Timothy R. Pestotnik, State Bar No. 128919
Russell A. Gold, State Bar No. 179498
LUCE, FORWARD, HAMILTON & SCRIPPS LLP
600 West Broadway, Suite 2600
San Diego, California 92101-3372
Telephone No.: 619.236.1414
Fax No.: 619.232.8311

Attorneys for Defendant SureBeam Corporation

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

In re SUREBEAM CORPORATION SECURITIES LITIGATION, This Document Relates To All Actions	Case No. 03-CV-01721-JM (POR) CLASS ACTION (Consolidated) The Hon. Jeffrey T. Miller **REPLY IN SUPPORT OF MOTION TO DISMISS CONSOLIDATED COMPLAINT AGAINST DEFENDANTS OBERKFELL, CLAUDIO AND RANE** **[F.R.C.P. 9(b) and 12(b)(6)]** Date: September 17, 2004 Time: 11:00 a.m. Crtrm.: 6 Complaint Filed: 8/27/03

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

Defendants Lawrence Oberkfell ("Oberkfell"), Kevin Claudio ("Claudio"), and David Rane ("Rane") (collectively the "SBC Defendants") respectfully submit the following reply in support of their motion to dismiss.

I. INTRODUCTION

Plaintiffs' opposition to the SBC Defendants' motion to dismiss merely recites the conclusory allegations of the Complaint. The opposition points to ***no particularized factual allegations*** in the Complaint that raise a ***strong inference*** of scienter by the SBC Defendants. Plaintiffs thus fail to meet the pleading standard for securities fraud in the Ninth Circuit. Instead, plaintiffs attempt to substitute their interpretation of the facts for the actual facts themselves. Then plaintiffs repeat the same allegations and conclusions throughout the opposition. Merely repeating a conclusion that plaintiffs would like the Court to adopt does not make a conclusory statement a fact. Under Ninth Circuit law, the Court does not need to accept plaintiffs' interpretation of the facts. The Court may draw its own inferences from the facts, including inferences unfavorable to the plaintiffs, as described below.

Plaintiffs repeatedly refer to the same email correspondence and Delphos letter regarding the Tech Ion transaction. Then, based on the portions of emails and Delphos correspondence, plaintiffs ***argue*** that (i) the World Bank and SUDAM were the ***only*** available financing sources for the Tech Ion transaction, and (ii) the SBC Defendants ***knew*** that the World Bank and SUDAM were the only available sources of funding for the Tech Ion transaction. Plaintiffs even go so far as to allege that SUDAM was the "last hope" for financing the Tech Ion transaction. But the actual text of the emails and correspondence alleged in the Complaint simply do no support plaintiffs' inferences. ***Nowhere*** do ***any*** of the documents reference in the Complaint state that the World Bank or SUDAM were the sole sources of available financing for the Tech Ion transaction. Significantly, none of the documents alleged come close to suggesting that any of the SBC Defendants believed, much less knew, that World Bank and SUDAM were the sole sources of financing for the Tech Ion transaction. ***No*** document relied on by plaintiffs states that SUDAM was the "last hope" for financing as plaintiffs' conclude. On a motion to dismiss a securities fraud complaint, the Court is not required to accept plaintiffs' interpretation of the facts, nor should the

Court do so in this case.

The same applies to plaintiffs' RESAL allegations (regarding the Saudi Arabian transaction). Plaintiffs allege no facts showing that RESAL could not pay for the systems they purchased. Plaintiffs merely argue for this conclusion based on the fact that RESAL renegotiated payment terms. A renegotiation of payment terms is not unusual, and does not mean that RESAL could not pay. Even more important to the scienter requirement here, a renegotiation of payment terms certainly does not mean that any of the SBC Defendants knew RESAL could not pay.

In addition, plaintiffs do not dispute that the group published pleading devise is no longer a viable pleading device because it fails to meet the heightened pleading requirements of the PSLRA. Realizing this, plaintiffs attempt to ignore the allegations of their Complaint, which expressly rely on the group published device in alleging liability as to the Revenue Recognition Allegations: "Defendants Oberkfell, Rane, and Claudio. . . are liable for the written false statements pleaded in ¶¶ 81-138, as those statements were 'group-published' information." [Complaint, ¶ 74.] Plaintiffs cannot rely on this pleading device. Plaintiffs must allege particularized facts as to each defendant, which they have failed to do.

Plaintiffs' Demand Allegations (relating to the level of consumer demand for SureBeam food processing services) are primarily based on the assumption that low production "capacity" in an existing facility somehow means that *demand* for SureBeam's services cannot increase elsewhere in the United States. Of course, capacity in one location may have nothing to do with demand elsewhere and is hardly sufficient to meet plaintiffs' heightened burden of showing particularized facts of deliberate or conscious recklessness. Plaintiffs are then left to quibble over whether statements about demand (which is inherently a forward-looking concept) are forward looking statements.

This is precisely the type of case that the PSLRA was designed to prevent. Plaintiffs have tried to use SureBeam's lack of business success as a basis for a securities fraud case. Plaintiffs attempt to manufacture a case of securities fraud by second-guessing the business decisions of SureBeam's officers and directors. The business decisions of officers and directors are not even actionable under the Business Judgment Rule, and plaintiffs' after-the-fact criticism of the

company's decisions cannot give rise to fraud claims. This is a classic attempt to plead fraud by hindsight. The PSLRA prohibits it.

II. UNDER NINTH CIRCUIT LAW, THE COURT NEED NOT ACCEPT PLAINTIFFS' CONCLUSIONS ABOUT HOW THE FACTS SHOULD BE INTERPRETED

On a motion to dismiss a complaint alleging securities fraud under the PSLRA, there is a difference between the treatment of *facts* alleged in a complaint and the treatment of *inferences* that should be drawn from those facts. *See Gompper v. Visx, Inc.*, 298 F.3d 893, 896-897 (9th Cir. 2002) (Even though court will accept plaintiffs' factual allegations as true, "the court must consider all reasonable inferences to be drawn from the allegations, including inferences unfavorable to the plaintiffs." [emphasis in original]). This difference between the treatment of factual allegations and the inferences that should be drawn from them is recognized by the principle case relied on by plaintiffs, *No. 84 Employer-Teamster Joint Council Pension Trust Fund v. America West Holding Corp.*, 320 F.3d. 920, 938 (9th Cir. 2003).

For the purpose of this motion, the SBC Defendants are not improperly challenging the *facts* alleged in the Complaint. The SBC Defendants challenge the improper inferences that plaintiffs draw from these facts because the facts do not give rise to a strong inference of scienter as the PSLRA requires.

III. PLAINTIFFS' GROUP-PUBLISHED ALLEGATIONS FAIL TO MEET THE PSLRA PLEADING STANDARD

Plaintiffs do not dispute that the group published pleading device fails to meet the pleading standards under the PSLRA. Instead, plaintiffs attempt to ignore the allegations of their Complaint that expressly rely on this pleading device. [Complaint, 74, quoted above.]

Plaintiffs do not attribute any statements to Oberkfell, Claudio or Rane concerning Revenue Recognition. Plaintiffs merely argue that Oberkfell and Claudio made false and misleading statements concerning revenue recognition by signing SureBeam's Prospectus and SEC filings during the class period. [Plaintiffs' opposition memo, p.12, fn. 6.]

Plaintiffs rely on *Howard v. Everex Sys.*, 228 F.3d 1057 (9th Cir. 2000) for the proposition that Oberkfell and Claudio are liable for making false and misleading statements by merely

signing the Prospectus and SEC filings. [Plaintiffs' memo, p.12, fn. 6.] In *Howard,* the court merely explained that a corporate officer who signs a public document "makes a statement" and may be a primary violator liable under Section 10(b). *Id.,* at 1061-63. But merely signing a public document does not make the officer liable for securities fraud. Plaintiffs must also show scienter. *Id.*, at 1062, 1063 (mentioning cases where those who signed public documents were not liable absent a showing of scienter, and stating "[k]nowledge or recklessness is required for a finding of scienter under § 10(b)."). Plaintiffs have failed to allege particularized facts showing a strong inference of scienter. *In re Silicon Graphics Sec. Litig.,* 183 F.3d 970, 979 (9th Cir.1999) (Plaintiffs must allege, "at a minimum, particular facts giving rise to a strong inference of deliberate or conscious recklessness."). The fact that a defendant officer signed a document filed with the SEC, standing alone, does not create a strong inference of scienter and does not give rise to liability for securities fraud.

IV. PLAINTIFFS FAIL TO ALLEGE PARTICULAR FACTS GIVING RISE TO A STRONG INFERENCE OF SCIENTER

Plaintiffs fail to point to any particular allegation of the Complaint that demonstrates the SBC Defendants acted with scienter. Instead, plaintiffs merely repeat the same conclusions, but no particularized *factual* allegations that would give rise to a *strong inference* of deliberate or conscious recklessness.

A. PLAINTIFFS FAIL TO ALLEGE SCIENTER FOR THE TECH ION OR RESAL JOINT VENTURES.

In a pure conclusory manner, plaintiffs argue that a strong inference of scienter should be drawn because the defendants knew that "no lender" would finance the Tech Ion joint venture. [*See* Plaintiffs' memo, 17:22 – 18:6.] But ***nowhere*** do plaintiffs allege any *facts* to show that either Oberkfell, Claudio or Rane knew that "no lender" would finance the Tech Ion joint venture. Plaintiffs fail to point to any allegation of the Complaint demonstrating that the SBC Defendants had any such "knowledge." Plaintiffs have alleged nothing more than the World Bank, and later SUDAM did not finance the venture. But there are no facts alleged showing the defendants believed, much less knew, that these were the only financing possibilities. Nor do plaintiffs allege

any facts that demonstrate the SBC Defendants were even aware prior to the IPO that the SUDAM financing did not go through. Moreover, plaintiffs' statement that SUDAM was "the last financing hope for the joint venture" is nowhere found in any of the documents plaintiffs allege in the Complaint. Most telling is the fact that in their opposition, plaintiffs are unable to point to a single allegation of the Complaint that raises a strong inference of scienter concerning the Tech Ion financing. [Plaintiffs' memo, 17:22 – 18:6]

Plaintiffs' arguments concerning construction delays for the Tech Ion joint venture are also insufficient to raise a strong inference of scienter. [Plaintiffs' memo, 18:7-15] Plaintiffs admit that a new construction firm was hired to complete the construction in Brazil. [Complaint ¶ 43.] This allegation negates any inference of scienter. It makes no sense to hire a new construction firm to complete construction if the SBC Defendants did not believe the joint venture would succeed.

Plaintiffs' arguments and allegations regarding the RESAL (Saudia Arabia) joint venture are particularly weak. Plaintiffs rely on allegations that the defendants knew RESAL had to secure appropriate funding to succeed. [Plaintiffs' memo, 18:16 – 19:2] That hardly constitutes knowledge that the venture was going to fail.

The same is true for plaintiffs' argument about refinancing the RESAL sale. The decision to refinance RESAL's payment obligation does not mean that the SBC Defendants believed, much less knew, that the RESAL joint venture would fail. Plaintiffs' argument that there would have been no delay and no refinance had RESAL truly intended to pay for the systems is a *non sequitur*. Even if it could somehow be known now what RESAL's managers "truly intended," this still does not establish what the SBC Defendants actually knew and believed concerning the RESAL transaction. Moreover, as explained in the SBC Defendants' opening brief, the Form 10-K for

///

///

///

///

///

2002 (referenced by plaintiffs in the Complaint) specifically discloses the financial due diligence conducted for the RESAL transaction. [Form 10-K for 2002, at Ex. 4, p. 50.][1]

B. PLAINTIFFS FAIL TO ADEQUATELY ALLEGE SCIENTER CONCERNING DOMESTIC DEMAND FOR SUREBEAM SERVICES.

Plaintiffs' allegations about domestic demand for SureBeam's *services* fail to establish that the SBC Defendants had scienter. When read in their entirety, most of the statements that plaintiffs allege refer to opening or expanding service-centers to meet the demands of particular customers (¶ 82) or for future anticipated use (¶ 10).[2]

Significantly, plaintiffs cannot and do not allege specific facts demonstrating that the SBC Defendants had actual knowledge that any of their statements concerning SureBeam's customer demand or SureBeam's production expansion for future demand (a forward looking statement by nature) was in any way false. The fact that any SureBeam facilities are alleged to have had excess capacity does not establish that demand for SureBeam's food processing services was not, in fact, growing, or that the SBC Defendants had actual knowledge that demand was not growing.

For example, paragraph 51 of the Complaint consists entirely of plaintiffs' arithmetic culminating in a calculation of SureBeam's operating *capacity* if it operated 7 days a week, 24 hours per day (a concept entirely plaintiffs and never announced by SureBeam). However, SureBeam's public filings, referenced in the Complaint, fully disclose SureBeam's production capacity: "[t]o date, both service centers have been currently operating at a very small percent of

---

[1] Plaintiffs' use of an "unnamed" source raises problems because plaintiffs must allege a specific factual basis for the witnesses' first hand knowledge of the pertinent facts. *In re Northpoint Communications Group, Inc. Sec. Litig.*, 221 F.Supp.2d 1090, 1097-98 (N.D. Cal. 2002). Plaintiffs make no showing that the unnamed sources have any first-hand knowledge about RESAL's ability to pay for the systems, or what the SBC Defendants knew about RESAL's ability to pay.

[2] Plaintiffs cite the SBC Defendants' memo for propositions not even stated in the moving papers. In their opening brief, the SBC Defendants note that they cannot be liable for their forward-looking statements about future demand unless the defendants knew the forward-looking statements were false when made. Plaintiffs attempt to recharacterize the issue on this motion from a question of what the defendants knew about future demand, to the defendants' knowledge of production output. [*See* Plaintiffs' memo, p.20, n.10.] To the extent that plaintiffs now attempt to recast statements about future demand to existing performance, the soft statements that plaintiffs argue are misleading are not actionable. *See, In re Verifone Sec. Litig.*, 11 F.3d 865, 869 (9th Cir. 1993) (No duty to disclose that future results may not match past performance).

their maximum processing capacity." [Exhibit 3, SureBeam's Form 10-K for 2001, at p. 11.] Thus, SureBeam did not mislead investors about its existing production capacity, and SureBeam did not equate production capacity at these facilities with the demand for its products and services. Moreover, as disclosed in SureBeam's SEC filings, the demand for SureBeam's products, i.e., irradiation ***system sales***, is not the same as the demand for SureBeam's domestic ***food processing*** services. SureBeam disclosed in its SEC filings that "food processing services represented a small portion, or 3%, of our total revenues versus system sales." [Ex. 3, SureBeam's Form 10-K for 2001, at p.5.]

In addition, "demand" is inherently a prediction of future sales. The truth or falsity of a statement about product demand can only be discerned from future sales. *See Harris v. IVAX Corp.,* 182 F.3d 799, 805 (11th Cir. 1999)(When a statement about a company's performance can only be determined to be true or false *after* the statement is made, the statement is necessarily a future-looking statement.) Indeed, plaintiffs' Complaint alleges SureBeam's statements about domestic demand in the context of projected ***future*** demand for SureBeam's services. [Complaint, ¶ 52 (SureBeam was adding capacity to "meet strong expected demand.").] Capacity was mentioned in the context of providing "greater flexibility" to service customers, not solely as a marker for predicting future demand. [Complaint, ¶ 52, at 21:3-4.]

Significantly, the defendants announced their intention to build new facilities. [Complaint ¶ 52.] This negates any inference that the defendants were intentionally misleading investors about future demand for SureBeam's services. It would simply make no business sense to open new facilities. Plaintiffs' conclusory argument about SureBeam expanding manufacturing capabilities to "create the appearance that its business was growing in order to raise capital" is pure speculation. Plaintiffs merely have the luxury of hindsight, but they fail to allege facts showing the defendants knew their statements about demand were false when made.

C. THE IPO FAILS TO RAISE A STRONG INFERENCE OF SCIENTER.

The IPO cannot raise a strong inference of scienter by any of the SBC Defendants. As noted above, Oberkfell and Claudio merely signed the Prospectus. Merely signing the Prospectus does not create scienter or make Oberkfell or Claudio liable for a section 10(b) violation. *See*

Howard, supra, 228 F.3d at 1062-63.[3] Plaintiffs' argument about the IPO is no different than plaintiffs' attempt to argue that Oberkfell and Claudio had scienter based on what they allegedly knew about the Tech Ion financing. The deficiencies in plaintiffs' Tech Ion conclusions are discussed above. Plaintiffs' conclusions have no greater force or effect when they are made in the context of the IPO.

D. THE SBC DEFENDANTS' STOCK SALES DO NOT RAISE A STRONG INFERENCE OF SCIENTER.

Defendant Oberkfell's and Claudio's stock sales are unremarkable. Their Form-4's filed with the SEC reflect the exercise and sale of options, once the options vested. [SBC Defendants' Exhibits 9 and 10] *See In re Burlington Coat Factory Sec. Litig.,* 114 F.3d 1410, 1424 (3d Cir. 1997)(It is expected that directors and employees holding company stock "will trade those securities in the normal course of events."). Further, the percentages sold with each sale are within the range of percentage sales found insufficient to create a strong inference of scienter in other cases. *Silicon Graphics, supra,* 183 F.3d at 987 (sale of 43.6 percent of holdings insufficient); *In re The Vantive Corp. Sec. Litig.,* 283 F.3d 1079, 1095 (9th Cir. 2002)(sale of 32 percent of holdings insufficient).

Plaintiffs also miss the point regarding Defendant Rane. Plaintiffs argue that a strong inference of scienter should be drawn based on plaintiffs' conclusion that Oberkfell and Claudio were selling shares "to avoid a sinking ship." [Plaintiffs' memo, 23:1] Then plaintiffs attempt to argue that the fact Rane did not sell stock does not matter. But plaintiffs ignore the fact that Rane, allegedly armed with the same information as Oberkfell and Claudio, ***purchased shares on the open market during the Class Period and during the same period that Oberkfell and Claudio where allegedly selling to "avoid a sinking ship."*** [*See* Rane's Form-4, SBC Defendants' Exhibit 11.] Plaintiffs cannot have it both ways. Oberkfell's and Claudio's stock sales cannot be evidence of scienter while Rane's purchase during the same period is ignored. The stock sales

---

[3] Plaintiffs do not allege the IPO raises a strong inference of scienter as to Rane, nor could they. Rane was not even a SureBeam employee at the time. [*See* Registration Statement, SBC Defendants' Exhibit 5, p. 50.]

negate scienter.[4]

E. A DIFFERENCE OF OPINION BETWEEN ACCOUNTANTS DOES NOT RAISE A STRONG INFERENCE OF SCIENTER.

Relying on an assortment of district court cases from other states, plaintiffs attempt to argue that because a third independent auditor ***later*** had a possible disagreement with SureBeam's two prior auditors, the SBC Defendants must have been aware of accounting violations not raised by the prior audits. Again, this is a conclusion not based on facts plead. Plaintiffs must realize they have failed to plead knowledge of any accounting violations, so they attempt to argue that the alleged accounting violations were "obvious" and evidence scienter. Plaintiffs cannot ignore the fact that, as admitted in the Complaint, the alleged accounting violations were not "obvious" to SureBeams' two prior auditors who agreed with the accounting for the Tech Ion and RESAL transactions. [*See* Complaint, ¶ 133, and original complaint, SBC Defendants' Exhibit 2, at ¶ 38.] Plaintiffs allege no facts showing that the SBC Defendants knew that the percentage of completion method of accounting for the Tech Ion and RESAL transactions was known to be improper at the time the accounting was done (even assuming, *arguendo*, it was). Once again, plaintiffs can only offer conclusions based on hindsight after a third auditor expressed that it might reach a different opinion than two prior auditors.[5]

V. PLAINTIFFS FAIL TO ALLEGE A SECTION 11 VIOLATION AGAINST THE SBC DEFENDANTS

As explained in the SBC Defendants' opening brief, plaintiffs have failed to allege that the registration statement for the IPO contained any material misstatement or omission when the

---

[4] The Fifth Circuit case cited by the SBC Defendants, *Nathenson v. Zonagen, Inc.*, 267 F.3d 400 (5th Cir. 2001), is persuasive, if not binding, authority. Plaintiffs, who cite numerous authorities from outside the Ninth Circuit, obviously understand this.

[5] Plaintiffs obfuscate the due diligence conducted by SureBeam's subsequent independent auditors. Plaintiffs allege a succession of auditors. [Complaint, ¶ 133.] The obvious inference from this fact is that the auditors will conduct their own due diligence before accepting the assignment. This is also a fact alleged in the Complaint. [Complaint, ¶ 63 (discussing Deloitte & Touche's due diligence in "looking at SureBeam's past audits").] The logical inference that should be drawn from these allegations is that when SureBeam hired a third auditor, it knew the auditor would conduct its own due diligence on the transactions at issue, and SureBeam would not have done so if it was trying to conceal improper accounting practices. This negates scienter.

registration statement became effective. *See In re Gap Stores Sec. Litig.*, 79 F.R.D. 283, 297 (N.D. Cal. 1978). Plaintiffs allege five purported material misstatements. [*See* bullet points, Plaintiffs' Memo, 12:8-15.] However, each of the bullet points that plaintiffs mention were, in fact, true when made.

Plaintiffs allege no facts showing that the statement concerning SureBeam receiving purchase orders from Tech Ion for eleven electronic food irradiation systems in May 2000 was a false statement. The statement plaintiffs' allege: that "we ***expect*** [the Tech Ion purchase orders] to result in approximately $55 million in sales revenues to us over the next three years" is a classic forward-looking statement and "expects" was even expressly identified as a forward-looking term in the Prospectus. [Registration Statement, SBC Defendants' Exhibit 5, p. 20.]

The second statement – that SureBeam began construction of the systems in July 2000, and how SureBeam recorded revenue for the systems, are true statements. Plaintiffs allege no facts stating SureBeam did not begin construction in July 2000 as stated. Plaintiffs may disagree (now) with how SureBeam recognized revenue, but SureBeam accurately reported the method by which it recognized revenue for these systems.

The third statement – that SureBeam's accounting policies comply with the provisions of SAB 101, was true when made. The accounting for the Tech Ion transaction was approved by SureBeam's independent auditor at the time, Arthur Andersen, and approved again by SureBeam's second independent auditor, KPMG. [*See* Complaint, ¶ 133; plaintiffs' original complaint, Ex. 2, ¶ 38; SureBeam's Form 10-K for 2001, Exhibit 3, p.46, and From 10-K for 2002, Exhibit 4, p. 53.] There has been no restatement of any kind, and a possible difference of opinion from a third auditor, three years later, does not render SureBeam's statement false when made. *See In re Bank of Boston Corp. Sec. Litig.,* 762 F.Supp. 1525, 1536-37 (1999)(Statements allegedly "misleading in *hindsight* – are not sufficient to constitute the basis of a securities action under Section 11. . . ." [emphasis in original].).

Plaintiffs do not dispute that SureBeam did not loan any money to the Tech Ion joint venture. Consequently, regardless of plaintiffs' "control allegations" regarding Titan, the statements that SureBeam acquired a 19.9 percent interest in SureBeam Brasil, and that SureBeam

Brasil was created without capital contribution from either party to the joint venture are correct statements and not actionable. [*See* Complaint, ¶ 40.]

VI. CONCLUSION

Plaintiffs fail to meet the pleading standards for securities fraud under the PSLRA. Plaintiffs' Complaint should be dismissed in its entirety.

DATED: August 27, 2004

LUCE, FORWARD, HAMILTON & SCRIPPS LLP

By: _____

Timothy R. Pestotnik
Russell A. Gold
Attorneys for Defendants Lawrence Oberkfell, Kevin Claudio, and David Rane

1994542.1

Timothy R. Pestotnik, State Bar No. 128919
Russell A. Gold, State Bar No. 179498
LUCE, FORWARD, HAMILTON & SCRIPPS LLP
600 West Broadway, Suite 2600
San Diego, California 92101-3372
Telephone No.: 619.236.1414
Fax No.: 619.744.3685

Attorneys for Defendants Lawrence A. Oberkfell, David A. Rane, and Kevin K. Claudio

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

In re SUREBEAM CORPORATION SECURITIES LITIGATION,	Master File No. 03-CV-01721-JM (POR)
	DECLARATION OF SERVICE BY FACSIMILE AND U.S. MAIL
This Document Relates To:	
All Actions.	**DATE:** September 17, 2004 **TIME:** 11:00 a.m. **COURTROOM:** 6 **JUDGE:** Hon. Jeffrey T. Miller

I, the undersigned, declare:

1. That declarant is and was at all time 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 600 West Broadway, Suite 2600, San Diego, California 92101-3372.

2. That on August 27, 2004, declarant served via facsimile and by depositing a true copy thereof in a United States mailbox at San Diego, California in a sealed envelope with postage thereon fully prepaid and addressed to the parties listed below the ***REPLY IN SUPPORT OF MOTION TO DISMISS CONSOLIDATED COMPLAINT AGAINST DEFENDANTS OBERKFELL, CLAUDIO AND RANE***:

LERACH COUGHLIN STOIA GELLER RUDMAN & ROBBINS — PLAINTIFFS
William S. Lerach, Esq.
Travis E. Downs, III, Esq.
Douglas R. Britton, Esq.
Brian O. O'Mara, Esq.
401 B Street, Suite 1700
San Diego, CA 92101
Tel: (619) 231-1058 / Fax: (619) 231-7423

SCHATZ & NOBEL, P.C. — PLAINTIFFS *[Co-Lead Counsel]*
Andrew M. Schatz, Esq.
Jeffrey S. Nobel, Esq.
Nancy A. Kulesa, Esq.
One Corporate Center
20 Church Street, Suite 1700
Hartford, CT 06103
Tel: (860) 493-6292 / Fax: (860) 493-6290

ALSCHULER GROSSMAN STEIN & KAHAN — DR. GENE RAY, SUSAN GOLDING, and TITAN CORPORATION
Marshall B. Grossman, Esq.
Bruce A. Friedman, Esq.
Jeremy E. Pendrey, Esq.
1620 – 26th Street
North Tower, 4th Flr.
Santa Monica, CA 90404-4060
Tel: (310) 907-1000 / Fax: (213) 907-2000

ORRICK, HERRINGTON & SURECLIFF — TITAN CORPORATION
Daniel J. Tyukody, Esq.
Michael C. Tu, Esq.
777 So. Figueroa Street, Ste. 3200
Los Angels, CA 90017-5704
Tel: (213) 629-2020 / Fax: (213) 612-2499

I declare under penalty of perjury that the foregoing is true and correct. Executed at San Diego, California on August 27, 2004.

EMMA J. GUNER

1994544.1