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CLERK U.S. DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

BY

DEPUTY

UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

ARLON RAY WILSON and WILSON  
PRODUCTIONS, INC.,

Plaintiff,

v.

SUNRISE MEDICAL, INC.; SUNRISE MEDICAL  
HHG, INC.; SUNRISE MEDICAL HOLDINGS,  
INC.; and DOES 1 to 20,

Defendants.

Case No.: 05 CV 0849 BEN (JMA)

STIPULATED PROTECTIVE ORDER

Dept: 3

Judge: Hon. Roger T. Benitez

This stipulation is entered into by and between Plaintiffs, ARLON RAY WILSON and WILSON PRODUCTIONS, INC. and SUNRISE MEDICAL, INC., SUNRISE MEDICAL HHG, INC. and SUNRISE MEDICAL HOLDINGS, INC. (individually referred to as a "Party," and collectively referred to hereafter as the "Parties").

RECITALS

1. The Parties are engaged in formal discovery pursuant to the Federal Rules of Civil Procedure;
2. The Parties assert that discovery will require the disclosure of information or matters that include trade secret or other confidential research, development, or commercial information within the meaning of Rule 26 of the Federal Rules of Civil Procedure;

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Case No.: 05 CV 0849 BEN (JMA)



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**II. ADMINISTRATION AND LOGISTICS.**

**A. Designation.** For written discovery or deposition testimony, Confidential Information may be designated by the Producing Party as “CONFIDENTIAL” or “CONFIDENTIAL – ATTORNEYS EYES ONLY.”

**B. Discovery Requests.** For written discovery responses and for documents and things produced in response to discovery requests which constitute or contain Confidential Information, the responses or documents, as the case may be, shall be designated by the Producing Party at the time of production by stamping or otherwise affixing thereto a designation as provided in Section II.A.

**C. Deposition Testimony.** For deposition testimony, unless modified by agreement of counsel or Court order, only those persons authorized by this Order to receive Confidential Information may be present during depositions. Furthermore, if during the course of a Producing Party’s deposition, such Producing Party believes all, or a portion, of its testimony constitutes Confidential Information, at any time during the course of the deposition, counsel for the Producing Party may designate all, or a portion, of the testimony and resulting deposition transcript Confidential Information by stating on the record that such information is “CONFIDENTIAL” or “CONFIDENTIAL – ATTORNEYS EYES ONLY” as provided in Section II.A. If the Producing Party designates any portion of the testimony as “CONFIDENTIAL – ATTORNEYS EYES ONLY,” then only those persons authorized under section III.A may remain present during the testimony.

**D. Copies of Confidential Information.** The Parties agree to the following parameters for the production of Confidential Information. Legible photocopies of documents, and where reasonably possible, inspected things, may be used for all purposes in this action in the place of, and to the extent that, “originals” may be so used. The “original” of the document, to the extent and in whatever form it may be found in the files of a Party, and the original things, shall be made available for inspection at reasonable times upon reasonable request of the Requesting Party.

1           E.     **Inadvertent Disclosures.** If a Producing Party at any time notifies the Requesting  
2 Party, in writing, that it inadvertently produced documents, testimony, information, and/or things  
3 that are protected from disclosure under the attorney-client privilege, work product doctrine,  
4 and/or any other applicable privilege or immunity from disclosure, the Requesting Party shall not  
5 review, or cease review if then currently reviewing such items, and return all copies of such  
6 documents, testimony, information, and/or things to the Producing Party within five (5) business  
7 days of receipt of such notice. The Requesting Party shall not use such items for any purpose  
8 until further order of the Court. The return of any discovery item to the Producing Party shall not  
9 preclude the Requesting Party from moving the Court for a ruling that: (i) the document or thing  
10 was never privileged or protected; or (ii) the privilege or protection has been waived.

11           F.     **Inadvertent Production Without Designation.** The inadvertent production of  
12 any document or thing without a Confidential designation shall be without prejudice to a  
13 subsequent claim that such material is Confidential. If the Producing Party asserts that such  
14 materials include Confidential Information, the Receiving Party shall take prompt steps to ensure  
15 that all known copies of such material are marked Confidential and treated as such. Nothing in  
16 this section shall preclude a Party from challenging the propriety of the claim of confidentiality.

17 **III. AUTHORIZED ACCESS TO AND USE OF CONFIDENTIAL INFORMATION.**

18           A.     Access to, and disclosure of, all documents, testimony, information, and things  
19 received by counsel for a Receiving Party pursuant to discovery, which are designated  
20 “**CONFIDENTIAL – ATTORNEYS EYES ONLY**” shall be limited to the following persons:

- 21                   1. Outside counsel for the Requesting Party, and their paralegals,  
22                   administrative assistants, secretaries, and support staff, and litigation  
23                   support services, including without limitation, copy services, document  
24                   production services, exhibit-making services, translation services, coding  
25                   services, scanning services, animation services, jury consultants and mock  
26                   jurors. It will be the responsibility of each of the Parties’ undersigned  
27                   counsel to ensure compliance with the protective order. Execution of this  
28                   Order by undersigned counsel shall constitute a representation that outside

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counsel for the Parties shall use reasonable best efforts to ensure that all such persons shall observe the terms of this Order;

2. Subject to Section V of this Order, outside consultants, or experts retained by a Requesting Party in this litigation who are not employees of the Requesting Party or its affiliates, and who do not have any subsisting or ongoing employment or retainer relationship with a Requesting Party, and who shall agree to be bound by this Order to the same extent as if they were a party to this agreement and shall not use a Producing Party's Confidential Information: (i) for the benefit of the Requesting Party other than in connection with this litigation; or (ii) for the benefit of any other person or entity; and
3. Court reporters, videographers, and Court personnel, as necessary.

B. Access to, and disclosure of, all documents, testimony, information, and things received by counsel for a Receiving Party pursuant to discovery, which are designated "CONFIDENTIAL" shall be limited to the following persons:

1. All persons described in section III.A;
2. In-house counsel for the Requesting Party, and their paralegals, administrative assistants, secretaries, and support staff. Execution of this Order by undersigned counsel shall constitute a representation that all such persons shall observe the terms of this Order;
3. Any witness testifying in a deposition in this case, regardless of the current status of his or her employment, if: (i) the witness is listed as an author or recipient on the face of such Confidential Information; and/or (ii) the lawyer disclosing such Confidential Information has a good-faith reasonable belief based upon the witness's testimony that the witness may have access to the Confidential Information; and
4. The Chief Executive Officer of a Party.

1 C. Use and/or dissemination of Confidential Information, whether designated  
2 "CONFIDENTIAL" or "CONFIDENTIAL - ATTORNEYS EYES ONLY" shall be in strict  
3 accordance with Sections IV - VIII of this Order.

4 **IV. BRIEFS CONTAINING CONFIDENTIAL INFORMATION.**

5 Any pleading, paper, or other document filed in this action which contains or attaches  
6 Confidential Information subject to this Order must be filed in a sealed envelope marked  
7 "CONFIDENTIAL."

8 **V. CONSULTANTS AND EXPERTS.**

9 A. The following provisions shall control the dissemination of Confidential  
10 Information to consultants and experts.

11 1. A Party proposing to show Confidential Information to a consultant or  
12 expert per Section III.A.2, above, shall first <sup>have the consultant or expert</sup> ~~submit to the Court~~ a sworn <sup>execu</sup>  
13 undertaking, in substantially the format attached hereto as Exhibit A, and a  
14 curriculum vitae ("C.V.") which includes the consultant's or expert's name,  
15 current business affiliation and address, and any known present or former  
16 relationships between the consultant or expert and the Producing Party or  
17 known competitor of the Producing Party. The undertaking and C.V. shall  
18 be delivered to the Producing Party by facsimile with confirmatory copy at  
19 least ten (10) business days prior to the disclosure of any Confidential  
20 Information to such consultant or expert.

21 2. If a Party receiving a notice pursuant to Section V, objects to such  
22 Confidential Information being disclosed to the selected consultant or  
23 expert, such Party shall make its objections known to the sender of the  
24 notice, via facsimile with a confirmatory copy, within ten (10) business days  
25 of receipt of the written notification required by Section V. If a written  
26 notice of objection is provided, no Confidential Information shall be  
27 disclosed to the selected consultant or expert until the objection is resolved  
28 by an order of the Court or by an agreement among the Parties involved.

1 **VI. PERSONS ACCESSING CONFIDENTIAL INFORMATION.**

2 All persons other than the persons listed in Paragraph III.A.1 and III.A.3, prior to  
3 receiving Confidential Information, shall be furnished with a copy of this Order and shall  
4 acknowledge in writing that he or she has read this Order, understands it, and agrees to be bound  
5 by it. Acknowledgment is an express agreement to be subject to the jurisdiction of this Court in  
6 connection with any proceeding or hearing relating to such Confidential Information or to this  
7 Order, including any proceeding relating to the enforcement of the Order. (See form attached as  
8 Exhibit A.)

9 **VII. NO OTHER DISCLOSURE OR USE.**

10 Under no circumstances shall any Party or person subject to this Order disclose or make  
11 use of any Confidential Information designated "**CONFIDENTIAL**" or "**CONFIDENTIAL –**  
12 **ATTORNEYS EYES ONLY**" that is obtained by the Party or person except for purposes  
13 necessary to litigation of this civil action.

14 **VIII. CHALLENGES TO DESIGNATION.**

15 This Order shall be without prejudice to the right of any Party, any person bound by this  
16 Order, or any interested member of the public, to bring before the Court the question of whether  
17 any particular item is properly designated "**CONFIDENTIAL**" or "**CONFIDENTIAL –**  
18 **ATTORNEYS EYES ONLY**" or properly designated as Confidential Information under the  
19 terms of this Order. The Party challenging the designation of an item as Confidential Information  
20 shall make a reasonable and good faith attempt to informally resolve the challenge prior to  
21 bringing a motion. Until an order is obtained from the Court, the challenging Party shall treat the  
22 *item as designated by the Producing Party, pursuant to the terms of this Order.*

23 **IX. THIRD-PARTY PRODUCTIONS.**

24 To the extent that documents, things, and deposition testimony are sought from a third-  
25 party, and in the event any documents, things, and/or deposition testimony are obtained from a  
26 third-party, such third-party shall have the right to designate any such documents, things, and/or  
27 deposition testimony as "**CONFIDENTIAL**" or "**CONFIDENTIAL – ATTORNEYS EYES**  
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1 ONLY” and the use of such Confidential Information by any Receiving Party shall be governed  
2 in all respects by the terms of this Order.

3 X. LASTING OBLIGATIONS.

4 A. Upon final termination of this action, the following provisions shall continue in  
5 full force and effect, with regard to the subject matter of this Order.

6 B. All persons subject to the terms hereof shall collect and return to the respective  
7 Parties all material designated “CONFIDENTIAL” or “CONFIDENTIAL – ATTORNEYS  
8 EYES ONLY” and all copies thereof, and shall return or destroy all other outlines, summaries,  
9 abstracts, compilations, memoranda and other documents, embodying or concerning such  
10 information and materials. Alternatively, all persons subject to the terms of this Order may  
11 certify in writing that such materials and documents have been destroyed. Notwithstanding the  
12 foregoing, outside counsel for each Party may retain one complete and unredacted set of  
13 pleadings and papers filed with the Court or served on the other Parties, including deposition,  
14 hearing, and trial transcripts, recordings and exhibits.

15 C. All obligations and duties arising under this Order shall survive the termination of  
16 this action. The Court retains jurisdiction indefinitely over the Parties, and any persons provided  
17 access to Confidential Information under the terms of this Order, with respect to any dispute over  
18 the improper use of such Confidential Information.

19 XI. TRIAL.

20 This Order shall apply to pre-trial proceedings and not to the trial of this action. The  
21 Parties shall address any needed protection for the confidentiality of materials introduced into  
22 evidence at trial with the Court at the pretrial conference.

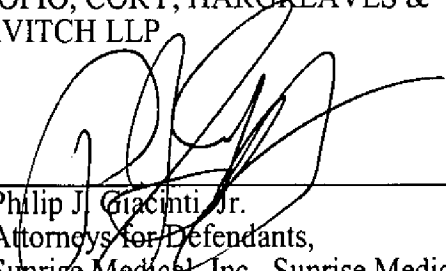
23 DATED: 3 January 2006

JONES, ODOM, DAVIS & POLITZ, L.L.P.

24  
25 By: John S. Odom, Jr.  
26 John S. Odom, Jr.  
27 Attorneys for Plaintiffs  
Arlon Ray Wilson and Wilson  
28 Productions, Inc.

1 DATED: 1/9/06

PROCOPIO, CORY, HARGREAVES &  
SAVITCH LLP

2  
3  
4 By:   
Philip J. Giacinti, Jr.  
Attorneys for Defendants,  
5 Sunrise Medical, Inc., Sunrise Medical  
6 HHG, Inc., and Sunrise Medical  
Holdings, Inc.

7 **ORDER**

8 **GOOD CAUSE APPEARING, IT IS SO ORDERED** in accordance with the above  
9 stipulation.

10 DATED: 1/12/06

  
11 Judge of the District Court

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13 **JAN M. ADLER**  
**U.S. MAGISTRATE JUDGE**

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Exhibit A

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I, \_\_\_\_\_, being duly sworn, state that:

1. My address is \_\_\_\_\_.

2. My present employer is \_\_\_\_\_.

3. My present occupation or job description is \_\_\_\_\_.

4. I have received a copy of the Stipulated Protective Order filed in the above-entitled action, and signed by Judge Roger T. Benitez on \_\_\_\_\_, 2006.

5. I have carefully read and understand the provisions of the Stipulated Protective Order.

6. I certify that I am eligible to have access to Confidential Information under the terms of the Stipulated Protective Order; and if necessary thereunder, my curriculum vitae is attached hereto.

7. I will comply with all provisions of the Stipulated Protective Order.

8. I will hold in confidence, will not disclose to anyone not qualified under the Stipulated Protective Order, and will use only for purposes of this action, any Confidential Information disclosed to me.

9. I will return all Confidential Information which come into my possession, and documents or things which I have prepared relating thereto, to counsel for the Party by whom I am retained at the conclusion of my retainer or at the final termination of the litigation.

10. I hereby submit to the jurisdiction of this Court for the purpose of enforcement of the Stipulated Protective Order in this action.

\_\_\_\_\_  
(Signature)

Subscribed and sworn to (or affirmed) before me on this \_\_\_\_ day of \_\_\_\_\_, 2006 by \_\_\_\_\_, personally known to me or proved to me on the basis of satisfactory evidence to be the person who appeared before me.

\_\_\_\_\_  
Notary Public



JOEH

3:02-CV-870 IN RE: PEREGRINE SYS INC V.

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SOUTHERN DISTRICT OF CALIFORNIA  
DEPUTY

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

In re:  
PEREGRINE SYSTEMS, INC.  
SECURITIES LITIGATION

CASE NO. 02CV870-BEN (RBB)  
**ORDER GRANTING FINAL  
JUDGMENT UNDER RULE 54(b)  
AND STAYING ACTION  
PENDING FINAL RESOLUTION  
OF APPEAL (Docket Nos. 630 and  
639)**

**I.  
INTRODUCTION.**

Now before the Court is the Lead Plaintiff<sup>1</sup>, the Loran Group's, Motion for Entry of Judgment under Federal Rule of Civil Procedure 54(b), based on two rulings the Court issued in January and March of 2005. Under Rule 54(b), "[w]hen more than one claim for relief is presented in an action . . . or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties . . . ." Id. The Motion is

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<sup>1</sup> Plaintiffs are divided into one main class and two sub-classes. The main class is represented by the Lead Plaintiff, the Loran Group. The sub-classes include those who obtained Peregrine's stock when it merged with Harbinger and Remedy Corporations. Unless specifically distinguishing between these classes of Plaintiffs, when the Court uses Plaintiff it only refers to the Lead Plaintiff, the Loran Group.

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1 unopposed.<sup>2</sup> Instead, Defendants<sup>3</sup> Moores, Noell, Hosley and van den Berg move for stay of the  
2 action if the 54(b) judgment is granted, which the sub-class Plaintiffs oppose.

3 The Loran Group's claims are under Sections 10(b) and 20(a) of the Securities Exchange  
4 Act, 15 U.S.C. §§ 78j(b) 78t(a), and the Securities Exchange Commission's Rule 10b-5, 17 C.F.R.  
5 § 240.10b-5.

6 In 2005, the Court issued two rulings regarding the Loran Group's claims. First, in January  
7 2005, the Court dismissed with prejudice the Loran Group's claims under Section 10(b) and Rule  
8 10b-5 of the 1934 Act against Defendants KPMG LLP, BearingPoint, Inc., and Larry Rodda ("the  
9 KPMG Defendants"). Specifically, the Court found that the KPMG Defendants were aiders and  
10 abettors within the meaning of Section 10(b) and Rule 10b-5, and thus not liable. See, Central  
11 Bank of Denver, N.A. v. First Interstate Bank of Denver ("Central Bank"), 511 U.S. 164, 191  
12 (1994) ("[A] private plaintiff may not maintain an aiding and abetting suit under § 10(b).").

13 Then, in March 2005, the Court issued its second Order. In that Order, as relevant here, the  
14 Court found that the Loran Group state a Section 10(b) claim against Gardner, Gless, Spitzer, and  
15 Cappel. The Court also found that the Loran Group adequately states claims for control liabilities  
16 under Sections 20(a) against Gardner and Gless. However, the Court found, that the Loran Group  
17 fails to state a: (1) Section 10(b) and Rule 10b-5 claim against Defendants: Nelson, Luddy,  
18 Moores, Noell, Cole, van den Berg, Hosley, Savoy, Watrous, Dammeyer, Stulac, and AWSC; and  
19 (2) Section 20(a) control liability claim against Moores, Nelson, Noell, Cole, van den Berg,  
20 Hosley, Watrous, Savoy, and Dammeyer. In dismissing these claims, the Court found that the  
21 Complaint failed to allege Luddy, Dammeyer, and Stulac engaged in a primary act, i.e., either  
22 employed a scheme to defraud or made any statements. As to the other Defendants, while the  
23 Complaint sufficiently alleged a primary act on their part in that they made statements, it failed to  
24 allege they did so with scienter. There were no allegations identifying specific conversations,  
25 board meetings, or reports where these individuals purportedly learned of the true and adverse  
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27 <sup>2</sup> Originally, Arthur Anderson LLP opposed the Motion. However, Arthur Anderson, LLP has  
28 subsequently withdrew that opposition. (See, Docket No. 696.)

<sup>3</sup> Defendants will be referred to by their last names only.

1 information regarding Peregrine's fraud. Further, there were no allegations showing that any of  
 2 these Defendants directed sales personnel to enter into contingent contracts, or otherwise directed  
 3 the alleged improper revenue recognition. Although, the Court dismissed the Loran Group's  
 4 claims against these Defendants without prejudice, and granted leave to amend, the Loran Group  
 5 decided not to amend its Complaint.

6 Instead, as noted, the Loran Group now moves for entry of judgment under Rule 54(b). For  
 7 the reasons that follow, the Court **GRANTS** Plaintiff's Motion for entry of judgment under Rule  
 8 54(b), and certifies judgment of Plaintiff's claims in accordance with the Court's January and  
 9 March 2005 Orders. Specifically, the following claims are certified for appeal: the Lead Plaintiff,  
 10 the Loran Group's: (1) Section 10(b) and Rule 10b-5 of the 1934 Act against Defendants KPMG  
 11 LLP, BearingPoint, Inc., and Larry Rodda ("the KPMG Defendants"); (2) Section 10(b) and Rule  
 12 10b-5 of the 1934 Act against Defendants Nelson, Luddy, Moores, Noell, Cole, van den Berg,  
 13 Hosley, Savoy, Watrous, Dammeyer, Stulac, and AWSC; and (3) Section 20(a) control liability of  
 14 the 1934 Act against Moores, Nelson, Noell, Cole, van den Berg, Hosley, Watrous, Savoy, and  
 15 Dammeyer. Further, the entire case is **STAYED** pending resolution of these claims on appeal.<sup>4</sup>

## 16 II.

### 17 DISCUSSION.

18 "Rule 54(b) certification is proper if it will aid 'expeditious decision' of the case." Texaco,  
 19 Inc. v. Ponsoldt, 939 F.2d 794 797 -798 (9th Cir. 1991). It "does not relax the finality required of  
 20 each decision . . . but it does provide a practical means of permitting an appeal to be taken from  
 21 one or more final decisions . . . in multiple claims actions, without waiting for final decisions to be  
 22 rendered on **all** the claims in the case." Sears, Roebuck & Co. v. Mackey, 351 U.S. 427, 435  
 23 (1956) (emphasis in original). "A pragmatic approach to the question of finality has been  
 24 considered essential to the achievement of the 'just, speedy, and inexpensive determination of  
 25 every action' . . ." Brown Shoe Co. v. United States, 370 U.S. 294, 306 (1962).

26 Rule 54(b) was enacted to counter the "liberalization of our practice to allow more issues  
 27

28 <sup>4</sup> In light of the Court's decision to stay the entire action pending resolution of appeal, Defendant Gardner's motion to stay the action as to him is denied as moot. (See, Docket No. 639.)

1 and parties to be joined in one action.” Dickinson v. Petroleum Conversion Corp., 338 U.S. 507,  
2 511 (1950). Thus, “the trend is towards greater deference to a district court’s decision to certify  
3 under Rule 54(b).” Texaco, Inc. v. Ponsoldt, 939 F.2d 794, 798 (9th Cir. 1991) (citations omitted);  
4 see also, Cadillac Fairview v. United States, 41 F.3d 562, 564 n. 1 (9th Cir. 1994) (“The present  
5 trend is toward greater deference to a court’s decision to certify under 54(b).”); Purdy Mobile  
6 Homes v. Champion Home Bldrs., 594 F. 2d 1313, 1316 (9th Cir. 1979) (“Whether there is just  
7 reason for delay in the entry of judgment is a matter left to the discretion of the trial court.”). In  
8 making its decision, a district court should adopt “a pragmatic approach focusing on severability  
9 and efficient judicial administration.” Continental Airlines v. Goodyear Tire & Rubber Co., 819  
10 F.2d 1519, 152 (9th Cir. 1987). See also, Core-Vent Corp. v. Nobel Indus. AB, 11 F.3d 1482,  
11 1484 (9th Cir. 1993).

12 As noted, Rule 54(b) judgment may be entered before the resolution of the entire case  
13 “[w]hen more than one claim for relief is presented in an action . . . or when multiple parties are  
14 involved . . .” Id. Here, there are multiple claims and parties. As such, Rule 54(b) provides the  
15 proper statutory basis for Plaintiff’s Motion for Entry of Judgment. See, Liberty Mutual Ins. Co. v.  
16 Wetzel, 424 U.S. 737 (1976).

17 But, before entering such judgment, there has be an “express determination that there is no  
18 just reason for delay and upon an express direction for the entry of judgment.” Fed.R.Civ.P. 54(b).  
19 Thus, Rule 54(b) authorizes district courts to direct entry of a final judgment where the following  
20 two elements are met: (1) “a final judgment”; and (2) “no just reason for delay.” Fed.R.Civ.P.  
21 54(b). Both requirements are met here.

22 A ruling is final, and therefore appealable “if it ‘ends the litigation on the merits and leaves  
23 nothing for the court to do but execute the judgment’ ’ as to that party or claim. Arizona State  
24 Carpenters Pension Trust Fund v. Miller, 938 F.2d 1038, 1039 (9th Cir. 1991). “It must be a  
25 ‘judgment’ in the sense that it is a decision upon a cognizable claim for relief, and it must be ‘final’  
26 in the sense that it is an ultimate disposition of an individual claim entered in the course of a  
27 multiple claims action.” Curtiss-Wright Corp. v. General Elec. Co., 446 U.S. 1, 10 (1980). The  
28 Court has entered just such a judgment , when, in January 2005, it dismissed with prejudice the

1 Plaintiff's Section 10(b) and Rule 10b-5 claims against the KPMG Defendants; all claims against  
2 the KPMG Defendants were then extinguished and became proper for appeal. See, Conerly v.  
3 Westinghouse Elec. Corp., 623 F.2d 117, 119 (9th Cir. 1980) ("A dismissal with prejudice  
4 constitutes a final appealable judgment . . . ."); see also, Marks v. San Francisco Real Estate Bd.,  
5 627 F.2d 947, 949 (9th Cir. 1980) (Same).

6 Similarly, in March 2005, the Court dismissed Plaintiff's Section 10(b) and Rule 10b-5  
7 claims against Defendants: Nelson, Luddy, Moores, Noell, Cole, van den Berg, Hosley, Savoy,  
8 Watrous, Dammeyer, Stulac, and AWSC. Although, the Court dismissed the Loran Group's  
9 claims against these Defendants without prejudice, and granted leave to amend, the Loran Group  
10 decided not to amend its Complaint. Thus, for all practical purposes, the Plaintiff's claims against  
11 these Defendants were also dismissed with prejudice, and therefore, appealable.

12 "Once having found finality, the district court must go on to determine whether there is any  
13 just reason for delay." Curtiss-Wright Corp. v. General Elec. Co., 446 U.S. at 8. "It is left to the  
14 sound judicial discretion of the district court to determine the 'appropriate time' when each final  
15 decision in a multiple claims action is ready for appeal. This discretion is to be exercised in the  
16 interest of sound judicial administration." Id. "Deference is granted to the district court's decision  
17 because it is the one most likely to be familiar with the case and with any justifiable reasons for  
18 delay." Texaco, Inc. v. Ponsoldt, 939 F.2d at 797.

19 In making this determination, "the district court must take into account judicial  
20 administrative interests as well as the equities involved." Curtiss-Wright Corp. v. General Elec.  
21 Co., 446 U.S. at 8. "Thus Curtiss-Wright requires two enquiries." Gregorian v. Izvestia, 871 F.2d  
22 1515, 1519 (9th Cir. 1989). First, is the judicial concerns, and "[t]he second, an assessment of  
23 basically equitable concerns, is made only after the 'judicial concerns' of the first step are  
24 satisfied." Id. As discussed below, both favor Rule 54(b) certification.

25 When considering judicial interests, the Court must determine "whether the claims under  
26 review [are] separable from the others remaining to be adjudicated and whether the nature of the  
27 claims already determined was such that no appellate court would have to decide the same issues  
28 more than once even if there were subsequent appeals." Id. See also, Wood v. GCC Bend, LLC,

1 422 F.3d 873, 878 (9th Cir. 2005) (“Whether a final decision on a claim is ready for appeal is a  
2 different inquiry from the equities involved, for consideration of judicial administrative interests is  
3 necessary to assure that application of the Rule effectively preserves the historic federal policy  
4 against piecemeal appeals.”).

5 Against this backdrop, entry of the requested 54(b) judgment is proper. Plaintiff seeks  
6 entry of such judgment on its claims under Sections 10(b) and 20(a) of the Securities Exchange  
7 Act, 15 U.S.C. §§ 78j(b) 78t(a), and the Securities Exchange Commission’s Rule 10b-5, 17 C.F.R.  
8 § 240.10b-5. Thus, there is no danger of redundant appeal with the remaining claims. As to the  
9 KPMG Defendants, the factual and legal allegations against them are unique. Unlike other  
10 Defendants, Plaintiffs do not charge these Defendants with any false or misleading statements as  
11 proscribed under Rule 10b-5(b). Rather, Plaintiffs only allege the KPMG Defendants violated  
12 subsections (a) and (c) of Rule 10b-5, which prohibit participation in a fraudulent scheme. Claims  
13 for engaging in a fraudulent scheme under 10b-5 (a) and (c) and for making a fraudulent statement  
14 or omission are distinct claims, with distinct elements. Unlike 10b-5(b), which requires a false  
15 statement or omission, claims under 10b-5(a) and (c) “are not so restricted.” Affiliated Ute  
16 Citizens of Utah v. U.S., 406 U.S. 128, 153 (1972). Nor does the Complaint allege that these  
17 Defendants had any role or were in a way involved in reviewing, drafting, preparing or filing any  
18 false or misleading statements. Rather, according to the Complaint, Peregrine and its executives  
19 were the only ones primarily responsible for communications with investors, and to have  
20 personally drafted many of the misleading communications. Moreover, and unlike other  
21 Defendants, the KPMG Defendants are not corporate insiders, but outside business entities and  
22 Peregrine’s principal customers, who allegedly entered into a number of bogus transactions with  
23 Peregrine so that Peregrine could book increasing revenue. These allegations and pleading  
24 requirements do not exist against any other remaining Defendants. There is also no Section 20(a)  
25 claim against the KPMG Defendants.

26 As to the other dismissed Defendants--Nelson, Luddy, Moores, Noell, Cole, van den Berg,  
27 Hosley, Savoy, Watrous, Dammeyer, Stulac, and AWSC--only some of them remain in the case,  
28 and only so on unrelated claims brought by the sub-class Plaintiffs. Specifically, the sub-class

1 Plaintiffs have a Section 11 of the Securities Exchange Act of 1933, 15 U.S.C. §§ 77k claim  
2 against Moores, Noell, Cole, van den Berg, Hosley, Savoy, and Watrous. Unlike the Section 10(b)  
3 claims, which the Plaintiff seeks to certify for judgment under 54(b), Sections 11 is “not governed  
4 by the heightened pleading standards of the PSLRA . . . .” Falkowski v. Imation Corp., 309 F.3d  
5 1123, 1133 -1134 (9th Cir. 2002). Rather, under Section 11, “[l]iability . . . is virtually absolute,  
6 even for innocent misstatements.” Id. Therefore, scienter--the controlling factor in the Court’s  
7 dismissal of Section 10(b) and Rule 10b-5 claims--is absent as to the adjudicated Section 11  
8 claims. See, In re Stac Electronics Securities Litigation, 89 F.3d 1399, 1404 (9th Cir. 1996) (“No  
9 scienter is required for liability under § 11; defendants will be liable for innocent or negligent  
10 material misstatements or omissions.”).

11 That some of the Defendants who have been held to answer to Plaintiff’s Section 10(b) and  
12 Rule 10b-5 claims--Gardner, Gless, Spitzer, and Cappel--does not compel a different result. Three  
13 of these Defendants have pled guilty to securities violations and one has been so indicted. The  
14 Court has also found that the Complaint sufficiently states scienter and a primary act on their part.  
15 By contrast, as to the above mentioned Section 10(b) and Rule 10b-5 Defendants, the Court has  
16 found that the Complaint neither states a primary act nor scienter on their part. Therefore, claims  
17 subject to the Rule 54(b) judgment do not implicate the same issues.

18 There is also no danger of redundant appeal with respect to the Section 20(a) claims.  
19 Plaintiff alleges Section 20(a) liability against Moores, Nelson, Noell, Cole, van den Berg, Hosley,  
20 Watrous, Savoy, and Dammeyer “based on their control of Peregrine.” (See, Complaint ¶ 669.)  
21 “To establish ‘controlling person’ liability, the plaintiff must show that a primary violation was  
22 committed and that the defendant ‘directly or indirectly’ controlled the violator.” Paracor Finance,  
23 Inc. v. General Elec. Capital Corp., 96 F.3d 1151, 1161 (9th Cir. 1996). No such pleading  
24 requirements remain with respect to the remaining Section 11 claims.

25 To be sure, “[t]he Rule 54(b) claims do not have to be separate from and independent of the  
26 remaining claims.” Sheehan v. Atlanta Int’l Ins. Co., 812 F.2d 465, 468 (9th Cir. 1987); see also,  
27 Wood v. GCC Bend, LLC, 422 F.3d 873, 881 (9th Cir. 2005) (“We do not mean to suggest that  
28 claims with overlapping facts are foreclosed from being separate for purposes of Rule 54(b).

1 Certainly they are not.”). In this regard, even where “the claims disposed of on appeal and the  
2 remaining counterclaims require proof of the same facts”, Rule 54 certification may be proper if  
3 “the legal issues . . . will streamline the ensuing litigation.” *Id.* This analysis “depends not on  
4 whether there are any facts in common between the adjudicated and the unadjudicated claim, but  
5 rather whether the factual issues ‘at the heart’ of the claims are sufficiently distinct.” Prudential  
6 Ins. Co. V. Curt Bullock Builders, Inc., 626 F.Supp. 159, 169 (D.Ill. 1985). As explained above,  
7 such is the case here.

8 Equity principles also favor not only granting Rule 54(b) certification, but staying the entire  
9 action pending appeal. See, Mediterranean Enterprises, Inc. v. Ssangyong Corp., 708 F.2d 1458,  
10 1465 (9th Cir. 1983) (“A trial court may, with propriety, find it is efficient for its own docket and  
11 the fairest course for the parties to enter a stay of an action before it, pending resolution of  
12 independent proceedings which bear upon the case.”); see also, Doe v. University of California,  
13 1993 WL 361540 (N.D.Cal. 1993) (“If a district court certifies claims for appeal pursuant to Rule  
14 54(b), it should stay all proceedings on the remaining claims if the interests of efficiency and  
15 fairness are served by doing so.”). In this regard, the Court “focus[es] on traditional equitable  
16 principles such as prejudice and delay.” Gregorian v. Izvestia, 871 F.2d at 1519. As Plaintiff  
17 contends, if the Rule 54(b) judgment is denied, the dismissed claims will have to wait as the  
18 remaining claims are litigated, which in all likelihood will take far longer than the resolution of the  
19 appeal of the dismissed claims. No discovery has even begun in the case. Nor has there been any  
20 class certification proceedings. Also remaining are the proceedings involving expert discovery and  
21 summary judgment motions.

22 Further, if the Court’s rulings on the dismissed claims are reversed, the dismissed claims  
23 will have to be incorporated to an already ongoing process. Moreover, as Plaintiff contends, it  
24 makes no sense to have multiple trials, which is what may happen if the Plaintiff is forced to wait  
25 to appeal until a final judgment is entered on the remaining claims years down the road. By  
26 contrast, an immediate appeal of the dismissed claims will eliminate this scenario. If the dismissed  
27 claims are reinstated on appeal, they will be litigated with the remaining claims at the same time.  
28 This would allow the Court and parties to avoid significant duplication of pre-trial efforts, and

1 potentially the need for a second trial. For example, all claims against six Defendants--  
2 Bearingpoint, KPMG, Rodda, AWSC, Stulac, and Dammeyer--have been dismissed. Thus, these  
3 Defendants are no longer in the case. If discovery goes forward, these Defendants will not be  
4 required or entitled to fully participate in it. Should the Ninth Circuit reverse the Court's  
5 dismissals, discovery would have to start all over again.


6 **III.**

7 **CONCLUSION.**

8 For the reasons set forth above, Plaintiff's Motion for entry of judgment under Rule 54(b)  
9 is **GRANTED**. The following claims are certified for appeal: the Lead Plaintiff, the Loran  
10 Group's: (1) Section 10(b) and Rule 10b-5 of the 1934 Act against Defendants KPMG LLP,  
11 BearingPoint, Inc., and Larry Rodda ("the KPMG Defendants"); (2) Section 10(b) and Rule 10b-5  
12 of the 1934 Act against Defendants Nelson, Luddy, Moores, Noell, Cole, van den Berg, Hosley,  
13 Savoy, Watrous, Dammeyer, Stulac, and AWSC; and (3) Section 20(a) control liability of the 1934  
14 Act against Moores, Nelson, Noell, Cole, van den Berg, Hosley, Watrous, Savoy, and Dammeyer.  
15 Further, the entire case is **STAYED** pending resolution of these claims on appeal.

16 **SO ORDERED.**

17  
18 DATED: 1/13/06

19   
20 ROGER T. BENITEZ  
21 United States District Judge

22 cc: All parties and respective counsel  
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