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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

In re SUREBEAM CORPORATION SECURITIES LITIGATION	Master File No. 03-CV-01721-JM(POR)
This Document Relates To: ALL ACTIONS.	CLASS ACTION NOTICE OF RECENT AUTHORITY SUBMITTED IN SUPPORT OF PLAINTIFFS' OPPOSITION TO DEFENDANTS' PENDING MOTION TO DISMISS DATE: N/A TIME: N/A COURTROOM: Hon. Jeffrey T. Miller

Plaintiffs hereby submit, in further support of their opposition to defendants' pending motions to dismiss, the following recent opinion: *In re Ultimate Elecs., Inc. Sec. Litig.*, No. 03-N-597 (D. Colo. Sept. 30, 2004) ("*Ultimate Electronics*"). A copy of this opinion is attached hereto as Exhibit A.

Ultimate Electronics supports plaintiffs' contention that defendants' pending motions to dismiss should be denied. Specifically, it supports plaintiffs' position that: (1) the bespeaks caution doctrine and defendants' disclosure arguments cannot serve as a basis to dismiss plaintiffs' §11 claims at the pleading stage; (2) plaintiffs' complaint meets the pleading requirements of Rule 8(a) and Rule 9(b) of the Federal Rules of Civil Procedure; and (3) plaintiffs have adequately alleged control person liability against The Titan Corporation by pleading that it had the ability to control SureBeam Corporation. Plaintiffs need not allege actual control, rather an allegation of the possession, direct or indirect, of the power to control is sufficient.

DATED: October 4, 2004

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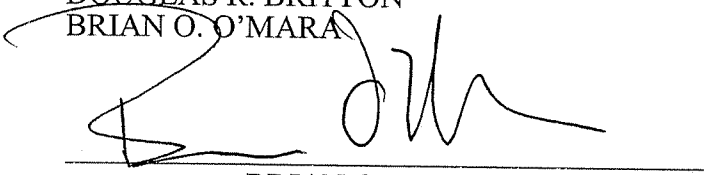

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EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Edward W. Nottingham

Civil Action No. 03 N 597

In re ULTIMATE ELECTRONICS, INC. SECURITIES LITIGATION

ORDER AND MEMORANDUM OF DECISION

This is a securities fraud case. Lead Plaintiff, Alaska Electrical Pension Fund ("Plaintiff"), alleges that Defendants Ultimate Electronics, Inc. ("Ultimate"), J. Edward McEntire, William J. Pearse, David J. Workman, Alan E. Kessock, Robert W. Beale, Randall F. Bellows, and Larry D. Strutton (collectively "Defendants") violated the Securities Act of 1933 ("1933 Act") by making material misstatements and omissions in Ultimate's prospectus for its secondary offering of stock. This matter is before the court on "Defendants' Motion to Dismiss Amended Complaint," filed September 11, 2003. Jurisdiction is premised upon 15 U.S.C.A. § 77v (West 1997 & Supp. 2004) and 28 U.S.C.A. § 1331. (West 1993 & Supp. 2004).

FACTS

I. Factual Background

The following facts are taken from the complaint and Ultimate's prospectus, and are assumed for the purposes of the present motion to be true. I may consider Ultimate's prospectus in ruling on this motion to dismiss because "if a . . . document is referred to in the complaint and is central to the plaintiff's claim, a defendant may submit an indisputably authentic copy to the court to be considered on a motion to dismiss." *GFF Corp. v. Associated Wholesale Grocers,*

EXHIBIT A

Inc., 130 F.3d 1381, 1384 (10th Cir. 1997).

Ultimate is a specialty retailer of consumer electronics and home entertainment products, and its common stock is traded on the Nasdaq National Market. (Lead Pl.'s Compl. for Violation of the Securities Act of 1933 ¶ 14 [filed Aug. 11, 2003] [hereinafter "Compl."].) Ultimate operates fifty-three stores in Arizona, Colorado, Idaho, Iowa, Minnesota, Missouri, Nevada, New Mexico, Oklahoma, South Dakota, Texas, and Utah. (*Id.* ¶ 15.)[1] As of the date of Ultimate's secondary offering, discussed below, Ultimate operated forty-six stores. (*Id.* ¶ 27.) Of these forty-six stores, thirty-two were "large format stores" and fourteen were smaller stores. (*Id.* ¶ 27.) Each of the individual Defendants are directors or officers at Ultimate. (*Id.* ¶¶ 16–23.)

On May 1, 2002, Ultimate commenced the sale of 3,162,500 shares of its common stock at $28.50 in a firm commitment secondary offering. (*Id.* ¶ 24; Defs.' Mot. to Dismiss Am. Compl., Ex. A at 47 [Prospectus] [filed Sept. 11, 2003] [hereinafter "Defs.' Br."].) Plaintiff purchased at least 9,500 shares of common stocks at $28.50 per share, in or traceable to Ultimate's May 1, 2002 secondary offering. (Compl. ¶ 13.) As part of this secondary offering, Ultimate filed a prospectus with the Securities and Exchange Commission, signed by each of the individual Defendants. (*Id.* ¶ 25; Defs.' Br., Ex. A [Prospectus].) Plaintiff alleges that Ultimate

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[1]Plaintiff refers to these twelve states as "several rural mid-western states." (Lead Pl. Alaska Electrical Pension Fund's Opp'n to Defs.' Mot. to Dismiss Compl. for Violations of the Securities Act of 1933 at 4 [filed Oct. 1, 2003] [hereinafter "Pl.'s Resp."].) Plaintiff's counsel's knowledge of geography is severely lacking. According to the United States Bureau of the Census, only four of these states, Iowa, Minnesota, Missouri, and South Dakota are actually in the Midwest. *See* Census Regions of the United States, *available at* http://www.census.gov. The other states are either in the West or the South. *Id.* Moreover, while there are certainly numerous rural areas within these states, it is a misnomer to refer to these states as rural for there are also numerous urban areas within these states, as defined by the Bureau of the Census. *See* Qualifying Urban Areas for Census 2000, *available at* http://www.census.gov.

made two omissions and false statements in its prospectus. First, Plaintiff alleges that Ultimate failed to disclose, and made false statements, regarding its failure to receive commissions on some sales related to DIRECTV. Second, Plaintiff alleges that Ultimate failed to disclose, and made false statements, regarding its customer service problems. I address the factual averments for each allegation in turn.

First, Ultimate sells and installs, among other things, Direct Broadcast Satellite ("DBS") equipment that lets customers receive satellite television programs for home viewing. (Compl. ¶¶ 4–5, 14, 26–28.) Ultimate's DBS equipment is coupled with a service offering from DIRECTV, which provides satellite television service. (*Id.* ¶¶ 27–29.) As a result of a policy change by DIRECTV prior to the secondary offering, Ultimate no longer received commissions from DIRECTV for selling DBS in certain rural areas. (*Id.* ¶¶ 30–31.)

Plaintiff contends that Ultimate failed to disclose this information and made material misrepresentations regarding the prospects of its DBS sales. (*Id.* ¶¶ 26–31.) Specifically, Plaintiff points to the following passages in Ultimate's prospectus that allegedly contain such misrepresentations and omissions.

> **The Consumer Electronics Industry** . . .
> We believe the advantages of digital technology . . . will continue to drive growth in consumer electronics, as consumers replace their analog-based products with digital products. Among the digital product developments that we believe support this growth are the following . . .
> Home Networking. Home networking devices combine the interface and operability of all electronic devices in the home by connecting to a variety of content sources, such as cable systems, satellites, telephone and the Internet. We believe home networking devices will continue to become more standardized, easier to use and more broadly distributed. We expect sales of home networking devices to grow significantly over the next five years.

(*Id.* ¶ 26; Defs.' Br., Ex. A at 1–2 [Prospectus].) The prospectus highlights "DIRECTV" as its only "direct broadcast satellite" ("DBS") product. (Compl. ¶ 27.) The prospectus further states that Ultimate's

> large format stores feature an extensive selection of over 4,000 [Stock Keeping Unit]'s with products in the following [twenty] categories:
> Conventional and projection televisions
> HDTVs and DTVs
> Home theater systems [and]
> Direct broadcast satellite . . .
> At these locations, we offer home installation of . . . satellite products . . .

(*Id.* ¶ 27; Defs.' Br., Ex. A at 29 [Prospectus].) Ultimate's smaller stores, according to the prospectus, "generally contain the same products and services available as our large format stores." (Compl. ¶ 27.) The prospectus, moreover, provides that Ultimate "supports [its] product sales by providing many important customer services, including home delivery and set-up [and] home satellite installation." (*Id.* ¶ 28.) Regarding its historical sales percentages, the prospectus sets forth the following chart:

	Fiscal Year Ended January 31,		
Product Category	**2000**	**2001**	**2002**
Television/DBS	31%	33%	38%
Audio	24%	22%	22%
Video/DVD	17%	17%	17%
Mobile Electronics	12%	10%	9%
Home Office	6%	5%	4%
Other	10%	12%	12%

(*Id.* ¶ 29 [emphasis in original].) The prospectus also contains several cautionary statements. (Defs.' Br., Ex. A at 6, 9, 11 [Prospectus].)

Second, During October 2001, Ultimate enacted a company wide policy to consolidate its

installation and delivery services of products sold to its customers. (Compl. ¶ 33.) This policy, according to Plaintiff, greatly harmed Ultimate's bottom line because this policy resulted in serious customer service problems. (*Id.*) Plaintiff contends that Ultimate made material misstatements regarding its customer service in the prospectus, because the prospectus stated in the MD&A section that

> Our objective is to enhance our position as a leading specialty retailer of consumer electronics and home entertainment products. Key elements of this strategy include . . .
> Training and Developing a Premier Sales and Installation Team. We conduct an extensive ongoing training program designed to ensure that our sales associates are equipped with the most up-to-date sales techniques and product knowledge. We believe that the quality and knowledge of our sales associates and installation technicians is critical to our success and represents a significant competitive advantage. We also believe that our ongoing, specialized training creates a superior customer experience that stimulates sales of our products.
> Providing "Red Carpet" Customer Service. We support our product sales by providing many important customer services, including home delivery and set-up, home theater and audio design and installation, home satellite installation, mobile electronics installation and regional service centers that off in-home and carry-in repair services.

(Compl. ¶ 32; Defs.' Br., Ex. A at 27–28 [Prospectus].)

Ultimate's stock traded at a high level from the secondary offering until August 2002. On August 8, 2002, Ultimate announced that it would report revenues and net income at levels far below the levels that it had previously led the market to expect. (*Id.* ¶ 35.) Specifically, Ultimate stated in a press release that

> [t]he DBS category suffered in the second quarter due to a lack of industry promotions as compared to the previous year. Since we install a majority of our DBS products, our installation revenues for the quarter were significantly less than we had anticipated.

> About 50% of the shortfall in the gross margin is attributable to the DBS category.

(*Id.* ¶ 35.) Due to this news, Ultimate's commons stock fell by thirty-one percent between August 7, 2002 to August 8, 2002, from $13.16 per share to $9.00 per share. (*Id.* ¶ 37.)

On August 26, 2002, Ultimate hosted a conference call with investors to discuss Ultimate's poor second quarter results. (*Id.* ¶ 38.) At this conference call, Defendant Workman, Ultimate's Chief Operating Officer and President, stated that Ultimate's sales were harmed because of "a policy change on the part of DIRECTV earlier in the year" which resulted in Ultimate being unable to sell DBS equipment in some rural areas. (*Id.* ¶¶ 17, 38.) Defendant Workman explained that this change in policy by DIRECTV impacted thirty percent of Ultimate's DBS sales in its rural markets. (*Id.* ¶ 39.)

2. Procedural History

Thereafter on April 7, 2003, Howard Fisher filed a class action complaint against Defendants. (Class Action Compl. for Violations of Federal Securities Laws and Jury Trial on Demand [filed Apr. 7, 2003].) On June 9, 2003, Plaintiff moved to be appointed as the lead plaintiff. (Mot. to Appoint Alaska Electrical Pension Fund as Lead Pl. Pursuant to § 21D(a)(3)(B) of the Securities Exchange Act of 1934 and to Approve Lead Pl.'s Choice of Lead Counsel [filed June 9, 2003].) The magistrate judge granted Plaintiff's motion to be appointed as the lead plaintiff on July 3, 2003. (Order Appointing Lead Pl. and Approving Lead Pl.'s Selection of Lead Counsel [filed July 3, 2003].) Thereafter, on August 11, 2003, Plaintiff filed its complaint which is now the operative complaint. (Compl.) Plaintiff sets forth three claims for relief in its complaint, (1) liability under § 11 of the 1933 Act, (2) liability under § 12(a)(2) of

the 1933 Act, and (3) liability of the individual Defendants under § 15 of the 1933 Act. (*Id.* ¶¶ 45–64.) On September 11, 2003, Defendants moved to dismiss Plaintiff's complaint for failure to state a claim upon which relief can be granted. (Defs.' Br.) Plaintiff filed its response October 1, 2003, disagreeing with Defendants arguments on each substantive point and arguing in the alternative that this court should permit Plaintiff leave to amend the complaint. (Pl.'s Resp.)

ANALYSIS

1. Standard of Review

For the purposes of a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), a court should only dismiss the claim "when it appears that the plaintiff can prove no set of facts in support of the claims that would entitle him to relief, accepting the well-pleaded allegations of the complaint as true and construing them in the light most favorable to the plaintiff." *Dubbs v. Head Start, Inc.*, 336 F.3d 1194, 1201 (10th Cir. 2003) (quoting *Yoder v. Honeywell, Inc.*, 104 F.3d 1215, 1224 [10th Cir. 1997]). "The court's function on a Rule 12(b)(6) motion is not to weigh potential evidence that the parties might present at trial, but to assess whether the plaintiff's complaint alone is legally sufficient to state a claim for which relief may be granted." *Id.* (quoting *Sutton v. Utah State Sch. for the Deaf & Blind*, 173 F.3d 1226, 1236 [10th Cir. 1999]).

2. Plaintiff's First Claim for Relief, Violation of § 11

Section 11 of the 1933 Act imposes liability for the filing of a securities registration statement that "contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading." 15 U.S.C.A. § 77k(a) (West 1997 & Supp. 2004); *see also Friedlob v. Trs. of Alpine Mut. Fund*

Trust, 905 F. Supp. 843, 857 (D. Colo. 1995) (Nottingham, J.). Accordingly, a defendant is liable for an untrue statement of material fact, an omission of a material fact required to be stated, or an omission of material fact that makes other statements in the prospectus misleading. *Id.* Defendants contend that Plaintiff has failed to state a claim upon either of Ultimate's alleged statements or omissions regarding (1) DBS sales, and (2) customer service. I address each issue in turn.

a. DBS Sales

"When alleging a violation of § 11, a plaintiff . . . need only show a material misstatement or omission to establish [a] prima facie case." *Schwartz v. Celestial Seasonings, Inc.*, 124 F.3d 1246, 1251 (10th Cir. 1997) (quoting *Herman & MacLean v. Huddleston*, 459 U.S. 375, 382 [1983]) (alteration in original). "A statement or omission is only material if a reasonable investor would consider it important in determining whether to buy or sell stock." *Grossman v. Novell, Inc.*, 120 F.3d 1112, 1119 (10th Cir. 1997); *see also Schaffer v. Evolving Sys., Inc.*, 29 F. Supp.2d 1213, 1221 & n.2 (D. Colo. 1998) (applying this rule to § 11 action). An omission, moreover, is material if there is a "substantial likelihood that the disclosure of the omitted fact would have been viewed by a reasonable investor as having significantly altered the 'total mix' of information made available." *Basic, Inc. v. Levinson*, 485 U.S. 224, 231–32 (1988) (quoting *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 [1976]); *see also Schaffer*, 29 F. Supp.2d at 1221. Even if a defendant does not have an affirmative duty to release certain information, a defendant is liable under § 11 for an omission if it "release[s] selective positive information . . . while withholding allegedly negative information." *Schaffer*, 29 F. Supp.2d at 1221. In other words, "a duty to speak the full truth arises when a defendant undertakes a duty to say anything."

Rubinstein v. Collins, 20 F.3d 160, 170 (5th Cir. 1994) (regarding Rule 10b-5).

Taking the facts as alleged in the complaint as true and in a light most favorable to Plaintiff, Plaintiff has at least shown material omissions with regards to its DBS Sales. The prospectus mentioned the prominence of DBS sales to Ultimate's business several times. (Compl. ¶¶ 26–29.) In neither these statements nor anywhere else in the prospectus did Ultimate disclose that it had lost commissions on some of its DIRECTV sales of DBS equipment. (*Id.*) Plaintiff has shown sufficient materiality in the complaint to survive a motion to dismiss by stating that Ultimate's stock significantly dropped when it announced it would have low revenues, and Ultimate admitted that these low revenues were a direct result of losing commissions on some of its DIRECTV sales. (*Id.* ¶¶ 35–39.)

Defendants argue, however, that (1) Plaintiff failed to meet the pleading requirements of materiality, and (2) Defendants were protected under the "bespeaks caution" doctrine. (Defs.' Br. at 4–15.) I address each argument below.

First, Defendants argue that Plaintiff has a heightened pleading standard for its § 11 claim. (*Id.* at 12–15.) Despite Defendants argument to the contrary, claims under the Securities Act of 1933 are not subject to the heightened pleading standard specified by the Private Securities Litigation Reform Act of 1995. 15 U.S.C.A. § 78u-4(b) (heightened pleading standard applies to "private action arising under this chapter") (West 1997 & Supp. 2004); *see also Falkowski v. Imation Corp.*, 309 F.3d 1123, 1133 (9th Cir. 2002); *Romine v. Acxiom Corp.*, 296 F.3d 701, 704–05 (8th Cir. 2002). Rather, this heightened standard only applies to actions under the Securities Exchange Act of 1934. *Id.*

It is unclear whether Plaintiff must meet the heightened pleading standards of Federal

Rule of Civil Procedure 9(b) in a § 11 claim. *See generally Schwartz*, 124 F.3d at 1251. Rule 9(b) provides that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." Fed. R. Civ. Proc. 9(b) (2004). Assuming, *arguendo*, that Rule 9(b)'s heightened standard applies, Plaintiff has met this standard for Plaintiff has met the even higher standard set forth in the Private Securities Litigation Reform Act regarding claims under the Securities Exchange Act of 1934. The Private Securities Litigation Reform Act requires that "the complaint shall 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." 15 U.S.C.A. § 78u-4(b). Plaintiff's complaint meets this burden. (*See* Compl. ¶¶ 26–29, 35–39.)

Second, Defendants argue that the cautionary statements in Ultimate's prospectus protect it from liability. (Defs.' Br. at 9–12.) This argument falls under the "bespeaks caution" doctrine. This doctrine provides that "[f]orward-looking representations are . . . immaterial when the defendant has provided the investing public with sufficiently specific risk disclosures or other cautionary statements concerning the subject matter of the statements at issue to nullify any potentially misleading effect." *Grossman*, 120 F.3d at 1120. The "bespeaks caution" doctrine only applies to forward-looking statements. *Id.* at 1123; *see also In re Synergen, Inc. Sec. Litig.*, 863 F. Supp. 1409, 1415–16 (D. Colo. 1994). It does not apply to historical information or factual conditions at the time the prospectus is issued. *Id.* Here, Ultimate's failure to receive commissions on certain DBS sales occurred prior to the secondary offering. (Compl. ¶¶ 30–31, 38.) Accordingly, the "bespeaks caution" doctrine does not apply to these facts. For the

foregoing reasons, I deny Defendants' motion to dismiss as to Plaintiff's first claim for relief as Plaintiff's first claim relates to Ultimate's DBS sales.

b. Customer Service

Defendants argue that Ultimate's statements regarding its customer service did not violate § 11 because these statements were, at most, vague and immaterial. (Defs.' Br. at 15–16.) "Statements classified as 'corporate optimism' or 'mere puffing' are typically . . . generalized statements of optimism that are not capable of objective verification. Vague, optimistic statements [in a prospectus] are not actionable because reasonable investors do not rely on them in making investment decisions." *Grossman*, 120 F.3d at 1119 (footnote omitted). The statements identified by Plaintiff regarding the quality of Ultimate's customer service are statements of corporate optimism and therefore do not provide the basis of liability. *See, e.g., In re Storage Tech. Corp. Sec. Litig.*, 804 F. Supp. 1368, 1372 (D. Colo. 1992) (statement of being "proud" of a particular product and opining that it would be a "blowout winner" were mere puffing and could not support a claim because no reasonable person would be misled by them). Plaintiff does not challenge that Ultimate required its sales force to engage in training. (Compl. ¶ 33.) Rather, Plaintiff asserts that this training was insufficient. (*Id.*) Ultimate's general statements in its prospectus regarding its quality customer service are not actionable. Accordingly, Plaintiff's customer service challenge cannot survive a motion to dismiss.

Along a similar line of reasoning, Ultimate's statements about customer service are immaterial. As set forth above, "[a] statement or omission is only material if a reasonable investor would consider it important in determining whether to buy or sell stock." *Grossman*, 120 F.3d at 1119. No reasonable investor would rely upon a company's general statement that its

staff provides strong customer service. Plaintiff's customer service challenge therefore cannot survive a motion to dismiss.

3. *Plaintiff's Second Claim for Relief, Violation of § 12(a)(2)*

Defendants assert that Plaintiff's § 12(a)(2) claim fails because Defendants did not "offer or sell" the securities. (Defs.' Br. at 17–19.) Section 12(a)(2) of the 1933 Act provides that "[a]ny person who . . . offers or sells a security . . . by means of a prospectus . . . which includes an untrue statement of a material fact or omits to state a material fact . . . shall be liable . . . to the person purchasing such security from him." 15 U.S.C.A. § 77l(a)(2) (West 1997 & Supp. 2004). The question before the court is whether Ultimate, as the issuer, and the other Defendants, as officers and directors of the issuer, can be held liable to Plaintiff under § 12(a)(2).

The Tenth Circuit has not directly addressed this issue, so I look to precedent from other circuits to guide my analysis. The Fifth Circuit has extensively analyzed this issue, and distinguishes between "firm commitment" underwriting, and "best efforts" underwriting. *See Lone Star Ladies Inv. Club v. Schlotzsky's Inc.*, 238 F.3d 363, 369–71 (5th Cir. 2001).[2] Ultimate's secondary offering was a firm commitment underwriting. (Defs.' Br., Ex. A at 47 [Prospectus].)

> [I]n a firm commitment underwriting . . . the public cannot ordinarily hold the issuers liable under section 12, because the public does not purchase from the issuers. Rather, the public purchases from the underwriters, and suing the issuers is an attempt to "recover against [the] seller's seller[, which the Supreme Court does not permit]." It is true that there are unusual

[2]In a firm commitment underwriting, "[t]he underwriter . . . buys the securities from the issuer and resells them as the principal, while in a best efforts underwriting, "[t]he underwriter . . . sells the securities as agent for the issuer," and thus the underwriter never actually buys the issuer's securities. Black's Law Dictionary 1528 (7th ed. 1999).

> cases in which the issuer is sufficiently active in promoting the securities as to essentially become the vendor's agent. But that possibility does not weaken this basic principle. Virtually all issuers routinely promote a new issue, if only in the form of preparing a prospectus and conducting a road show. That said, *Pinter* holds that a plaintiff invoking section 12 may show that an issuer's role was not the usual one; that it went farther and became a vendor's agent.

Id. at 370 (quoting *Pinter v. Dahl*, 486 U.S. 622, 644 n. 21 [1988]) (footnote omitted) (second alteration in original).

In its complaint, Plaintiff contends that

> Defendants, and each of them, were sellers, offerors, and/or solicitors of sales of the shares offered in connection with the Prospectus. . . .
> Defendants, and each of them, solicited and/or played a substantial role in the Secondary Offering of Ultimate Electronics common stock. But for the participation and solicitation by Defendants, the Secondary Offering could not and would not have been accomplished.
> Defendants did the following acts in furtherance of the sale of Ultimate Electronics common stock:
>
> > (a) They actively and jointly drafted, revised and approved the Prospectus and other written selling materials by which the offering of Ultimate Electronics common stock was made;
> > (b) They finalized the Prospectus relating to the Secondary Offering of Ultimate Electronics common stock and caused it to become effective. But for the defendants having drafted, filed, signed and/or authorized the signing of the Prospectus, the Secondary Offering could not have been accomplished; and
> > (c) They conceived and planned the offering of Ultimate Electronics common stock and jointly orchestrated all activities necessary to effect the sale of these shares by issuing the common stock, promoting the stock, supervising the distribution of the common stock, and ultimately selling the shares.

(Compl. ¶¶ 53, 55–56.) To the extent that these averments allege that Defendants were involved

in the drafting and signing of the prospectus, such activities do not make Defendants liable under § 12. *Lone Star*, 238 F.3d at 370. Removing these averments, Plaintiff's remaining averments are that Defendants engaged in solicitation and selling of the shares. (Compl. ¶¶ 53, 55–56.) "[B]ald and factually unsupported allegation that [the defendants] 'solicited' the plaintiffs' securities purchases is not, standing alone, sufficient" to survive a motion to dismiss. *Maher v. Durango Metals, Inc.*, 144 F.3d 1302, 1307 (10th Cir. 1998) (quoting *Shaw v. Digital Equip. Corp.*, 82 F.3d 1194, 1216 (1st Cir. 1996) (second alteration in original). Plaintiff's assertion that Defendants solicited the stock consist only of the conclusory allegations set forth above, without any factual underpinning. Accordingly, Plaintiff's solicitation allegation is insufficient to adequately plead § 12 liability.

Finally, Plaintiff alleges that Defendants "were sellers" of the common shares, and "ultimately s[old] the shares." (Compl. ¶¶ 53, 55.) Presumably, this language implies that Defendants sold the shares directly to Plaintiff, although Plaintiff does not specifically make such an averment. If Plaintiff means that it bought shares directly from Ultimate, it is not clear how this would be possible because the secondary offering was a firm commitment underwriting. (Defs.' Br., Ex. A at 47 [Prospectus].) Plaintiff's allegation that Defendants sold the shares does not make Defendants liable under § 12 because (1) Plaintiff does not allege that it bought shares directly from Defendants, (2) had Plaintiff so alleged, this allegation would not be possible, absent unusual circumstances, considering the underwriting method used by Ultimate, and (3) had Plaintiff so alleged, this allegation is conclusory and without explanation.

For the foregoing reason, Plaintiff has not stated a claim upon which relief can be granted as to Defendants' § 12(a)(2) liability. Plaintiff requests leave to amend the complaint. (Pl.'s

Resp. at 28.) "A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served. . . . Otherwise a party may amend the party's pleading only by leave of court . . . and leave shall be freely given when justice so requires." Fed. R. Civ. Proc. 15(a) (2004). A motion to dismiss is not a responsive pleading under Rule 15(a). *Brever v. Rockwell Int'l Corp.*, 40 F.3d 1119, 1131 (10th Cir. 1994). Accordingly, Plaintiff need not obtain leave of the court to file an amended complaint prior to Defendants' filing of an answer. Plaintiff may therefore amend its complaint if it so chooses without this court's approval, so long as it does so prior to Defendants' filing their answer.

4. Plaintiff's Third Claim for Relief, Violation of § 15

Defendants contend that I must dismiss Plaintiff's third claim for relief as to Defendants Beale, Bellows, and Sutton because they did not exercise control over Ultimate as required by § 15 of the 1933 Act. (Defs.' Br. at 19–20.) Section 15 of the 1933 Act states that

> [e]very person who, by or through stock ownership, agency, or otherwise . . . controls any person liable under sections 77k or 77l of this title, shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable, unless the controlling person had no knowledge of or reasonable ground to believe in the existence of the facts by reason of which the liability of the controlled person is alleged to exist.

15 U.S.C.A. § 77o (West 1997 & Supp. 2004).

In order "to state a prima facie case of control person liability, the plaintiff must establish (1) a primary violation of the securities laws and (2) 'control' over the primary violator by the alleged controlling person." *Maher*, 144 F.3d at 1305. As set forth above, Plaintiff has shown a primary violation of the securities laws sufficient to survive a motion to dismiss, so it has met its

burden regarding the first element.[3]

Regarding the second element of the its prima facie case, "'control' is defined as 'the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of [the liable party].'" *Maher*, 144 F.3d at 1305 (quoting 17 C.F.R. § 230.405). Here, the complaint alleges that Defendants Beale, Bellows, and Strutton are each directors of Ultimate and each "prepared, reviewed and signed" the prospectus. (Compl. ¶¶ 19–21.) By alleging that Defendants Beale, Bellows, and Sutton prepared, reviewed, and signed the prospectus, Plaintiff has sufficiently alleged control by these Defendants. Accordingly, Defendants' motion to dismiss fails as to this claim.

5. Conclusion

Based on the foregoing it is therefore

ORDERED that Defendants' motion to dismiss (# 34) is GRANTED in part and DENIED in part. Defendants' motion is DENIED as to Plaintiff's first claim for relief and third claim for relief as they relate to Ultimate's statements and omissions in its prospectus regarding its DBS sales. Defendants' motion is GRANTED as to Plaintiff's first claim for relief and third claim for relief as they relate to Ultimate's customer service statements and omission in its

[3]Of course, to the extent that Plaintiff relies upon the customer service statements in the prospectus, such reliance fails under § 15 of the 1933 Act just as it fails under § 11 of the 1933 Act.

prospectus. Defendants' motion is GRANTED as to Plaintiff's second claim for relief.

Dated this 29 day of September, 2004.

BY THE COURT:

EDWARD W. NOTTINGHAM
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 03–N–597 (PAC)

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Order and Memorandum of Decision signed by Judge Edward W. Nottingham on September 29, 2004 was served on September 30, 2004 by hand-delivery, where a "D.C." box number or asterisk (*) is indicated after the recipient's name, by electronic mail to the electronic mail address specified where a double asterisk (**) is indicated after the recipient's name, or otherwise by depositing it in the United States mail, postage prepaid, addressed to the recipient:

Magistrate Judge Patricia A. Coan*

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GREGORY C. LANGHAM, CLERK

By Janice J. Heflin
Deputy Clerk or Secretary

DECLARATION OF SERVICE BY MAIL

I, the undersigned, declare:

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

2. That on October 4, 2004, declarant served the **NOTICE OF RECENT AUTHORITY SUBMITTED IN SUPPORT OF PLAINTIFFS' OPPOSITION TO DEFENDANTS' PENDING MOTION TO DISMISS** by depositing a true copy thereof in a United States mailbox at San Diego, California in a sealed envelope with postage thereon fully prepaid and addressed to the parties listed on the attached Service List.

3. That there is a regular communication by mail between the place of mailing and the places so addressed.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 4th day of October, 2004, at San Diego, California.

LISA J. VALLE

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