Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=43ea7434-e811-48b4-8808-54ac947615b4

ALSCHULER GROSSMAN STEIN & KAHAN LLP
Marshall B. Grossman (No. 35958)
Bruce A. Friedman (No. 65852)
Jeremy E. Pendrey (No. 187075)
The Water Garden
1620 26th Street
Fourth Floor, North Tower
Santa Monica, CA 90404-4060
Telephone: 310-907-1000
Facsimile: 310-907-2000

BUTZ DUNN DeSANTIS & BINGHAM
Douglas Butz (No. 060722)
101 West Broadway
Suite 1700
San Diego, CA 92101-8289
Telephone: 619-233-4777
Facsimile: 619-231-0341

Attorneys for Defendants
THE TITAN CORPORATION, DR. GENE W. RAY
AND SUSAN GOLDING

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

(Consolidated)

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)

[Notice of Motion and Motion and Request for Judicial Notice filed concurrently herewith]

Date: September 17, 2004
Time: 11:00 a.m.
Place: Courtroom 6

DEMAND FOR JURY TRIAL

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=43ea7434-e811-48b4-8808-54ac947615b4

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS

Page

INTRODUCTION 1

I. ALLEGATIONS OF THE CONSOLIDATED COMPLAINT 3

A. The Titan Defendants 3

B. Tech Ion 4

C. The IPO Registration Statement 5

D. Post-IPO Statements 6

E. RESAL 7

F. The Audit Opinions 8

G. The Claims 9

II. PLAINTIFFS FAIL TO STATE A CLAIM FOR RELIEF UNDER SECTION 11 OF THE 1933 ACT 10

A. Titan Is Not a Proper Section 11 Defendant 11

B. Plaintiffs Fail to Allege That SureBeam Made False or Misleading Statements in Its Registration Statement 11

1. Plaintiffs Do Not Plead Facts Showing That SureBeam's Revenue Recognition Was Improper 11

2. SureBeam's Statement That It "Expected" to Derive $55 Million in Revenue from Tech Ion over the Next Three Years Was a Forward-Looking Statement Protected by the Bespeaks Caution Doctrine 14

3. SureBeam's Statements Regarding the Interest It Acquired in the Joint Venture Were Not False or Misleading 15

C. Plaintiffs Fail to Allege That They Acquired Their Securities Pursuant to or Traceable to a Registration Statement 15

D. Plaintiffs Do Not Plead Reliance 16

III. PLAINTIFFS FAIL TO STATE A CLAIM AGAINST TITAN UNDER SECTION 20(A) OF THE 1934 ACT 17

A. Plaintiffs Fail to Plead Facts Demonstrating That SureBeam Made False or Misleading Statements or Omissions of Material Fact 18

1. SureBeam's Post-IPO Alleged Misrepresentations Are Forward-Looking Statements Protected by the PSLRA's "Safe Harbor" Provision and the Bespeaks Caution Doctrine 18

a. Anticipated demand for irradiated food and processing 19
b. Analyst conference call statements 19
c. Titan's expectations are irrelevant 20

2. Plaintiffs Fail to Plead Facts That Demonstrate That SureBeam's Revenue Recognition Was Improper 20

B. Plaintiffs Fail to Plead Facts Giving Rise to a Strong Inference That SureBeam Acted with Scienter 21

ALSCHULER GROSSMAN STEIN & KAHAN LLP

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=43ea7434-e811-48b4-8808-54ac947615b4

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS
(continued)

Page

1. Failure to Comply with GAAP Does Not Raise a Strong Inference of Scienter 22
2. Plaintiffs' Allegations That Tech Ion and RESAL Needed Funding to Pay SureBeam Do Not Give Rise to an Inference of Scienter 23
C. Plaintiffs Fail to Plead Actual Reliance or Reliance on an Efficient Market........ 23
IV. PLAINTIFFS FAIL TO PLEAD FACTS ESTABLISHING THAT TITAN WAS A "CONTROL PERSON" OF SUREBEAM 24
CONCLUSION........ 25

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=43ea7434-e811-48b4-8808-54ac947615b4

1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Aldridge v. A.T. Cross Corp.,
284 F.3d 72 (1st Cir. 2002) 25

Allison v. Brooktree Corp.,
999 F. Supp. 1342 (S.D. Cal. 1998) 25

American Bank Note Holographics,
93 F. Supp. 2d 424 (S.D.N.Y. 2000) 11

Ballard v. Savage,
1997 U.S. Dist. LEXIS 24013 No. 92-840 JM (AJB), *22 (S.D. Cal. No. 10 1997) 25

Basic v. Levinson,
485 U.S. 224 (1988) 17, 23

Binder v. Gillespie,
184 F.3d 1059 (9th Cir. 1999) 17, 24

Cammer v. Bloom,
711 F. Supp. 1264 (D.N.J. 1989) 23

Durham v. Kelly,
810 F.2d 1500 (9th Cir. 1987) 11, 24

Ernst & Ernst v. Hochfelder,
425 U.S. 185 (1976) 21

Farley v. Henson,
11 F.3d 827 (8th Cir. 1993) 25

Gompper v. VISX, Inc.,
298 F.3d 893 (9th Cir. 2002) 21, 23, 25

Guenther v. Cooper Life Sciences, Inc.,
759 F. Supp. 1437 (N.D. Cal. 1990) 10, 15

Harrison v. Dean Witter Reynolds, Inc.,
79 F.3d 609 (7th Cir. 1996) 25

Howard v. Everex Systems, Inc.,
228 F.3d 1057 (9th Cir. 2000) 24

In re Bank of Boston Corp. Sec. Litig.,
762 F. Supp. 1525 (D. Mass. 1991) 10

In re Cirrus Logic Sec. Litig.,
946 F. Supp. 1446 (N.D. Cal. 1996) 21

In re Dura Pharmaceuticals, Inc. Sec. Litig.,
No. 99CV0151-L (NLLS), 2000 WL 33176043 (S.D. Cal. July 11, 2000) 22

In re Foundry Networks Sec. Litig.,
2003 WL 22077729, Case No. C00-4823, MMC (N.D. Cal. Aug. 29, 2003) 18

In re Gap Stores Sec. Litig.,
79 F.R.D. 283 (N.D. Cal. 1978) 10

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=43ea7434-e811-48b4-8808-54ac947615b4

1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28

TABLE OF AUTHORITIES
(continued)

Page

In re NationsMart Corp. Sec. Litig., 130 F.2d 309 (8th Cir. 1997) 23

In re Northpoint Communications Group, Inc. Sec. Litig., 184 F. Supp. 2d 991 (N.D. Cal. 2001) 22

In re Pacific Gateway Exch., Inc. Sec. Litig., No. C-00-1211 PJH, 2002 U.S. Dist. LEXIS 8014, (N.D. Cal. Apr. 30, 2002) 14, 21

In re Silicon Graphics, Inc. Sec. Litig., 183 F.3d 970 (9th Cir. 1999) 6, 18, 21

In re Software Toolworks Inc. Sec. Litig., 38 F.3d 1078 (9th Cir. 1994) 22

In re Turbodyne Techs. Sec. Litig., No. CV 99-00697 MMM (BQRx), 2002 U.S. Dist. LEXIS 25738 (C.D. Cal. Mar. 13, 2002) 18, 23, 24

In re Worlds of Wonder Sec. Litig., 35 F.3d 1407 (9th Cir. 1994) 14, 18, 22

In re ZZZZ Best Securities Litigation, No. CV-87-3574-RSWL (Bx), 1994 U.S. Dist. LEXIS 19784 (C.D. Cal. Oct. 27, 1994) 24

Kaplan v. Rose, 49 F.3d 1363 (9th Cir. 1994) 25

Krim v. pcOrder.com, Inc., 210 F.R.D. 581 (W.D. Tex. 2002) 15

Lilley v. Charren, 936 F. Supp. 708 (N.D. Cal. 1996) 14, 15

No. 84 Employer-Teamster Joint Counsel Pension Trust Fund v. America West Holding Corp., 320 F.3d 920 (9th Cir. 2003) 24

Paracor Finance Inc. v. General Elec. Capital Corp., 96 F.3d 1151 (9th Cir. 1996) 23

Provenz v. Miller, 102 F.3d 1478 (9th Cir. 1990) 22

SEC v. Seaboard Corp., 677 F.2d 1301 (9th Cir. 1982) 20

Shapiro v. UJB Financial Corp., 964 F.2d 272 (3d Cir. 1992) 10, 16

Southland Sec. Co. v. Inspire Ins. Solutions Inc., 365 F.3d 353 (5th Cir. 2004) 14

In re Stac Elec. Sec. Litig., 89 F.3d 1399, 1403 (9th Cir. 1996) 10

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=43ea7434-e811-48b4-8808-54ac947615b4

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES (continued)

Page

In re SureBeam Corp. Sec. Litig.
Case No. 03 CV 1721 JM (POR), 2003 U.S. Dist. LEXIS 25022 (S.D. Cal. Jan. 5, 2004) 10, 16, 21, 25

FEDERAL STATUTES

15 U.S.C. Section 77b(a)(4) 11

15 U.S.C. Section 77k(a) 10, 11, 16

15 U.S.C. Section 78j(b) 17

15 U.S.C. Section 78u-4(b)(1) 18, 21

15 U.S.C. Section 78u-5(c) 18

15 U.S.C. Section 78u-5(i)(1) 18, 20

17 C.F.R. Section 240.10b-5 17

Exchange Act of 1934 Section 10(b) 1, 3, 17, 18, 23, 25

Exchange Act of 1934 Section 20(a) 1, 24

Federal Rules of Civil Procedure Section 9(b) 11, 23, 24, 25

Securities Act of 1933 Section 11 ..... 1, 10, 11, 15, 25

Securities Act of 1933 section 15 ..... 1, 9, 24

OTHER AUTHORITIES

AICPA SOP 81-1 ..... 11, 12

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=43ea7434-e811-48b4-8808-54ac947615b4

1 **INTRODUCTION**

2 Lead plaintiffs' ("Plaintiffs") consolidated complaint is an attempt to plead fraud
3 by hindsight. Plaintiffs fail to state any claim against defendant The Titan Corporation ("Titan")
4 or its directors Dr. Gene W. Ray and Susan Golding.[1]

5 In March 2001, SureBeam Corporation ("SureBeam") sold 20% of its shares in an
6 initial public offering ("IPO").[2] Although SureBeam expected success, SureBeam disclosed in its
7 IPO registration statement (the "Registration Statement") numerous risks that might cause the
8 business to fail.[3] SureBeam is now bankrupt, and Plaintiffs see Titan as a potential deep pocket.

9 Plaintiffs claim the Registration Statement contained false or misleading
10 statements regarding SureBeam's past and expected revenue. Plaintiffs also allege that SureBeam
11 defrauded investors by making false or misleading statements about revenue and the expected
12 demand for food it irradiated.[4]

13 Plaintiffs identify two transactions for which they contend SureBeam improperly
14 recognized revenue on sales of its irradiation systems: (1) Tech Ion Industrial, S.A. in Brazil
15 ("Tech Ion") and (2) RESAL in Saudi Arabia ("RESAL"). SureBeam recognized revenue on
16 these sales under the "percentage of completion" method of accounting. Under this accounting
17 method, SureBeam recognized revenue over time as it incurred costs.

18 Plaintiffs allege that to recognize revenue from Tech Ion and RESAL, SureBeam

19 [1] Titan directors Dr. Gene W. Ray ("Ray") and Susan Golding ("Golding") were also SureBeam Corporation directors (collectively with Titan, the "Titan Defendants").

20 [2] Until its IPO, SureBeam was a wholly-owned Titan subsidiary. From the IPO until August 5,
21 2002 when Titan spun-off its remaining SureBeam shares, Titan owned a majority of SureBeam's stock.

22 [3] SureBeam was in the business of selling and installing food irradiation systems designed to kill food-borne disease. It also operated processing centers where customers irradiated food using
23 SureBeam systems.

24 [4] Plaintiffs sue the Titan Defendants, among others, for allegedly violating section 11 of the Securities Act of 1933 (the "1933 Act") by making false or misleading statements in the
25 Registration Statement. Plaintiffs also allege Titan violated section 15 of the 1933 Act as a "control person" of SureBeam, an alleged primary violator of section 11 of the 1933 Act.
26 Pursuant to section 20(a) of the Exchange Act of 1934 (the "1934 Act"), Plaintiffs allege Titan was a SureBeam "control person" when SureBeam allegedly violated section 10(b) and rule 10b-
27 5 of the 1934 Act. Other defendants in this action include former SureBeam executives Lawrence Oberkfell, Kevin Claudio and David Rane, as well as underwriters of the IPO. Due to its
28 bankruptcy, SureBeam is no longer a defendant.

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=43ea7434-e811-48b4-8808-54ac947615b4

was required to have reasonable assurance that it could collect the revenue. Plaintiffs claim that because Tech Ion and RESAL required outside funding to pay SureBeam, collecting the revenue could not have been reasonably assured. But where Tech Ion and RESAL were going to obtain funding is irrelevant as long as SureBeam was reasonably assured that funding would be obtained. Indeed, two national accounting firms issued unqualified audit opinions on SureBeam's financial statements, which accounted for these revenues, knowing that Tech Ion and RESAL were obtaining outside funding. KPMG LLP ("KPMG") issued an unqualified audit opinion after Tech Ion failed to pay and the debt was written off. The fact that the Tech Ion debt and part of the RESAL debt turned out to be uncollectible, in hindsight, does not demonstrate that collecting the revenue was not reasonably assured when SureBeam recorded it.

At the time of the IPO, SureBeam had recognized $15.5 million in revenue on the Tech Ion transaction. Plaintiffs claim that, four days before the IPO, SUDAM (a Brazilian government agency that Plaintiffs allege was a major potential funding source for Tech Ion) had been disbanded by the Brazilian government. But Plaintiffs fail to plead how SUDAM's alleged closure in March 2001 shows SUDAM's condition when SureBeam recognized the revenue or impacted SureBeam's belief in 2000 that it would collect the revenue.

Also, Plaintiffs fail to plead facts showing why SUDAM's alleged closure mattered to SureBeam. Plaintiffs plead a conclusory allegation that SUDAM was Tech Ion's "last chance" for funding, but the Court need not accept uncorroborated conclusions as true. Plaintiffs fail to allege facts showing that Tech Ion was not going to obtain funding elsewhere. In fact, Plaintiffs allege that Tech Ion had hired a company called Delphos International to obtain funding for Tech Ion from the World Bank and other sources.

Plaintiffs also claim SureBeam falsely stated that it "expected" to collect revenue from Tech Ion and RESAL and "expected" or "anticipated" demand for its products to increase. But SureBeam cautioned investors that they should not rely on forward-looking statements of what it "expected" or "anticipated." Under the bespeaks caution doctrine and the safe harbor provision of the Private Securities Litigation Reform Act of 1995 ("PSLRA"), these statements are not actionable.

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=43ea7434-e811-48b4-8808-54ac94761b54

1 Plaintiffs sue Titan for violating section 11 of the 1933 Act even though Titan did
2 not issue SureBeam's stock or sign the Registration Statement. Titan is not a proper section 11
3 defendant. Also, Plaintiffs fail to properly plead that any class member can trace ownership of
4 their shares to the IPO. The Court should dismiss Plaintiffs' section 11 claim against the Titan
5 Defendants and the section 15 claim against Titan.

6 For their section 20(a) claim against Titan as a controlling shareholder of
7 SureBeam when it allegedly violated section 10(b) of the 1934 Act, Plaintiffs again fail to plead
8 that SureBeam made false or misleading statements. Plaintiffs do not allege facts to demonstrate
9 that SureBeam improperly recognized revenue or misled investors about SureBeam's future.

10 Plaintiffs also fail to plead scienter, which under the Ninth Circuit's rigorous
11 pleading standard, requires Plaintiffs to plead in great detail specific facts showing at least
12 intentional or conscious recklessness. With respect to Tech Ion, Plaintiffs fail to plead facts
13 showing that after SUDAM closed SureBeam did not expect Tech Ion to obtain funding to pay
14 SureBeam. Plaintiffs fail even to plead when, if ever, SureBeam knew that SUDAM closed.
15 With respect to RESAL, Plaintiffs merely allege that RESAL needed outside funding. Plaintiffs
16 admit RESAL had numerous funding sources and actually paid SureBeam $7.5 million. Also,
17 even if SureBeam's financial statements violated generally accepted accounting principles
18 ("GAAP"), which Plaintiffs do not plead facts to support, as a matter of law that does not raise
19 the required strong inference of scienter.

20 Plaintiffs also fail to plead particular facts demonstrating that Titan was a "control
21 person" of SureBeam. Titan owned a majority of SureBeam's stock until the August 2002 spin
22 off, but that fact only demonstrates that Titan had the <u>ability</u> to control SureBeam. Plaintiffs fail
23 to plead with particularity that Titan <u>exercised</u> day-to-day control over SureBeam. The Court
24 should dismiss the section 15 and 20(a) claims against Titan.

25 **I. <u>ALLEGATIONS OF THE CONSOLIDATED COMPLAINT</u>**

26 **A. <u>The Titan Defendants</u>**

27 According to the consolidated complaint, Titan, a defense contractor, created
28 SureBeam as a wholly owned Titan subsidiary. (Consolidated Complaint ("CC"), ¶ 14.)

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=43ea7434-e811-48b4-8808-54ac947615b4

1 SureBeam manufactured a system for irradiating various foods, including meat, fruit, and
2 vegetables, in order to destroy or prevent the reproduction of organisms that cause infestation,
3 contamination, spoilage, or food-borne diseases. (Id.) Ray and Golding were SureBeam directors
4 who signed SureBeam's Registration Statement. (Id., ¶¶ 75-76.)[5]

5 **B. Tech Ion**

6 In April 2000, SureBeam and Tech Ion allegedly entered into a joint venture to
7 irradiate food in Brazil. (CC, ¶¶ 18-19.) Pursuant to the joint venture, SureBeam (through a
8 subsidiary) and Tech Ion formed a Brazilian company named SureBeam Brasil ("SBB"). SBB
9 was to buy irradiation equipment from SureBeam, and pay for the equipment at the higher of 75%
10 of its profits or a fixed payment. The division of profits between SureBeam and Tech Ion would
11 exist until all systems had been paid for, and thereafter would be split 50-50. (Id., ¶ 20.)

12 Under the alleged terms of the joint venture agreement, SureBeam owned 19.9%
13 of the voting common stock and Tech Ion owned the remaining 80.1%. (CC, ¶ 20.) Titan
14 extended a $5 million working capital line of credit that bore interest at 10% per annum. (Id., ¶
15 40.) In May 2000, Tech Ion purchased eleven irradiation systems from SureBeam, and in 2000,
16 SureBeam recognized $15.5 million for the sale under the percentage of completion method of
17 accounting. (Id., ¶ 38.) On May 30, 2000, Titan issued a press release stating, among other
18 things, that it expected in excess of $50 million in revenues from the venture. (Id., ¶ 24.)

19 Plaintiffs allege that SureBeam knew Tech Ion's financial condition was weak and
20 that it was a new business. (CC, ¶ 22.) Tech Ion was going to pay for the equipment through
21 profits of the venture or outside funding. (Id., ¶¶ 20-21.) Tech Ion and SureBeam allegedly
22 retained Delphos International ("Delphos") to aid in securing funding for Tech Ion's purchase of
23 SureBeam irradiators. (Id., ¶ 23.) Plaintiffs contend that efforts at funding through the World
24 Bank and SUDAM (an Amazon region developmental agency) were unsuccessful. (Id., ¶¶ 32,
25 37.) According to Plaintiffs, SUDAM was disbanded by the Brazilian government four days
26 before SureBeam's IPO. (Id., ¶¶ 27, 37.) Without alleging corroborating facts, Plaintiffs allege

27
28 [5] In the March 2001 IPO, Titan sold 20% of SureBeam's stock. (CC, ¶ 38.) It spun-off the remaining shares to Titan shareholders on August 5, 2002. (Id., ¶¶ 59-62.)

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=43ea7434-e811-48b4-8808-54ac947615b4

that SUDAM was Tech Ion's "last chance" for funding. (Id., ¶¶ 32, 38.)

Plaintiffs allege that, by the time of the IPO, Tech Ion had not yet secured funding to pay for the SureBeam irradiation systems. (CC, ¶ 38.) Plaintiffs quote from e-mails sent in late 2000 between Delphos and Tech Ion evidencing Tech Ion's ongoing efforts to obtain funding. (Id., ¶¶ 25-30.) One e-mail states that meetings with potential funding sources "went very well." (Id., ¶25.) Other e-mails state that if certain steps were taken Tech Ion "will have government support" for funding, further strengthening SureBeam's conclusion that it would collect the revenue. (Id., ¶ 28-29.)

C. The IPO Registration Statement

Allegedly on March 19, 2001, SureBeam filed its Registration Statement for the IPO issuance of 6.7 million shares of its stock. (CC, ¶ 38.)[6] Plaintiffs contend that false or misleading information was contained in or omitted from the Registration Statement:

(1) SureBeam stated that its financial statements were in compliance with GAAP (CC, ¶¶ 85, 153) and had recognized $15.5 million of revenue in 2000 due to the sale of irradiation systems to Tech Ion under the percentage of completion method of accounting. (Id., ¶¶ 38-39.) Plaintiffs also allege that SureBeam did not disclose that Tech Ion was having trouble obtaining funding from the World Bank and that Tech Ion lost its "last chance" for funding when SUDAM was disbanded days before the IPO (id., ¶ 86);

(2) SureBeam stated that it "expected" to derive $55 million in sales revenues from Tech Ion over the next three years (CC, ¶ 38); and

(3) SureBeam stated that it acquired a 19.9% equity interest in SBB "without charge" and that SBB was created with "no initial capital contribution from either party" (CC, ¶ 40).

SureBeam disclosed in the "Risk Factors" section of its Registration Statement that sales of irradiation systems accounted for under the percentage of completion method of

[6] Plaintiffs allege that SureBeam issued a "Prospectus" which they define as a "prospectus" and a "registration statement." (CC, ¶ 2.) This brief refers to the Registration Statement – the only document that can be the basis of a section 11 claim.

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=43ea7434-e811-48b4-8808-54ac947615b4

1 accounting, "are not yet installed or in operation and … [a] reduction or delay … could
2 significantly reduce our revenues." (See Ex. 1 at p. 16.)[7] SureBeam also warned that "[w]e
3 cannot assure you that we will continue to derive revenues from [Tech Ion], [or] that revenues
4 from [Tech Ion] will continue at current or historical levels," and that the "expected completion
5 date of the first service center in Brazil was postponed from the fourth quarter of 2000 to the third
6 quarter of 2001 as a result of unanticipated delays in the construction process. Any delay in the
7 deployment of our systems could adversely affect our revenues and cash flows." (Id. at pp. 16,
8 19.)

9 During the first half of 2001, SureBeam continued to recognize revenue from the
10 joint venture using the percentage of completion method of accounting. (CC, ¶¶ 39, 44, 48, 91,
11 92, 99, 104, 109, 113, 116, 119.) On October 31, 2001, SureBeam acquired an 80.1% total
12 interest in SBB. (Id., ¶ 44.) It ultimately released Tech Ion from $22.4 million in trade
13 receivables. (Id.)

14 **D. Post-IPO Statements**

15 Plaintiffs allege that following the IPO Titan issued a press release stating that it
16 "expected" increased revenues and profits from SureBeam. (CC, ¶ 87.)

17 In press releases and SEC filings, SureBeam stated that it "expected" or
18 "anticipated" strong demand for irradiated food. (CC, ¶¶ 2, 91.) SureBeam stated that it
19 anticipated demand to increase for processing services at its processing facilities and that it was
20 opening additional centers to expand capacity. (Id., ¶¶ 52, 91, 95, 99, 101.) SureBeam's press
21 releases cautioned investors in detail not to rely on forward-looking statements. (See, e.g., Ex. 2
22 at pp. 97, 101.) For example, one press release quoted by Plaintiffs warned that statements
23 regarding the "expected processing capacity and benefits of the new processing facility" were
24 forward-looking and are "subject to risks and uncertainties that could cause actual results to differ

25 ---

26 [7] See the Request for Judicial Notice filed concurrently herewith (unless otherwise specified, all exhibit references are to the Request for Judicial Notice). The Court may consider documents submitted in support of the motion that are referenced in the consolidated complaint, even if not
27 physically attached to the pleading, as well as matters that may be judicially noticed. In re Silicon Graphics, Inc. Sec. Litig., 183 F.3d 970, 986 (9th Cir. 1999) (considering full text of prospectus,
28 including portions not mentioned in the complaint).

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=43ea7434-e811-48b4-8808-54ac947615b4

materially from those set forth in or implied by forward-looking statements." (Id. at p. 97.) SureBeam stated that "these risks and uncertainties include the risks associated with the Company's entry into new commercial businesses and new markets such as the food pasteurization market that require the company to develop demand for its product . . ." (Emphasis added.)

SureBeam CFO David Rane stated in a conference call that SureBeam "projected" $14 to $18 million in processing center revenue. (CC, ¶ 115.) At the outset of analyst conference calls, SureBeam Director of Investor Relations Krista Mallory cautioned investors regarding forward-looking statements:

> . . .The statements made on this call which are not historical facts are forward-looking statements that are subject to risks and uncertainties that could cause actual results to differ materially from those set forth in or implied by forward-looking statements. Examples of such forward-looking statements include the Company's belief as to the following: the existence of international market opportunities for SureBeam systems and services, the expectation that large processors will choose to have SureBeam's in-line systems installed in their facilities, that SureBeam anticipates securing commitments from several major retailers and food service companies to carry SureBeam products . . . that SureBeam is expected to achieve significant revenue and profit expansion over the next 18 months . . . These statements and other forward-looking statements are subject to risks and uncertainties that could cause actual results to differ materially from those set forth in or implied by forward-looking statements. These risks include consumer acceptance of food irradiation, the inability to raise the capital necessary to execute our strategy, the risks of operating in developing countries and international markets, including foreign currency risks, the risks that our strategic alliance customers will not obtain financing for systems of processing centers . . ."

(Ex. 3 at p. 135-136.)

E. RESAL

Plaintiffs allege that in approximately May 2001, SureBeam entered into a joint venture with RESAL, a sole proprietorship in Saudi Arabia. (CC, ¶¶ 8, 46.) Pursuant to the joint venture, RESAL was to build three facilities in Saudi Arabia and purchase ten SureBeam irradiation systems, which RESAL intended to pay for through the profits of the joint venture.

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=43ea7434-e811-48b4-8808-54ac947615b4

1 (Id.) Plaintiffs allege that RESAL could secure initial funding from "investors, the Saudi
2 Industrial Development Fund, commercial banks, and/or other individual lenders. . . ." (Id., ¶ 46.)
3 According to Plaintiffs, RESAL did not obtain funding. (Id., ¶ 48.)

4 In 2003, SureBeam stated that it expected to receive a total of $53 million in
5 revenue from RESAL. SureBeam had recognized approximately $23.5 million in RESAL
6 revenue using the percentage of completion method of accounting. (CC, ¶¶ 48-50.) RESAL
7 ultimately paid $7.5 million in progress payments to SureBeam. (Id., ¶ 50.)

8 **F. The Audit Opinions**

9 SureBeam's independent auditor in 2001, Arthur Andersen LLP ("Anderson"),
10 issued an audit report that contained an unqualified opinion on SureBeam's financial statements
11 for the year ended December 31, 2001. (CC, ¶ 133; original complaint, ¶ 38, attached as Ex. 4 to
12 Request for Judicial Notice.)[8] In April 2002, SureBeam hired KPMG to replace Andersen as its
13 independent auditor. KPMG issued an audit report that contained an unqualified opinion
14 regarding SureBeam's financial statements for the year ended December 31, 2002. (CC, ¶ 133;
15 original complaint, ¶ 38.)

16 In the original complaint, Plaintiffs cite a SureBeam press release discussing
17 SureBeam's relationship with Andersen and KPMG:

18 During the year ended December 31, 2001, and the subsequent
interim period through April 9, 2002, we [SureBeam] had no
19 disagreement with Arthur Andersen on any matter of accounting
principles or practices, financial statement disclosure, auditing
20 scope or procedure … Arthur Andersen's report on our
consolidated financial statements for the year ended December 31,
21 2001 was issued on an unqualified basis … During the period from
April 15, 2002 to June 3, 2003, we had no disagreements with
22 KPMG on any matter of accounting principles or practices,
financial statement disclosure, auditing scope or procedure …
23 KPMG's report on our consolidated financial statements for the
24 year ended December 31, 2002 was issued on an unqualified basis.

25 (Original complaint, ¶ 38; emphasis added.)[9]

26 [8] Originally, various plaintiffs filed 17 separate actions, which the Court consolidated. The
27 complaints contained very similar allegations. Lead counsel filed several of the complaints. The
"original complaint" filed concurrently herewith is one such complaint.

28 [9] In the consolidated complaint, Plaintiffs only briefly mention SureBeam's relationship with

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=43ea7434-e811-48b4-8808-54ac947615b4

On June 3, 2003, SureBeam terminated its relationship with KPMG and retained Deloitte & Touche LLP ("Deloitte") as its new independent auditor. (CC, ¶ 133.) On August 21, 2003, SureBeam announced that it was dismissing Deloitte as its auditor because Deloitte had raised "issues of concern" about its prior audited financial statements. (Id., ¶ 36.) SureBeam also announced that it believed that its financial statements were appropriate. (Id.) It stated that they were audited by national accounting firms. (Id.)

On January 12, 2004, SureBeam announced that it would file bankruptcy under Chapter 7 of the United States Bankruptcy Code. (CC, ¶ 138.)

G. The Claims

Plaintiffs assert this action on behalf of a putative class of SureBeam shareholders who acquired or purchased securities between March 16, 2001 and August 27, 2003. (CC, ¶¶ 1, 169.) In their first purported claim of the consolidated complaint, Plaintiffs assert a cause of action against all defendants (except David Rane) for allegedly violating section 11 of the 1933 Act. This is the only claim asserted against Ray and Golding. (Id., ¶¶ 75-76.) In their purported second claim for relief under section 15 of the 1933 Act, Plaintiffs seek to impose section 11 liability on Titan as a control person of SureBeam. Against former SureBeam executives Lawrence Oberkfell, Kevin Claudio and David Rane, Plaintiffs assert a cause of action for violating section 10(b) of the 1934 Act and rule 10b-5 promulgated thereunder. In their fourth purported claim for allegedly violating section 20(a) of the 1934 Act, Plaintiffs seek to impose 10(b) liability on Titan as a control person of SureBeam.

Andersen and KPMG: "SureBeam notified the SEC in a Form 8-K filing that it had terminated KPMG as its outside auditor (purportedly over fees) and retained Deloitte as its new independent accountant. The Form 8-K addressed the lack of any dispute with its auditor at length and stated that it had terminated [Andersen] as its accountant back on April 9, 2002." (Emphasis added.) (CC, ¶ 133.)

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=43ea7434-e811-48b4-8808-54ac947615b4

1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28

II. PLAINTIFFS FAIL TO STATE A CLAIM FOR RELIEF UNDER SECTION 11 OF THE 1933 ACT[10]

To state a claim under section 11 of the 1933 Act, Plaintiffs must allege (1) a registration statement (2) that contained a material misstatement or omission (3) when the registration statement became effective. See 15 U.S.C. § 77k(a); In re Gap Stores Sec. Litig., 79 F.R.D. 283, 297 (N.D. Cal. 1978). Plaintiffs must also allege that they purchased their shares "directly in the public offering for which the misleading registration statement was filed or ... traceable to the public offering." Guenther v. Cooper Life Sciences, Inc., 759 F. Supp. 1437, 1439 (N.D. Cal. 1990); see also Hertzberg v. Dignity Partners, Inc., 191 F.3d 1076, 1080 n.4 (9th Cir. 1999); Shapiro v. UJB Financial Corp., 964 F.2d 272, 286 (3d Cir. 1992).[11]

Section 11 applies only to statements materially misstated or omitted when the registration statement became effective. Gap Stores, 79 F.R.D. at 297. Representations in a registration statement rendered false by subsequent events do not give rise to a claim. See, e.g., In re Bank of Boston Corp. Sec. Litig., 762 F. Supp. 1525, 1537-38 (D. Mass. 1991) (statements or omissions misleading only in "hindsight" are insufficient to state a section 11 claim).

In claims grounded in alleged fraud, such as this, the plaintiff must plead with particularity the time, place and content of the alleged misrepresentations, as well as what is false or misleading about the statements and why they are false.[12] Stac Elec., 89 F.3d at 1404-05

---

[10] Federal Rule of Civil Procedure 12(b)(6) requires a court to dismiss a complaint if it fails to "state a claim upon which relief can be granted." While allegations of material fact are accepted as true, "[c]onclusory allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss for failure to state a claim." In re Stac Elec. Sec. Litig., 89 F.3d 1399, 1403 (9th Cir. 1996).

[11] Additionally, Plaintiffs must plead and prove reliance if they acquired their securities "after the issuer has made generally available to its security holders an earning statement covering a period of at least twelve months beginning after the effective date of the registration statement." 15 U.S.C. § 77k(a).

[12] The consolidated complaint is grounded in fraud. As the Court noted in appointing the lead Plaintiffs in this action, the section 11 and rule 10b-5 claims are based on the same allegations. In re SureBeam Corp. Sec. Litig., Case No. 03 CV 1721 JM (POR), 2003 U.S. Dist. LEXIS 25022, at *30 (S.D. Cal. Jan. 5, 2004); see Stac Elec., 89 F.3d at 1401-05, 1405 n.4 (complaint based on fraud where plaintiff based section 11 and rule 10b-5 claims on same allegations). Plaintiffs' attempt to disclaim their fraud allegations in the section 11 claim does not eviscerate the particularity requirement. (See CC, ¶ 176.) Stac Elec., 89 F.3d at 1405 n.2 ("nominal effort" of disclaiming fraud allegations "unconvincing where the gravamen of the complaint is plainly fraud and no effort is made to show any other basis" for section 11 claims).

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=43ea7434-e811-48b4-8808-54ac947615b4

(applying Fed. R. Civ. P. 9(b) to section 11 claim grounded in fraud).

A. Titan Is Not a Proper Section 11 Defendant

Section 11 claims may be brought only against certain categories of defendants, including, among others, persons who signed or issued a registration statement. 15 U.S.C. §77k(a). Plaintiffs make the conclusory allegation that "Titan is liable for its own acts under §11 of the 33 Act." (CC, ¶ 77.) Yet, Titan did not issue or sign the Registration Statement, nor does it fit within any other statutory category of defendants. See 15 U.S.C. §77k(a).

At the time of the IPO, Titan was SureBeam's parent corporation. (CC, ¶ 2.) Even if a parent corporation of an issuer acts as a de facto issuer for the IPO, it is not a proper section 11 defendant unless it falls within one of the statutory categories. American Bank Note Holographics, 93 F. Supp. 2d 424, 436-37 (S.D.N.Y. 2000) (dismissing section 11 claim against parent corporation of issuer, despite parent corporation acting as de facto issuer).[13] The Court should dismiss the section 11 claim against Titan.

B. Plaintiffs Fail to Allege That SureBeam Made False or Misleading Statements in Its Registration Statement[14]

1. Plaintiffs Do Not Plead Facts Showing That SureBeam's Revenue Recognition Was Improper

Plaintiffs contend that SureBeam's recognition of $15.5 million of revenue in 2000 for the sale of irradiation systems to Tech Ion was improper and thus rendered the Registration Statement false or misleading because, according to Plaintiffs, SureBeam did not have reasonable assurance that Tech Ion could pay. (CC, ¶¶ 38-39, 85, 153.)[15]

[13] Under the 1933 Act, "issuer" does not include control persons. 15 U.S.C. § 77b(a)(4).

[14] This section addresses the section 11 claim against Ray and Golding and the section 15 claim against Titan. To establish the section 15 claim against Titan as a control person, Plaintiffs must first plead that SureBeam violated section 11. See Durham v. Kelly, 810 F.2d 1500, 1503-4 (9th Cir. 1987).

[15] The percentage of completion method of accounting allows a company to recognize income as work progresses. American Institute of Certified Public Accountants ("AICPA"), Statement of Position ("SOP") 81-1, "Accounting for Performance of Construction-Type and Certain Production-Type Contracts," at 81-1.04 (attached hereto as Ex. A). Among the requirements to use the percentage of completion method of accounting is that "the buyer can be expected to satisfy his obligations under the contract." AICPA SOP 81-1 at 81-1.23 (Ex. A at pp. 34-35).

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=43ea7434-e811-48b4-8808-54ac947615b4

Plaintiffs claim that, before the IPO, SureBeam knew that Tech Ion's financial condition was eroding and that Tech Ion needed outside funding. (CC, ¶22.) But whether Tech Ion had cash on hand to pay SureBeam is irrelevant as long as Tech Ion could be expected to satisfy its obligations. AICPA, SOP 81-1 at 81-1-23 (Ex. A at pp. 34-35). Plaintiffs fail to allege facts showing that, at the time SureBeam recognized the revenue, it did not have reasonable assurance that Tech Ion was able to obtain funding to pay SureBeam.

Plaintiffs fail to plead how SUDAM's alleged closure in March 2001 rendered, in hindsight, SureBeam's year 2000 revenue recognition improper. (See CC, ¶ 38.) Plaintiffs cite portions of e-mails that predate the IPO and draw the untenable conclusion that SureBeam knew that Tech Ion could not get funding. However, even the partial e-mails that Plaintiffs have selectively cited do not give rise to the inference that Tech Ion would not obtain funding. The e-mails demonstrate SureBeam should have anticipated just the opposite:

Partial Document Cited by Plaintiff	**Conclusions**
"As we discussed, *the meetings at the IIC and IFC went very well. Both organizations are genuinely interested* but expressed some of the same reservations. Specifically, SureBeam Brasil aims to provide a high technology service that is currently under-utilized (or non-existent) in Brazil. Although *this is at the heart of its potential for success*, lenders secured only by the project's assets need greater assurances that there will be customers to generate revenue to pay the debt. As presented in the information memorandum, the customer base is not well-defined enough and established enough to provide comfort." (Emphasis added.) (CC, ¶ 25.)	Plaintiffs conclude that this document demonstrates that IIC and IFC "certainly were not impressed and were very skeptical about the entire venture because it lacked an established (and well defined) customer base." (CC, ¶ 25.) Reasonable conclusion: The meetings went very well and the organizations are genuinely interested in providing funding. There is little or no competition with SureBeam in Brazil, which is at the heart of its potential for success.
"I am sending this email to both of you in advance of that phone call because Delphos' material needs enormous rewriting and deep changes in the concept and numbers, etc. As it is now, I believe that it will not be approved, and if World Bank asks for outside experts to examine the technical aspects, they will certainly locate our weak spots. *I am ready with my team to rewrite the document in order to meet Delphos's schedules [sic]. We are*	Plaintiffs conclude that this document shows the joint venture had to "scramble for a solution" to "devastating" problems with funding. (CC, ¶¶ 28-29.) Reasonable conclusion: Tech Ion is about to rework the funding proposal so that it can be successful.

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=43ea7434-e811-48b4-8808-54ac947615b4

Partial Document Cited by Plaintiff	Conclusions
ready to work overnight, etc., if we agree on the changes of concept..." (Emphasis added.) (CC, ¶29.)	
"The dilema [sic] we face is how to use Xray and Ebeam in the CEASA without hurting the JV? The best solution is to establish CEASA as a Center of Excellence for Food Irradiation. *In this manner, we will have government support and financing for the facility, hopefully at zero interest costs. If we follow this strategy, we will have Brazilian federal government support within the WB* [*i.e.*, World Bank], we will push for ICGFI next meeting in June to be in Brazil in our premises, transfer the PAHO project from Manaus to Rio, etc. The governor of the State of Rio is interested in the idea and the minister of Science and Technology. I believe that we should include this idea in the text." (Emphasis added.) (CC, ¶ 29.)	Plaintiffs conclude that this document shows the joint venture had to "scramble for a solution" to "devastating" problems with funding. (CC, ¶¶ 28-29.) <u>Reasonable conclusion</u>: Tech Ion <u>will have</u> government support and funding at zero cost and <u>will have</u> Brazilian government support within the World Bank.
"Overall Conclusion: Let's change the image of Rio to a Center of Excelence [sic] to justify the presence of X-ray and E-beam there, and *to enable us to obtain government funds – hopefully grants – to finance the project*." (Emphasis added.) (CC, ¶ 29.)	Plaintiffs conclude that this document "struck at the heart" of SBB's planned operation. (CC, ¶ 30.) <u>Reasonable conclusion</u>: Changing the image of the Rio center <u>will enable</u> the venture to obtain government funds, hopefully grants, to finance the project.

At the time it recognized revenue, SureBeam had every reason to believe that Delphos was doing its job and Tech Ion would obtain funding and satisfy its obligations. Whether, in hindsight, Tech Ion obtained funding is irrelevant.

Also, the Court need not accept as true Plaintiffs' conclusory allegation that Tech Ion lost its "last chance" for funding when Brazil closed SUDAM. (CC, ¶¶ 37-39, 86.) Plaintiffs have not alleged any facts to show that Tech Ion, at the time of the purported registration statement: (1) would not obtain funding from other government agencies; (2) would not obtain funding from other non-governmental organizations; or (3) would not obtain private interest-bearing financing. <u>See</u> <u>In re Pacific Gateway Exch., Inc. Sec. Litig.</u>, No. C-00-1211 PJH, 2002

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=43ea7434-e811-48b4-8808-54ac947615b4

1 U.S. Dist. LEXIS 8014, at *51 (N.D. Cal. Apr. 30, 2002) (dismissing claim based on defendants'
2 alleged failure to disclose problems in obtaining financing where plaintiffs did not allege
3 sufficient facts to show "that defendants were unable to identify alternative sources of funding").

4 2. SureBeam's Statement That It "Expected" to Derive $55 Million in
5 Revenue from Tech Ion over the Next Three Years Was a Forward-
6 Looking Statement Protected by the Bespeaks Caution Doctrine

7 "The bespeaks caution doctrine provides a mechanism by which a court can rule as
8 a matter of law ... that defendants' forward-looking representations contained enough cautionary
9 language or risk disclosure to protect the defendant against claims of securities fraud." In re
10 Worlds of Wonder Sec. Litig., 35 F.3d 1407, 1413 (9th Cir. 1994). A motion to dismiss will
11 succeed "where the documents containing defendants' challenged statements include enough
12 cautionary language or risk disclosure that 'reasonable minds' could not disagree that the
13 challenged statements were not misleading." Lilley v. Charren, 936 F. Supp. 708, 714 (N.D. Cal.
14 1996).[16]

15 SureBeam's forecast in the Registration Statement that it "expected" the
16 relationship with Tech Ion to result in "approximately $55.0 million in sales revenues ... over the
17 next three years" is a classic forward-looking statement. (CC, ¶¶ 38-39.) Also, the Registration
18 Statement expressly defines SureBeam's use of the word "expected" as a forward-looking
19 statement. (Ex. 1 at p. 23 (forward-looking statements include those using the word "expects,"
20 and "[y]ou should not place undue reliance on these forward-looking statements").)

21 SureBeam expressly warned investors that the systems it sold to customers such as
22 Tech Ion "are not yet installed or in operation and ... [a] reduction or delay ... could significantly
23 reduce our revenues." (Ex. 1 at p. 16.) SureBeam further warned that "[w]e cannot assure you
24

25 [16] Also, general statements of optimism are not actionable. Southland Sec. Co. v. Inspire Ins.
Solutions Inc., 365 F.3d 353, 372 (5th Cir. 2004); In re Foundry Networks Sec. Litig., 2003 WL
26 22077729, Case No. C00-4823, MMC, at * 13-16 (N.D. Cal. Aug. 29, 2003); In re Splash Tech
Sec. Litig., 160 F. Supp.2d 1059, 1077 (N.D. Cal. 2001). "[V]ague, hyperbolic statements of
27 optimism lack sufficient materiality to support a claim of securities fraud, because no reasonable
investor would rely on such statements." Pacific Gateway, 2002 U.S. Dist. LEXIS at * 36, Fn. 7.
28

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=43ea7434-e811-48b4-8808-54ac947615b4

1 that we will continue to derive revenues from [Tech Ion], [or] that revenues from [Tech Ion] will
2 continue at current or historical levels." (Id.)

3 SureBeam also cautioned potential investors that the construction of SBB's
4 facilities was facing problems – the "expected completion date of the first service center in Brazil
5 was postponed from the fourth quarter of 2000 to the third quarter of 2001 as a result of
6 unanticipated delays in the construction process. Any delay in the deployment of our systems
7 could adversely affect our revenues and cash flows." (Id. at p. 19.) With these disclosures,
8 SureBeam's "expectations" are not actionable.

9 3. SureBeam's Statements Regarding the Interest It Acquired in the Joint
10 Venture Were Not False or Misleading

11 SureBeam stated in the Registration Statement that it acquired a 19.9% equity
12 interest in the joint venture with Tech Ion "without charge" and the joint venture was created with
13 "no initial capital contribution from either party." (CC, ¶ 40.) Plaintiffs contend that these
14 statements were false because Titan had "contributed" $5 million to Tech Ion. (Id.)

15 Plaintiffs have not pled how SureBeam's statement was false, misleading or
16 material. SureBeam and Titan were separate corporations. Plaintiffs concede that the
17 Registration Statement disclosed the $5 million Titan "contribution" for what it was – a loan from
18 Titan, not a contribution from SureBeam. (CC, ¶ 40.) SureBeam accurately stated that it
19 acquired its interest in SBB without charge.

20 **C. Plaintiffs Fail to Allege That They Acquired Their Securities Pursuant to or**
21 **Traceable to a Registration Statement**

22 To state a section 11 claim, Plaintiffs must allege that they purchased their shares
23 "directly in the public offering for which the misleading registration statement was filed or …
24 traceable to the public offering." Guenther, 759 F. Supp. at 1439. They must plead the specific
25 dates and facts to establish tracing for all of their shares. See Lilley, 936 F. Supp. at 716 ("given
26 the fact that the market eventually contained shares that were not issued pursuant to the
27 prospectuses … plaintiffs must amend their pleadings to allege the specific dates and facts that
28 establish the representative plaintiffs' standing for a section 11 claim") (emphasis added); Krim v.

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=43ea7434-e811-48b4-8808-54ac947615b4

pcOrder.com, Inc., 210 F.R.D. 581, 586 (W.D. Tex. 2002) ("Plaintiffs must demonstrate *all* stock for which they claim damages was actually issued pursuant to a defective [registration] statement, not just that it might have been, probably was, or most likely was....") (emphasis original).

Plaintiffs fail to allege section 11 standing. Plaintiffs allege only that two members of the putative class, Melvyn Manaster and James Janette, purchased certain of their shares (but not all) "directly from or traceable to SureBeam's Initial Public Offering." (CC, ¶ 69(d)-(e).)[17] Plaintiffs allege that all putative class members "purchased or otherwise acquired SureBeam common stock ... during the Class Period" (CC, ¶ 169), which spans from March 2001 to August 2003.[18] Plaintiffs fail to allege the specific dates and facts Lilley requires to establish standing. (Id., ¶¶ 2, 69.)[19]

D. Plaintiffs Do Not Plead Reliance

If a shareholder acquired his or her security after the issuer "has made generally available ... an earning statement covering a period of at least twelve months beginning after the effective date of the registration statement," then the shareholder must plead and prove that he or she bought the security relying on the material misstatements "in the registration statement or relying upon the registration statement and not knowing of" the material omissions. 15 U.S.C. § 77k(a).

---

[17] Notably, neither Manaster nor Janette are lead plaintiffs. In the process of being appointed a lead plaintiff, FMC Ltd. Pension Plan & Trust ("FMC") represented to the Court that it had standing to assert section 11 claims. SureBeam Corp., 2003 U.S. Dist. LEXIS 25022, at *30-31. Now, after being named as a lead plaintiff, FMC fails to allege section 11 standing.

[18] Following Titan's August 2002 spin-off of the SureBeam subsidiary, the market contained 60 million shares of SureBeam stock that was not issued in the IPO. See CC, ¶ 61. Thus, any Plaintiffs who acquired their securities after the spin-off would have no way of knowing whether their shares are traceable to the IPO, and cannot assert a section 11 claim. Lilley, 936 F. Supp. at 715-16.

[19] Plaintiffs' section 11 claim also fails because Plaintiffs fail to allege that SureBeam made false or misleading statements in a Registration Statement, rather than a prospectus. 15 U.S.C. § 77k(a); see also Shapiro, 964 F.2d at 288-9 (section 11 plaintiff must allege the threshold requirement of a registration statement). A prospectus "is a distinctly separate document under the federal securities laws." Shapiro, 964 F.2d at 288. Plaintiffs define "Prospectus" to include a "registration statement" (CC, ¶ 2), yet the only SureBeam SEC filing on which they rely is a prospectus allegedly filed on March 19, 2001. (Id., ¶ 38). SureBeam did not file a registration statement on March 19. (See Ex. 5 at p. 169.) SureBeam filed the Registration Statement (Form S-1/A) on March 5, 2001. (Id.)

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=43ea7434-e811-48b4-8808-54ac947615b4

1 Plaintiffs define the putative class as shareholders who purchased or acquired
2 SureBeam securities between March 16, 2001 and August 27, 2003. (CC, ¶¶ 1, 169.) SureBeam
3 filed a Form 10-K with the SEC on April 1, 2002 and a Form 10-Q on May 15, 2002 which, taken
4 together, constituted earnings statements that covered the twelve months after the effective date
5 of the registration statement. (CC, ¶¶ 40, 43, 111, 113.) Thus, Plaintiffs are required to plead
6 either that all section 11 putative plaintiffs purchased shares before May 15, 2002, or that putative
7 plaintiffs who purchased shares after that date relied on the Registration Statement. Plaintiffs
8 have not done so.

9 **III. PLAINTIFFS FAIL TO STATE A CLAIM AGAINST TITAN UNDER SECTION**
10 **20(a) OF THE 1934 ACT**

11 To plead a cause of action under section 20(a) against Titan as a SureBeam
12 "control person," Plaintiffs must first plead that SureBeam violated section 10(b) of the 1934
13 Act.[20] If Plaintiffs fail to plead a primary violation of the securities laws, "any discussion of
14 control person liability is moot." In re Splash Tech Holdings, Inc., No. C 99-00109 SBA, 2000
15 U.S. Dist. LEXIS 15369, at *84 (N.D. Cal. Sept. 29, 2000).[21]

16 To plead a primary violation, Plaintiffs must plead facts demonstrating that "there
17 has been a misstatement or omission of a material fact, made with scienter, which proximately
18 caused [their] injury." McCormick v. Fund America Co., 26 F.3d 869, 875 (9th Cir. 1994).
19 Plaintiffs must also plead their reliance on the material misrepresentations or omissions, or allege
20 that the security was actively traded in an "efficient market," which substitutes "fraud on the
21 market" for actual reliance. Basic v. Levinson, 485 U.S. 224, 247 (1988); Binder v. Gillespie,
22 184 F.3d 1059, 1064 (9th Cir. 1999).

23 [20] Section 10(b) of the 1934 Act states that "[i]t shall be unlawful for any person . . . [t]o use or
24 employ in connection with the purchase or sale of any security . . . any manipulative or deceptive
device…" 15 U.S.C. § 78j(b). Rule 10b-5 promulgated thereunder prohibits (1) employing any
25 device, scheme or artifice to defraud, (2) to make any material untrue or misleading statement or
omission, or (3) to engage in any act, practice or course of business which operates or would
26 operate as a fraud or deceit upon any person. 17 C.F.R. § 240.10b-5.

27 [21] Plaintiffs admit that as of August 5, 2002, Titan completed its spin-off of SureBeam and was
"effectively SureBeam free." (CC, ¶¶ 61-62.) Thus, Titan cannot be held liable as a "control
28 person" for any alleged SureBeam conduct that Plaintiffs contend gives rise to section 10(b)
liability after August 5, 2002.

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=43ea7434-e811-48b4-8808-54ac94761fb4

Pursuant to the PSLRA, section 10(b) claims must be pled with heightened specificity. In re Silicon Graphics Inc. Sec. Litig., 183 F.3d 970, 974 (9th Cir. 1999). A plaintiff must "specify each statement alleged to have been misleading; the reason or reasons why the statement is misleading; and if an allegation regarding the statement or omission is made on information and belief, the complaint shall state with particularity all facts on which that belief is formed." In re Foundry Networks, Inc. Sec. Litig., No. C 00-4823 MMC, 2003 U.S. Dist. LEXIS 18200, at *7 (N.D. Cal. Aug. 29, 2003) (citing 15 U.S.C. § 78u-4(b)(1)); See In re Vantive Corp. Sec. Litig., 283 F.3d 1079, 1084-85 (9th Cir. 2002).

A. Plaintiffs Fail to Plead Facts Demonstrating That SureBeam Made False or Misleading Statements or Omissions of Material Fact[22]

1. SureBeam's Post-IPO Alleged Misrepresentations Are Forward-Looking Statements Protected by the PSLRA's "Safe Harbor" Provision and the Bespeaks Caution Doctrine

The PSLRA provides a "safe harbor" from securities fraud for "forward-looking statements that are immaterial, are limited by meaningful cautionary statements, or are made without knowledge of their falsity." 15 U.S.C. § 78u-5(c); In re Turbodyne Techs. Sec. Litig., No. CV 99-00697 MMM (BQRx), 2002 U.S. Dist. LEXIS 25738, at *42, Fn. 99 (C.D. Cal. Mar. 13, 2002). The PSLRA defines forward-looking statements to include, among other things, "a statement containing a projection of revenues, income, . . . earnings . . . or other financial items . . . a statement of the plans and objectives of management for future operations, including plans related to the products or services of the issuer . . . a statement of future economic performance." 15 U.S.C. § 78u-5(i)(1). The judicially-created bespeaks caution doctrine, described in section II(B)(2), supra, provides similar protection. See Worlds of Wonder, 35 F.3d at 1413.

a. Anticipated demand for irradiated food and processing

In press releases and SEC filings alleged in the complaint, SureBeam stated that it

[22] Plaintiffs fail to allege facts showing that the Registration Statement contains false or misleading statements. (See section II(B), supra) This section discusses allegations regarding post-IPO allegedly false or misleading statements (up to August 5, 2002, when Titan became "SureBeam free"). (See CC, ¶¶ 61-62.)

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=43ea7434-e811-48b4-8808-54ac947615b4

1 "expected" and "anticipated" strong demand for irradiated food and "anticipated" demand for its
2 processing centers to increase. (CC, ¶¶ 52, 91, 99, 101.) It also cautioned that statements
3 regarding the "expected processing capacity and benefits of the new processing facility" were
4 forward-looking and are "subject to risks and uncertainties that could cause actual results to differ
5 materially from those set forth in or implied by forward-looking statements." (Ex. 2 at 97.)
6 SureBeam stated that "these risks and uncertainties include the risks associated with the
7 Company's entry into new commercial businesses and new markets such as the food
8 pasteurization market that require the company to develop demand for its product . . ." (Emphasis
9 added.) (Id.) SureBeam's statements are not actionable because they are forward-looking and
10 accompanied by appropriate risk disclosure. Plaintiffs also fail to plead facts demonstrating that,
11 at the time SureBeam stated that it anticipated demand to increase, SureBeam did not honestly
12 expect demand to increase.

13 b. Analyst conference call statements

14 Plaintiffs allege that David Rane, SureBeam's CFO, stated on May 5, 2002 in an
15 analyst conference call that SureBeam "expected" to collect $58 million in unbilled receivables
16 by the end of 2003, a portion of which was attributable to revenue from RESAL. (CC, ¶ 112.)
17 Plaintiffs also allege that Mr. Rane stated in an analyst conference call on July 29, 2002 that
18 SureBeam "projected" $14 to $18 million in processing center revenue. (Id., ¶ 115.) With
19 respect to RESAL, Plaintiffs plead that this was "an extraordinary statement given that
20 [SureBeam's] venture with Tech Ion in Brazil had failed and that its venture in Saudi Arabia had
21 been unable to secure funding from the Saudi government." (Id., ¶ 112.)

22 However, Plaintiffs fail to plead particular facts raising a strong inference that Mr.
23 Rane had actual knowledge that the projections could not be achieved. Nor do Plaintiffs plead
24 how the transaction in Brazil, the revenue for which had already been written off, had any impact
25 on unbilled receivables in 2003. Plaintiffs also fail to plead that RESAL was not expecting
26 funding elsewhere. Notably, RESAL actually paid SureBeam $7.5 million in 2003. (CC, ¶ 50.)
27 Moreover, at the outset of calls, SureBeam's investor relations representative warned investors
28 not to rely on forward-looking "expectations" and "projections." (See Ex. 3 at pp. 135-136.) See

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=43ea7434-e811-48b4-8808-54ac947615b4

1 15 U.S.C. § 78u-5(i)(1).

2 c. Titan's expectations are irrelevant

3 Plaintiffs allege that Titan issued a press release stating that Titan "expected"
4 SureBeam to have increased revenues and profits after the IPO. (CC, ¶ 87.) Plaintiffs only sued
5 Titan as a control person for SureBeam's alleged violations of section 10(b), not as a primary
6 violator. Titan's statements regarding SureBeam's expected revenue are irrelevant. In any event,
7 Titan's "expectation" is another classic forward-looking statement that is not actionable.

8 2. Plaintiffs Fail to Plead Facts That Demonstrate That SureBeam's Revenue
9 Recognition Was Improper

10 Plaintiffs claim that SureBeam improperly recognized revenue on the Tech Ion and
11 RESAL transactions. (CC, ¶¶ 40, 48-50, 81-86, 91-92, 99-100, 102, 108, 112-116, 118-119, 125-
12 127.) As discussed in section II(B)(1), supra, Plaintiffs fail to allege that when SureBeam
13 recognized revenue, it had reason to believe that Tech Ion would not obtain funding.

14 Plaintiffs claim that SureBeam should not have recognized RESAL revenue
15 because RESAL needed to secure funding. (CC, ¶¶ 46, 49.) But Plaintiffs fail to allege facts to
16 demonstrate that RESAL would not obtain funding. Plaintiffs concede that RESAL had numerous
17 sources of funding: "investors, the Saudi Industrial Development Fund, commercial banks, and/or
18 other individual lenders . . ." (Id., ¶ 46.) In 2003, RESAL paid over $7.5 million to SureBeam,
19 and thus had obtained funding. (Id., ¶ 50.)

20 Plaintiffs allege that in August 2003, Deloitte, whom SureBeam hired as its
21 independent auditor in June 2003, had "questions" and raised "issues of concern" regarding
22 SureBeam's past revenue recognition. (CC, ¶¶ 135-36.) Deloitte's "questions" do not raise the
23 inference that SureBeam improperly recognized revenue. Also, the press release Plaintiffs quote
24 does not identify the accounting issues or specify the contracts Deloitte questioned. (CC, ¶ 136.)
25 Applying GAAP requires the auditor to make professional judgments, with which a different
26 auditor could disagree. Such disagreement does not make the accounting improper. See, e.g.,
27 SEC v. Seaboard Corp., 677 F.2d 1301, 1311, Fn. 13 (9th Cir. 1982) ("Generally accepted
28 accounting standards are general standards of conduct relating to the auditor's professional

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=43ea7434-e811-48b4-8808-54ac947615b4

1 qualities and to the judgments exercised by him in the performance of his examination and
2 report."); In re Cirrus Logic Sec. Litig., 946 F. Supp. 1446, 1457 (N.D. Cal. 1996) ("GAAP is not
3 a set of rules insuring identical treatment of identical transactions; rather it tolerates a range of
4 reasonable treatments, leaving the choice among alternatives to management.").

5 The consolidated complaint and Plaintiffs' original complaint filed on August 27,
6 2003 allege that two national accounting firms issued unqualified audit opinions of SureBeam's
7 financial statements. (Ex. 4, original complaint, ¶ 38; CC, ¶ 133.) KPMG issued its unqualified
8 opinion of SureBeam's financial statements for the year ended December 31, 2002, after the
9 events that Plaintiffs claim allegedly demonstrate that the accounting was wrong.[23]

10 **B. Plaintiffs Fail to Plead Facts Giving Rise to a Strong Inference That**
11 **SureBeam Acted with Scienter**

12 To state a section 10(b) claim, the complaint must plead in great detail facts that
13 raise a strong inference of scienter. 15 U.S.C. § 78u-4(b)(1); Silicon Graphics, 183 F.3d at 974.
14 Scienter is "a mental state embracing intent to deceive, manipulate or defraud." Ernst & Ernst v.
15 Hochfelder, 425 U.S. 185, 193 n.12 (1976). Scienter means "knowing or intentional
16 misconduct." Id. at 197-99.[24] In determining whether Plaintiffs have shown a strong inference of
17 scienter, the court must consider all reasonable inferences, including inferences unfavorable to
18 Plaintiffs. Gompper v. VISX, Inc., 298 F.3d 893, 897 (9th Cir. 2002).

19 Plaintiffs fail to plead that SureBeam made any false or misleading statements, let
20 alone pleading any facts giving rise to a strong inference of SureBeam's scienter.

21

22

23 [23] At the time KPMG issued a clean audit opinion, SureBeam had already taken a majority interest in the Tech Ion joint venture on October 23, 2001. (CC, ¶¶ 44, 103-06.) SureBeam
24 already recognized revenue from Tech Ion and RESAL using the percentage of completion method of accounting. (Id., ¶¶ 48-50, 84, 91, 92, 99, 100, 102, 108, 113, 118, 119.) Amounts
25 outstanding under the working capital line of credit from Titan remained unpaid as of April 1, 2002. (Id., ¶ 40.) Titan also already forgave debt owed by Tech Ion. (Id., ¶ 44.)

26 [24] In the Ninth Circuit, "Recklessness satisfies the scienter requirement only 'to the extent that it reflects some degree of intentional or conscious misconduct.'" SEC v. Rubera, 350 F.3d 1084,
27 1094-95 (9th Cir. 2003) (emphasis added). Plaintiffs must plead, at a minimum, particular facts giving rise to a strong inference of deliberate or conscious recklessness." Pacific Gateway, 2002
28 U.S. Dist. LEXIS 8014, at *54.

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=43ea7434-e811-48b4-8808-54ac947615b4

1. Failure to Comply with GAAP Does Not Raise a Strong Inference of Scienter

Plaintiffs fail to plead facts to support their conclusion that SureBeam violated GAAP. Yet, even if Plaintiffs had properly pled that SureBeam violated GAAP, inaccurate accounting does not raise an inference of scienter. "The mere publication of inaccurate accounting figures, or a failure to follow GAAP, without more, does not establish Scienter." Provenz v. Miller, 102 F.3d 1478, 1490 (9th Cir. 1990). Scienter requires "more than a misapplication of accounting principles." In re Software Toolworks Inc. Sec. Litig., 38 F.3d 1078, 1089-90 (9th Cir. 1994) (citing Worlds of Wonder, 35 F.3d at 1426); see also In re Northpoint Communications Group, Inc. Sec. Litig., 184 F. Supp. 2d 991, 998 (N.D. Cal. 2001) ("With accounting fraud . . . the necessary scienter is in general not established merely by the publication of inaccurate accounting figures, or failure to follow generally accepted accounting principles"); In re Dura Pharmaceuticals, Inc. Sec. Litig., No. 99CV0151-L (NLLS), 2000 WL 33176043, at *9 (S.D. Cal. July11, 2000) ("even a deliberate violation of GAAP without more, does not amount to fraud . . .").

Two national accounting firms gave unqualified audit opinions of the financial statements containing the revenue at issue. (Original complaint, ¶ 38; CC, ¶ 133.) SureBeam never reversed the revenue. Plaintiffs' allegations that SureBeam violated GAAP do not raise an inference of scienter.

2. Plaintiffs' Allegations That Tech Ion and RESAL Needed Funding to Pay SureBeam Do Not Give Rise to an Inference of Scienter

Plaintiffs contend that Tech Ion and RESAL's inability to secure funding demonstrates SureBeam's scienter. (CC, ¶¶ 139-148.) Plaintiffs are attempting to plead fraud by hindsight. Even if SureBeam was mistaken in its belief that Tech Ion would pay and RESAL would pay in full (it paid SureBeam $7.5 million) for the equipment, Plaintiffs do not plead facts showing that SureBeam knew or was intentionally reckless about whether Tech Ion or RESAL would pay.

With respect to Tech Ion, the e-mails Plaintiffs cite reflect that funding was likely.

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=43ea7434-e811-48b4-8808-54ac94761 5b4

1 (CC, ¶¶ 25-30.) Under Gompper, the Court must consider inferences negative to Plaintiffs. 298
2 F.3d at 897. Also, Plaintiffs fail to plead that SureBeam ever knew that SUDAM closed. Also, as
3 previously discussed, Plaintiffs fail even to allege that Tech Ion would not obtain other funding.

4 Plaintiffs also allege that SureBeam knew by April 2001 that Tech Ion's
5 construction of the SBB facility was behind schedule and that as of July 2001 it had not been built
6 (CC, ¶¶ 41-42.) But these allegations do not demonstrate that the facility would not be built or
7 that SureBeam knew that Tech Ion would not eventually pay. Further, Plaintiffs' allegations that
8 SureBeam had to take over the venture in October 2001 does not demonstrate that SureBeam ever
9 knew before then that Tech Ion could not pay.

10 **C. Plaintiffs Fail to Plead Actual Reliance or Reliance on an Efficient Market**

11 To state a section 10(b) claim, Plaintiffs must plead reliance. See Paracor Finance
12 Inc. v. General Elec. Capital Corp., 96 F.3d 1151, 1157 (9th Cir. 1996). Rule 9(b) of the Federal
13 Rules of Civil Procedure requires that reliance be pled with particularity. Turbodyne Techs.,
14 2002 U.S. Dist. LEXIS 25738, at *46 (citing In re NationsMart Corp. Sec. Litig., 130 F.2d 309,
15 321-22 (8th Cir. 1997)). Here, Plaintiffs do not allege actual reliance. Rather, "they seek to plead
16 reliance under the fraud-on-the-market doctrine." Turbodyne Techs., 2002 U.S. Dist. LEXIS
17 25738, at *46 (citing Basic, 485 U.S. at 241-42).[25] The fraud-on-the-market "presumption of
18 reliance" is available "only when plaintiffs allege that defendants made material
19 misrepresentations or omissions regarding a security actively traded in an 'efficient market.'"
20 Basic, 485 U.S. at 247.

21 "[T]he complaint must state with particularity the facts upon which plaintiffs base
22 their assertion that [SureBeam's] stock is traded in an efficient market." Turbodyne Techs., 2002
23 U.S. Dist. LEXIS 25738, at *49. The fact that a stock traded on the NASDAQ does not
24 necessarily mean that it traded in an efficient market. Id. at *49. In determining what constitutes
25 an "efficient market," the Ninth Circuit has adopted the five-factor test articulated in Cammer v.

26
27 [25] The fraud-on-the-market doctrine presumes that "in an open and developed securities market, the price of a company's stock is determined by the available material information regarding the company and its business.... Misleading statements will therefore defraud purchasers of stock
28 even if the purchasers do not directly rely on the misstatements." Basic, 485 U.S. at 241-42.

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=43ea7434-e811-48b4-8808-54ac947615b4

1 Bloom, 711 F. Supp. 1264, 1286-87 (D.N.J. 1989). See Binder, 184 F.3d at 1064; Turbodyne
2 Techs., 2002 U.S. Dist. LEXIS 25738, at *46-53. Cammer's five-factor test considers:

3 (1) whether the stock trades at a high weekly volume; (2) whether securities analysts follow and report on the stock; (3) whether the
4 stock has market makers and arbitrageurs; (4) whether the company
5 is eligible to file an SEC registration Form S-3, as opposed to Form S-1 or S-2; and (5) whether there are "empirical facts" showing
6 causation between corporate events or releases and an immediate response in the stock price.

7 Cammer, 711 F. Supp. at 1286-87. The Turbodyne Technologies court held that with respect to a
8 stock traded on NASDAQ, like SureBeam, "pleading two of the five factors is not sufficient to
9 satisfy the particularity requirement of Rule 9(b)." 2002 U.S. Dist. LEXIS 25738, at *52.
10 Here, Plaintiffs have failed to allege any of the five factors required by the
11 Cammer test. In fact, the consolidated complaint alleges that a factor goes against the Cammer
12 test: SureBeam filed an S-1, not an S-3. (CC, ¶ 136.) Plaintiffs merely allege that "Plaintiffs and
13 the Class have suffered damages in that, in reliance on the integrity of the market, they paid
14 artificially inflated prices for SureBeam stock." (CC, ¶ 188.) This cursory allegation does not
15 satisfy the Cammer test or the particularity requirement of Rule 9(b).

16
17 **IV. PLAINTIFFS FAIL TO PLEAD FACTS ESTABLISHING THAT TITAN WAS A**
18 **"CONTROL PERSON" OF SUREBEAM**

19 Section 20(a) of the 1934 Act imposes secondary liability on one who "controls"
20 any person liable under section 10(b) of the 1934 Act. See, e.g., In re ZZZZ Best Securities
21 Litigation, No. CV-87-3574-RSWL (Bx), 1994 U.S. Dist. LEXIS 19784, at *19-20 (C.D. Cal.
22 Oct. 27, 1994). Section 15 of the 1933 Act applies the same test for "control person" liability for
23 a section 11 claim. Durham, 810 F.2d at 1503.
24 To establish control, Plaintiffs must allege (1) a "primary violation of federal
25 securities laws";[26] and (2) "that the defendant exercised actual power or control over the primary
26 violator." Howard v. Everex Systems, Inc., 228 F.3d 1057, 1065 (9th Cir. 2000); No. 84

27 [26] Plaintiffs also should at least name the alleged primary violator, even if bankrupt like
28 SureBeam, as a defendant. See Griffin v. Painewebber Inc., 84 F. Supp. 2d 508, 516 (S.D.N.Y. 2000). Here, Plaintiffs fail to name SureBeam as a defendant.

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=43ea7434-e811-48b4-8808-54ac947615b4

Employer-Teamster Joint Counsel Pension Trust Fund v. America West Holding Corp., 320 F.3d 920, 945 (9th Cir. 2003); Allison v. Brooktree Corp., 999 F. Supp. 1342, 1355 (S.D. Cal. 1998) ("In order to state a claim for control person liability, Plaintiffs must allege actual power or influence over the company."); Ballard v. Savage, 1997 U.S. Dist. LEXIS 24013 No. 92-840 JM (AJB), *22 (S.D. Cal. No. 10 1997).[27]

Whether the defendant is a control person involves "scrutiny of the defendant's participation in the day-to-day affairs of the corporation and the defendant's power to control corporate actions." Howard, 228 F.3d at 1065 (citing Kaplan v. Rose, 49 F.3d 1363, 1382 (9th Cir. 1994)). Circumstances of a "control relationship" must be pled with sufficient particularity to satisfy Federal Rule of Civil Procedure 9(b). Gompper, 298 F.3d at 895.

Plaintiffs make only the cursory allegation that "Titan, by reason of its stock ownership and control of SureBeam, was a controlling person of SureBeam and had power and influence, and exercised its power and influence, to cause defendants to engage in the violations of law complained of herein." (CC, ¶ 184.) Plaintiffs fail to allege with particularity that Titan exercised its ability to control SureBeam. The Court should dismiss Plaintiffs' section 15 and 20(a) claims against Titan.

CONCLUSION

For the foregoing reasons, the Titan Defendants respectfully request that the Court dismiss the first, second and fourth claims of the consolidated complaint.

DATED: June 14, 2004

ALSCHULER GROSSMAN STEIN & KAHAN LLP

By
Jeremy E. Pendrey
Attorneys for Defendants
The Titan Corporation, Dr. Gene Ray
and Susan Golding

---

[27] See also Aldridge v. A.T. Cross Corp., 284 F.3d 72, 85 (1st Cir. 2002); Commodity Futures Trading Comm. v. Baragosh, 278 F.3d 319, 330 (4th Cir. 2002); Harrison v. Dean Witter Reynolds, Inc., 79 F.3d 609, 614 (7th Cir. 1996); Farley v. Henson, 11 F.3d 827, 835 (8th Cir. 1993).