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. — APPELLEES

(Caption Continued On Inside Cover)

APPEAL FROM THE
CIRCUIT COURT OF HINDS COUNTY, MISSISSIPPI

REPLY BRIEF OF APPELLANT QUALCOMM

ORAL ARGUMENT REQUESTED

Of Counsel
Joshua Rosenkranz
HELLER EHRMAN LLP
Times Square Tower
7 Times Square
New York, NY 10036
212-847-8748

Glenn Gates Taylor (MBN [redacted]
B. Wade Smith, IV (MBN [redacted]
Christy M. Sparks (MBN [redacted]
COPELAND, COOK, TAYLOR & BUSH, P.A.
200 Concourse, Suite 200
1062 Highland Colony Parkway (39157)
Post Office Box 6020
Ridgeland, MS 39158
601-856-7200
601-353-6235 (fax)

April 9, 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., ET AL., 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., ET AL.	**APPELLEES**

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INTRODUCTION

One would never know it from reading the Whittington Plaintiffs' brief, but there has been a seismic change in this case since Qualcomm filed its opening brief: American Wireless, the lead Plaintiff below and in this appeal, has opted not to defend any aspect of the ruling below. Reversing course, American Wireless now demands that Qualcomm and the Leap Defendants arbitrate all of the claims in this dispute. Since American Wireless did not seek this Court's permission to withdraw from the appeal so late in the process, this Court should treat American Wireless as conceding error—on all grounds appealed by Qualcomm—and should dismiss American Wireless's complaint with prejudice.

As to the remaining Plaintiffs, American Wireless's ploy demolishes the stance its owners, the Whittington Plaintiffs, are taking in this appeal. First, American Wireless and the Whittington Plaintiffs now agree that the subject matter of this dispute does in fact fall within the arbitration clause at issue. Second, American Wireless has demanded arbitration of this dispute, even though not a single Defendant signed the AWG Agreement containing the arbitration clause, which confirms that this arbitration clause can be enforced against a non-signatory in the right circumstances, particularly in this dispute.

American Wireless's concession is correct, and compels the same result for its owners. The Whittington Plaintiffs are no strangers to the AWG Agreement. They have emphasized that their theory of liability depends upon the view that they were the intended beneficiaries of the AWG Agreement; indeed, they claim that was the "**sole purpose**" of the contract. Resp. at 38 (emphasis in original).[1] Similarly, the Whittington Plaintiffs are suing Qualcomm on the theory that it was

[1] The Whittington Plaintiffs' Brief in Response to Qualcomm will be cited as "Resp." and their Brief in Response to the Leap Defendants will be cited as "Leap Resp." Qualcomm's opening brief will be cited as

controlling Leap's allegedly culpable conduct. They cannot evade the arbitration clause they negotiated on behalf of their company by suing those who supposedly controlled Leap rather than suing Leap itself. That is what the AWG Agreement means when it says that arbitration is required of "any dispute . . . in any way related to this Agreement"—without regard to the precise identities of the parties listed on the legal papers.

If this Court does not send this case to arbitration, it should dismiss the complaint outright. First, Qualcomm is the wrong defendant. The Whittington Plaintiffs have offered no reason to believe they will ever be able to prove that Qualcomm controlled Leap during the relevant period, even if all the facts they allege are true. They identify "overlaps" in personnel, but omit the undisputed fact that no Leap official or director served Qualcomm at the relevant time—or any time after the spin-off. Resp. at 34. They do not explain how any one of the various "business arrangements" they rely on could amount to control. And, try as they might, they cannot turn Qualcomm's 1.3% stock ownership into a "dominant shareholder position." Resp. at 31.

Second, the Whittington Plaintiffs are the wrong plaintiffs. The Whittington Plaintiffs do not dispute that the state securities law they invoke ordinarily would require proof that they bought the stock directly from Leap, or that the federal securities law ordinarily would require proof that they bought the very same stock that Leap sold to American Wireless. Instead, they insist that the literal terms of these statutes should be ignored because this "case involves an extremely unique factual scenario." Resp. at 38 (emphasis omitted). There was good reason why Congress and the State Legislature both limited the scope of these statutes—and would never have wanted to extend the scope based upon assertions of what the subjective "purpose" of the transaction was. Resp. at 38 (emphasis omitted). This Court is not free to revise the statute to fit this factual scenario.

"OB."

Finally, the Whittington Plaintiffs are wrong when they assert that Qualcomm did not move to dismiss the fraud counts for lack of specificity. And they offer no answer to Qualcomm's argument—that there were no allegations specifying what Qualcomm did to warrant fraud liability.

ARGUMENT

I. AMERICAN WIRELESS'S COMPLAINT SHOULD BE DISMISSED WITH PREJUDICE BECAUSE IT HAS NOT DEFENDED THE RULING BELOW

The Whittington Plaintiffs' argument about arbitration revolves around a single premise repeated with metronomic regularity and presented with emphasis that amounts to the written equivalent of a shriek: "**no plaintiff in this case and no defendant executed the arbitration agreement that is at issue here.**" Resp. at 17 (emphasis in original); *see also* Resp. at 14, 18, 19, 25. As the very next sentence reveals, that statement is false: "The Agreement containing the arbitration clause at issue . . . was 'by and between *American Wireless Group, LLC* . . . and Leap Wireless International, Inc." Resp. at 17 (quoting Whit. R. 656) (emphasis added). One need look no further than the name of this case to see that "American Wireless Group, LLC" is, indeed, the lead "plaintiff in this case" and a party in this appeal.

A funny thing happened on the way to this Courthouse. American Wireless defaulted. American Wireless opted not to submit a brief defending the ruling below. Plaintiffs caption both of their response briefs, "Brief of the Whittington Plaintiffs." They define "the Whittington Plaintiffs" by coyly listing 49 Plaintiffs—every Plaintiff in the case *except American Wireless*. Resp. at 2. Nowhere do the Whittington Plaintiffs or their lawyers (the same ones who represent American Wireless) answer the obvious question: What happened to American Wireless?

The answer lurks in documents that American Wireless filed elsewhere. After two years of insisting that it was not required to arbitrate this dispute, American Wireless has now reversed

course. On February 19, 2007—the day before filing their appellate brief on behalf of the Whittington Plaintiffs in this Court—the same lawyers filed on American Wireless's behalf a demand to arbitrate this very dispute with the American Arbitration Association and a motion in the circuit court to stay these state court proceedings.[2]

American Wireless's filing with the Court below is clearly a procedural mistake—the motion should have been filed with this Court. As American Wireless had to have known, the circuit court has no jurisdiction over these issues and lacks the power to undermine this Court's jurisdiction over the parties. *See In re Estate of Moreland*, 537 So. 2d 1345, 1347 (Miss. 1989) (holding that after an appeal, "the lower court may not entertain attempts to broaden, amend, modify, vacate, clarify, or rehear the decree"). "The filing of a notice of appeal transfers jurisdiction of a matter from the lower court to the appellate court," *McNeil v. Hester*, 753 So. 2d 1057, 1075 (Miss. 2000), subject to exceptions not applicable here, *see* Miss. R. Civ. P. 60(b). If American Wireless wished to extract itself from this case, it was obliged to seek this Court's permission to withdraw its appeal. *See* Miss. R. App. P. 42(b). This requirement is no mere formality. It is designed to ensure that litigation is conducted efficiently and to prevent parties from gaining unfair advantage through unscrupulous maneuvers. American Wireless should not be permitted to unilaterally change the appellate status quo after Qualcomm has filed an appellate brief premised on American Wireless's participation in this appeal.

American Wireless's strategic decision not to take the required step leaves it in the same position it would have been in had it simply opted not to file a brief. The default operates as a confession that the circuit court's ruling was incorrect—in all the ways argued in Qualcomm's and the Leap Defendants' opening briefs. *See Snow Lake Shores Property Owners Corp. v. Smith*, 610

[2] For the Court's convenience, contemporaneous with the filing of this brief, Qualcomm has moved to

So. 2d 357, 361 (Miss. 1992) (appellee's failure to file a brief "is tantamount to a confession of error and will be accepted as such unless [the Court] can with confidence say, after considering the record and brief of appellant, that there was no error"). It is a confession not just that American Wireless must arbitrate its claims (which is what it now wants to do), but also that the claims must be dismissed outright. For this reason, alone, this Court should dismiss American Wireless's claims with prejudice.

II. AS IS EVIDENT FROM AMERICAN WIRELESS'S FILING OF AN ARBITRATION DEMAND FOR THIS VERY DISPUTE, THE WHITTINGTON PLAINTIFFS ARE REQUIRED TO ARBITRATE THIS CASE

The Whittington Plaintiffs no longer dispute, as they did below, that the arbitration clause in the AWG Agreement covers the subject matter of this dispute. *See* OB at 20-25. The Whittington Plaintiffs offer four reasons why *they* nevertheless cannot be compelled to arbitrate the same dispute against Qualcomm that the company they own is now demanding be arbitrated against Qualcomm. Their main argument is that arbitration is not required, regardless of what the AWG Agreement says, because "neither the Whittington Plaintiffs nor Qualcomm are signatories to any arbitration agreement." Resp. at 19 (emphasis omitted). Secondly, the Whittington Plaintiffs assert that the language of the AWG Agreement does not, in any event, cover a dispute between them and Qualcomm. Third, they try to distinguish this case from the cases that estop a party from seeking the benefits of an agreement while renouncing the agreement's arbitration clause. Finally, they reject Qualcomm's argument that all these threshold interpretive issues are, themselves, subject to arbitration. There is no merit to any of those arguments.

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supplement the record on appeal to include those documents.

A. The Whittington Plaintiffs Cannot Escape an Obligation to Arbitrate this Dispute Just Because the Parties Did Not Formally Sign the Arbitration Agreement

American Wireless's latest maneuver demolishes the Whittington Plaintiffs' main argument—that its dispute with Qualcomm cannot be subject to arbitration simply because "neither the Whittington Plaintiffs nor Qualcomm are signatories to any arbitration agreement." Resp. at 19 (emphasis omitted). When the company the Whittington Plaintiffs own and run invoked the arbitration clause against all the Defendants in this case—including Qualcomm—it made a critical concession. American Wireless necessarily acknowledged that it simply did not matter that "Qualcomm . . . is not a signatory to the Agreement." Resp. at 19 (emphasis omitted). If, as the Whittington Plaintiffs insist, "[t]he Agreement binds only the two corporations and in no way binds its officers, directors or members," Resp. at 19, then there was no way American Wireless could have hauled Leap directors and Leap officers into arbitration.

The Whittington Plaintiffs do not even try to distinguish the various cases holding that non-signatories can compel arbitration—and can be compelled to arbitrate—under identical circumstances. *See* OB at 27-28. Qualcomm, for example, cited two federal cases from Mississippi and discussed one Eleventh Circuit case—all of which stand for the proposition that "when the charges against a parent company and its subsidiary are based on the same facts and are inherently inseparable, a court may refer claims against the parent to arbitration even though the parent is not formally a party to the arbitration agreement." *Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.*, 10 F.3d 753, 757 (11th Cir. 1993) (requiring the non-signatory parent to arbitrate). The Fourth Circuit reached the same conclusion, allowing a non-signatory parent (who was alleged to be in control of the signatory subsidiary) to compel arbitration. *See J.J. Ryan & Sons, Inc. v. Rhone Polenc Textile, S.A.*, 863 F.2d 315, 320-21 (4th Cir. 1988). And the Sixth Circuit reached the same conclusion,

allowing a company's officers and directors to compel arbitration where they were being sued for alleged misdeeds they committed on the company's behalf, even though only the company was nominally a party to the agreement containing the arbitration clause. *See Arnold v. Arnold Corp.-Printed Communications for Business*, 920 F.2d 1269, 1281 (6th Cir. 1990). The Sixth Circuit explained that "if [plaintiff] can avoid the practical consequences of an agreement to arbitrate by naming nonsignatory parties as [defendants] in his complaint, . . . arbitration would, in effect, be nullified." *Id.*

To this litany, we can now add a recent case from this Court confirming that non-signatories can invoke an arbitration clause. *See Fradella v. Seaberry*, No. 2005-CT-00404-SCT, 2007 WL 852097 (Miss. Mar. 22, 2007). There, as here, a defendant invoked a contract's arbitration clause even though she did not sign the contract. Like the Whittington Plaintiffs, the plaintiffs there argued that "one who was not a signatory to a contract could not take advantage of an arbitration clause within the contract." *Id.* at *10. This Court disagreed, confirming that the controlling question was not who signed the contract, but what the parties intended when they signed it. *Id.* at *20. This Court concluded that "[w]hen the pertinent documents concerning this real estate transaction are read in their totality, the fact that [the agent] . . . did not sign this contract is of no moment." *Id.* at *29.

B. The Language of the AWG Agreement Confirms that the Parties Intended to Arbitrate This Dispute

As *Fradella* underscores, the question whether the Whittington Plaintiffs must arbitrate their claims against Qualcomm can be answered only by discerning the intention of the parties who signed the contract. *See* OB at 26. The Whittington Plaintiffs never try to explain why the parties to the AWG Agreement would have intended to create an arbitration right that binds (or can be invoked by) only the corporate entities, themselves, but not by the officers or directors who run them nor by others who are alleged to control them.

In gauging the intent of the contracting parties, this contextual point bears emphasis. The Whittington Plaintiffs are not, and do not purport to be, complete strangers to the AWG Agreement. To the contrary, *they are American Wireless's owners*, and their theory of liability is that they were the intended third-party beneficiaries of the transaction: "The plan was always for the members of AWG to hold the Leap Stock," they proclaim. Resp. at 38. Likewise, the Whittington Plaintiffs and American Wireless are both trying to pin Qualcomm with the blame for conduct they attribute to the Leap Defendants; they place Qualcomm in the shoes of the Leap Defendants. Thus, the specific question here is not whether the AWG Agreement contemplated that the arbitration clause could be invoked in connection with a dispute by *any* non-signatory against *any* other non-signatory. The question here is whether the parties intended to arbitrate a dispute like this one—where the positions of the parties on each side of the litigation derive entirely from the positions of the signatories.

The intent of the parties is discerned, of course, by examining the language of the AWG Agreement. Instead of faithfully interpreting the language of the AWG Agreement, however, the Whittington Plaintiffs contort it beyond recognition. Stripped to its essence, the arbitration clause the parties negotiated provides: "[A]ny dispute . . . arising under this Agreement or in any way related to this Agreement . . . may be submitted to binding arbitration at the election of either Buyer [Leap] or Seller [American Wireless]." Whit. R. 683-84. The Whittington Plaintiffs read this clause as if it applied only to "disputes *between* Leap and American Wireless" or to "cases in which American Wireless sues Leap." As Qualcomm's opening brief underscored, there is a big difference between this formulation and the language the parties chose, which covers "any dispute, claim or controversy arising under this Agreement" or "in any way related to this Agreement"—without regard to the nominal identities of the parties. *See* OB at 26-27. In other words, the language in the contract emphasizes the parties' intentions not to allow an end-run around the arbitration provision

just because the parties named in legal papers might not have been the ones who signed the Agreement.

The final words in the clause—allowing for arbitration "at the election of either Buyer [Leap] or Seller [American Wireless]"—do not change this conclusion. This language does not override the language that purports to subject "any dispute" to arbitration so long as the dispute "arises under" the AWG Agreement or "in any way relates" to it. It merely reserves to Leap and American Wireless the power to make the election whether a dispute matching that description will be arbitrated. Leap has done just that. Leap, like any other company, can act only through its own directors and officers, and those directors and officers have made the requisite election in no uncertain terms.

The Whittington Plaintiffs cannot override this natural reading of the arbitration clause by invoking another clause from elsewhere in the contract. *See* Resp. at 22. The language of that clause confirms that the Agreement is not "intended . . . 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. 682-83. The Whittington Plaintiffs misread this provision. As the Whittington Plaintiffs acknowledge, the AWG Agreement defines "Permitted Assignee" to include not just "subsidiaries, successors, and assigns," but *any* "Affiliates." Whit. R. at 682; *see* Resp. at 22. What the Whittington Plaintiffs do not mention is that the AWG Agreement also provides that an "'Affiliate' of a specified Person is a Person that directly, or indirectly through one or more intermediaries, controls or is controlled by, or is under common control with, the Person specified." Whit. R. 656. Inasmuch as the Whittington Plaintiffs' theory against Qualcomm revolves around the view that Qualcomm *controls* Leap's every move, they cannot deny Qualcomm the benefit of any "right" or "remedy" that is reserved for "Affiliates."

When the focus is on the language actually drafted, it is immediately evident why this case is distinguishable from *Adams v. Greenpoint Credit, LLC*, 943 So. 2d 703 (Miss. 2006), the only Mississippi case the Whittington Plaintiffs invoke. *See* Resp. at 22-23. In that case, both the language of the arbitration clause and the factual context were different. The arbitration provision limited arbitration to "[a]ny controversy . . . *between* or among *you or me* or our assignees," 943 So. 2d at 704, which, as we have seen, is narrower than the provision here. The factual distinction between this case and *Adams* is equally fundamental. As this Court made clear, its holding rested on much more than the simple fact that the party resisting arbitration had not signed the contract. Rather, she was a complete "stranger to that contract." *Id.* at 709. There is a world of difference between the status of a "stranger to th[e] contract" and the parties here who were (or were alleged to be) intimate to, and indeed beneficiaries of, the transaction in question and who are standing in the signatories' shoes to the AWG Agreement.[3]

C. The Whittington Plaintiffs Must Arbitrate Their Claims Against Qualcomm Under Principles of Equitable Estoppel

The Whittington Plaintiffs acknowledge that equitable estoppel can be an independent ground for compelling arbitration—a ground that can apply even where the arbitration clause itself does not literally require arbitration. *See* Resp. at 23-24.[4] Their main argument against equitable estoppel is

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[3] The Alabama cases the Whittington Plaintiffs invoke are also distinguishable for the same reasons—both on the basis of the language of the contract and on the basis of the facts. In one of them, the court emphasized that "[t]he written arbitration agreements in this case expressly limit the scope of the agreements to 'disputes, claims, and controversies' *arising between the 'Buyer' and the 'Seller' only.*" *Med Center Cars, Inc. v. Smith*, 727 S. 2d 9, 13 (Ala. 1998) (emphasis in original). The other involved an arbitration clause that applied only to "disputes . . . between the parties." *Jim Burke Automotive, Inc. v. McGrue*, 826 So. 2d 122, 131-32 (Ala. 2002) (capitalization omitted). In neither case was the non-signatory a beneficiary of that contract or alleged to be controlling the signatory. *See Med Center Cars*, 727 S. 2d at 17-19; *Jim Burke*, 826 So. 2d at 131-32.

[4] The only case the Whittington Plaintiffs cite in support of the proposition that "[c]ourts have held that language in arbitration provision [sic] . . . that explicitly limits enforcement to a 'buyer' and a 'seller' is an exception to the estoppel theory," Resp. at 24-25, says nothing at all about abolishing estoppel in that context. *See Jim Burke Auto., Inc. v. McGrue*, 826 So. 2d 122, 131, 132 (Ala. 2002). And if even that

that the doctrine "applies only to prevent a ***signatory*** from avoiding arbitration with a nonsignatory." Resp. at 24 (emphasis in original; internal quotation marks omitted). They insist the doctrine does not apply "where a **non-signatory** seeks to enforce the agreement against another **non-signatory**." Resp. at 24 (emphasis in original). Of course, the Whittington Plaintiffs once again omit the inconvenient fact that this appeal *does* involve a "signatory [American Wireless] . . . avoiding arbitration with a nonsignatory"; it's just that the signatory declined to file a responsive brief.

In any event, the Whittington Plaintiffs are incorrect. Their argument consists largely of quoting cases that apply the equitable estoppel principles and highlighting—in combinations of bold, italics, and underlining—every time the cases use the word "signatory" or "sign" in articulating the rule or recounting the facts. *See* Resp. at 23, 24. All the Whittington Plaintiffs prove with this device is that the typical estoppel case involves a signatory and a non-signatory. In none of those cases did any of the courts suggest that these are the only circumstances in which equitable estoppel could ever be applied. The Whittington Plaintiffs do not cite any case that holds that estoppel is inapplicable in the circumstance where a non-signatory plaintiff is stepping into the shoes of a signatory—claiming the benefits of a contract—and thrusts a non-signatory into the role of a defendant.

More importantly, the Whittington Plaintiffs offer no reason why the estoppel principles would not apply in that context. The focus of equitable estoppel in these contexts—as in all contexts—is on the inconsistency in positions. The question in these cases is whether a party (whether it be the signatory or the non-signatory) is taking a position on the merits of the lawsuit that clashes with its position on arbitration. *See Terminix Intern. Inc. v. Rice*, 904 So. 2d 1051, 1058

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were Alabama law, courts interpreting Mississippi law have reached the opposite conclusion. *See Terminix Intern. Inc. v. Rice*, 904 So. 2d 1051, 1058 (Miss. 2004) (holding that a non-signatory "Purchaser" may be bound to an arbitration agreement under equitable estoppel despite language in the

(Miss. 2004) ("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 Arbitration Act.") (quoting *Washington Mutual Finance Group, LLC v. Bailey,* 364 F.3d 260, 268 (5th Cir. 2004)).

As the Whittington Plaintiffs concede, the courts have recognized at least two circumstances in which equitable estoppel compels arbitration. *See* Resp. at 23-24. One is where the party invoking an "arbitration clause must rely on the terms of the written agreement [containing the clause] in asserting its claims against the nonsignatory." *Grigson v. Creative Artists Agency, L.L.C.*, 210 F.3d 524, 527 (5th Cir. 2000) (emphasis omitted). Another is where the case "raises allegations of substantially interdependent and concerted misconduct by both the nonsignatory and one or more of the signatories to the contract." *Id.* Qualcomm invoked both of these rules.

Qualcomm led with the latter: "First, at every turn Plaintiffs' complaint asserts (albeit without any factual substantiation) interdependent and concerted misconduct by Qualcomm (the nonsignatory) and Leap (the signatory)." OB at 29. Qualcomm recited numerous ways in which the Whittington Plaintiffs' complaint intertwined Qualcomm with Leap, OB at 29-30, most notably the observation that "the only basis on which Plaintiffs are suing Qualcomm is the assertion that Qualcomm was in control of Leap," OB at 30. The Whittington Plaintiffs offer cannot prevail unless they defeat both theories, but they offer no response at all to this one.

As to the other theory—that the Whittington Plaintiffs "must rely on the terms of the written agreement in asserting [their] claims against" Qualcomm—the Whittington Plaintiffs' only response is to change the subject. As the Whittington Plaintiffs concede, the inquiry is whether "'the claims against the non-signatory [Qualcomm] are fundamentally grounded in, intimately founded in and

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arbitration clause that the "Purchaser" and the company agree to arbitrate).

intertwined with, or arise out of and relate directly to the agreement containing the arbitration clause.'" Resp. at 23-24 (quoting *Mississippi Fleet Card*, 175 F. Supp. 2d at 900). Instead of addressing this question, the Whittington Plaintiffs assert simply that "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." Leap Resp. at 20 (emphasis added). The Whittington Plaintiffs do not get anywhere by reciting each claim and repeating over and over that the claims "are not based on contract duties"; "are not contractual duties"; and are "independent and separate from duties imposed under the Agreement." Leap Resp. at 20-21.[5] What matters, under the legal test the Whittington Plaintiffs embrace, is that the complaint presumes the existence of the AWG Agreement and rests on the allegation that the Agreement's "*sole purpose*" was to transfer "Leap Stock from AWG to the Whittington Plaintiffs," Resp. at 38 (emphasis in original), as well as similar allegations (catalogued fully in the principal brief, *see* OB at 30). *See, e.g.*, *Sunkist*, 10 F.3d at 758 (focusing on the "integral relationship" between the non-signatory and the signatory to conclude "that the claims are 'intimately founded in and intertwined with' the license agreement" containing the arbitration clause); *Gulf Guar. Life Ins. Co v. Connecticut General Life Ins. Co.*, 957 F. Supp. 839, 842 (S.D. Miss. 1997) (rejecting non-signatory plaintiff's argument that the defendant "committed a separate and independent tort" by its actions in relation to the contract, observing that such an argument "would allow a party to defeat an otherwise valid arbitration clause simply by alleging that an agent of the party seeking arbitration has improperly performed certain duties under the contract and thereby committed a tort that is so integrally related to the subject of arbitration between the parties as to constitute a bar to such arbitration") (internal quotation marks and citations omitted);

[5] In this regard, the inquiry under this estoppel theory is the same as the question whether a dispute "arises under" or "relates to" a contract. In neither context is it sufficient for the Whittington Plaintiffs to respond that they were not alleging a breach of contract. *See* OB at 23-25 (discussing cases).

Mississippi Fleet Card, 175 F. Supp. 2d at 901. The Whittington Plaintiffs do not acknowledge—much less refute—these points.[6]

D. Plaintiffs Agreed to Arbitrate Threshold Issues About the Scope of the Arbitration Agreement and to Whom It Applies

The Whittington Plaintiffs do not dispute that an arbitration provision as broad as the one in the AWG Agreement—which relegates to arbitration all disputes related to the AWG Agreement's "interpretation, enforceability or inapplicability"—means that issues about the scope of meaning of the arbitration clause must be decided by the arbitrators, not the courts. This Court just reaffirmed this rule. *See Greater Canton Ford Mercury, Inc. v. Ables*, No. 2005-CA-01316-SCT, 2007 WL 273502, at *3-*4 (Miss. Feb. 1, 2007) (arbitrators must decide threshold issues of whether the arbitration clause applies to a particular dispute, where parties agreed to arbitrate "claims regarding the interpretation, scope or validity of this clause or arbitrability of any issue"). This rule means that it is for the arbitrators to decide whether the parties intended to relegate to arbitration only disputes between the two signatories or also disputes where the nominal parties stand in the signatories' shoes.

The Whittington Plaintiffs miss the point when they respond with the familiar refrain that "Qualcomm has not and cannot point to a binding arbitration provision that was signed by the Whittington Plaintiffs." Resp. at 25. American Wireless had the power to agree to terms that bound its own owners—including, for example, that its owners would arbitrate disputes "related to" the

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[6] *Primerica Fin. Servs., Inc. v. Coley*, 192 F. Supp. 2d 655 (N.D. Miss. 2002), is not contrary. In *Primerica*, the parties seeking to compel arbitration invoked an arbitration clause in a mutual fund contract that had nothing to do with the affiliates he was suing over an insurance contract. The arbitration clause required arbitration of all claims asserted "in connection with the mutual fund transaction," *id.* at 656, not any claim the plaintiff might ever have against any affiliate in connection with any other service offered. Unsurprisingly, the court held that the two affiliates could not enforce the arbitration provision under the doctrine of equitable estoppel because the plaintiff had "not raised allegations of substantially interdependent and concerted misconduct by both the non-signatories [the companies in involved in the insurance services] and the signatory" (which sold the plaintiff mutual fund services). *Id.* at 657-58.

contract. The question whether that is what American Wireless agreed to is, as we have seen, a question of interpretation. The interpretation should be conducted by the arbitrators.

III. PLAINTIFFS RECEIVED MORE THAN THE REQUISITE NOTICE THAT QUALCOMM'S MOTION WAS A MOTION FOR SUMMARY JUDGMENT

The Whittington Plaintiffs argue that the order denying summary judgment should be affirmed because they did not have sufficient notice that Qualcomm's motion to dismiss would be treated as a motion for summary judgment. They are wrong for three reasons.

First, the Whittington Plaintiffs did not object below on the ground that they did not get the requisite 10 days' notice, and cannot raise it for the first time on appeal. *Southern v. Mississippi State Hosp.*, 853 So. 2d 1212, 1214 (Miss. 2003).

Second, the reason they did not raise the issue below is because they got far more than 10 days' notice. Qualcomm filed its motion to dismiss on January 28, 2005. R.E. 6, AWG R. 2596-99; Whit. R. 1589-92. Qualcomm's supporting affidavit was attached to that motion. The attachment—which attested to "matters outside the pleadings"—put the Whittington Plaintiffs on notice that "the motion *shall* be treated as one for summary judgment as provided in Rule 56." Miss. R. Civ. P. 12(b) (emphasis added). Plaintiffs broadcast their understanding that this was exactly how the motion would be treated, when they filed a "Rule 56(f) Affidavit," on March 1. AWG R. 2679-82; Whit. R. 1647-50. Rule 56(f) provides that a party opposing a *motion for summary judgment* is permitted to submit an "affidavit [demonstrating] that he cannot for reasons stated present by affidavit facts essential to justify his opposition." Miss. R. Civ. P. 56(f). Had the affidavit met the requisite standard, the circuit court would have had two options: "[1] the court may refuse the application for judgment or [2] may order a continuance to permit . . . discovery to be had." *Id.*

That is exactly what Plaintiffs requested. But the circuit court denied that relief, presumably because Plaintiffs did not offer the slightest hint as to how further discovery could possibly advance their position.

The circuit court did not hold its hearing on Qualcomm's motion until June 14, 2005, almost five months after Qualcomm filed its motion—and four months after Plaintiffs submitted their Rule 56(f) affidavit. They had all that time either to adduce the necessary evidence to support their opposition, or devise a better reason to expect that discovery could yield any further support to their insufficient allegations. They came into court with neither. As this Court has explained, the purpose of the notice provision is to give the parties a "reasonable opportunity to present all material pertinent to such motion," *Jones v. Regency Toyota, Inc.*, 798 So. 2d 474, 476 (Miss. 2001), or, failing that, to explain why they should be entitled to more time to do so, *see Russell v. Williford*, 907 So. 2d 362, 369 (Miss. Ct. App. 2004). Plaintiffs had every opportunity they needed to explain why further discovery was warranted, and they never suggested that they could have done any better, if only they had had another 10 days. Even now, Plaintiffs offer no response to Qualcomm's argument that their proposed discovery was nothing more than a fishing expedition. *See* OB at 41-42; *McQueen v. Williams*, 587 So. 2d 918, 923 (Miss. 1991).

Third, even if the circuit court erred in converting the motion to dismiss into a motion for summary judgment, the Whittington Plaintiffs are not entitled to an affirmance of the *summary judgment* denial. Their complaint is that the circuit court should never have considered the extra-pleading material Qualcomm produced and should have treated the motion as a motion to dismiss. If they are right, then the additional material should be disregarded and this Court should treat the motion as a motion to dismiss.

IV. BECAUSE THE WHITTINGTON PLAINTIFFS FAILED TO PLEAD ANY FACTS THAT COULD PROVE QUALCOMM CONTROLLED LEAP, THE STATE AND FEDERAL SECURITIES CLAIMS AGAINST QUALCOMM MUST BE DISMISSED

All the parties agree that the Whittington Plaintiffs cannot satisfy their burden of alleging (or demonstrating) that Qualcomm controlled Leap, for purposes of the securities claims, simply by declaring "Defendant Qualcomm . . . acted as [a] controlling person[] of Leap." Resp. at 30 (quoting Whit. R. 179). "[A]t a minimum," they had to "allege some facts demonstrating that the defendant had the requisite *power to* directly or indirectly *control* or influence the primary violator's actions or *day-to-day control* or knowledge of the underlying violation." *In re Enron Corp. Securities, Derivative & ERISA Litig.*, 258 F. Supp. 2d 576, 598 (S.D. Tex. 2003); *Food & Allied Serv. Trades Dept., AFL-CIO v. Millfeld Trading Co.*, 841 F. Supp. 1386, 1391 (S.D.N.Y. 1994). In an effort to satisfy this standard, the Whittington Plaintiffs assert that their complaint "allege[s] at least four distinct set [sic] of facts evidencing Qualcomm's control liability: (1) its past business dealings with Leap directors and officers, (2) its influence business arrangements with Leap, (3) its dominant shareholder position, and (4) its access to inside information." Resp. at 31. The Whittington Plaintiffs' allegations—even if accepted as true—do not support most of these assertions and, in any event, do not add up to control. We address each, in turn.

"Past business dealings". In support of the proposition that Qualcomm controlled Leap when it filed the relevant registration statement, the Whittington Plaintiffs' principal argument revolves entirely around the "past." While their brief cagily couches descriptions of titles and status in ambiguous tenses—stating, for example, that "certain individual Defendants . . . had both director, officer, agent and/or representative capacities in Qualcomm and Leap," Resp. at 33, and that there were "overlaps in many of Qualcomm's and Leap's key officer and director positions," Resp. at 34—their complaint is unmistakably clear about one fact: Every single person the Whittington Plaintiffs

identify had no affiliation with Qualcomm *at the relevant time*. As the Whittington Plaintiffs concede, every one of these Leap officials dissolved his formal relationship with Qualcomm by the time of the spin-off, more than two years before the transaction in question. *See* Resp. at 10 n.2.

The Whittington Plaintiffs do not offer any theory as to how Qualcomm could control Leap just because some Leap personnel once worked for Qualcomm. If "[a] person's status as [a *current*] officer, director, or shareholder, absent more, is not enough to trigger liability under" the securities laws, *Hemming v. Alfin Fragrances, Inc.*, 690 F. Supp. 239, 245 (S.D.N.Y. 1988), then perforce the Whittington Plaintiffs' naked recitation of the *former* titles of Leap officers and directors falls short.

"Influence business arrangements". The Whittington Plaintiffs' reference to "influence business arrangements" encompasses two types of arrangements—past and current. As to the past, the Whittington Plaintiffs repeat the complaint's allegations about the terms of the separation agreement between the two companies: Qualcomm made a cash contribution, retained a right to a revenue stream, and so forth. Resp. at 32. Leap, for its part, "assumed some of Qualcomm's liabilities." Resp. at 32. Nowhere in their complaint or their brief do the Whittington Plaintiffs explain how any of the terms from the *past* separation agreement gave Qualcomm control over Leap years later.

The same goes for the current arrangements. There was a "license to patent rights"; a "right of first refusal . . . to proposed . . . investments"; a non-competition agreement; a loan; and a sublease. Resp. at 32. Nowhere does the complaint or the Whittington Plaintiffs' brief suggest that these dealings were anything other than arms-length transactions of two companies. *See Morse v. Weingarten*, 777 F. Supp. 312, 318 (S.D.N.Y. 1991) (allegations that underwriter exercised control over corporation's investments fail to state a claim for control person liability absent allegations

identifying any position or title that underwriter held at corporation or any meetings which underwriter attended or conversations which he had with any of the corporation's officers).

"Dominant shareholder position". The Whittington Plaintiffs do not dispute that the Leap shares Qualcomm actually owned at the relevant time represented 1.3% of the outstanding Leap stock. *See* OB at 38. This is what the Whittington Plaintiffs describe as a "dominant" position. While the Whittington Plaintiffs virtually shout "that practical control of a corporation **does not require ownership of 51%**," Resp. at 28 (emphasis in original), they offer no explanation of how a 1.3% share could amount to control. The Whittington Plaintiffs do not advance their cause much by citing cases involving a "24% stockholder," who was also "an officer, a director and was involved in regular loan gathering," Resp. at 29 (discussing *G.A. Thompson & Co. v. Partridge*, 636 F.2d 945, 958 (11th Cir. 1981)), or a 27% owner with "six representatives in its 16-person board," Resp. at 36 (discussing *Green v. Hamilton Intern., Corp.*, 493 F. Supp. 596, 598 n.2 (S.D.N.Y. 1979)), or a 45% shareholder, Resp. at 36 (discussing *Defflemyer v. W.F. Hall Printing Co.*, 558 F. Supp. 372, 385-86 (D. Del. 1983)). Nor do they distinguish the several cases Qualcomm cited, demonstrating that 22%, 18%, and 8%—many multiples of Qualcomm's ownership of Leap—did not suffice to establish control. *See* OB at 28-39 (citing and discussing cases).

The only way the Whittington Plaintiffs can boost their claim of ownership just barely into the double digits, is by pretending that Qualcomm's warrants—unexercised rights to purchase Leap stock—were the same as owning stock. But aside from affixing the inapt label "beneficial ownership" to these warrants, Resp. at 32, the Whittington Plaintiffs offer no theory as to how an unexercised right to purchase stock—which carries with it no voting power and no actual control—somehow turns Qualcomm into a "dominant shareholder."

"Access to inside information". Nowhere in their brief or in their complaint do the Whittington Plaintiffs explain what inside information Qualcomm possessed at the time of the relevant transactions—nor how the sort of inside information that comes from close collaboration and common interests could turn into control.

In sum, while the Whittington Plaintiffs allege that "there are numerous factual disputes as to essential elements of control," Resp. at 27, they still fall far short of demonstrating what they need to demonstrate: that the facts they have alleged, even if taken as gospel, could amount to control. To be sure, control can be shown through a confluence of various factors. But each of the four categories of factors the Whittington Plaintiffs describe is independently valueless in proving control. So no matter how long an excursus the Whittington Plaintiffs present on the details of these four elements, the final calculation is the same: zero plus zero plus zero plus zero is still zero. At no point—even in their Rule 56(f) affidavit—have the Whittington Plaintiffs offered a hint as to what they could possibly discover that would turn any of these allegations into proof that Qualcomm controlled Leap. The securities claims against Qualcomm should be dismissed.

V. THE WHITTINGTON PLAINTIFFS LACK STANDING TO BRING THE SECURITIES CLAIMS BECAUSE THEY BOUGHT THEIR SECURITIES ON THE OPEN MARKET

The parties all agree on what the relevant securities statutes say about who can sue for a violation—at least in the usual situation. When § 717 of the Mississippi Securities Act ("MSA") says that the seller who makes false or misleading statements in a registration statement can be "liable [only] to the *person buying the security from him*," Miss. Code Ann. § 75-71-717(a)(2) (emphasis added), the Whittington Plaintiffs do not dispute that this means that only the buyer who purchases the very shares identified in the registration statement directly from the seller can be liable under this provision. *See Fortenberry v. Foxworth Corp.*, 825 F. Supp. 1265, 1279 (S.D. Miss.

1993). In the context of this case, all agree, that would ordinarily mean that only someone who bought his shares directly from Leap can sue. Likewise, when § 11 of the 1933 Securities Act limits the right to sue to "any person *acquiring such security*," 15 U.S.C. 77k(a) (emphasis added), there is no dispute on what that means: If the ordinary rule applies, the Whittington Plaintiffs would have to allege that they either (1) purchased the shares described in the registration statement directly from Leap; or (2) can trace ownership of the specific shares they bought directly back to American Wireless. *See* OB at 42-43.

While the Whittington Plaintiffs at one point loosely assert that "Leap was the 'seller' of Leap Stock that Plaintiffs acquired," Resp. at 39, it is clear from both their complaint and their brief that they mean this only in most figurative sense. The Whittington Plaintiffs concede that *American Wireless* was the one who bought the stocks directly from Leap. Moreover, they do not contend that they bought their stock from Leap—which is the only relevant question under MSA § 717. Nor do they contend that they could ever prove (under the slightly broader federal statute) that they bought their stock directly from American Wireless, or from someone who bought from American Wireless, or from some who bought the same exact stock further downstream. In other words, the Whittington Plaintiffs offer no argument that they satisfy the literal terms of these two securities statutes.

They argue, instead, that the literal terms of these strict statutes are inapplicable because this "case involves an extremely unique factual scenario." Resp. at 38 (emphasis omitted). What makes this case unique, they say, is "that this Registration Statement was filed for the **sole purpose** of selling the Leap Stock from AWG to the Whittington Plaintiffs" and "the plan was always for the members of AWG to hold the Leap Stock." *Id.* (emphasis in original).

The Whittington Plaintiffs neglect to explain where in the statutory language they find this "sole purpose" exception. The Mississippi statute does not say that Leap is "liable to the person

buying the security from him *or to any later purchaser who ends up owning similar stock so long as the sole purpose of the transaction is to enable the later purchaser to eventually own the stock or other stock like it.*" The federal statute does not have a "plan always was" exception; it does not provide that Leap is liable to "any person acquiring such security *or to any person who always was the intended beneficiary of the original sale.*" The Whittington Plaintiffs do not explain why this Court should—or would have the power to—amend the language prescribed by the Legislature and Congress to embrace scenarios the legislatures explicitly excluded.

There is not a single case that extends the statutory language as the Whittington Plaintiffs propose. And for good reason. Any such expansion of the statutory language would clash with the goals of both statutes. Because these statutes can give rise to "virtually absolute" liability for corporate issuers even for innocent material misstatements, *Lone Star Ladies Investment Club v. Schlotzky's Inc.*, 238 F.3d 363, 369 (5th Cir. 2001), the legislatures limited the remedies only to the "narrow class of persons" consisting of "those who purchased securities that are the *direct* subject of the prospectus and registration statement," *Fischnan v. Raytheon Mfg. Co.*, 188 F.2d 783, 786-87 (2d Cir. 1951) (emphasis added). The goal was to ensure that a single registration statement covering a limited number of shares could not mushroom into duplicative recoveries disproportionate to any harm actually inflicted. *Kirkwood v. Taylor*, 590 F. Supp. 1375, 1381 (D. Minn. 1984). That is why a long line of cases confirms that the State Legislature and Congress intentionally limited the class of plaintiffs to ensure that "those who buy identical stocks already being traded" are not entitled to invoke the remedy. *In re Global Crossing Ltd. Sec. Litig.*, 313 F. Supp. 2d 189, 207 (S.D.N.Y. 2003); *Q.T. Wiles*, 223 F.3d at 1159; *In re Crazy Eddie Sec. Litig.*, 792 F. Supp. 197, 202 (E.D.N.Y. 1992). That is why, for example, a plaintiff cannot sue under these statutes even if he can show "a high probability" that he purchased a security issued under a tainted registration statement. *Abbey v.*

Computer Memories, Inc., 634 F. Supp. 870, 875 (N.D. Cal. 1986). *See also Kirkwood*, 590 F. Supp. at 1378-83; *Rosenzweig v. Azurix Corp.*, 332 F.3d 854, 873 (5th Cir. 2003). Any expansion beyond the small universe of eligible plaintiffs "would be inconsistent with the narrow scope of potential liability envisioned by section 11" and MSA § 717. *Abbey*, 634 F. Supp. at 870. "Section 11 was simply not intended to provide a remedy to every person who might have been harmed by a defective registration statement." *Id.* at 875.

The same principles compel the same conclusion here. Allowing a party to sue based upon subjective expectations would impermissibly explode the universe of claimants under the securities laws. Just as in the context of probabilistic claims, the Whittington Plaintiffs are claiming merely that they were "harmed by a defective registration statement." *Id.* at 875. Here, as there, that is not enough.

For similar reasons, the Whittington Plaintiffs are wrong when they insist that dismissal is inappropriate because "[t]racing is a question of fact reserved for trial." Resp. at 40 (emphasis omitted). There are, of course, circumstances in which that is true. *See, e.g., In re LILCO Sec. Litig.*, 111 F.D.R. 663 (E.D.N.Y. 1986). But this is not one of them. Because the Whittington Plaintiffs admit that they bought their shares on the open market, there is no scenario under which they will be able to trace their shares directly to the registration statement they are attacking. No amount of discovery or expert testimony will enable the Whittington Plaintiffs to prove that unprovable fact. To extend the analogy presented in Qualcomm's opening brief, a child may well be posing a question of fact when he asserts, "The water in my buddy's bucket is directly traceable to the water I dumped out of my bucket." *See* OB at 43. But once he admits that the assertion is based on the fact that he dumped his bucket on the shores of Biloxi and his buddy drew his water in Pascagoula, it is absolutely clear that he will never be able to prove the proposition—and it would be

a waste of time and energy to let him try. *See Krim*, 210 F.R.D. 585-87 (dismissal is proper if plaintiff fails to plead facts demonstrating standing under § 11); *In re Alamosa Holdings, Inc.*, 382 F. Supp. 2d 832, 864-66 (N.D. Tex. 2005) (same); *Abbey*, 634 F. Supp. at 874-75 (same). The assertion does not become any stronger just because the Biloxi boy asserts that he dumped his bucket and his buddy drew his "virtually simultaneously," Resp. at 39, or that the "**sole purpose**" of dumping his water was to allow his friend to draw the same water elsewhere and that "always was" the "plan," Resp. at 38.

In sum, because the Whittington Plaintiffs lack standing to bring a § 11 or a MSA § 717 claim, those claims must be dismissed.

VI. PLAINTIFFS DID NOT STATE A FRAUD CLAIM AGAINST QUALCOMM

Qualcomm demonstrated in its opening brief that the Whittington Plaintiffs failed to assert their fraud allegations against Qualcomm with the requisite specificity. In response, the Whittington Plaintiffs offer a false procedural dodge, and then a complete dodge on the merits.

The Whittington Plaintiffs begin with the false assertion that "Qualcomm did not raise the issue of specificity of fraud allegations in the Circuit Court." Resp. at 41. In its brief below, Qualcomm included a fullblown argument under the following point heading: "**Plaintiff's Complaint Fails to State a Claim against QUALCOMM for State and Common Law Fraud.**" Mem. in Support of Mot. to Dismiss by Defendant Qualcomm at 16 (emphasis in original).[7] The brief asserted that "Plaintiff has not demonstrated any affirmative misrepresentation made by QUALCOMM" and that "Plaintiff failed to plead any facts showing that QUALCOMM had any involvement in the transaction between Leap and American Wireless." *Id.* at 17. Plaintiffs responded with several pages of argument—under the heading "**Plaintiffs [sic] common law fraud**

[7] The briefs are not part of the official record this Court received from the circuit court. But Qualcomm

claims are actionable"—that are almost verbatim the argument they present to this Court. Plaintiffs' Opp. to Defendants' Motion to Dismiss at 19-21 (emphasis in original).

On the merits, the Whittington Plaintiffs do nothing but ignore Qualcomm's argument, which (in keeping with the above-quoted arguments to the circuit court) was that the complaint neglected to say anything specific about *Qualcomm*—and how any alleged participation by *Qualcomm* rose to the level of fraud. The Whittington Plaintiffs respond with an argument that is virtually identical to their argument against the Leap Defendants. *Compare* Resp. at 41-43 *with* Leap Resp. at 42-45. In it, they focus only on their allegations against the *Leap Defendants*. They do not point to a single misrepresentation Qualcomm made. Nor do they point to a single specific fact demonstrating any support for the allegation that Qualcomm participated in any way in the Leap Defendants' alleged misrepresentations.

The Whittington Plaintiffs have not even tried to refute Qualcomm's argument that Qualcomm cannot be held vicariously liable for fraud based on a "controlling person" theory. Nor do they demonstrate that they are otherwise entitled to sustain a fraud complaint against Qualcomm by reciting specific facts against others. Because Plaintiffs failed to plead any facts sufficient to satisfy the elements of fraud *against Qualcomm*, the Court should dismiss the fraud claims against Qualcomm.

CONCLUSION

The ruling of the lower court should be reversed. The Court should enforce the broad arbitration provision of the AWG Agreement, and compel arbitration of Plaintiffs' claims. If the Court declines to order arbitration, it should dismiss all the claims against Qualcomm, whether the motion under review is treated as a motion to dismiss or as a motion for summary judgment.

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has supplied them to this Court along with a motion to supplement the record on appeal.

This, the 9th day of April, 2007.

Respectfully submitted,

QUALCOMM INCORPORATED

By: 

Glenn Gates Taylor (MBN[redacted]
B. Wade Smith, IV (MBN[redacted])
Christy M. Sparks (MBN[redacted]
COPELAND, COOK, TAYLOR & BUSH, P.A.
200 Concourse, Suite 200
1062 Highland Colony Parkway (39157)
Post Office Box 6020
Ridgeland, MS 39158
601-856-7200
601-353-6235 (fax)

Of Counsel
Joshua Rosenkranz
HELLER EHRMAN LLP
Times Square Tower
7 Times Square
New York, NY 10036
212-847-8748

ATTORNEYS FOR APPELLANT
QUALCOMM INCORPORATED

CERTIFICATE OF SERVICE

I, Glenn Gates Taylor, hereby certify that I have this day served via U.S. Mail, postage prepaid, a true and correct copy of the foregoing **REPLY BRIEF OF APPELLANT QUALCOMM INCORPORATED** to the following:

David W. Clark, Esq.
Mary Clay W. Morgan, Esq.
BRADLEY ARANT ROSE & WHITE, LLP
P.O. Box 1789
Jackson, MS 39215-1789

J. Michael Rediker, Esq.
Peter J. Teply, Esq.
Page A. Poerschke, Esq.
Meredith Jowers Lees, Esq.
HASKELL SLAUGHTER YOUNG & REDIKER, LLC
1400 Park Place Tower
2001 Park Place North
Birmingham, AL 35203

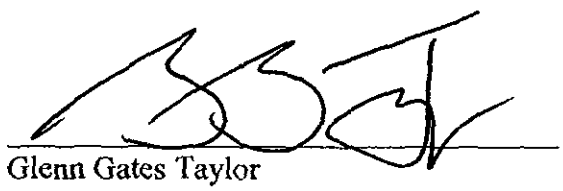
Eugene C. Tullos, Esq.
TULLOS & TULLOS
P.O. Box 74
Raleigh, MS 39153

J. Douglas Minor, Jr., Esq.
Carlton W. Reeves, Esq.
PIGOTT, REEVES, JOHNSON & MINOR, P.A.
P.O. Box 22725
Jackson, MS 39225-2725

Christopher A. Shapley, Esq.
Joseph Anthony Sclafani
Brunini, Grantham, Grower & Hewes, PLLC
P.O. Drawer 119
Jackson, MS 39205-0119

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

This, the 9th day of April, 2007.



Glenn Gates Taylor