences" from the allegations of the Complaint in plaintiffs' favor in evaluating plaintiffs' ***Securities Act*** claims. Moreover, although defendants argue that the Court must consider "inferences unfavorable to plaintiffs" while adjudicating a motion to dismiss claims asserted under the ***Exchange Act*** (Titan Brf. at 21, the Titan Defendants make no such argument with respect to a motion to dismiss claims brought under the ***Securities Act***.

B. The Complaint Adequately Pleads §11 Claims Against the Titan Defendants

1. The Securities Act Provides a Broad Remedy to Investors Who Purchased Securities in an IPO

Section 11 of the Securities Act enforces the important proposition that if an issuer has taken investors' money pursuant to a Registration Statement (including a Prospectus) any part of which contains material misrepresentations or omissions, the people responsible for the Registration Statement – rather than the investors – should suffer the consequences of ***any*** material misrepresentation.[7] In order to ensure compliance with this philosophy of full disclosure, §11 imposes liability ***without proof of fraud or intent on all*** who are involved in the issuance of these new securities, including the issuer (SureBeam) and all directors or other signatories to the Registration Statement (such as defendants Ray and Golding). Moreover, not only is the issuer absolutely liable for material misstatements or omissions in the Registration Statement, but all other defendants are *prima facie* liable, without regard to any potential defense. *See Herman & MacLean v. Huddleston*, 459 U.S. 375, 381-82 (1983).[8] Section 15 of the Securities Act extends that *prima facie* liability to all persons – such as Titan – who "control" a liable party.

Moreover, §11 (and, by extension, §15) imposes liability ***not only*** for false statements and for failure to disclose facts necessary to make statements actually made not misleading (which §10(b) of the Exchange Act does as well), ***but also*** for the omission of any facts "required to be stated [in a Registration Statement]." Therefore, §11, unlike §10(b) of the Exchange Act, permits liability for a pure omission of a material fact. This provision creates liability for failure to disclose information

---

[7] A misrepresentation or omission is material if there is a "'substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the total mix of information made available.'" *Basic Inc. v. Levinson*, 485 U.S. 224, 231-32 (1988). As a result, materiality generally cannot be determined on a motion to dismiss. *See TSC Indus. v. Northway, Inc.*, 426 U.S. 438, 450 (1976); *Provenz v. Miller*, 102 F.3d 1478, 1489 (9th Cir. 1996) (citing *TSC*, 426 U.S. 438).

[8] The Director Defendants do not dispute that, as signatories to the Prospectus, they are *prima facie* liable under §11 of the Securities Act for any misrepresentations or omissions therein. *See* 15 U.S.C. §77k. Although the Director Defendants are entitled to prove a defense of due diligence, that is not a proper matter for a motion to dismiss. *See In re Enron Corp. Sec.*, 258 F. Supp. 2d 576, 639 (S.D. Tex. 2003).

required by any rule or regulation of the Securities and Exchange Commission ("SEC"). *Shaw v. Digital Equip. Corp.*, 82 F.3d 1194, 1204 (1st Cir. 1996).

The Ninth Circuit has expressly recognized that the type of information "required to be stated" in a Registration Statement includes the information required under Item 303 of SEC Regulation S-K, 17 C.F.R. §229.303 ("Item 303"). *Steckman v. Hart Brewing*, 143 F.3d 1293, 1296 (9th Cir. 1998). Item 303 requires, in part, disclosure of

> any known trends or uncertainties that have had or that the registrant reasonably expects will have a material favorable or unfavorable impact on net sales or revenues or income from continuing operations.

17 C.F.R. §229.303(a)(3)(ii). Item 303 "essentially says to a registrant: If there has been an ***important change in your company's business or environment that significantly or materially decreases the predictive value of your reported results***, explain this change in the prospectus." *Oxford Asset Mgmt. v. Jaharis*, 297 F.3d 1182, 1191-92 (11th Cir. 2002), *cert. denied*, 2003 U.S. LEXIS 6969 (2003).

Therefore, §11 requires disclosure of known adverse trends or uncertainties in a Prospectus. *See Shaw*, 82 F.3d at 1205 n.9, 1208; *Milman v. Box Hill Sys. Corp.*, 72 F. Supp. 2d 220, 230-31 (S.D.N.Y. 1999).

2. The Prospectus Contains Untrue Statements and Omits Material Facts in Violation of §11

The Complaint adequately alleges violations of all three prongs of §11: (i) misstatements; (ii) failures to disclose material information necessary to make statements not misleading; and (iii) failure to disclose information required by SEC regulations.

a. Misstatements in the Financial Statements and Text of the Prospectus

(1) The Financial Statements Were Materially False and Misleading as of December 31, 2000

The Complaint alleges a *prima facie* claim under §11 for the misstatements contained in SureBeam's financial statements for the year ended December 31, 2000, which were contained in the Prospectus. Britton Decl., Ex. A at 52-59; *see* ¶¶39, 85. SureBeam misrepresented that SureBeam Brasil had recognized $15.5 million in revenue from the SureBeam Brasil joint venture as of

December 31, 2000, in accordance with GAAP.[9] However, GAAP unequivocally requires that revenue only be recognized where collectibility is "reasonably assured." ¶157 (citing SAB No. 101); *see also* ¶¶155-156 (citing SOP No. 81-1 and AICPA Accounting Research Bulletin No. 45). Collectibility plainly cannot be reasonably assured where it is dependent upon the future negotiation by an insolvent third party (*i.e.*, *Tech Ion*) of a loan from some other third party (whether SUDAM or anyone else), as was the situation facing SureBeam as of December 31, 2000.

Indeed, even under the Titan Defendants' improperly lenient formulation – that SureBeam could properly recognize revenue under GAAP if it had "reasonable assurance" that SureBeam Brasil would be able to obtain funding from some third party to pay for the systems (Titan Brf. at 11-14) – revenue recognition was improper. The Complaint not only alleges that SureBeam had no reasonable assurance that Tech Ion or the joint venture would obtain funding, but also alleges facts which strongly infer that SureBeam did not have such reasonable assurance. First, the Complaint alleges that SureBeam Brasil did not have financing at the end of 2000. *See* ¶¶28-32. Second, as discussed above, the Complaint alleges that SureBeam and Tech Ion realized in December 2000 that their business plan was a failure, that SureBeam Brasil was not able to attract customers, and that neither traditional lenders nor lenders of last resort were interested. *See id.* Lastly, as also discussed above, the Complaint alleges that the joint venture's approach to SUDAM, quickly concocted after the original intended funding proved nonexistent, was a desperate long-shot at best. *See* ¶¶32-36. Thus, SureBeam was not "reasonably assured" as of December 31, 2000 that it would ever get paid because SureBeam Brasil had not received "reasonable assurance" from any lender that funds would ever be forthcoming. In fact, all indications were to the contrary. ¶¶25-37.

---

[9] Although the Titan Defendants argue that an alleged GAAP violation, standing alone, does not infer scienter, they do not – and cannot – dispute that a GAAP violation, even standing alone, constitutes a misrepresentation of a financial statement which purports to be in compliance with GAAP. *See Holmes v. Baker*, 166 F. Supp. 2d 1362, 1371 (S.D. Fla. 2001). In any event, the Complaint pleads far more than just GAAP violations in support of its accounting claims. *See* ¶¶149-162 (detailing defendants' unlawful accounting practices).

(2) The Financial Statements Were Materially False and Misleading as of the March 16, 2001 IPO

The financial statements were even more clearly untrue as of the date of the IPO on March 16, 2001. Once SUDAM (and SureBeam Brasil's financing) had collapsed on March 12, 2001, there was essentially no chance – and certainly not a "reasonably assured" one – that SureBeam would be paid for its systems. ¶¶37-38.

The Titan Defendants' argument (Titan Brf. at 12) that the propriety of the financial statements must be evaluated based upon the status of SureBeam Brasil's funding on December 31, 2000 (the "as of" date of the financial statements) is both irrelevant and incorrect. GAAP – specifically, Financial Accounting Standards Board ("FASB") 5, ¶8 (*see* Britton Decl., Ex. B) – provides that an estimated loss from a loss contingency shall be accrued by a charge to earnings if "***[i]nformation available prior to the issuance of the financial statements indicates that it is probable that an asset [including an account receivable] had been impaired or a liability had been incurred at the date of the financial statements***"). *See* Ex. B at 74-75. As discussed above, SureBeam knew by the end of December, 2000 – and, thus, not only prior to the issuance of the financial statements, but also prior to the close of the financial statement period itself – that its ability to collect its $15.5 million receivable from Tech Ion was substantially impaired. SureBeam Brasil's entire business plan had collapsed, but in order for SureBeam to collect its receivable, Tech Ion, despite being insolvent, would somehow have to secure a loan from some other third party – a highly dubious proposition.

In addition, GAAP required SureBeam to disclose that the account receivable was impaired as of the IPO date. Specifically, GAAP requires disclosure (in footnotes or other text) of any information necessary "to keep the financial statements from being misleading" that "become[s] available" at a time "[a]fter the date of an enterprise's financial statements but before those financial statements are issued" that "indicat[es] that an asset was impaired ... after the date of the financial statements or that there is at least a reasonable possibility that an asset was impaired ... after that date." *See* Britton Decl., Ex. B at 75. The collapse of SUDAM – Tech Ion's last funding hope and SureBeam's last hope for collection of its receivable – occurred before the financial statements were

issued to investors as part of the Prospectus, and certainly created at least a "reasonable possibility" that the amount would never be collected.[10]

(3) The Prospectus Falsely Represented Compliance with SAB 101

Beyond the misstatements in the financial statements, the Prospectus falsely represented that SureBeam's "accounting policies comply with the provisions of SAB 101." ¶85. SAB 101 requires that revenue only be recognized where collectibility is "reasonably assured." ¶157. As discussed above, SureBeam did not follow this principle when it recognized $15.5 million in revenue from SureBeam Brasil in the financial statements set forth in the Prospectus.

b. Misleading Statements in the Text of the Prospectus

(1) The Prospectus Untruthfully Portrayed SureBeam's Financial Results and Status by Omitting to Disclose the Failure to Obtain Funding to Pay for the Irradiators

By failing to disclose that SUDAM (and the funding opportunity it represented) had collapsed seven days prior to the IPO in the Prospectus, the Prospectus failed to disclose a material fact necessary to make the Prospectus not misleading. In the "Management's Discussion and Analysis" ("MD&A") portion of the Prospectus discussing SureBeam's "Liquidity and Capital Resources," SureBeam represented that:

> In May 2000, we received purchase orders from Tech Ion Industrial Brasil S.A. for eleven electronic food irradiation systems which we expect to result in approximately $55.0 million in sales revenues to us over the next three years. We began construction of these systems in July 2000, and have ***recorded revenues of $15.5 million under the percentage-of-completion method for the year ended December 31, 2000.***

---

[10] Indeed, SureBeam ***recognized*** its obligation to update the financial statements in the Prospectus to include all material developments that occurred through the date of the IPO. Note 13 to the financial statements, entitled "Subsequent Events," discloses that on March 6, 2001 (over two months after the close of fiscal 2000, and only six days before SUDAM's collapse), SureBeam's compensation committee met and "approved bonuses to certain officers and key employees amounting to approximately $530,000." Britton Decl., Ex. A at 68. SureBeam's decision to disclose a subsequent event involving only $530,000 also rendered its failure to disclose the overstatement of revenue and assets by $15.5 million clearly material.

¶38.[11] Disclosure of SUDAM's collapse and SureBeam Brasil's lack of funding as of the date of the IPO was necessary to inform investors of the likelihood that SureBeam would not actually be able to collect this $15.5 million already recognized as revenue and included in SureBeam's balance sheet as a receivable. ¶¶37-38.[12]

The fact that SureBeam Brasil no longer had a funding source ***in and of itself*** would have been highly material to IPO investors, as it would have "'significantly altered the "total mix" of information made available.'" *Basic*, 485 U.S. at 231-32. Even if SureBeam believed that SureBeam Brasil would be able to find funding from another source, "a reasonable investor would be concerned about the uncertainties of alternative financing sources." *Sheehan v. Little Switzerland*, 136 F. Supp. 2d 301, 315-16 (D. Del. 2001) (denying, in part, motion to dismiss where defendant had failed to disclose in proxy statement that financing commitment letters would expire prior to consummation of merger, because "a reasonable investor would consider to be important, in the total mix of information, the fact that an acquirer's financing expires prior to the merger date").

(2) The Prospectus Untruthfully Portrayed SureBeam's Business by Omitting to Disclose the Complete Failure of SureBeam Brasil's Business Plan

The Prospectus improperly failed to disclose that, as Jose Medeiros had informed SureBeam in December 2000, SureBeam Brasil's business plan was economically unsound and doomed to failure because SureBeam Brasil could not make a profit at the rates it needed to charge to attract customers. This omission rendered misleading ***all*** representations concerning the joint venture with Tech Ion in the Prospectus text. ¶38; Britton Decl., Ex. A at 20-21, 27, 31. A reasonable investor

---

[11] In addition, in the Introduction to the MD&A section, SureBeam affirmatively represented that "[f]or the year ended December 31, 2000, we had electronic food irradiation system sales of $25.2 million, or 86% of total revenue" (Britton Decl., Ex. A at 20), $15.5 million (or 61%) of which is attributable to SureBeam Brasil revenue. *See also id.* at 21 ("Our revenues increased ... to $29.4 million in 2000 ... primarily related to revenues recognized from sales of our electronic food irradiation systems ... principally to Tech Ion").

[12] In addition, if the Titan Defendants were correct in arguing that GAAP only looks at the financial statement representations as of December 31, 2000 (which is incorrect, as discussed above), these representations about revenue and accounts receivable in the text of the Prospectus were "as of" the IPO.

would find it material that the entire concept underpinning SureBeam's flagship operation had proved by the time of the IPO to be economically infeasible. *See Krim v. pcOrder.com, Inc.*, No. A 00 CA 776 SS, 2002 U.S. Dist. LEXIS 6648, at *13-*15 (W.D. Tex. Apr. 12, 2002) (sustaining claims under §§11 and 15 of the Securities Act where alleged that "IPO registration statement failed to disclose its lack of a formal business plan" and thus that "defendants failed to disclose information in the prospectuses that was required for potential investors to make 'prudent investment decisions'").

(3) The Prospectus Untruthfully Portrayed SureBeam's Expected Revenues by Omitting to Disclose the Loss of Potential Funding and the Complete Failure of SureBeam Brasil's Business Plan

SureBeam's failure to disclose that SUDAM had collapsed and that SureBeam Brasil's business plan had failed also rendered materially misleading SureBeam's representation in the Prospectus that "we expect [the Tech Ion joint venture] to result in approximately $55.0 million in sales revenues to us over the next three years" (*i.e.*, $40 million beyond the $15.5 million that it had already recognized). ¶38. It is well-settled that predictions in a Prospectus are actionable under §11 where the Prospectus fails to disclose facts that render the predictions unreasonable. "A projection or statement of belief contains [an] implicit factual assertion [that] the speaker is not aware of any undisclosed facts tending to seriously undermine the accuracy of the statement. A projection or statement of belief may be actionable to the extent that [this implicit factual assertion] is inaccurate." *In re Apple Computer Sec. Litig.*, 886 F.2d 1109, 1113 (9th Cir. 1989); *In re Amylin Pharms., Inc. Sec. Litig.*, No. 01cv1455 BTM(NLS), 2003 U.S. Dist. LEXIS 7667 (S.D. Cal. May 1, 2003). Here, the projection of $30 million in future revenue is actionable because SureBeam was aware of the undisclosed facts regarding SureBeam's financing and business plan that "seriously ... undermine[d] the statement's accuracy" of that forecast. *See also Cooper v. Pickett*, 137 F.3d 616, 629 (9th Cir. 1998) (optimistic earnings forecasts actionable where "the speaker is aware of undisclosed facts that

tend seriously to undermine the statement's accuracy"); *In re Hi/fn, Inc. Sec. Litig.*, No C 99-4531 SI, 2000 U.S. Dist. LEXIS 11631, at *16-*19 (N.D. Cal. Aug. 9, 2000).[13]

(4) The Prospectus Untruthfully Portrayed SureBeam's Loan to Tech Ion

Finally, the Prospectus was materially false and misleading when it misstated that SureBeam had "acquired a 19.9% equity interest in SureBeam Brasil ***without charge***," and that SureBeam Brasil was created "***with no initial capital contribution from either party***." ¶40. In fact, Titan had contributed $5 million to SureBeam Brasil. ¶40.[14] Although this contribution was ostensibly a "loan," the Prospectus failed to disclose that the agreement made no provision specifying the circumstances under which Tech Ion or SureBeam Brasil would have to repay Titan. *Id.*

c. The Prospectus Omitted Material Facts Required to Be Disclosed Under Item 303 of Regulation S-K

SureBeam and the Director Defendants are also liable under §11 because they failed to disclose information required by the SEC to be included in a Registration Statement under Item 303 of SEC Regulation S-K. As discussed in §III.B.1 above, Item 303 requires securities registrants to "[d]escribe any known trends or uncertainties that have had or that the registrant reasonably expects will have a material favorable or unfavorable impact on net sales or revenues or income from continuing operations." 17 C.F.R. §229.303(a)(3)(ii). Item 303 "is primarily concerned with developments that render the registrant's reported results less indicative of the registrant's future prospects." *Oxford*, 297 F.3d at 1191. "A disclosure duty exists [under Item 303] where a trend, demand, commitment, event, or uncertainty is both presently known to management and is reasonably likely to have a material effect on the Registrant's result of operations." 17 C.F.R. §229.303.

---

[13] The Titan Defendants properly do not argue that SureBeam's statements about "expected" revenues are protected under the PSLRA's "safe harbor" provisions. Consistent with the broad remedial scope of the Securities Act (*see* §III.A. above), the PSLRA safe harbor expressly does not apply to statements "made in connection with an initial public offering." 15 U.S.C. §77z-2(b)(2)(D).

[14] At the time of the contribution, Titan and SureBeam were essentially identical; Titan controlled 100% of SureBeam stock (and had overlapping officers), and continued to control 98% of SureBeam's voting shares even after the IPO. *See* §III.D below.

SureBeam's failure to disclose in the Prospectus the collapse of SUDAM – and the known uncertainty of obtaining funding – violated Item 303 because those facts rendered SureBeam's "reported results less indicative of [its] future prospects." The lack of funding for Tech Ion or the joint venture would not only require a reversal of the $15.5 million in receivables and a charge to future earnings but also would preclude realization of the remainder of the $55 million in revenue which the Prospectus stated that SureBeam expected to record for the Tech Ion "sale." In addition, as SureBeam Brasil was SureBeam's flagship project, anything that significantly impacted upon SureBeam Brasil's financing or ability to operate would in turn have a significant impact on SureBeam. *See, e.g.*, ¶¶2, 38.

C. The Titan Defendants' Arguments Are Without Factual or Legal Basis.

1. Rule 9(b) Is Not Applicable to Plaintiffs' Securities Act Claims

The Titan Defendants also incorrectly argue that plaintiffs' Securities Act allegations must be dismissed for failure to satisfy Fed. R. Civ. P. 9(b). Titan Brf. at 10 n.12. However, Rule 9(b) only applies to claims of "fraud." Not only is a claim under §11 of the Securities Act not a fraud claim, as discussed above, but plaintiffs' Securities Act claims as set forth in the Complaint do not "sound in fraud" as they allege misstatements in the Prospectus and do not assert that those misstatements were intentional. ¶¶175-184. Therefore, the sufficiency of the Complaint's §§11 and 15 claims must be tested under the "notice pleading" standards of Fed. R. Civ. P. 8, not under Rule 9(b). *See Vess v. Ciba-Geigy Corp.*, 317 F.3d 1097, 1104-05 (9th Cir. 2003) (when fraud is not an essential element of a claim and there are allegations of fraudulent and non-fraudulent contact only conduct only the allegations of fraud must satisfy Rule 9(b)); *Romine v. Acxiom Corp.*, 296 F.3d 701, 705 (8th Cir. 2002) (plaintiffs alleging §11 violations are only required to "comply with the short and plain statement requirements of Rule 8(a)"); *In re Initial Public Offering Sec. Litig.*, 241 F. Supp. 2d 281,

342 (S.D.N.Y. 2003) (holding that because plaintiffs' §11 claim "is not a fraud claim, ***Rule 8(a)*** applies," not Rule 9(b)).[15]

Moreover, the Complaint "expressly exclude[s] and disclaim[s] any allegations that could be construed as alleging intentional or reckless misconduct or fraud." ¶176. In the Ninth Circuit, Securities Act claims that expressly disclaim fraud are not governed by Rule 9(b) even where the plaintiff has also pled fraud-based claims arising from the same basic circumstances. *See Vess*, 317 F.3d at 1104-05 (when fraud is not an essential element of a claim and there are allegations of fraudulent and non-fraudulent conduct only the allegations of fraud must satisfy Rule 9(b)). Therefore, under controlling Ninth Circuit authority the Complaint's Securities Act claims must be reviewed only under the notice pleading requirements of Rule 8 and not the more onerous requirements of Rule 9(b).[16]

2. The Bespeaks Caution Doctrine Does Not Immunize Defendants' Misstatements and Is Not Applicable to Omissions

Contrary to the Titan Defendants' argument (Titan Brf. at 14-15), the statement in the Prospectus that SureBeam expected to derive $55 million in future revenue from sales of its systems to SureBeam Brasil is not protected by the "bespeaks caution" doctrine. The boilerplate statement in the Prospectus that a "reduction or delay in system sales" could "reduce our revenues" is insufficient because it does not even remotely disclose the specific, known facts of the lack of necessary funding, the collapse of SUDAM and the failure of SureBeam Brasil's business plan, each of which had already occurred by the date of the IPO. A securities complaint may be dismissed under the bespeaks caution doctrine "only when the documents containing defendants' challenged statements include '***enough*** cautionary language or risk disclosure' ... that 'reasonable minds' could not disagree that the challenged statements were not misleading." *Fecht*, 70 F.3d at 1082.

---

[15] *See also In re Calpine Corp. Sec. Litig.*, 288 F. Supp. 2d 1054, 1077-78 (N.D. Cal. 2003). Other circuits are in accord. *See Lone Star Ladies Inv. Club v. Schlotzsky's, Inc.*, 238 F.3d 363, 369 (5th Cir. 2001); *In re NationsMart Corp. Sec. Litig.*, 130 F.3d 309, 318-19 (8th Cir. 1997).

[16] In the event, the Complaint's detailed factual allegations also satisfy Rule 9(b)'s particularlity requirements by setting forth the who, when, why and how of defendants' alleged misconduct. *See Fecht v. Price Co.*, 70 F.3d 1078 (9th Cir. 1995).

Here, the Prospectus' boilerplate warnings about ***potential future*** risks that ***might*** occur ***if*** customers were to reduce or delay their orders were not "enough" to alert investors that SureBeam Brasil had already failed to obtain financing (and, thus, could not pay SureBeam). "An otherwise actionable omission concerning past or present problems ... cannot be sanitized by forward-looking statements about similar problems" *In re Towne Servs. Sec. Litig.*, 184 F. Supp. 2d 1308, 1319-20 (N.D. Ga. 2001) (declining to dismiss §11 claim where "the Prospectus' open-ended, general, and future-oriented warnings about [defendant's] computer systems (and the possibility of customer attrition) are misleading in light of severe, discrete problems [that defendant] had already suffered in this regard").[17]

3. The Titan Defendants' Factual Argument Concerning Alternate Sources of Funding Is Irrelevant and Improper

The Titan Defendants' argument that SureBeam was not required to disclose that SUDAM had collapsed because SureBeam believed that other funding might become available at some future point fails for at least three reasons. First, it is wholly irrelevant. As discussed in §§III.B.2.b(1)-(2) above, the fact that SUDAM had collapsed four days before the IPO, leaving SureBeam Brasil with no source of funding, would ***in and of itself*** have been material to investors.

Second, the Titan Defendants' argument is contrary to the well-established rule that a court must presume ***all factual allegations of the complaint are true and draw all reasonable inferences in favor of plaintiffs***. *Am. West*, 320 F.3d at 931; *see* §III.A above. The allegations of the Complaint, when properly read in plaintiffs' favor, reasonably infer that no other funding was available as of the date of the IPO. In this regard, the Complaint specifically alleges that SureBeam knew that "SUDAM was [SureBeam Brasil's] last hope." ¶32. That allegation is enough on a

---

[17] *See Huddleston v. Herman & MacLean*, 640 F.2d 534, 544 (5th Cir. 1981) ("To warn that the untoward may occur when the event is contingent is prudent; to caution that it is only possible for the unfavorable events to happen when they have already occurred is deceit"), *aff'd in relevant part and rev'd in part on other grounds*, 459 U.S. 375 (1983); *In re Pemstar, Inc.*, No. 02-1821 (DWF/SRN), 2003 U.S. Dist. LEXIS 14452, at *8 (D. Minn. Aug. 15, 2003) (denying motion to dismiss §11 claim where defendant had disclosed that certain adverse trends could adversely affect demand for defendants' services in the future but failed to disclose that problems had already begun).

motion to dismiss. Moreover, the Complaint also alleges further facts that reasonably infer that no other funding was available. For example, SureBeam Brasil's original business plan had been to provide food irradiation services to Brazil's CEASAs. ¶28. However, the traditional and last resort lenders solicited by SureBeam Brasil to fund this enterprise demurred, stating that they "need[ed] greater assurances that there will be customers to generate revenue to pay the debt." ¶¶25-27. SureBeam and Tech Ion could not provide these assurances, because customers would not pay and, therefore, SureBeam Brasil's entire business plan was flawed and "financially inadequate." ¶¶27-30. As a result of this rejection, SureBeam Brasil took the desperate measure of approaching SUDAM for funding, despite the fact that doing so entailed: (1) shipping all of SureBeam's accelerators to Manaus in the Amazon, which could cause the irradiators to deteriorate; and (2) falsifying the shipping invoices to indicate that the Tech Ion had already paid for the irradiators (when it had not). ¶¶32-35. SureBeam's agreement to take these drastic steps only confirms that SUDAM was SureBeam Brasil's last hope. ¶32.[18]

Third, even if it were proper for the Titan Defendants to argue against the above reasonable inferences by positing ***competing*** inferences that ***they*** have inferred, their alternative inferences are patently unreasonable. The Titan Defendants erroneously argue that SureBeam thought ***at the time of the IPO in March 2001*** that it could secure new funding because Delphos, the company that SureBeam and Tech Ion had hired to assist in the search for funding in 2000, wrote in an e-mail ***in November 2000*** that meetings with certain potential lenders "went very well" and that they were "genuinely interested." Titan Brf. at 12; *see* ¶25. However, the Titan Defendants ignore the fact that the same e-mail goes on to say that the potential lenders "need greater assurances that there will be customers to generate revenue to pay the debt." ¶25. More importantly, they ***completely ignore*** a subsequent e-mail from Delphos, dated December 28, 2000, which states that in order to satisfy the

---

[18] The Titan Defendants' reliance upon *In re Pac. Gateway Exch., Inc. Sec. Litig.*, No. C-00-1211 PJH, 2002 U.S. Dist. LEXIS 8014, at *51 (N.D. Cal. Apr. 30, 2002), is misplaced. There, unlike here, the "plaintiffs assert ***no*** facts supporting the claim" that defendants "were unable to identify alternative sources of funding," and the court dismissed the plaintiffs' §10(b) claims. *Id.* The instant Complaint contains extensive factual details showing that SureBeam did not have alternative fundraising sources at the time of the IPO.

lenders' concerns, SureBeam would have to provide, *inter alia*, letters of interest from potential customers. ¶27. As discussed above, ***Titan and Tech Ion did not (and could not) deliver as requested***. ¶¶27-30. Thus, by the end of 2000, SureBeam knew that any hope of obtaining financing from these lenders was dead.

The Titan Defendants' reliance on Tech Ion's December 2000 memo to SureBeam (Titan Brf. at 12-13; *see* ¶¶28-29) is equally unavailing. Although that memo concludes that SureBeam Brasil's entire business plan was "financially inadequate," Tech Ion suggested that reconstituting ***the Rio facility*** as a "Center of Excellence" might enable SureBeam Brasil "to obtain government funds." ¶¶29-30. However, shortly after the "Center of Excellence" suggestion, Tech Ion and SureBeam Brasil decided to redirect the irradiators ***to Manaus*** (in the Amazon) in pursuit of the ill-fated SUDAM (government) funding. ¶¶32-35. Titan and Tech Ion would never have taken this drastic step had "Center of Excellence" funding of the Rio facility still been a realistic possibility.

4. The Titan Defendants' Standing Argument Is Without Merit

The Titan Defendants' argument that Lead Plaintiffs and named plaintiffs do not have standing to pursue this litigation are without merit. Contrary to the Titan Defendants' argument (Titan Brf. at 15-16), plaintiffs all own shares that are traceable to SureBeam's IPO. Titan sold approximately 16% of its SureBeam shares in the March 2001 IPO; in August 2002, Titan distributed its remaining SureBeam holdings to its (Titan's) shareholders pursuant to a tax-free spin-off. ¶¶38, 61. The Titan Defendants ***concede*** that any plaintiffs who purchased shares prior to the August 2002 spin-off can trace those shares to the IPO; they argue only that "any Plaintiffs who acquired their securities ***after*** the spin-off" cannot. Titan Brf. at 16 n.18. All of the Lead Plaintiffs and named plaintiffs have previously filed certifications with the Court establishing that they purchased shares ***before*** August 2002.[19]

---

[19] The case cited by the Titan Defendants in support of their argument that the Complaint must itself allege purchase dates with specificity predates the PSLRA and its requirement that all named plaintiffs and lead plaintiff applicants submit certifications containing this information to the Court. *See Lilley v. Charren*, 936 F. Supp. 708 (N.D. Cal. 1996). All defendants already received the certifications in original complaints (for plaintiffs FMC Ltd. Pension Plan & Trust, Joseph J. Brogan,

5. Plaintiffs Need Not Plead Reliance

Contrary to the Titan Defendants' argument (Titan Brf. at 16-17), plaintiffs were not required to plead reliance on the misrepresentations in the Prospectus in order to properly allege their Securities Act claims. It is well settled that reliance is not an element of a §11 claim ***unless*** "such person acquired the security after the issuer has made generally available to its security holders ***an earnings statement*** covering a period of at least 12 months beginning after the effective date of the registration statement." 15 U.S.C. 77k(a). Because an earnings statement covering a period of at least 12 months after the March 2002 IPO effective date was not filed until March 31, 2003, and ***all*** plaintiffs made purchases ***before*** that date, the Titan Defendants' argument is without merit.[20]

Moreover, limitation of the class of Securities Act claimants is a matter for consideration on a later motion for class certification. Plaintiffs themselves purchased before May 2002 and need not show reliance, so any problem posed by any requirement that some other class members prove reliance is not an issue on a motion to dismiss the Complaint.[21]

Delaware Charter Gty. Trust Tr. Melvyn Manaster IRA R/O and James Janette) or as part of the Lead Plaintiff appointment process (for plaintiff Spear Capital Management Inc.).

[20] Although it is irrelevant because all of the plaintiffs made purchases before May 15, 2002, the Titan Defendant are incorrect that all purchasers after May 15, 2002 must show reliance. Contrary to the express language of §11, the Titan Defendants improperly cobble together ***two separate filings*** (SureBeam's 10-K filed with the SEC on April 1, 2002, and its Form 10-Q filed on May 15, 2002) and argue that when "***taken together***" they "constituted earnings ***statements***" covering the requisite 12 month period (and that, therefore, the applicable date should be May 15, 2002). However, §11 specifically states that reliance need not be pled until ***a single*** statement covering a 12 month period after the Prospectus has been filed, which did not occur until SureBeam filed its fiscal year 2002 Form 10-K on ***March 31, 2003***.

[21] Finally, the Titan Defendants' footnote argument that "Plaintiffs fail to allege that SureBeam made false or misleading statements in a Registration Statement, rather than a prospectus" (Titan Brf. at 16 n.19) is disingenuous. SureBeam filed its IPO Registration Statement on March 5, 2001, including a "preliminary prospectus" that was expressly "subject to completion." *See* Defendants The Titan Corporation, Dr. Gene W. Ray and Susan Golding's Request for Judicial Notice in Support of Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(6), Ex. 1 at 5. Consistent with common practice, SureBeam subsequently filed an amended (and final) Prospectus dated March 15, 2001.

D. The Complaint Adequately Pleads a §15 Control Person Liability Claim Against Titan

The allegations of the Complaint – as well as the contents of the Prospectus – establish that Titan was a control person of SureBeam at the time of the IPO and, therefore, that Titan is liable under §15 of the Securities Act for the untrue statements in and the omissions from the Prospectus. *See* 15 U.S.C. §77o. Under Ninth Circuit law, to state a cause of action for "'controlling person'" liability under §15, plaintiffs need only allege that Titan "possessed the actual power to control" SureBeam. *Lilley*, 936 F. Supp. at 716.

Here, the Complaint alleges not only that Titan had the power to control SureBeam (¶184), but also that Titan controlled 100% of SureBeam stock before the IPO (¶2). Section 15 of the Securities Act specifically provides that the requisite control may be "by or through stock ownership, agency or otherwise." 15 U.S.C. §77o. Therefore, by statute, stock ownership is sufficient without more.[22]

Moreover, SureBeam has ***specifically admitted*** in the Prospectus that Titan had the power "to control the election of our directors and all other matters requiring stockholder approval" and "ultimately [to] control our management." Britton Decl., Ex. A at 3, 12. Even ***after*** the IPO, Titan not only maintained an 84% ***ownership*** interest in SureBeam (¶59), but it specifically structured the IPO to retain "approximately ***98%*** of [SureBeam's] ***voting power***." Britton Decl., Ex. A at 3. Finally, the fact that Titan had control over the Registration Statement may be inferred from Titan's agreement to indemnify SureBeam's underwriters for misstatements or omissions in the Prospectus. *Id.* at 49.

---

[22] Nonetheless, more indicia of control than stock ownership is alleged. Titan had a representative on SureBeam's Board of Directors – Defendant Ray, who was Titan's CEO, President and Board Chairman. ¶¶19, 75; Britton Decl., Ex. A at 35. *See Am. West*, 320 F.3d at 945-46 (stock ownership and board memberships are "'traditional indicia of control'"). Indeed, SureBeam acknowledged in the Prospectus that "several of [SureBeam's] directors and executive officers also are directors or executive officers of Titan" which "could cause Titan's interests to receive priority over our interests." *Id.* at 12.

Nonetheless, Titan improperly attempts to secure dismissal of plaintiffs' §15 control person claim by grossly misstating plaintiffs' burden at this stage in the litigation. According to the Titan Defendants:

> To establish control, Plaintiffs must ***allege*** (1) a "primary violation of federal securities laws"; and (2) "that the defendant ***exercised*** actual power or control over the primary violator." *Howard v. Everex Systems, Inc.*, 228 F.3d 1057, 1065 (9th Cir. 2000).

Titan Brf. at 24. *Howard* says nothing of the sort. *Howard* is a summary judgment case that addresses only what plaintiffs need to prove under §15, not what they need to allege. Moreover, the question in *Howard* was whether certain officers of the defendant company were control persons by virtue of their positions; the case does not refute or even address the statutory (and common sense) rule that 100% stock ownership constitutes *per se* control. In any event, *Howard* firmly establishes that the question of whether Titan "exercised" its control is an affirmative defense that must be pled by Titan and is inappropriate for adjudication on a motion to dismiss. *Howard*, 226 F.3d at 1065.[23]

E. The Complaint Adequately Pleads Titan's Control Person Liability Under §20 of the Exchange Act

Independent of Titan's liability under §15 of the Securities Act for SureBeam's misrepresentations and omissions in the Prospectus, the Complaint also adequately pleads that Titan is liable as a control person under §20 of the Exchange Act for the untrue statements and omissions made not only in the Prospectus but also from the start of the Class Period through August 5, 2002 (the date on which Titan spun off its SureBeam holdings to Titan's shareholders). First, as set forth

---

[23] Titan's footnote argument that "Plaintiffs also should at least name the alleged primary violator, even if bankrupt like SureBeam, as a defendant" is spurious. Section 15 imposes liability on a party that controls "***any person liable***," not any person "***named***." Titan Brf. at 24 n.26. Indeed, naming as a defendant a company that has filed for bankruptcy would violate the automatic stay provisions of the Bankruptcy Code. *See* 11 U.S.C. §362(a); *In re Spiegel, Inc.*, No. 02 C 8946, 2004 U.S. Dist. LEXIS 12648, at *3-*12 (N.D. Ill. July 8, 2004) (sustaining control person claims against corporate officers and directors despite expressly noting that bankrupt corporation not a named defendant). Titan's reliance on *Griffin v. PaineWebber Inc.*, 84 F. Supp. 2d 508, 515-16 (S.D.N.Y. 2000), is misplaced. That court's primary concern with plaintiffs' control person claims was that the plaintiffs had failed to allege that the bankrupt company had engaged in a primary violation at all. *Id.* The court simply concluded that "this defect is best remedied by permitting Plaintiff to replead to name [the bankrupt company] as a nominal defendant ... and to allege facts sufficient to state a [primary claim] against [it]." *Id.* As discussed in the text, plaintiffs have adequately pled a primary violation by SureBeam.

at length in Plaintiffs' Opposition to Defendants Oberkfell, Claudio and Rane's Motion to Dismiss Consolidated Complaint, plaintiffs have adequately pled that SureBeam violated §10(b) of the Exchange Act and, thus, established a primary securities law violation.[24] Second, plaintiffs have adequately pled that Titan was a "control" person of SureBeam within the meaning of §20(a). *See* §III.D above.[25]

IV. CONCLUSION

For the foregoing reasons, the Titan Defendants' motion to dismiss should be denied in its entirety. In the event that the Court determines that any of the allegations in the Complaint are insufficient, plaintiffs respectfully request leave to amend the Complaint to remedy any such insufficient allegations. *See Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1051-52 (9th

---

[24] Titan sole argument concerning SureBeam's violation of §10(b) that is not also made by defendants Oberkfell, Claudio and Rane is its erroneous assertion that plaintiffs have not adequately pled that SureBeam's shares traded on an efficient market. Titan Brf. at 23-24. Plaintiffs pled that "SureBeam's stock traded in an efficient market on the Nasdaq National Market System." ¶70. As Titan acknowledges, the Ninth Circuit has adopted the test set forth in *Cammer v. Bloom*, 711 F. Supp. 1264 (D.N.J. 1989), for establishing the existence of an efficient market. *See Binder v. Gillespie*, 184 F.3d 1059, 1064-65 (9th Cir. 1999). Yet "Cammer provides that there is a presumption that the NASDAQ is an efficient market for all of the securities traded on it." *Levine v. SkyMall, Inc.*, No. CIV 99-166-PHX-ROS, 2001 U.S. Dist. LEXIS 24705, at *13 (D. Ariz. May 22, 2001). (By contrast, *Binder* did not involve a Nasdaq National Market Stock, but merely an OTC stock which traded on "pink sheets." *Binder*, 184 F.3d at 1065.) However, should additional facts be necessary, Titan's own authority indicates that leave to replead should be granted, as "it is likely that plaintiffs will be able to cure this deficiency in their pleading." *In re Turbodyne Techs., Inc. Sec. Litig.*, No. CV 99-00697 MMM(BQRx), 2000 U.S. Dist. LEXIS 25738, at *4-*5 (C.D. Cal. Mar. 13, 2002).

[25] As Titan acknowledges (Titan Brf. at 24-25), in the Ninth Circuit the test for a control person under §20 of the Exchange Act is the same as for a control person under §11 of the Securities Act.

Cir. 2003) (reversing district court's dismissal of securities claim because "[d]ismissal with prejudice and without leave to amend is not appropriate unless it is clear on de novo review that the complaint could not be saved by amendment").

DATED: July 29, 2004

Respectfully submitted,

LERACH COUGHLIN STOIA
& ROBBINS LLP
WILLIAM S. LERACH
TRAVIS E. DOWNS III
DOUGLAS R. BRITTON
BRIAN O. O'MARA

DOUGLAS R. BRITTON

401 B Street, Suite 1700
San Diego, CA 92101
Telephone: 619/231-1058
619/231-7423 (fax)

SCHATZ & NOBEL, P.C.
ANDREW M. SCHATZ
JEFFREY S. NOBEL
SETH KLEIN
One Corporate Center
20 Church Street, Suite 1700
Hartford, CT 06103
Telephone: 860/493-6292
860/493-6290 (fax)

Co-Lead Counsel for Lead Plaintiffs

S:\CasesSD\SureBeam\BRF00012058-Titan.doc

DECLARATION OF SERVICE BY FEDERAL EXPRESS DELIVERY

I, the undersigned, declare:

1. That declarant is and was, at all times herein mentioned, a citizen of the United States and a resident of the County of San Diego, over the age of 18 years, and not a party to or interest in the within action; that declarant's business address is 401 B Street, Suite 1700, San Diego, California 92101.

2. That on July 29, 2004, declarant served by FedEx, next day delivery, the PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS THE TITAN CORPORATION, DR. GENE W. RAY AND SUSAN GOLDING'S MOTION TO DISMISS PURSUANT TO FED. R. CIV. P. 12(b)(6) to the parties listed on the attached Service List. Declarant also served the parties by facsimile.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 29th day of July, 2004, at San Diego, California.

Kathleen R. Jones

KATHLEEN R. JONES

Counsel For Defendant(s)

Marshall B. Grossman
Bruce A. Friedman
Jeremy E. Pendrey
Alschuler Grossman Stein & Kahan LLP
1620 26th Street, 4th Floor
Santa Monica, CA 90404-4060
310/907-1000
310/907-2000 (Fax)

Michael C. Tu
Clifford Chance US LLP
601 South Figueroa Street
Los Angeles, CA 90017-5704
213/312-9400
213/312-9401 (Fax)

Timothy R. Pestotnik
Russell A. Gold
Luce, Forward, Hamilton & Scripps, LLP
600 West Broadway, Suite 2600
San Diego, CA 92101-3391
619/236-1414
619/232-8311 (Fax)

Counsel For Plaintiff(s)

William S. Lerach
Travis E. Downs III
Douglas R. Britton
Lerach Coughlin Stoia & Robbins LLP
401 B Street, Suite 1700
San Diego, CA 92101-4297
619/231-1058
619/231-7423 (Fax)

Andrew M. Schatz
Jeffrey S. Nobel
Nancy A. Kulesa
Schatz & Nobel, P.C.
One Corporate Center
20 Church Street, Suite 1700
Hartford, CT 06103
860/493-6292
860/493-6290 (Fax)