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known as First Union Securities, Inc.)

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) **REPLY MEMORANDUM IN SUPPORT OF THE UNDERWRITER DEFENDANTS' MOTION TO DISMISS THE SECTION 11 CLAIM AGAINST THEM IN PLAINTIFFS' CONSOLIDATED COMPLAINT** Date: September 17, 2004 Time: 11:00 a.m. Location: Courtroom 6 Hon. Jeffrey T. Miller

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Defendants Merrill Lynch, Pierce, Fenner & Smith Incorporated, Credit Suisse First Boston LLC and Wachovia Capital Markets LLC, formerly known as First Union Securities, Inc. (collectively, the "Underwriters"), respectfully submit this reply memorandum in support of their motion to dismiss plaintiffs' consolidated complaint (the "Complaint").

I. INTRODUCTION

Unable to refute the fact that SureBeam's Registration Statement disclosed all facts relevant to the only two alleged misrepresentations pertinent to their case against the Underwriters, plaintiffs respond by mischaracterizing the facts and the law. Plaintiffs also mischaracterize the Complaint itself, which does not allege what the Opposition ("Opp.") says it does.

Plaintiffs misstate the law in claiming that "the adequacy of disclosure [in a Registration Statement] is an intensely factual issue which is inappropriate for resolution at the pleading stage." Opp. 2:21-22. In fact, such a review is entirely appropriate. See, e.g., In re Stac Elec. Sec. Litig., 89 F.3d 1399, 1405 (9th Cir. 1996) (affirming motion to dismiss Section 11 claim because "all of the omissions alleged by [plaintiff] were either actually disclosed, or need not have been disclosed, in Stac's prospectus."), *cert. denied*, 520 U.S. 1103, 117 S.Ct. 1105 (1997).

Plaintiffs are also wrong that "the 'bespeaks caution' doctrine, by definition, cannot apply to the alleged omissions of material facts contained in the Prospectus." Opp. 2:23-24. The Ninth Circuit has said precisely the opposite: "'The bespeaks caution doctrine provides a mechanism by which a court can rule as a matter of law (*typically in a motion to dismiss for failure to state a cause of action* . . .) that defendants' forward-looking representations contained enough cautionary language or risk disclosure to protect the defendant against claims'" under Section 11. In re Worlds of Wonder Sec. Litig., 35 F.3d 1407, 1413 (9th Cir. 1994) (emphasis added); accord Employers Teamsters v. Clorox Co., 353 F.3d 1125, 1132 (9th Cir. 2004) (same).

Plaintiffs also misstate the Complaint by saying that the Underwriters reviewed certain documents and "knew" "as part of their pre-IPO investigation" that certain anticipated funding sources were not available to the joint venture. Opp. 7-8 & 12 (where this assertion is made five separate times.) But the Complaint actually says the opposite: it castigates the Underwriters for allegedly not "conduct[ing] even the slightest due diligence on the venture . . . ." Compl. ¶89; see

also id. ¶¶163-66.

As far as factual issues are concerned, plaintiffs do not contest that the Complaint's pertinent allegations against the Underwriters are contained in paragraphs 40 and 86 (see Opp. 2:13-14), which assert that it was a misrepresentation that SureBeam Brazil was created with no initial capital contribution (Compl. ¶40), and that it was a material omission not to say that "the very foundation of the joint venture was based on entities with no proven track record, no customer base and which had no ability to pay . . . ." Compl. ¶86.

But as pointed out in the Underwriters' opening memorandum, the Registration Statement fully disclosed what plaintiffs claim was misrepresented or omitted. Not only did the Registration Statement expressly warn that the joint venture was a "*start up company*" created "with *no initial capital contribution* from either party," it disclosed that Tech Ion was provided with a $5 million line of credit. It further warned that "[t]he markets for our SureBeam system are *unproven*," "that *future revenues* from sales or our SureBeam systems . . . . are *highly uncertain*" and that SureBeam's Brazilian operations were "subject to several *inherent risks* that could increase our costs and decrease our profit margins including . . . . changes in [Brazil's] *political* or *economic conditions*." Tu Decl., Ex. A at 11-12, 14-15 & 39. The Registration Statement even cited the "delays in the construction process" that had already occurred in Brazil as something that had, and might continue to "adversely affect [Surebeam's] revenues." Id. at 19.

In this context, the claim that a reasonable investor would not know that the joint venture had no proven track record or customer base, that it did not have an assured ability to meet its obligations, or that Brazil's history of political instability was not a risk, simply ignores reality. See Lilley v. Charren, 17 Fed. Appx. 603, 608, 2001 WL 985705, *4 (9th Cir. 2001) ("any investor reasonably should have recognized and anticipated the possibility that . . . economic developments, or other uncertainties affecting a novel technology might prevent the company from reaching its optimistic goals."); Parnes v. Gateway 2000, Inc., 122 F.3d 539, 546 (8th Cir. 1997) ("Some matters are such common knowledge that a reasonable investor can be presumed to understand them.").

As far as the "no capital contribution" allegation, plaintiffs attempt to blur the corporate lines that are carefully articulated in the Registration Statement, but this is ultimately self-defeating.

Plaintiffs allege that the joint venture was not formed with "no initial capital investment from either party" as stated in the Registration Statement, because Tech Ion received a $5 million line of credit. Compl. ¶40. When the Underwriters pointed out that all this was disclosed, plaintiffs responded in their Opposition by saying the "Prospectus" claimed that the "*venture* was created with no capital contribution from *SureBeam/Titan* . . . ." Opp. 7:14-15. But there is no such thing as "SureBeam/Titan," and what the Registration Statement actually says is that the *joint venture* – i.e., Surebeam Brazil – was formed without either party's (Surebeam's or Tech Ion's) capital contribution. The Tech Ion credit line was also fully described. Plaintiffs collapse those transactions to manufacture a misrepresentation where none exists, but no reasonable person reading this section could have been misled about how Surebeam Brazil was capitalized.

Finally, plaintiffs' argument that "Under controlling Ninth Circuit authority, plaintiffs need not plead their §11 claims with particularity because such claims are based on negligence and not fraud" (Opp. 13:20-22) relies on a series of overruled district court decisions from the Second Circuit, and ignores the rule set forth in the very Ninth Circuit decision cited by plaintiffs. See Vess v. Ciba-Geigy Corp., 317 F.3d 1097, 1104-05 (9th Cir. 2003) (when Section 11 claim "is said to be 'grounded in fraud' or to 'sound in fraud' . . . the pleading of that claim as a whole must satisfy the particularity requirement of Rule 9(b).") (cited in the Opp. 13:22). The fact is the Complaint undeniably attributes allegations of intentional misconduct against *all* defendants, including the Underwriters (Compl. ¶¶5, 11, 41, 64, 93-94, 98 & 105), and expressly incorporates those allegations as a part of its Section 11 claim. Compl. ¶175.

II. DISCUSSION

A. Plaintiffs' Opposition Fails To Address The Full And Complete Disclosures That Are Contained In The Registration Statement

Plaintiffs argue that the Section 11 claims against the Underwriters should not be dismissed because disclosures in a Registration Statement present an "intensely factual issue which is inappropriate for resolution at the pleading stage." Opp. 2:21-25. This misstates the law.

The Ninth Circuit has consistently held that the adequacy of disclosures in a Registration Statement may be determined at the motion to dismiss stage. E.g., Stac, 89 F.3d at 1403 ("if the

adequacy of the disclosure or the materiality of the statement is so obvious that reasonable minds could not differ . . . these issues [are] appropriately resolved as a matter of law.") (quotation omitted); In re VeriFone Sec. Litig., 11 F.3d 865, 870 (9th Cir. 1993) (affirming dismissal of Section 11 claim because plaintiffs "fail to allege non-disclosed material facts").[1] In determining the adequacy of disclosures in a Registration Statement, courts look to the entirety of the disclosures in that document, not just those mentioned in the Complaint. Stac, 89 F.3d at 1405 n.4 ("The district court considered the full text of the Prospectus, including portions which were not mentioned in the complaints. . . . such consideration is appropriate in the context of a motion to dismiss . . . ."). Indeed, the Durning decision cited by plaintiffs recognizes that whether an offering document "failed to disclose a material fact" is "an objective test" which the court may determine as a matter of law. Durning v. First Boston Corp., 815 F.2d 1265, 1268 (9th Cir.), *cert. denied*, 484 U.S. 944 (1987).[2]

The Opposition argues that the disclosures in the Registration Statement were not adequate because: (i) they "overlook the fact that Tech Ion was in dire financial straights at the inception of the venture (possessing on[ly] $1,753 in current assets) and both Tech Ion and SureBeam Brasil desperately needed an infusion of capital to get the project off the ground," and (ii) while "a contribution of $5 million to the venture" was "structured and announced as a 'loan,' defendants made no provision for repayment." Opp. 10:3-16. But in fact the Registration Statement fully disclosed the details of these alleged misrepresentations. See Underwriter's Opening Mem. at 3-5. As the Opposition concedes (Opp. 10:9), the Registration Statement clearly disclosed that the joint venture was "a *start up company* that was created with *no initial capital contribution* from either

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[1] Other circuits are in accord. See Rombach v. Chang, 355 F.3d 164, 175-76 (2d Cir. 2004) (affirming dismissal because "the offering documents either did not omit such information [regarding operational problems] or contained sufficient cautionary language"); Kapps v. Torch Offsore, Inc., __ F.3d __, 2004 WL 1658524, *5 (5th Cir. July 26, 2004) ("many Section 11 cases have been properly dismissed on the pleadings for lack of materiality."); Romine v. Acxiom Corp., 296 F.3d 701, 708 (8th Cir. 2002) (affirming dismissal because registration statement "disclosed all material facts" about contract at issue).

[2] Durning is easily distinguishable on its facts. In Durning, plaintiffs alleged that an offering statement did not adequately disclose that certain bonds were callable prior to 1991. The offering statement identified several redemption means and contained a table listing early redemption dates, the earliest of which was in 1991. A section describing other redemption means stated the bonds "will be subject to mandatory redemption . . . under certain conditions." 815 F.2d at 1265. Given the specific dates, and that no disclosure was made saying that the bonds could be called prior to those dates, the Ninth Circuit held that a reasonable investor could have believed the bonds were not callable prior to the earliest listed date. Id. at 1265-70.

party." Tu Decl., Ex. A at 14-15 & 39 (emphasis added). The Registration Statement made it clear that the joint venture had no track record or experience, no operating history or customer base, and that one of its parties even required a $5 million line of credit, of which $2.2 million was already outstanding as of the year end prior to filing the Registration Statement. Tu Decl., Ex. A at 38-39. The Registration Statement also specifically identified the fact that Surebeam itself had *never* had a profitable quarter. Tu Decl., Ex. A at 12 ("We have incurred operating losses in each quarter since we commenced operations"). In light of these disclosures, no reasonable investor could have been misled into believing that SureBeam Brazil was anything other than an unproven joint venture.

With respect to the line of credit, the Registration Statement clearly contradicts plaintiffs' assertion that "no provision for repayment" was made. The Registration Statement explicitly discloses that the loan would be repaid at an interest rate of "10% per annum" and that repayment of the loan was "secured by the stock and assets of Tech Ion." Tu Decl., Ex. A at 38-39.[3]

Plaintiffs also claim that SureBeam's financial statements incorrectly recognized revenue attributable to the sale of equipment to Tech Ion, but the Complaint tacitly acknowledges the fact that two major accounting firms (Arthur Anderson and KPMG) passed on the appropriateness of this revenue recognition. Compl. ¶¶84-85 & 133. SureBeam's financial statements have not been restated, and nothing in the Registration Statement or the Complaint provides a modicum of support for plaintiffs' bald accusation that the Underwriters "knew" (Opp. 7:19) that Tech Ion could not pay for the equipment. The Complaint provides no explanation as to why the Underwriters should have believed that SureBeam's accounting for the sale was not appropriate. See Stac, 89 F.3d at 1409 ("The plaintiff must set forth what is false or misleading about a statement, and *why it is false*." In other words, the plaintiff must set forth *an explanation* as to why the statement or omission

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[3] Plaintiffs' citation to In re Convergent Sec. Litig., 948 F.2d 507 (9th Cir. 1991) only supports the Underwriters' argument that the disclosures in this case were adequate. In Convergent, the Ninth Circuit affirmed the summary judgment dismissal of claims that defendants had misled investors by "concealing certain cost and production problems." Id. at 515. Recognizing that the Convergent prospectus disclosed "significant risk factors" such as the warning that the product line's "cost objectives are very aggressive and there is no assurance they can be achieved," and that "there can be no assurance that the Company will successfully complete the development of its new products," the Ninth Circuit held that the prospectus *adequately disclosed* those problems. Id. These disclosures, which were described as "virtually overflow[ing]" (id.), were less detailed than the Registration Statement's disclosures in this case.

complained of was false or misleading.") (emphasis added). As far as plaintiffs' accounting allegations and the Underwriters are concerned, there are no explanations, only assertions.

B. The Ninth Circuit's "Bespeaks Caution" Doctrine Protects the Registration Statement's Forward Looking Statements

The revenue projection is also not actionable because it is a forward-looking statement protected by the "bespeaks caution" doctrine. The Opposition asserts that the protection should not apply because the Registration Statement failed to disclose that "(i) the very foundation of the SureBeam joint venture was based on entities with no proven track record, no customer base and which had no ability to pay anywhere near $55 million (or any amount for that matter) for SureBeam's irradiator systems but instead were relying on outside funds as a source of capital; (ii) before the IPO, Tech Ion had failed in its attempt to secure funding from the World Bank (or any other lender) because SureBeam Brasil's business plan . . . and (iii) in fact, defendants ultimately failed in their attempt to secure funding and saw their last chance for funding disappear when SUDAM collapsed amid political scandal just days before the IPO." Opp. 11-12 (citing Compl. ¶86).

But as set forth above, these risks were clearly disclosed in the Registration Statement. See Tu Decl., Ex. A at 11-12, 14-15 & 39. In the context of these disclosures, any reasonable investor would know that the joint venture had no proven track record or customer base, that it did not have an assured ability to meet its financial obligations, and that Brazil's recent history of political instability carried a risk. See, e.g., Hillson Partners Ltd. v. Adage, Inc., 42 F.3d 204, 213-14 (4th Cir. 1994) ("It is not a violation of any securities law to fail to disclose a result that is obvious even to a person with only an elementary understanding of the stock market.").

The Opposition's attempt to evade the bespeaks caution defense relies on several inapposite cases. In two of the decisions, the disclosures did not even accompany the alleged misstatements, and they were far less specific than the risk factors articulated in SureBeam's Registration Statement. For example, Judge Brewster of this court held in Powers v. Eichen, 977 F. Supp. 1031, 1043 (S.D. Cal. 1997) that the generic statement, "There can be no assurance that the Company will be able to develop and deliver new products in a timely manner," did not adequately warn that "a component part shortage might adversely affect" a long range microlaser project. Moreover, that

warning "was not included in the actual releases and statements issued that plaintiffs claim are misleading" but rather were articulated in the company's subsequent Form 10-K filing. Id. at 1043-44. Similarly, in Cherednichenko the court recognized that the bespeaks caution doctrine would not protect "boilerplate disclaimers" that "did not accompany the allegedly misleading oral misrepresentations, thus diminishing their cautionary effect." Cherednichenko v. Quarterdeck Corp., 1997 WL 809750, *5 (C.D. Cal. Nov. 26, 1997).[4]

C. The Joint Venture Allegation Is A Non-Actionable Mismanagement Claim

Plaintiffs rely upon In re Wells Fargo Sec. Litig., 12 F.3d 922, 927 (9th Cir. 1993) and other decisions, for the proposition that "victims of securities violations do not lose their securities claim because the . . . misconduct could also form the basis for separate claims for mismanagement." Opp. 12:22-26. The Underwriters do not contest this assertion, but what plaintiffs fail to mention is that each decision they cite involved securities fraud claims brought under Rule 10b-5, for which plaintiffs alleged specific facts regarding defendants' knowledge of the purported fraud. These cases provide a useful contrast to the Section 11 claims against the Underwriters.[5]

In this case, the mismanagement alleged was not even that of the issuer, SureBeam -- it was of Titan, which supposedly threw good money away after bad by "contribut[ing]" $5 million to Tech

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[4] Plaintiffs' reliance on Provenz is also misplaced. The Provenz complaint alleged a revenue falsification scheme which failed to "disclose to the market that it was recognizing revenue before the terms of certain contracts had been negotiated, before the deliverables had been shipped, and before certain contingencies were satisfied." Provenz v. Miller, 102 F.3d 1478, 1493-94 (9th Cir. 1996). These allegations have nothing to do with predictive statements, and accordingly it is not surprising that the Ninth Circuit held that warnings that a company "lacked visibility," and was "in an uncertain economic environment" were insufficient.

Plaintiffs also cite a number of pre-Silicon Graphics (183 F.3d 970 (9th Cir. 1999)) decisions in which the bespeaks caution doctrine was held not applicable to fraud claims alleging *intentional fraudulent misconduct* violating Rule 10b-5. But only Section 11 claims have been pled against the Underwriters, and according to what plaintiffs say in their Opposition, the Complaint does not allege intentional conduct against the Underwriters. Plaintiffs apparently want to have it both ways, relying on fraud-based cases when it suits their purpose, and disavowing those allegations when it does not.

[5] Plaintiffs' claims in Wells Fargo were more than mere mismanagement claims; instead they contained allegations of intentional conduct sufficient to support a pleading of securities fraud under pre-Reform Act standards. In the same paragraph quoted by plaintiffs, the Ninth Circuit clarified that mismanagement could be the basis for an actionable claim under Section 10(b) when "a defendant was *aware* that mismanagement had occurred and made a material public statement . . . inconsistent with the existence of the mismanagement." Wells Fargo, 12 F.3d at 927 (quotation omitted, emphasis added). Plaintiffs could proceed only because they had "*specifically identified facts* omitted by Wells Fargo" alleging "that Wells Fargo *knew* of certain 'contingencies' which rendered its loan reserves 'inadequate,' and failed to disclose this information to purchasers of its stock." Id. (emphasis added).

Ion supposedly without even a "provision for repayment." Compl. ¶40. Whatever the truth of this allegation, and as noted above, it is belied by the Registration Statement itself, there is no concealment (intentional or otherwise) of this purported mismanagement. Indeed, plaintiffs "know" of this alleged mismanagement because of what they read (or misread) in the Registration Statement.

D. The Strict Pleading Particularity Requirements of Rule 9(b) Should Be Applied To Plaintiffs' Section 11 Claims Because They Are Expressly Based Upon Allegations Of Fraud

Unable to refute the fact that the Complaint contains numerous accusations of intentional conduct against the Underwriters, plaintiffs cite the Ninth Circuit's decision in Vess for the proposition that "plaintiffs need not plead their §11 claim with particularity because such claims are based on negligence and not fraud." Opp. 13:20-22. But that is contrary to what Vess actually held based upon the facts of that case.[6] Vess affirmed the rule in the Ninth Circuit that where plaintiffs allege "a unified course of fraudulent conduct . . . as the basis" of their claim, that claim "is said to be 'grounded in fraud' or to 'sound in fraud,' . . . the pleading of that claim . . . must satisfy the particularity requirement of Rule 9(b)." Vess, 317 F.3d at 1103-04. Accordingly, "if a plaintiff were to attempt to establish violations of Section[ ] 11 . . . as well as the anti-fraud provisions of the Exchange Act through allegations in a single complaint of a unified course of fraudulent conduct, fraud might be said to 'lie[ ] at the core of the action.'" Id. at 1104 (quotation omitted).

A "unified course of fraudulent conduct" is what the Complaint in this case alleges: it *expressly incorporates* every one of the Complaint's numerous accusations of fraudulent conduct as part of the Section 11 claim against the Underwriters. See Compl. ¶175. Moreover, as detailed in the Underwriters' opening memorandum (see Underwriter's Opening Mem. at 8-11), the Complaint specifically names *all* defendants, including the Underwriters, in many of those allegations of intentional conduct.[7] Compare Vess, 317 F.3d at 1104 ("'Appellants maintain that their 1933 Securities Act claims were inappropriately subjected to the Rule 9(b) heightened pleading standard.

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[6] Vess did not involve Section 11 or any other federal securities law claim. In Vess, the Ninth Circuit *affirmed the dismissals* of claims against two of three defendants brought under the California Consumers Legal Remedies Act (Cal. Civ. Code §1770) and California's unfair business practice laws (Cal. Bus. & Prof. Code §§17200 & 17500), on grounds that the claims were grounded in fraud and therefore subject to the pleading requirements of Rule 9(b). Vess, 317 F.3d at 1100-08.

[7] See Compl. ¶¶11, 41, 93-94, 105 & 158.

This argument is untenable in light of the complaint's wholesale adoption of the allegations under the securities fraud claims for purposes of the Securities Act claims.'") (quotation omitted). Even plaintiffs' Opposition itself makes accusations of knowing and intentional misconduct. See Opp. 5:17-18 ("At all times material to the IPO process, the Underwriter Defendants *knew* or should have known about the adverse, non-public material facts set forth above.") (emphasis added).

Plaintiffs' argument that Rule 9(b)'s pleading requirements do not apply to Section 11 claims based on fraud is also undermined by the fact that *over half of the decisions they rely upon have been overruled* on that very point. Plaintiffs' citation to five decisions from the Southern District of New York[8] ignores the Second Circuit's recent rejection of these holdings. Rombach, 355 F.3d at 171 ("the heightened pleading standard of Rule 9(b) applies to Section 11 . . . claims insofar as the claims are premised on allegations of fraud."). In Rombach, the Second Circuit favorably cited the Ninth Circuit's decisions in Stac and Vess, stating that the pleading requirements of Rule 9(b) should be applied to Section 11 claims sounding in fraud because "'Rule 9(b), serves to . . . prohibit plaintiffs from unilaterally imposing upon the court, the parties and society enormous social and economic costs absent some factual basis.'" Id. at 171 (quoting Stac, 89 F.3d at 1405).[9]

Plaintiffs also claim that Rule 9(b) should not apply because (i) the Complaint contains paragraphs that "disclaim" plaintiffs' accusations of fraud, and (ii) neither paragraphs 40 or 86 contain the words "fraud," "deceit" or "misrepresentation." Opp. 14:12-13. Identical arguments have been repeatedly rejected by the Ninth Circuit. See Stac, 89 F.3d at 1405 n.2 (where Section 11 claim "specifically disclaimed any allegations of fraud," plaintiffs' "nominal efforts are

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[8] These decisions, which are cited at page 14 of the Opposition are: In re Initial Public Offering Sec. Litig., 241 F. Supp. 2d 281 (S.D.N.Y. 2003); Degulis v. LXR Biotechnology, 928 F. Supp. 1301, 1310 (S.D.N.Y. 1996); In re In-Store Advertising Sec. Litig., 878 F. Supp. 645, 650 (S.D.N.Y. 1995); Nelson v. Paramount Communications, Inc., 872 F. Supp. 1242, 1246 (S.D.N.Y. 1994) and In re AnnTaylor Stores Sec. Litig., 807 F. Supp. 990, 1003 (S.D.N.Y. 1992).

[9] The remaining cases cited by plaintiffs are equally inapplicable. In Lone Star Ladies, the Fifth Circuit reversed dismissal of a complaint containing inadequate "fraud based" Section 11 claims, because the district court did not allow plaintiffs to file an amended complaint which would have contained no allegations of fraud. Lone Star Ladies Investment Club v. Schlotzsky's Inc., 238 F.3d 363, 368-69 (5th Cir. 2001). The courts in In In re Calpine Corp. Sec. Litig., 288 F. Supp. 2d 1054,1078 (N.D. Cal. 2003) and Kensington Capital Management v. Oakley, Inc., 1999 WL 816964, *2 (C.D. Cal. Jan. 14, 1999) recognized that Rule 9(b) can apply to Section 11 violations, but held that the particularized allegations in those cases, unlike those here, were not grounded in fraud. The only case supporting plaintiffs is one which expressly rejects Ninth Circuit precedent. See In re NationsMart Corp. Sec. Litig., 130 F.3d 309, 315 (8th Cir. 1997) (specifically declining to follow the Ninth Circuit's rule).

unconvincing where the gravamen of the complaint is plainly fraud and no effort is made to show any other basis for the claims levied at the Prospectus."); Vess, 317 F.3d at 1108 ("Although [plaintiff] nowhere uses the word 'fraud' in these allegations, the pleading requirements of Rule 9(b) cannot be evaded simply by avoiding the use of that magic word.").

E. Section 11(a) Requires That Plaintiffs Plead Reliance In Connection With The Alleged Class Period After May 15, 2002

For the purported class period occurring after May 15, 2002, i.e., after earnings statements covering a 12 month period after the Registration Statement's effective date were available, Section 11(a) requires that plaintiffs plead facts showing they "affirmatively relied upon the Registration Statement and did not know of the alleged misrepresentations." 15 U.S.C. §77k(a).

Plaintiffs' contend Section 11(a) is inapplicable solely because the 12 months earnings information was available in two separately issued financial statements, rather than in one physical document. Opp. 16:6-9. Plaintiffs' interpretation should be rejected because it is at odds with the statute's fundamental purpose and legislative history. Congress made it clear that "The basis of this provision is that in all likelihood *the purchase and price of the security purchased after publication of such an earning statement will be predicated on that statement rather than upon the information disclosed upon registration.*" See Supp. Declaration of Michael C. Tu, Ex. C at 34 (H.R. Conf. Rep. No. 73-1838, 73rd Cong., 2nd Sess. 1934 (emphasis added)). The sensible interpretation is that when at least 12 months of financial statements are publicly available, there should be no presumption of reliance because the Registration Statement is then comparatively "stale."

III. CONCLUSION

For the foregoing reasons, the claims against the Underwriters should be dismissed.

Dated: August 30, 2004

Respectfully submitted,

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 years and not a party to the within action. My business address is Orrick, Herrington & Sutcliffe LLP, 777 South Figueroa Street, Suite 3200 California 90017.

On August 30, 2004, I served the foregoing document described as **REPLY MEMORANDUM IN SUPPORT OF THE UNDERWRITER DEFENDANTS' MOTION TO DISMISS THE SECTION 11 CLAIM AGAINST THEM IN PLAINTIFFS' CONSOLIDATED COMPLAINT** on the parties to this action by placing a true copy thereof enclosed in sealed envelopes addressed as follows:

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Executed on August 30, 2004, at Los Angeles, California.

☐ (STATE) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

☒ (FEDERAL) I declare that I am employed in the office of a member of the bar of this court whose direction the service was made.

Barbara Turner

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