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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 W. RAY AND SUSAN GOLDING'S REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS PURSUANT TO FED. R. CIV. P. 12(b)(6)

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

I. INTRODUCTION

Plaintiffs argue that the parties are disputing the "interpretation" of facts. Nonsense. Plaintiffs have alleged uncorroborated conclusions from which they have drawn unreasonable inferences. The Court need not accept them as true.

Plaintiffs claim they allege in their complaint that SureBeam improperly recognized revenue on the Tech Ion transaction. They base their assertion primarily on two unsupported conclusory allegations: (1) SureBeam's business plan had purportedly failed by December 2000; and (2) SureBeam's alleged "last chance" for funding ended in March 2001 when the Brazilian agency SUDAM closed. Neither conclusion is supported by fact allegations.[1]

The fundamental flaw with Plaintiffs' conclusion that SUDAM was the last chance for funding is the complete absence of any allegation regarding what role SUDAM funding was to play. How much of the venture or Tech Ion's activities did they anticipate SUDAM would fund? 5%? 10%? 20%? From Plaintiffs' complaint, it is impossible to tell. Plaintiffs' conclusion that SUDAM was Tech Ion's "last chance" for funding is pure conjecture.

Plaintiffs offer partial e-mails to purportedly "support" their conclusion that SureBeam's business plan had failed by late 2000. Those e-mails demonstrate that as of late 2000 the World Bank had not yet decided whether to finance Tech Ion. The e-mails never confirm that the business plan is "dead" or that financing won't be obtained.

Plaintiffs' opposition also attempts to recast the complaint from a misrepresentation case to one of purported "failures to disclose" facts as required by SEC Rule 303. But Plaintiffs' opposition is the first place these supposed omissions appear: The complaint fails to allege that SureBeam did not comply with SEC Rule 303. Also, no facts support the conclusion that SureBeam was required to disclose SUDAM's closure. Plaintiffs also fail to allege facts supporting their conclusion that SureBeam's business plan "collapsed" in late 2000, and thus they cannot allege that it should have been disclosed.

[1] Not only are the conclusions unsupported by fact allegations, they directly contradict each other. On the one hand, Plaintiffs claim the business plan was dead by late 2000, and on the other hand, they allege that funding was possible until March 2001 when SUDAM closed.

With respect to the Section 20(a) claim against Titan, Plaintiffs fail to allege any misrepresentations occurred that could give rise to a securities fraud claim. Also, Plaintiffs fail to raise an inference of scienter against any SureBeam executive. Even viewed most favorably to Plaintiffs, their allegations paint a picture of diligent, though fruitless, efforts to make SureBeam succeed, not knowledge of fraud.

II. PLAINTIFFS FAIL TO STATE A SECTION 11 CLAIM[2]

A. Plaintiffs Do Not Dispute That Titan Is Not A Proper Section 11 Defendant

Titan neither signed nor issued SureBeam's IPO Registration Statement, nor does Titan fit within any other statutory category of other proper Section 11 defendants. 15 U.S.C. § 77k(a). The fact that Titan was SureBeam's parent corporation at the time of the IPO does not render it a Section 11 defendant. In re American Bank Note Holographics Sec. Litig., 93 F. Supp. 2d 424, 436-37 (S.D.N.Y. 2000). Plaintiffs fail to address this authority or cite any contrary authority. The Court should dismiss the Section 11 claim against Titan.

B. Plaintiffs Fail To Allege Facts To Support Their Conclusory Allegations[3]

1. Plaintiffs Do Not Plead Facts To Support Their Conclusion That SUDAM Was SureBeam's "Last Chance" For Funding

Plaintiffs do not plead facts to give the Court any means to infer what role SUDAM funding was to play for Tech Ion. Based on the allegations, the Court cannot infer either that SUDAM was 1% of Tech Ion's funding, 100%, or anywhere in between. Yet Plaintiffs somehow conclude that it was Tech Ion's "last chance." In their opposition, Plaintiffs even argue

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[2] Plaintiffs are erroneous in their assertion that the Titan Defendants "argue that plaintiffs' Securities Act allegations must be dismissed for failure to satisfy Fed.R.Civ.P. 9(b)." (Opp. at 14:12-13.) Although the Titan Defendants correctly pointed out that Plaintiffs are required to satisfy Rule 9(b), they never argued that Plaintiffs' failure to do so was the reason the Court should dismiss the complaint. Rather, Plaintiffs' unsupported conclusory allegations fail to satisfy any pleading standard. With respect to Plaintiffs' Rule 9(b) argument, it is meritless on its face. The same "misrepresentations" Plaintiffs allege violated Section 11, Plaintiffs also allege were made with scienter.

[3] In adjudicating a motion to dismiss, "the court need not accept as true unreasonable inferences or conclusory legal allegations cast in the form of factual allegations." City of Arcadia v. United States E.P.A., 265 F. Supp. 2d 1142, 1151 (N.D. Cal. 2003); Western Mining Council v. Watt, 643 F.2d 618, 624 (9th Cir. 1981). "[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).

that SUDAM funding was a "desperate long shot," an argument unsupported by any fact allegations.[4]

Oddly, Plaintiffs also cite the fact that SureBeam shipped its irradiators through Manaus, Brazil (in the Amazon), which they admit was done to increase the chance of getting SUDAM funding, as a purported fact allegation supporting that Tech Ion could not get financing. This fact does not raise any inference about whether funding would actually be obtained through SUDAM or any other source.

2. Plaintiffs Do Not Plead Facts To Support Their Conclusion That SureBeam's Business Plan "Collapsed" In Late 2000

Plaintiffs fail to plead any facts to support their argument that SureBeam's "business plan was a failure, that SureBeam Brasil was not able to attract customers, and that neither traditional lenders nor lenders of last resort were interested." (Opp. at 8:13-16.) In their opposition, Plaintiffs selectively quote partial e-mails, then conclude that "SureBeam Brasil's business plan was economically unsound and doomed to failure because SureBeam Brasil could not make a profit at the rates it needed to charge to attract customers." (Opp. at 11:16-19.) Nowhere does any e-mail Plaintiffs quote raise the inference that the business plan was "doomed to failure." This is pure invention based on hindsight.

Plaintiffs appear not to have read even the partial quotes they cite from the e-mails, which are rife with optimism, not predictions of doom. (See Compl. at ¶¶ 27-29.)[5] The most Plaintiffs could reasonably infer from those e-mails is that SureBeam was working to get financing. Yet Plaintiffs incredibly argue that "by the end of 2000, SureBeam knew that any hope of obtaining financing from these lenders was dead," and that "SureBeam's entire business plan was 'financially inadequate.'"[6] (Compl. at ¶ 27; Opp. at 18:3-7.) The Court need not accept

[4] Plaintiffs' claim that its unsupported conclusion that SUDAM funding was Tech Ion's "last chance" is "enough" to survive a motion to dismiss turns pleading requirements on their head. It is Plaintiffs' burden to allege facts demonstrating that their conclusion may be true.

[5] The e-mail sections cited by Plaintiffs are set out in further detail in the chart on pages 12 and 13 of the Titan Defendants' moving papers.

[6] Plaintiffs' opposition also argues that purportedly shipping irradiators to Manaus demonstrates SureBeam's business plan had collapsed by the end of 2000. However, Plaintiffs' Complaint

this unreasonable, unsupported conclusion as true.

3. Plaintiffs Do Not Plead Facts To Support Their Conclusion That SureBeam Improperly Recognized $15.5 Million In Revenue In December 2000

Plaintiffs argue that somehow SureBeam's year 2000 revenue recognition is not correct because SureBeam later should have accrued a loss contingency for Tech Ion revenue. (Opp. at 9:8-13.) Whether SureBeam should have accrued a loss contingency in March 2001 is irrelevant to its revenue recognition in December 2000. SureBeam recognized the revenue based on the facts available as of December 2000 — including the facts in the e-mails pled in Plaintiffs' complaint that lenders were "genuinely interested" in providing financing, Tech Ion was "ready to rewrite" its funding proposal, Tech Ion "anticipated government support and financing for the facility, hopefully at zero interest costs," and anticipated that "chang[ing] the image of Rio to a Center of Excellence" would enable the venture to obtain government funds, and hopefully grants, to finance the project.[7] (Compl. at ¶¶ 25-29.)

Plaintiffs also fail to plead facts demonstrating that SureBeam had any reason to accrue a loss contingency in March 2001, as opposed to late 2001 when SureBeam did write off the debt. As the Titan Defendants have already explained, Plaintiffs fail to plead facts showing that SUDAM's closure was significant to Tech Ion's ability to pay SureBeam. SureBeam wrote the Tech Ion debt off over six months later, which raises the inference that SureBeam continued after March 2001 to work to obtain financing.[8]

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alleges that the irradiators were not shipped until January 16, 2001 and January 25, 2001. (Compl. at ¶ 35.)

[7] Plaintiffs argue that "SureBeam recognized its obligation to update financial statements in the Prospectus" because SureBeam disclosed that on March 6, 2001 SureBeam's compensation committee met and approved bonuses to certain officers and employees. (Opp. at 10, n.10.) However, SEC Regulation S-K requires very specific disclosure of management compensation information. 17 C.F.R. § 229.402(a)(2). SureBeam's compliance with SEC Regulation S-K does not mean that the Registration Statement should have disclosed SUDAM's closure.

[8] Furthermore, Plaintiffs' opposition fails to even address that KPMG issued an unqualified audit opinion of SureBeam's financial statements for the year ended December 31, 2002. (Compl. at ¶ 133; see moving papers, Ex. 4, original compl. at ¶ 38.) As Plaintiffs concede, the clean audit opinion was issued after SureBeam recognized $15.5 million in revenue in December 2000, after SUDAM's collapse in March 2001, after SureBeam issued its Prospectus, and after Titan forgave debt owed by Tech Ion.

4. Plaintiffs Do Not Plead Facts To Demonstrate That SureBeam Misrepresented Its Involvement In The Joint Venture

Plaintiffs admit Titan, not SureBeam, contributed $5 million to start up the SureBeam Brasil joint venture, yet they insist that SureBeam misrepresented that it did not contribute capital to SureBeam Brasil. (Opp. at 13:4-9.) Plaintiffs fail to allege any facts to demonstrate that SureBeam's representation was false. They claim that the loan did not specify circumstances under which it would be repaid, but cannot dispute that SureBeam Brasil was legally obligated to repay Titan. Also, they attempt to discard over 200 years of American corporate law and claim that Titan and SureBeam are "essentially identical" even though they are separate corporations. (Id. at 13, n.14.) Plaintiffs do not allege facts to support their brash conclusion.

C. Plaintiffs Fail To Plead A "Nondisclosure" Case

Plaintiffs' opposition de-emphasizes the purported "misleading statements" of their complaint, and instead focuses on alleged "failures to disclose" in the SureBeam Registration Statement. Yet, the complaint fails to plead that SureBeam violated SEC disclosure rules, nor does it plead any facts showing that material statements were not disclosed.

Plaintiffs argue that the Registration Statement failed to disclose that "SureBeam Brasil's business plan was economically unsound and doomed to failure because SureBeam Brasil could not make a profit at the rates it needed to charge to attract customers." (Opp. at 11:16-19.) But Plaintiffs fail to allege facts supporting this conclusion in the complaint. Paragraph 38, the specific paragraph cited by Plaintiffs, does not mention the alleged "failure" of SureBeam Brasil's business plan.

Plaintiffs argue that SureBeam failed to disclose SUDAM's closure. But the complaint fails to plead facts demonstrating how this purported omission violated any statute or gave rise to any cause of action. Plaintiffs' hindsight surmise of the effect of SUDAM's closure is conclusory speculation.

Plaintiffs also argue that SureBeam should have disclosed that the joint venture in Brazil switched construction companies and that SureBeam shipped irradiators to Manaus in the

Amazon rather than to Rio. These allegations of "nondisclosures" are specious. SureBeam disclosed that construction had been delayed. (Request for Judicial Notice, Ex. 1 at 19.) Who performed the construction is irrelevant. The Brazilian entry point for the irradiators may be relevant to Tech Ion's efforts to obtain SUDAM funding, but Plaintiffs fail to plead why the change from Rio to Manaus should have been disclosed to investors. Plaintiffs fail to plead why SureBeam should have disclosed these patently immaterial facts.

D. SureBeam's Statement That It Expected To Derive $55 Million In Revenue Was Protected By The Bespeaks Caution Doctrine

Plaintiffs claim that the bespeaks caution doctrine does not apply because SureBeam did not disclose the "specific, known facts of the lack of necessary funding, the collapse of SUDAM and the failure of SureBeam Brasil's business plan . . .." (Opp. at 15:17-19.) Plaintiffs fail to plead facts showing that any of these issues should have impacted revenue recognition. Moreover, Plaintiffs fail to plead that at the time of the IPO any Titan or SureBeam representative even knew that SUDAM had closed.

Also, Plaintiffs assert that SureBeam's Prospectus contained only "boilerplate" cautionary language. The Prospectus contained extensive specific risk disclosures, including the express warnings that "[w]e cannot assure you that we will continue to derive revenues from [Tech Ion], [or] that revenues from [Tech Ion] will continue at current or historical levels," and "[w]e will require significant additional capital to fund our future operations, which may not be available on acceptable terms or at all." (Request for Judicial Notice, Ex. 1 at 16, 18.) SureBeam's Registration Statement expressly defines the word "expects" as forward-looking. (Id. at p. 23.)

E. Plaintiffs Fail To Plead Standing

Lead Plaintiffs claim that they have pled tracing of their SureBeam shares to the IPO because they previously filed certifications with the Court establishing that they purchased SureBeam shares before August 20, 2002 when the spin off put additional SureBeam shares in the market. (Opp. at 18:21-23.) Further, Plaintiffs contend that all defendants "already received

certifications in original complaints…or as part of the Lead Plaintiff appointment process."[9] (Opp. at fn. 19.) Not true. The Titan Defendants were not defendants in the original complaints. (See e.g., Moving Papers, Ex. 4.) Plaintiffs never served the Titan Defendants with the original complaints. The consolidated complaint does not include or incorporate those certifications. On this basis alone, the Court should dismiss the Section 11 claim against the Titan Defendants.

F. Plaintiffs Fail To Plead Reliance

SureBeam filed a Form 10-K with the SEC on April 1, 2002 and a Form 10-Q on May 15, 2002, which, taken together, constitute earnings statements that covered the twelve months after the effective date of the Registration Statement. Thus, Plaintiffs must plead either that all Section 11 putative plaintiffs purchased shares before May 15, 2002, or that putative plaintiffs who purchased shares after that date relied on the Registration Statement. 15 U.S.C. § 77k(a). Plaintiffs failed to do so.

Plaintiffs erroneously contend that two earnings statements cannot together constitute the statutory 12-month period, such that Plaintiffs need not plead reliance. SEC Rule 158(a) defines the term "earning statement." An "earning statement" can be contained in multiple documents. Sec. Act. Release No. 6485 (Sept. 23, 1983), 1983 WL 33530 Fed. Sec. L. Rep. (CCH) ¶ 86,228 n.4, a copy of which is attached hereto as Exhibit A. Securities Act Release No. 6485 states, "such information may be contained in three Form 10-Q's and one Form 10-K. Alternatively, such information may be contained in two Form 10-Q's, one Form 10-K and one Form 8-K, or in any other combination of Exchange Act reports, or the annual report to security holders, that covers the 12 month period specified in the last paragraph of Section 11(a)." Id. (emphasis added). Thus, Plaintiffs fail to plead Section 11 reliance.

III. PLAINTIFFS FAIL TO STATE A SECTION 20(A) CLAIM

A. Plaintiffs Fail To Plead That Titan Was A "Control Person" Of SureBeam

Plaintiffs do not deny that circumstances of a "control relationship" must be pled

[9] Plaintiffs' reference to certifications purportedly included in "original complaints" is ironic in light of Plaintiffs' opposition to the Titan Defendants' Request for Judicial Notice of one of those original complaints. Plaintiffs cannot reference "original complaints" where it suits their purpose, then disclaim the original complaints where the allegations they contain would defeat Plaintiffs' claims.

with particularity. Howard v. Hui, Case No. C 92-3742 CRB, 2001 U.S. Dist. LEXIS 15443 (N.D. Cal., September 24, 2001). Instead, Plaintiffs claim they do not have to plead that Titan "exercised" control. (Opp. at 20:5-8.)

Yet, Plaintiffs' complaint pleads generically that Titan "exercised" control, demonstrating that when Plaintiffs drafted the consolidated complaint, they knew that they had to plead exercise of control. (Compl., ¶¶ 184, 191.) They failed to plead it with particularity, and thus the Court should dismiss their Section 20(a) claim against Titan.

Plaintiffs now claim that exercise of control is not an element of their claim. (Opp. at 21:10-13, citing Howard v. Everex Sys., Inc., 228 F.3d 1057, 1065 (9th Cir. 2000).) Plaintiffs misunderstand the Howard court's holding. Howard held that a plaintiff need not plead exercise of control over the specific act giving rise to a violation of the securities laws. Id. at 1065-66.[10]

In the Ninth Circuit, a plaintiff must plead that the purported control person exercised control over the allegedly controlled entity's day-to-day operations. No. 84 Employer-Teamster Joint Council Pension Trust Fund v. America West Holding Corp., 320 F.3d 920, 945 (9th Cir. 2003) (the Ninth Circuit requires the plaintiff to plead "(1) a primary violation of the federal securities law and (2) that the defendant exercised actual power or control over the primary violator."); 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. Plaintiffs allege that defendants Bixby and Canning exercised actual control over Brooktree.") (internal citations omitted).

While Titan's status as SureBeam's controlling shareholder may, on its face, satisfy the "ability to control" requirement, it does not demonstrate with particularity that Titan exercised any control over SureBeam's day-to-day operations. The Court should dismiss the Section 20(a) claim against Titan.

[10] Plaintiffs' claim that Howard is distinguishable because it is a summary judgment case is a distinction without a difference. Plaintiffs need to plead with particularity and prove exercise of control if they are to prevail.

B. Plaintiffs' Allegations Do Not Support An Inference That SureBeam Acted With Scienter[11]

To state a section 10(b) cause of action, the Ninth Circuit requires that Plaintiffs plead particular facts giving rise to a strong inference of scienter, i.e., knowing or intentional fraud. In re Silicon Graphics Sec Litig., 183 F.3d 970, 974 (9th Cir. 1999); see Ernst & Ernst v. Hochfelder, 425 U.S. 185, 193 n.12 (1976).[12]

Plaintiffs' allegations fail to give rise to a strong inference of intentional or conscious misconduct by SureBeam. Plaintiffs fail even to address important arguments: (1) inaccurate accounting does not raise an inference of scienter, and (2) Tech Ion and RESAL's inability to secure funding does not demonstrate scienter.

Based on the arguments set forth in the Titan Defendants' moving papers and the SureBeam Defendants' reply brief in support of their Motion to Dismiss, the Court should dismiss the section 20(a) claim against Titan.

C. Plaintiffs Fail To Plead Reliance On An Efficient Market

Plaintiffs' cursory allegation that SureBeam traded on NASDAQ is not enough to satisfy either the Ninth Circuit's Cammer test or Rule 9(b), which require that Plaintiffs plead with particularity the facts upon which they base their assertion that SureBeam's stock traded in an efficient market. In re Turbodyne Techs., Inc. Sec. Litig., Case No. CV 99-00697 MMM (BQRx), 2002 U.S. Dist. LEXIS 25738, at *46-47 (C.D. Cal. Mar. 13, 2002).

Plaintiffs, citing to a District of Arizona case, argue that NASDAQ is

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[11] Instead of addressing the Titan Defendants' 1934 Act arguments, Plaintiffs attempt to incorporate by reference the arguments made in their Opposition to Defendants Oberkfell, Claudio and Rane's Motion to Dismiss (the "SureBeam Defendants"). The Titan Defendants object to Plaintiffs' purported incorporation by reference on the grounds that Plaintiffs are not entitled to a fifty-page opposition without leave from the Court, which they failed to seek. To the extent that the Court considers the arguments set forth in Plaintiffs' opposition to the SureBeam Defendants' motion to dismiss, the Titan Defendants hereby join in the SureBeam Defendants' reply brief filed in support of their Motion to Dismiss. In any event, even with the additional pages of argument, Plaintiffs fail to show how they have alleged scienter.

[12] The Court must also consider "inferences unfavorable to the plaintiffs." Gompper v. VISX, Inc., 298 F.3d 893, 897 (9th Cir. 2002); Employers Teamsters Local Nos. 175 and 505 Pension Trust Fund v. Clorox Co., 353 F.3d 1125, 1134 (9th Cir. 2004) (emphasis added).

presumptively an efficient market. (Opp. at 22, n. 24), citing Levine v. SkyMall, No. CIV 99-166-PHX-ROS, 2001 U.S. Dist. LEXIS 24705, at *13 (D. Ariz. May 22, 2001). But the Levine court states that the fact that shares are traded on NASDAQ is "not dispositive" of whether or not a market is efficient, and that the fact stock trades on NASDAQ merely "contributes to a finding that the market is efficient." Id.

Even if the fact that SureBeam traded on NASDAQ contributes to a finding that the market is efficient, Plaintiffs have failed to allege any of the other factors required by the Cammer test. In contrast, the Levine plaintiffs pled facts demonstrating all five factors required by the Cammer test. If pleading "two of the five factors is not sufficient to satisfy the particularity requirement of Rule 9(b)" (Turbodyne, 2002 U.S. Dist. LEXIS 25738, at *52), pleading only one factor, as Plaintiffs claim they have done, is clearly insufficient. (Motion at 24.) Furthermore, Plaintiffs have failed even to address that the consolidated complaint alleges a factor that goes against the Cammer test: SureBeam filed an S-1, not an S-3. CC, ¶ 136. Plaintiffs have failed to satisfy the Cammer test and the particularity requirement of Rule 9(b). Accordingly, the Court should dismiss the Section 20(a) claim against Titan.

IV. CONCLUSION

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

DATED: August 30, 2004

ALSCHULER GROSSMAN STEIN & KAHAN LLP

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

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***1** 17 CFR Part 230

S.E.C. Release No.

Securities Act of 1933

Definition of Terms
File No. S7-972
September 23, 1983

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: The Commission announces the adoption of new Rule 158, which defines certain terms for purposes of the last paragraph of Section 11(a) of the Securities Act of 1933. That paragraph relates to liability under the Act and imposes a reliance requirement upon purchasers in certain circumstances. The Rule is intended to provide clarity and certainty with respect to these terms by building upon the Integrated Disclosure System.

EFFECTIVE DATE: September 30, 1983.

FOR FURTHER INFORMATION CONTACT: Barry Mehlman, (202) 272-2573, Office of Chief Counsel, Division of Corporation Finance, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, D.C. 20549.

SUPPLEMENTARY INFORMATION: The Securities and Exchange Commission announces the adoption of new Rule 158, which defines the terms 'earning statement', 'made generally available to its security holders' and 'effective date of the registration statement' for purposes of the last paragraph of Section 11(a) of the Securities Act of 1933 (the 'Securities Act') [15 U.S.C. 77a et seq. (1976 and Supp. IV 1980)]. Consistent with the Integrated Disclosure System, [FN1] the Rule defines such terms with reference to certain reports filed pursuant to the Securities Exchange Act of 1934 (the 'Exchange Act') [15 U.S.C. 78a et seq. (1976 and Supp. IV 1980)].

I. Background

In April 1983, the Commission published for comment Rule 158 defining the terms 'earning statement', 'made generally available to its security holders' and

'effective date of the registration statement' for purposes of the last paragraph of Section 11(a). [FN2] That paragraph imposes a reliance requirement upon purchasers of securities in a registered offering if the purchase is made after the registrant 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.

Historically, no clear guidelines have existed for determining the meaning of and standards for satisfying the terms and conditions of the last paragraph of Section 11(a). In addition, over the years, a wide variety of practices have developed with respect to the form and content of the earning statement and with respect to demonstrating general availability to security holders. In view of the absence of clear guidelines, the differing practices which had developed, and particularly the establishment of the Integrated Disclosure System, which makes use under the Securities Act of existing reports filed pursuant to the Exchange Act, the Commission believed that it would be appropriate to define the terms in the last paragraph of Section 11(a).

Commentator response to proposed Rule 158 was overwhelmingly favorable. [FN3] In addition, some commentators suggested modifying or clarifying certain provisions of the Rule. The Commission is adopting the Rule with modifications to reflect certain of the specific comments. These modifications are discussed below.

II. Discussion

A. Earning Statement

***2** Paragraph (a) of Rule 158, as adopted, is modified in five respects: (1) The Commission has determined to allow statements of income in one or any combination of Exchange Act reports to satisfy the requirements of paragraph (a) of the Rule, provided that certain conditions are met; (2) the Commission has modified paragraph (a) to allow statements of income meeting the requirements of Rule 14a-3(b) [17 CFR 240.14a-3(b)] under the Exchange Act for annual reports to satisfy the requirements of that paragraph; (3) the Commission has revised paragraph (a) to allow a subsidiary issuing debt securities guaranteed by its parent to meet the requirements of that paragraph if the parent's income statements satisfy the requirements of paragraph (a) and information respecting the subsidiary is included to the same extent as was presented in the registration statement; (4) the Commission has added a provision to provide explicitly that paragraph (a) is nonexclusive; and (5) the Commission has added provisions applicable to foreign private issuers (described separately below).

In the Proposing Release, the Commission indicated that only optional cumulative twelve month income statements in reports on Form 10-Q [17 CFR 249.308a] would be deemed 'sufficient' for purposes of paragraph (a). Several commentators objected to this proposal, arguing that it would have the effect of making mandatory the filing of optional cumulative twelve month income statements in reports on Form

10-Q and, to the extent it did not and three month Form 10-Q reports were interspersed with twelve month Form 10-Q reports, it would confuse rather than inform investors. These commentators suggested that the Rule be modified to allow the filing of Exchange Act reports for the twelve month period specified in Section 11(a) to meet the requirements of paragraph (a), regardless of whether statements of income in reports of Form 10-Q contain three or twelve month information.

In view of these comments, the Commission has determined to allow statements of income in one or any combination of Exchange Act reports to satisfy the requirements of paragraph (a) of the Rule, provided that certain conditions are met. Thus, an 'earning statement' shall be sufficient for purposes of the last paragraph of Section 11(a) if the information specified in the last paragraph of Section 11(a): (1) Is contained in one report or any combination of reports on Form 10-K [17 CFR 249.310], Form 10-Q, Form 8-K [17 CFR 249.308] or in the annual report to security holders pursuant to Rule 14a-3; and (2) meets the requirements of Item 8 of Form 10-K, Part I, Item I of Form 10-Q or Rule 14a-3(b) under the Exchange Act.

Permitting one or any combination of Exchange Act reports containing the required information for statements of income to satisfy the 'earning statement' requirement of paragraph (a) means that the information in the 'earning statement' may be contained in multiple documents. [FN4] The Commission believes that this change satisfies the purposes underlying Section 11(a). Under the Integrated Disclosure System, the information contained in Exchange Act reports is available to the public, regardless of the number of disclosure documents in which it is contained. Thus, twelve month financial information for an issuer is generally available even though it may be contained in several documents.

***3** The Commission also is expanding paragraph (a) to allow statements of income in the annual report to security holders to satisfy the requirements of that paragraph. Because the requirements for statements of income pursuant to Rule 14a-3(b) are uniform with those for Form 10-K, [FN5] the Commission believes that it is appropriate to allow statements of income prepared in accordance with Rule 14a-3(b) to satisfy the requirements of paragraph (a).

It also was suggested that the Commission amend paragraph (a) to provide that an earning statement of a parent guarantor satisfies the earning statement requirement of both the parent guarantor and the subsidiary where the subsidiary issues debt securities guaranteed by the parent. Because this change would be consistent with the staff's administrative practice under the Securities Act in connection with the disclosure required in registration statements, the Commission has determined to modify paragraph (a) to permit a subsidiary issuing debt securities gauranteed by its parent to meet the requirement of that paragraph if the parent's income statements satisfy the criteria of paragraph (a) and information respecting the subsidiary is included to the same extent as was presented in the registration statement. [FN6]

There were a number of suggestions as to how paragraph (a) could be clarified. For example, some commentators expressed concern that, because of the reference to

Item 8 of Form 10-K, paragraph (a) may be construed to require audited financial information for earning statements and requested that this be clarified. While the Commission does not believe that it is necessary to amend the rule in this regard, it notes that financial information in earning statements under paragraph (a) need not be audited. [FN7] Because current practice does not mandate audited earning statements, requiring an audit for earning statements under Rule 158 would impose an undue burden on registrants.

Finally, a number of commentators suggested that a nonexclusivity provision be added to paragraph (a). Because this change would be consistent with paragraph (b) of the Rule, the Commission is amending paragraph (a) to provide that an 'earning statement' not meeting the requirements of that paragraph may otherwise be sufficient for purposes of Section 11(a).

B. General Availability

Paragraph (b) of Rule 158 is adopted substantially as proposed. The Commission has determined not to modify paragraph (b) to include non-reporting registrants in the Rule or to impose additional requirements on registrants not qualified to use Forms S-2 or S-3. The Commission has added the annual report to security holders, which is supplied to the Commission pursuant to Rule 14a-3(c), to the means specified for meeting the general availability requirement of that paragraph and has added provisions applicable to foreign private issuers (described separately below).

In the Proposing Release, the Commission requested specific comment as to whether paragraph (b) should be broadened to include registrants not subject to Sections 13 or 15(d) of the Exchange Act. Commentators opposing the inclusion of non-reporting registrants indicated that the voluntary filing of Exchange Act reports by non-reporting registrants would be an unexpected occurrence and, thus, would not make the earning statement 'generally available.' On the other hand, commentators favoring the inclusion of non-reporting registrants asserted that most are foreign issuers and that information comparable to that filed by reporting registrants is available and is readily assimilated into the market place.

***4** The Commission has determined not to include non-reporting registrants in the Rule. Because only reporting registrants are required to file periodic reports under the Exchange Act, the Commission believes that the voluntary filing of Exchange Act reports by non-reporting registrants would not make the earning statement 'generally available' within the meaning of the Rule. In addition, the Commission believes that the number of registrants that have made public offerings within a preceding twelve month period, but no longer have a reporting obligation under Section 15(d) of the Exchange Act, [FN8] is small. Because the Rule is non-exclusive, these registrants can meet the general availability requirement of the last paragraph of Section 11(a) in ways other than those specified in the Rule. If the number of such registrants becomes larger, however, the Commission will reconsider whether non-reporting registrants should be convered by the Rule.

In the Proposing Release, the Commission also requested specific comment as to whether the filing of Exchange Act reports should be sufficient to establish general availability in the case of registrants not qualified to use Forms S-2 or S-3 or whether additional requirements should be imposed on such registrants. Most of the commentators addressing this point believed that additional requirements should not be imposed on S-1 registrants, indicating that Exchange Act reports are readily available for reporting companies and are not affected by the nature of the reporting company. Because S-1 registrants file the same Exchange Act reports as registrants qualified to use Forms S-2 or S-3 and since these reports are in the Commission's disclosure system and readily available to the investing public, the Commission does not believe it is necessary to impose additional requirements on registrants not qualified to use Forms S-2 or S-3.

It also was suggested that paragraph (b) be modified to allow the annual report to security holders pursuant to Rule 14a-3 to meet the general availability requirement of that paragraph. The Commission believes that this change is appropriate for several reasons. First, the Integrated Disclosure System is premised on the concept of equivalency of information and, accordingly, the annual report to security holders contains the same minimum disclosure package, including statements of income, which is required to be included in the Form 10-K. [FN9] Second, copies of the annual report to security holders, while not deemed to be filed with the Commission, are required to be supplied to the Commission [FN10] and thus are in the Commission's disclosure system and readily available to the investing public. And, of course, by definition, such reports are disseminated to the registrant's security holders.

Accordingly, the Commission has determined to amend paragraph (b) to permit the annual report to security holders to satisfy the general availability requirement of that paragraph. Copies of the annual report to security holders will be deemed to meet the general availability requirement of paragraph (b) at the time the copies are sent to the Commission pursuant to the requirements of Rule 14a-3(c).

***5** While some commentators believed that the Commission should set forth additional ways in which an earning statement can be made 'generally available,' [FN11] the Commission does not believe such action is appropriate. Tying the general availability requirement to the Exchange Act reporting system provides certainty and avoids the problems inherent in setting standards for alternatives. Moreover, approving additional ways in which an earning statement can be made 'generally available' is unnecessary because the Rule is nonexclusive.

C. Effective Date

Paragraph (c) of Rule 158 is adopted substantially as proposed. It provides that for purposes of the last paragraph of Section 11(a) the 'effective date of the registration statement' is deemed to be the latest to occur of three dates. These dates are: (1) The effective date of the initial registration statement; (2) the effective date of a post-effective amendment, which next precedes a particular sale of securities by the registrant, that is filed for the purposes enumerated in

Item 512(a) of Regulation S-K; [FN12] and (3) the filing date of an Exchange Act report incorporated by reference into a registration statement, subsequent to its effective date and next preceding a particular sale of securities by the registrant, if such report takes the place of an otherwise required post-effective amendment. The Commission has relocated the phrase 'next preceding a particular sale by the registrant of registered securities to the public' in paragraph (c)(2) in order to make clear that the phrase applies to each of subclauses (i), (ii) and (iii).

D. Foreign Private Issuers

In the Proposing Release, the Commission indicated its intention to adopt comparable provisions, either in Rule 158 or in a separate rule, for foreign private issuers that file annual reports on Form 20-F [17 CFR 249.220f] and requested specific comment as to: (1) The extent to which earning statements on Form 6-K [17 CFR 249.306] reports should come within the definition of the term 'earning statement' for purposes of the last paragraph of Section 11(a) and (2) which reports should be deemed to have been made generally available to security holders for such purposes.

A number of commentators suggested that foreign private issuers filing periodic reports on Forms 20-F and 6-K should come within the purview of the Rule. They asserted that the rationale of relying on the Exchange Act reporting system in order to make the earning statement generally available applies equally to foreign private issuers.

In view of these comments, and the establishment of the Integrated Disclosure System for foreign private issuers which is comparable to the Integrated Disclosure System for domestic registrants, [FN13] the Commission has determined to include foreign private issuers in Rule 158. Thus, under paragraph (a) of the Rule, an 'earning statement' of a foreign private issuer eligible to use Form 20-F shall be sufficient for purposes of the last paragraph of Section 11(a) if the information specified in the last paragraph of Section 11(a): (1) Is contained in one or any combination of reports on Form 20-F or Form 6-K; and (2) meets the requirements of Item 17 of Form 20-F. Similarly, under paragraph (b) of the Rule, foreign private issuers may use Form 20-F and Form 6-K to meet the general availability requirement of that paragraph.

III. Statutory Authority

***6** Rule 158 is being adopted pursuant to Sections 6, 7, 10 and 19(a) of the Securities Act of 1933.

IV. Effective Date

In view of the clarifying nature of Rule 158, the absence of costs or burdens imposed on registrants by the Rule and the interest expressed in making the Rule effective immediately, the Commission has determined to make Rule 158 effective upon publication in the Federal Register.

List of Subjects in 17 CFR Part 230

Reporting requirements, Securities.

V. Text of Proposal

In accordance with the foregoing, Title 17, Chapter II, of the Code of Federal Regulations is amended as follows:

PART 230--GENERAL RULES AND REGULATIONS, SECURITIES ACT OF 1933

By adding § 230.158 to read as follows:

§ 230.158 Definitions of certain terms in the last paragraph of section 11(a).

(a) An 'earning statement' made generally available to security holders of the registrant pursuant to the last paragraph of section 11(a) of the Act shall be sufficient for the purposes of such paragraph if (1) there is included the information required for statements of income contained either (i) in Item 8 of Form 10-K (§ 249.310 of this chapter, Part I, Item 1 of Form 10-Q (§ 249.308a of this chapter), or Rule 14a-3(b) (Section 240.14a-3(b) of this chapter) under the Securities Exchange Act of 1934, or (ii) in Item 17 of Form 20-F (§ 249.220f of this chapter), if appropriate; and (2) the information specified in the last paragraph of section 11(a) is contained in one report or any combination of reports either (i) on Form 10-K, Form 10-Q, Form 8-K (§ 249.308 of this chapter), or in the annual report to security holders pursuant to Rule 14a-3 under the Securities Exchange Act of 1934, or (ii) on Form 20-F or Form 6-K (§ 249.306 of this chapter). A subsidiary issuing debt securities guaranteed by its parent will be deemed to have met the requirements of this paragraph if the parent's income statements satisfy the criteria of this paragraph and information respecting the subsidiary is included to the same extent as was presented in the registration statement. An 'earning statement' not meeting the requirements of this paragraph may otherwise be sufficient for purposes of the last paragraph of section 11(a).

(b) For purposes of the last paragraph of section 11(a) only, the 'earning statement' contemplated by paragraph (a) of this Rule shall be deemed to be 'made generally available to its security holders' if the registrant (1) is required to

file reports pursuant to section 13 or 15(d) of the Securities Exchange Act of 1934 and (2) has filed its report or reports on Form 10-K, Form 10-Q, Form 8-K, Form 20-F, or Form 6-K, or has supplied to the Commission copies of the annual report sent to security holders pursuant to Rule 14a-3(c), containing such information. A registrant may use other methods to make an earning statement 'generally available to its security holders' for purposes of the last paragraph of section 11(a).

***7** (c) For purposes of the last paragraph of section 11(a) only, the 'effective date of the registration statement' is deemed to be the date of the latest to occur of (1) the effective date of the registration statement: (2) the effective date of the last post-effective amendment to the registration statement, next preceding a particular sale by the registrant of registered securities to the public filed for purposes of (i) including any prospectus required by section 10(a)(3) of the Act, (ii) reflecting in the prospectus any facts or events arising after the effective date of the registration statement (or the most recent post-effective amendment thereof) which, individually or in the aggregate, represent a fundamental change in the information set forth in the registration statement, or (iii) including any material information with respect to the plan or distribution not previously disclosed in this registration statement or any material change to such information in the registration statement, or (3) the date of filing of the last report of the registrant incorporated by reference into the prospectus, and relied upon in lieu of filing a post-effective amendment for purposes of paragraphs (c)(2)(i) and (ii) of this rule, next preceding a particular sale by the registrant of registered securities to the public.

(Secs. 6, 7, 10, 19(a), 48 Stat. 78, 81, 85; secs. 205, 209, 48 Stat. 906, 908; sec. 8, 68 Stat. 685; sec. 308(a)(2), 90 Stat. 57; 15 U.S.C. 77f, 77g, 77j, 77s(a))

By the Commission.

George A. Fitzsimmons,

Secretary.

[FR Doc. 83-26795 Filed 9-29-83; 8:45 am]

BILLING CODE 8010-01-M

FN1 See Release No. 33-6383 (March 3, 1982) [47 FR 11380]. Because the Integrated Disclosure System utilizes the term 'registrant,' see Rule 405 [17 CFR 230.405], the Commission has amended Rule 158 to refer to a 'registrant' instead of an 'issuer.'

FN2 Release No. 33-6464 (April 22, 1983) [48 FR 19392] ('Proposing Release').

FN3 The Commission received twenty-six comment letters in response to the proposed Rule. The comment letters and a highlight of the comments prepared by the staff are available for inspection and copying at the Commission's Public Reference Room, 450 Fifth Street, N.W., Washington, D.C. 20549 (See File No. S7-972).

FN4 For example, such information may be contained in three Form 10-Q's and one Form 10-K. Alternatively, such information may be contained in two Form 10-Q's, one Form 10-K and one Form 8-K, or in any other combination of Exchange Act reports, or the annual report to security holders, that covers the twelve month period specified in the last paragraph of Section 11(a).

FN5 See Release No. 33-6234 (September 2, 1980) [45 FR 63682].

FN6 Pursuant to Staff Accounting Bulletin No. 53 (June 13, 1983) [48 FR 28230], subsidiaries issuing debt securities guaranteed by a parent are subject to differing levels of disclosure in their registration statements. Were the subsidiary is wholly owned, has no independent operations and the guarantee is full and unconditional, separate financial statements for the subsidiary are not required. Where the guarantee is full and unconditional and where the subsidiary is wholly owned, but has more than minimal independent operations, summary financial information for the subsidiary must be provided. Where the subsidiary is not wholly owned or where the guarantee is not full and unconditional, all financial information for the subsidiary specified by the applicable registration form is required.

FN7 However, both Form 10-K and Rule 14a-3(b) require that financial statements in annual reports be audited. Thus, when a registrant uses its Form 10-K or annual report to security holders to meet the general availability requirement of paragraph (b), the income statement contained therein necessarily will be audited.

FN8 Under Section 15(d) a registrants's obligation to file periodic reports under Section 13(a) of the Exchange Act is automatically suspended if, at the beginning of the fiscal year following the effective date of the registration statement, the securities of the class to which the registration statement relates are held of record by less than three hundred persons.

FN9 Release No. 33-6231 (September 2, 1980) [45 FR 63630].

FN10 Rule 14a-3(c) under the Exchange Act requires that seven copies of the

annual report sent to security holders be mailed to the Commission. solely for its information, not later than the date on which such report is first sent or given to security holders or the date on which preliminary copies of solicitation material are filed with the Commission pursuant to Rule 14a-6(a) [17 CFR 240.14a-6(a)], whichever date is later. The report is not deemed to be 'filed' with the Commission or subject to the liabilities of Section 18 of the Exchange Act.

FN11 For example, some commentators suggested that publishing an earning statement in a financial journal or sending informal quarterly reports to security holders should be deemed to be acceptable ways of making an earning statement 'generally available' within the meaning of paragraph (b) of Rule 158.

FN12 Item 512(a) of Regulation S-K (17 CFR 229.512) sets forth undertakings which must be included in a registration statement if securities are registered pursuant to Rule 415 [17 CFR 230-415]. These undertakings require the filing of a post-effective amendment: (a) To include any prospectus required by Section 10(a)(3) of the Securities Act; (b) to reflect any facts or events arising after the effective date which, individually or in the aggregate, represent a fundamental change in the information set forth in the registration statement; or (c) to include any new material information, or any materially changed information, with respect to the plan of distribution.

FN13 See Release No. 33-6437 (November 19, 1982) [47 FR 54764].

END OF DOCUMENT

PROOF OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is Alschuler Grossman Stein & Kahan LLP, The Water Garden, 1620 26th Street, Fourth Floor, North Tower, Santa Monica, California 90404-4060. On August 30, 2004 I served a true copy of the within documents:

DEFENDANTS THE TITAN CORPORATION, DR. GENE W. RAY AND SUSAN GOLDING'S REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS PURSUANT TO FED.R.CIV.P.12(B)(6)

☐ by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m.

The above transmission was reported as complete and without error. Attached hereto is a copy of the respective transmission report, which was properly issued by the transmitting facsimile machine.

☒ by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Santa Monica, California, addressed as set forth below.

☐ by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.

SEE ATTACHED SERVICE LIST

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

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

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on August 30, 2004 in Santa Monica, California.

Gladys Kawaguchi

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