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5 **Proposed Liaison Counsel for Lead Plaintiff**
Movant The Vertical Group and the Class

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11 **Proposed Lead Counsel for Lead Plaintiff**
Movant The Vertical Group and the Class

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

MICHAEL MITCHELL, Individually and)
on Behalf of All Others Similarly Situated,)
Plaintiff,)
vs.)
PEGASUS WIRELESS CORPORATION,)
JASPER KNABB, STEPHEN DURLAND,)
ALEX TSAO,)
Defendants.)

CASE NO.: 3-06-CV-06969 MHP
CLASS ACTION
CORRECTED REPLY IN FURTHER
SUPPORT OF MOTION OF THE
VERTICAL GROUP FOR
APPOINTMENT AS LEAD
PLAINTIFF AND APPROVAL OF
PLAINTIFF'S SELECTION OF
COUNSEL

DATE: February 26, 2007
TIME: 2:00 P.M.
CTRM: 15, 18th Floor

1 **I. Introduction**

2 Movants The Vertical Group LLC (“Vertical”), Robert Schaffer (on behalf of himself and as
3 a Principal of Vertical) and Cody Corrubia (collectively the “Vertical Group”), respectfully submit
4 this Memorandum of Law in Reply to the Opposition to the Vertical Group’s Motion for
5 Appointment as Lead Plaintiff submitted by Peter Gianoukas, Nick Pournaras, Mike Mitchell, Marat
6 Khusainov and Michael Dattilo (collectively, the “Pournaras Group”). As discussed below, the
7 Vertical Group should be appointed as lead plaintiff. First, the Vertical Group is the lead plaintiff
8 movant with the “largest financial interest” in this litigation within the meaning of the Private
9 Securities Litigation Reform Act of 1995, 15 U.S.C. §§ 78u-4(a)(3)(B) (“PSLRA”). Second, the
10 belated agreement by the Pournaras Group to work together in prosecuting this litigation is
11 insufficient to overcome the fact that they – unlike the Vertical Group – did not have any
12 relationship with each other prior to the initiation of this litigation, but is evidence that their efforts
13 to control this litigation are “lawyer-driven.”

14
15 **II. It Is Improper To Aggregate The Losses Of Class Members With No Pre-Existing
16 Relationship To Determine The Largest Financial Interest In The Litigation.**

17 The Vertical Group – consisting of class members (including an institutional investor) with a
18 pre-existing relationship – possesses the “largest financial interest” in the litigation under the
19 PSLRA because its losses exceed the losses of any “member” of the Pournaras Group. As
20 previously shown, it is improper under the PSLRA to aggregate the losses of a “group” of class
21 members with no pre-existing relationship for the purposes of determining which lead plaintiff
22 “movant” possesses the “largest financial interest” in the litigation under the PSLRA. See
23 Memorandum of Law in Further Support of Motion of the Vertical Group for Appointment as Lead
24 Plaintiff and Approval of Choice of Counsel, at pages I- 4.

25 Indeed, none of the cases relied upon by the Pournaras Group hold to the contrary. For
26 example, in In re Milestone Scientific Sec. Litig., 183 F.R.D. 404, 417-418 (D.N.J. 1998), the Court
27 appointed a group consisting of a family of related funds, noting that one member of the family
28 manages or controlled all of the funds). In In re Microstrategy Sec. Litig., 110 F.Supp.2d 427, 439

1 (E.D. Va. 2000), the Court granted the motion of a group consisting of a family with the largest
2 losses of any competing movant and an institutional investor, because the family wished to serve as
3 a co-lead plaintiff with the institutional investor. Nowhere in the decision did the Court hold that it
4 was appropriate to aggregate the losses of unaffiliated investors in comparison to the losses of a
5 group with a preexisting relationship for the purposes of evaluating which movant possessed the
6 largest financial interest in the relief sought. Similarly, in In re Oxford Health Plans, Inc., 182
7 F.R.D. 42, 46 (S.D.N.Y. 1998), the Court appointed a pension fund, an investment management
8 company and various individuals as lead plaintiffs, noting that by enacting the PSLRA, Congress
9 intended to encourage the participation of institutional investors; nowhere in the decision did the
10 Court rule that the losses of class members with no preexisting relationship could be aggregated to
11 trump the losses of a group of investors with a preexisting relationship. In each of Steiner v. Aurora
12 Foods, Inc., No. C 00-602-CW, 2000 U.S. Dist. LEXIS 20341,*12 (N.D. Cal. June 5, 2000), In re
13 Advanced Tissue Sciences, 184 F.R.D. 346, 350 (S.D. Cal. 1998), In re Informix Corp. Sec. Litig.,
14 No. C 97-1289-SBA, 1997 U.S. Dist. LEXIS 23687, *9 (N.D. Cal. Oct. 17, 1997), Chill v. Green
15 Tree Financial Corp., 181 F.R.D. 398, 408 (D. Minn. 1998), and Takeda v. Turbodyne
16 Technologies, Inc., 67 F. Supp.2d 1129, 1136 (C.D. Cal May 28, 1999), none of the competing
17 movant groups had a pre-existing relationship.¹

18 While the Vertical Group recognizes that courts have found it appropriate to evaluate the
19 aggregate losses of small, competing groups when **none** of the competing groups have a preexisting
20 relationship, it would turn the PSLRA on its head if the aggregate losses of unaffiliated class
21 members (that were cobbled together by lawyers) could be compared to the losses of a group of
22 class members with a preexisting relationship for the purpose of determining which movant
23 possessed the largest financial interest in the relief sought.

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27 ¹ While the Court in In re Versata, Inc. Sec. Litig. 2001 WL 34012374, *6 (N.D. Cal. Aug.
28 20, 2001), ruled that losses of unaffiliated Class Members could be aggregated in that case, the
Court gave significant weight to the fact that the group consisted of institutional investors.

1 **III. The Pournaras Group's Belated Agreement**
2 **To Jointly Prosecute The Litigation Is Irrelevant.**

3 In February 2007, **after** learning that the Vertical Group was composed of individuals and an
4 institutional investor with a pre-existing relationship, the lawyers for the Pournaras Group decided
5 to have the "members" of the Pournaras Group submit a Declaration indicating their willingness to
6 be aggregated as a group and to work together to prosecute this litigation.² This belated agreement is
7 nothing more than a transparent attempt to show that the "members" of the Pournaras Group are
8 cohesive in order to overcome the fact that they had no agreement or relationship prior to the
9 commencement of this litigation. Not surprisingly, Courts have recognized that lead plaintiff
10 "groups" **without** a preexisting relationship cannot use evidence of agreements to jointly prosecute
11 the litigation entered into **after** the commencement of the litigation as a basis to aggregate losses for
12 the purpose of showing that the group possesses the largest financial interest in the relief sought
13 under the PSLRA. See, e.g., Bowman v. Legato Sys., Inc., 195 F.R.D. 655, 658 (N.D. Cal. 2000).

14 **IV. Conclusion**

15 For the foregoing reasons, the Vertical Group respectfully requests that this Court appoint it
16 to serve as Lead Plaintiff and approve its selection of Schatz Nobel IZard, P.C. as Lead Counsel and
17 the Braun Law Group as Liaison Counsel.

18
19 Dated: February 16, 2007

Michael D. Braun
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21 /S/ Michael D. Braun

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27 ² The Declaration was submitted with the Pournaras Group's Opposition Brief on February
28 5, 2007 [Doc. No. 26]. However, The Declaration signed by Michael Mitchell, a "member" of the
Pournaras Group, was filed on February 7, 2007, even after the Pournaras Group's untimely attempt
to prove itself a cohesive group [Doc. No. 29].

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**Proposed Liaison Counsel for Lead Plaintiff
Movant The Vertical Group and the Class**

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PROOF OF SERVICE

STATE OF CALIFORNIA)
)ss.:
COUNTY OF LOS ANGELES)

I am employed in the county of Los Angeles, State of California, I am over the age of 18 and not a party to the within action; my business address is 12400 Wilshire Boulevard, Suite 920, Los Angeles, CA 90025.

On February 16, 2007, using the Northern District of California's Electronic Case Filing System, with the ECF ID registered to Michael D. Braun, I filed and served the document(s) described as:

CORRECTED REPLY IN FURTHER SUPPORT OF MOTION OF THE VERTICAL GROUP FOR APPOINTMENT AS LEAD PLAINTIFF AND APPROVAL OF PLAINTIFF'S SELECTION OF COUNSEL

The ECF System is designed to automatically generate an e-mail message to all parties in the case, which constitutes service. According to the ECF/PACER system, for this case, the parties served are as follows:

- Aaron H. Darsky, Esq. adarsky@schubert-reed.com
- Juden Justice Reed, Esq. jreed@schubert-reed.com
- Robert C. Schubert, Esq. rschubert@schubert-reed.com
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Counsel for Plaintiff

- Perry J. Woodward, Esq. pwoodward@terra-law.com

Counsel for Defendant Pegasus Wireless Corporation

On February 16, 2007, I served the document(s) described as:

CORRECTED REPLY IN FURTHER SUPPORT OF MOTION OF THE VERTICAL GROUP FOR APPOINTMENT AS LEAD PLAINTIFF AND APPROVAL OF PLAINTIFF'S SELECTION OF COUNSEL

by placing a true copy(ies) thereof enclosed in a sealed envelope(s) addressed as follows:

- Andrew M. Schatz, Esq.
- Jeffrey S. Nobel, Esq.

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27 **Counsel for Plaintiffs**

28 I served the above document(s) as follows:

BY MAIL. I am familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in an affidavit.

I declare, pursuant to Civil L.R. 23-2, that on the date hereof I served a copy of the above-listed document(s) on the Securities Class Action Clearinghouse by electronic mail through the following electronic mail address provided by the Securities Class Action Clearinghouse:

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scac@law.stanford.edu

I further declare that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

I further declare under penalty of perjury under the laws of the United States that the above is true and correct.

Executed on February 16, 2007, at Los Angeles, California 90025.

/S/ LEITZA MOLINAR

Leitza Molinar