COPY

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

2005-IA-1841

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

OPENING BRIEF OF THE LEAP DEFENDANTS (APPELLANTS)

ORAL ARGUMENT REQUESTED

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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**

CERTIFICATE OF INTERESTED PARTIES

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

1. Plaintiff/Appellee American Wireless License Group, LLC ("AWG"), the plaintiff in *American Wireless License Group, LLC v. White, et al.*, Hinds County Circuit Court Case No. 251-03-692 CIV ("*American Wireless*");

2. Plaintiffs/Appellees Homer A. Whittington, Jr., as Trustee for the Homer A. Whittington, Jr. Revocable Trust; Edwin Dodd; Douglas Packer; Robert G. Germany; Joseph E, Roberts, Jr.; C. Victor Welsh, III; Crymes M. Pittman; Lucy P. Culver; Jeffrey L. Smith; Crymes G. Pittman, indvidually and as the Trustee for the Homer A. Whittington, Jr. Deferred Compensation Trust; Yerger Properties, LP; Lyndel B. Smith and Shirley E. Smith, as Trustees for the Smith Family Trust; Betty Sue Yandell; Y. Clifton Yandell; William M. Yandell, Jr.; William M. Yandell, III, individually and as the registered owner of the William M. Yandell, III IRA; Blue Mountain Wireless, LLC; W.M. Yandell FLP, LP; Susan Yandell McKee; Walcott and Caldewell, LLC; Dr. Richard Rushing; Dr. Jane T. Mills; William P. Thomas; Darden North; Terrell Williams; Wirt A. Yerger, Jr.; James T. Thomas, IV; Claiborne P. Deming; David L. Meredith; Mary Jane Finney; David Bailey; Kim McDonald; Debra Morton; Gordon Morton; Gordon Morton IRA; Ann Carter Thomas; Betty J. Thomas Marital Trust; Bill Thomas; James T. Thomas; Martha Ross Thomas; W.P. Thomas, Jr.; Elaine A. Chatham; Henry E. Chatham, Jr.; Franklin E. Chatham; Marie D. Chatham; Retirement Plan for Employees Wise Carter Child & Caraway; James C. Eckert; Lori Moskowitz; and Bertie Heiner (the "Whittington Plaintiffs"), the plaintiffs in *Whittington v. White*, Hinds County Circuit Court Case No. 251-03-692 CIV ("*Whittington*");

3. Eugene C. Tullos of Tullos & Tullos, attorneys for AWG and the Whittington Plaintiffs;

4. J. Michael Rediker, Peter J. Tepley, Page A. Poerschke, and Meredith Jowers Lees of Haskell Slaughter Young Rediker, LLC, of counsel for AWG and the Whittington Plaintiffs;

5. Defendants/Appellants 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 (collectively, the "Leap Defendants"), defendants in *American Wireless* and *Whittington*;

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

7. Boris Feldman, Robert P. Feldman, Clayton Basser-Wall, and Mark T. Oakes of Wilson Sonsini Goodrich & Rosati, P.C., of counsel for the Leap Defendants;

8. Defendant/Appellant QUALCOMM Incorporated ("Qualcomm"), a defendant in *American Wireless* and *Whittington*;

9. Glen Gates Taylor, D. James Blackwood, and Wade Smith of Copeland, Cook, Taylor & Bush, P.A., attorneys for Qualcomm;

10. Defendant UBS Financial Services, Inc., a defendant in *American Wireless*, (named as UBS Paine Webber, Inc.) ("UBS");

11. W. Whitaker Rayner of Watkins Ludlam Winter & Stennis, P.A., attorneys for UBS; and

///

12. Daniel Cantor and William Sushon of O'Melveny & Myers, LLP, of counsel for UBS.

RESPECTFULLY SUBMITTED this the 17th day of November, 2006.

DAVID W. CLARK (MBN 6112)
MARY CLAY W. MORGAN (MBN 101181)

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

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PRELIMINARY STATEMENT

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 (collectively, the "Leap Defendants") respectfully submit this opening brief in support of their appeal of orders of the Circuit Court of Hinds County (Honorable Tomie T. Green, presiding) denying their motions to compel arbitration and stay proceedings under the Federal Arbitration Act, 9 U.S.C. § 1, or, in the alternative, to dismiss pursuant to Mississippi Rule of Civil Procedure 12(b)(6) the Original Complaint filed in *American Wireless License Group, LLC v. White*, Case No. 251-03-692 CIV ("*American Wireless*") and the First Amended and Restated Complaint filed in *Whittington v. White*, Case No. 251-03-175 CIV ("*Whittington*").

INTRODUCTION

The Circuit Court erred in applying the law to the Leap Defendants' motions. As discussed below, the Circuit Court should have dismissed these actions in their entirety or sent them to arbitration.

On February 7, 2001, Leap Wireless International, Inc. ("Leap") entered into an Agreement for Purchase and Sale of Licenses (the "Agreement") with American Wireless License Group, LLC ("AWG"). Pursuant to that Agreement, Leap issued approximately 1.9 million unregistered shares of Leap stock to AWG in exchange for several wireless telephone licenses held by AWG. The transaction closed on June 8, 2001. Shortly thereafter, Leap registered AWG's Leap stock with the Securities and Exchange Commission ("SEC") by filing a Form S-3 registration statement (the "June 2001 Registration Statement"). In "the fall of 2001," AWG began selling its Leap stock in the public stock market pursuant to the June 2001 Registration Statement. Several of AWG's members (the "Whittington Plaintiffs") (together with AWG, "Plaintiffs") allegedly purchased Leap stock in the public stock market "in the period following September 2001."

In June 2001 (when AWG acquired its Leap stock), Leap stock was trading at around $30.00 per share. As a result of the downturn in the telecommunications industry, the value of Leap stock began to decline. By September 2001 (when the Whittington Plaintiffs allegedly purchased their Leap stock), the price of Leap stock had fallen to around $15.00 per share. Thereafter, the price of Leap stock continued to decline. By July 2002, Leap stock was trading below $1.00 per share. Leap eventually filed for bankruptcy in April 2003.

AWG and the Whittington Plaintiffs now have buyers' remorse. Dissatisfied with how their investment in Leap stock turned out, they filed the *American Wireless* and *Whittington* actions against the Leap Defendants in the Circuit Court of the First Judicial District of Hinds County, Mississippi. Plaintiffs claim, in hindsight, that Leap and its management (the Leap Defendants) failed to warn them that a purchase price adjustment dispute with a company named MCG PCS, Inc. ("MCG"), which also sold wireless licenses to Leap, could result in Leap paying additional amounts in Leap stock to MCG *in the future*; that Leap stock was subject to dilution *in the future*; and that additional issuances of Leap stock could trigger a default under certain of Leap's loan covenants *in the future*. Plaintiffs assert five claims for relief: under Sections 11 and 15 of the Securities Act of 1933, Sections 717(a)(2) and 719 of the Mississippi Securities Act, and common law. There are several problems with Plaintiffs' claims.

First, Plaintiffs do not have legal standing to pursue claims under Section 11 of the Securities Act of 1933 (the "1933 Act"). Section 11 provides for civil liability for issuing a false or misleading registration statement. To have legal standing under Section 11, plaintiffs must have purchased shares that were issued and sold pursuant to the allegedly false or misleading registration statement – in this case, the June 2001 Registration Statement. By its own admission, AWG did not purchase Leap stock that was issued and sold pursuant to the June 2001 Registration Statement. Rather, AWG purchased Leap stock in a private offering that closed before the June 2001 Registration Statement was filed or became effective. With respect to the Whittington Plaintiffs, they admit that they purchased their Leap stock in the public securities market several months after Leap filed the June 2001 Registration Statement. At the times of

their purchases, over 34 million shares of Leap stock were outstanding and being traded in the public market. Those shares were issued and sold pursuant to several different registration statements going back to September 1998. The Whittington Plaintiffs do not plead any facts that would suggest the shares of Leap stock 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. Because the Whittington Plaintiffs do not (and, indeed, cannot) show that the shares they purchased were issued and sold pursuant to the June 2001 Registration Statement, they do not have standing to pursue Section 11 claims based on the allegedly false or misleading statements that appeared in that registration statement.

Second, Plaintiffs cannot show that the allegedly false or misleading statements in the June 2001 Registration Statement caused their alleged losses. Plaintiffs claim that (i) the Leap Defendants failed to disclose certain information about Leap's purchase price adjustment dispute with MCG; and (ii) their alleged losses are attributable to the "revelation" in August 2002 of an unfavorable outcome in that purchase price adjustment dispute. But AWG admits that it disposed of all of its Leap stock by December 2001, almost eight months before the Leap Defendants allegedly made the "first significant disclosures" regarding the purchase price adjustment dispute. With respect to the Whittington Plaintiffs' alleged losses, the publicly available stock records show that Leap's stock price had already fallen below $1.00 per share before the alleged "revelation" in August 2002. Under these circumstances, AWG and the Whittington Plaintiffs simply cannot show that the Leap Defendants' allegedly false or misleading statements, and the eventual disclosure of those false or misleading statements, caused their alleged losses.

Third, on the face of AWG's Original Complaint (the "AWG Complaint"), the Whittington Plaintiffs' First Amended and Restated Complaint (the "FARC"), and the documents incorporated therein, it is clear that AWG and the Whittington Plaintiffs were explicitly warned of all the risks they claim were omitted from Leap's public filings. During June 2001, Leap specifically disclosed to both AWG and the Whittington Plaintiffs that, *inter*

alia, (1) Leap had issued additional shares of stock, which would dilute the value of the Leap stock then outstanding; (2) Leap had purchased wireless licenses from MCG, and MCG was asserting in arbitration that it was entitled to a purchase price adjustment because of an alleged change in the market value of wireless licenses; (3) Leap could pay the purchase price adjustment in cash or stock, at its discretion; and (4) Leap was significantly leveraged, and its credit facilities included change of control provisions, which could trigger default if a substantial number of shares were issued. Because these are the precise risks Plaintiffs contend were omitted from the June 2001 Registration Statement, their claims fail as a matter of law. For these reasons, and others, the Circuit Court should have dismissed the *American Wireless* and *Whittington* actions in their entirety.

Even if the Circuit Court correctly denied the Leap Defendants' motions to dismiss, it nevertheless should have sent these actions to arbitration. Section 12.11 of the Agreement contains a broad arbitration clause, providing for binding arbitration of any dispute claim or controversy "arising under" the Agreement or in any way "related to" the Agreement. Based on the facts pleaded by Plaintiffs, it appears on the face of the AWG Complaint and the FARC that these actions arise under and relate to the Agreement. Specifically, Plaintiffs allege that the Leap Defendants, acting on behalf of and in concert with Leap, induced AWG to enter into the Agreement and induced AWG to purchase Leap stock. Plaintiffs also allege that AWG entered into the Agreement on behalf of the Whittington Plaintiffs and that the Agreement was intended to benefit them individually by placing Leap stock in their hands. Finally, Plaintiffs' claims are based almost entirely on the alleged inadequacy of the risk disclosures in the June 2001 Registration Statement, which Leap filed pursuant to its obligations under the Agreement. Thus, the Circuit Court should have compelled Plaintiffs to arbitrate their claims and stayed all proceedings in these actions pending arbitration.

The Circuit Court erred in denying the Leap Defendants' motions. This Court should remand these actions to the Circuit Court with instructions to enter orders dismissing these

actions in their entirety. In the alternative, this Court should remand these actions to the Circuit Court with instructions to enter orders compelling Plaintiffs to arbitrate their claims.

STATEMENT OF THE ISSUES

1. Whether the Circuit Court erred in denying the Leap Defendants' Motion to Dismiss in *American Wireless*.

2. Whether the Circuit Court erred in denying the Leap Defendants' Motion to Dismiss in *Whittington*.

3. Whether the Circuit Court erred in denying the Leap Defendants' Motion to Compel Arbitration and Stay Proceedings in *American Wireless*.

4. Whether the Circuit Court erred in denying the Leap Defendants' Motion to Compel Arbitration and Stay Proceedings in *Whittington*.

STATEMENT OF THE CASE

I. NATURE OF THE CASE

The *American Wireless* and *Whittington* actions are securities cases. Plaintiffs in both actions assert five claims for relief: under Sections 11 and 15 of the 1933 Act, 15 U.S.C. §§ 77k and 77o, Sections 717(a)(2) and 719 of the Mississippi Securities Act (the "MSA"), and common law. The Leap Defendants are current and former officers and directors of Leap. QUALCOMM Incorporated ("Qualcomm") is an entity that allegedly "controlled" Leap during the relevant period. Leap is not named as a defendant in *American Wireless* or *Whittington*.

II. PROCEEDINGS AND DISPOSITION BELOW

On December 31, 2002, several of the Whittington Plaintiffs filed the *Whittington* action in the Circuit Court of the First Judicial District of Hinds County against the Leap Defendants and Qualcomm. Whitt. Rec. at 7.[1] On May 16, 2003, the Whittington Plaintiffs filed their FARC. *Id.* at 101.

[1] References to "Whitt. Rec. at __" are to the Appellate Record in *Whittington*.

On June 6, 2003, AWG filed the *American Wireless* action in the First Judicial District of Hinds County against the Leap Defendants, Qualcomm, and UBS Paine Webber, Inc. ("UBS"). AWG Rec. at 7.[2] The *American Wireless* action is virtually identical to the *Whittington* action. Both actions assert exactly the same claims, predicated on exactly the same facts.[3]

On January 28, 2005, the Leap Defendants filed motions to compel arbitration and stay proceedings, or in the alternative, to dismiss the *American Wireless* and *Whittington* actions. AWG Rec. at 1289; Whitt. Rec. at 514. On or about September 12, 2005, the Circuit Court denied those motions, but *sua sponte* certified its orders for interlocutory appeal. AWG Rec. at 2934, 2938; Whitt. Rec. at 1875-1878.

On September 26, 2005, the Leap Defendants appealed the Circuit Court's orders denying their motions to compel arbitration in *American Wireless* and *Whittington* (the "direct appeals"). On September 28, 2005, the Leap Defendants filed a petition for permission to appeal the Circuit Court's order denying their motion to dismiss in *American Wireless*. On October 4, 2005, the Leap Defendants filed a petition for permission to appeal the Circuit Court's order denying their motion to dismiss in *Whittington*. On October 14, 2005, the Leap Defendants moved to consolidate the direct appeals.

On October 21, 2005, this Court granted the Leap Defendants' motion to consolidate the direct appeals. That same day, this Court also granted the Leap Defendants' petition for permission to appeal the Circuit Court's order denying their motion to dismiss in *American Wireless*. On October 25, 2005, this Court granted the Leap Defendants' petition for permission

[2] References to "AWG Rec. at __" are to the Appellate Record in *American Wireless*. Because the *American Wireless* action is virtually identical to the *Whittington* action (*see infra*), the appellate records in these actions are virtually identical as well. For the Court's convenience, the Leap Defendants have cited to the *American Wireless* record only whenever possible.

[3] On May 29, 2003, the Leap Defendants removed the *Whittington* action to the United States District Court for the Southern District of Mississippi. Whitt. Rec. at 222-228. The Leap Defendants removed the *American Wireless* action to the Southern District of Mississippi on June 26, 2003. AWG Rec. at 88-90. On November 10, 2004, the Honorable David C. Bramlette of the United States District Court for the Southern District of Mississippi remanded the *American Wireless* and *Whittington* actions to the First Judicial District of Hinds County.

to appeal the Circuit Court's order denying their motion to dismiss in *Whittington*. This Court then consolidated the Leap Defendants' interlocutory appeals with their direct appeals.

III. STATEMENT OF FACTS

A. Leap

Leap was a low-cost provider of wireless telephone services in local markets across the United States.[4] AWG Rec. at 1323 (June 2001 Registration Statement). Leap conducted operations through its subsidiaries. Cricket Communications, Inc. ("Cricket") was Leap's principal operating subsidiary. Cricket offered wireless telephone services under the brand name "Cricket." Cricket service allowed customers to (i) make and receive virtually unlimited calls within a local calling area; and (ii) receive unlimited calls from any area for a flat monthly rate.

Leap was originally formed as a subsidiary of Qualcomm. AWG Rec. at 1327. In September 1998, Leap was "spun off" to be owned and operated independently of Qualcomm. *Id.* at 1327, 1360. In connection with this "spin off," Qualcomm issued and registered approximately 17 million shares of Leap stock. Between September 1998 and May 2001, Leap conducted two public offerings and issued and registered millions of additional shares of Leap stock pursuant to several different registration statements. *Id.* at 1474-1492 (cover pages of several of Leap's SEC filings, each of which reflects issuances of Leap common stock). As of June 5, 2001, approximately 34 million shares of Leap stock were outstanding. *Id.* at 1359 (June

[4] On a motion to dismiss, the Court may consider documents relied on by plaintiffs in the complaint. *See Sennett v. United States Fidelity & Guaranty Co.*, 757 So.2d 206, 209 (Miss. 2000). The Court may also take judicial notice of and consider documents of public record such as filings with the SEC. *See* Miss. R. Evid. 201(f) ("Judicial notice may be taken at any stage of the proceeding"); *Allyn v. Wortman*, 725 So.2d 94, 99, 103 (Miss. 1998) (considering SEC filings on motion to dismiss); *Ditto v. Hinds County*, 665 So.2d 878, 880 (Miss. 1995) (court may take judicial notice of public records). Copies of such documents were attached to (i) the Declaration of David W. Clark in Support of the Leap Defendants' Motion to Compel Arbitration and Stay Proceedings or, in the Alternative, to Dismiss Plaintiff's Original Complaint, filed in *American Wireless*; and (ii) the Declaration of David W. Clark in Support of the Leap Defendants' Motion to Compel Arbitration and Stay Proceedings or, in the Alternative, to Dismiss Plaintiffs' First Amended and Restated Complaint, filed in *Whittington*. AWG Rec. at 1314-1317; Whitt. Rec. at 560-563. These documents were before the Circuit Court when it considered and denied the Leap Defendants' motions.

2001 Registration Statement). Until December 2002, Leap stock traded publicly on the Nasdaq National Market under the symbol "LWIN." *Id.* at 8 (AWG Compl. ¶ 2).

Leap was subject to restrictive loan covenants during the relevant period. AWG Rec. at 1334-1336. Leap's vendor credit agreement with Ericsson Credit AB, for example, defined an event of default to include a "change of control," which would occur if an entity other than Leap acquired beneficial ownership of Leap stock representing 20% or more of the combined voting power of all Leap shares then outstanding. *Id.* at 1604, 1611-1612, 1676-1678 (Credit Agreement between Cricket Communications Holdings, Inc., Cricket Communications, Inc. and Ericsson Credit AB, dated October 20, 2000). Leap's vendor credit agreements with Lucent Technologies, Inc. and Nortel Networks, Inc. contained similar provisions.[5] Leap attached copies of these agreements to its SEC filings, which were themselves incorporated by reference into the June 2001 Registration Statement.[6]

B. The Leap Defendants

The Leap Defendants are current and former officers and directors of Leap or its successor in interest. *See* AWG Rec. at 1296 (Chart of Named Defendants). According to AWG and the Whittington Plaintiffs, the Leap Defendants acted "on behalf of," "in concert and conspiracy" with, "aided and abetted," and "carried out a plan, scheme or course of conduct" with Leap during the relevant period.[7]

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[5] *See* AWG Rec. at 1777, 1784, 1849-1851 (Credit Agreement between Cricket Communications Holdings, Inc., Cricket Communications, Inc. and Lucent Technologies, dated September 20, 1999, as Amended and Restated as of October 20, 2000), 2077, 2084, 2151-2153 (Credit Agreement dated as of August 28, 2000 among Cricket Communications Holdings, Inc., Cricket Communications, Inc. and Nortel Networks, Inc.).

[6] *See* AWG Rec. at 1601-1603 (cover page and exhibit list from Leap's quarterly results on Form 10-Q for the period ended September 30, 2000, as filed with the SEC on November 14, 2000), 1776 (cover page from Leap's annual results on Form 10-K for the period ended August 31, 1999, as filed with the SEC on October 20, 1999), 2074-2076 (cover page and exhibit list from Leap's quarterly results on Form 10-Q for the period ended September 30, 2000, as filed with the SEC on November 14, 2000), 1367-1369 (June 2001 Registration Statement, incorporating by reference the aforementioned SEC filings).

[7] AWG Rec. at 65-66, 69-70, 71, 77-79, 81-83 (AWG Compl. ¶¶ 72, 76, 83, 102, 104, 109); Whitt. Rec. at 172-173, 176-177, 178, 184-186, 188-190 (FARC ¶¶ 73, 77, 84, 103, 105, 110).

C. AWG and the Whittington Plaintiffs

AWG is a Mississippi limited liability company. AWG Rec. at 8 (AWG Compl. ¶ 2). AWG owned wireless telephone licenses for certain areas in the southeastern United States, including Jackson, Mississippi, Birmingham, Alabama, Tuscaloosa, Alabama, and Jonesboro, Arkansas. In June 2001, AWG sold these licenses to Leap for approximately 1.9 million unregistered shares of Leap stock. *Id.* at 9 (AWG Compl. ¶ 3).

The Whittington Plaintiffs are alleged members of AWG (akin to owners). Whitt. Rec. at 104 (FARC ¶ 4). They allegedly purchased Leap stock in the public securities market "in the period following September 2001." *Id.* at 115-125; *see also* 104, 185-186 (FARC ¶¶ 4, 15, 105).

D. The AWG Transaction

Leap, like all providers of wireless telephone services, had to obtain licenses to use the radio spectrum in a particular geographic area. Leap acquired many of its wireless licenses through acquisitions from existing holders. Leap frequently used its stock as consideration for these acquisitions.

One of Leap's acquisitions involved wireless licenses owned by AWG. On February 7, 2001, Leap and AWG entered into an Agreement for Purchase and Sale of Licenses (the "Agreement"), which required Leap to pay for AWG's licenses with unregistered shares of Leap stock. AWG Rec. at 9 (AWG Compl. ¶ 3), 1493, 1495, 1500-1502 (Sections 2.1, 2.2, 4.9, and 4.10 of the Agreement). Leap and AWG agreed to arbitrate "any dispute, claim or controversy arising under th[e] Agreement or in any way related to th[e] Agreement." AWG Rec. at 1520-1521 (Section 12.11 of the Agreement).

The AWG transaction closed on June 8, 2001. *Id.* at 50-51 (AWG Compl. ¶ 52). On that date, Leap transferred approximately 1.9 million unregistered shares of Leap stock directly to AWG. *Id.* at 9, 50-52 (AWG Compl. ¶¶ 3, 52, 54). Leap transferred those shares in a private offering that, as expressly agreed, was not subject to the registration requirements of the 1933 Act. *Id.* at 1500-1501 (Section 4.9 of the Agreement). Leap agreed to register those shares after

their transfer to AWG so that AWG could sell them in the public market at a later date. *Id.* at 1507 (Section 7.4(a) of the Agreement).

On June 11, 2001, Leap registered AWG's Leap stock with the SEC by filing the June 2001 Registration Statement. *Id.* at 51-52 (AWG Compl. ¶ 54), 1319-1321 (June 2001 Registration Statement). In the June 2001 Registration Statement, Leap disclosed:

> This prospectus relates to the offer and sale of up to 1,900,829 shares of Leap Wireless International, Inc. common stock by the selling security holder identified in this prospectus. The shares offered by this prospectus were originally issued by us to the selling security holder in connection with our acquisition of wireless licenses from the selling security holder, subject to the terms of an agreement for purchase and sale of licenses, dated February 7, 2001. Under the terms of the purchase agreement, we agreed to register for resale the shares of our common stock offered by this prospectus and bear the expenses of registration of the shares. We will not receive any of the proceeds from the sale of shares of common stock by the selling security holder.

Id. at 1321. Leap identified "American Wireless License Group, LLC" as the "selling security holder." *Id.* at 1353.

The June 2001 Registration Statement became effective on June 15, 2001. *Id.* at 9, 51-52 (AWG Compl. ¶¶ 4, 54). AWG allegedly began selling its Leap stock in the public stock market "during the fall of 2001," and disposed of all of its Leap stock in "piecemeal" fashion by December 2001. *Id.* at 9, 53, 78-79 (AWG Compl. ¶¶ 4, 56, 104).

The Whittington Plaintiffs allegedly began purchasing Leap stock in the public market "in the period following September 2001." Whitt Rec. at 115-125; *see also* 104, 185-186 (FARC ¶¶ 4, 15, 105). They claim they "wound up owning the [same] Leap Stock that had been owned by [AWG], had been registered for sale by Leap, and had been sold into the public market [by AWG]." *Id.* at 104 (FARC ¶ 4). According to the Whittington Plaintiffs, "[t]he plan was always for Leap to sell its Stock to the [Whittington] Plaintiffs and other [AWG] members," and Leap's filing of the June 2001 Registration Statement and AWG's subsequent sale of Leap stock in the public market were part of "an integrated series of steps" used to accomplish this. *Id.*

E. The MCG Acquisition

Plaintiffs' claims are focused on the Leap Defendants' alleged failure to disclose certain information about a brewing dispute between Leap and MCG over two wireless licenses Leap bought from MCG in 2000. AWG Rec. at 10, 51-52, 66-69 (AWG Compl. ¶¶ 6, 54, 73-74); Whitt. Rec. at 105, 157-158, 173-176 (FARC ¶¶ 6, 54, 74-75).

MCG owned wireless licenses in Buffalo and Syracuse, New York. AWG Rec. at 46 (AWG Compl. ¶ 40). In September 2000, Leap purchased MCG's wireless licenses for $18.3 million in cash and an $18 million promissory note. *Id.* at 48-49, 66-68 (AWG Compl. ¶¶ 49, 73). The MCG acquisition closed at or around the same time as the AWG transaction. *Id.* at 48-49 (AWG Compl. ¶ 49).

At or before the closing of the MCG acquisition, MCG asserted that it was entitled to a purchase price adjustment that would effectively double the purchase price for the Buffalo and Syracuse licenses. *Id.* at 1332-1333 (June 2001 Registration Statement). As a result, in the June 2001 Registration Statement, Leap disclosed:

> Under certain circumstances, the number of shares to be issued in connection with our acquisitions of wireless licenses is subject to change based on the value of wireless licenses and the market price of our common stock at the time of the closing of the acquisition. In the pending acquisition of wireless licenses in Buffalo and Syracuse, New York that we refer to above, the seller has asserted that based on the results of the recent FCC auction of wireless licenses, it is entitled to a purchase price adjustment that would result in the purchase price being effectively doubled. Under the terms of the agreement, if we are obligated to pay a purchase price adjustment, we are entitled to pay such additional amounts in cash or Leap common stock, at our discretion.

Id.

On June 15, 2001, when the June 2001 Registration Statement became effective, Leap stock was trading at approximately $30.00 per share. AWG Rec. at 49-50 (AWG Compl. ¶ 50). Accordingly, a payment of $36.3 million in Leap stock (*i.e.*, a purchase price adjustment that would have "effectively doubled" the original purchase price for the Buffalo and Syracuse licenses) would have resulted in the issuance of approximately 1.2 million shares of Leap stock, (approximately 4% of the 34 million Leap shares then outstanding). Thus, when the June 2001

Registration Statement became effective, Leap could have paid an arbitral award to MCG without violating the "change of control" provisions of its vendor credit agreements.

F. Leap's Stock Price

Like other companies in the telecommunications industry, Leap suffered during the 2001-2002 economic downturn. Decreased demand and increased competition hampered growth and flattened revenues and profits throughout the entire sector. Leap's stock price reflected these tough market conditions. On June 8, 2001, Leap stock was trading at $30.42 per share. AWG Rec. at 49-50 (AWG Compl. ¶ 50). By August 23, 2001, it was under $18.00. *Id.* at 53-54 (AWG Compl. ¶ 57). By February 12, 2002, it fell to less than $10.00. *Id.* at 57-58 (AWG Compl. ¶ 64). By July 2002, it was trading below $1.00. *Id.* at 1537-1544 (chart of Leap's historical stock price data from March 15, 2001 through September 13, 2002 ("Stock Price Chart")).

AWG and the Whittington Plaintiffs do not allege that Leap made any corrective disclosures regarding the MCG dispute during this time period that could have accounted for this stock price decline. Rather, they claim Leap "withheld and concealed . . . at all times between the fall of 2000 and August, 2002" the "principal facts" concerning the MCG acquisition. AWG Rec. at 10 (AWG Compl. ¶ 6); Whitt. Rec. at 105 (FARC ¶ 6). Thus, Plaintiffs admit that Leap's stock price lost over 98% of its value ***before*** the Leap Defendants disclosed to the market the "principal facts" concerning the purchase price adjustment dispute with MCG.

G. The Outcome of the Purchase Price Adjustment Dispute

On or about August 5, 2002, the arbitrator in the purchase price adjustment dispute ruled against Leap and determined that MCG was entitled to a purchase price adjustment of $40.8 million, payable in cash or stock. AWG Rec. at 62-64 (AWG Compl. ¶ 67). Since the award was calculated in June 2002, when Leap's stock was trading at $1.90 per share, a payment of the award in stock would have required Leap to deliver 21,548,415 shares of Leap stock to MCG. *Id.* at 62-64 (AWG Compl. ¶ 67), 1537-1544 (Stock Price Chart).

On August 14, 2002, Leap announced that it had lost the purchase price adjustment dispute with MCG and that MCG was entitled to a purchase price adjustment of $40.8 million. *Id.* at 62-64 (AWG Compl. ¶ 67). Leap informed its shareholders that, if it paid the award in stock, at the now-diminished stock price, MCG would end up owning more than 28% of Leap's outstanding common shares on a fully diluted basis, which could trigger an event of default under Leap's vendor credit agreements. *Id.* at 62.

Based on various business considerations, including that Leap believed it did not have sufficient excess cash to pay the award, Leap elected to pay the award in stock. *Id.* at 1546-1547 (excerpts from Leap's quarterly results on Form 10-Q for the period ended September 30, 2002, as filed with the SEC on November 13, 2002). In November 2002, Leap disclosed that this issuance of stock had triggered an event of default under Leap's vendor credit agreements and that Leap's vendors had ceased funding new loan requests. *Id.* at 1546. Leap also disclosed that, because of a number of factors including Leap's inability to repay its debt or raise new funds, it was substantially likely that Leap's stock had no value. *Id.* Six months later, in April 2003, Leap filed for protection under the bankruptcy laws.

H. The American Wireless and Whittington Actions

On May 16, 2003, the Whittington Plaintiffs filed their FARC against the Leap Defendants and Qualcomm.[8] Whitt. Rec. at 101. The Whittington Plaintiffs' claims are focused on the Leap Defendants' alleged failure to disclose the "significant risk" that a "disastrous contractual arrangement" between Leap and MCG would result in a large arbitral award against Leap. *Id.* at 157-158 (FARC ¶ 54). The Whittington Plaintiffs allege that "the value of [their] investment in Leap Stock" was "eradicat[ed]" when the Leap Defendants finally disclosed that risk in August 2002. *Id.* at 105-106 (FARC ¶ 7). The Whittington Plaintiffs assert five claims

[8] Plaintiffs allege that Qualcomm is vicariously liable for any alleged violations of state or federal law the Leap Defendants committed during the relevant period because Qualcomm allegedly "control[led]" Leap. AWG Rec. at 36-39, 72-75 (AWG Compl. ¶¶ 29, 86-92); Whitt. Rec. at 142-145, 179-182 (FARC ¶¶ 30, 87-93).

for relief: under Sections 11 and 15 of the 1933 Act, Sections 717(a)(2) and 719 of the MSA, and common law.

On June 6, 2003, AWG, by the same counsel who filed the *Whittington* action, filed the *American Wireless* action against the Leap Defendants, Qualcomm, and UBS.[9] AWG Rec. at 7. With the exception of replacing the Whittington Plaintiffs with AWG and adding UBS as a defendant, the AWG Complaint is identical in all material respects to the FARC. AWG's claims are predicated on exactly the same facts as the *Whittington* action. *Compare* Whitt. Rec. at 102-106, 145-171 (FARC ¶¶ 1-7, 31-70) *with* AWG Rec. at 7-11, 40-65 (AWG Compl. ¶¶ 1-7, 31-69).[10] AWG also has asserted exactly the same causes of action as asserted in *Whittington*. *Compare* Whitt. Rec. at 172-192 (FARC ¶¶ 71-115) *with* AWG Rec. at 65-85 (AWG Compl. ¶¶ 70-114). Finally, like the Whittington Plaintiffs, AWG's claims are focused on the Leap Defendants' alleged failure to disclose the "significant risk" that a "disastrous contractual arrangement" between Leap and MCG would result in a large arbitral award against Leap. *Compare* Whitt. Rec. at 157-158 (FARC ¶ 54) *with* AWG Rec. at 51-52 (AWG Compl. ¶ 54).

STANDARD OF REVIEW

This Court reviews *de novo* a trial court's order denying a motion to dismiss. *See Sullivan v. Mounger*, 882 So.2d 129, 132 (Miss. 2004); *Allyn*, 725 So.2d at 98. This Court applies the same *de novo* standard to review a trial court's order denying a motion to compel arbitration. *See Terminix Int'l, Inc. v. Rice*, 904 So.2d 1051, 1054 (Miss. 2004); *McKenzie Check Advance of Miss., LLC v. Hardy*, 866 So.2d 446, 459-60 (Miss. 2004); *see also Holman Dealerships, Inc. v. Davis*, 934 So.2d 356, 358 (Miss. App. 2006).

[9] Plaintiffs allege that UBS acted as a broker for both AWG and the Whittington Plaintiffs in connection with AWG's sales of Leap stock and the Whittington Plaintiffs' subsequent purchases of Leap stock. AWG Rec. at 45-46 (AWG Compl. ¶ 39(d)); Whitt. Rec. at 151 (FARC ¶ 39(d)). Plaintiffs also allege that UBS made a number of false or misleading statements regarding Leap during the relevant period. AWG Rec. at 53-54 (AWG Compl. ¶¶ 57-58); Whitt. Rec. at 159-160 (FARC ¶¶ 57-58). AWG asserted claims against UBS. The Whittington Plaintiffs did not. The Circuit Court ordered AWG to arbitrate its claims against UBS.

[10] The AWG Complaint contains two paragraphs numbered "66." AWG Rec. at 58-62.

SUMMARY OF THE ARGUMENT

The Circuit Court erred in applying the law to the Leap Defendants' motions to dismiss. As the Leap Defendants demonstrated in the trial court, Plaintiffs' claims suffer from a number of purely legal deficiencies.

First, the specific factual admissions in the AWG Complaint and the FARC demonstrate that Plaintiffs do not have legal standing to assert claims under Section 11 of the 1933 Act. AWG admits that it acquired its Leap stock in a private offering that closed *before* the June 2001 Registration Statement was filed or became effective. Thus, AWG could not have purchased stock that was issued and sold pursuant to the June 2001 Registration Statement. With respect to the Whittington Plaintiffs, they admit that they purchased their Leap stock in the public stock market months after Leap filed the June 2001 Registration Statement. The Whittington Plaintiffs do not and cannot show that the shares they purchased were issued and sold pursuant to the June 2001 Registration Statement, as opposed to one of the other registration statements Leap filed over the years.

Second, Plaintiffs cannot show that the allegedly false or misleading statements in the June 2001 Registration Statement caused their alleged losses. Plaintiffs allege that the value of their Leap stock was "eradicated" in August 2002 when the Leap Defendants disclosed the principal facts concerning the purchase price adjustment dispute with MCG. But AWG admits that it disposed of all of its Leap stock by December 2001, eight months before the relevant disclosures were made. With respect to the Whittington Plaintiffs, they admit that Leap stock had already lost over 98% of its value by August 2002.

Third, on the face of the AWG Complaint, the FARC, and the documents incorporated therein, it is clear that the Leap Defendants disclosed the precise risks Plaintiffs contend were omitted from Leap's public filings.

Finally, with respect to Plaintiffs' claims for securities fraud under the MSA and common law, Plaintiffs fail to plead the essential element of scienter. Instead, they offer only general

allegations that the Leap Defendants acted with the requisite intent. Such allegations are insufficient as a matter of law.

Even if the Circuit Court correctly denied the Leap Defendants' motions to dismiss, it erred in applying the law to the Leap Defendants' motions to compel arbitration. At the outset, there can be no doubt that the FAA applies to the Agreement between Leap and AWG. The FAA applies to written arbitration provisions in contracts evidencing transactions in interstate commerce. Here, the Agreement evidences a transaction in interstate commerce because it involves the securities industry. Likewise, the *American Wireless* and *Whittington* actions are within the scope of the arbitration provision in the Agreement. These actions arise under and relate to the Agreement because they involve the principal transaction underlying the Agreement: Leap's issuance of stock to AWG in exchange for AWG's wireless licenses. These actions also involve the adequacy of the risk disclosures in the June 2001 Registration Statement, which Leap filed pursuant to its obligations under the Agreement.

Furthermore, the Leap Defendants are entitled to enforce the arbitration provision even though they did not sign the Agreement. Under the doctrine of equitable estoppel, non-signatory defendants may enforce an arbitration clause when, *inter alia*, plaintiffs allege substantially interdependent and concerted misconduct by both the non-signatory and one or more of the signatories. Here, the *American Wireless* and *Whittington* actions are based on the allegation that Leap and the Leap Defendants acted in concert to induce AWG and the Whittington Plaintiffs to exchange AWG's wireless licenses for Leap stock. Plaintiffs refer to Leap as a "Co-Conspirator" and allege that the Leap Defendants acted "in concert and conspiracy with" Leap.

Finally, the Whittington Plaintiffs can be compelled to arbitrate their claims even though they did not sign the Agreement. It is well settled that non-signatory plaintiffs are estopped from refusing to comply with an arbitration clause when they receive a direct benefit from the contract containing the arbitration clause. Here, the FARC rests on the allegation that the transaction between Leap and AWG that was reflected in the Agreement was intended to benefit the Whittington Plaintiffs individually by placing Leap stock in their hands. The Whittington

Plaintiffs further allege that they actually purchased in the public market the same Leap stock that Leap issued to AWG pursuant to the Agreement.

For the foregoing reasons, and as discussed more fully below, the Circuit Court erred in applying the law to the Leap Defendants' motions. The Circuit Court's orders should be reversed.

ARGUMENT

I. THE CIRCUIT COURT ERRED IN DENYING THE LEAP DEFENDANTS' MOTIONS TO DISMISS

In the Circuit Court, the Leap Defendants moved under Mississippi Rule of Civil Procedure 12(b)(6) for an order dismissing both the AWG Complaint and the FARC for failure to state a claim upon which relief can be granted. On a Rule 12(b)(6) motion to dismiss, courts consider the allegations in the complaint and documents incorporated by reference therein. *See Sennett*, 757 So.2d at 209. Courts may also take judicial notice of and consider documents of public record. *Allyn*, 725 So.2d at 98.

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

Both AWG and the Whittington Plaintiffs assert claims for relief under Section 11 of the 1933 Act.[11] Section 11 provides, in relevant part:

> In case any part of the registration statement, when such part became effective, contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading, any person acquiring such security . . . may, either at law or in equity, in any court of competent jurisdiction, sue.

15 U.S.C. § 77k(a). For the reasons set forth below, Plaintiffs' Section 11 claims fail as a matter of law and the Circuit Court should have dismissed them.

1. Plaintiffs lack legal standing to assert claims under Section 11

Plaintiffs cannot, as a matter of law, pursue claims under Section 11 because they lack legal standing under that section of the 1933 Act.

[11] State and federal courts have concurrent jurisdiction over claims brought under the 1933 Act. *See* 15 U.S.C. § 77v(a).

The 1933 Act regulates public offerings of securities. *See Gustafson v. Alloyd Co.*, 513 U.S. 561, 571-72 (1995). It is a far narrower statute than the Securities Exchange Act of 1934 (the "1934 Act"); unlike the 1934 Act, the 1933 Act is "chiefly concerned with disclosure and fraud in connection with offerings of securities - primarily . . . initial distributions of newly issued stock from corporate issuers." *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 752 (1975) (citation omitted).

Section 11 of the 1933 Act provides for civil liability for issuing a false or misleading registration statement. 15 U.S.C. § 77k(a). It provides relief to "any person acquiring such security." *Id.* "'[T]he natural reading of 'any person acquiring such security' is . . . that the buyer must have purchased a security issued under the registration statement at issue, rather than some other registration statement.'" *Rosenzweig v. Azurix Corp.*, 332 F.3d 854, 873 (5th Cir. 2003), quoting *Hertzberg v. Dignity Partners, Inc.*, 191 F.3d 1076, 1080 (9th Cir. 1999); *accord Joseph v. Wiles*, 223 F.3d 1155, 1159 (10th Cir. 2000). Thus, Section 11's standing provisions limit putative plaintiffs to the narrow class of persons who purchased the actual "shares issued and sold pursuant to the challenged registration statement." *7547 Corp. v. Parker & Parsley Dev. Partners, L.P.*, 38 F.3d 211, 223 (5th Cir. 1994); *see also Lee v. Ernst & Young, LLP*, 294 F.3d 969, 976-77 (8th Cir. 2002) (Section 11 standing is limited 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."). Courts dismiss Section 11 claims where plaintiffs fail to allege facts showing they have proper standing. *See, e.g., 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); *In re Alamosa Holdings, Inc.*, 382 F. Supp. 2d 832, 864 (N.D. Tex. 2005); *Moskowitz v. Mitcham Indus.*, No. CIV. A. 98-1244, 1999 WL 33606197, at *20 (S.D. Tex. Sept. 29, 1999).

a. AWG did not purchase Leap stock pursuant to the June 2001 Registration Statement

AWG alleges that it purchased Leap stock pursuant to the June 2001 Registration Statement. AWG Rec. at 75-76 (AWG Compl. ¶ 95). That conclusory assertion, however, is directly contradicted by the factual allegations in the AWG Complaint. As alleged in the AWG Complaint, Leap issued 1,900,829 shares of Leap stock to AWG on June 8, 2001. *Id.* at 9, 50-51 (AWG Compl. ¶¶ 3, 52). Leap issued and "sold" those shares to AWG in a private offering that was not subject to the registration requirements of the 1933 Act. *Id.* at 1500-1501 (Section 4.9 of the Agreement). As AWG expressly "acknowledge[d] and agree[d]" in its Agreement with Leap, "the Leap shares have not been registered under the Securities Act [of 1933], or under any state securities laws, and are being offered and sold in reliance upon federal and state exemptions for transactions not involving any public offering." *Id.* at 1501-1502 (Section 4.10 of the Agreement); *see also id.* at 1495, 1500-1501 (Sections 2.2 and 4.9 of the Agreement).

On June 11, 2001, three days ***after*** AWG acquired its Leap stock in the private offering, Leap filed the June 2001 Registration Statement. Leap did so for the express purpose of enabling AWG to ***sell*** its Leap shares in the public market. *Id.* at 44 (AWG Compl. ¶ 38(h)) ("Leap agreed, within 30 days after the Closing, to file with the SEC a registration statement under the federal Securities Act of 1933 . . . which would permit [AWG] to resell the above-mentioned Leap Stock to the public."); *see also id.* at 1507 (Section 7.4(a) of the Agreement). In the June 2001 Registration Statement, Leap explained that (i) AWG already owned the shares that were being offered for sale; (ii) the shares that were being offered for sale "were originally issued by [Leap] to [AWG] in connection with [Leap's] acquisition of wireless licenses;" and (iii) the shares were being offered for sale by AWG, ***not Leap***. *Id.* at 1321, 1354. The June 2001 Registration Statement became effective on June 15, 2001, seven days ***after*** AWG acquired its Leap stock in the earlier private offering. *Id.* at 9, 50-52 (AWG Compl. ¶¶ 3, 4, 52, 54).

The allegations in the AWG Complaint and the structure of the transaction between Leap and AWG establish conclusively that AWG did not purchase Leap stock pursuant to the June 2001 Registration Statement. Rather, AWG acquired its Leap stock in a private offering that

occurred before the June 2001 Registration Statement was filed or became effective. Thus, AWG could not have purchased Leap stock that was issued and sold pursuant to the June 2001 Registration Statement. Under these circumstances, AWG simply cannot establish that it has standing to assert a claim under Section 11. *See Turner v. First Wisconsin Mortgage Trust*, 454 F. Supp. 899, 911 (E.D. Wis. 1978) (plaintiff who purchased her shares in August of 1972 "obviously" could not prove that she had standing to pursue a Section 11 claim for an allegedly false registration statement that was filed in February of 1973); *In re Penn Cent. Sec. Litig.*, 357 F. Supp. 869, 877 (E.D. Pa. 1973) ("open market sellers" do not have standing under Section 11), *aff'd*, 494 F.2d 528 (3d Cir. 1974).[12]

b. The Whittington Plaintiffs cannot "trace" their Leap stock to the June 2001 Registration Statement

By their own admission, the Whittington Plaintiffs did not acquire their shares directly from Leap. Rather, they purchased their Leap stock "in the public market" months after Leap filed the June 2001 Registration Statement. Whitt. Rec. at 104, 115-125, 185-186 (FARC ¶¶ 4, 15, 105). At the times of their purchases, over 34 million shares of Leap stock were outstanding and being traded in the public market. AWG Rec. at 1332 (June 2001 Registration Statement). Those shares were issued pursuant to several different registration statements going back to September 1998. Whit Rec. at 572-590 (cover pages of several of Leap's SEC filings, each of which reflects issuances of Leap common stock). The number of Leap shares registered pursuant to the June 2001 Registration Statement was approximately 5½% of the total number of

[12] In the Circuit Court, AWG argued that it has standing to pursue a Section 11 claim because it "did not purchase *all* of its [Leap] shares before the [June 2001] Registration Statement was filed." AWG Rec. at 2665 (AWG's Opposition to the Leap Defendants' Motion to Dismiss) (emphasis added). Specifically, AWG asserted that it purchased "190,083 shares of Leap Stock [during] June 2002 and these shares would have been purchased pursuant to the [June 2001] Registration Statement." *Id.* Because this assertion appears nowhere in the AWG Complaint, it cannot provide a basis for Section 11 standing. Moreover, the AWG Complaint fails to plead any facts that would suggest these "190,083 shares of Leap Stock" were issued and sold pursuant to the June 2001 Registration Statement. *See Davidco Investors*, [2006-2006 Transfer Binder] Fed. Sec. L. Rep. (CCH) at 98,448 (dismissing complaint for lack of standing; "[i]n order to have standing to sue under § 11, a plaintiff must show that his shares were issued pursuant to the particular registration statement alleged to be defective.").

Leap shares then outstanding. AWG Rec. at 1332 (June 2001 Registration Statement). Thus, when the Whittington Plaintiffs purchased their Leap stock, they had (at most) a 5½% chance of acquiring shares that were issued and sold pursuant to the June 2001 Registration Statement.

The Whittington Plaintiffs nevertheless contend they can "trace" their shares to the June 2001 Registration Statement because they purchased their Leap stock in the public market at around the same time that AWG was selling its Leap shares in the public market. Whitt. Rec. at 104, 150-152, 158-159, 172-173, 182-183 (FARC ¶¶ 4, 39, 56, 73, 96). The Fifth Circuit recently rejected a similar attempt at "tracing" in *Krim v. pcOrder.com*. In *Krim*, the Fifth Circuit held that plaintiffs cannot rely on "statistical tracing" to establish standing for purposes of Section 11. *See* 402 F.3d 489, 496-97 (5th Cir. 2005). In that case, pcOrder.com issued roughly 2.5 million shares of stock in an initial public offering (the "IPO"). Shortly thereafter, certain pcOrder insiders sold their "insider shares" into the public market. pcOrder issued a small number of additional shares in a secondary offering (the "SPO") later that year. When plaintiffs purchased their shares, the IPO and SPO shares constituted 91% of the outstanding shares in the public market; the insider shares comprised the remaining 9%. Plaintiffs filed an action alleging that the registration statements for the IPO and SPO were false and misleading. The Fifth Circuit found that while plaintiffs had a high probability of having purchased stock that was issued and sold pursuant to the registration statements for the IPO or the SPO, there was a chance (however slight) that they had purchased "insider shares." The Court found that even this slight chance that plaintiffs had not purchased shares issued and sold pursuant to the challenged registration statements prohibited them from pursuing Section 11 claims. *Id.* at 500-02. The Court explained:

> 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 the tainted shares . . . Appellants here cannot meet the statutory standing requirement of Section 11 merely be showing that they jumped into a potentially polluted 'pool' of stock.

Id. at 500; *see also id.* 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.").

Courts in other jurisdictions have similarly rejected "statistical tracing" as a basis for establishing Section 11 standing. *See, e.g., Davidco Investors*, [2005-2006 Transfer Binder] Fed. Sec. L. Rep. (CCH) at 98,448-449 ("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."); *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) ("[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") (citation omitted).

Here, because the Whittington Plaintiffs purchased their Leap shares in "the public market" (*see* Whitt. Rec. at 104, 115-125, 186-186 (FARC ¶¶ 4, 15, 105)), they cannot establish with certainty that the particular 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. Notably, the Whittington Plaintiffs have a much weaker case than the plaintiffs in *Krim*. In *Krim*, plaintiffs had at least a 90% probability of having purchased shares that were issued pursuant to the allegedly misleading registration statements. *See Krim*, 402 F.3d at 492. If a 90% likelihood does not provide sufficient certainty to support standing, surely a 5½% chance cannot support the Whittington Plaintiffs' standing here. *See Alamosa Holdings, Inc.*, 382 F. Supp. 2d at 864 ("mere probability that a plaintiff can trace shares is clearly insufficient" for Section 11 standing).

In the Circuit Court, the Whittington Plaintiffs argued that the issue of Section 11 standing "is a fact-intensive inquiry which cannot be resolved on a preliminary dismissal motion, where no discovery has yet occurred." Whitt. Rec. at 1640 (Whittington Plaintiffs' Opposition to the Lead Defendants' Motion to Dismiss) (emphasis in original). That is not an accurate statement of the law. Indeed, the United States District Court for the Middle District of Florida recently rejected a similar argument in *Davidco Investors*. In that case, plaintiff argued that the

issue of Section 11 standing is "beyond the scope of a motion to dismiss." [2005-2006 Transfer Binder] Fed. Sec. L. Rep. (CCH) at 98,449. Relying on the Fifth Circuit's decision in *Krim*, the Court rejected plaintiff's argument and held that "standing is an element of subject matter jurisdiction, which may be determined on a motion to dismiss." *Id.* The Court then dismissed plaintiff's Section 11 claim because he "offered no evidence in support of his contention that the shares that he purchased are traceable to the prospectus." *Id.* Similarly, in *Alamosa Holdings*, the United States District Court for the Northern District of Texas dismissed plaintiff's Section 11 claim because the Court 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 Circuit Court should have dismissed the Whittington Plaintiffs' Section 11 claims for the same reason.[13]

2. American Wireless Cannot Demonstrate That Its Alleged Losses Were Caused By the Leap Defendants

AWG cannot, as a matter of law, demonstrate that its alleged losses were caused by the Leap Defendants. Section 11(e) limits a plaintiff's damages to the difference between the offering price and the value of the security when the suit was filed or when the security was sold. 15 U.S.C. § 77k(e). The statute also provides an affirmative defense known as "negative causation." Specifically, Section 11(e) provides:

> [I]f the defendant proves that any portion or all of such damages represents other than the depreciation in value of such security resulting from such part of the registration statement, with respect to which his liability is asserted, not being true or omitting to state a material fact required to be stated therein or necessary to make the statements therein not misleading, such portion of or all such damages shall not be recoverable.

[13] It is worth noting that all of the facts bearing on whether the Whittington Plaintiffs can demonstrate standing for purposes of Section 11 are solely within the possession of the Whittington Plaintiffs. The Leap Defendants do not know and could not reasonably be expected to know whether the shares of Leap stock the Whittington Plaintiffs allegedly purchased in the open market were or were not issued and sold pursuant to the June 2001 Registration Statement. Thus, no amount of discovery from the Leap Defendants can help the Whittington Plaintiffs in satisfying this essential element of their claims.

Thus, where defendants can show that factors other than the alleged omissions in the registration statement caused the depreciation in the stock price, plaintiffs have no claim. *See id.*

Although "negative causation" is ordinarily raised as an affirmative defense, courts have considered such arguments on a motion to dismiss where the facts are beyond dispute. *See Alamosa Holdings*, 382 F. Supp. 2d at 865 ("If the negative causation defense is apparent on the face of a complaint, dismissal . . . of the Section 11 claim is proper."); *In re Merrill Lynch & Co., Inc. Research Reports Sec. Litig.*, 289 F. Supp. 2d 429, 437 (S.D.N.Y. 2003) ("Where it is apparent from the face of the complaint that the plaintiff cannot recover her alleged losses, dismissal of the complaint . . . is proper."); *In re McKesson HBOC, Inc. Sec. Litig.*, 126 F. Supp. 2d 1248 (N.D. Cal. 2000) (dismissing Section 11 claim where it was clear on the face of the complaint that certain plaintiffs could not establish that defendants' alleged misstatements caused their damages).

Here, it is readily apparent that the Leap Defendants' alleged omissions did not cause AWG's alleged losses. AWG alleges that its losses were "[t]he direct result of the eventual disclosures of the [allegedly] concealed facts" regarding the MCG transaction, and that these "eventual disclosures" were made "in August 2002." AWG Rec. at 10, 64 (AWG Compl. ¶¶ 7, 68). However, AWG also alleges that it disposed of all its Leap stock by December 2001. AWG Rec. at 53 (AWG Compl. ¶ 56). Obviously, the Leap Defendants' alleged omissions and the August 2002 disclosure of those omissions could not have had any negative affect on the value of AWG's Leap stock when AWG disposed of all its shares ***eight months before the relevant disclosures were even made.*** AWG Rec. at 9, 53, 62-64 (AWG Compl. ¶¶ 4, 56, 67). Under these circumstances, AWG cannot show that it suffered any damages as a result of the Leap Defendants' alleged omissions. *See McKesson HBOC*, 126 F. Supp. 2d at 1262 (plaintiffs who sold their stock prior to corrective disclosures could not show that defendants' alleged misstatements caused their damages). For this additional reason, the Circuit Court should have dismissed AWG's Section 11 claim.

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

To state a Section 11 claim, plaintiffs must allege that a registration statement contained a material misrepresentation or omission. *See* 15 U.S.C. § 77k(a). A misrepresentation or omission is material if "it would have misled a reasonable investor about the nature of his or her investment." *In re Stac Elecs. Sec. Litig.*, 89 F.3d 1399, 1403-04 (9th Cir. 1996) (citation omitted). A court can asses the adequacy or materiality of a statement or omission at the pleading stage if it is "so obvious that reasonable minds could not differ." *Id.* at 1405; *see also Kapps v. Torch Offshore, Inc.*, 379 F.3d 207, 216 (5th Cir. 2004) ("[a]ppellants claim that materiality should be a question of fact for the jury, but many Section 11 cases have been properly dismissed on the pleadings for lack of materiality").

It is well established that a Section 11 claim must be dismissed where defendants disclose the precise risks that plaintiffs claim were omitted. *See Melder v. Morris*, 27 F.3d 1097, 1100-01 (5th Cir. 1994) (dismissing Section 11 claim where prospectuses disclosed risks plaintiff asserted were omitted); *see also Olkey v. Hyperion 1999 Term Trust, Inc.*, 98 F.3d 2, 5 (2d Cir. 1996) (dismissing Section 11 claim where "[t]he prospectuses warn investors of exactly the risk plaintiffs claim was not disclosed."); *Hinerfeld v. United Auto Group*, [1998 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 90,264, at 91,167 (S.D.N.Y. July 15, 1998) ("Courts will dismiss claims under [Section 11] if they charge omissions of what was in fact disclosed. . . . If the plaintiffs' claims of misleading disclosures are contradicted by disclosures made on the face of the prospectus, then no additional facts can prove the claims and dismissal is proper.").

Here, Plaintiffs allege that the June 2001 Registration Statement was false and misleading because the Leap Defendants failed to disclose the risks associated with the MCG acquisition and the potential consequences of an adverse finding in the MCG arbitration. AWG Rec. at 51-52 (AWG Compl. ¶ 54); Whitt. Rec. at 157-158 (FARC ¶ 54). Leap disclosed these risks.

a. Leap disclosed that additional share issuances would dilute the value of Leap stock

Plaintiffs allege that the Leap Defendants failed to disclose the risks that "would bear on dilution of [AWG's] equity and other holders' equity in Leap." AWG Rec. at 52 (AWG Compl. ¶ 54); Whittington Rec. at 157 (FARC ¶ 54). The June 2001 Registration Statement included a boldfaced, all-capital-lettered warning: "**YOUR OWNERSHIP INTEREST IN LEAP WILL BE DILUTED UPON ISSUANCE OF SHARES WE HAVE RESERVED FOR FUTURE ISSUANCE.**" AWG Rec. at 1332. In the June 2001 Registration Statement, Leap told its investors that 34,079,432 shares of its stock was then outstanding and that it had reserved for future issuance 22,633,849 additional shares. *Id.* Leap added, "[t]he issuance of these additional shares will reduce your percentage ownership in Leap." *Id.* Leap also expressly warned that, if the value of wireless licenses increased or if the price of Leap stock decreased, Leap might have to issue more shares of stock to acquire wireless licenses. *Id.*

Leap also made clear that additional share issuances could cause the market price of Leap stock to decline. Leap stated: "Dilution of the outstanding number of shares of our common stock could adversely affect prevailing market prices for our common stock." *Id.* at 1334. Consequently, in the June 2001 Registration Statement, Leap apprised Plaintiffs that Leap would issue more shares, that these stock issuances would dilute the market value of Plaintiffs' shares, and this dilution could cause Leap to issue more shares. *Id.*

b. Leap disclosed the potential consequences of its dispute with MCG

Plaintiffs contend that the Leap Defendants failed to disclose "the amount of shares . . . that Leap would have to deliver to fulfill such 'adjustments' to MCG" and "the risks and consequences that would flow from" such a purchase price adjustment. AWG Rec. at 52 (AWG Compl. ¶ 54); Whitt. Rec. at 157 (FARC ¶ 54). At the outset, it bears noting that there is no way the Leap Defendants could have calculated the amount of shares that Leap would have to deliver to MCG since the amount would depend on the value of Leap stock at the time of the award.

Leap disclosed, however, that the purchase price adjustment MCG was seeking would effectively "double" the purchase price of the transaction and that Leap might pay this adjustment in stock:

> In the pending acquisition of wireless licenses in Buffalo and Syracuse, New York that we refer to above, the seller has asserted that based on the results of the recent FCC auction of wireless licenses, *it is entitled to a purchase price adjustment that would result in the purchase price being effectively doubled.* Under the terms of the agreement, if we are obligated to pay a purchase price adjustment, we are entitled to pay such additional amounts *in cash or Leap common stock*, at our discretion."

AWG Rec. at 1332-1333 (June 2001 Registration Statement) (emphasis added).

Accordingly, in the June 2001 Registration Statement, Leap warned Plaintiffs that Leap might have to pay a large purchase price adjustment in Leap stock as a consequence of the MCG dispute. Plaintiffs were also put on notice that any such purchase price adjustment could dilute the value of Plaintiffs' holdings of Leap stock and (for the reasons discussed below) potentially could trigger a default under Leap's "lending and financing arrangements."

c. Leap disclosed that it was subject to restrictive loan covenants and additional share issuances could trigger an event of default

Plaintiffs claim that the Leap Defendants failed to disclose that the purchase price adjustment dispute with MCG created a "significant risk that Leap's covenants in its lending and financing arrangements would be violated." AWG Rec. at 52 (AWG Compl. ¶ 54); Whitt. Rec. at 157-158 (FARC ¶ 54). The June 2001 Registration Statement contained a boldfaced, all-capital-lettered warning: **"HIGH LEVELS OF DEBT COULD ADVERSELY AFFECT OUR BUSINESS AND FINANCIAL CONDITION."** AWG Rec. at 1334. As of March 31, 2001, Leap's long-term debt was almost $900 million. *Id.* at 1550 (Leap's quarterly results on Form 10-Q for period ended March 31, 2001, as filed with the SEC on May 15, 2001). Leap also disclosed that certain of Leap's senior debt obligations required Leap to maintain certain ratios and satisfy certain tests. *Id.* at 1334-1336 (June 2001 Registration Statement). Leap warned that its failure to satisfy these tests could mean it would be in default under its senior debt and be unable to make payments under its outstanding notes: "Any defaults that result in a suspension of further borrowings under the vendor facilities or acceleration of our obligations to repay the

outstanding balances under the vendor facilities would have a material adverse effect on our business and our financial condition." *Id.* at 1336. As noted, the precise vendor credit agreements to which Leap referred were attached to Leap's SEC filings, which were themselves incorporated by reference into the June 2001 Registration Statement. *See supra* at 8 & n.5, n.6. Those credit agreements defined an event of default to include a "change of control," which would occur if an entity other than Leap acquired beneficial ownership of Leap stock representing 20% or more of the combined voting power of all Leap shares.[14]

In sum, the June 2001 Registration Statement specifically disclosed that:

- Leap stock would be diluted whenever Leap issued more shares;
- The dispute with MCG could result in Leap's having to pay double the purchase price in Leap stock; and
- Leap had a significant debt load and was obligated to comply with restrictive loan covenants, one of which prohibited any entity other than Leap from owning 20% or more of Leap's stock.

Leap and MCG were only in the early stages of the purchase price adjustment dispute when the Leap Defendants were issuing these warnings. At the time, Leap stock was trading at approximately $30.00 per share. Plaintiffs are effectively accusing the Leap Defendants of failing to predict in June 2001 that, over one year later (in August 2002), there would be an unfortunate confluence of negative events – *i.e.*, Leap would lose the purchase price adjustment dispute with MCG in its entirety, Leap would not have sufficient cash to pay the purchase price adjustment to MCG, and Leap stock would be trading at less $1.00 per share. Nobody could have predicted these events. Nor do the federal securities laws require such prediction. *See Stac*,

[14] *See* AWG Rec. at 1604, 1611-1612, 1676-1678 (Credit Agreement between Cricket Communications Holdings, Inc., Cricket Communications, Inc., and Ericsson Credit AB, dated October 20, 2000), 1777, 1784, 1849-1850 (Credit Agreement between Cricket Communications Holdings, Inc., Cricket Communications, Inc. and Lucent Technologies, dated September 20, 1999, as Amended and Restated as of October 20, 2000), and 2077, 2084, 2151-2153 (Credit Agreement dated as of August 28, 2000 among Cricket Communications Holdings, Inc., Cricket Communications, Inc. and Nortel Networks, Inc.).

89 F.3d at 1406 ("[A] company is not required to forecast future events"). They require only the disclosure of material facts. Since Plaintiffs fail to allege the omission of any such facts, their Section 11 claims fail as a matter of law and should have been dismissed. *Cf. City of Philadelphia v. Fleming Cos.*, 264 F.3d 1245, 1268 (10th Cir. 2001) (dismissing claim under Section 10(b) of the 1934 Act where defendants failed to disclose the existence of a lawsuit that resulted in a large verdict against the company; "we cannot find Defendants liable [for securities fraud] for failing to anticipate the full extent of their potential exposure in the David's litigation").

B. The Circuit Court Should Have Dismissed Plaintiffs' Section 15 Claims

Both AWG and the Whittington Plaintiffs assert claims under Section 15 of the 1933 Act. Section 15, entitled "Liability of Controlling Persons," provides, in relevant part, that "[e]very person who . . . controls any person liable under section 11 or 12, shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable . . ." 15 U.S.C. § 77o.

A prerequisite to a finding of controlling person liability under Section 15 is a finding that the controlled person violated Sections 11 or 12 of the 1934 Act. *See Kapps*, 379 F.3d at 221; *Dennis v. General Imaging, Inc.*, 918 F.2d 496, 508-09 (5th Cir. 1990). Since Plaintiffs cannot state a claim under Section 11 (*see supra* at 17-29), dismissal of their Section 11 claims also requires dismissal of their Section 15 control person liability claims. *See, e.g., R2 Invs. LDC v. Phillips*, 401 F.3d 638, 641 (5th Cir. 2005) (control person liability may not be imposed absent an underlying violation).

Even if Plaintiffs had pleaded adequately a primary violation of the 1933 Act (they have not), their control person allegations against certain of the Leap Defendants fail. In particular, Plaintiffs assert Section 15 claims against former outside directors of Leap (Messrs. Jarvis, Targoff, Dynes, Williams, Chase and Ms. Barad). AWG Rec. at 21-23, 26-32 (AWG Compl. ¶¶ 17, 20-24); Whitt. Rec. at 127-129, 132-138 (FARC ¶¶ 18, 21-25). The only facts Plaintiffs have alleged to support Section 15 controlling person liability against these individuals are (a) they

were members of the board of Leap (but *not* also officers) and (b) they held small amounts of Leap stock. AWG Rec. at 21-23, 26-32 (AWG Compl. ¶¶ 17, 20-24); Whitt. Rec. at 127-129, 132-138 (FARC ¶¶ 18, 21-25). As a matter of law, these facts are insufficient to state a claim for controlling person liability. *See Dennis*, 918 F.2d at 509-10 (status as director, minority stock ownership insufficient); *Sloane Overseas Fund, Ltd. v. Sapiens Int'l Corp.*, 941 F. Supp. 1369, 1378 (S.D.N.Y. 1996) ("Director status alone does not establish control person liability" under Section 20 of the 1934 Act; 8% stock ownership insufficient).[15]

Similarly, Plaintiffs attempt to state a Section 15 claim against Leap's Senior Vice Presidents of Public Affairs (Mr. Pegg) and Human Resources (Mr. Stephens). Here, too, Plaintiffs allege nothing about these individuals other than they were officers of Leap who held small amounts of Leap stock. AWG Rec. at 34-36 (AWG Compl. ¶¶ 27-28); Whitt. Rec. at 141-142 (FARC ¶¶ 28-29). These facts are not enough to support a Section 15 claim. *See, e.g., Dennis*, 918 F.2d at 509-10 (nominal stock ownership insufficient). Furthermore, Messrs. Pegg's and Stephens' positions in "public affairs" and "human resources," respectively, suggest that these individuals would not have been involved in the acts and transactions alleged in this case, let alone would have exercised control over any person allegedly liable under Section 11. *See Cohen v. Citibank, N.A.*, 954 F. Supp. 621, 629 (S.D.N.Y. 1996) (pleading legal conclusions or a defendant's mere status – *i.e.*, that the defendant "[wa]s a corporate officer, director, or shareholder" – is insufficient). Accordingly, the Circuit Court should have dismissed the Section 15 claims against Messrs. Jarvis, Targoff, Dynes, Williams, Chase, Pegg, Stephens and Ms. Barad.

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

Both AWG and the Whittington Plaintiffs assert fraud claims under Section 717(a)(2) of the MSA and common law. To state a claim under Section 717(a)(2) or common law, plaintiff

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[15] Section 15 and its analogue in the 1934 Act, Section 20(a), are interpreted identically. *See Pharo v. Smith*, 621 F.2d 656, 673 (5th Cir.), *aff'd in relevant part*, 625 F.2d 1226 (5th Cir. 1980).

must plead that defendants intentionally made untrue statements or omissions of material fact which plaintiff relied upon and which caused plaintiff's losses. *See* Miss. Code Ann. § 75-71-717(a)(2) (requiring an "untrue statement of material fact or any omission to state a material fact necessary in order to make the statements made . . . not misleading"); *Geisenberger v. John Hancock Distribs., Inc.*, 774 F. Supp. 1045, 1051 (S.D. Miss. 1991) (Section 717(a)(2) "contain[s] an implicit requirement of reasonable reliance"); *Owens Corning v. R.J. Reynolds Tobacco Co.*, 868 So.2d 331, 343 (Miss. 2004) (setting forth elements to establish common law fraud); *Russell v. S. Nat'l Foods, Inc.*, 754 So.2d 1246, 1256 (Miss. 2000) (plaintiff asserting claims under the MSA must show proximate causation and "intentional or deceptive conduct"). As discussed more fully below, Plaintiffs fail to allege facts to support key elements of these claims.

1. The Allegedly Omitted Information Could Not Have Caused Plaintiffs' Losses

A plaintiff asserting claims under Section 717(a)(2) or common law fraud must plead facts showing that the defendants' alleged misrepresentations or omissions "'touched upon' the reasons for [plaintiff's] loss or caused the loss itself in some reasonably direct way." *Geisenberger*, 774 F. Supp. at 1051 ("loss causation" required under Section 717(a)(2) of the MSA); *see Russell*, 754 So.2d at 1256 (plaintiff asserting claims based on the MSA and common law fraud must show proximate cause). Here, Plaintiffs have not pleaded adequately that the Leap Defendants' alleged omissions caused their alleged losses.

AWG alleges that its losses were "[t]he direct result of the eventual disclosures of the [allegedly] concealed facts" regarding the MCG transaction, and that these "eventual disclosures" were made "in August 2002." AWG Rec. at 10-11, 64 (AWG Compl. ¶¶ 7, 68). However, AWG also alleges that it had disposed of all its Leap stock by December 2001. AWG Rec. at 53 (AWG Compl. ¶ 56). Obviously, the Leap Defendants' alleged omissions and the August 2002 disclosure of those omissions could not have had any negative affect on the value of AWG's Leap stock when AWG disposed of all its shares eight months before the relevant

disclosures were even made. AWG Rec. at 9, 53, 62-64 (AWG Compl. ¶¶ 4, 56, 67). Under these circumstances, AWG cannot show that it suffered any damages as a result of the Leap Defendants' alleged omissions. *See Arduni/Messina P'ship v. Nat'l Med. Fin. Servs. Corp.*, 74 F. Supp. 2d 352, 361-362 (S.D.N.Y. 1999) (plaintiffs who sold their stock before the defendants' allegedly fraudulent scheme was disclosed could not establish "loss causation"). Accordingly, AWG cannot plead or prove loss causation and its claims should have been dismissed.

With respect to the Whittington Plaintiffs, they claim that the Leap Defendants' alleged omissions caused Leap's stock price to be inflated during the relevant period and that the price of Leap's stock came crashing down to $0.30 a share once the "truth" was revealed on August 14, 2002. *See* Whitt. Rec. at 105-106, 155, 170-171 (FARC ¶¶ 7, 50, 69). However, the Whittington Plaintiffs concede that Leap's stock price had already lost ***over 98% of its value*** by August 13, 2001 (the day before the alleged "truth" was revealed to the market).[16] Under these circumstances, it is evident that the Leap Defendants' alleged omissions did not cause the decline in Leap's stock price. Accordingly, the Whittington Plaintiffs cannot plead or prove loss causation and their claims should be dismissed. *See Bastian v. Petren Res. Corp.*, 892 F.2d 680, 684-85 (7th Cir. 1990) (dismissing complaint where it was apparent that market forces, not defendants' misstatements, caused plaintiffs' alleged losses).

The Southern District of New York's decision in *Merrill Lynch* is on point. In that case, plaintiffs filed suit against a Merrill Lynch mutual fund, claiming that the defendants failed to disclose in the registration statements for the mutual fund conflicts of interest between the fund and certain Merrill Lynch analysts. Plaintiffs alleged that the value of the mutual fund declined when these conflicts were subsequently disclosed to the public on April 8, 2002 (when the New York Attorney General filed a complaint against Merrill Lynch in connection with these alleged

[16] The Whittington Plaintiffs concede that Leap's stock fell from $30.42 to $17.44 between June 8, 2001 and August 23, 2001, from $17.44 to $9.42 between August 23, 2001 and February 12, 2002, and from $9.42 to $0.55 between February 12, 2002 and August 13, 2002. *See* Whitt. Rec. at 155, 159, 163, 168-170 (FARC ¶¶ 50, 57, 64, 68).

conflicts). Plaintiffs also alleged, however, that the mutual fund had lost over 74% of its value by March 31, 2001 (over one-year *before* the disclosure of the allegedly concealed conflicts). 289 F. Supp. 2d at 437. The Court dismissed plaintiffs' claims on the grounds that they, *inter alia*, failed to plead adequately that the defendants' alleged omissions caused their losses. The Court explained: "'[P]rice decline before disclosure may not be charged to defendants.'" *Id.*; *see also Alamosa*, 382 F. Supp. 2d at 865 ("As a general rule price decline before disclosure of the truth may not be charged to defendants.") (citation omitted).

As explained above, the FARC demonstrates that the alleged failure to disclose the risks associated with the MCG dispute was not the cause of Leap's share price decline, and thus not the cause of the Whittington Plaintiffs' alleged losses. By the time the MCG arbitration award was announced, Leap's stock had already lost over 98% of its value. Accordingly, the Whittington Plaintiffs cannot plead and prove loss causation and the Circuit Court should have dismissed their claims.

2. Leap Disclosed the Risks That AWG and the Whittington Plaintiffs Claim Were Omitted

A claim for securities or common law fraud must be dismissed where the defendants have disclosed the precise risks the plaintiff claims were omitted. *See* Miss. Code Ann. § 75-71-717(a)(2) (a buyer who knows of the untruth or omission may not recover); *Owens Corning*, 868 So.2d at 343 (plaintiff who knows of untruth may not recover). This Court has previously rejected attempts by investors to predicate liability for securities fraud upon allegedly omitted facts that were actually disclosed. *See Allyn*, 725 So.2d at 103.

In *Allyn*, the defendants prepared and distributed a private placement memorandum (the "PPM") to raise capital to build a casino. *Id.* at 97. Certain investors suffered a loss when the casino encountered financial and construction problems. *Id.* The investors brought a claim under, *inter alia*, the MSA, asserting that the PPM failed to disclose the risks associated with investing in the casino business. *Id.* This Court reviewed the PPM in its entirety and dismissed the case, holding that "claims of concealment are not well-founded" where "[t]he Defendants'

filings with the SEC openly reflect the problems with the [investment]." *Id.* at 100. The Court explained: "It is virtually impossible to read the PPM in its entirety without realizing the risky nature of the casino venture. Additionally, all of the complaints alleged by the Investors are addressed by the PPM. The Investors are merely seeking a scapegoat for their poor investment." *Id.* at 104.

The same is true here. Plaintiffs' claims focus on the Leap Defendants' alleged failure to disclose the risks associated with the MCG transaction. As shown above (*see supra* at 25-29), Leap disclosed these risks. Plaintiffs' state law claims should have been dismissed for this reason alone.

3. Plaintiffs Fail to Allege That the Leap Defendants Acted With Scienter

The AWG Complaint and the FARC are also devoid of any allegation that the Leap Defendants acted with scienter. To state a cause of action under Section 717, plaintiff must plead that defendants engaged in, "[a]t the very least, intentional or deceptive conduct." *Russell*, 754 So.2d at 1256 (citing *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976)). Similarly, to establish a claim for common law fraud, plaintiff must show that the defendants knew that a representation was false and intended the plaintiffs to rely on it. *Owens Corning*, 868 So.2d at 343. Here, Plaintiffs have not made any scienter allegations that are specific to any of the Leap Defendants. Instead, they have provided only general allegations that the Leap Defendants, as a group, acted with scienter. AWG Rec. at 81-84 (AWG Compl. ¶¶ 109-111); Whitt. Rec. at 188-191 (FARC ¶¶ 110-112). This boilerplate fails to allege specific facts to support an inference that the Leap Defendants acted with the intent to deceive. *See, e.g., Lou v. Belzberg*, 728 F. Supp. 1010, 1022-23 (S.D.N.Y. 1990) (dismissing securities and common law fraud claims for failure to allege sufficient facts to support an inference of fraudulent intent; "when more than one

defendant is charged with fraud, the complaint must particularize each defendant's alleged participation in the fraud").[17]

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

In the Circuit Court, the Leap Defendants also moved under the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.* (the "FAA") to compel arbitration of Plaintiffs' claims. Section 2 of the FAA provides, in pertinent part:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . *shall* be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2 (emphasis added).

In enacting Section 2 of the FAA, "Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration." *Terminix*, 904 So.2d at 1054, quoting *Russell v. Performance Toyota, Inc.*, 826 So.2d 719, 722 (Miss. 2002). Congress thus "mandated [the] enforce[ment] [of] arbitration agreements contained in contracts involving commerce." *Terminix*, 904 So.2d at 1055; *accord IP Timberlands Operating Co. v. Denmiss Corp.*, 726 So.2d 96, 107 (Miss. 1998), quoting *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984).

The FAA establishes "a strong presumption in favor of arbitration." *IP Timberlands*, 726 So.2d at 107. Under the FAA, "[d]oubts as to the availability of arbitration must be resolved in favor of arbitration." *Terminix*, 904 So.2d at 1054, quoting *Russell*, 826 So.2d at 722; *see also Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983) ("The

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[17] Since Plaintiffs fail to plead a predicate claim for primary liability under the MSA or common law, their claim for "control person" or "aiding and abetting" liability under Section 719 of the MSA must also fail. *See Tatum v. Smith*, 887 F. Supp. 918, 924 n.6 (N.D. Miss. 1995) (MSA "mirrors the federal securities act" and should be interpreted similarly), *aff'd sub nom. Tatum v. Legg Mason Wood Walker, Inc.*, 83 F.3d 121 (5th Cir. 1996); *see also R2 Invs.*, 401 F.3d at 641 (control person liability may not be imposed absent an underlying violation).

Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration . . ."). As this Court observed in *IP Timberlands*, "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 compelled to arbitrate their claims and "a stay pending arbitration should be granted." 726 So.2d at 107, quoting *Wick v. Atlantic Marine, Inc.*, 605 F.2d 166, 168 (5th Cir. 1979).

Notably, "[t]he case law in Mississippi regarding arbitration and the Federal Arbitration Act are consistent with one another." *Smith Barney, Inc. v. Henry*, 775 So.2d 722, 725 (Miss. 2001). Indeed, this Court "has long observed a policy favoring agreements to arbitrate" (*see IP Timberlands*, 726 So.2d at 107) and has stated that it "will respect the right of an individual or entity to agree in advance of a dispute to arbitration or other alternative dispute resolution." *Terminix*, 904 So.2d at 1054, quoting *Russell*, 826 So.2d at 722; *accord MS Credit Center, Inc. v. Horton*, 926 So.2d 167, 174-75 (Miss. 2006); *McKenzie Check Advance*, 866 So.2d at 450.

Here, the Agreement between 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." AWG Rec. at 1520-1521 (Section 12.11 of the Agreement). As demonstrated below, the FAA applies to the Agreement, the parties' "dispute" is within the scope of the arbitration clause, and the Circuit Court should have ordered Plaintiffs to arbitrate their claims.

A. The FAA Applies to the Agreement

The FAA, "resting on Congress's authority under the Commerce Clause, creates a body of federal substantive law that is applicable in both state and federal courts." *IP Timberlands*, 726 So.2d at 107, citing *Moses H. Cone*, 460 U.S. at 24. "'The sine qua non of the FAA's applicability to a particular dispute is an agreement to arbitrate the dispute in a contract which evidences a transaction in interstate commerce.'" *Smith Barney*, 775 So.2d at 724, quoting *Peoples Sec. Life. Ins. Co. v. Monumental Life Ins. Co.*, 867 F.2d 809, 813 n.4 (4th Cir. 1989); *see also McKenzie Check Advance*, 886 So.2d at 450 ("Section 2 of the Federal Arbitration Act,

which makes enforceable a written arbitration provision in 'a contract evidencing a transaction involving commerce,' 'should be read broadly to extend the Act's reach to the limits of Congress' Commerce Clause Power.'") (citation omitted). The Agreement in this case is such a contract.

This Court's decision in *Smith Barney* is directly on point. In that case, this Court held that the FAA applied to a customer agreement between a securities investor and a brokerage firm because "the securities industry, on a national level, meets the minimum threshold of affecting or bearing upon interstate commerce." 775 So.2d at 725; *see also Rodriguez de Quijas v. Shearson/Am. Exp. Inc.*, 490 U.S. 477 (1989) (contracts involving the securities industry involve commerce and are subject to the FAA).

Like the customer agreement in *Smith Barney*, the Agreement in this instance involves the securities industry and clearly "evidences a transaction in interstate commerce." As noted, Leap and AWG entered into the Agreement for the purpose of exchanging wireless licenses for Leap common stock. AWG Rec. at 9 (AWG Compl. ¶ 3). At the time, Leap stock was traded publicly on the Nasdaq National Market. *Id.* at 8 (AWG Compl. ¶ 2). Pursuant to Section 7.4(a) of the Agreement, Leap agreed to register the Leap shares it had provided to AWG so that AWG could sell those shares in the public securities market. *Id.* at 1507 (Section 7.4(a) of the Agreement). AWG ultimately sold those Leap shares in the public market. *Id.* at 9, 53, 78-79 (AWG Compl. ¶¶ 4, 56, 104). The Whittington Plaintiffs allegedly purchased the same Leap shares in the public market. Whitt. Rec. at 104, 185 (FARC ¶¶ 4, 105). Thus, the Agreement "directly involves a transaction [or transactions] in interstate commerce" and "is precisely the type of contract that Congress intended to be covered by the FAA." *Smith Barney*, 775 So.2d at 725-26.

B. Plaintiffs' Claims are Within the Scope of the Agreement's Arbitration Clause

Courts conduct a bifurcated inquiry on motions to compel arbitration under the FAA. First, they determine "whether the parties' dispute is within the scope of a valid arbitration

agreement." *Terminix*, 904 So.2d at 1055; *accord Sullivan*, 882 So.2d at 132, quoting *East Ford, Inc. v. Taylor*, 826 So.2d 709, 713 (Miss. 2002). Second, they consider "'whether any federal statute or policy renders the claims nonarbitrable." *Washington Mut. Fin. Group, LLC v. Bailey*, 364 F.3d 260, 263 (5th Cir. 2004); *see also MS Credit Center, Inc.*, 926 So.2d at 175 ("[t]he second prong addresses whether legal constraints external to the agreement . . . foreclose arbitration of the claims").

Here, the parties' "dispute" is clearly within the scope of a valid arbitration agreement. As shown, the Agreement contains a broad arbitration clause. Section 12.11 of the Agreement provides, in pertinent part:

> [S]enior management employees of [Leap] and [AWG] shall meet and negotiate in good faith to reach a satisfactory resolution of any dispute arising in connection with this Agreement. If such negotiations do not result in a resolution within five (5) days after the first meeting of such representatives, then *any dispute, claim or controversy arising under this Agreement or in any way related to this Agreement*, or its interpretation, enforceability or inapplicability may be submitted to binding arbitration at the election of either [Leap] or [AWG].

AWG Rec. at 1520-1521 (emphasis added); *see Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 406 (1967) (labeling nearly identical language a "broad arbitration clause").

According to Plaintiffs' own allegations, the *American Wireless* and *Whittington* actions "aris[e] under" and "relate[] to" the principal transaction underlying the Agreement: Leap's obligation 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 telephones licenses.[18] Likewise, Plaintiffs' claims "aris[e]" under" and "relate[] to" the adequacy of the risk disclosures that appeared in the June 2001 Registration Statement.[19] Leap's obligation to file the June 2001 Registration Statement arose under Section 7.4 of the Agreement. AWG Rec. at 9 (AWG

[18] *See* AWG Rec. at 1495 (Sections 2.1 and 2.2 of the Agreement); *see also* AWG Rec at 9, 40-46, 49-53, 69-70, 78-79 (AWG Compl. ¶¶ 3-4, 31-39, 50-56, 76, 104); Whitt. Rec. at 104, 145-152, 155-159, 176-177, 185-186 (FARC ¶¶ 3-4, 31-39, 50-56, 77, 105).

[19] *See* AWG Rec. at 10-11, 51-52, 65-69, 75-81 (AWG Compl. ¶¶ 5-7, 54, 72-74, 95, 97-98, 104, 106); Whitt. Rec. at 105-106, 157-158, 172-176, 182-183, 185-187 (FARC ¶¶ 5-7, 54, 73-75, 96, 98-99, 105, 107).

Compl. ¶ 4), 1507 (Section 7.4(a) of the Agreement); Whitt. Rec. at 104 (FARC ¶ 4). Thus, the parties' "dispute" clearly "aris[es] under" and "relate[s] to" the Agreement and is within the scope of the arbitration clause. *See MS Credit Center*, 926 So.2d at 176 ("[b]ecause broad arbitration language is capable of expansive reach, courts have held that 'it is only necessary that the dispute 'touch' matters covered by the contract to be arbitrable'"), quoting *Pennzoil Exploration & Prod. Co. v. Ramco Energy Ltd.*, 139 F.3d 1061, 1067 (5th Cir. 1998).

In the Circuit Court, Plaintiffs acknowledged that their claims "aris[e] under" and "relate[] to" the Agreement. AWG Rec. at 2658-2659 (AWG's Opposition to the Leap Defendants' Motion to Compel Arbitration); Whitt. Rec. at 1623-1624 (Whittington Plaintiffs' Opposition to the Leap Defendants' Motion to Compel Arbitration). Plaintiffs nevertheless argued that their claims are not within the scope of the arbitration clause because they have asserted tort and statutory claims that "are not based on contract duties that arose from the Agreement but are based upon common law and statutory disclosure duties that arise independently and separately from the existence of the Agreement." Whitt. Rec. at 1632; *see also* AWG Rec. at 2663. This argument runs afoul of both the FAA and Plaintiffs' own allegations.

Under the FAA, parties are required to arbitrate their claims if they are within the scope of a valid arbitration clause. *See Russell*, 826 So.2d at 722 ("'[u]nless it can be said with positive assurance that an arbitration clause is not susceptible of an interpretation which would cover the dispute at issue, then a stay pending arbitration should be granted'") (citation omitted). Accordingly, parties cannot avoid arbitration simply "by casting their claims in tort, rather than contract." *Grigson v. Creative Artists Agency, LLC*, 210 F.3d 524, 526 (5th Cir. 2000). This Court's decision in *Russell* is on point. In *Russell*, plaintiff entered into an agreement to sell a Toyota T-100 to an automobile dealership and purchase a Toyota Tacoma from the dealership. 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 eventually repossessed the Tacoma and plaintiff filed an action for fraud, wrongful repossession and illegal

conversion. Plaintiff argued that his claims were not subject to arbitration because they did not arise from the agreement and, instead, arose "from the actions and the willful and wanton disregard of [his] property rights by [the dealership]." *Id.* at 722. This Court held that plaintiff was required to arbitrate his claims. While the Court acknowledged that 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 Tacoma and the T-100, the two vehicles which are the subject of the Purchase Agreement." *Id.* at 723.

As discussed above, Plaintiffs' allegations demonstrate that their claims "aris[e] under" or "relate[] to" the Agreement. Both the AWG Complaint and the FARC allege that (i) Leap issued approximately 1.9 million shares of Leap stock to AWG pursuant to its obligations under Sections 2.1 and 2.3 of the Agreement; (ii) Leap subsequently registered that stock by filing the June 2001 Registration Statement pursuant to its obligations under Section 7.4 of the Agreement; (iii) pursuant to the "plan" contemplated by the Agreement, AWG sold that Leap stock in the public market and the Whittington Plaintiffs subsequently purchased that stock in the public market; and (iv) Plaintiffs suffered damages as a result of this "integrated" series of transactions due to the allegedly inadequate risk disclosures in the June 2001 Registration Statement, which Leap filed pursuant to its obligations under the Agreement.[20] Thus, regardless of whether Plaintiffs' claims are based on "duties that ar[o]se independently and separately from the existence of the Agreement" (AWG Rec. at 2663; Whitt. Rec. at 1632), 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.

Furthermore, there are no federal statutes or policies that would preclude enforcement of the arbitration clause in this instance. As an initial matter, Plaintiffs' claims are arbitrable; they are not subject to any statutory exceptions. *See Rodriguez*, 490 U.S. at 484-85 (claims under the

[20] *See* AWG Rec. at 9-11, 40-46, 50-53, 65-70, 76-79 (AWG Compl. ¶¶ 3-7, 31-39, 51-56, 72-74, 76, 97-98, 104); Whitt. Rec. at 104-106, 145-152, 155-159, 172-177, 183, 185-186 (FARC ¶¶ 3-7, 31-39, 51-56, 73-75, 77, 98-99, 105).

1933 Act may be arbitrated); *Arnold v. Arnold Corp.*, 920 F.2d 1269, 1272, 1280 (6th Cir. 1990) (claims under state securities act and for common law fraud subject to arbitration); *Terminix*, 904 So.2d at 1053-57 (Mississippi common law fraud claims are arbitrable). Nor are there any allegations in the AWG Complaint or the FARC that would suggest the Agreement is otherwise unenforceable under ordinary contract law principles. Thus, Section 12.11 of the Agreement applies to Plaintiffs' claims and should be enforced under the FAA.

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

Courts applying the FAA have recognized that if a plaintiff "c[ould] avoid the practical consequences of an agreement to arbitrate by naming nonsignatory parties as [defendants] . . . the effect of the rule requiring arbitration would, in effect, be nullified." *Arnold Corp.*, 920 F.2d at 1281. Thus, as "an outgrowth of the strong federal policy favoring arbitration" (*see Letizia v. Prudential Bache Sec., Inc.*, 802 F.2d 1185, 1187 (9th Cir. 1986)), numerous courts have held that a defendant may, in certain circumstances, enforce an arbitration clause in an agreement he did not sign. *See, e.g., International Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 416-17 (4th Cir. 2000) ("[w]ell-established common law principles dictate that in an appropriate case a nonsignatory can enforce, or be bound by, an arbitration provision within a contract executed by other parties").[21] The Leap Defendants may enforce the arbitration clause in the Agreement in this instance.

As an initial matter, it is well established that federal law controls the issue of whether a non-signatory may enforce (or be bound by) an arbitration clause under the FAA. In the context of motions to compel arbitration, the United States Supreme Court has directed courts to "apply ordinary state-law principles that govern the formation of contracts" (*see First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995)) and the "federal substantive law of

[21] *See also Grigson*, 210 F.3d at 527-528; *Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.*, 10 F.3d 753, 757 (11th Cir. 1997); *Mississippi Fleet Card, L.L.C. v. Bilstat, Inc.*, 175 F. Supp. 2d 894, 900-01 (S.D. Miss. 2001); *Hoffman v. Deloitte & Touche, LLP*, 143 F. Supp. 2d 995, 1004 (N.D. Ill. 2001).

arbitrability." *Moses H. Cone*, 460 U.S. at 24. Thus, state law determines questions "'concerning the validity, revocability, or enforceability of contracts generally,'" but the FAA "create[s] a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act." *International Paper*, 206 F.3d at 417 n.4, quoting *Moses H. Cone*, 460 U.S. at 24. Because the determination of whether a non-signatory may enforce (or be bound by) an arbitration clause "'presents no state law question of contract formation or validity,' a court should 'look to the federal substantive law of arbitrability to resolve th[ese] question[s].'" *Bailey*, 364 F.3d at 267 n.6, quoting *International Paper*, 206 F.3d at 417 n.4; *see Terminix*, 904 So.2d at 1058 ("adopt[ing] the same principles announced by the court in *Bailey*").[22]

Federal law provides that non-signatory defendants may enforce arbitration clauses under the doctrine of equitable estoppel in cases in which (i) plaintiff's claims "make[] reference to or presume[] the existence of" the written agreement containing the arbitration clause; or (ii) plaintiff alleges "substantially interdependent and concerted misconduct by both the nonsignatory [sic] and one or more of the signatories." *Mississippi Fleet Card*, 175 F. Supp. 2d at 900, quoting *Grigson*, 210 F.3d at 527; *see also Gulf Guar. Life Ins. Co. v. Connecticut Gen. Life Ins. Co.*, 957 F. Supp. 839, 841 (S.D. Miss. 1997), citing *Sunkist Soft Drinks*, 10 F.3d at 758.

[22] *See also Grigson*, 210 F.3d at 526-531 (applying federal law to determine whether non-signatory defendants could compel arbitration); *Letizia*, 802 F.2d at 1187 (permitting non-signatory defendants to enforce arbitration clause "[b]ecause the issue involves the arbitrability of a dispute, it is controlled by application of federal substantive law rather than state law"); *Hoffman*, 143 F. Supp. 2d at 1004 n.4 (non-signatory defendants could enforce arbitration clause "[b]ecause the determination of whether defendants can enforce the arbitration clauses presents no issue of contract formation or validity, the federal substantive law of arbitrability governs"); *Boucher v. Alliance Title Co.*, 127 Cal. App. 4th 262, 268 (2005) ("[t]he question presented, then, is whether defendant, a nonsignatory to the June 5, 2003, employment agreement, can rely on it to compel plaintiff to arbitrate his claims . . . [u]nder the [Federal] Arbitration Act, that question is answered not by state law, but by the federal substantive law of arbitrability"); *Metalclad Corp. v. Ventana Envtl. Org. P'ship*, 109 Cal. App. 4th 1705, 1712 (2003) ("[t]he question is not so much *what* is covered by the agreement but rather *who* may invoke it . . . [w]hether Ventana, a nonsignatory to that agreement, may rely on it to compel Metalclad to arbitration is answered by federal law, not state law").

Here, Plaintiffs allege concerted misconduct between the non-signatory Leap Defendants and Leap, a signatory to the Agreement. The Southern District of Mississippi's decision in *Mississippi Fleet Card* is directly on point. In that case, a limited liability company (the "LLC") entered into an agreement with a corporation. *See* 175 F. Supp. 2d at 896. The agreement contained an arbitration clause. *See id.* The LLC and several of its members subsequently filed suit against the corporation and several of its officers and directors. *See id.* at 897-98. While the LLC and the corporation signed the agreement containing the arbitration clause, the defendant officers and directors did not. *See id.* at 900. The Court held that the non-signatory defendants could compel arbitration. *See id.* Relying heavily upon plaintiffs' allegation that the non-signatory defendants "were 'employed by and/or were officers and/or directors of [the corporation] and were charged with the operations and decision making of the corporate defendants with respect to the conduct alleged [in the complaint],'" the Court found that plaintiffs' claims alleged concerted misconduct by the non-signatory defendants and the corporation that signed the agreement. *See id.* at 900-01.[23]

Both the *American Wireless* and *Whittington* actions are based upon the allegation that Leap and the Leap Defendants acted in concert to induce AWG to exchange AWG's wireless licenses for Leap stock. AWG Rec. at 9-10, 40, 69-71 (AWG Compl. ¶¶ 3-5, 31, 75-79); Whitt. Rec. at 104-105, 145-146, 176-178 (FARC ¶¶ 3-5, 31, 76-80). Plaintiffs allege that the Leap Defendants were officers and directors of Leap. AWG Rec. at 19-36 (AWG Compl. ¶¶ 16-28); Whitt. Rec. at 126-142 (FARC ¶¶ 17-29). Plaintiffs also allege that the Leap Defendants "had direct and supervisory involvement in the day-to-day operations of Leap and, therefore, [are] presumed to have had the power to control or influence the particular transactions giving rise to the securities violations as alleged herein, and exercised the same." AWG Rec. at 74 (AWG

[23] *See also Holden v. Deloitte & Touche LLP*, 390 F. Supp. 2d 752, 759, 765 (N.D. Ill. 2005) (permitting Deloitte & Touche to enforce an arbitration clause in an agreement it did not sign because the complaint alleged that, *inter alia*, Deloitte "directed and controlled" the defendant corporation that signed the agreement and "Deloitte and each of the defendants conspired with each other" to defraud plaintiffs).

Compl. ¶ 88); Whitt. Rec. at 180 (FARC ¶ 89). Plaintiffs refer to Leap as a "Co-Conspirator" and "Joint-Tortfeasor" and allege 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. AWG Rec. at 19, 65-66, 69-71, 77-79 (AWG Compl. ¶¶ 15, 72, 76, 83, 102, 104); Whitt. Rec. at 125-126, 172-173, 176-177, 178, 184-186 (FARC ¶¶ 16, 73, 77, 84, 103, 105). Thus, Plaintiffs clearly have alleged "substantially interdependent and concerted misconduct by both the nonsignatory [*i.e.*, the Leap Defendants] and one or more of the signatories [*i.e.*, Leap]." *See Mississippi Fleet Card*, 175 F. Supp. 2d at 900.

Plaintiffs' claims also "make[] reference to" and "presume[] the existence of" the Agreement. *See Sunkist Soft Drinks*, 10 F.3d at 758 (applying equitable estoppel; "[a]lthough Sunkist does not rely exclusively on the license agreement to support its claims, each claim presumes the existence of such an agreement"). Both the AWG Complaint and the FARC recount in detail how Leap, the Leap Defendants, AWG, and the Whittington Plaintiffs negotiated and structured the transaction that was ultimately reflected in the Agreement. AWG Rec. at 40-46, 49-51 (AWG Compl. ¶¶ 31-39, 50-53); Whitt. Rec. at 145-152, 155-156 (FARC ¶¶ 31-39, 50-53). Also, Plaintiffs' claims are focused on the alleged inadequacy of the risk disclosures in the June 2001 Registration Statement. AWG Rec. at 10-11, 51-52, 65-69, 75-81 (AWG Compl. ¶¶ 5-7, 54, 72-74, 95, 97-98, 104, 106); Whitt. Rec. at 105-106, 157-158, 172-176, 182-183, 185-187 (FARC ¶¶ 5-7, 54, 73-75, 96, 98-99, 105, 107). As noted, Leap filed the June 2001 Registration Statement pursuant to its obligations under the Agreement. AWG Rec. at 1507 (Section 7.4(a) of the Agreement); *see also id.* at 44 (AWG Compl. ¶ 38(h)); Whitt. Rec. at 149 (FARC ¶ 38(h)). Thus, Plaintiffs' claims "make[] reference to" and "presume[] the existence of" the Agreement and the Leap Defendants may enforce the arbitration clause under the doctrine of equitable estoppel. *See Holden*, 390 F. Supp. 2d at 766 (plaintiffs made reference to and presumed existence of agreement containing an arbitration clause where they "allege[d] that a central goal of the conspiracy and claimed fraud scheme was to induce individuals like [plaintiffs] to 'sell their companies' to EPS, as [plaintiffs] did through the [agreement]").

This result is consistent with this Court's decision in *B.C. Rogers Poultry, Inc. v. Wedgeworth*, 911 So.2d 483 (Miss. 2005). In that case, the Court found that "[a]bsent allegations of substantially interdependent and concerted misconduct between a non-signatory and a signatory who have a close legal relationship," a non-signatory cannot enforce an arbitration agreement. *Id.* at 492. Unlike in *B.C. Rogers*, Plaintiffs have alleged substantially interdependent and concerted misconduct between the non-signatory Leap Defendants and Leap, a signatory to the Agreement (*see supra* at 43-44); Plaintiffs also have alleged that the Leap Defendants had a close legal relationship with Leap – *i.e.*, that they were officers and directors of Leap during the relevant period. AWG Rec. at 19-36 (AWG Compl. ¶¶ 16-28); Whitt. Rec. at 126-142 (FARC ¶¶ 17-29). Thus, this Court's decision in *B.C. Rogers* does not apply here.

This result is also consistent with this Court's decision in *Parkerson v. Smith*, 817 So.2d 529 (Miss. 2002). In that case, the Court suggested, in dicta, that a defendant could not compel arbitration because it did not sign an agreement containing an arbitration clause. *See id.* at 535. In *Parkerson*, however, the Court did not address the issue of whether a non-signatory defendant may compel arbitration under equitable estoppel. Instead, the Court was focused exclusively on the third party beneficiary doctrine (*see id.* at 535), which is very different from equitable estoppel:

> Under third party beneficiary theory, a court must look to the intentions of the parties at the time the contract was executed. Under the equitable estoppel theory, a court looks to the parties' conduct after the contract was executed. Thus, the snapshot this Court examines under equitable estoppel is much later in time than the snapshot for third party beneficiary analysis.

Bridas S.A.P.I.C. v. Gov't of Turkmenistan, 345 F.3d 347, 362 (5th Cir. 2003) (emphasis added) (citation omitted), *petition for cert. filed*, 75 USLW 3094 (Aug. 21, 2006) (No. 06-267). Unlike the defendant in *Parkerson*, the Leap Defendants are asking the Court to compel arbitration in light of "the parties' conduct after the contract was executed," *i.e.*, based upon the allegations Plaintiffs made in the AWG Complaint and the FARC. Thus, *Parkerson* does not apply here and the Leap Defendants should be permitted to enforce Section 12.11 of the Agreement.

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

Like Leap, AWG signed the Agreement. AWG Rec. at 1521 (signature page of the Agreement). Because the Leap Defendants have shown that they may enforce the Agreement's arbitration clause (*see supra* at 41-44), the only issue remaining is whether the Whittington Plaintiffs, who did not sign the Agreement, can be compelled to arbitrate their claims.

As this Court has recognized, "[i]t does not follow . . . that under the [Federal Arbitration] Act an obligation to arbitrate attaches only to one who has personally signed the written arbitration provision." *Terminix*, 904 So.2d at 1058 (citations omitted). Rather, it is well settled that a non-signatory plaintiff can be bound by an arbitration provision in a contract he did not sign. *See Bailey*, 364 F.3d at 267 ("a nonsignatory party may be bound to an arbitration agreement if so dictated by the ordinary principles of contract and agency"); *International Paper*, 206 F.3d at 416 ("a party can agree to submit to arbitration by means other than personally signing a contract containing an arbitration clause"); *Deloitte Noraudit A/S v. Deloitte Haskins & Sells, U.S.*, 9 F.3d 1060, 1064 (2d Cir. 1993).[24]

Under the theory of estoppel, a non-signatory is estopped from refusing to comply with an arbitration clause "when it receives a 'direct benefit' from a contract containing an arbitration clause." *American Bureau of Shipping v. Tencara Shipyard S.P.A.*, 170 F.3d 349, 353 (2d Cir. 1999); *see also Deloitte Noraudit*, 9 F.3d at 1064; *Mississippi Fleet Card*, 175 F. Supp.2d at 902-03. As the Fifth Circuit explained in *Bailey*, "[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 the enactment of the [FAA]." 364 F.3d at 267-68 (citation omitted).

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[24] As demonstrated above, federal law controls the issue of whether a non-signatory plaintiff can be compelled to arbitrate his claims. *See supra* at 41-42 & n.22; *see also Bailey*, 364 F.3d at 267 n.6 ("because the determination of whether a non-signatory is bound by an arbitration provision 'presents no state law question of contract formation or validity,' a court should 'look to the federal substantive law of arbitrability to resolve this question'") (citation omitted); *Terminix*, 904 So.2d at 1058 ("adopt[ing] the same principles announced by the court in *Bailey*").

The Second Circuit's decision in *Tencara* is instructive. In that case, a group of investors entered into a construction contract with a ship builder to build a racing yacht; the ship builder then entered into a contract with the defendant, a ship classification society, to inspect and certify the yacht. The contract between the ship builder and the defendant contained an arbitration clause; the contract between the ship builder and the investors did not. *See* 170 F.3d at 351. The yacht later suffered hull damage as a result of defective design. *See id.* at 351. The ship builder, the investors, and the insurers of the yacht collectively sued the classification society, claiming that the defendant erroneously certified the yacht. *See id.* The defendant moved to compel arbitration against all plaintiffs, including the investors. The Second Circuit held that the defendant could compel the investors to arbitrate their claims. *See id.* at 353. The Court found that while the investors did not actually sign the contract between the defendant and the ship builder, they received several direct benefits from that contract, including lower insurance rates on the yacht and the ability to sail under the French flag. *See id.*; *see also Deloitte Noraudit*, 9 F.3d at 1064 (compelling non-signatory plaintiff Noraudit to arbitrate its claims; "Noraudit knowingly accepted the benefits of the Agreement through its continuing use of the name 'Deloitte' . . . [t]hus, Noraudit is estopped from denying its obligation to arbitrate under the 1990 Agreement.").

Here, the FARC rests on the allegation that the transaction between Leap and AWG was intended to benefit the Whittington Plaintiffs individually by placing Leap stock in their hands. Whitt. Rec. at 104, 150-152, 185-186 (FARC ¶¶ 4, 39, 105). The Whittington Plaintiffs contend that this was "an integrated, pre-planned, fully-discussed arrangement worked out with Leap and the [Leap] Defendants before the [June 2001] Registration Statement was issued, and in fact before the original June 8, 2001 closing [of the Agreement]." *Id.* at 176-177 (FARC ¶ 77). The Whittington Plaintiffs also allege that they received a "benefit" 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 [by AWG]." *Id.* at 104 (FARC ¶ 4); *see also id.* at 157-158, 182-183 (FARC ¶ 54, 96). Because the Whittington Plaintiffs contend they were entitled to

receive certain benefits under the Agreement and, in fact, did receive certain benefits under the Agreement, they are estopped from refusing to comply with the arbitration clause.

In the Circuit Court, the Whittington Plaintiffs argued that they should not be compelled to arbitrate their claims because "**not a single party**" in the *Whittington* action is a signatory to the Agreement. Whitt. Rec. at 1629-1630 (Whittington Plaintiffs' Opposition to the Leap Defendants' Motion to Compel Arbitration) (emphasis in original). This argument is unavailing. The only reason that AWG, one of the signatories to the Agreement, is not a party to the *Whittington* action is because the Whittington Plaintiffs have made an "obvious attempt to make an end-run around the arbitration clause." *Cf. Grigson*, 210 F.3d at 530. After the Whittington Plaintiffs filed the *Whittington* action, AWG, by the same counsel who filed the *Whittington* action, filed the *American Wireless* action in the same court. With the exception of replacing the Whittington Plaintiffs with AWG and adding one defendant, the AWG Complaint is identical in all material respects to the FARC. AWG has asserted *exactly* the same causes of action, predicated on *exactly* the same facts. *Compare* AWG Rec. at 7-11, 40-85 (AWG Compl. ¶¶ 1-7, 31-114) *with* Whitt. Rec. at 102-106, 145-192 (FARC ¶¶ 1-7, 31-115). There was simply no reason for AWG and its members (*i.e.*, the Whittington Plaintiffs) to file two separate but identical lawsuits against the Leap Defendants in the same court. Notwithstanding Plaintiffs' attempt to make an end-run around the arbitration clause, the Whittington Plaintiffs should be compelled to arbitrate their claims.

E. These Actions Should Be Stayed Pending Arbitration

The Leap Defendants also moved under Section 3 of the FAA for a stay of all proceedings in the *American Wireless* and *Whittington* actions pending arbitration. Section 3 of the FAA provides, in pertinent part:

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court . . . shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement.

9 U.S.C. § 3.

As shown above, both the *American Wireless* and *Whittington* actions are referable to arbitration pursuant to Section 12.11 of the Agreement. *See supra* at 36-41. Thus, pursuant to Section 3 of the FAA, the Circuit Court should have entered orders staying all proceedings in these actions until the parties arbitrate their dispute.

CONCLUSION

The Circuit Court's orders should be vacated. This Court should remand these actions to the Circuit Court with instructions to enter orders dismissing these actions in their entirety for failure to state a claim upon which relief can be granted. In the alternative, this Court should remand these actions with instructions to enter orders compelling Plaintiffs to arbitrate their claims and staying all proceedings in these actions pending arbitration.

RESPECTFULLY SUBMITTED this the 17th day of November, 2006.

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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 17th day of November, 2006.

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