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

QUALCOMM INCORPORATED — **APPELLANTS**

VS.

AMERICAN WIRELESS LICENSE GROUP, LLC — **APPELLEES**

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

QUALCOMM INCORPORATED — **APPELLANTS**

VS.

HOMER A. WHITTINGTON, JR. — **APPELLEES**

(Caption Continued On Inside Cover)

APPEAL FROM THE
CIRCUIT COURT OF HINDS COUNTY, MISSISSIPPI

BRIEF OF APPELLANT QUALCOMM INCORPORATED

ORAL ARGUMENT REQUESTED

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November 17, 2006

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

HARVEY P. WHITE, ET AL. — **APPELLANTS**

VS.

AMERICAN WIRELESS LICENSE GROUP, LLC — **APPELLEES**

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

HARVEY P. WHITE, ET AL. — **APPELLANTS**

VS.

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

Consolidated With:
Cause No. 2005-IA-01894

HARVEY P. WHITE, ET AL. — **APPELLANTS**

VS.

AMERICAN WIRELESS LICENSE GROUP, LLC — **APPELLEES**

Consolidated With:
Cause No. 2005-IA-01883

HARVEY P. WHITE, ET AL. — **APPELLANTS**

VS.

HOMER A. WHITTINGTON, JR., ET AL. — **APPELLEES**

CERTIFICATE OF INTERESTED PERSONS

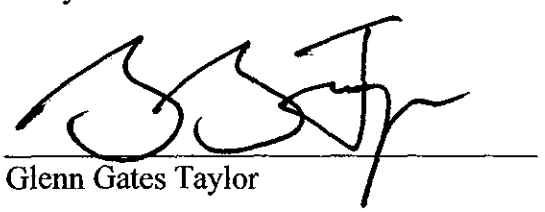
The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1. Qualcomm Incorporated, Defendant below.
2. Glenn Gates Taylor, B. Wade Smith, and Christy M. Sparks of Copeland Cook Taylor & Bush, P.A., attorneys for Qualcomm Incorporated.
3. Joshua Rosenkranz, Heller Ehrman LP, Times Square Tower, 7 Times Square, New York, NY 10036, attorney for Qualcomm Incorporated.
4. Harvey P. White, Scott B. Jarvis, Susan G. Swenson, Thomas J. Bernard, Jeffery P. Williams, Anthony R. Chase, Michael B. Targoff, Jill E. Barad, Robert C. Dynes, James E. Hoffmann, Stewart Douglas Hutcheson, Daniel O. Pegg, Leonard C. Stephens ("the Leap Defendants"), Defendants below.
5. David W. Clark and Mary Clay Morgan of Bradley Arant Rose & White LLP, attorneys for the Leap Defendants.
6. 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.
7. 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, individually 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, Plaintiffs below.

8. Eugene C. Tullos of Tullos & Tullos, attorneys for Plaintiffs.

9. J. Michael Rediker, Peter Tepley, Page Poerschke, Meredith Jowers Lees of Haskell Slaughter Young & Rediker, LLC, attorneys for Plaintiffs.



Glenn Gates Taylor

STATEMENT REGARDING ORAL ARGUMENT

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

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INTRODUCTION

Plaintiffs made a bad investment. The Whittington Plaintiffs were members of American Wireless License Group, LLC ("American Wireless") when their company made a business deal with Leap Wireless International, Inc. ("Leap"). Under the contract for that deal—referred to as the "AWG Agreement"—American Wireless sold certain licenses to Leap in return for almost two million shares of Leap stock. Unfortunately, but like innumerable companies, Leap failed in the marketplace. Its stock plummeted in value, and Leap went bankrupt. Like thousands of other investors—who owned over 30 million shares of Leap stock—Plaintiffs lost money. In this lawsuit, Plaintiffs are trying to make someone else pay for their losses.

Plaintiffs allege that Leap withheld material information when it negotiated the AWG Agreement, and when Leap made certain filings with the Securities Exchange Commission ("SEC"), including a Registration Statement that the AWG Agreement expressly required Leap to file. Plaintiffs allege that Leap committed fraud and that its filings violated both § 11 of the Securities Act of 1933, 15 U.S.C. 77k, and § 717 of the Mississippi Securities Act ("MSA") § 71-75-717.

Plaintiffs did not, however, sue Leap. Instead, Plaintiffs sued Leap's officers and directors. But, apparently fearing that their pockets were not deep enough, Plaintiffs also sued QUALCOMM Incorporated ("Qualcomm"). That was a *real* leap. Qualcomm did not have any involvement in the negotiations for the AWG Agreement and played no role in the Registration Statement. Nevertheless, Plaintiffs try to pin liability on Qualcomm with the assertion that Qualcomm controlled Leap during those negotiations and the filings. Admittedly, Qualcomm *once* controlled Leap. It created Leap in June 1998, but then promptly spun it off within three months, and distributed every single share of Leap stock to Qualcomm shareholders. After the spin-off, Leap was entirely independent of

Qualcomm. The two companies did not share any directors or officers, and Qualcomm exercised no control over Leap. The negotiations between American Wireless and Leap did not even begin until two and a half years *after* Qualcomm spun-off Leap.

Qualcomm filed a motion to compel arbitration and, in the alternative, to dismiss the claims against it. The motion to compel arbitration was premised on a broad commitment that American Wireless made in the AWG Agreement to arbitrate "any dispute, claim, or controversy arising under this Agreement or in any way related to this Agreement." Qualcomm argued that, because the claims arise out of and revolve entirely around the AWG Agreement and the Registration Statement, Plaintiffs could not credibly claim that this dispute does not arise under or is not "in any way related to" the AWG Agreement. The central focus of the motion to dismiss was Qualcomm's argument that the facts asserted in the complaint did not come close to stating a claim that Qualcomm controlled Leap, which is the only basis on which Qualcomm could be held liable for Leap's conduct. Qualcomm also argued that Plaintiffs lacked standing to assert the securities claims.

The circuit court denied both motions, but certified its order for interlocutory appeal.

STATEMENT OF THE ISSUES

1. Plaintiffs' claims arise from and revolve around allegations that Leap failed to make disclosures while negotiating the AWG Agreement and in a Registration Statement filed by Leap pursuant to its obligations under the Agreement. The Agreement requires arbitration of "any dispute, claim or controversy arising under this Agreement or in any way related to this Agreement." Did the circuit court err in refusing to enforce the arbitration provision?

2. Plaintiffs' securities claims against Qualcomm depend entirely on the theory that Qualcomm controlled Leap's activities during the period of time at issue. However, the complaint does not allege any specific facts that make out a claim that Qualcomm controlled Leap. In fact, Qualcomm spun-off Leap into an independent, publicly traded company some two and a half years *before* the transactions at issue. Qualcomm had no involvement in those transactions. At the time that the AWG Agreement was executed, Qualcomm owned only a minuscule percentage of Leap's common stock, and, *e.g.*, the two companies did not share any officers or directors. Should the Court dismiss the complaint as to Qualcomm?

3. The relevant federal securities law does not allow the Whittington Plaintiffs to sue on the basis of a registration statement unless they can prove that they acquired the very same securities that are identified in the statement. The analogous Mississippi statute does not allow the Whittington Plaintiffs to sue unless they acquired the securities directly from Leap, the offeror. The Whittington Plaintiffs bought their stock in the open market, and not directly from Leap. Should their complaint be dismissed?

4. A fraud claim must be plead with specificity, alleging specific facts that demonstrate that the defendant made representations it knew to be false. The complaint does not specify anything that Qualcomm, itself, did or said that rose to the level of fraud. Did the circuit court err by failing to dismiss the fraud claims against Qualcomm?

STATEMENT OF THE CASE

A. Course Of Proceedings And Disposition In The Court Below

On December 31, 2002, American Wireless and many of its members (the "Whittington Plaintiffs") (all of the suing parties are collectively referred to as "Plaintiffs") filed two suits in the Hinds County Circuit Court against Leap's current and former officers and directors ("the Leap Defendants"), Qualcomm, and numerous other defendants.[1] R.E. 4, AWG R. 7-87; R.E. 5, Whit. R. 101-94 (complaint).[2] The allegations of each complaint are virtually identical. In both suits, Plaintiffs asserted claims for violations of various state and federal securities laws and fraud. R.E. 4, AWG R. 65-86; R.E. 5, Whit. R. 172-93 (complaint). Plaintiffs alleged that they were misled by the Leap Defendants, and that, as a result, they had suffered a decline in the value of their stockholdings. R.E. 4, AWG R. 65-86; R.E. 5, Whit. R. 172-93 (complaint). On May 29, 2003, the Leap Defendants removed the case to the United States District Court for the Southern District of Mississippi. Whit. R. 218-19. On November 10, 2004, the district court remanded this action to state court.

In January 2005, Qualcomm and the Leap Defendants filed separate motions seeking to compel arbitration of Plaintiffs' claims or, alternatively, to dismiss the action. R.E. 6, AWG R. 2596-99; Whit. R. 1589-92. Because Qualcomm attached an affidavit to its motion, the circuit court treated Qualcomm's motion to dismiss as a motion for summary judgment. On September 7, 2005,

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[1] The two cases filed below were styled: *American Wireless License Group, LLC v. White, et al.*, and *Whittington, et al. v. White, et al.*

[2] References to "Whit. R." are to the Appellate Record in *Whittington*. References to "AWG R." are to the Appellate Record in *American Wireless*. The appellate records in the two cases are almost identical. Qualcomm has cited to both records when possible.

the circuit court denied the motions to compel arbitration and to dismiss. R.E. 2, AWG R. 2930-31; Whit. R. 1873-74 (order). The circuit court also granted leave for Qualcomm and the Leap Defendants to seek an interlocutory appeal on the denial of the motions, and stayed all proceedings in the lower court pending the conclusion of the interlocutory appeal. AWG R. 2932; Whit. R. 1871-74 (order).

Qualcomm and the Leap Defendants filed separate petitions for interlocutory appeal. This Court granted the petitions for interlocutory appeal, and consolidated the cases for the purposes of appeal.[3]

B. Statement Of The Facts

Because this appeal arises from a motion to dismiss that the circuit court converted to a motion for summary judgment, the following narrative presents the facts as depicted in the complaint, *see infra* Section B.1-B.5, and then recites the additional facts that Qualcomm presented in an unrebutted affidavit, *see infra* Section B.6.

1. Qualcomm Creates Leap And Immediately Spins It Off

Qualcomm is a leading innovator and manufacturer in wireless communications. In June 1998, Qualcomm created Leap as a separate corporation to serve as a low-cost provider of wireless telephone services in local markets across the United States. R.E. 4, AWG R. 8; R.E. 5, Whit. R. 103 (complaint); AWG R 1323 (Registration Statement). Initially, Leap was a wholly owned subsidiary

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[3] Because Leap and Qualcomm filed separate petitions for interlocutory appeal, there were several petitions, each styled differently, before the Court: *Qualcomm Incorporated v. American Wireless License Group, LLC* (Cause No. 2005-IA-001827-SCT); *Qualcomm Incorporated v. Whittington, et al.* (Cause No. 2005-IA-01829-SCT); *White, et al. v. Whittington, et al.* (Cause No. 2005-IA-01883-SCT); *White, et al. v. American Wireless License Group, LLC* (Cause No. 2005-IA-01894-SCT). The Court consolidated these cases for purposes of appeal under the style *Qualcomm Incorporated v. American Wireless License Group, LLC.*

of Qualcomm. R.E. 4, AWG R. 8; R.E. 5, Whit. R. 103 (complaint); AWG R. 1327. But in September 1998, Qualcomm spun it off. R.E. 4, AWG R. 8; R.E. 5, Whit. R. 103 (complaint); AWG R. 1327, 1360. As part of the spin-off, Qualcomm distributed all of its shares of Leap's stock to Qualcomm's shareholders. R.E. 4, AWG R. 8; R.E. 5, Whit. R. 103 (complaint). Consequently, Leap became an independent, publicly traded company. R.E. 4, AWG R. 8; R.E. 5, Whit. R. 103 (complaint). Leap's common stock was listed on the NASDAQ/NMS and traded under the symbol "LWIN." R.E. 4, AWG R. 8; R.E. 5, Whit. R. 103 (complaint).

From the moment of the spin-off, Qualcomm and Leap were entirely separate companies. While some *former* Qualcomm personnel were running Leap, Qualcomm and Leap have never had any common officers, directors, or employees. Whit. R. 3387. Qualcomm was not a party to, or a signatory on, any registration statement or any other public filings of Leap. AWG R. 3438-39; Whit. R. 648-50. Having distributed all of Leap's stock when it set Leap on its own, Qualcomm did not own any Leap stock. AWG R. 3387. Qualcomm held only a warrant (an option), which, gave Qualcomm a right to purchase a limited amount of Leap common stock for a set price.[4] R.E. 4, AWG R. 38; R.E. 5, Whit. R. 144 (complaint).

2. Leap And American Wireless Make A Deal With No Participation By Qualcomm

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[4] When the spin-off was completed in September 1998, Qualcomm did not own any shares of Leap stock. In connection with the spin-off, however, Leap issued a warrant (an option) to Qualcomm under which Qualcomm could purchase shares of Leap common stock. From the time of the 1998 spin-off until January 2001, Qualcomm did not own any Leap shares. In January 2001, Qualcomm converted a portion of the warrant into Leap stock, and then sold some of those shares into the public market. By the end of June 2001, Qualcomm owned only 489,000 shares of Leap stock, which represented roughly 1.3% percent of the approximately 35 million shares of Leap common stock then outstanding. Qualcomm did not further convert the warrant into Leap stock, nor did Qualcomm otherwise acquire any additional shares in Leap. R.E. 4, AWG R. 8; R.E. 5, Whit. R. 103 (complaint); AWG R. 3560 (Exhibit to Qualcomm's motion to dismiss, excerpt from Qualcomm's June 30, 2002 Form 10-Q at 9, note 2).

Two and a half years elapsed after Qualcomm spun-off Leap. Then, on February 7, 2001, Leap and American Wireless entered into the AWG Agreement, formally entitled "Agreement for Purchase and Sale of Licenses." R.E. 4, AWG R. 9, 38; R.E. 5, Whit. R. 104, 144 (complaint). Under the AWG Agreement, Leap agreed to purchase wireless telephone licenses from American Wireless in exchange for Leap common stock. R.E. 4, AWG R. 9; R.E. 5, Whit. R. 104 (complaint). Four months later, on June 8, 2001, Leap and American Wireless closed on the deal. R.E. 4, AWG R. 50-51; R.E. 5, Whit. R. 56 (complaint). Leap issued just over 1.9 million shares of Leap stock directly to American Wireless in exchange for its licenses. R.E. 4, AWG R. 9, 50-52; R.E. 5, Whit. R. 104, 156-58 (complaint). Under the AWG Agreement, Leap agreed to register the Leap shares it had provided to American Wireless so that American Wireless could sell them on the public stock market. R.E. 4, AWG R. 51-52; R.E. 5, Whit. R. 157 (complaint). The AWG Agreement contained a broad "Resolution of Disputes" provision, which provided for binding arbitration:

> [Senior] management employees of [Leap] and [American Wireless] 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 [American Wireless].*

R.E. 3, AWG R. 1520-21, Whit. R. 683-84 (AWG Agreement § 12.11) (emphasis added).

Within three days of the closing, on June 11, 2001, Leap filed a Form S-3 Registration Statement with the SEC documenting the transfer of stock. R.E. 4, AWG R. 51-52, R.E. 5, Whit. R. 157-58 (complaint). The June Registration Statement documented that the 1.9 million Leap shares issued to American Wireless represented about 5.5% of the total number of Leap shares then outstanding. R.E. 4, AWG R. 9; R.E. 5, Whit. R. 104 (complaint); AWG R. 1332 (Registration Statement).

The complaint does not allege that Qualcomm had any involvement in the negotiation or execution of the AWG Agreement, or the Registration Statement. Qualcomm was not a party to the AWG Agreement, and Qualcomm did not participate in preparing or reviewing the registration or any public filings relating to the AWG Agreement. As of the end of June 2001, Qualcomm owned only 489,000 of Leap's approximately 35 million shares then outstanding. Qualcomm also held a warrant (an option) that entitled it to acquire an additional 3.375 million shares; however, Qualcomm never exercised the right to acquire any of those shares. AWG R. 3560 (Exhibit to Qualcomm's motion to dismiss, excerpt from Qualcomm's June 30, 2002 Form 10-Q at 9, note 2).

3. American Wireless Sells Its Leap Stock And Plaintiffs Buy Leap Stock On The Open Market

Over the ensuing six months, American Wireless began selling its Leap stock in the public stock market. By December 2001, American Wireless had dumped all of its stock, by selling it all in the open market. R.E. 4, AWG R. 9, 53, 78-79; R.E. 5, Whit. R. 104, 158, 159 (complaint). American Wireless did not sell a single share of Leap stock to its own directors or officers.

As is the case for any publicly traded company, while American Wireless was selling its Leap stock, untold thousands of investors were simultaneously trading millions of Leap shares. R.E. 4, AWG R. 9, 53, 78-79; R.E. 5, Whit. R. 104, 158, 159 (complaint). The Whittington Plaintiffs were among the countless investors who bought Leap stock in that six-month period. R.E. 4, AWG R. 9; R.E. 5, Whit. R. 104 (complaint). Although the Whittington Plaintiffs are members or owners of American Wireless, they did not buy any of their Leap stock directly from American Wireless. Because they bought their stock on the open market, their transactions are legally indistinguishable from the millions of other transactions in Leap stock that occurred in the same time frame. It is impossible to trace whether the Leap stock they bought was the same as the Leap stock American Wireless sold.

4. Leap Stock Plummets, And Plaintiffs Sue

Leap's stock subsequently declined dramatically in value, and Leap eventually went bankrupt. Disappointed, Plaintiffs filed suit blaming Leap's management for their bad investment. They claimed that Leap failed to warn them of certain facts in connection with the AWG Agreement. Plaintiffs contend that Leap's management should have informed them of certain "significant risks" associated with Leap stock—risks that, according to Plaintiffs, caused a "massive dilution" in the value of Plaintiffs' stock holdings. R.E. 4, AWG R. 10; R.E. 5, Whit. R. 105 (complaint).

Plaintiffs pointed to four facts in particular that Leap failed to disclose. First, they claim, Leap entered into "contractual arrangement for the purchase of FCC licenses in New York state with another company MCG PCS, Inc. . . . under which . . . the effective working control of Leap could (and did) change hands." R.E. 4, AWG R. 10; R.E. 5, Whit. R. 105 (complaint). Second, they assert "that the MCG PCS contract . . . created the basis for a massive dilution or 'watering' of the Leap [stock]" American Wireless acquired. R.E. 4, AWG R. 10; R.E. 5, Whit. R. 105 (complaint). Third, that "contract created a significant risk" that the issuance of additional Leap stock could trigger a default under Leap's loan covenants. R.E. 4, AWG R. 10; R.E. 5, Whit. R. 105 (complaint). Fourth, they asserted that Leap's management should have informed them that a dispute with MCG PCS had erupted, and that the dispute could potentially result in Leap's paying MCG additional amounts in Leap stock. R.E. 4, AWG R. 10; R.E. 5, Whit. R. 105 (complaint). They claimed that these omissions ran afoul of Mississippi and federal statutes prohibiting the sale of a security through a statement that contains an untrue fact or an omission of material fact, *see* MSA § 71-75-717; Securities Act of 1933 § 11 15 U.S.C. 77k, and also that the omissions amounted to fraud. R.E. 4, AWG R. 65-86; R.E. 5, Whit. R. 172-92 (complaint).

Because Leap was already bankrupt, Plaintiffs filed their suits against various members of Leap's management. But Plaintiffs did not stop there. They also sued Qualcomm. The complaint, however, does not allege that Qualcomm had any involvement in the negotiation or the execution of the AWG Agreement, or in the preparation of the relevant Registration Statement or other filings. Rather, Plaintiffs assert that Qualcomm is liable on the theory that it is a "controlling person" under the joint and several liability provisions of state and federal law. *See* MSA § 71-75-719; Federal Securities Act of 1933§ 15, 15 U.S.C. 77o. Plaintiffs, however, do not allege that any Qualcomm director or officer served on Leap's board, and they do not assert that Qualcomm owned a majority of Leap stock—or even a significant number of shares. Their claim that Qualcomm nevertheless controlled Leap rests largely upon the allegation that "Qualcomm held *beneficial ownership* and/or control of 5,161,624 shares of Leap Stock" at the time that the AWG Agreement was signed, and "still held *beneficial ownership* of and/or control of 4,561,424 shares of Leap Stock" a couple of months before closing on the transaction. R.E. 4, AWG R. 36; R.E. 5, Whit. R. 142 (complaint). That allegation is a reference to the *warrant* (the unexercised option) that Qualcomm held to purchase up to additional shares of Leap stock. R.E. 4, AWG R.37-39; R.E. 5, Whit. R. 144 (complaint). However, it is undisputed that Qualcomm never exercised its right to purchase any additional shares of Leap stock.[5] As of the end of June 2001, Qualcomm owned only 489,000 shares of Leap stock, and never acquired any more of the stock.

Beyond that, the complaint also alleges that Qualcomm engaged in several other arms-length transactions with Leap. First, Qualcomm loaned Leap some money. However, as the complaint

[5] If Qualcomm had exercised the warrant and had acquired all of the additional shares, it would have owned approximately 3.864 million shares, or roughly 10% of Leap's common stock.

acknowledges, the loan was secured and it bore interest. R.E. 4, AWG R. 36-37; R.E. 5, Whit. R. 142-43 (complaint). Second, Qualcomm subleased some office space to Leap. However, as the complaint concedes, the sublease is written and Leap pays over $500,000 a year for it. R.E. 4, AWG R. 37; R.E. 5, Whit. R. 143 (complaint). Third, Plaintiffs recite various "agreements resulting from Qualcomm's spin-off of Leap." R.E. 4, AWG R. 37; R.E. 5, Whit. R. 143-44 (complaint). However, while reciting the terms in detail, the complaint does not suggest how any element of this separation agreement gave Qualcomm control over Leap's management decisions.

5. Defendants Move to Compel Arbitration or to Dismiss

Qualcomm and the Leap Defendants filed separate motions to compel arbitration or, alternatively, to dismiss. The motions to compel arbitration were premised on the ground that Plaintiffs' claims are a "*dispute, claim or controversy arising under th[e] [AWG] Agreement or in any way related to this Agreement*," within the meaning of the Agreement's broad and expansive arbitration provision. R.E. 3, AWG R. 1520-21, Whit. R. 683-84 (AWG Agreement) (emphasis added). Qualcomm's motion to dismiss was based on two grounds. First, unlike the Leap Defendants, Qualcomm cannot be held liable for any act or omission committed by Leap's management, because Qualcomm did not control Leap or its conduct. Second, like the Leap Defendants, Qualcomm argued also that Plaintiffs have no standing to challenge the Registration Statement, or other filings or conduct in connection with the sale of stocks to American Wireless, because Plaintiffs bought their shares on the open market, and not directly or indirectly from Leap.

6. The Unrebutted Syrowik Affidavit

With its motion to dismiss, Qualcomm filed an affidavit from senior executive Paul Syrowik. The affidavit confirmed that "[a]fter the spin-off, QUALCOMM exercised no management or

administrative control over Leap in any of Leap's business affairs. QUALCOMM and Leap were entirely separate and distinct companies." R.E. 7, AWG R. 3387, Whit. R. 2275 (Syr Aff. ¶ 3). It also averred that "[s]ince the spin-off, QUALCOMM did not have any control over the day-to-day activities of Leap or control with respect to larger strategic issues." R.E. 7, AWG R. 3387, Whit. R. 2275 (Syr Aff. ¶ 3). The affidavit also recounts steps Qualcomm took, "out of an abundance of caution," in response to suggestions that "certain third parties" made to the Federal Communications Commission ("FCC") "that Leap . . . was . . . still under QUALCOMM's *de jure* or *de facto* control." R.E. 7, AWG R. 3388, Whit. R. 2276 (Syr. Aff. ¶ 6). For example, in March 1999, Qualcomm and Leap agreed to amend the warrant "to reduce the number of shares covered by the Warrant from 5.5 million to 4.5 million," and to limit Qualcomm's voting rights, all with a view toward "further negat[ing] any perceived ability on the part of QUALCOMM . . . to exercise any control over Leap as a result of existing or future equity ownership in Leap." R.E. 7, AWG R. 3388-89, Whit. R. 2276-77 (Syr. Aff. ¶ 7). The FCC directed Qualcomm to take further steps and accept further conditions "to avoid any possible doubts as to" whether Leap was "under the control of QUALCOMM. R.E. 7, AWG R. 3389, Whit. R. 2277 (Syr. Aff. ¶ 7) (quoting FCC Wireless Telecommunications Bureau Memorandum Opinion and order ("July 1999 Order")). Based upon all these changes, in July 1999, the FCC entered an order in which it definitively held that "QUALCOMM does not have the power to control Leap directly or indirectly." R.E. 7, AWG R. 3390, Whit. R. 2278 (Syr. Aff. ¶ 10) (quoting July 1999 Order). "The FCC also found that 'there is no evidence that Leap has ceded either management or administrative functions to QUALCOMM." R.E. 7, AWG R. 3390, Whit. R. 2278 (Syr. Aff. ¶ 10) (quoting July 1999 Order).

The affidavit also confirms that all the agreements between Qualcomm and Leap since the spin-off "were arms-length transactions made between independent companies in the ordinary course of business. Nothing in those agreements allowed QUALCOMM to control Leap." R.E. 7, AWG R. 3390, Whit. R. 2278 (Syr. Aff. ¶ 12). Specifically, it swore that Qualcomm "had nothing to do with Leap's issuance of stock pursuant to the AWG Agreement, and . . . did not participate in the negotiation of the AWG Agreement" or "in any public filings relating to the AWG Agreement." R.E. 7, AWG R. 3390-91, Whit. R. 2278-79 (Syr. Aff. ¶ 13).

Finally, attachments to the affidavit provided greater specificity than the complaint did as to how many shares Qualcomm actually owned outright at the relevant time. As of September 2001, after the execution of the AWG Agreement, Qualcomm owned 489,000 shares of Leap common stock, out of approximately 35 million shares then outstanding, which amounted to a roughly 1.3% of those shares. AWG R. 3560 (Exhibit to Qualcomm's motion to dismiss, excerpt from Qualcomm's June 30, 2002 Form 10-Q at 9, note 2).[6] At that same time, Qualcomm also owned a warrant that gave it the right to purchase 3.375 million shares of Leap common stock at a specified price. Whit. R. 633 (Exhibit to Qualcomm's motion to dismiss, excerpt from Qualcomm's Form 10-K at F-35, note 15). It is undisputed that Qualcomm never exercised that warrant to purchase any additional shares, nor did Qualcomm otherwise acquire any additional shares.

While Plaintiffs complained that Qualcomm's submission of this affidavit converted its motion to dismiss into a motion for summary judgment, Plaintiffs did not offer a shred of evidence by way of rebuttal. Invoking Miss. R. Civ. P. 56(f), Plaintiffs argued that they should be entitled to

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[6] "[T]he company holds 489,000 shares of Leap Wireless's stock at June 30, 2002." AWG R. 3560.

depose various Qualcomm witnesses, "because the information that Plaintiffs need to respond to the Syrowik affidavit[] is in the possession of Defendant QUALCOMM." AWG R. 2679-80; Whit. R. 1647-48 (Rediker Aff. ¶ 3). Plaintiffs, however, did not offer a *single* specific fact to show that their proposed discovery was anything other than a general fishing expedition. Qualcomm agreed that its motion to dismiss should be treated as a motion for summary judgment. In the *eight months* that elapsed between Qualcomm's filing of the affidavit and the circuit court's decision, Plaintiffs did not present any facts or other evidence to rebut Qualcomm's affidavit.

7. The Circuit Court Denies the Motions

The circuit court denied the motions to compel arbitration without giving any reasons. R.E. 2, AWG R. 2930-34, Whit. R. 1873-75 ("QUALCOMM's Motion to Compel Arbitration should be denied for the reasons set forth in the Court's Order on the Motion filed by Leap Defendants"); R.E. 2, AWG R. 2930, Whit. R. 1873 (denying Leap Defendants' motion without citing any reasons).

As to the motion to dismiss, the court began by holding that: "Because the submission of QUALCOMM went outside the pleadings, the Court treated the portion of the Motion that attempted to dismiss Plaintiffs' claims against Qualcomm as a Motion for Summary Judgment pursuant to Mississippi Rule of Civil Procedure 56." R.E. 2, AWG R. 2930, Whit. R. 1873 (orders). The court tacitly rejected Plaintiffs' request to conduct more discovery before disposing of the summary judgment motion. On the control issue, the court then denied summary judgment, stating only that "the Court is of the opinion that a dispute of material fact which precludes summary judgment exists as to whether Qualcomm was a control person of Leap Wireless International, Inc., which could make Qualcomm liable pursuant to on [sic] the claims asserted." R.E. 2, AWG R. 2930, Whit. R. 1873 (orders). The court did not address the motion to dismiss for lack of standing, and therefore is deemed to have denied it.

SUMMARY OF THE ARGUMENT

1. **Arbitration.** The broad arbitration provision in the AWG Agreement—covering "any dispute, claim or controversy arising under . . . or in any way related to this Agreement"—encompasses all of Plaintiffs' claims in this case. The sheer volume of verbiage in the complaint dedicated to the formation and scope of the AWG Agreement demonstrates that this claim is, at the very least, "related to" the AWG Agreement. So, too, does the repeated assertion that Leap did not inform Plaintiffs of certain facts in the course of negotiating the AWG Agreement, and the fact that the AWG Agreement, itself, required Leap to file the Registration Statement that Plaintiffs attack in this case.

Qualcomm is entitled to invoke the arbitration provision even though it was not a signatory to the AWG Agreement. First, the AWG Agreement, itself, must be read to entitle any party who is alleged to have controlled Leap's misconduct to invoke the arbitration provision, so long as Leap would have been entitled to demand arbitration. Arbitration provisions would be meaningless if they could be evaded by simply suing individuals or companies that are alleged to have been controlling a company, instead of suing the company itself. Second, Plaintiffs are equitably estopped from evading the arbitration provisions because all of their claims arise out of and revolve around allegations of interdependent and concerted misconduct between Qualcomm and Leap in the negotiation of the AWG Agreement and the filings made pursuant to that Agreement.

Finally, even if there were a plausible issue about whether Plaintiffs' claims fall outside the scope of the arbitration provision, or whether Qualcomm can enforce the provision, this case would still have to proceed to arbitration on those threshold questions. The arbitration provision specifies that the arbitrators shall decide not only the merits of a covered dispute, but "any dispute, claim or controversy arising under . . . or in any way related to this Agreement *or its interpretation,*

enforceability or inapplicability." (emphasis added). The Court must respect the language of the contract and compel arbitration at least for this threshold determination of what the arbitration provision means and who can enforce it.

2. **Control Person Liability.** If this Court declines to compel arbitration, it should dismiss Qualcomm from this action. Plaintiffs' securities law claims against Qualcomm are based entirely on the allegation that Qualcomm "controlled" Leap, as defined under the relevant securities laws. However, the complaint does not allege a single specific fact in support of the conclusory assertion that Qualcomm controlled Leap. For example, Plaintiffs do not allege any specific fact suggesting that Qualcomm had any involvement with the transaction between Leap and American Wireless, or with any of the Plaintiffs. Qualcomm did not sign the Registration Statement at issue. Moreover, the complaint does not allege that any of Qualcomm's officers or directors were officers or directors of Leap at the time that the Registration Statement was prepared or filed.

Plaintiffs cannot prove any set of facts under which they could prevail on the claim for control person liability. Qualcomm's ownership of a minuscule percentage of Leap stock and its involvement in a few arms-length transactions with Leap—such as a loan, a lease for office space, and a license—do not amount to control. If they did, every bank, landlord, and licensee would suddenly be a target for securities claims premised on the conduct of the debtor, tenant, and licensor.

3. **Standing.** The Whittington Plaintiffs also lack standing to assert a claim against Qualcomm for alleged violations of § 11 of the 1933 Securities Act and § 75-71-717 of the MSA. Both statutes limit suits to those brought by an individual who purchased the very security identified in the allegedly fraudulent registration statement, and the state statute limits standing even further to those who purchased the security directly from the offeror. The Whittington Plaintiffs concede that they purchased their securities on the open market and not directly from Leap, who issued the

security, or even directly from American Wireless, who acquired the security from Leap. The Whittington Plaintiffs' claim that they bought the securities on the open market around the same time American Wireless sold its shares is not sufficient to confer standing.

4. **Fraud.** Finally, Plaintiffs' fraud claim against Qualcomm must be dismissed. The complaint does not specify a single act that Qualcomm itself allegedly did or failed to do that would constitute fraud. Once again, Plaintiffs attempt to rely on the "controlling person" theory to put Qualcomm on the hook for Leap's alleged actions. But fraud requires specific pleading of actual facts that demonstrate Qualcomm knew of the transaction at issue, knew of the misstatements and omissions, participated in creating or approving the communications, and had a role in the alleged conspiracy. Not only does the complaint fail to meet this standard, it explicitly recognizes that Qualcomm had completely spun-off Leap into an independent corporation two and a half years before the alleged fraud occurred, belying the bald accusation that Qualcomm was "working in concert" with Leap.

STANDARD OF REVIEW

The denial of a motion to dismiss, a motion for summary judgment, and a motion to compel arbitration are all subject to de novo review by this Court. *Sullivan v. Mounger*, 882 So. 2d 129, 132 (Miss. 2004) (motion to dismiss and motion to compel arbitration); *Leffler v. Sharp*, 891 So. 2d 152, 156 (Miss. 2004) (motion for summary judgment); *Davis v. Hoss*, 869 So. 2d 397, 401 (Miss. 2004) (motion for summary judgment); *East Ford, Inc. v. Taylor*, 826 So. 2d 709, 713 (Miss. 2002) (motion to compel arbitration).

Summary judgment is appropriate if, when taking the evidence in the light most favorable to the nonmoving party, there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Miss. R. Civ. P. 56(c); *Davis*, 869 So. 2d at 401; *Russell v. Orr*, 700 So.

2d 619, 622 (Miss. 1997). When a motion for summary judgment is properly supported, the party opposing the motion may not simply rest upon allegations or denials in the pleadings, but instead, must set forth specific facts showing that there are genuine issues for trial. *See Massey v. Tingle*, 867 So. 2d 235, 238 (Miss. 2004) (citing *Richmond v. Benchmark Constr. Corp.*, 692 So. 2d 60, 61 (Miss. 1997)).

ARGUMENT

I. THE CIRCUIT COURT ERRED IN REFUSING TO ENFORCE THE BROAD AND UNCONDITIONAL AGREEMENT TO ARBITRATE ANY DISPUTE, CLAIM OR CONTROVERSY ARISING UNDER OR IN ANY WAY RELATED TO THE AWG AGREEMENT

Congress could not have been clearer when it commanded, in the Federal Arbitration Act ("FAA"), that agreements to arbitrate disputes "*shall* . . . be enforceable." 9 U.S.C. § 2 (emphasis added). With that command, Congress established a strong "federal policy favoring arbitration." *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987). State courts and federal courts, alike, are legally obligated to enforce arbitration agreements. *See Terminix Int'l Inc. v. Rice*, 904 So. 2d 1051, 1054-55 (Miss. 2004). Thus, the circuit court was required to compel Plaintiffs to arbitrate this dispute so long as the dispute fell within the scope of the broad arbitration provision at issue. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985); *Sanderson Farms, Inc. v. Gatlin*, 848 So. 2d 828, 834 (Miss. 2003); *East Ford, Inc. v. Taylor*, 826 So. 2d 709, 713 (Miss. 2002).[7]

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[7] The only exception to the rule that an agreement to arbitrate must be enforced are (1) when the arbitration clause is itself invalid because it was induced by fraud or duress; or (2) when there are other "legal constraints external to the parties' agreement [that] foreclosed arbitration of those claims." *East Ford, Inc. v. Taylor*, 826 So. 2d 709, 713 (Miss. 2002) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985)); *see also Sanderson Farms, Inc. v. Gatlin*, 848 So. 2d 828, 834 (Miss. 2003). Plaintiffs have not invoked either ground. *See American Heritage Life Ins. Co. v. Beasley*, 174 F. Supp. 2d 450, 454 (N.D. Miss. 2001) (stating that a party seeking to evade arbitration must allege and prove that the arbitration clause was the product of fraud or coercion or that another ground exists at law or in equity).

The court below gave not a hint of explanation as to why it declined to enforce the arbitration agreement. Presumably, the circuit court adopted one of the two arguments offered by Plaintiffs: (1) that the subject matter of this dispute is beyond the scope of the arbitration agreement; or (2) that the particular Defendants that Plaintiffs chose to sue cannot invoke the arbitration agreement. Both of these arguments are without merit. First, this dispute is at least "arising under" or "related to" the AWG Agreement, within the meaning of the broad arbitration provision. *See infra* Point I.A. Second, Plaintiffs cannot evade the obligation to arbitrate simply by suing individuals or companies that allegedly "controlled" Leap, rather than suing Leap itself. *See infra* Point I.B.1. In addition, principles of equitable estoppel require Plaintiffs to arbitrate the dispute even if the AWG Agreement does not. *See infra* Point I.B.2.

Even if Plaintiffs' contrary position on these matters of contract interpretation were plausible, the circuit court still should have compelled arbitration. The arbitration agreement relegated to the arbitrators the threshold interpretive questions about the scope of the arbitration provision and who can invoke it. *See infra* Point I.C.

A. A Dispute About Disclosures Omitted From Negotiations For The AWG Agreement And From The Registration Statement Filed Pursuant To The AWG Agreement "Arise Under" Or "In Any Way Relate To" The Agreement

Plaintiffs bear a heavy burden in trying to persuade this Court that the AWG Agreement's broad arbitration provision does not cover their claims in this case. While the question whether the subject matter of this dispute falls within the arbitration provision is governed by ordinary principles of contract interpretation, *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 945 (1995); *Fleetwood Enters. Inc. v. Gaskamp*, 280 F.3d 1069, 1073-74 (5th Cir. 2002); *Terminix*, 904 So. 2d at 1054, the scale tips markedly in favor of arbitration, *I.P. Timberlands Operating Co. v. Denmiss*

Corp., 726 So. 2d 96, 106 (Miss. 1998). In deference to Congress's command, the arbitration agreement must be "liberally construed," indulging every reasonable presumption in favor arbitration. *Id.*; *see also Gaskamp*, 280 F.3d at 1073 ("[A]mbiguities . . . [are] resolved in favor of arbitration.") (quoting *Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 475 (1989)); *I.P. Timberlands*, 726 So. 2d at 107 ("Doubts as to the availability of arbitration must be resolved in favor of arbitration."). Therefore, a promise to arbitrate must be enforced "unless it can be said with positive assurance that the arbitration clause is not susceptible of an interpretation which would cover the dispute at issue." *Neal v. Hardee's Food Sys., Inc.*, 918 F.2d 34, 37 (5th Cir. 1990).

Plaintiffs could not come close to bearing that burden here. If there can be any "positive assurance," it runs the other way; the *only* way to read the arbitration provision in the AWG Agreement is to embrace this dispute. When American Wireless signed the AWG Agreement, it undertook a broad, expansive and unconditional arbitration obligation. It did not agree to arbitrate just claims involving breach of contract or disputes about the construction of the agreement. It agreed to arbitrate "*any* dispute, claim or controversy *arising under* this Agreement or *in any way related to this Agreement*." R.E. 3, AWG R. 1520-21, Whit. R. 683-84 (AWG Agreement) (emphasis added).

This dispute falls squarely within that broad and expansive agreement. First, this dispute arises out of and revolves around disclosures that were made (or not made) in negotiating the AWG Agreement. Had there never been an AWG Agreement, there would never have been a stock transaction, there would never have been a June 2001 Registration Statement, and there would never have been an allegation of failure to disclose anything in that statement or in the course of negotiating the deal. Thus, this dispute necessarily "aris[es] under" or "in any way relate[s] to" the AWG Agreement.

Second, one of Plaintiffs' claims focuses specifically on the June 2001 Registration Statement memorializing the transfer of Leap stock to American Wireless. The AWG Agreement explicitly "required" Leap to file that Registration Statement. R.E. 4, AWG R. 9; R.E. 5, Whit. R. 104 (complaint ¶ 4). Clearly, that is a dispute that arises under or is in any way related to the AWG Agreement.

Third, as if to underscore the connection between Plaintiffs' claims and the AWG Agreement, the complaint describes the AWG Agreement at length. It begins with a narrative of the negotiations lead up to the signing of the AWG Agreement. R.E. 4, AWG R. 40-46; R.E. 5, Whit. R. 145-52 (complaint ¶¶ 31-39). The complaint discusses "inducements and representations made by Leap and members of the Leap Control Group [to] American [Wireless]" to persuade them to sign the AWG Agreement. R.E. 4, AWG R. 9, 42-43; R.E. 5, Whit. R. 104, 148 (complaint ¶¶ 3, 37). It enumerates more than a dozen material terms of the AWG Agreement. R.E. 4, AWG R. 43-44; R.E. 5, Whit. R. 148-50 (complaint ¶ 38(a)-(n)). The complaint, then, repeatedly characterizes "the 'deal' between Leap, the Defendants, and the Plaintiffs" as one in which "Leap was effectively selling the Leap Stock to American's members, including the Plaintiffs." R.E. 4, AWG R. 78-79 (complaint ¶ 104); R.E. 5, Whit. R. 185-86 (complaint ¶ 105). For example, Plaintiffs allege that "the plan was always for Leap to sell its stock to the Plaintiffs and other [AWG] members" and that the Agreement was part of "an integrated series of steps" used to accomplish this. R.E. 4, AWG R. 9; R.E. 5, Whit. R. 104 (complaint ¶ 4). Those allegations certainly set forth a dispute, claim or controversy that arises under or is in any way related to the AWG Agreement.

Fourth, the complaint focuses not just on allegations of "material misstatements and omissions . . . contained in the Registration Statement," but also on other "disclosure failures of the Defendants

and Leap" in the course of negotiating the AWG Agreement "at all times between the fall of 2000 and August, 2002." R.E. 4, AWG R. 10; R.E. 5, Whit. R. 105 (complaint ¶¶ 5-6). The complaint recites at length various points in the negotiating history at which Leap should have disclosed the facts that Plaintiffs now deem material. *See, e.g.*, R.E. 4, AWG R. 46-48; R.E. 5, Whit. R. 152-54 (complaint ¶¶ 40-48). For example, the complaint recites that *at the closing* of the AWG Agreement, "Leap's representative and counsel . . . delivered . . . said law firm's approving legal opinion," but "failed to disclose the existence of any dispute . . . involving MCG PCS." R.E. 4, AWG R. 51; R.E. 5, Whit. R. 156 (complaint ¶ 53). All the claims in the complaint—including the state and federal securities claims—recite that the relevant misrepresentations were not just in connection with publicly filed documents, but also "by means of personal visit, the telephone, faxes, e-mails and United States mails sent . . . by or on behalf of Leap"—all in connection with negotiating the AWG Agreement. R.E. 4, AWG R. 70 (complaint ¶ 79); R.E. 5, Whit. R. 177-78 (complaint ¶ 80); *see also* R.E. 4, AWG R. 72-73 (complaint ¶ 87); R.E. 5, Whit. R. 179-80 (complaint ¶ 88) (state securities claim refers to Defendants' "participations in the inducements of Plaintiffs and American [Wireless] in connection with the Agreement"); R.E. 4, AWG R. 76-77 (complaint ¶ 97); R.E. 5, Whit. R. 183 (complaint ¶ 98) (federal securities claim is premised on omissions that make statements misleading "in light of the circumstances under which they were made," incorporating by reference the allegations of the first count as to the specific circumstances); R.E. 4, AWG R. 77-78 (complaint ¶ 102); R.E. 5, Whit. R. 184-85 (complaint ¶ 103) (fraud claim refers to Defendants' "purchase inducement communications with Plaintiffs"). In light of all the connections between this dispute and the AWG Agreement, Plaintiffs cannot plausibly claim that this dispute is *not* "in any way related to th[e] [AWG] Agreement."

The case law confirms this common-sense conclusion. As the U.S. Supreme Court has observed, when commenting on an identical arbitration provision, the "Resolution of Disputes" provision in the AWG Agreement is a "broad arbitration clause." *See Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 397-98 (1967) (describing the language, "any controversy or claim arising out of or related to this Agreement," as a "broad arbitration clause" that covered both the execution and acceleration of an agreement). When parties agree to an arbitration provision with this language, they "intend the clause to reach *all aspects of the relationship.*" *Nauru Phosphate Royalties, Inc. v. Drago Daic Interests, Inc.*, 138 F.3d 160, 164-65 (5th Cir. 1998) (emphasis added) (clause covers "[a]ny dispute . . . arising out of or in connection with or relating to this Agreement"). As the Fifth Circuit has held, "[b]road arbitration clauses," like this one, "are not limited to claims that literally 'arise under the contract,' but rather embrace all disputes between the parties having a significant relationship to the contract regardless of the label attached to the dispute." *Penzoil Exploration and Prod. Co. v. Ramco Energy Ltd.*, 139 F.3d 1061, 1067 (5th Cir. 1998). Thus, Plaintiffs can get nowhere by insisting that the cause of action is not for breach of the AWG Agreement, and does not call upon the courts to interpret the contract.

This Court illustrated the proposition in two recent cases. In *Smith Barney, Inc. v. Henry*, 775 So. 2d 722 (Miss. 2001), the mother of a decedent sued a brokerage firm over assets of the estate and the firm's fiduciary duties to the decedent. The decedent's contract with the brokerage firm required arbitration of "any controversy arising out of or relating to" the contract. *Id.* at 723. The mother argued that her claims fell outside the scope of the arbitration clause because her claims did not depend upon the formation of the agreements between Smith Barney and the decedent. *Id.* at 726. Rejecting the mother's argument, this Court held that the broad arbitration promise covered the claim

of breach of fiduciary duty since the funds that were the subject of the claims "were derived directly from . . . accounts and transactions with Smith Barney." *Id.*

This Court reached a similar result in *Russell v. Performance Toyota, Inc.*, 826 So. 2d 719 (Miss. 2002). There, a consumer purchased a truck from a dealer. Their contract provided that the parties would arbitrate "any controversy or claim arising out of or relating to the vehicle which is the subject of this contract." *Id.* at 723. After the dealer repossessed the truck, the buyer sued, alleging wrongful repossession, conversion, fraud, and tortious interference with a business relationship. *Id.* He did not sue for breach of the sales contract. The buyer claimed that his tort claims were not covered by the arbitration agreement in the contract covering the sale of the vehicle. This Court disagreed, holding that all of the buyer's claims pertained to the disputed ownership of the truck and trade-in vehicle, which placed them squarely within the "broad language" of the arbitration clause in the purchase agreement. *Id.* at 723.

Like each of those cases, Plaintiffs' claims represent a "dispute, claim or controversy arising under this Agreement" or at least a dispute that is in *some* "way related to this Agreement." The arbitration provision is sufficiently broad to cover all of Plaintiffs' claims against Qualcomm, and none of those claims fall outside the scope of the arbitration provision. Further, even if there were a question as to whether these claims fall within the scope of the arbitration provision, the Court should resolve any doubts in favor of arbitration. *I.P. Timberlands*, 726 So. 2d at 107; *Taylor*, 826 So. 2d at 713.

B. Plaintiffs Are Obligated To Arbitrate Their Claims Even Though Qualcomm Is A Non-Signatory

If Plaintiffs had filed their complaint directly against Leap, their claims would clearly be subject to arbitration. Plaintiffs cannot evade the effect and reach of the arbitration provision by choosing to sue individuals and companies that Plaintiffs claim were *controlling* Leap, rather than suing Leap, itself.

1. As One Who Is Alleged To Have "Controlled" Leap, Qualcomm Has The Right To Enforce The Arbitration Provision

The question of whom the parties intended to cover by the arbitration provision, like the question of which disputes the parties intended to cover, is a question of contract interpretation. And the same principles apply. Here, too, the arbitration agreement must be "liberally construed," indulging every reasonable presumption in favor arbitration, *I.P. Timberlands*, 726 So. 2d at 106 (Miss. 1998); "ambiguities . . . [must be] resolved in favor of arbitration," *Gaskamp*, 280 F.3d at 1073 (quotation marks and citation omitted); and American Wireless's promise to arbitrate must be enforced "unless it can be said with positive assurance that the arbitration clause is not susceptible of an interpretation which would cover" a dispute with these particular Defendants. *Neal*, 918 F.2d at 37.

Far from refuting "with positive assurance" the conclusion that the parties undertook to arbitrate disputes with those who are alleged to be in control of Leap, the language of the AWG Agreement confirms that they did. The arbitration provision is not limited only to "disputes *between* Leap and American Wireless," or to "cases in which American Wireless *sues Leap*." The agreement contemplated a much broader commitment to arbitrate "any dispute, claim or controversy arising under this Agreement" or "in any way related to this Agreement"—without regard to the precise

identity of a party the Plaintiff chooses to sue. *See, e.g., American Heritage Life Ins. Co. v. Beasley*, 174 F. Supp. 2d 450, 454-55 (N.D. Miss. 2001) (permitting nonsignatories to an arbitration agreement, which required arbitration of any claim arising from or relating to insurance written in connection with the loan agreement, to compel arbitration); *Smith v. Equifirst Corp.*, 117 F. Supp. 2d 557, 566 (S.D. Miss. 2000) (compelling arbitration of borrowers' claims against a nonsignatory because the arbitration provision provided for arbitration of any claim, dispute or controversy that may arise out of or is based on relationships which resulted from the loan application, and indicated that the agreement to arbitrate applied no matter by whom or against whom the claim was made).

The reason for this more expansive choice of words is evident. It would make no sense for a company to negotiate a commitment to send a dispute to arbitration, if the promise could be easily circumvented with the tactic of suing the company's executives rather than the company itself. The same is true of lawsuits against other entities that are alleged to have been in control of a party. Imagine, for example, the identical arbitration provision in a contract between ABC and a newscaster. If the newscaster has a dispute with ABC, it obviously cannot avoid arbitration through the simple device of, say, suing the corporate parent, Disney, insisting that it controlled—and should be ultimately responsible for—all its subsidiary's activities. That is true even though the parent is not specifically named in the contract, and even if (as is the case here) a provision of the contract says that the contract is not "intended . . . to confer upon any Person other than the parties and successors . . . any right . . . by reason of this Agreement." The party alleged to be in control (Disney in the hypothetical, and Qualcomm here) is not claiming a right under the AWG Agreement. The parties negotiated the rights, and the rights included a promise that "any dispute" would be arbitrated.

For example, *Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.*, 10 F.3d 753, 757 (11th Cir. 1993), involved a dispute between a signatory to a contract and a nonsignatory as to whether the nonsignatory could compel arbitration. The nonsignatory was Del-Monte Corporation, the parent corporation of Sunkist Soft Drinks ("SSD"), the company which had signed the agreement containing the arbitration provision. The court stated that "[e]ssentially, Sunkist contends that Del Monte, through its management and operation of SSD, caused SSD to violate various terms and provisions of the license agreement." *Id.* at 758. The court then stated that "when the charges against a parent company and its subsidiary are based on the same facts and are inherently inseparable, a court may refer claims against the parent to arbitration even though the parent is not formally a party to the arbitration agreement." *Id.* at 757.

This principle applies with full force here, even though Qualcomm vehemently disputes the allegation that it was in control of Leap. Plaintiffs' obligation to arbitrate is triggered by the allegations of their complaint, not by the defenses interposed in response. If Plaintiffs claim that Qualcomm controlled Leap, or that Leap and Qualcomm are essentially the same entity for purposes of holding Qualcomm liable, then Plaintiffs cannot simultaneously take the contradictory position that the arbitration provision does not apply to claims against Qualcomm.

2. Equitable Estoppel Prevents Plaintiffs From Evading Their Obligation To Arbitrate

Qualcomm may also compel arbitration as a matter of equity. Mississippi federal courts have recognized that a nonsignatory party may compel arbitration under the doctrine of equitable estoppel, where "the claims against the non-signatory are fundamentally grounded in, intimately founded in and intertwined with, or arise out of and relate directly to the agreement containing the arbitration clause."

In resisting arbitration, Plaintiffs are trying to have their cake and eat it, too—which is *exactly* what the doctrine of equitable estoppel prohibits. Plaintiffs "cannot, on the one hand, seek to hold the nonsignatory liable pursuant to duties imposed by the agreement, which contains an arbitration provision, but, on the other hand, deny arbitration's applicability because the defendant is a nonsignatory." *Grigson*, 210 F.3d at 528. Permitting Plaintiffs "to claim the benefit of the contract and simultaneously avoid its burdens would both disregard equity and contravene the purposes underlying enactment of the Arbitration Act." *Terminix*, 904 So. 2d at 1058 (quoting *Washington Mutual Finance Group, LLC v. Bailey*, 364 F.3d 260, 268 (5th Cir. 2004)). Therefore, because Plaintiffs raise allegations of substantially interdependent and concerted misconduct by both Qualcomm and Leap, Qualcomm, though a nonsignatory to the AWG Agreement, is entitled to compel arbitration under that Agreement.

C. Plaintiffs Also Agreed To Arbitrate Threshold Issues About The Scope Of The Arbitration Provision And To Whom It Applies

Even if there were a plausible question about the scope of the arbitration provision—either as to what substantive disputes it covered, or as to which parties could enforce the provision—the arbitration provision would still require this dispute be sent to arbitration. American Wireless agreed to submit to arbitration even those threshold inquiries about the scope of the arbitration.

When American Wireless signed the AWG Agreement, it did not just agree to commit to arbitration "any dispute . . . under this Agreement," but also "any dispute . . . in any way related to . . . its *interpretation, enforceability or inapplicability.*" R.E. 3, AWG R. 1520-21, Whit. R. 683-84 (AWG Agreement § 12.11) (emphasis added). Deciding whether the AWG Agreement's arbitration provision should be interpreted to encompass this sort of dispute is the quintessential exercise in

contract "interpretation." Similarly, deciding whether the provision should be interpreted to encompass claims Plaintiffs bring against others who are alleged to be in control of Leap is a classic question of "enforceability or inapplicability." Accordingly, these were all matters for the arbitrators to decide.

The circuit court's insistence on resolving these contractual disputes violated decades of established precedents. *See Buckeye Check Cashing, Inc. v. Cardegna,* 126 S. Ct. 1204 (2006) (arbitrators must decide whether a contract is void, due to alleged illegality); *Prima Paint Corp. v. Flood and Conklin Mfg. Co.*, 388 U.S. 395 (1967) (holding that arbitrator must decided whether a contract was induced by fraud). These cases establish that the question of *who* decides a threshold question—including the question "who has the primary power to decide arbitrability"—depends on the intent of the parties as expressed in the arbitration provision. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995) (internal quotation marks omitted). Like all questions of contract interpretation, this one "turns upon what the parties agreed about *that* matter." *Id.* So long as the parties "clearly and unmistakably" assigned the arbitrators to decide questions about the scope of an arbitration clause, courts are statutorily required to respect that contractual commitment. *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 648-50 (1986); *see AmSouth Bank v. Steadman*, 339 F. Supp. 2d 778, 781 (S.D. Miss. 2004).

The arbitration provision in the AWG Agreement did, indeed, manifest the requisite intent to commit questions about the scope of the arbitration provision to the arbitrators, by empowering the arbitration panel to resolve any and all disputes related to the AWG Agreement's "*interpretation, enforceability or inapplicability.*" *See Citifinancial Inc. v. Newton*, 359 F. Supp. 2d 545 (S.D. Miss. 2005) (holding that arbitration clause that incorporates the rules of the American Arbitration

Association clearly includes incorporation of rule empowering an arbitrator to rule on his or her own jurisdiction).

One recent opinion by a Mississippi federal court is exactly on point. In *Smith v. Equifirst Corp.*, 117 F. Supp. 2d 557, 559 (S.D. Miss. 2000), the court confronted a provision that, like the provision at issue here, promised to arbitrate "any dispute or controversy over the applicability or enforceability of this . . . agreement." *Id.* at 559 n.3. The court concluded that this language was "'clear and unmistakable evidence' that the parties agreed that the issue of arbitrability could be submitted to an arbitrator for decision." *Id.* Other courts concur. *See, e.g., PaineWebber Inc. v. Bybyk*, 81 F.3d 1193, 1199 (2d Cir. 1996) (holding that even without a specific grant to determine applicability, the language covering "'any and all controversies . . . between [the investor] and PaineWebber'" was enough to evince "the parties' intent to arbitrate all issues, including arbitrability"); *Galbraith v. Clark*, 122 P.3d 1061, 1064 (Colo. App. 2005) (finding language committing to arbitration "[a]ny dispute concerning this Agreement—the way it was formed, its applicability, meaning, enforceability confers the power to arbitrate the scope of the arbitration provision).

In short, the circuit court usurped the role of the arbitrators by conducting the steps of contract interpretation necessary to decide whether or not the arbitration provision covered this dispute and these particular parties.

II. BECAUSE QUALCOMM DID NOT CONTROL LEAP, THE STATE AND FEDERAL SECURITIES CLAIMS AGAINST QUALCOMM MUST BE DISMISSED

As the complaint tacitly acknowledges, Qualcomm did not have any involvement with any of the transactions between Leap and American Wireless, or with any of Plaintiffs. Plaintiffs offer

no allegations that Qualcomm signed, or had any direct connection, with the Registration Statement that is the focus of the federal securities claim, or with the various other filings that are the focus of the state securities claims. They have alleged no facts that would make Qualcomm primarily liable for any omissions in these statements. *See* 15 U.S.C. § 77k(a) (limiting liability under § 11 to someone who signed the challenged registration statement; was, or was about to become, a director of the issuer; was an accountant, appraiser, or underwriters). In fact, in the 26-page recitation of the "Facts Upon Which This Complaint Is Based," Plaintiffs make no reference to anything Qualcomm did. *See* R.E. 4, AWG R. 40-65; R.E. 5, Whit. R. 145-72 (complaint ¶¶ 31-70) (capitalization altered); *cf.* R.E. 4, AWG R. 56; R.E. 5, Whit. R. 161-62 (Complaint ¶ 62) (recounting a newspaper article mentioning Qualcomm's success). Similarly, with only one exception (noted immediately below), not a single paragraph in Plaintiffs' 20-page recitation of claims mentions Qualcomm. *See* R.E. 4, AWG R. 65-85 (complaint ¶¶ 70-114); R.E. 5, Whit. R. 172-92 (complaint ¶¶ 71-115). Nevertheless, Plaintiffs seek to hold Qualcomm liable for the Registration Statement and other public filings, by lumping Qualcomm in with various Leap officers and directors who are characterized as the "Leap Control Group." *See, e.g.*, R.E. 4, AWG R. 36-39, 72-73 (complaint ¶¶ 29, 87); R.E. 5, Whit. R. 142-45, 179-80 (complaint ¶¶ 30, 88). As this device underscores, Plaintiffs' only theory is that Qualcomm controlled Leap—or, in the parlance of the relevant statutes, that Qualcomm acted as a "controlling person" of Leap. MSA § 75-71-719; 15 U.S.C. § 77o (2006).

This ploy fails. It is not enough for Plaintiffs merely to assert the conclusion that Qualcomm controlled Leap; they were required to allege facts in support of that allegation. *See infra* Point II.A. Looking only at the face of the complaint, Plaintiffs have not come close to alleging facts that would support a claim that Qualcomm controlled Leap. *See infra* Point II. B. Moreover, treating this motion

as a motion for summary judgment, as the circuit court did, Plaintiffs fall even further short of their burden, for failure to produce any evidence of control at all. *See infra* Point I.C.

A. To Survive A Motion To Dismiss, Plaintiffs Were Required To Allege Specific Facts That, If True, Could Prove That Qualcomm Controlled Leap's Activities

Section 15 of the 1933 Securities Act, entitled "Liability of Controlling Persons," provides that:

> Every person, who, by or through stock ownership, agency or otherwise, or who, pursuant to or in connection with an agreement or understanding with one or more other persons by or through stock ownership, agency, or otherwise, controls any person liable under sections 77k or 77l of this title, 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, unless the controlling person had no knowledge of or reasonable ground to believe in the existence of facts by reason of which the liability of the controlled person is alleged to exist.

15 U.S.C. § 77o (2006). Mississippi's "controlling person" liability provisions parallel this provision and are coextensive with it.[8] MSA § 75-71-719; *see Tatum v. Smith*, 887 F. Supp. 918, 924 n.6 (N.D. Miss. 1995) (dismissing plaintiffs' controlling persons claim under the MSA because the MSA's controlling persons liability provision "mirrors" that of § 15 of the Securities Act of 1933, which the court had already dismissed).

Under both these provisions, Plaintiffs bear the burden of establishing control. They cannot survive a motion to dismiss their claims based on "controlling person" liability, unless they have properly pled two prongs. *See Abbott v. Equity Group, Inc.*, 2 F.3d 613, 620 (5th Cir. 1993). First, they must adequately allege that they can hold Leap responsible for a primary violation of the

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[8] Section 719 of the MSA provides that, "[e]very person who directly or indirectly controls a seller liable under § 75-71-717, every partner, officer or director of such seller, [and] every person occupying a similar status or performing similar functions . . . who materially aids in the sale are also liable jointly and severally with and to the same extent as the seller." MSA § 75-71-719. "Control," in turn, means "the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise." MSA, Rule 103(F).

securities laws—a prong they fail to establish for reasons addressed later in this brief. *See infra* Point III. Second, they must allege that Qualcomm had the power to direct Leap's "management and policies." Miss. Stat. Ann., Rule 203(F); *see Abbott*, 2 F.3d at 620. Plaintiffs cannot satisfy their burden simply by asserting that "Qualcomm . . . has been a member of the controlling person group of Leap within the meaning of the Mississippi Act and the 1933 Act," and calling it a day. R.E. 4, AWG R. 36-39 (complaint ¶ 29); R.E. 5, Whit. R. 142-45 (complaint ¶ 30). They must offer "more than a mere identification of a person's status." *In re Enron Corp. Securities, Derivative & ERISA Litig.*, 258 F. Supp. 2d 576, 598 (S.D. Tex. 2003). The pleading test is this: "[A]t a minimum a plaintiff must allege some facts demonstrating that [Qualcomm] had the requisite power to directly or indirectly control or influence [Leap's] actions or day to day control or knowledge of the underlying violation." *Id.*

B. Plaintiffs Did Not Allege Any Specific Facts That Could Demonstrate That Qualcomm Controlled Leap

Despite the conclusory allegation that "Qualcomm . . . has been a member of the controlling person group of Leap," R.E. 4, AWG R. 36-39 (complaint ¶ 29); R.E. 5, Whit. R. 142-45 (complaint ¶ 30), the complaint, through concessions and omissions, demonstrates exactly the opposite. The complaint does not assert that any of Qualcomm's officers or directors were officers or directors of Leap at the relevant time. The complaint does not even allege that Qualcomm and Leap shared any employees or shared common places of business. The complaint does not allege that Qualcomm was a majority shareholder of Leap—not even close. To the contrary the complaint acknowledges that Qualcomm distributed every single share of Leap stock that it owned at the time of the spin-off, R.E. 4, AWG R. 36-39 (complaint ¶ 29); R.E. 5, Whit. R. 142-45 (complaint ¶ 30), and is studiously silent

as to whether Qualcomm owned any stock at all, much less whether it had any voting rights.[9] Thus, by any ordinary metric, Qualcomm was not in control of Leap.

Plaintiffs' efforts to satisfy the statutory standard revolve around allegations of certain exotic forms of control. Their principal allegation appears to be that "Qualcomm held *beneficial ownership* and/or control of 5,161,624 shares of Leap Stock" on the eve of signing the AWG Agreement, and "still held beneficial ownership of and/or control of 4,561,424 shares of Leap Stock" a couple of months before closing on the transaction. R.E. 4, AWG R. 36-39 (complaint ¶ 29); R.E. 5, Whit. R. 142-45 (complaint ¶ 30) (emphasis added). As the complaint elsewhere acknowledges, what Plaintiffs describe as "beneficial ownership," was not ownership at all; *it was merely a warrant*—an option to purchase that amount of stock at a specified price. *Compare* R.E. 4, AWG R. 36-39 (complaint ¶ 29); R.E. 5, Whit. R. 142-45 (complaint ¶ 30), *with* R.E. 4, AWG R. 37-38 (complaint ¶ 29(3)); R.E. 5, Whit. R. 143-45 (complaint ¶ 30(3)) (alleging that the warrant was for the same number of shares).[10] As is evident from the complaint's silence, and from the Syrowik Affidavit, Qualcomm *never* exercised its right to purchase any of those shares. Which necessarily means that Qualcomm *never* owned that stock in any relevant sense, never had the power to vote that stock, and, therefore, could not exert any control over Leap's management by virtue of that inchoate power,

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[9] In fact, as Qualcomm's affidavit demonstrated, Qualcomm owned only 489,000 shares, which was a tiny 1.3% of the nearly 35 million shares then outstanding at the time the AWG Agreement was executed. AWG R. 3560. As is demonstrated below, such a small sliver does not amount to a controlling interest.

[10] Plaintiffs justify the label "beneficial ownership" by invoking an unrelated SEC rule that deems a person to be "beneficial owner" of a security when that person has the right to acquire ownership within 60 days through the exercise of an option, warrant, or right. *See* Rule 13d-3(d)(1) of the Securities Exchange Act of 1934, 17 C.F.R. § 240.13d-3(d)(1). But that rule serves a different purpose and does not convert a warrant into an interest that amounts to control for purposes of creating vicarious liability.

which was never realized. As if to concede the point, Plaintiffs' complaint does not offer so much as a hypothesis as to how the unexercised option to buy stock at some future date translated into the power to control Leap's day-to-day operations during the transactions at issue—or ever.

In any event, even if Qualcomm's unexercised warrant could be equated with voting shares of Leap stock, that still would not establish control. For all of Plaintiffs' bluster about 4.6 million shares, those shares—even if Qualcomm had ever owned them—would have amounted to only 11.6% of the 36 million outstanding shares of Leap stock. *However, the undisputed reality is that Qualcomm never owned more than 489,000 shares, which is roughly 1.3% of the outstanding shares.*

As the case law confirms, that is not enough to establish control. In one recent case, as here, the plaintiffs alleged that the defendant corporation was a control person under § 15. *See Deutsche Telekom AG Securities Litigation*, No. 00-CIV-9475- SHS, 2002 WL 244597, at *1-3 (S.D.N.Y. Feb. 20, 2002). The defendant owned 22% of the offeror—in actual stocks, not just options—which was double Qualcomm's total holdings in stock and warrants combined. *Id.* at *1. The complaint there, like Plaintiffs' complaint against Qualcomm, further alleged broadly that the defendant participated in the offeror's operations and had the power to influence and control the decision-making of the offeror, including the content and dissemination of the public statements that the plaintiffs contended were false. The federal court held that the only allegation that was sufficiently concrete was the allegation of stock ownership. *Id.* at *6. The court then held that 22% was simply not enough to establish control—a conclusion that goes double for this case. *Id. See also Dennis v. General Imaging, Inc.*, 918 F.2d 496, 509-10 (5th Cir. 1990) (status as a director and minority stockholder were insufficient to maintain a claim); *Metge v. Beahler*, 762 F.2d 621, 631 (8th Cir. 1985) (lender's 18% interest in borrower's stock and proxy on controlling interest in borrower's subsidiary, did not

establish control); *In re Gupta Corp. Sec. Litig.*, 900 F. Supp. 1217, 1241, 1243 (N.D. Cal. 1994) (minority stock ownership insufficient); *Sloane Overseas Fund, Ltd. v. Sapiens Int'l Corp.*, 941 F. Supp 1369, 1378-79 (S.D.N.Y. 1996) (8% stock ownership insufficient).

Even less powerful are the other facts Plaintiffs try to present as indicia of control. First, Qualcomm loaned Leap money. The complaint does not allege that this was anything other than an arms-length transaction, and the details confirm that is all it was. R.E. 4, AWG R. 36-37 (complaint ¶ 29(1)); R.E. 5, Whit. R. 142-43 (complaint ¶ 30(1)). The complaint confirms that Leap was obligated to pay interest, and even a "commitment fee." *Id.* Moreover, the loan was secured; in fact, the security at any given time had to be worth 50% more than the principal amount of the loan. *Id.* Second, Qualcomm subleased some office space to Leap. Again, the complaint takes for granted that this was an arms-length transaction. R.E. 4, AWG R. 37 (complaint ¶ 29(2)); R.E. 5, Whit. R. 143 (complaint ¶ 30(2)). As the complaint concedes, the sublease is written, and Leap pays over $500,000 a year for it. *Id.* Third, the complaint mentions various "agreements resulting from Qualcomm's spin-off of Leap." R.E. 4, AWG R. 37-39 (complaint ¶ 29(3)); R.E. 5, Whit. R. 143-45 (complaint ¶ 30(3)). The complaint describes a "Separation and Distribution Agreement," which (as the complaint confirms in detail) is simply a division of assets and liabilities between the two companies—much like a separation agreement between husband and wife or a dissolution of a partnership. As part of the separation deal, Leap agreed to license certain technology to Qualcomm, and not to make certain investments that would be hostile to Qualcomm's business interests. *Id.*

While Plaintiffs describe these three transactions in excruciating detail, they do not point to a single aspect of these contracts that so much as suggests that Qualcomm could control Leap's management. Nor does the complaint describe how Plaintiffs might even try to make that connection.

Perhaps more significantly, there is no allegation that any of those agreements had anything to do with Leap's issuance of stock to American Wireless, or with the AWG Agreement. If Plaintiffs are free to sue Qualcomm on the basis of these allegations, then a plaintiff could sue any landlord, lender, or licensee on the same theory. Notably, Plaintiffs do not cite a single case in which a court has found any such transaction to qualify (or potentially qualify) as control. These facts fall far short of the level necessary to "support a reasonable inference that they had the potential power to influence and direct the activities of the primary violator." *Sloane*, 941 F. Supp. at 1378 (citation omitted); *see Suez Equity Investors, L.P. v. Toronto-Dominion Bank*, 250 F.3d 87, 102 (2d Cir. 2001).

Accordingly, the allegations of complaint do not make out a *prima facie* case under MSA § 719 or § 15 of the Federal Act. *See Cromer Fin. Ltd. v. Berger*, 137 F. Supp. 2d 452, 484 (S.D.N.Y. 2001). The circuit court should have dismissed the complaint without regard to whether it was appropriate to consider Qualcomm's affidavit or to convert the motion into a summary judgment motion.

C. Because Plaintiffs Failed To Present Evidence To Counter Qualcomm's Proof Of Lack Of Control, Qualcomm Is Entitled To Summary Judgment

Dismissal of the case is even more appropriate when treating the motion, as the circuit did, as a motion for summary judgment. Qualcomm's Syrowik affidavit contains not just the definitive statements (made in various ways) that Qualcomm "did not have any control over the day-to-day activities of Leap or control with respect to larger strategic issues," but also specific facts to support that conclusion. R.E. 7, AWG R. 3387, Whit. R. 2275 (Syr. Aff. ¶ 3). Most notable among them is the extensive discussion of the steps Qualcomm took to diminish even the slightest semblance of control, and the FCC's consequent conclusions that "'QUALCOMM does not have the power to

control Leap directly or indirectly,'" and that "[t]he FCC also found that 'there is no evidence that Leap has ceded either management or administrative functions to QUALCOMM.'" R.E. 7, AWG R. 3390, Whit. R. 2278 (Syr. Aff. ¶ 10) (quoting Exhibit 4, ¶¶ 29, 30 and Exhibit 5).

Beyond that, the affidavit also explicitly states what is already evident from the complaint itself: (1) that all the agreements between Qualcomm and Leap since the spin-off "were arms-length transactions made between separate independent companies in the ordinary course of business," R.E. 7, AWG R. 3390, Whit. R. 2278 (Syr. Aff. ¶ 12); (2) that "[n]othing in those agreements allowed QUALCOMM to control Leap," R.E. 7, AWG R. 3390, Whit. R. 2278 (Syr. Aff. ¶ 12); (3) that Qualcomm "had nothing to do with Leap's issuance of stock pursuant to the AWG Agreement, and . . . did not participate in the negotiation of the AWG Agreement" or "in any public filings relating to the AWG Agreement," R.E. 7, AWG R. 3390-91, Whit. R. 2278-79 (Syr. Aff. ¶ 13); and (4) that Qualcomm's holdings of actual stock (as opposed to warrants) amounted to a measly 1.3% of the outstanding stock.

In the face of these sworn statements, Plaintiffs came forward with nothing. Literally. Plaintiffs did not even put the allegations asserted in their complaint in evidentiary form. That lapse is fatal in and of itself, for Plaintiffs cannot withstand summary judgment by resting on an unsworn complaint. *McMichael v. Howell*, 919 So. 2d 18, 21 (Miss. 2005) (reiterating the well-established principle that the party opposing summary judgment "may not rest upon mere allegations or denials in the pleadings"). But even if the complaint could be considered a suitable opposition to summary judgment, the complaint does nothing to refute the affidavit. Plaintiffs' Rule 56(f) submission acknowledged as much, when it conceded that "Plaintiffs cannot at the present time respond by affidavit to the . . . claims in th[e] affidavit," because "the information that Plaintiffs need to respond

to the Syrowik Affidavit[] is in the possession of Defendant QUALCOMM." AWG R. 2679-80; Whit. R. 1647-48 (Rediker Aff. ¶ 3). The circuit court correctly rejected Plaintiffs' argument that they were entitled to discovery before responding. Plaintiffs were not entitled to discovery just for the sake of it. If they had some basis on which to believe that any of the innocuous transactions they had pointed to amounted to control, it was up to them to state that basis. But, having failed to do so, Plaintiffs were not entitled to proceed with a fishing expedition in the hopes of drudging something up.

III. PLAINTIFFS LACK STANDING TO BRING THE SECURITIES CLAIMS, BECAUSE THEY BOUGHT THE SECURITIES ON THE OPEN MARKET, AND NOT DIRECTLY FROM LEAP

Even if Plaintiffs could demonstrate that Qualcomm is a proper defendant, this case would have to be dismissed because Plaintiffs are not proper plaintiffs; they are not authorized to bring the securities claims under either federal or state law. Both statutes authorize a lawsuit only by a person acquiring the very securities identified in the Registration Statement. The Whittington Plaintiffs, who acquired their stock on the open market, not directly from Leap, fall outside the scope of these statutes. Nor does American Wireless have standing to bring a federal securities claim against Qualcomm.[11]

A. Because The Whittington Plaintiffs Cannot Demonstrate That They Purchased The Same Securities That Were The Subject Of The Registration Statement, the Whittington Plaintiffs Lack Standing To Bring The Federal Securities Claim

Section 11 of the 1933 Securities Act creates civil liability for issuing a false or misleading registration statement. 15 U.S.C. 77k(a). But only a limited universe of parties is authorized to sue.

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[11] As to American Wireless's lack of standing, we adopt and incorporate the argument set forth in the Leap Defendants' Brief.

The statute provides that:

> 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 . . . sue.

Id. (emphasis added). The statute does not say "any person who read the statement may sue," and it does not say "any person who contemporaneously acquired *other* securities on the open market may sue." Congress purposely limited the cause of action to those who "acquir[e] such security"—meaning, the very security identified in the registration statement that is being challenged. *See, e.g., Lee v. Ernst & Young, L.L.P.*, 294 F.3d 969, 977 (8th Cir. 2002).

As the complaint concedes, the Whittington Plaintiffs did not "acquir[e] such security"—the security described in the challenged Registration Statement. They acquired their securities on the open market. American Wireless was the one who "acquired such security," and it never sold a single Leap share to the Whittington Plaintiffs; it dispersed all of its shares into the open market, where those shares mingled with millions of fungible shares. So the Whittington Plaintiffs could not prove that any particular share they bought was originally offered pursuant to the challenged Registration Statement, any more than a child in Biloxi could prove that the bucket of water he dumped into the Gulf is the same as the water his buddy in Pascagoula drew a week later.

The Whittington Plaintiffs might conceivably have standing to sue under § 11 (though, as we shall see, not under the Mississippi analog) if Leap had sold the securities to American Wireless, and American Wireless turned around and sold those very same securities to the Whittington Plaintiffs. Then, the Whittington Plaintiffs would at least be able to say that they *ultimately* "acquir[ed] such security." *See Lee*, 294 F.3d at 977; *Joseph v. Wiles*, 223 F.3d 1155, 1159 (10th Cir. 2000);

Hertzberg v. Dignity Partners, Inc., 191 F.3d 1076, 1080 (9th Cir. 1999). In securities parlance, the Whittington Plaintiffs would then be "aftermarket purchasers"—purchasers who purchase a security "after it has been initially sold by the issuer," *Black's Law Dictionary* 61 (6th ed. 1990)—but they could still prove that they acquired the very same stock that was the subject of the challenged Registration Statement. Only where the security a plaintiff purchased is "traceable" in this way to the challenged registration statement may the plaintiff sue under § 11. *Rosenzweig v. Azurix Corp.*, 332 F.3d 854, 873 (5th Cir. 2003); *see also Harden v. Raffensperger, Hughes & Co.*, 933 F. Supp. 763, 766-67 (S.D. Ind. 1996) (noting the difficulties associated with tracing securities in the open market). But where, as here, the shares the Whittington Plaintiffs held could not be reliably traced directly to the challenged Registration Statement, they may not sue. *See Lee*, 294 F.3d at 976-77; *Joseph v. Wiles*, 223 F.3d at 1159; *Hertzberg*, 191 F.3d at 1080. Otherwise, any shareholder could claim standing under § 11 based on the possibility that it might be holding shares that derived from the challenged offering. Congress limited the remedy to traceable share precisely because it wanted to prevent a circumstance where the "issuer could find itself liable for far more than the number of shares issued in the challenged offering." *Kirkwood v. Taylor,* 590 F. Supp. 1375, 1380 (D. Minn. 1984).

The cases consistently apply this principle to require the purchaser who is suing to prove with absolute certainty that the stocks he holds are traceable to the registration statement he is challenging. Sometimes, that is easy—where, for example, there has been only one offering (and one registration statement), so that everyone who purchased stock on the public market can trace the stock back to that offering. *See Hertzbert*, 191 F.3d at 1082; *Joseph*, 223 F.3d at 1157 ("[B]ecause [the defendant] made only one debenture offering, the debentures [the plaintiff] purchased are directly traceable to

the [challenged] offering and registration statement."). However, in the more typical circumstance, exemplified by this case, it is impossible to trace stock that is trading on the open market back to any particular registration statement. *See Kirkwood*, 590 F. Supp. at 1380 (declining to presume that a pro rata portion of the shares plaintiffs purchased in the aftermarket were new shares).

One recent federal case illustrates the distinction vividly. In *Krim v. pcOrder.com, Inc.*, 210 F.R.D. 581, 586 (W.D. Tex. 2002), a company conducted two public offerings—an initial public offering and a secondary public offering ten months later—and the plaintiffs challenged the registration statements for both. Between the first and the second public offering, insiders began selling their shares. One plaintiff bought his shares after the initial public offering, and *before* those insider shares entered the market. The court held that he had standing to sue, because he "purchased stock at a time when only shares issued pursuant to the registration statement were available on the market." *Id.* at 586. His shares were traceable with absolute certainty. In contrast, two other plaintiffs bought their shares *after* the insider shares entered the market. The court held that these two plaintiffs did not have standing, because they could not definitively prove that their shares were traceable to the challenged registration statements. *Id.* The court stood by this conclusion even thought there was "a high statistical probability (greater than 90 percent at all times) [that] the stock they purchases on the open market was issued pursuant to the initial or secondary offerings' registration statements." *Id.* As the court put it, the plaintiffs must "demonstrate *all* stock for which they claim damages was *actually* issued pursuant to a defective statement, not just that it might have been, probably was, or most likely was, issued pursuant to a defective statement." *Id.* (second emphasis added).

The Whittington Plaintiffs' position is even weaker than the failed position of the plaintiffs in *Krim*. According to the complaint, pursuant to the Registration Statement in question, Leap issued 1.9 million shares to American Wireless, which, over the course of seven months, proceeded to dump those shares into a sea of nearly 34 million fungible shares of Leap stock. R.E. 4, AWG R. 9; R.E. 5, Whit. R. 104 (complaint ¶¶ 3, 4); (Exhibit to Qualcomm's motion to dismiss, excerpt from Leap's 2001 Form S-3 at 21). Accordingly, the Whittington Plaintiffs cannot claim that they purchased the actual shares issued pursuant to the allegedly fraudulent Registration Statement. The most they can say is that there was a 5.5% chance that any particular share they purchased was one of the shares covered by the Registration Statement in question. If a 90% chance will not establish standing, a 5.5% chance must fail as well.

Plaintiffs cannot overcome this barrier by asserting that "[t]he plan was always for Leap to sell its Stock to the Plaintiffs." R.E. 4, AWG R. 9; R.E. 5, Whit. R. 104 (complaint ¶ 4). As the complaint acknowledges, no such plan came to fruition. *See* R.E. 4, AWG R. 42; R.E. 5, Whit. R. 147-48 (complaint ¶ 36). The parties opted instead for a different arrangement under which "the Plaintiffs were buying . . . the Leap Stock" in the same time-frame when "American [Wireless was] disposing of the registered shares." R.E. 4, AWG R. 53; R.E. 5, Whit. R. 158 (complaint ¶ 56). Contrary to the complaint's assertion, this did not mean that the Whittington Plaintiffs were "in effect buying back . . . the Leap Stock," R.E. 4, AWG R. 53; R.E. 5, Whit. R. 158 (complaint ¶ 56), or that they essentially "wound up" with that stock, R.E. 4, AWG R. 9, 53, 65-66; R.E. 5, Whit. R. 104, 115-25, 158-59, 172-73 (complaint ¶¶ 3, 4, 15, 56, 73), any more than the Pascagoula kid could claim to be "in effect taking back" or "winding up with" the water dumped by his Biloxi

Since the Whittington Plaintiffs failed to plead facts demonstrating standing, the § 11 claim must be dismissed. *See Moskowitz v. Mitcham Indus.*, No. Civ.A.98-1244, 1999 WL 33606197, at *20 (S.D. Tex. Sept. 29, 1999).

B. The State Securities Claim Must Be Dismissed Because The Whittington Plaintiffs Did Not Buy Their Stock Directly From Leap

The Mississippi analog, MSA § 75-71-717, has a similar limitation on standing, but it is even more restrictive. It provides that "any person who . . . offers or sells a security by the use of a communication which contains untrue statements or material omissions . . . is liable to the person *buying the security from him.*" MSA § 75-71-717(a)(2) (emphasis added). Like its federal counterpart, this provision narrows the universe of people who can sue over an offering statement. But unlike the federal law, the state analog does not permit *anyone* who acquires securities in the aftermarket to sue. Only those who "buy[] the security from him"—directly from the offeror—can sue.

In this regard, the state statute is similar to § 12(2) of the Federal Securities Act of 1933, which applies to a person who "sells a security . . . to the person purchasing such security from him." 15 U.S.C. § 77l(2). Courts have held that this provision can be invoked only by the person who purchased directly from the offeror. *See Lee*, 294 F.3d at 976 (distinguishing § 11 from § 12(2), because the latter is more limited).

Because the Whittington Plaintiffs did not purchase the security directly from Leap—and certainly because they cannot trace their shares to the challenged offering—they have no standing under the state securities law. That claim must be dismissed.

IV. PLAINTIFFS DID NOT STATE A FRAUD CLAIM AGAINST QUALCOMM

The circuit court also erred in declining to dismiss the fraud claim against Qualcomm. Under Mississippi law, Plaintiffs cannot sustain a fraud claim unless they plead with specificity that: (1) Qualcomm made a representation; (2) the representation was false or omitted a fact that made it misleading; (3) the representation or omission was material to Plaintiffs; (4) Qualcomm knew the statement was false (or knew the fact omitted); (5) Qualcomm intended that Plaintiffs would act upon the representation and in the manner reasonably contemplated; (6) Plaintiffs did not know the statement was false (or did not know the omitted fact); (7) Plaintiffs relied on the representation; (8) Plaintiffs had a right to rely on it; and (9) Plaintiffs suffered an injury proximately caused by their reliance on the representation. *American Bankers' Ins. Co. of Fla v. Wells*, 819 So. 2d 1196, 1207 (Miss. 2001); *see also Mooneyham v. Progressive Gulf Ins. Co.*, 910 So. 2d 1223, 1227 (Miss. Ct. App. 2005) ("An omission constitutes fraud only if the speaker owed the hearer a duty of disclosure.").

Plaintiffs' complaint does not satisfy the requisite elements of fraud. Plaintiffs have not even tried to specify anything that Qualcomm, itself, did or failed to do that rose to the level of fraud—which is why Qualcomm barely makes an appearance in the factual narrative or in the claims. Throughout the complaint, Plaintiffs' sole theory of liability for Qualcomm is that Qualcomm is responsible for Leap's conduct because Qualcomm controlled Leap. This approach is rebutted above. But the more important point here is that fraud cannot be proven by a vicarious "controlling person" theory, the way the securities claims can be. *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); *Zishka v. American Pad & Paper Co.*, 72 Fed. Appx. 130, 132 (5th Cir. 2003) (there can be no control person

liability where the appellants have failed to plead the predicate securities claim). If Plaintiffs want to hold Qualcomm liable, they must demonstrate Qualcomm's direct responsibility for misrepresentations or material omissions.

It is not enough for Plaintiffs to declare that Qualcomm was "working in concert and conspiracy, and materially and knowingly aiding and abetting" the alleged malfeasors at Leap. R.E. 4, AWG R. 77-78 (complaint ¶ 102); R.E. 5, Whit. R. 184-85 (complaint ¶ 103). This would not be enough even if the complaint did not acknowledge (as it does) that Qualcomm spun-off Leap into an independent company three years before these alleged misrepresentations occurred. *See* R.E. 4, AWG R. 8; R.E. 5, Whit. R. 103 (complaint ¶ 2). In the context of a fraud claim, Plaintiffs must plead, with specificity, actual facts that demonstrate that Qualcomm knew about the deal, knew about the misstatements and omissions, participated in crafting or approving the offending communications, and had a role in the supposed conspiracy. *See Howard v. Estate of Harper*, Nos. 2005-IA-00115-SCT, 2005-IA-00117-SCT, 2006 WL 3026398, at *6 (Miss. Oct. 26, 2006) (dismissing fraud claims for failure to satisfy the pleading requirements of Rule 9(b), where plaintiffs made only general allegations and blanket assertions against the collective defendants and not each defendant specifically); *Allen v. Mac Tools, Inc.*, 671 So. 2d 636, 642 (Miss. 1996) (explaining that fraud may not be pled in general terms, but instead must state "the circumstances of the alleged fraud such as the time, place and contents of any false representations or conduct"); Miss. R. Civ. P. 9(b) (requiring that fraud must be pled with particularity).

CONCLUSION

The judgment of the lower court should be reversed. The Court should enforce the broad arbitration provision of the AWG Agreement, and compel arbitration of Plaintiffs' claims, including arbitration of any threshold question as to whether the claims are within the scope of the agreement to arbitrate. Alternatively, if the Court declines to order arbitration, it should dismiss all the claims against Qualcomm, whether the motion under review is treated as a motion to dismiss or as a motion for summary judgment.

This, the 17th day of November, 2006.

Respectfully submitted,

QUALCOMM INCORPORATED

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CERTIFICATE OF SERVICE

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

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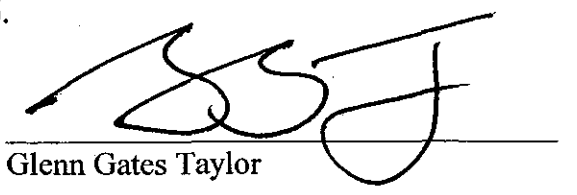
This, the 17th day of November, 2006.



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