IN THE SUPREME COURT OF MISSISSIPPI
Cause No. 2005-IA- 001827-SCT

QUALCOMM INCORPORATED — APPELLANTS

VS.

AMERICAN WIRELESS LICENSE GROUP, LLC — APPELLEES

Consolidated With:
Cause No. 2005-IA-01829-SCT

QUALCOMM INCORPORATED — APPELLANTS

VS.

HOMER A. WHITTINGTON, JR., as Trustee for the Homer A. Whittington, Jr. Revocable Trust, *et al.* — APPELLEES

(Caption Continued On Inside Cover)

APPEAL FROM THE
CIRCUIT COURT OF HINDS COUNTY, MISSISSIPPI

BRIEF OF THE WHITTINGTON PLAINTIFFS (APPELLEES) IN RESPONSE TO BRIEF OF APPELLANT LEAP DEFENDANTS

ORAL ARGUMENT REQUESTED

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February 20, 2007

Consolidated With:
Cause No. 2005-IA-01841-SCT

HARVEY P. WHITE, *et al.*	**APPELLANTS**
VS.	
AMERICAN WIRELESS LICENSE GROUP, LLC	**APPELLEES**

Consolidated With:
Cause No. 2005-IA-01895-SCT

HARVEY P. WHITE, *et al.*	**APPELLANTS**
VS.	
HOMER A. WHITTINGTON, JR., as Trustee for the Homer A. Whittington, Jr. Revocable Trust, *et al.*	**APPELLEES**

Consolidated With:
Cause No. 2005-IA-01894-SCT

HARVEY P. WHITE, *et al.*	**APPELLANTS**
VS.	
AMERICAN WIRELESS LICENSE GROUP, LLC	**APPELLEES**

Consolidated With:
Cause No. 2005-IA-01883-SCT

HARVEY P. WHITE, *et al.*	**APPELLANTS**
VS.	
HOMER A. WHITTINGTON, JR., as Trustee for the Homer A. Whittington, Jr. Revocable Trust, *et al.*	**APPELLEES**

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1. Homer A. Whittington, Jr., as Trustee for the Homer A. Whittington, Jr. Revocable Trust; Dr. Edwin Dodd; Douglas Packer; Robert G. Germany; Joseph E. Roberts, Jr.; C. Victor Welsh, III; Crymes M. Pitman; Lucy P. Culver; Jeffrey L. Smith; Crymes G. Pittman, Individually and as Trustee for the Homer A. Whittington, Jr., Deferred Compensation Trust; Yerger Properties, LP; Lyndel B. Smith and Shirley E. Smith as trustees for the Smith Family Trust, Betty Sue Yandell; Y. Clifton Yandell; William M. Yandell, Jr; William M. Yandell, III; William M. Yandell, III IRA; Blue Mountain Wireless, LLC; W.M. Yandell FLP, LP; and Susan Yandell McKee, Walcott and Caldwell, LLC, Dr. Richard Rushing, Jane T. Mills, William P. Thomas, Darden North, Dr. Terrell Willimas, Wirt A. Yerger, Jr., James T, Thomas, IV, Claiborne Deming Dr. David Merideth, Mary Jane Finney, David Bailey, Kim McDonald, Debra Morton, Gordon Morton, Gordon Morton, IRA, Ann Carter Thomas, Betty J. Thomas Marital Trust, Bill Thomas, James T. Thomas, Martha Ross Thomas, W.P. Thomas, Jr., Elaine Chatham, Henry Chatham, Franklin and Marie Chatham, Wise Carter Child & Carraway Retirement Plan, James Eckert, Lori Moskowitz, and Bertie Heiner, the Plaintiffs in this action.

2. American Wireless License Group, LLC.

3. J. Michael Rediker, Peter J. Tepley, Page A. Poerschke and Meredith Jowers Lees of Haskell Slaughter Young & Rediker, LLC, 1400 Park Place Tower, 2001 Park Place North, Birmingham, Alabama 35203, attorney for Plaintiffs in this action.

4. Christopher A. Shapley and Joseph A. Scalfani, Brunini, Grantham, Grower & Hewes, PLLC, 1400 Trustmark Building, 248 East Capitol Street, Jackson, Mississippi, 39201.

5. Eugene Tullos, Tullos & Tullos, The Tullos Building, Main Street, Raleigh, Mississippi, 39153.

6. Qualcomm Incorporated, a Defendant in this action.

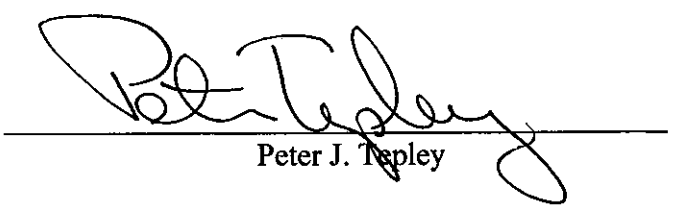
7. Joshua Rosenkranz of Heller Ehrman LP, Times Square Tower, 7 Times Square, New York, New York, 10036, attorney for Qualcomm Incorporated.

8. Glenn Gates Taylor, B. Wade Smith and Christy M. Sparks of Copeland Cook Taylor & Bush, P.A., 200 Concourse, Suite 200, 1062 Highland Colony Parkway, Jackson, Mississippi, 39157, attorneys for Qualcomm Incorporated.

9. Harvey P. White; Scot B. Jarvis; Susan G. Swenson; Thomas J. Bernard; Jeffrey P. Williams; Anthony R. Chase; Michael B. Targott; Jill E. Barad; Robert C. Dynes; James E. Hoffman; Stewart Douglas Hutcheson; Daniel O. Pegg; and Leonard C. Stephens (the "Leap Defendants"), Defendants in this action.

10. David W. Clark and Mary Clay Morgan, Bradley Arant Rose & White LLP, attorneys for the Leap Defendants.

11. Boris Feldman, Robert P. Feldman, Clayton Basser-Wall, and Mark T. Oates of Wilson Sonsini Good rich & Rosati, 650 Page Mill Road, Palo Alto, California, 94304, attorneys for the Leap Defendants.



Peter J. Tepley

STATEMENT REGARDING ORAL ARGUMENT

Appellees request oral argument. Oral argument may be helpful to the Court if, after considering the briefs, the Court has questions concerning the facts and the law. Oral argument will aid the Court in its decision-making process.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Statutes

Other Authorities

Mississippi Authorities

Acts

STATEMENT OF THE ISSUES

1. Was the Circuit Court correct in denying Appellant Leap Defendants' Motion to Compel arbitration when no plaintiff and no defendant in this case executed the arbitration agreement that the Leap Defendants are attempting to use to compel arbitration?

2. Under Mississippi law, to prevail on a pre-discovery motion to dismiss, the moving party must establish that (i) when all the facts pled in the Complaint are taken as true; **and** (ii) when the Complaint is construed liberally in favor of the non-moving party; (iii) it still "appears beyond doubt that the [non moving party] will be unable to prove any set of facts in support of [their] claim[s]." *Scaggs v. GPCH-GP, Inc.*, 931 So. 2d 1274, 1275 (Miss. 2006). When the factual allegations of the Complaints are taken as true and the Complaint is construed liberally in favor of the Whittington Plaintiffs, did the Leap Defendants fail to meet its high burden of showing that "it appears beyond doubt [that] the [Whittington Plaintiffs] will not be able to prove any set of facts in support of [their] claim[s]" for common law fraud and violations of: (1) Section 11 of the 1993 Securities Act; (2) Section 15 of the 1933 Securities Act, (3) the Mississippi Securities Act?

PRELIMINARY STATEMENT

This appeal concerns the Circuit Court of Hinds County's denials of both a motion to compel arbitration and a pre-discovery motion to dismiss for failure to state a claim upon which relief can be granted. Plaintiffs, Homer A. Whittington, Jr., as Trustee for the Homer A. Whittington, Jr., Revocable Trust; Dr. Edwin Dodd; Douglas Packer; Robert G. Germany; Joseph E. Roberts, Jr.; C. Victor Welsh, III; Crymes M. Pitman; Lucy P. Culver; Jeffrey L. Smith; Crymes G. Pittman, Individually and as Trustee for the Homer A. Whittington, Jr., Deferred Compensation Trust; Yerger Properties, LP; Lyndel B. Smith and Shirley E. Smith as trustees for the Smith Family Trust; Betty Sue Yandell; Y. Clifton Yandell; William M. Yandell, Jr; William M. Yandell, III; William M. Yandell, III IRA; Blue Mountain Wireless, LLC; W.M. Yandell FLP, LP; Susan Yandell McKee; Walcott and Caldwell, LLC; Dr. Richard Rushing; Jane T. Mills; William P. Thomas; Darden North; Dr. Terrell Williams; Wirt A. Yerger, Jr.; James T, Thomas, IV; Claiborne Deming; Dr. David Merideth; Mary Jane Finney; David Bailey; Kim McDonald; Debra Morton; Gordon Morton; Gordon Morton, IRA; Ann Carter Thomas; Betty J. Thomas Marital Trust; Bill Thomas; James T. Thomas; Martha Ross Thomas; W.P. Thomas, Jr.; Elaine Chatham; Henry Chatham; Franklin and Marie Chatham; Wise Carter Child & Carraway Retirement Plan; James Eckert; Lori Moskowitz; and Bertie Heiner (collectively, the "**Whittington Plaintiffs**") respectfully submit this brief in response to the appeal filed on behalf of Defendants, Harvey P. White; Scot B. Jarvis; Susan G. Swenson; Thomas J. Bernard; Jeffrey P. Williams; Anthony R. Chase; Michael B. Targott; Jill E. Barad; Robert C. Dynes; James E. Hoffman; Stewart Douglas Hutcheson; Daniel O. Pegg; and Leonard C. Stephens (collectively, the **"Leap Defendants"**). Said appeal challenges certain orders of the Circuit Court denying the Leap Defendants' motions to compel arbitration and stay proceedings or, in the alternative, to dismiss.

STATEMENT OF THE CASE

A. COURSE OF PROCEEDINGS

This case has been stalled and delayed at every turn by the Leap Defendants' creative use of procedural motions. This matter has been pending almost **five years**. However, to date **no discovery** has commenced.

This case was originally filed on December 21, 2002, in the Circuit Court for the First Judicial District of Hinds County, Mississippi. In May 2003, the Whittington Plaintiffs filed the First Amended and Restated Complaint. Due to a back log in the Circuit Clerk's office, the Leap Defendants were not all served until April 29, 2003.

The Leap Defendants improperly removed this matter on May 29, 2003, to the United States District Court for the Southern District of Mississippi, Jackson Division. This case was stalled at the federal level for almost a year because three judges assigned to the case recused themselves. While at the federal level, the Leap Defendants filed several unfounded procedural motions and sought to have the case dismissed. Finally, on April 7, 2004, this case was reassigned to the Honorable David Bramlette who granted Plaintiffs' motion to remand and sent case back to the Circuit Court of Hinds County on September 28, 2004.

In another attempt to stall and delay this matter further, the Leap Defendants filed a Motion to Reconsider the order remanding this case to state court. On November 10, 2004, Judge Bramlette properly pointed out in his order denying the Motion to Reconsider that the Leap Defendants had not raised any new issues and the case should be remanded. The Leap Defendants also improperly asked the United States District Court to enter a stay to allow them the opportunity to appeal the remand order. However, Judge Bramlette properly denied that motion recognizing that an order to remand based on lack of subject matter is not reviewable on appeal.

Upon remand, this matter was assigned to Judge Tomie Green. The parties agreed to a scheduling order that established that the Leap Defendants must file a responsive pleading to the Complaint on or before January 14, 2005. Rather than answering the Complaint, the Leap Defendants' filed a Motion to Compel Arbitration and Stay Proceedings, or in the alternative, to Dismiss Plaintiffs' First Amended and Restated Complaint. The briefing on the Leap Defendants' Motion was completed on March 15, 2005. The hearing on the Leap Defendants' Motion was originally set for June 14, 2005. However, due to an unfortunate death in Judge Green's family, the hearing was rescheduled until August 15, 2005. Judge Green properly denied the Leap Defendants' Motion at the hearing and this Appeal followed.

B. STATEMENT OF THE FACTS

The action on appeal alleges actions, omissions, and misrepresentations made by the Leap Defendants that Plaintiffs allege constitute common law fraud, violate the Securities Act of Mississippi (the Mississippi Act), and violate Sections 11 and 15 of the Federal Securities Act of 1933 ("1933 Act").

The following facts are taken from the First Amended and Restated Complaint[1] and must be taken as true for purposes of the Leap Defendants' Motion to Dismiss. *Arnona v. Smith*, 749 So. 2d 63(¶ 6) (Miss. 1999). American Wireless Group ("AWG"), a Mississippi limited liability company owned wireless spectrum licenses issued by the Federal Communications Commission ("FCC") for certain key markets in the southeastern United States. The Whittington Plaintiffs are members of AWG who possessed a significant ownership in that company. Whit. R. 103-104. (FARC at ¶ 4) Leap Wireless International, Inc. ("Leap"), which is not a party to this action, is a wireless service provider whose primary offering is a service marketed under the brand name "Cricket." Whit. R. 103 (FARC at ¶ 2). "Cricket" features unlimited wireless calling

1 References to "FARC at ¶ __" are to the First Amended and Restated Complaint.

from a specified area for a fixed monthly fee. *Id.* Leap became, and was at all times relevant hereto, a publicly held company and its stock was listed on the NASDAQ/NMS under the symbol "LWIN." *Id.* The Leap Defendants are the officers and directors of Leap, who acted at all times relevant hereto as the "controlling persons" of Leap. Whit. R. 126-142 (FARC at ¶¶ 17-29).

On February 7, 2001, based on inducements and representations made by the Leap Defendants, AWG agreed to enter into a contract with Leap, entitled "Agreement for Purchase and Sale of Licenses" (the "Agreement"), to sell to Leap the FCC Licenses it owned for wireless spectrum in Jackson, Mississippi; Birmingham, Alabama; Tuscaloosa, Alabama; and Jonesboro, Arkansas (the "Licenses"). Whit. R. 104 (FARC at ¶ 3). Under the Agreement, the Licenses were sold to Leap in exchange for 1,900,829 shares of Leap stock, 190,083 shares of which were to be held in escrow for one year. Whit. R. 148 (FARC at ¶ 37). The Agreement provided that Leap would register the Leap stock within 30 days following the closing of the sale. The closing occurred on June 8, 2001, and the Leap shares held in escrow were released one year later on June 8, 2002. On June 15, 2001, as required by the Agreement, Leap caused a Form S-1 Registration Statement for the entire 1,900,829 shares of Leap stock to be filed with the SEC. Whit. R. 157-58 (FARC at ¶ 54).

Even before the June 8, 2001 closing, it was known by all parties to the Agreement that the Whittington Plaintiffs, who were members of AWG, would become Leap shareholders. Whit. R. 150-52 (FARC at ¶ 39). Because AWG had among its membership quite a number of unaccredited investors, Leap was unwilling to directly issue its stock to all AWG members. *Id.* Therefore, a "work-around-the-problem" scenario was devised by the parties, which contemplated the following connected steps: (1) Leap would issue the stock to AWG, as the accredited investor; (2) Leap would not allow AWG to dissolve and distribute the stock to its

members; instead, Leap would register the stock for resale in AWG's name; and (3) the AWG members would then buy the Leap stock back in essentially simultaneous purchases with UBS (as a broker-dealer) serving as the seller of the Leap stock in the buy-back. *Id.* This "buy back" proceeded slowly during the fall of 2001, reaching completion in December 2001. In practice, Leap was selling its stock to the Whittington Plaintiffs, but was required to cast the transaction in the series of connected steps set forth above. Whit. R. 151 (FARC at ¶ 39(c)).

The Whittington Plaintiffs were induced by the Leap Defendants to invest in Leap, participate in the purchase and buy-back, and retain their Leap stock. Whit. R. 105 (FARC at ¶5). Such inducement was made by, *inter alia*: (1) the material misstatements and omissions of material fact contained in the Registration Statement (which made possible the presence of such stock in the market); and (2) the disclosure failures of the Leap Defendants. *Id.* During the negotiations between Leap and AWG, and in filing the June 15, 2001 Registration Statement and August 14, 2001, SEC Form 10-Q Report, the Leap Defendants knowingly misrepresented Leap's financial health and failed to disclose the true risks associated with Leap's legal dispute with a company called MCG (MCG). Whit. R. 157-58 (FARC at ¶ 54). The undisclosed risks—which in fact came to fruition—included Leap's breach of its financing covenants, the dilution in value of Leap stock, and Leap's eventual bankruptcy. Whit. R. 170-71 (FARC at ¶ 69). The Leap Defendants' actions, omissions, and misrepresentations directly resulted in the utter obliteration in value of Leap stock held by the Whittington Plaintiffs, each of whom suffered damages individually based on the number of shares they purchased. Whit. R. 171 (FARC at ¶ 70).

SUMMARY OF THE ARGUMENT

The Leap Defendants' Motion (and this Appeal) was merely another attempt by the Leap Defendants' to delay and postpone discovery and the inevitable trial on the merits in this matter. The Leap Defendants cannot establish that: (1) a valid arbitration agreement governs the Whittington Plaintiffs' claims, or alternatively, (2) they have met their heavy burden that the Whittington Plaintiff's claims should be dismissed before discovery has even commenced

The Circuit Court properly denied the Leap Defendants' Motion to Compel Arbitration because the Leap Defendants cannot demonstrate that a valid arbitration agreement exists between the Leap Defendants and the Whittington Plaintiffs where, as here, no party is a signatory to an arbitration agreement. It is well settled that "[a]rbitration is a matter of contract between the relevant parties [and] **no** party can be required to arbitrate absent an agreement to do so." *McKenzie Check Advance of Miss., LLC v. Hardy*, 866 So. 2d 446, 450 (Miss. 2004) (emphasis added). Here, neither the Leap Defendants nor the Whittington Plaintiffs executed an applicable arbitration agreement or agreed to arbitrate the claims at issue. Therefore, this matter cannot be compelled to arbitration and the Circuit Court's ruling should be affirmed. The Circuit Court correctly denied the Leap Defendants' Motion, and the Whittington Plaintiffs have a right to have their claims heard by a jury after discovery has been conducted.

The Circuit Court also properly denied Leap Defendants' Motion to Dismiss because the Leap Defendants at this preliminary stage of litigation simply cannot meet the heavy burden that they must meet in order to prevail on their Motion to Dismiss. To prevail on their Motion, the Leap Defendants must establish that (i) when all the facts pled in the Complaint are taken as true and (ii) when the Complaint is construed liberally in favor of the Whittington Plaintiffs; (iii) it still "appears beyond doubt [that] the [Whittington Plaintiffs] will not be able to prove any set of facts in support of [their] claim[s]." *Black v. City of Tupelo*, 853 So. 2d 1221, 1224 (Miss.

2003); *see also Poindexter v. Southern United Fire Ins. Co.,* 838 So. 2d 964, 966 (Miss. 2003) (quoting *Sennett v. United States Fid. & Guar. Co.,* 757 So. 2d 206, 209 (Miss. 2000).

The Whittington Plaintiffs have clearly stated claims for common law fraud as well as for the Leap Defendants' violations of the Securities Act of Mississippi, and sections 11 and 15 of the federal Securities Act of 1933 (the "1933 Act"). For example, when the factual allegations of the Complaints are taken as true, as they must be at this juncture, they establish that the Leap Defendants acted in concert with the Co-Conspirators[2] to induce the Whittington Plaintiffs to purchase and to retain their shares of Leap common stock ("Leap Stock") to the Whittington Plaintiffs' detriment. In addition, under the unique facts present here, including the "work around the problem," the Whittington Plaintiffs have properly pled a violation of Section 11 as the Complaint clearly demonstrates that the Whittington Plaintiffs purchased the Leap Stock at issue pursuant to a Registration Statement that contained numerous material misrepresentations and omissions. Further, the Whittington Plaintiffs have standing to assert these claims because the Registration Statement at issue was filed for the sole purpose of selling the Leap Stock to AWG and in turn to the Whittington Plaintiffs. As the Whittington Plaintiffs have asserted viable Section 11 claims, the Leap Defendants liability under Section 15 is clear because the Leap Defendants were Leap's officers and directors.

STANDARD OF REVIEW

The standard of review by a Mississippi appellate court of a circuit court's denial of a motion to compel arbitration or a motion to dismiss is *de novo,* such that this Court must perform the same review as did the circuit court below. *Arceo v. Tolliver*, 2006 WL 3317036 *2 (Miss.

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2 The Whittington Plaintiffs alleged that UBS PaineWebber, Inc., Roger Davis, James O'Brien, Collette Fleming, and QUALCOMM acted in concert with the Leap Defendants to perpetrate the Fraud against the Plaintiffs. UBS, Davis, O'Brien and Fleming were not parties to this action. Plaintiffs' Claims against the UBS Defendants were the subject of an arbitration before the National Association of Securities Dealers and have since been settled.

2006); *Holman Dealerships, Inc. v. Davis*, 934 So. 2d 356, 358 (Miss. Ct. App. 2006); *Pruitt v. Hancock Medical Center*, 942 So. 2d 797, 800 (Miss. 2006). However, if the actions of a trial court can be upheld for any reason, the appellate court should affirm. *Gates v. Gates,* 616 So. 2d 888, 890 (Miss. 1993); *Vinson v. Roth-Roffy,* 829 So. 2d 1250, 1252 (Miss. Ct. App. 2002). Further, this Court must affirm where there is **any** ground disclosed by the record upon which the decision could have properly been reached, notwithstanding the lower court did not make explicit its grounds. *DeFoe v. Great Southern Nat. Bank, N.A.,* 547 So. 2d 786, 789 (Miss. 1989) (citations omitted).

When reviewing a trial court's ruling on a motion to dismiss, this Court must consider the allegations of the complaint to be true, and the motion to dismiss "should not be granted unless it appears beyond doubt that the plaintiff will be unable to prove any set of facts in support of his claim." *Park on Lakeland Drive, Inc. v. Spence,* 941 So. 2d 203, 206 (Miss. 2006). (citations omitted).

ARGUMENT

Although the Leap Defendants addressed the denial of their motion to dismiss first in the opening brief, the Court must first decide whether this dispute is properly before the Court or whether it should be arbitrated. Critical to this inquiry is the fact that **neither the Whittington Plaintiffs nor the Leap Defendants are signatories to any arbitration agreement that compels arbitration of this matter**. Despite the fact that the Leap Defendants cannot cite to a single case in which this Court or any other has compelled two non-signatories to arbitration, the Leap Defendants contend that this matter should be compelled to arbitration. If this Court agrees that the Whittington Plaintiffs' claims should be arbitrated, then it cannot rule on the Leap Defendants' motion to dismiss, as it would be without jurisdiction to do so since these claims would have to be arbitrated.

AWG has recently agreed to arbitrate its claims and has filed a statement of claim with the AAA. Therefore, the issue to be resolved by the Court is whether the Leap Defendants, who are non-signatories, can enforce the arbitration clause in the Agreement against other non-signatories – the Whittington Plaintiffs. The Whittington Plaintiffs did not sign the Agreement, which contains the arbitration clause (Whit. R. 684), and neither did the Leap Defendants. *Id.* The Leap Defendants are asking the Court to vastly expand current arbitration law and pen groundbreaking arbitration law precedent. **Again, neither the Whittington Plaintiffs nor the Leap Defendants are signatories to any arbitration agreement that compels arbitration of this matter**. As discussed below, the Agreement binds only the two corporations and in no way binds its officers and directors. *See FDIC v. Trans Pacific Industries, Inc.*, 14 F.3d 10, 12 (5th Cir. 1994) (individual who signs promissory note manifests that he is signing in representative capacity where agent names his principal and places "by:" before his signature or follows it with a display of agency status, "preferably his title in the represented institution.").

I. THE CIRCUIT COURT PROPERLY DENIED THE LEAP DEFENDANTS' MOTION TO COMPEL ARBITRATION

The Agreement containing the arbitration clause at issue (which explicitly prohibits enforcement by non-parties),was "by and between . . . [AWG], a Mississippi limited liability company ("Seller"), and Leap . . . a Delaware corporation ("Buyer"). Whit. R. 656. The Agreement defines the Seller as AWG and it is signed "by" Wirt A Yerger, III as "its Manager and CEO." Whit. R. 656; 684. Similarly, the Agreement sets forth the Buyer as Leap and it is signed "by" Harvey P. White ("White"), as "Its: Chairman and CEO." *Id.* The Agreement between AWG and Leap explicitly limits enforcement by non-parties by stating:

> This agreement shall be binding upon and inure to the benefit of the parties hereto and their successor and Permitted Assigns. The successors and permitted assigns hereunder shall include without limitation, in the case of Buyer, any permitted Assignee as well as the successors in interest to such Permitted Assignee. **Nothing in this agreement, expressed or implied, is intended or shall be**

construed to confer upon any Person other than the parties and successors, and Permitted Assignees, any right remedy or claim under or by reason of this Agreement.

Whit. R. 682.

The Agreement defines "permitted assignees" as, "Affiliates, subsidiaries, successors and assigns." *Id.* Furthermore, the provision at issue, Section 12.11, states, "... any dispute, claim or controversy arising under this Agreement or in any way related to this Agreement, or its interpretation, enforceability or inapplicability **may** be submitted to bonding arbitration at the election of either **Buyer or Seller**." Whit. R. 683-84 (emphasis added). The term "Buyer" is defined in the Agreement as Leap. Similarly, the term "Seller" is defined as AWG. Whit. R. 656. In addition, the language of the arbitration provision says that disputes "**may**" be submitted to binding arbitration. Whit. R. 683-84. The word "may" customarily connotes discretion. *Jama v. Immigration and Customs Enforcement,* 543 U.S. 335, 346 (2005). In *Local 189, Service Emp. Union v. Scot Lad Foods, Inc.,* 513 F. Supp. 839 (D.C. Ill. 1981), the union brought an action to compel an employer to arbitrate a labor dispute. The court was called upon to consider a provision of a collective bargaining agreement that stated that the union "may request" arbitration. *Id.* at 841. The *Local 189* court held that the inference could clearly be drawn that the use of the word "may" gave the employer the option of rejecting a request for arbitration. Here the inference can be clearly drawn that AWG and anyone alleged to be bound by AWG, -- i.e., the Whittington Plaintiffs -- can choose to reject arbitration and instead bring its action in state court.

The Circuit Court correctly denied the Leap Defendants' motion to compel arbitration because the Whittington Plaintiffs cannot be compelled to arbitrate their current disputes with the Leap Defendants.

A. Neither the Whittington Plaintiffs nor the Leap Defendants Were Signatories to the American Wireless/Leap Wireless Agreement.

"[T]he first question to be addressed in adjudicating a motion to compel arbitration under the FAA is 'whether the parties agreed to arbitrate the dispute in question.'" *American Heritage Life Ins. Co. v. Lang*, 321 F.3d 533, 537 (5th Cir. 2003) (quoting *Webb v. Investacorp.*, 89 F.3d 252, 258 (5th Cir. 1996)). The answer here is "no". Neither the Whittington Plaintiffs nor the Leap Defendants are signatories to any arbitration agreement that compels arbitration of this matter. The Agreement was by and between AWG (Seller), and Leap (Buyer). Whit. R. 656. The Agreement defines the Seller as AWG and it is signed "by" Wirt A Yerger, III as "its Manager and CEO." Similarly, the Agreement sets forth the Buyer as Leap and it is signed "by" Harvey P. White ("White"), as "Its: Chairman and CEO." Whit. R. 656; 684. The Agreement binds only the two corporations and in no way binds its officers, directors or members. *See FDIC v. Trans Pacific Industries, Inc.*, 14 F.3d 10, 12 (5th Cir. 1994) (individual who signs promissory note manifests that he is signing in representative capacity where agent names his principal and places "by:" before his signature or follows it with a display of agency status, "preferably his title in the represented institution.").

Like the Whittington Plaintiffs, the Leap Defendants were also not signatories to the Agreement with the arbitration clause. The Leap Defendants incorrectly argue that "most of the Leap Defendants did not sign the agreement," because the fact is that **none** of the Leap Defendants signed the Agreement. White signed the agreement in his official capacity, not in his individual capacity. The Agreement was signed "by" White as "Chairman and CEO" of Leap. Whit. R. 684. A corporation can act only through its agents and there is no indication that either Yerger or White was signing the Agreement in their individual capacities. Accordingly, Defendant White was not a signatory to the Agreement in his individual capacity. *See, Shemper v. Hancock Bank*, 40 So. 2d 742, 744 (Miss. 1949) (a person who signs an instrument using

words indicating that he signed for and on behalf of a principal is not liable on the instrument if he was duly authorized to sign). Therefore, all of the named Defendants are non-signatories to the Agreement.

In sum, this Court has a situation where no Plaintiff and no Defendant signed an arbitration contract governing the dispute here. There is no case when arbitration has been compelled where, as here, not a single party in the lawsuit (plaintiffs or defendants) was a signatory to the arbitration agreement.

B. The claims of AWG and the Whittington Plaintiffs are based on the Leap Defendants' individual conduct and do not arise from the Agreement.

The estoppel or "intertwining theory" is inapplicable in this case because, the claims against the Leap Defendants, non-signatories to the Agreement, are not "intertwined with the agreement that the estopped party has signed." *Bridas S.A.P.I.C. v. Government of Turkmenistan*, 345 F.3d 347, 361 (5th Cir. 2003). The current facts are similar to the facts of *Primerica Financial Services, Inc., v. Coley*, 192 F. Supp. 2d 655 (N.D. Miss. 2002). Coley, a signatory, brought an action against PFS and PLIC, both non-signatories, based on their individual misconduct. PFS and PLIC sought to compel arbitration based upon a contract between Coley and their affiliate company, PFSI. The *Coley* Court held the investor's claims against PFS and PLIC did not fall within the arbitration clause even though the two companies were affiliated with PFSI. The *Coley* Court concluded: (1) "the signatory Coley has not raised allegations of 'substantially interdependent and concerted' misconduct by both the non-signatory Plaintiff, PFS and PLIC, and the signatory PFSI; **indeed PFSI is not a party to Coley's ... lawsuit**"; and (2) "there [was] no evidence before the court indicating that Coley must rely on the terms of her agreement with PFSI asserting her claims against the Plaintiff." *Id.* at 657-658. (emphasis added) The *Coley* Court concentrated on the fact that the complaint focused on PFS and PLIC's conduct and not PFSI's conduct. The *Coley* Court noted that PFSI was not a named

party, which further evidenced that the claims were not intertwined. *See also*, *Bridas*, 345 F.3d at 361 (refusing to compel arbitration where the party sought to be esttopped **did not sign a contract containing an arbitration provision** and **never sued on the agreement**.)

As in *Coley* and *Bridas*, the Whittington Plaintiffs' complaint is based solely on the Leap Defendants' individual misconduct and does not invoke the terms of the Agreement. The Whittington Plaintiffs did not name Leap as a defendant. The tort claims against the Leap Defendants are not based on contractual duties that arose from the Agreement but are based upon common law fraud and statutory duties that arise independently and separately from the existence of the Agreement.

For instance, the counts in the Complaint relating to securities fraud are derived from Mississippi's Security Act and the federal securities laws, which imposes a duty on all sellers of securities. The duty not to deceive or misrepresent the value of stock arises under these statutes and are not duties arising merely from the Agreement. In other words, the Leap Defendants owed a duty to the Whittington Plaintiffs based upon the federal securities laws and Mississippi's statutory law and that duty is independent of any Agreement. *C.f.*, *Daimler Chrysler Corp. v. N.L.R.B.*, 288 F.3d 434 (D.C. Cir. 2002) (employment suit did not defer to arbitration because duty of employer to provide information to collective bargaining representative was independent of contractual duty under collective bargaining agreement); *Norman v. Occupational Safety Ass'n of Ala. Workmen's Comp. Fund*, 776 So. 2d 788 (Ala. 2000) (plaintiff's claims against a defendant were not based on the contract containing the arbitration clause, but were derived from company bylaws and other agreements not containing arbitration provisions). Thus, the Leap Defendants' reliance on *Mississippi Fleet Card, LLC v. Bilstat, Inc.*, 175 F. Supp. 2d 894 (S.D. Miss. 2001) is misplaced. The *Bilstat* facts are distinguishable because, unlike here, the

defendant did not owe a duty at common law or under statute to the plaintiffs absent the contractual relationship.

Likewise the fraud claims under Mississippi common law do not rely upon the Agreement as the basis of Leap Defendants' duties. Instead, they rely on the Leap Defendants' common law duty not to misrepresent a material fact, and it is that duty which forms the basis of the Complaint. The Leap Defendants unpersuasively argue that the allegations of the complaint allege substantially interdependent and concerted misconduct. The Complaint is thorough and designed to give the Court sufficient background information regarding the background of this action. However, it is clear from the Complaint that the claims are derived from statutory and common law and not the Agreement.

The Leap Defendants also make the argument that the only reason that AWG is not a party to the Whittington action is because the Whittington Plaintiffs have made an attempt to make an "end-run around the arbitration clause". Leap Defendants Brief at 48. To the contrary, the AWG action and the Whittington action involve two distinct types of complex stock sales transactions. The first type involved AWG selling valuable licenses issued by the FCC for certain key market areas in the southeastern United States to Leap for Leap Stock in deal dated February 7, 2001 which closed on June 8, 2001. The second type involved the later sales of Leap Stock to the Whittington Plaintiffs beginning in October 2001.

AWG commenced its action because if it had known of the risks and consequences of the Leap-MCG deal it would not have agreed to accept Leap common stock in consideration for the sale of its FCC licenses. Leap common stock was trading at $38.50 on the date of execution of the Agreement and $30.42 a share on the date of the closing. On June 15, 2001, Leap filed a registration statement on Form S-3 registering all 1,900,829 shares of Leap common stock issued to AWG. 190,083 of these shares were held in escrow for one year until June 2002.

Between August and December of 2001, AWG sold the Leap common stock that was not held in escrow for an average price of $17.31 per share resulting in a substantial loss to AWG, which **itself** lost $29,613,0313.00 if valued from the execution date and $22,427,880.00 if valued from the date of the closing. During the year the 190,083 shares were held in escrow, Leap's common stock continued to decline in market value and upon the date that such shares were released from escrow, AWG was only able to sell them for an average price of $1.01 per share which resulted in an additional loss to AWG of $7,126,211.60 if valued from the date of execution and $5,590,218.80 if valued from the closing date.

In contrast, the causes of actions and damages alleged by the Whittington Plaintiffs are derived from their role as equity holders of AWG who, pursuant to the "work-around-the-problem", purchased and retained the Leap stock, which had been issued to AWG under the Agreement, based on alleged material misrepresentations and omissions by the Leap Defendants and others. The Leap stock held by the Whittington Plaintiffs was either sold for a loss or is still held by the individual Plaintiffs and is worthless today. Each of the Whittington Plaintiffs suffered damages individually based on the number of shares they purchased.

C. The Agreement limits enforcement by non-parties.

As discussed above, the Agreement between AWG and Leap explicitly limits enforcement by non-parties. Only the Buyer (Leap) or Seller (AWG) can elect arbitration. Whit. R. 683-84. In addition, the Agreement between AWG and Leap provides:

> This agreement shall be binding upon and inure to the benefit of the parties hereto and their successor and Permitted Assigns. The successors and permitted assigns hereunder shall include without limitation, in the case of Buyer, any permitted Assignee as well as the successors in interest to such Permitted Assignee. Nothing in this agreement, expressed or implied, is **intended or shall be construed to confer upon any Person other than the parties and successors, and Permitted Assignees, any right remedy or claim under or by reason of this Agreement.**

Whit. R. 682.

The Leap Defendants are not "permitted assignees" as that term is defined as, "Affiliates, subsidiaries, successors and assigns." *Id.* Also the Leap Defendants are not the successors of Leap. Thus, this provision adequately limits the rights, remedies and claims of any third person to enforce a provision of the contract.

A case recently decided by this Court, *Adams v. Greenpoint Credit, LLC,* 943 So. 2d 703 (Miss. 2006), is on point. In *Greenpoint Credit,* one of the plaintiffs and his wife had purchased a mobile home and signed an arbitration agreement related to the purchase of the mobile home. Subsequent to purchasing the mobile home, the plaintiff's wife passed away. The defendant drafted a payment for the mobile home from a joint checking account owned by the plaintiff and his daughter. The draft presented to the bank was signed by the plaintiff's deceased wife. The plaintiffs filed suit against the mobile home seller alleging fraud, negligence, intentional and/or negligent infliction of mental and emotional distress, breach of contract and defamation. The mobile home seller sought to compel arbitration of the claims brought by both the mobile home purchaser and his daughter. The trial court granted the motion to compel arbitration as to the daughter and the purchaser of the mobile home. However, the Mississippi Court of Appeals reversed the trial court's decision as to the daughter holding that she did not agree to arbitrate any claims with the mobile home purchaser. The Court of Appeals also stayed the daughter's claims pending the father's arbitration. This Court affirmed the Court of Appeals decision that the arbitration agreement did not encompass claims asserted by the daughter and reversed the stay imposed by the Court of Appeals. This Court held that the equitable estoppel doctrine did not apply given the specific language of the arbitration clause at issue which stated:

> Any controversy or claim between or among **you** or **me** or our assignees arising out of or relating to this Contract or any agreements or instruments relating to or delivered in connection with this Contract, including any claim based on or arising from an alleged tort, shall, **if requested by either you or me**, be determined by arbitration, reference, or trial by judge as provided below.

Id. at 704 (emphasis added); *see also Jim Burke Automotive, Inc. v. McGrue*, 826 So. 2d 122, 131-132 (Ala. 2002) (nonsignatories could not enforce arbitration agreement that expressly limited its enforcement to the defined "buyer" and "seller"). This Court held that the daughter was not a signatory to the contract: "[c]learly, [the purchasers of the mobile home] constitute the "you;" and the "me" is [the mobile home seller]." *Id.* at 708. Further, this Court held that the daughter was not a third-party beneficiary of the contract. This Court also recognized that the doctrine of estoppel "is an extraordinary remedy to be used with caution." *Id.* at 709. Here, the doctrine of estoppel should not apply because the arbitration provision in the Agreement also specifically limits its enforcement to the "Buyer" and "Seller".

The Agreement does not intend to give any rights to third parties, including the right to compel arbitration. Whit. R. 682-84. Accordingly, the Leap Defendants, who are not parties to the Agreement, may not seek to enforce the arbitration provision of the Agreement.

D. Estoppel or "Intertwining" Theory Does Not Apply Under The Current Facts

The estoppel or "intertwining" theory does not apply to the facts of this case. Under that theory, "**a non-signatory** may enforce an arbitration agreement **against a signatory** of such agreement in cases in which: "(a) the non-signatory is alleged to be the agent of a signatory or (b) the claims against the non-signatory are fundamentally grounded in, intimately founded in and intertwined with, or arise out of and relate directly to the agreement containing the arbitration clause." *Mississippi Fleet Card, LLC v. Bilstat, Inc.*, 175 F. Supp. 2d 894, 900 (S.D. Miss. 2001) (quoting *Gulf Guar. Life Ins. Co. v. Connecticut Gen. Life Ins. Co.*, 957 F. Supp. 2d 839, 841 (S.D. Miss. 1997)) (citing *Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.*, 10 F.3d 753, 758 (11th Cir. 1993)) (emphasis added). The estoppel theory "applies only to prevent 'a ***signatory*** from avoiding arbitration with a nonsignatory when the issues the ***nonsignatory*** **is seeking to resolve in arbitration are intertwined with the agreement that the *estopped party***

has signed.'" *Bridas S.A.P.I.C. v. Government of Turkmenistan*, 345 F.3d 347, 361 (5th Cir. 2003) (quoting *Thomson-C.S.F., S.A. v. American Arbitration Ass'n*, 64 F.3d 773, 779 (2d Cir. 1995)). (emphasis in original). In *Grigson v. Creative Artists Agency, L.L.C.*, 210 F.3d 524 (5th Cir. 2000), the Court explained:

> [E]quitable estoppel allows a nonsignatory to compel arbitration in two different circumstances. First, equitable estoppel applies **when the signatory to a written agreement containing an arbitration clause** must rely on the terms of the written agreement in asserting its claims against the nonsignatory ... Second, application of equitable estoppel is warranted when **the signatory to the contract containing an arbitration clause** raises allegations of substantially inter-dependent and concerted misconduct by both the nonsignatory and one or more of the signatories to the contract.

210 F.3d at 527. (emphasis added). No court has applied the estoppel theory in situations where a **non-signatory** seeks to enforce an agreement against **another non-signatory**. The rule requires a signatory party. Here, however, there is not one.

In addition, a recognized exception to the estoppel or "intertwining" theory is applicable here and bars the relief sought by the Leap Defendants. Courts have held that language in arbitration provision, such as the one here, that explicitly limits enforcement to a "buyer" and a "seller" prohibits the application of an estoppel theory. *See Jim Burke Automotive, Inc. v. McGrue*, 826 So. 2d 122, 131-132 (Ala. 2002). Because the arbitration provision at issue clearly limits its enforceability by non-parties, the Leap Defendants cannot compel arbitration here.

1. The cases cited by Defendants are inapplicable.

As stated below, in each of the cases cited by the Leap Defendants, either the plaintiff or the defendant was a signatory to a contract containing an arbitration agreement. These are not the facts of the current case.

In *Mississippi Fleet Card*, unlike here, Mississippi Fleet Card, LLC, was a **signatory** to a development agreement, **and** its members, who were non-signatories to the agreement, brought an action against Bilstat Inc., also a **signatory** to the agreement, **and** its officers and directors,

who were non-signatories. In *American Bureau of Shipping v. Tencara Shipyard S.P.A.*, 170 F.3d 349 (2d Cir. 1999), unlike here, involved a **nonsignatory** that brought suit against a **signatory** based in part upon an agreement. Further, *Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.*, 10 F.3d 753, 757 (11th Cir. 1993), concerned a **signatory plaintiff** filing an action against a non-signatory defendant.

Mississippi Fleet Card, Tencara Shipyard, or *Sunkist Growers* all the involved a **non-signatory** seeking to compel a **signatory** to arbitration, and are simply inapplicable here where neither the Whittington Plaintiffs nor the Leap Defendants are signatories to the Agreement.

2. Plaintiffs' claims are based on Defendants' individual conduct and do not arise from the Agreement.

As in *Coley,* 192 F. Supp. at 657-58, and *Bridas*, 345 F.3d at 361, see also discussion supra at pp. 12-13, the Whittington Plaintiffs' complaint is based solely on the Leap Defendants' individual misconduct and is not based on breach of the terms of the Leap Agreement. Additionally, the Plaintiffs do not name Leap as a defendant. The tort claims against the Defendants are not based on contract duties that arose from the Agreement but are based upon common law and statutory disclosure duties that arise independently and separately from the existence of the Agreement. Count I and Count II are derived from the MSA, which imposes a duty on all sellers of securities. The duty not to deceive or misrepresent the value of stock arises from Mississippi's statutes and the federal Securities Act of 1933 §11, and are not contractual duties arising from the Agreement. In other words, the Defendants owe a duty to Plaintiffs based upon Mississippi's common and statutory law and federal securities registration statutory law and that duty is independent of any Agreement. *Cf., Daimler Chrysler,* 288 F.3d 434 (employment suit not compelled to arbitration because duty of employer at issue was independent of contractual duty); *Norman*, 776 So. 2d 788 (plaintiff's claims against a defendant were not based on the contract containing the arbitration clause, but rather on company bylaws and other

agreements without arbitration provisions). Like Counts I and II, Count III arises from the Securities Act of 1933, which is independent and separate from duties imposed under the Agreement, and Count IV arises from the Leap Defendants' common law duty not to misrepresent a material fact. Although, the Complaints provide detailed background information, it is clear that the Whittington Plaintiffs' actions are based in statutory and common law and not the terms of the Agreement.

II. THE CIRCUIT COURT PROPERLY DENIED THE LEAP DEFENDANTS' MOTION TO DISMISS

The Whittington Plaintiffs have stated a valid claim for violation of Section 11 of the 1933 Act. Section 11 provides buyers of securities a private remedy for false or materially misleading statements or omissions against any signer of the registration statement, any director or partner of the issuer, any professional who prepared or certified the registration statement, and any underwriter. 15 U.S.C. § 77(k). Because a plaintiff who purchased a security issued pursuant to a Registration Statement need only show a material misstatement or omission to establish a prima facie case against an issuer, the Whittington Plaintiffs have properly pled Section 11 violations. Whit. R. 182-83 (FARC at ¶¶ 94-101). As the United States Supreme Court stated in *Herman & MacLean v. Huddleston*, 459 U.S. 375, 381-382 (1983):

> If a plaintiff purchased a security issued pursuant to a registration statement, **he need only show a material misstatement or omission to establish his prima facie case. Liability against the issuer of a security is virtually absolute, even for innocent misstatements. Other Defendants bear the burden of demonstrating due diligence**. *See* 15 U.S.C. § 77k(b).")

(Emphasis added). Additionally, the 1933 Act "**impos[es] a stringent standard of liability on the parties who play a direct role in a registered offering**." *Id.* As discussed below, the Whittington Plaintiffs have met their pleading burden here.

A. The Circuit Court Properly Denied Defendants' Motion to Dismiss Section 11 Claims

The Whittington Plaintiffs' Complaint clearly delineates that the Whittington Plaintiffs' purchases were: (1) made pursuant to a registered public offering of Leap Stock which became effective at the time of the June 15, 2001 prospectus forming part of the Leap Registration Statement; (2) part of a registered secondary public offering of such Leap Stock made by means of said Registration Statement which offering was conducted at Leap's request and insistence on a delayed basis, such that registration statement sales by UBS were taking place concurrently with Plaintiff's purchases, all within six months of the Registration Statement becoming effective; and (3) effectuated by use of the means and instruments of transportation and/or communication in interstate commerce. Whit. R. 182 – 83 (FARC at ¶ 96).

1. The Whittington Plaintiffs have standing to assert their Section 11 claims

Section 11(a) of the Securities Act, 15 U.S.C. 77k(a), provides an express damages action against the signer of a registration statement and the directors and partners of the issuer and others involved in the offering for making material misrepresentations and/or misrepresentations in a registration statement. Section 11 provides, in relevant part:

> In case any part of the registration statement, when such part became effective, 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, any person acquiring such security (unless it is proved that at the time of such acquisition he knew of such untruth or omission) may, either at law or in equity, in any court of competent jurisdiction, sue –
>
> (1) every person who signed the registration statement;
> (2) every person who was a director of (or person performing similar functions) or partner in the issuer at the time of the filing of the part of the registration statement with respect to which his liability is asserted;

The purpose of Section 11 is "to assure compliance with the disclosure provisions of the [Securities] Act by imposing a stringent standard of liability on the parties who play a direct role in a registered offering." *Herman & MacLean*, 459 U.S. at 381-82.

The Leap Defendants' claim that the Whittington Plaintiffs cannot trace their purchase of Leap Stock to the defective offering is misplaced. Section 11(a) provides that where a material fact is misstated or omitted from a registration statement accompanying a stock filing with the SEC, "any person acquiring such security" has standing to bring an action for such. *Hertzberg v. Dignity Partners, Inc.*, 191 F.3d 1076, 1079 (9th Cir. 1999) (quoting 15 U.S.C. § 77(a)). "The limitation on 'any person' is that he or she must have purchased 'such security.' Clearly, this limitation only means that the person must have purchased a security issued under that, rather than some other, registration statement." *Id.* at 1080. "Section 11 does not require the securities be purchased directly in the offering; rather, 'to have standing under section 11, one must simply be able to trace the purchase of his securities to the registration statement that allegedly violated section 11 by containing a material misrepresentation or omission.'" *In re Friedman's, Inc. Securities Litigation*, 385 F. Supp. 2d 1345, 1371 (N.D. Ga. 2005) (*citing In re JDN Realty Corp. Sec. Litig.*, 182 F. Supp. 2d 1230, 1244 (N.D. Ga. 2002). Even a cursory review of the Prospectus and Registration Statement shows that Leap Defendants' argument is without merit.

The case involves an extremely **unique** factual scenario in that this Registration Statement was filed for the **sole purpose** of selling the Leap Stock from AWG to the Whittington Plaintiffs and other members of AWG. Whit. R. 157-58 (FARC at ¶ 54). In fact, the plan was always for the members of AWG to hold the Leap Stock. This was discussed prior to the closing on June 8, 2001, with Leap officer Robert Anselmo, and Leap Defendant James Hoffman, as well as counsel for AWG and Leap. Whit. R. 150 (FARC at ¶ 39). Both the July 1, 2001 Prospectus and Registration Statement explicitly state, "This prospectus relates to the offer and

sale of up to 1,900,829 shares of Leap Wireless International, Inc., common stock by the selling security holder identified in this prospectus," which is exactly the amount of Leap Stock AWG received from the Agreement. Whit. R. 625. Further, the prospectus states:

> The shares offered by this prospectus were originally issued by us to the selling security holder [AWG] in connection with our acquisition of wireless licenses from the selling security holder, subject to the terms of an agreement for purchase and sale of licenses, dated February 7, 2001. Under the terms of the purchase agreement, we agreed to register for resale the shares of our common stock offered by this prospectus . . . We agreed to keep the registration statement effective for a period ending upon the earlier of the one year anniversary of the effective date of the registrations statement of which this prospectus forms a part or such time as the selling security holder advises us that it has completed the resale of the shares of common stock offered by this prospectus.

Id.

Moreover, as discussed above, the Leap Defendants knew that the Whittington Plaintiffs would be repurchasing the Leap Stock that was issued directly to AWG pursuant to the Agreement. Whit. R. 150 (FARC at ¶ 39). Because many of the Whittington Plaintiffs were not accredited investors, the Leap Stock had to be initially transferred to AWG for the purpose of reselling it to the Whittington Plaintiffs. *Id.* In addition, the Whittington Plaintiffs purchased the Leap Stock virtually simultaneously as AWG sold it and AWG purchased it directly from Leap. Whit. R. 104 (FARC at ¶4). Obviously, under these unique facts, which must be taken as true, the Whittington Plaintiffs' purchase of the Leap Stock is traceable to the Prospectus and Registration Statement.

Another allegation in the Complaint, which must be taken as true for purposes of the Leap Defendant's Motion is that:

> In every sense, therefore, Leap was selling its Stock to [AWG's] members, including the Plaintiffs, but to work around the accredited investor problems, Leap cast the transaction as the series of steps set out above. In substance, however, **Leap was the "seller" of the Leap Stock that Plaintiffs acquired** and are here suing upon, and the Defendants were aiders/abettors and control persons of Leap as the "seller."

Whit. R. 151 (FARC at ¶ 39(c)) (emphasis added). In addition, the Whittington Plaintiffs' Complaint alleges that each of the purchases of Leap Stock at issue was "made pursuant to a registered public offering of Leap Stock which became effective at the time of the June 15, 2001 prospectus forming part of the Leap Registration Statement, ..." Whit. R. 182 (FARC at ¶ 96).

As held in *Krim v. pcOrder.com, Inc.*, 210 F.R.D. 581, 585 (W.D. Tex. 2002), "aftermarket purchasers who can trace their purchases to the misleading registration statement have standing to sue." Therefore, the Leap Defendants' argument that the Whittington Plaintiffs shares are not traceable to the Registration Statement and Prospectus is simply without merit. In any event, tracing is a fact-intensive inquiry which cannot be resolved on a preliminary dismissal motion, where no discovery has yet occurred. At the pleading stage, "[p]laintiffs have not been required to explain how their shares can be traced; general allegations that plaintiff purchased 'pursuant to' or traceable to a false registration statement have been held sufficient to state a claim." *In re Global Crossing, Ltd. Securities Litigation*, 313 F. Supp. 2d 189, 207 (S.D.N.Y. 2003) (citing *Shapiro v. UJB Fin. Corp.*, 964 F.2d 272 (3rd Cir. 1992); *In re Crazy Eddie, Sec. Litig.*, 747 F. Supp. 850, 854-55 (E.D.N.Y. 1990); *In re AES Corp. Sec. Litig.*, 825 F. Supp. 578, 592 (S.D.N.Y. 1993); *Neuberger v. Shapiro*, Fed. Sec. L. Rep. 90, 261, 1998 WL 408877 at *2 (E.D. Pa. 1998). The court in *In re Immune Response Securities Litigation*, 375 F. Supp. 2d 983 (S.D. Cal. 2005), held that plaintiffs' complaint, which merely alleged that "Plaintiffs and the other members of the Class purchased or otherwise acquired IRC shares pursuant to the defective Registration Statement and Prospectus" provided sufficient grounds for a presumption of standing and denied the defendants' motion to dismiss. *Id.* at 1039; *see also Shapiro v. UJB Fin. Corp.*, 964 F.2d 272, 286 (3rd Cir.1992) (allegation that plaintiff purchased the shares "pursuant to the [offering]" held sufficient to defeat motion to dismiss section 11 claim); *Central Laborers' Pension Fund v. SIRVA, Inc.*, 2006 WL 2787520 (N.D. Ill. 2006) (allegation that plaintiff

purchased stock "issued pursuant or traceable to the [offering]" was sufficient to put plaintiff in the class of investors covered by Section 11); *accord In re LILCO Sec. Litig.*, 111 F.R.D. 663, 671 (E.D.N.Y. 1986) ([T]racing is a question of fact reserved for trial.").

2. The Leap Defendants Caused the June 2001 Registration Statement to be False and Misleading because they Failed to Disclose the Risks Associated with the MCG Acquisition

Although the Leap Defendants argue that they properly disclosed that: (1) additional share issuances would dilute the value of Leap Stock; (2) at the time of the Registration Statement and Prospectus, MCG and Leap were embroiled in a dispute related to their contractual relationship and that arbitration proceedings had been initiated to determine the amount of additional Leap Stock being issued to MCG; and even that (3) the MCG contract created a significant risk that Leap's existing covenants in its lending and financial arrangements would be violated which would accelerate Leap's debt and force it into bankruptcy (Leap Defendants' Opening Brief at pp. 25-29), when the boiler plate language upon which this argument is based is exposed, it is clear that this argument has no merit.

The Whittington Plaintiffs claims arise from omissions of material facts. Such omissions included that on September 1, 2000, Leap had entered into a contract with MCG obligating Leap to pay consideration which would create material risks of dispute, litigation and severe adverse effects on Leap and Leap's other shareholders besides MCG. Whit. R. 174-75 (FARC at ¶ 74 (a)). In addition, the Leap Defendants' omissions included a failure to disclose the fact that a material dispute had arisen between Leap and MCG regarding the amount of form of the consideration owed under the September 1, 2000 contract to MCG. Whit. R. 174 (FARC at ¶ 74(b)). Further, such omissions included that the Leap Defendants had caused to be created, in such arrangement with MCG, a material risk that the effective working control of Leap could (and ultimately would) change hands. Whit. R. 174 (FARC at ¶ 74(d)).

An omitted fact is material if there is a "substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." *See TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976); *Kronfeld v. Trans World Airlines, Inc.*, 832 F.2d 726, 731 n. 11 (2d Cir. 1987); *Geiger v. Solomon-Page Group, Ltd.*, 933 F. Supp. 1180, 1184 (S.D.N.Y. 1996). *Hinerfeld v. United Auto Group*, 1998 WL 397852, *4 (S.D.N.Y. July 15, 1998). Additionally courts have held that boilerplate language, similar to the statements the Leap Defendants argue are disclosures, is not an adequate disclosure. "[A] vague or blanket (boilerplate) disclaimer which merely warns the reader that the investment has risks will ordinarily be inadequate to prevent misinformation. To suffice, the cautionary statements must be substantive and tailored to the specific future projections . . . ." *In re Donald J. Trump Casino Securities Litigation-Taj Mahal Litigation*, 7 F.3d 357, 371-372 (3rd Cir. 1993). *See also La Grasta v. First Union Securities, Inc.*, 358 F.3d 840, 850-851 (11th Cir. 2004).

a. The Leap Defendants did not adequately disclose that the MCG Arbitration would completely dilute the value of the Leap Stock.

The Leap Defendants disingenuously argue that the Registration Statement disclosed, "YOUR OWNERSHIP INTEREST IN LEAP WILL BE DILUTED UPON ISSUANCE OF SHARES WE HAVE RESERVED FOR FUTURE ISSUANCE," was an adequate warning of the possible catastrophic effects of the MCG arbitration. Whit. R. 604. This "disclosure" is nothing more than boilerplate language which does not even mention let alone adequately disclose the likely possible outcome of the then-pending MCG Arbitration. Also, this vague language regarding the issuance of additional shares (and the other "disclosures" cited by the Leap Defendants related to the future issuance of shares) is not related to the specific risk that the MCG arbitration presented and merely represents normal risks involved with any security. This

vague and ambiguous boilerplate language completely failed to warn the Whittington Plaintiffs of the risks that the MCG arbitration posed to the value of the Leap Stock at the time of the Registration Statement and Prospectus. The vague language cited by the Leap Defendants could not have "significantly altered the total mix of information made available" to the Whittington Plaintiffs. *TSC*, supra.

b. The Leap Defendants did not adequately disclose that Leap might have to pay MCG $40 million in Leap Stock.

The Registration Statement failed to disclose that Leap might have to pay $40 million in Leap Stock to MCG. The Registration Statement states:

> In the pending acquisition of wireless licenses in Buffalo and Syracuse, New York that we refer to above, the seller has asserted that based on the results of the recent FCC auction of wireless licenses, it is entitled to a purchase price adjustment that would result in the purchase price being effectively doubled. Under the terms of the agreement, if we are obligated to pay a purchase price adjustment, we entitled to pay such additional amounts in cash or Leap common stock, at our discretion. We believe the seller's position is without merit, and **we will vigorously defend against any claim that the seller may make in the future.**

Whit. R. 604-05. (Emphasis added). This disclosure is defective and fraudulent for numerous reasons. First, nothing is mentioned regarding the purchase price Leap originally paid for the Buffalo and Syracuse license. Thus, it is impossible for an investor to determine from this vague statement the amount that Leap would have to pay in the future if the purchase price doubled. Additionally, the disclosure, which speaks of claims that may be made in the future, was patently false and knowingly misleading because at the time of the June 2001 Registration Statement, MCG had **already** instigated an arbitration proceeding.

The Leap Defendants argument that the fact that Leap may have to pay MCG $40 million in stock was also disclosed in the August 14, 2001 10-Q is similarly without merit. The 10-Q on widely separated pages stated:

> In June 2001, we acquired wireless licenses in Buffalo and Syracuse, New York from MCG PCS, Inc., for an aggregate of $18.3 million case and $18.0 million promissory note with interest at the rate of $8.5% per annum, with principal and interest payable at maturity on June 15, 2002. MCG PCS has the right to convert $11.0 million of the note at maturity into shares of our common stock at $45.825 per share, or 240,043 shares. The note is secured by a wholly owned subsidiary of Leap that owns wireless license.

(Whit. R. 725) and then nearly five pages later stated:

> In connection with our recent acquisition of wireless licenses in Buffalo and Syracuse, New York that closed in June 2001, the seller has asserted that based on the results of the recent FCC auction of wireless licenses, it is entitled to a purchase price adjustment that would result in the purchase price being effectively doubled. The parties are in the early stage of an arbitration concerning this claim. Under the terms of the agreement, if we are obligated to pay a purchase price adjustment, we are entitled to pay such additional amount in case or Leap common stock, at our discretion. We believe the seller's position is without merit, and we will vigorously defend against the claim.

Id. at p. 730.

However this 10-Q, which was made **after** the June 2001 Registration Statement and Prospectus, contained no other disclosures about MCG, the true nature of the terms of Leap's agreement with MCG, nor the true nature of the risks if MCG won the arbitration. These limited and vague disclosures are widely separated and do not even cross-reference each other. Whit. R. 154-155 (FARC at ¶ 49). Moreover, even if a reader was able to put these two widely-separated statements together, it was only disclosed that less than 500,000 shares would be involved, not the 21 million shares that were actually involved. Also, the disclosure fraudulently states that the debt is **fully secured.**

These statements were not only patently false, but also completely inadequate as they did not "significantly alter[] the total mix of information made available" to the Plaintiff. *TSC,* 26 U.S. at 449. Nowhere did Leap **EVER** adequately disclose the possible (and eventual) disastrous effects of the MCG deal.

c. The Leap Defendants failed to adequately disclose that the MCG contract could and did violate Leap's restrictive lending covenants.

The Leap Defendants wrongfully attempt to state that the Whittington Plaintiffs' Complaint only alleges claims that Leap failed to disclose its restrictive covenants in its debt instruments. Actually, the Complaint alleges that Leap did not disclose that the MCG deal could and did place Leap in violation of its restrictive loan covenants. Whit R. 152-54. The only alleged disclosures the Leap Defendants can cite to are contained within the boilerplate language that did not adequately warn the Plaintiffs of the potential effect that the MCG deal would have in causing Leap to violate its lending covenants and be thrown into bankruptcy. There is absolutely no indication that that the effective ownership and control of Leap could change to MCG and the 10-Q is absolutely silent as to the fact that if the ownership and /or control of Leap changed, because of the MCG arbitration, Leap would be in violation of its covenants in its largest debt instruments. Whit. R. 725; 730. As demonstrated above, the vague and ambiguous disclosures are woefully inadequate boilerplate language that does not insulate the Leap Defendants from liability. *See generally Saltzberg v. TM/Sterling/Austin Associates,* 45 F.3d 399, 400 (11th Cir.1995); *In re Trump Casino Securities Litigation,* 7 F.3d at 371-72 ("Simply put, the disclaimers were not explicit or specific as to the fraud alleged by the [plaintiffs], and therefore did not put them on actual notice."); *see, also, In re WorldCom, Inc. Securities Litigation,* 294 F. Supp. 2d 392, 430 (S.D.N.Y. 2003).

B. The Whittington Plaintiffs Asserted Viable Claims Under Section 15 of the 1933 Act.

The Whittington Plaintiffs asserted a viable claim under Section 15 because Plaintiffs have clearly demonstrated that the Leap Defendants are liable under Section 11. The Leap Defendants controlled Leap as they were its officers and directors. Whit. R. 126-42; 187 (FARC at ¶¶ 17-29; 97). The Leap Defendants are clearly liable under Section 15, which states:

> Every person who, by or through stock ownership, agency, or otherwise, or who, pursuant to or in connection with an agreement and understanding with one or more other persons by or through stock ownership, agency, or otherwise, controls any person liable under sections 77k or 77*l* of this title, shall be jointly and severally with and to the same extent as such controlled person is liable . . .

The standard for a controlling person is provided by the Code of Federal Regulations which states: "'control' . . . means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise." *G.A. Thompson & Co., Inc. v. Partridge*, 636 F.2d 945, 958 (11th Cir. 1981) (citing 17 C.F.R. § 230.405(f) (1979)).

In the Fifth Circuit, a claimant need not even allege, much less prove, that a defendant actually participated in a wrongful transaction in order to state a claim for "controlling persons" liability. *See G.A. Thompson & Co.* 636 F.2d at 958 (5th Cir. 1981) ("Neither this definition [17 C.F.R. § 230.405(f) (1979)] nor the statute appears to require participation in the wrongful transaction. Fifth Circuit case law appears to follow the plain meaning of the statute in this respect.") The Leap Defendants were the control group of Leap within the meaning of Section 15 of the 1933 Securities Act. Controlling persons liability is a broad concept, designed to broaden culpable violators of securities laws. "[T]he 'controlling person' provisions [of § 15] were enacted to expand, rather than restrict, the scope of liability under the securities laws." *SEC v. Mgt. Dynamics, Inc.*, 515 F.2d 801, 812 (2d Cir. 1975).

> The concept of control herein involved is not a narrow one, depending upon a mathematical formula of 51 percent of voting power, but is broadly defined to permit the provisions of the act to become effective wherever the fact of control actually exists.

Loss & Seligman, Fundamentals of Securities Regulation, Ch. 5 B at 461 (quoting H.R. Rep. No. 85, 73d Cong, 1st Sess. 14 (1933) (in reference to definition of underwriter). Simply stated, the Plaintiffs have alleged more than sufficient facts to demonstrate that all of the Leap Defendants,

including former outside directors Jarvis[3], Targoff[4], Dynes[5], Williams[6], Chase[7] and Barad[8] controlled Leap. It is important to note that all of these Defendants signed the June 2001 Registration Statement in their role as a Director. Whit. R. 648-50. In addition, there are sufficient allegations in the Complaint against Defendants Pegg[9] and Stephens10. The Complaint clearly alleges that these defendants held senior level positions at Leap, received large compensation packages, and owned a significant interest in Leap. Whit. R. 141-42 (FARC at ¶¶ 28-29). Thus, the allegations must be taken as true, *see Scaggs*, 931 So. 2d at 1275, and Plaintiff has properly asserted Section 15 claims against all of the Leap Defendants as control persons of Leap.

Furthermore, "[c]ontrol is a question of fact" not to be "resolved summarily at the pleading stage." *Brumbaugh v. Wave Systems Corp.*, 416 F. Supp. 2d 239, 259 (D. Mass. 2006). As is demonstrated above, there are numerous factual disputes as to essential elements of control

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3 The Complaint alleges that Jarvis developed the concept for Cricket (Leap's business format) with Defendant Williams. Whit. R. 128-29 (FARC at ¶18). Also, through June 2000, Jarvis was a director of Cricket, a Leap subsidiary. *Id.* at ¶ 129. Jarvis was also a member of Leap's Audit Committee. *Id.* at 127. In addition, Jarvis personally participated in negotiations and/or dealings between Leap and AWG. *Id.*

4 The Complaint alleges that Targoff served as a director of Leap since 1998 and served on Leap's Audit Committee and possessed a significant interest in Leap. Whit. R. 136 (FARC at ¶ 23).

5 The Complaint alleges that Dynes served as a director of Leap since 1999 and was partially responsible for approving the generous compensation packages of various other Defendants. In addition, Dynes owned beneficial ownership of 17,000 shares of Leap stock. Whit. R. 138 (FARC at ¶ 25).

6 The Complaint also alleges that Williams served as a director of Leap since 1998 and served on the audit committee. Further, Williams developed the Cricket concept (Leap's business format) with Defendant Jarvis. Whit. R. 132-34 (FARC at ¶21). Also, Williams is a director of Cricket, a Leap subsidiary. *Id.*

7 The Complaint also alleges that Chase served as a director of Leap since 2000, sold a telecommunications company to Leap, retained large amounts of Leap Stock and warrants and worked as a consultant of Leap and was compensated $250,000 per year. Whit. R. 134-36 (FARC at ¶ 22).

8 The Complaint also alleges that Barad served as a director of Leap since 2000, sat on Leap's Audit Committee and owned a significant interest in Leap. Whit. R. 137-38 (FARC at ¶ 24).

9 Additionally, the Complaint alleges that Pegg served as Senior Vice President, Public Affairs of Leap since 1998 and was directly responsible for reviewing and auditing all company reports to shareholders and SEC filings. In addition, Pegg held beneficial ownership of 75,805 shares of Leap stock. Whit. R. 141 (FARC at ¶ 28).

10 The Complaint also alleges that Stephens serves as Vice President, Human Relations for Leap since 1998. Whit. R. 141- 42 (FARC at ¶29). Further, Stephens held beneficial ownership of and/or control 116,062 shares of Leap Stock. *Id.*

person liability; thus, the Circuit Court's denial of the Leap Defendants' Motion must be affirmed.

C. The Whittington Plaintiffs stated viable claims under § 75-71-717(a)(2) of the Mississippi Securities Act.

The Leap Defendants' argument that Plaintiffs have failed to state an actionable claim under the Mississippi Securities Act ("MSA") is also without merit. The Leap Defendants are liable to the Plaintiffs based upon § 75-71-717(a)(2), together with the material participation and aider/abettor liability provision of § 75-71-719 because the Leap Defendants sold the Leap Stock to Plaintiffs by using materially false oral and written communications. §75-71-717(a)(2) states:

> Any person who . . . offers or sells a security by the use of any written or oral communication which contains any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading (the buyer not knowing of the untruth or omission) . . . is liable to the person buying the security from him . . .

Miss. Code Ann. § 75-71-717(a)(2). Simply stated, a person who misrepresents or fraudulently sells a security is *liable* to the purchaser of the security. *Geisenberger v. John Hancock Distributors, Inc.*, 774 F. Supp. 1045, 1050 (S.D. Miss. 1991). Section 717(a)(2) parallels section 12(a)(2) of the 1933 Securities Act, which makes liable any person who:

> offers or sells a security . . . by the use of any means or instruments of transportation or communication in interstate commerce or of the mails, by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading (the purchaser not knowing of such untruth or omission), and who shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of such untruth or omission.

15 U.S.C. § 77l(a)(2) (Supp. V 1999). Section 717(a)(2) is broader than section 12(a)(2) in two important ways. First, section 717(a)(2) is not limited to only those securities sold "by means of a prospectus or oral communication." Second, section 717(a)(2) is not limited to only those

securities sold "by the use of any means or instruments of transportation or communication in interstate commerce or of the mails."

Plaintiffs alleged all the necessary elements of a claim under both sections. Whit. R. 172-82 (FARC at ¶¶ 71-93). The Leap Defendants' argument that they are not liable under the MSA is completely disingenuous. According to the factual allegations of the Complaint (which must be taken as true for purposes of the Leap Defendants' Motion), during the relevant time period, the Leap Defendants, acting in concert with the Co-Conspirators carried out a plan, scheme and course of conduct which was intended to and did: (1) offer or sell a security; (2) by means of any written or oral communication; (3) which contained an untrue statement of material fact, or omitted a material fact necessary to make those statements that were made, in light of the circumstances in which they were made, not misleading; and (4) the Plaintiffs did not know, nor could they have known in the exercise of reasonable care, of the untruth or omission. Whit. R. 173 (FARC at ¶ 74).

1. Loss causation is an issue of fact for trial.

The Leap Defendants also make the incredulous argument that their Motion should be granted because they claim that the Plaintiff's losses were not caused by the material misrepresentations and omissions at issue here. The Leap Defendants claim that the Plaintiffs' losses were instead caused by general market conditions and the technology downturn that allegedly existed at the time. The disputed cause of Plaintiffs' losses should not be resolved without a trial. Moreover, the Complaint clearly alleges (which must be taken as true) that Plaintiffs suffered damage as a result of the material misrepresentations and omissions of Leap Defendants.

Furthermore, loss causation is not required under the MSA. The Leap Defendants cite to *Geisenberger v. John Hancock Distribs., Inc.*, 774 F. Supp. 1045, 1051 (S.D. Miss 1991) for the

proposition that "loss causation" is required under Section 717(a)(2). However, as commentators have noted, that case erroneously injected a 10b-5 standard into the MSA:

> Geisenberger appears to make a number of errors in its assessment of the MSA, owing to the district judge's dogged attempt to analogize section 717(a)(2) to Rule 10b-5, rather than to section 12(a)(2), with which section 717(a)(2) has much more in common. See supra note 110. Consequently, the Geisenberger court erroneously imported the Rule 10b-5 "loss causation" element into his section 717(a)(2) analysis. *See Geisenberger*, 774 F. Supp. at 1051. Fortunately, while Judge Barbour appears to have been doctrinally wrong in implying reliance and loss causation elements into a section 717(a)(2) claim, he found sufficient facts in the case at bar to satisfy both putative elements. *See id.* As a net result, his holding was the same as it should have been absent the two misplaced elements.

70 Miss. L.J. 683, n. 141 (2000).

Section 75-71-717(a)(2) is analogous to Uniform Securities Act (1956) § 410(a)(2).[11] Furthermore, Section 410(a)(2) parallels 12(a)(2) of the 1933 Securities Act. A plain reading of the statutory language of "Section 410(a) of the Uniform Securities Act shows no explicit loss causation requirement." Joe Long, 12A Blue Sky Law § 9:117.39 (2006). Furthermore, the section has **not** "been held to **imply** a loss causation requirement." *Id.* (emphasis in original). Treatise material regarding this area have noted that "the omission of a loss causation element in ... Uniform Securities Act, Section 410(a)(2) was intentional, **not an oversight**." *Id.* (emphasis in original). "Unlike SEC Rule 10b-5, where the emphasis is on awarding the investor the difference between the value of the securities as sold and their actual value at that time, Sections 12(2) and 410(a)(2) are aimed at setting the transaction aside and returning the parties to their status **before** the transaction was entered into." *Id.* (emphasis in original). As a result, it is well-settled in the states which have adopted the Uniform Securities Act that loss causation is not an element that must be proven or alleged. *See*, e.g., *Dunn v. Borta*, 369 F.3d 421, 432 (4th Cir.

11 Section 410(a)(2) is identical to Mississippi's Section 717(a) and states: "(a) Any person who ... (2) offers or sells a security by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading (the buyer not knowing of the untruth or omission), and who does not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of the untruth or omission..."

2004) (holding that causation was not an element in Uniform Securities Act and refusing to imply that it is an element); *Kirchoff v. Selby*, 703 N.E.2d 644 (Ind. 1998); *Hines v. Data Line Sys. Inc.*, 787 P.2d 8, 12-13 (Wash. 1990) (A plain reading of the [Uniform] Securities Act demonstrates that a decline in the market value of the stock is not an element of a [Uniform] Securities Act violation. [Section 410(a)(2)] makes it unlawful for a seller to make a material misrepresentation or omission in connection with the sale of a security. The violation is in the misrepresentation itself; it is not how the misrepresentation affected the price of the stock [Section 410(a)] provides rescission as the basic remedy. Thus an investor who is wrongfully induced to purchase a security may recover his investment without any requirement of showing a decline in the value of the stock); *Klein v. Boyd*, 1996 WL 675554 (E.D. Pa. Nov. 19, 1996) rev'd on other grounds; *Lolkus v. Vanderwilt*, 141 N.W.2d 600, 603 ("as in common law rescission, the buyer need not shown any causal connection between the violation and his loss, nor need he be able to show a loss.").

Even the non-Uniform Securities Act states that have similar civil liability provisions against misrepresentations and omissions "have concluded that **loss causation is not** an element of recovery under their statutes. Long, 12A Blue Sky Law at § 9:117.45 (emphasis in original); *see also, E.F. Hutton & Co. Inc. v. Rousseff*, 537 So. 2d 978, 981 (Fla. 1989); *Lucas v. Downtown Greenville Investors L.P.*, 671 N.E.2d 389 (Ill. App. 1996).

Furthermore, Plaintiffs are seeking, *inter alia,* rescissionary damages, alleging that but for the Leap Defendants' fraud they would have never purchased the Leap stock. With regard to such damages the US Supreme Court stated:

> We may therefore infer that Congress chose a rescissory remedy when it enacted § 12(2) in order to deter prospectus fraud and encourage full disclosure as well as to make investors whole. Indeed, by enabling the victims of prospectus fraud to demand rescission upon tender of the security, Congress shifted the risk of an intervening decline in the value of the security to defendants, whether or not that decline was actually caused by the fraud.

Randall v. Loftsgaarden, 478 U.S. 647, 659 (1986).

2. Leap Failed to Disclose Materially Adverse Facts to the Whittington Plaintiffs

As discussed above, (*see supra* Section A2 at pp. 25-29), and as alleged in the Complaint, the Leap Defendants failed to disclose that: (1) on September 1, 2000, Leap had entered into a contract with MCG obligating Leap to pay consideration (contingent or otherwise) which would create material risks of dispute, litigation and severe adverse effects on Leap and Leap's other shareholders besides MCG; (2) a material dispute had arisen between Leap and MCG regarding the amount of form of the consideration owed under the September 1, 2000 contract to MCG, and providing exact and quantitative details of the issues and amounts at risk in the controversy, especially amounts claimed by MCG or for which Leap was otherwise potentially at risk (i.e., at no time before approximately August 2002 did Defendants or Leap disclose anything remotely like 21 million shares of Leap Stock being at risk); (3) the details of MCG's demands and positions being taken in the arbitration of such dispute, and the risks (with a quantification of amounts) to Leap of losing in such proceeding; (4) the Defendants had caused to be created, in such arrangement with MCG, a material risk that the effective working control of Leap could (and ultimately would) change hands; (5) the MCG contract (which predated the Plaintiffs' purchases by approximately a year) created the basis for a massive dilution or "watering" of the Leap Stock first acquired by AWG in June 2001 and then acquired by Plaintiffs in the fall of 2001 in the "buy back" arrangement described above; (6) the MCG contract created a significant risk that Leap's covenants in its lending and financing arrangements would be violated and the other adverse consequences would occur, that have now indeed occurred; and (7) the risks from such MCG contract, and the resulting dispute and the arbitration, included potential bankruptcy of Leap. Whit. R. 173-75 (FARC at ¶ 74). Furthermore, there were material

misrepresentations in the Registration statement signed by the Leap Defendants including, but not limited to the following: (1) Shareholder equity was misstated and/or not properly footnoted, to reflect the impact of the issuance of up to 21,021,431 shares of Leap Stock to MCG; (2) Statements as to shares reserved for future issuance did not properly reflect the potential amounts of issuance of up to 21,021,431 shares of Leap Stock to MCG; (3) Per-share amounts, including earnings, were misstated and/or not properly footnoted, to reflect the impact of the issuance of up to 21,021,431 shares of Leap Stock to MCG; (4) Leap's descriptions of financing arrangements were inaccurate, and conveyed a misleading impression that Leap had no looming risks of covenant defaults from the MCG contract and the dispute and (5) Leap's uninformative mentions of an "arbitration" in certain reports from mid-2001 through the spring of 2002 did not tie back to MCG and gave a wholly understated, misleading picture of the dispute, and gave a misleading impression that the result of such proceeding would not be material to Leap. Whit. R. 175-76 (FARC at ¶ 75).

3. Scienter is not an element of Miss. Code Ann. § 75-71-717(a)(2)

The Leap Defendants wrongfully argue that the Whittington Plaintiffs are required to plead that the Leap Defendants acted with the requisite scienter. The Leap Defendants are clearly mistaken because a cause of action under these provisions does not require pleading or proof of a defendant's scienter. *See Fortenberry v. Foxworth Corp.*, 825 F. Supp. 1265 (S.D. Miss. 1993). In F*ortenberry* a Mississippi federal court was called upon to determine the applicable statute of limitation for § 10b and Rule 10b-5 claims in Mississippi. In so doing, that court analyzed the Mississippi Blue Sky Laws and recognized that "[n]either § 501 nor § 717 requires the element of scienter. Common law fraud requires the element of scienter, as do Rule 10b-5 actions in the wake of the Supreme Court's opinion in *Ernst and Ernst v. Hochfelder.*" *Id.* at 1279-1280.

The Leap Defendants cite *Russell v. Southern Nat'l Foods, Inc.*, 754 So. 2d 1246 (Miss. 2000) for the proposition that Section 717 requires plaintiffs to plead that defendants engaged in intentional or deceptive conduct. However, the issue in Russell was not the requisite pleading standard of Section 717(a)(2), which as noted above is based upon Section 12(a)(2,), which contains no scienter element. In fact, the Mississippi Supreme Court has never been called upon to determine whether section 717 requires the element of scienter. Rather, in dicta, the *Russell* court cited to *Ernst & Ernst v. Hochfelder,* 425 U.S. 185 (1976) for the proposition that allegations of securities fraud (which can be brought pursuant to many different statutes with many different pleading requirements) required pleading of intentional or deceptive conduct. However, *Hochfelder* concerned actions under section 10(b) of the Securities Exchange Act of 1934 and rule 10b-5, not Section 717. In fact, although *Hochfelder* held that scienter was required to state a claim under § 10(b) of the 1934 Act and Rule 10b-5, it also noted that scienter was not required under § 12(2) of the 1933 Act, and actually supported that holding by noting that § 12(2) "allow[s] recovery for negligent conduct." *Hochfelder*, 425 U.S. at 188 & n. 27. *See also, Kronenberg v. Katz,* 872 A.2d 568, 600 (Del.Ch. 2004). As Section 717 is identical to Section 12(2), it is clear that scienter is not a requirement.

In general, under blue sky laws, like the MSA and unlike at common law, scienter is not a necessary element of a fraud action. 18 Am. Jur. 2d *Corporations* § 117, n.9. In exploring scienter in the context of state securities laws, the following is noted:

> **The lack of scienter as an element of a civil action for securities fraud distinguishes the blue sky laws from the federal securities laws.** Under the federal securities laws, in an action for securities fraud under § 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder, scienter must be shown before recovery will be permitted in a private civil action, although the degree of scienter is the subject of some disagreement. **While some blue sky jurisdictions have mentioned the federal cases in passing, it is generally accepted that the reasoning by which the federal courts have held that the federal securities laws require a showing of scienter does not apply to actions brought under the blue sky laws.** At least part of the reason for this is that the

> antifraud provisions of the blue sky laws are patterned after § 12 of the Securities Act of 1933 rather than § 10(b) and SEC Rule 10b-5.

69A Am. Jur. 2d *Securities Regulation--State* § 186 (emphasis added). As discussed above, Section 75-71-717 is analogous to Uniform Securities Act (1956) § 410(a)(2) and Section 717 should be "construed as to effectuate its general purpose to make uniform the law of those states which enact it and to coordinate the interpretation and administration of this chapter with the related federal regulation." Miss. Code Ann. §§ 75-71-103 and 75-71-717. Accordingly, case law from states that have adopted the Uniform Securities Act is persuasive, and the states that have addressed the issue overwhelmingly hold that scienter is not an element to a civil liability claim under the Uniform Securities Act. *See*, citations and discussion *infra*.

Furthermore, Section 410 parallels 12(a)(2) of the 1933 Securities Act, which does not require a showing of scienter. *See*, *Fortenberry v. Foxworth Corp.*, 825 F. Supp. 1265, 1279 ("Neither § 501 nor § 717 [of Mississippi Securities Act] requires the element of scienter") (S.D. Miss. 1993); *Burgess v. Premier Corp.*, 727 F.2d 826, 833 (9th Cir. 1984) (Scienter is not required under Washington [Securities Act]); *Gaudina v. Haberman*, 644 P.2d 159 (Wyo. 1982); *Kittilson v. Ford*, 608 P.2d 264 (Wash. 1980); *Merrill Lynch Pierce Fenner & Smith v. Byrne*, 320 So. 2d 436 (Fla. App. 1975); *Sprangers v. Interactive Techs. Inc.*, 394 N.W.2d 498, 503 (Minn. App. 1986); *In re Tyco Intern., Ltd.*, 2004 WL 2348315, *15 ((D.N.H. 2004) (Neither § 11 nor § 12(a)(2) requires an allegation of scienter.); *In re Adams Golf, Inc. Securities Litigation*, 381 F.3d 267, 274 (3rd Cir. 2004) (Sections 11 and 12(a)(2) are virtually absolute liability provisions, which do not require plaintiffs to allege that defendants possessed any scienter. (*citing*, *Huddleston*, 459 U.S. at 382.)); *Benak v. Alliance Capital Management L.P.*, 349 F. Supp. 2d 882, 888 (D. N.J. 2004) ("...sections 11 and 12(a)(2) contain no scienter requirement..."). Long recognizes that "whether scienter is required under Section 410(a)(2) of the Uniform Act in those states which incorporate Section 101 will depend upon which part of

Section 101 is relied upon to impose civil liability." 12A at § 9:136. Mississippi does incorporate Section 101 in its securities act, therefore scienter is not required if civil liability is based upon Miss. Code Ann. §§ 75-71-501(2) or (3).[12]

Commentators have noted that the Mississippi Securities Act does not require a showing of scienter:

> Nor does the section 717(a)(2) require the buyer to prove that the seller knew the representation was false or made it without regard to its truth or falsity with the intent that the buyer rely upon it --as is required to show common law fraud or a Rule 10b-5 violation.

70 Miss. L.J. 683, 719-20 (2000).

Furthermore, despite the fact that scienter is not a required element under Section 717, Plaintiffs nonetheless have pled scienter. The Plaintiffs' Complaint states:

> Each Defendant listed in this complaint was, during the relevant time periods specified, aware of the material omitted facts described in the fact section of this Complaint and of the further fact that such material omitted facts were not being disclosed to the Plaintiff, and that the activities of such Defendant were assisting Leap, its officers, its directors and affiliates, and the Co-Defendants named herein, to create, perpetrate and continue the wrongful, deceptive and fiduciary-duty-breaching schemes and fraudulent courses of business alleged herein. But for the activities of the Defendants, the losses of Plaintiffs would not have occurred. Each defendant knew and intended that the material omitted facts were not being disclosed to Plaintiffs, and acted **with the requisite degree of knowledge or scienter,** intending thereby to induce Plaintiffs to pay Plaintiff's money for the Leap Stock under circumstances of not knowing the material omitted facts. Defendants, in their commission of, and in their participation in, and in their authorization or direction of, the wrongs alleged above, acted or omitted to act intentionally or in reckless disregard for the truth, or else acted or omitted to act knowingly or willfully, and in any event they acted or omitted to act with intent to do the acts done (or to omit to do the acts needed to be done as outlined herein) or, as to acts not done by any particular Defendants, with the intent or knowledge that such acts would be done by the other Defendant, control person, or co-conspirator thereof who did in fact perform such act or omission, or who materially aided the primary wrongdoers.

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12 Miss. Code Ann. §§ 75-71-501 ...

(2) "to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, or

(3) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.

...

> All of Defendants, who were in possession of the material undisclosed facts and **willfully or knowingly** or recklessly **concealed them**, acting in concert and conspiracy, engaged in the aforesaid omissive, and therefore **deceptive and manipulative and fraudulent, acts**, practices and courses of business with the intent to take advantage of the position of inferior knowledge and ignorance of the true facts on the part of the Plaintiffs, and in order to take advantage of Plaintiffs' trust and confidence in the Defendants, and with **the intent to defraud the Plaintiffs**, and with a profit-seeking motive on the Defendants' part.

Whit. R. 189; 191 (FARC at ¶ 110; 112) (Emphasis added).

D. The Whittington Plaintiffs' Common Law Fraud Claims are Actionable

The Whittington Plaintiffs alleged that the Leap Defendants committed fraud by inducing the Whittington Plaintiffs to purchase the Leap Stock on the front end, and then by inducing them to hold onto the Leap Stock. Moreover, the Whittington Plaintiffs alleged that acting with full knowledge of Leap's true financial condition and forecast, the Leap Defendants, engaged in the course of fraud, manipulation and deception described above. The Whittington Plaintiffs make separate and independent claims under the Mississippi blue sky laws and common law fraud.

These actions are actionable fraud, pursuant to a number of applicable tort law principles, among which are the following:

> Restatement of Torts (Second), sec 525: "One who fraudulently makes a misrepresentation of fact, opinion, intention or law for the purpose of inducing another to act or *to refrain from action* in reliance upon it, is subject to liability to the other in deceit for pecuniary loss caused to him by his justifiable reliance upon the misrepresentation." (Emphasis added.)

> Restatement of Torts (Second), sec 531: "One who makes a fraudulent misrepresentation is subject to liability to the persons or class of persons whom he intends or has reason to expect to act or *to refrain from action* in reliance upon the misrepresentation, for pecuniary loss suffered by them through their justifiable reliance in the type of transaction in which he intends or has reason to expect their conduct to be influenced." (Emphasis added.)

> Restatement of Torts (Second), sec 551(1): "One who fails to disclose to another a fact that he knows may justifiably induce the other to act *or refrain from acting*

> in a business transaction is subject to the same liability to the other as though he had represented the nonexistence of the matter that he has failed to disclose...." (Emphasis added.)

In a recent decision, the California Supreme Court held that **both fraud and negligence** claims can be brought where the **claimant was caused or induced to retain or not to sell a stock**. *See Small v. Fritz Companies, Inc.*, 65 P.3d 1255 (Cal. 2003). The California Supreme Court succinctly summarized its holding as follows:

> [T]his case present[s] the issue whether California should recognize a cause of action by persons wrongfully **induced** to hold stock instead of selling it. (For convenience, we shall refer to such a lawsuit as a "holder's action" to distinguish it from suits claiming damages from the purchase or sale of stock.) We conclude that California law should allow a holder's action for fraud or negligent misrepresentation.

Id. at 1256-1257.

In Mississippi, the elements of common law fraud include: "(1) a representation, (2) its falsity, (3) its materiality, (4) the speaker's knowledge of its falsity or ignorance of its truth, (5) his intent that it should be acted upon by the person and in the manner reasonably contemplated, (6) the hearer's ignorance of its falsity, (7) his reliance on its truth, (8) his right to rely thereon, and (9) his consequent and proximate injury." *Welsh v. Mounger*, 883 So. 2d 46, 48 (Miss. 2004).

Plaintiffs here have alleged facts to adequately state a claim for common law fraud. Plaintiffs' Complaint states: (1) the representations (as set forth above); (2) their falsity (as stated above); (3) their materiality (as stated above); (4) the speaker's knowledge of its falsity or ignorance of the truth (each of the Leap Defendants "signed and/or personally approved the quarterly and/or annual reports to the SEC and to shareholders and investors..." Whit. R. 187 (FARC at ¶ 107)); (5) the speaker's intent that it should be acted upon by the hearer and in the manner reasonably contemplated (each of the Leap Defendants "knew and expected that their false and misleading information, and the omissions of material facts, would be conveyed to

Leap Stock holders in Mississippi such as Plaintiffs" Whit. R. 187 (FARC at ¶ 107); (6) the hearer's ignorance of its falsity ("At the time of said misrepresentations and omissions, Plaintiffs were ignorant of their falsity, and believed them to be true." Whit. R. 178 (FARC at ¶ 83); (7) his reliance on its truth ("Had Plaintiffs known the truth regarding the problems that Leap was experiencing, which were not disclosed by [the Leap] Defendants, Plaintiffs would not have purchased or otherwise acquired the Leap Stock." Whit. R. 178 (FARC at ¶ 83)); (8) his right to rely thereon (the Leap Defendants "occupied a vastly superior position of knowledge and access to information than Plaintiffs" Whit. R. 187 (FARC at ¶ 107)); and (9) his consequent and proximate injury ("As a direct and proximate result of [the Leap] Defendants' wrongful conduct, Plaintiffs suffered damages in connection with its respective purchases and sales and retained holdings of Leap Stock during the relevant time period. Whit. R. 179 (FARC at ¶ 86)).

In addition, the Leap Defendant's concealment of material information from the Whittington Plaintiffs also constitutes fraud under Mississippi law. Omission or concealment of material facts can constitute misrepresentation, just as can positive, direct assertion. *Davidson v. Rogers*, 431 So. 2d 483, 484 (Miss. 1983). Under Mississippi law, a duty to disclose may exist where one voluntarily undertakes to speak but fails to prevent his or her words from being misleading, or where one party has knowledge of material facts to which the other party does not have access. *Shelter Mutual Ins. Co. v. Brown,* 345 F. Supp. 2d 645, 652 (S.D. Miss. 2004). The Whittington Plaintiffs have alleged that the Leap Defendants "were in position of vastly superior knowledge concerning Leap as compared with Plaintiffs." Whit. R. 190 (FARC at ¶ 111). Furthermore, the Complaint alleges that the Leap Defendants induced the Whittington Plaintiffs to purchase and hold Leap Stock through their misrepresentations and omissions. The Whittington Plaintiffs have also alleged direct and actual reliance. As control persons and their positions as insiders in possession of superior knowledge of Leap's true financial picture, the

Leap Defendants had an affirmative duty to speak. "A statement in a business transaction which, while stating the truth so far as it goes, the maker knows or believes to be materially misleading because of his failure to state qualifying matter is a fraudulent misrepresentation. Such a statement of a half truth is as much a misrepresentation as if the facts stated were untrue." *Equitable Life Ins. Co. of Iowa v. Halsey, Stuart & Co.*, 312 U.S. 410, 425-426 (1941) (citations omitted).

CONCLUSION

As shown above, no party – Defendant or Plaintiff – signed an agreement to arbitrate the claims at issue, as such, those claims cannot be compelled to arbitration. In addition, the Whittington Plaintiffs have clearly met their pleading requirements and when all the facts in their Complaint are taken as true, as they must be, the Whittington Plaintiffs have stated claims upon which relief can be granted. Therefore, the orders of the Circuit Court of Hinds County denying the Leap Defendants' Motions to dismiss or in the alternative to compel arbitration should be affirmed.

Done this the 20th day of February, 2007.

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CERTIFICATE OF SERVICE

I hereby certify that I have filed with the Clerk of the Mississippi Supreme Court **Brief of The Whittington Plaintiffs (Appellees) In Response To Brief of Appellant Leap Defendants** by depositing for delivery via Federal Express an original and three copies of the foregoing and have served a copy of the foregoing upon counsel of record by placing a copy of same in the United States mail, first class postage prepaid, or other method indicated and addressed as follows:

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DONE this the 20th day of February, 2007.

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