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**

(For Continuation of Caption See Inside Cover)

ON APPEAL FROM THE CIRCUIT COURT OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI HONORABLE TOMIE T. GREEN, CIRCUIT JUDGE

REPLY BRIEF OF THE LEAP DEFENDANTS (APPELLANTS)

ORAL ARGUMENT REQUESTED

David W. Clark (MBN [redacted])
Mary Clay W. Morgan (MBN [redacted])
BRADLEY ARANT ROSE & WHITE LLP
One Jackson Place
Suite 450
188 East Capitol Street
Jackson, Mississippi 39201
Telephone: (601) 948-8000
Facsimile: (601) 948-3000

Attorneys for the Leap Defendants
Harvey P. White, Scot B. Jarvis, Susan G. Swenson, Thomas J. Bernard, Jeffrey P. Williams, Anthony R. Chase, Michael B. Targoff, Jill E. Barad, Robert C. Dynes, James E. Hoffmann, Stewart Douglas Hutcheson, Daniel O. Pegg, and Leonard C. Stephens

OF COUNSEL:
WILSON SONSINI GOODRICH & ROSATI
Professional Corporation
Boris Feldman (admitted *pro hac vice*)
Robert P. Feldman (admitted *pro hac vice*)
Clayton Basser-Wall (admitted *pro hac vice*)
Mark T. Oakes (admitted *pro hac vice*)
650 Page Mill Road
Palo Alto, California 94304
Telephone: (650) 493-9300
Facsimile: (650) 565-5100

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

HARVEY P. WHITE, *et al.* — APPELLANTS

VS.

AMERICAN WIRELESS LICENSE GROUP, LLC — APPELLEES

Consolidated With:
Cause No. 2005-IA-01883

HARVEY P. WHITE, *et al.* — APPELLANTS

VS.

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

RULE

INTRODUCTION

The Leap Defendants' Opening Brief demonstrated that the Circuit Court erred in denying their motions to dismiss the Original Complaint in *American Wireless License Group, LLC v. White*, Case No. 251-03-692 CIV (the "AWG Complaint") and the First Amended and Restated Complaint filed in *Whittington v. White*, Case No. 251-03-175 CIV (the "FARC"). As shown in the Opening Brief, American Wireless License Group, LLC ("AWG") and the Whittington Plaintiffs (together with AWG, "Plaintiffs") do not have standing to assert claims under Section 11 of the Securities Act of 1933; they cannot establish that their losses were caused by the Leap Defendants' alleged omissions; and the Leap Defendants disclosed all of the risks they claim were omitted from the June 2001 Registration Statement. Thus, the Circuit Court should have dismissed the AWG Complaint and the FARC pursuant to Mississippi Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted.

The Leap Defendants' Opening Brief also demonstrated that even if the Circuit Court correctly denied their motions to dismiss, it nevertheless should have sent the *American Wireless* and *Whittington* actions to arbitration. As shown in the Opening Brief, Section 12.11 of the Agreement for Purchase and Sale of Licenses (the "Agreement") between Leap Wireless International, Inc. ("Leap") and AWG contains a broad arbitration clause providing for arbitration of "any dispute, claim or controversy arising under th[e] Agreement or in any way related to th[e] Agreement;" and Plaintiffs' claims against the Leap Defendants "aris[e] under" and "relate[] to" the Agreement because they are focused on the principal transactions underlying the Agreement, *i.e.*, Leap's obligations under Sections 2.1 and 2.2 of the Agreement to issue approximately 1.9 million shares of Leap stock to AWG and Leap's obligation under Section 7.4 of the Agreement to file the June 2001 Registration Statement. Thus, the Circuit Court should have ordered Plaintiffs to arbitrate their claims pursuant to the Federal Arbitration Act (the "FAA") and stayed all proceedings in the *American Wireless* and *Whittington* actions pending arbitration.

AWG responded to this showing by agreeing to arbitrate its claims. *See* Pls. Opp. at 10.[1] Indeed, AWG recently filed a motion in the Circuit Court to stay all proceedings in the *American Wireless* action pending arbitration. The Whittington Plaintiffs, by contrast, filed an Opposition to the Leap Defendants' appeals.

In the Opposition, the Whittington Plaintiffs contend that their claims are not within the scope of the arbitration clause of the Agreement. The Whittington Plaintiffs concede, however, that they are the individual members of AWG; that they have asserted *exactly* the same claims based on *exactly* the same factual allegations as AWG; that the FARC is virtually identical to the AWG Complaint; and that they are represented by the same counsel as AWG.

The Whittington Plaintiffs also contend that they have standing to assert claims under Section 11 of the Securities Act of 1933 because they can "trace" their shares to the June 2001 Registration Statement. Finally, the Whittington Plaintiffs contend that the risk disclosures in the June 2001 Registration Statement were "vague and ambiguous" and "woefully inadequate boilerplate," and that loss causation and scienter are not elements of a claim under Section 717(a)(2) of the Mississippi Securities Act (the "MSA"). As discussed more fully below, the Whittington Plaintiffs misstate the law, the facts, and the allegations of their own complaint.

---

[1] References to "Pls. Opp. at __" refer to the Brief of the Whittington Plaintiffs (Appellees) in Response to Brief of Appellant Leap Defendants. References to "Open Brief at __" refer to the Opening Brief of the Leap Defendants (Appellants).

ARGUMENT

I. THE CIRCUIT COURT ERRED IN DENYING THE LEAP DEFENDANTS' MOTION TO DISMISS THE *WHITTINGTON* ACTION

A. The Circuit Court Should Have Dismissed The Whittington Plaintiffs' Section 11 Claims

1. The Whittington Plaintiffs Lack Legal Standing to Assert Claims Under Section 11

Section 11 of the Securities Act of 1933 provides relief to persons who purchase "a security that was originally registered under the allegedly defective registration statement, so long as the security was indeed issued under *that* registration statement and not another." *See* Open Brief at 18 (citing authority). Thus, to have standing to assert a claim under Section 11, "a purchaser must have bought shares directly from the issuer or underwriter in the initial offering or be a secondary market purchaser who sufficiently alleges that the shares are traceable to the challenged registration statement." *In re Alamosa Holdings, Inc.*, 382 F. Supp. 2d 832, 864 (N.D. Tex. 2005).

Here, the Whittington Plaintiffs *admit* that they did not purchase their shares directly from Leap. *See* Open Brief at 20. Instead, they allege that they purchased their shares "in the public market" months after the June 2001 Registration Statement was filed. *See id.* The Whittington Plaintiffs nevertheless contend that they can "trace" their shares to the June 2001 Registration Statement because they purchased their Leap stock in the public market "virtually simultaneously as AWG sold it [in the public market]." Pls. Opp. at 24; *see also* Open Brief at 21. The Whittington Plaintiffs concede, however, that (i) at the times of their purchases, over 34 million shares of Leap stock were outstanding and being traded in the public market; (ii) Leap had issued those shares pursuant to several different registration statements going back to September 1998; and (iii) the 1.9 million shares of Leap stock Leap issued pursuant to the June 2001 Registration Statement represented just 5½% of the 34 million shares that were outstanding and being traded in the public market at the times of the Whittington Plaintiffs' purchases. *See* Open Brief at 20-21.

As the Leap Defendants demonstrated in the Opening Brief, "[c]ourts have uniformly interpreted [Section] 11 as requiring more than a showing that a plaintiff's stock 'might' have come from the relevant offering." *See* Open Brief at 22 (quoting *In re Quarterdeck Office Sys., Inc. Sec. Litig.*, [1993-1994 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 98,092, at 98,743 (C.D. Cal. Sept. 30, 1993)). Instead, plaintiffs must be able to establish *with certainty* that the shares they purchased were issued and sold pursuant to the challenged registration statement. *See* Open Brief at 22-23 (citing authority). As the Fifth Circuit explained in *Krim v. pcOrder.com*:

> Congress conferred standing on those who *actually* purchased the tainted stock, not on the whole class of those who *possibly* purchased tainted shares – or, to put it another way, are at risk of having purchased tainted shares . . . Appellants here cannot meet the statutory standing requirement of Section 11 merely by showing that they jumped into a potentially polluted 'pool' of stock.

402 F.3d 489, 497, 500 (5th Cir. 2005).

Here, the Whittington Plaintiffs admit that they cannot establish with certainty that the shares they purchased were issued and sold pursuant to the June 2001 Registration Statement, as opposed to the other registration statements Leap filed over the years. *See* Open Brief at 20-21. Rather, they allege that they must have acquired shares that were issued and sold pursuant to the June 2001 Registration Statement because they purchased their Leap shares in the public market "virtually simultaneously" as AWG sold its Leap shares in the public market. *See* Pls. Opp. at 24; *see* Open Brief at 20-21. As shown above, "standing cannot be based on a statistical tracing theory, *i.e.*, by showing that there is a *very high probability* that the shares can be traced to the allegedly defective registration statement." *Davidco Investors, LLC v. Anchor Glass Container Corp.*, [2005-2006 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 98,732, at 98,448-449 (M.D. Fla. Mar. 3, 2006).[2] Thus, because the Whittington Plaintiffs admit that they cannot establish with certainty that they can "trace" their shares to the June 2001 Registration Statement, their Section 11 claims must be dismissed. *See In re Global Crossing, LTD. Sec. Litig.*, 313 F. Supp. 2d 189,

[2] *See also Krim*, 402 F.3d at 497 ("In limiting those who can sue to 'any person acquiring such security,' Congress specifically conferred standing on a *subset* of security owners . . . To allow Appellants to satisfy the tracing requirement for aftermarket standing in this case with the proffered statistical methodology would contravene the language and intent of Section 11.").

207-208 (S.D.N.Y. 2003) ("Only those who purchase securities that are subject to [the] allegedly false registration statement, and not those who buy identical stocks already being traded, can sue under [S]ection 11.").

The cases the Whittington Plaintiffs rely upon do not change this result. *See* Pls. Opp. at 25-26. None of those cases held (or even suggested) that plaintiffs can establish standing for purposes of Section 11 by alleging that they must have purchased shares that were issued pursuant to the challenged registration statement because they purchased shares in the public market at around the same time that an offering occurred. Indeed, in *Global Crossing*, the United States District Court for the Southern District of New York rejected almost exactly the same "tracing" argument the Whittington Plaintiffs have made in this case. *See* 313 F. Supp. 2d at 207. In *Global Crossing*, plaintiffs alleged that they could "trace" their purchases of Global Crossing, Ltd. ("GC") stock to a registration statement the company filed in connection with a secondary offering because they "purchased substantial numbers of GC shares within weeks of the Secondary Offering." *Id.* The Court dismissed plaintiffs' claims, holding that they had not pleaded adequately that the shares they purchased were issued and sold pursuant to the registration statement for the secondary offering. *See id.* at 207-208. The Court explained: "[T]o have standing to assert a [S]ection 11 claim, plaintiffs must be able to 'trace their shares to an allegedly misleading registration statement.'" *Id.* at 206 (citation omitted). Here, because it is apparent on the face of the FARC that the Whittington Plaintiffs cannot establish with certainty that their purchases are "traceable" to the June 2001 Registration Statement, the Circuit Court should have dismissed their claims. *See Alamosa Holdings*, 382 F. Supp. 2d at 864 ("[M]ere probability that a plaintiff can trace shares is clearly insufficient").

The Whittington Plaintiffs cannot salvage their claims by asserting that Section 11 standing "is a fact-intensive inquiry which cannot be resolved on a preliminary dismissal motion, where no discovery has yet occurred." Pls. Opp. at 25 (emphasis in original). As the Leap Defendants demonstrated in the Opening Brief, courts routinely dismiss Section 11 claims where plaintiffs fail to allege facts showing they have proper standing. Open Brief at 22-23. For

instance, in *Davidco Investors*, the Court dismissed a Section 11 claim, holding that "standing is an element of subject matter jurisdiction, which may be determined on a motion to dismiss." [2005-2006 Transfer Binder] Fed. Sec. L. Rep. (CCH) at 98,449. Similarly, in *Alamosa Holdings*, the Court dismissed a Section 11 claim where it was "unable to locate any specific allegation that the Lead Plaintiff purchased traceable shares or any facts to support such an allegation." 382 F. Supp. 2d at 864. The Whittington Plaintiffs ignore this authority in their Opposition.

The Whittington Plaintiffs' reliance on *In re LILCO Sec. Litig.*, 111 F.R.D. 663 (E.D.N.Y. 1986), is misplaced. In *LILCO*, defendants argued on a motion for class certification that common questions of fact did not predominate on plaintiffs' Section 11 claim because the Court would have to hold a "mini-trial" for each member of the proposed class to determine whether that plaintiff could "trace" her shares to the challenged registration statement. *See id.* at 671. The Court held that individual issues of "tracing" "d[id] not merit denial of [plaintiffs'] motion for class certification." *Id.* The Court found that the named plaintiffs had already established that they could "trace" their shares to the challenged registration statement and that the issue of whether the unnamed, absent class members could "trace" their shares was "a question of fact reserved for trial." *Id.* Unlike in *LILCO*, the issue of "tracing" can and should be resolved on a motion to dismiss in this case. Here, the named plaintiffs (the Whittington Plaintiffs) have asserted a "statistical tracing" theory; thus, they have admitted that, as a matter of law, they cannot "trace" their shares to the June 2001 Registration Statement. *See, e.g., Davidco Investors*, [2005-2006 Transfer Binder] Fed. Sec. L. Rep. (CCH) at 98,448-449 ("[S]tanding cannot be based on a statistical tracing theory . . . "); *Alamosa*, 382 F. Supp. 2d at 864 ("[M]ere probability that a plaintiff can trace shares is clearly insufficient").

2. Leap Disclosed the Risks the Whittington Plaintiffs Claim Were Omitted from the June 2001 Registration Statement

It is well settled that a Section 11 claim must be dismissed where the defendants disclose the precise risks plaintiffs claim were omitted. *See* Open Brief at 25. Here, the Whittington

Plaintiffs contend that the Leap Defendants failed to warn them that a purchase price dispute with a company called MCG PCS, Inc. ("MCG") could dilute the value of their Leap stock and trigger a default under Leap's loan covenants. *See id.* at 25-29 As the Leap Defendants demonstrated in the Opening Brief, Leap disclosed these risks in its public filings. *See id.*

The Whittington Plaintiffs attempt to salvage their Section 11 claims by characterizing Leap's ample risk disclosures as "vague and ambiguous" and "woefully inadequate boilerplate." Pls. Opp. at 30. The Whittington Plaintiffs' hyperbole notwithstanding, it is readily apparent from a review of the actual risk disclosures that the Whittington Plaintiffs *were* explicitly and specifically warned of *all* the risks they claim were omitted. *See* Open Brief at 26-29. Before any of the Whittington Plaintiffs purchased a single share of Leap stock, he or she was told, *inter alia*, that Leap would be issuing additional shares of stock, which would dilute the value of the Leap stock then outstanding; that Leap had purchased wireless licenses from MCG and MCG was asserting that it was entitled to a purchase price adjustment that could effectively double the original purchase price of those licenses; that Leap could pay the purchase price adjustment in cash or stock; and that Leap's credit facilities included change of control provisions, which could trigger an event of default if a substantial number of shares were issued to another entity, such as MCG. *See id.* Because these are the precise risks the Whittington Plaintiffs contend were omitted from the June 2001 Registration Statement, their Section 11 claims fail as a matter of law. *See id.* at 25-29 (citing authority).

Moreover, the Court should note that the Whittington Plaintiffs are effectively alleging that the Leap Defendants failed to predict in June 2001 that, over one year later, there would be an unfortunate confluence of negative events. When Leap filed the June 2001 Registration Statement, Leap and MCG were only in the early stages of the purchase price dispute and Leap stock was trading at approximately $30.00 per share. *See* Open Brief at 11-12. By July 2002, Leap stock had fallen from approximately $30.00 per share to less than $1.00 per share. *See id.* at 12. In August 2002, Leap lost the purchase price adjustment dispute with MCG in its entirety. *See id.* at 13. By that time, Leap did not have sufficient cash to pay MCG, so it had to pay the

purchase price adjustment in stock – at the now diminished stock price. *See id.* at 12-13. As a result, MCG wound up owning more than 28% of Leap's outstanding shares on a fully diluted basis, which constituted an event of default under Leap's credit facilities. *See id.* at 13. Nobody could have predicated these events in June 2001. Nor do the securities laws require such prediction. They require only the disclosure of material facts based on information available at the time. *See Fadem v. Ford Motor Co.*, 352 F. Supp. 2d 501, 519 (S.D.N.Y. 2005) ("'Corporate officials need not be clairvoyant; they are only responsible for revealing those material facts reasonably available to them'"), quoting *Novak v. Kasaks*, 216 F.3d 300, 309 (2d Cir. 2000)), *aff'd*, 157 Fed. Appx. 398 (2d Cir. 2005). Since the Whittington Plaintiffs fail to plead the omission of any such facts, their Section 11 claims should have been dismissed. *See* Open Brief at 25-29 (citing authority).

B. The Circuit Court Should Have Dismissed The Whittington Plaintiffs' State Law Claims

To state a claim under Section 717(a)(2) of the MSA or common law fraud, plaintiffs must plead that defendants intentionally made untrue statements or omissions of material fact which plaintiffs relied upon and which caused their losses. *See* Open Brief at 30-31 (citing authority). As the Leap Defendants demonstrated in the Opening Brief, the Whittington Plaintiffs' state law claims should have been dismissed because they fail to plead essential elements of those claims, including an untrue statement or omission of material fact, loss causation (*i.e.*, proximate cause), and scienter (*i.e.*, intent). *Id.* at 29-35.

The Whittington Plaintiffs contend that loss causation cannot be resolved on a motion to dismiss because it "is an issue of fact for trial." *See* Pls. Opp. at 34 (emphasis omitted). The Whittington Plaintiffs ignore the applicable legal authority. As shown in the Opening Brief, courts routinely dismiss claims for securities fraud where it is apparent on the face of the complaint that plaintiffs' alleged losses were not caused by the alleged wrongdoing. *See* Open Brief at 31-33 (citing authority). Here, the Whittington Plaintiffs admit that Leap's stock had lost over 98% of its value *before* the alleged "truth" concerning Leap's purchase price dispute

with MCG was disclosed. *See* Open Brief at 32. Accordingly, the Whittington Plaintiffs' own allegations establish conclusively that the Leap Defendants' alleged wrongdoing could not have caused their losses. *See, e.g., In re Merrill Lynch & Co., Inc. Research Reports Sec. Litig.*, 289 F. Supp. 2d 429, 437 (S.D.N.Y. 2003) (dismissing claims where plaintiffs alleged that the value of their investment lost over 74% of its value *before* the disclosure of the alleged fraud; "price decline before disclosure may not be charged to defendants").

The Whittington Plaintiffs also contend that they have adequately alleged that the Leap Defendants acted with scienter. *See* Pls. Opp. at 41.[3] As the Leap Defendants demonstrated in the Opening Brief, the Whittington Plaintiffs cannot survive a motion to dismiss with vague allegations that the Leap Defendants, *as a group*, acted with scienter. *See, e.g.*, Pls. Opp. at 41-42 (quoting FARC ¶¶ 110, 112). Instead, the Whittington Plaintiffs must "particularize each defendant's alleged participation in the fraud." *See* Open Brief at 34-35 (quoting *Lou v. Belzberg*, 728 F. Supp. 1010, 1022-23 (S.D.N.Y. 1990)); *see also* Miss. R. Civ. P. 9(b) ("In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated *with particularity*.") (emphasis added). Because the Whittington Plaintiffs have not made any scienter allegations that are specific to any of the Leap Defendants, their state law claims should have been dismissed for failure to plead adequately the element of scienter.

Recognizing the fundamental flaws in the FARC, the Whittington Plaintiffs now contend that loss causation and scienter are not elements of a claim under Section 717(a)(2).[4] Notably, the Whittington Plaintiffs contend that this Court "has never been called upon" to rule on the

---

[3] The Whittington Plaintiffs contend that they have adequately alleged an untrue statement or omission of material fact as well. As shown above (*see supra* at 7-8), the Leap Defendants disclosed all the risks the Whittington Plaintiffs contend were omitted from the June 2001 Registration Statement. This provides a separate and independent basis for dismissing the Whittington Plaintiffs' state law claims.

[4] The Whittington Plaintiffs tacitly acknowledge that loss causation and scienter are elements of a claim for common law fraud. *See* Pls. Opp. at 43 (citing *Welsh v. Mounger*, 883 So.2d 46, 48 (Miss. 2004)). Thus, even if the Whittington Plaintiffs are correct that loss causation and scienter are not elements of a claim under Section 717(a)(2) of the MSA, their claims for common law fraud fail as a matter of law because they have not pleaded these elements.

elements of a Section 717(a)(2) claim. The Whittington Plaintiffs misapprehend this Court's decision in *Russell v. S. Nat'l Foods, Inc.*, 754 So.2d 1246 (Miss. 2000).

In *Russell*, this Court affirmed a trial court decision granting summary judgment in favor of defendants on all claims asserted by plaintiffs, including a claim under Section 717(a)(2) of the MSA. *See id.* at 1247. This Court explained that to survive a motion for summary judgment, plaintiffs must establish, "by affidavit or otherwise," the existence of facts to support each element of their claims. *Id.* at 1254. The Court then found that plaintiffs had not submitted evidence to support key elements of their claim under Section 717(a)(2). *Id.* at 1255-56. In particular, the Court observed that plaintiffs had not submitted any evidence to establish the element of intent, even though "an affirmative intent to deceive must be shown." *Id.* at 1256. The Court also noted that plaintiffs had not shown that defendants' false statements or omissions caused their losses, even though "recovery is not permitted if the proximate cause of the monetary loss is other than the fraud alleged." *Id.* Thus, contrary to the Whittington Plaintiffs' contentions, this Court *has* determined that a plaintiff asserting a claim under Section 717(a)(2) must establish loss causation (*i.e.*, proximate cause) and scienter (*i.e.*, an affirmative intent to deceive).

For the most part, the Whittington Plaintiffs ignore this Court's decision in *Russell*. *See* Pls. Opp. at 39. Instead, they argue that loss causation and scienter *cannot* be elements of a Section 717(a)(2) claim because Section 717(a)(2) "parallels" Section 12(a)(2) of the Securities Act of 1933, which does not require plaintiffs to plead and prove loss causation or scienter. *See* Pls. Opp. at 33, 40.[5] To support this argument, the Whittington Plaintiffs rely upon cases from other jurisdictions interpreting other states' Blue Sky laws. *See* Pl. Opp. at 35-36, 39-41.[6] As

---

[5] Section 12(a)(2) provides that "[a]ny person who offers or sells a security . . . 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 . . . shall be liable . . . to the person purchasing such security from him." 15 U.S.C. § 77*l*.

[6] The Whittington Plaintiffs also rely upon the United States District Court for the Southern District of Mississippi's decision in *Fortenberry v. Foxworth Corp.*, 825 F. Supp. 1265 (S.D. Miss. 1993). In

noted above, however, this Court has held that Section 717(a)(2) of the MSA requires plaintiffs to plead and prove loss causation and scienter. The Whittington Plaintiffs do not explain why this Court should reverse its decision in *Russell* in favor of other courts' interpretations of other states' Blue Sky laws. Nor do they explain why this Court should expand the purview of Section 717(a)(2) to include situations where the defendant had no intent to deceive and the defendant's alleged misstatements did not cause plaintiff's losses.

Moreover, even if Section 717 "parallels" Section 12(2) of the Securities Act of 1933 (and loss causation and scienter are not elements of a Section 717 claim), the Whittington Plaintiffs' claims fail as a matter of law. Standing to assert claims under Section 12(2) is limited to a narrow class of persons. In particular, Section 12(2) permits a purchaser to recover from his immediate seller only. *See Rosenzweig v. Azurix Corp.*, 332 F.3d 854, 861 (5th Cir. 2003) ("The purchaser may recover against his immediate seller . . . "). Also, the United States Supreme Court has held that "[t]he intent of Congress and the design of the statute require that [Section] 12(2) liability be limited to public offerings." *Gustafson v. Alloyd Co.*, 513 U.S. 561, 578 (1995). Thus, "the only [persons] who have standing to sue under Section 12 are those who have purchased their shares directly from a seller in a public offering." *Moskowtiz v. Mitcham Indus.*, No. Civ. A. 98-1244, 1999 WL 33606197, at *19 (S.D. Tex. Sept. 29, 1999); *see also Rosenzweig*, 332 F.3d at 871 (dismissing Section 12(2) claims where plaintiffs conceded that they did not acquire their securities directly from the defendants).

As noted previously, the Whittington Plaintiffs admit that they did not purchase their shares directly from Leap in a public offering pursuant to the June 2001 Registration Statement. *See supra* at 3. Instead, they allege that they purchased their shares in the public market months after the June 2001 Registration Statement was filed. *See id.* Thus, if Section 717(a)(2)

Fortenberry, the Southern District of Mississippi did not address the issue of whether loss causation is an element of a claim under Section 717(a)(2) of MSA. The Court did, however, conclude that scienter is not an element of a claim under Section 717(a)(2). *See Fortenberry*, 825 F. Supp. at 1279-80. To the extent *Fortenberry* is inconsistent with this Court's decision in *Russell*, the Leap Defendants respectfully submit that *Fortenberry* was wrongly decided and should be disregarded.

"parallels" Section 12(2), as the Whittington Plaintiffs argue, their claims under Section 717(a)(2) fail as a matter of law because, by their own admission, they do not have standing to assert those claims. *Cf. Booth v. Verity, Inc.*, 124 F. Supp. 2d 452, 463 (W.D. Ky 2000) (dismissing claims under Section 292.480 of the Kentucky Blue Sky Laws where plaintiffs admitted that they had not purchased their shares directly from the defendant; holding that Section 292.480 "parallels" Section 12(2) of the Securities Act of 1933 and, thus, "imposes liability on only the buyer's immediate seller").

II. THE CIRCUIT COURT ERRED IN DENYING THE LEAP DEFENDANTS' MOTION TO COMPEL ARBITRATION AND STAY PROCEEDINGS

A. The Arbitration Provision of the Agreement Applies to This Dispute

As the Leap Defendants noted in the Opening Brief, the Agreement between Leap and AWG provides for arbitration of "any dispute, claim or controversy arising under th[e] Agreement or in any way related to th[e] Agreement." Open Brief at 38 (quoting Section 12.11 of the Agreement). Here, the Whittington Plaintiffs' claims clearly "aris[e] under" or "relate[] to" the Agreement. *See id.* at 38-39. Specifically, the Whittington Plaintiffs allege that (i) pursuant to Sections 2.1 and 2.2 of the Agreement, Leap issued approximately 1.9 million shares of Leap stock to AWG; (ii) pursuant to Section 7.4 of the Agreement, Leap registered those shares by filing the June 2001 Registration Statement; (iii) pursuant to the "plan" contemplated by the Agreement, AWG sold those shares "during the fall of 2001" so the Whittington Plaintiffs could purchase those shares in the public market "in the period following September 2001;" and (iv) the Whittington Plaintiffs suffered damages as a result of those purchases due to the allegedly inadequate risk disclosures in the June 2001 Registration Statement. *Id.* Thus, the Whittington Plaintiffs claims are within the scope of the arbitration clause of the Agreement.

The Whittington Plaintiffs virtually acknowledge that their claims relate to the Agreement. *See* Pls. Opp. at 5-6. The Whittington Plaintiffs nevertheless contend that their claims are not within the scope of the arbitration clause because the FARC asserts tort and

statutory claims that "are not based on contractual duties that arose from the Agreement but are based upon common law and statutory duties that arise independently and separately from the existence of the Agreement." Pls. Opp. at 14. This argument fails for at least two reasons.

First, AWG recently agreed to arbitrate its claims against the Leap Defendants pursuant to the arbitration clause of the Agreement. *See* Pls. Opp. at 10. As the Leap Defendants demonstrated in the Opening Brief, AWG's claims are predicated on *exactly the same facts* as this action; AWG has asserted *exactly the same causes of action* as asserted in this action; the AWG Complaint is identical in all material respects to the FARC; and AWG and the Whittington Plaintiffs are represented by *the same counsel*. *See* Open Brief at 14. Thus, since AWG has conceded that its claims are within the scope of the arbitration clause, the Whittington Plaintiffs cannot credibly argue that their claims are not.

Second, the fact that the Whittington Plaintiffs have asserted tort and statutory claims (as opposed to contract claims) has no bearing on whether their claims are within the scope of the arbitration clause. *See* Open Brief at 39-40; *see also Grigson v. Creative Artists Agency, L.L.C.*, 210 F.3d 524, 526 (5th Cir. 2000) (parties cannot avoid arbitration agreements simply "by casting their claims in tort, rather than in contract;" permitting non-signatories to compel arbitration of claims for tortious interference with a distribution agreement).[7] Under the FAA, arbitrability is determined by the language of the arbitration clause, not the type of claims asserted. *See Russell v. Performance Toyota, Inc.*, 826 So.2d 719, 723 (Miss. 2002) (compelling arbitration of tort claims because they fell within the scope of an agreement providing for

---

[7] *See also Holden v. Deloitte & Touche LLP*, 390 F. Supp. 2d 752, 767 (N.D. Ill. 2005) ("'[I]t is well established that a party may not avoid broad language in an arbitration clause by attempting to cast its complaint in tort rather than in contract'"; permitting non-signatory to compel arbitration of tort claims that related to the agreement containing the arbitration clause) (quoting *Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.*, 10 F.3d 753, 758 (11th Cir. 1993)); *Pacific Life Ins. Co. v. Heath*, 370 F. Supp. 2d 539, 544 (S.D. Miss. 2005) ("A party to an arbitration agreement cannot avoid its consequences by simply 'casting her claims in tort, rather than in contract'"; compelling defendant to arbitrate her claims even though the majority of them arose from tort, not contract, principles) (quoting *Grigson*, 210 F.3d at 526); *Keytrade USA, Inc. v. M/V AIN Temouchent*, No. Civ. A. 01-1617, 2003 WL 122312, at *3 (E.D. La. Jan. 10, 2003) ("[P]arties cannot avoid arbitration agreements simply 'by casting their claims in tort, rather than in contract'") (citation omitted).

arbitration of "any controversy arising out of or relating to" the agreement); *Smith Barney, Inc. v. Henry*, 775 So.2d 722, 726 (Miss. 2001) (compelling plaintiff to arbitrate claims for breach of fiduciary duty, negligence, and conspiracy because they were within the scope of an agreement providing for arbitration of "any controversy arising out of or relating to" the agreement). As this Court explained in *IP Timberlands Operating Co. v. Denmiss Corp.*, "unless it can be said with positive assurance that an arbitration clause is not susceptible of an interpretation which would cover the dispute at issue" the parties should be required to arbitrate their claims and "a stay pending arbitration should be granted." 726 So.2d 96, 107 (Miss. 1998) (citation omitted). Thus, regardless of whether the Whittington Plaintiffs have asserted tort, statutory or contract claims, the relevant inquiry in this case is whether those claims "aris[e] under" or "relate[] to" the Agreement. *See* Whitt. Rec. at 683-684 (quoting Section 12.11 of the Agreement).

This Court's decision in *Performance Toyota* is on point. In *Performance Toyota*, plaintiff entered into an agreement with an automobile dealership to sell a Toyota T-100 and purchase a Toyota Tacoma. The agreement provided for arbitration of "[a]ny controversy or claim arising out of or relating to the vehicle which is the subject of this contract." 826 So.2d at 723. The dealership repossessed the Tacoma and plaintiff filed an action for fraud, wrongful repossession and illegal conversion. This Court held that plaintiff's claims were within the scope of the arbitration clause. Although plaintiff had asserted tort claims based on his "property rights," the Court found that arbitration was required because "[a]ll of [plaintiff's] claims pertain to the disputed ownership of . . . the two vehicles which are the subject of the Purchase Agreement." *Id.* at 723. The Leap Defendants cited and discussed *Performance Toyota* in the Opening Brief (*see* Open Brief at 39-40); the Whittington Plaintiffs did not address this decision in their Opposition.

Performance Toyota applies here. As discussed above, each of the Whittington Plaintiffs' claims "aris[es] under" or "relates to" the principal transaction underlying the Agreement: Leap's obligations under Sections 2.1 and 2.2 of the Agreement to issue approximately 1.9 million shares of Leap stock to AWG in exchange for AWG's wireless

licenses. *See* Open Brief at 38-39. Likewise, each of the Whittington Plaintiffs' claims "aris[es] under" or "relate[s] to" the adequacy of the risk disclosures in the June 2001 Registration Statement, which Leap filed pursuant to its obligation under Section 7.4 of the Agreement. *See id.* Thus, regardless of whether the Whittington Plaintiffs' claims are based on "duties that ar[o]se independently and separately from the existence of the Agreement" (*see* Pls. Opp. at 14), their claims clearly "aris[e] under" and "relate[] to" the principal transactions underlying the Agreement, and are therefore within the scope of the arbitration clause.

B. Although the Leap Defendants Did Not Sign the Agreement, They May Enforce the Arbitration Clause

As the Leap Defendants demonstrated in the Opening Brief, the doctrine of equitable estoppel permits non-signatory defendants to enforce arbitration clauses in cases in which (1) plaintiffs "'make[] reference to or presume[] the existence of'" the agreement containing the arbitration clause; or (2) plaintiffs allege "'substantially interdependent and concerted misconduct'" by the non-signatory and one or more of the signatories to the agreement. *See* Open Brief at 42 (citing authority). Because both elements of equitable estoppel are present here, the Leap Defendants may enforce the arbitration clause even though they did not sign the Agreement. *See id.* at 43-44.

The Whittington Plaintiffs contend that equitable estoppel does not apply here because "it is clear from the Complaint that the [Whittington Plaintiffs'] claims are derived from statutory and common law and not the Agreement." Pls. Opp. at 15. This argument is neither a correct statement of law nor an accurate description of the FARC. As shown in the Opening Brief, the FARC recounts in detail how Leap, the Leap Defendants, AWG, and the Whittington Plaintiffs negotiated and structured the transaction that was ultimately reflected in the Agreement. *See* Open Brief at 44; *see also* Pls. Opp. at 5-6. Likewise, the FARC is focused on the June 2001 Registration Statement (*see* Open Brief at 44), which Leap filed pursuant its obligation under Section 7.4 of the Agreement. Thus, the Whittington Plaintiffs' claims clearly make reference to and presume the existence of the Agreement. *See Holden v. Deloitte & Touche LLP*, 390 F.

Supp. 2d 752, 766 (N.D. Ill. 2005) (plaintiffs' claims made reference to and presumed existence of the agreement where they "allege[d] that a central goal of the conspiracy and claimed fraud [sic] scheme was to induce individuals like [plaintiffs] to 'sell their companies' to EPS, as [plaintiffs] did through the [agreement]").

The Whittington Plaintiffs also contend that they have not alleged substantially interdependent and concerted misconduct by Leap and the Leap Defendants. *See* Pls. Opp. at 15. Again, the Whittington Plaintiffs mischaracterize their allegations. A review of the FARC confirms that the Whittington Plaintiffs have alleged substantially interdependent and concerted misconduct by Leap and the Leap Defendants. For instance, the FARC refers to Leap as a "Co-Conspirator" and "Joint Tortfeasor" and alleges that the Leap Defendants acted "on behalf of," "in concert or conspiracy with," "aided and abetted" and "carried out a plan, scheme or course of conduct" with Leap. *See* Open Brief at 44. The FARC also alleges that "Leap was the 'seller' of the Leap Stock that the [Whittington] Plaintiffs acquired and are here suing upon, and the [Leap] Defendants were aiders/abettors and control persons of Leap as the 'seller'." Whitt. Rec. at 151 (FARC ¶ 39(c)); *see also* Pls. Opp. at 16. Thus, contrary to the Whittington Plaintiffs' contentions, both elements of equitable estoppel are present here and the Leap Defendants are entitled to enforce the arbitration provision of the Agreement.

The Whittington Plaintiffs' reliance on *Primerica Financial Services, Inc. v. Coley*, 192 F. Supp. 2d 655 (N.D. Miss. 2002), is misplaced. In *Primerica*, Catherine Coley opened a mutual fund account with Primerica Financial Services Investments, Inc. ("Primerica"). The agreement for the mutual fund account provided for arbitration of all claims asserted "in connection with the mutual fund transaction." *Id.* at 656. Coley subsequently purchased a life insurance policy from two companies that were affiliated with Primerica: Primerica Financial Services, Inc. ("PFS") and Primerica Life Insurance Company ("PLIC"). Coley then filed a state court action against PFS and PLIC for fraudulent misrepresentation in connection with her purchase of life insurance. PFS and PLIC moved in federal court to compel arbitration under the agreement for the mutual fund account. The Court held that PFS and PLIC could not enforce the

arbitration clause under equitable estoppel because (i) "Coley ha[d] not raised allegations of 'substantially interdependent and concerted' misconduct by both the non-signator[ies], PFC and PLIC, and the signatory [Primerica];" and (ii) Coley's claims involved "Coley's purchase of life insurance," not "the mutual fund transaction." *Id.* at 656-58. Unlike in *Primerica*, the Whittington Plaintiffs have alleged substantially interdependent and concerted misconduct by the non-signatory Leap Defendants and Leap, one of the signatories to the Agreement. *See supra* at 16. Also, the Whittington Plaintiffs' claims involve the principal transactions underlying the Agreement. *See supra* at 15.

The Whittington Plaintiffs' contention that "the Agreement between AWG and Leap explicitly limits enforcement by non-parties" (Pls. Opp. at 16) is unavailing. The Whittington Plaintiffs do not and cannot point to any language in the Agreement specifically prohibiting enforcement of the arbitration clause by non-parties in accordance with settled principles of equitable estoppel. Nor do they cite any legal authority to support their position. Instead, the Whittington Plaintiffs point to Section 12.4(b) of Agreement, which generally limits the creation of third-party rights under the Agreement. *See* Pls. Opp. 10-11; *see also* Whitt. Rec. at 682. This provision, entitled "Successors and Assigns," does not prohibit the Leap Defendants from enforcing the arbitration clause for at least three reasons:

> First, . . . [t]hese sorts of provisions are *de riguer*, and one can reasonably assume that similar provisions existed in the series of cases establishing the equitable estoppel and agency bases for compelling arbitration. Second, and independently, agency concepts and coconspirator concepts teach that the alleged coconspirator (or coschemer, or agent) is effectively in the shoes of the signatory defendant and that the two parties are responsible for each other's misconduct. As a result, the idea that other third-parties might not otherwise acquire rights under contractual liability is, with all respect, beside the point. The non-signatory, by virtue of the plaintiffs' allegations, is standing in the shoes of the signatory. Third, and again independently, to the extent that application of equitable estoppel has to do with concepts of fairness – and precedent would suggest that it has much to do with them . . . – it would seem unjust to preclude a non-signatory who would otherwise fairly be entitled to compel arbitration simply because the signatory sought to freeze out the non-signatory's rights in a contract to which the non-signatory was not a named party.

Holden, 390 F. Supp. 2d at 767 (rejecting plaintiffs' argument that "a provision limiting the creation of third-party" rights prohibited the defendant from enforcing the arbitration clause of an agreement it did not sign) (citations omitted).

The cases the Whittington Plaintiffs rely upon are inapposite. *See Adams v. Greenpoint Credit, LLC*, 943 So.2d 703 (Miss. 2006); *Jim Burke Automotive, Inc. v. McGrue*, 826 So.2d 122 (Ala. 2002). The agreements in those cases did not contain provisions like the one at issue in this case - *i.e.*, a provision limiting the creation of third-party rights. Instead, the agreements in those cases contained narrow arbitration clauses providing for arbitration of disputes between the parties to the agreements only. *See Adams*, 943 So.2d at 706 ("[a]ny controvery or claim *between or among you or me or our assignees* arising out of or relating to this Contract . . . ") (emphasis added) (citation omitted); *Jim Burke Automotive*, 826 So.2d at 128 ("[a]ll disputes, controversies or claims or any kind and nature *between the parties hereto* . . . ") (emphasis added). As a result, those cases held that disputes with third-parties arising out of the contracts were outside the scope of the arbitration clause. *See Jim Burke Automotive*, 826 So.2d at 131 ("Clearly, the arbitration agreements are limited to the signing parties . . . "); *see also Adams*, 943 So.2d at 708. Unlike in those cases, the arbitration clause in this case is not limited to disputes between the signing parties (Leap and AWG); instead, the arbitration clause covers "any dispute, claim or controversy arising under this Agreement or in any way related to this Agreement." Open Brief at 38 (quoting Section 12.11 of the Agreement).

C. Although the Whittington Plaintiffs Did Not Sign the Agreement, They Are Estopped from Avoiding Arbitration

In a last-ditch attempt to avoid arbitration, the Whittington Plaintiffs contend that equitable estoppel is a limited doctrine that "applies only to prevent 'a ***signatory*** from avoiding arbitration with a nonsignatory.'" Pls. Opp. at 18 (emphasis in original). Thus, the Whittington Plaintiffs argue that even if the Leap Defendants can enforce the arbitration clause against a signatory to the Agreement (such as AWG), they cannot enforce it against non-signatories, such as the Whittington Plaintiffs. *Id.* at 10-11. The Whittington Plaintiffs misstate the law.

Under equitable estoppel, a non-signatory plaintiff may be estopped from refusing to comply with an arbitration clause "when it [has] receive[d] a 'direct benefit' from a contract containing an arbitration clause." Open. Mem. at 46. As this Court has recognized: "[t]o allow a plaintiff to claim the benefit of the contract and simultaneously avoid its burdens would both disregard equity and contravene the purposes underlying enactment of the [FAA]." *Terminix Int'l, Inc. v. Rice*, 904 So.2d 1051, 1058 (Miss. 2004) (quoting *Washington Mut. Fin. Group, LLC v. Bailey*, 364 F.3d 260, 268 (5th Cir. 2004)).

Here, the FARC rests on the allegation that the Agreement between Leap and AWG was intended to benefit the Whittington Plaintiffs individually by placing Leap stock in their hands. *See* Open Brief at 47 (citing FARC ¶¶ 4, 39, 105). The Whittington Plaintiffs contend that Leap filed the June 2001 Registration Statement (pursuant to its obligation under Section 7.4 of the Agreement) for the "**sole purpose** of selling the Leap Stock from AWG to the Whittington Plaintiffs and other members of AWG." Pls. Opp. at 23 (emphasis in original). The Whittington Plaintiffs also contend that they did, in fact, receive certain benefits from the Agreement by purchasing "the Leap Stock that had been owned by [AWG], had been registered by Leap, and had been sold into the public market." Open Brief at 47 (quoting FARC ¶ 4). Thus, even though the Whittington Plaintiffs did not sign the Agreement, they are estopped from refusing to comply with the arbitration provision.

The Whittington Plaintiffs contend that "[n]o court has applied the estoppel theory in situations where a **non-signatory** seeks to enforce an agreement against **another non-signatory**." Pls. Opp. at 19. The Whittington Plaintiffs are wrong. In *Mississippi Fleet Card, L.L.C. v. BilStat, Inc.*, 175 F. Supp. 2d 894 (S.D. Miss. 2001), the United States District Court for the Southern District of Mississippi held that the non-signatory officers and directors of a corporation could enforce an arbitration clause against the non-signatory members of a limited liability company. In that case, Mississippi Fleet Card, L.L.C. ("MFC") entered into an agreement with BilStat, Inc. ("BilStat"). *See* 175 F. Supp. 2d at 896. The agreement contained an arbitration clause. MFC and its members subsequently filed an action against BilStat and its

officers and directors. While MFC and BilStat signed the agreement containing the agreement clause, MFC's members and BilStat's officers and directors did not. The Southern District of Mississippi held that the *non-signatory* officers and directors of BilStat could enforce the arbitration clause against the *non-signatory* members of MFC because, *inter alia*, the "[m]embers contend that they, in their individual capacities, were to receive benefits under the . . . [a]greement." 175 F. Supp. 2d at 903. *Mississippi Fleet Card* applies here. As noted previously, the non-signatory Leap Defendants (current and former officers and directors of Leap) seek to enforce the arbitration clause of the Agreement against the non-signatory plaintiffs (the members of AWG); and the Whittington Plaintiffs contend that they, in their individual capacities, were to receive and, in fact, did receive, "benefits" under the Agreement.

Notably, in *Mississippi Fleet Card*, the Southern District of Mississippi applied the same analyses that courts have applied in other cases involving the doctrine of equitable estoppel, *i.e.*, cases in which a non-signatory sought to enforce an arbitration clause against a signatory and cases in which a signatory sought to enforce an arbitration clause against a non-signatory. Thus, the Whittington Plaintiffs' contention that the Court's analysis of this case should somehow be different (because the non-signatory Leap Defendants seek to enforce the arbitration clause against the non-signatory Whittington Plaintiffs) rings hollow.

The Whittington Plaintiffs' reliance on *Bridas S.A.P.I.C. v. Government of Turkmenistan*, 345 F.3d 347 (5th Cir. 2003), is misplaced. In that case, a signatory plaintiff sought to enforce an arbitration agreement against a non-signatory defendant. *See id.* at 351, 362. The Court held that because the non-signatory defendant had not filed an action or asserted any claims against the signatory plaintiff, there was no equitable basis for enforcing the arbitration clause against him. *See id.* at 360-62. *Bridas* does not apply here. In this case, the non-signatory Whittington Plaintiffs *have* filed an action and asserted claims against the Leap Defendants. Moreover, the Whittington Plaintiffs claims allege that they received a direct benefit from the Agreement. *See supra* at 20. Thus, there is an equitable basis for enforcing the arbitration provision against them. *See, e.g., Terminix*, 904 So.2d at 1058 ("To allow a plaintiff to claim the benefit of the

contract and simultaneously avoid its burdens would both disregard equity and contravene the purposes underlying enactment of the [FAA].").

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the Opening Brief, the Leap Defendants respectfully request that this Court remand the *Whittington* action to the Circuit Court with instructions to enter an order dismissing the *Whittington* action in its entirety for failure to state a claim upon which relief can be granted. In the alternative, the Leap Defendants respectfully request that this Court remand the *Whittington* action to the Circuit Court with instructions to enter an order compelling the Whittington Plaintiffs to arbitrate their claims and staying all proceedings in the *Whittington* action pending arbitration.

RESPECTFULLY SUBMITTED this the 8th day of March, 2007.

DAVID W. CLARK (MB[redacted]
MARY CLAY W. MORGAN (MB[redacted]

Attorneys for the Leap Defendants
Harvey P. White, Scot B. Jarvis, Susan G. Swenson, Thomas J. Bernard, Jeffrey P. Williams, Anthony R. Chase, Michael B. Targoff, Jill E. Barad, Robert C. Dynes, James E. Hoffmann, Stewart Douglas Hutcheson, Daniel O. Pegg, and Leonard C. Stephens

OF COUNSEL:

BRADLEY ARANT ROSE & WHITE LLP
One Jackson Place, Suite 450
188 East Capitol Street
Jackson, Mississippi 39201
Telephone: (601) 948-8000
Facsimile: (601) 948-3000

WILSON SONSINI GOODRICH & ROSATI
Professional Corporation
Boris Feldman (admitted *pro hac vice*)
Robert P. Feldman (admitted *pro hac vice*)
Clayton Basser-Wall (admitted *pro hac vice*)
Mark T. Oakes (admitted *pro hac vice*)
650 Page Mill Road
Palo Alto, California 94304
Telephone: (650) 493-9300
Facsimile: (650) 565-5100

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing was served on all counsel of record herein via U. S. Mail, postage pre-paid, this the 8th day of March, 2007.

Eugene C. Tullos
Tullos & Tullos
P. O. Box 74
Raleigh, MS 39153

J. Michael Rediker
Peter J. Tepley
Page A. Poerschke
Meredith Jowers Lees
Haskell Slaughter Young & Rediker, LLC
1400 Park Place Tower
2001 Park Place North
Birmingham, AL 35203

Mr. Glenn G. Taylor
Copeland Cook Taylor & Bush
1062 Highland Colony Pkwy., Suite 200
P. O. Box 6020
Ridgeland, MS 39158-6020

Carlton W. Reeves, Esq.
Pigott, Reeves, Johnson & Minor, P.A.
775 North Congress Street
P. O. Box 22725
Jackson, MS 39225-2725

Christopher A. Shapley, Esq.
Brunini Grantham Grower & Hewes, PLLC
1400 Trustmark Building
248 E. Capitol Street
Jackson, MS 39205

Hon. Tomie T. Green
Hinds County Circuit Court Judge
P.O. Box 327
Jackson, MS 39205

MARY CLAY W. MORGAN