

1 Michael D. Braun (167416)  
2 BRAUN LAW GROUP, P.C.  
3 12400 Wilshire Blvd., Suite 920  
4 Los Angeles, CA 90025  
5 Tel: (310) 442-7755  
6 Fax: (310) 442-7756

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

9 Andrew M. Schatz  
10 Jeffrey S. Nobel  
11 Nancy Kulesa  
12 SCHATZ NOBEL IZARD, P.C.  
13 One Corporate Center  
14 20 Church Street, Suite 1700  
15 Hartford, Connecticut 06103  
16 Tel: (860) 493-6292  
17 Fax: (860) 493-6290

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

20 **UNITED STATES DISTRICT COURT**  
21 **NORTHERN DISTRICT OF CALIFORNIA**  
22 **SAN FRANCISCO DIVISION**

23 MICHAEL MITCHELL, Individually and )  
24 on Behalf of All Others Similarly Situated, )  
25 )  
26 Plaintiff, )  
27 )  
28 vs. )  
29 PEGASUS WIRELESS CORPORATION, )  
30 JASPER KNABB, STEPHEN DURLAND, )  
31 ALEX TSAO, )  
32 )  
33 Defendants. )

CASE NO.: 3-06-CV-06969 MHP

**CLASS ACTION**

**MEMORANDUM OF LAW IN FURTHER  
SUPPORT OF MOTION OF THE  
VERTICAL GROUP FOR  
APPOINTMENT AS LEAD PLAINTIFF  
AND APPROVAL OF CHOICE OF  
COUNSEL**

**DATE: February 26, 2007**  
**TIME: 2:00 P.M.**  
**CTRM: 15, 18<sup>th</sup> Floor**

1 **I. INTRODUCTION**

2 Movants Robert Schaffer, on behalf of himself and as a Principal of The Vertical Group  
3 LLC (“Vertical”) and Cody Corrubia (collectively the “Vertical Group”) respectfully submit this  
4 memorandum of law in further support of their motion for appointment as lead plaintiff filed in the  
5 above-captioned action, and in opposition to the motion for appointment as lead plaintiff filed by  
6 Peter Gianoukas, Nick Pournaras, Mike Mitchell, Marat Khusainov and Michael Dattilo  
7 (collectively, the “Pournaras Group”).<sup>1</sup>

8 The Court should appoint the Vertical Group as lead plaintiff in this litigation. The Vertical  
9 Group – consisting of class members with a relationship that predates this litigation – is the “most  
10 adequate plaintiff” within the meaning of the Private Securities Litigation Reform Act of 1995, 15  
11 U.S.C. §§ 78u-4(a)(3)(B) (“PSLRA”), because its \$510,922 in losses from purchases of Pegasus  
12 Wireless Corporation (“Pegasus”) stock is well in excess of the \$481,070 in losses suffered by any  
13 of the individual “members” of the purported “Pournaras Group.” The members of the purported  
14 Pournaras Group – unaffiliated investors with no pre-existing relationship – were improperly  
15 cobbled together by the law firm of Kahn Gauthier Swick, LLC (“Kahn Gauthier”) for the purpose  
16 of aggregating their losses in order to create a “movant” with the “largest financial interest” under  
17 the PSLRA. Appointment of the Pournaras Group will merely ensure that the litigation is  
18 controlled by attorneys rather than investors, precisely the result which Congress sought to avoid.

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20 **II. THE VERTICAL GROUP SHOULD BE APPOINTED AS LEAD PLAINTIFF**

21 When Congress enacted the lead plaintiff provisions of the Private Securities Litigation  
22 Reform Act of 1995, 15 U.S.C. §§ 78u-4(a)(3)(B) (“PSLRA”), it sought to curtail perceived abuses  
23 resulting from the proliferation of “lawyer driven” class action litigation. In attempting to  
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26 <sup>1</sup> Mr. James Anglim, an individual who had previously sought to participate in this litigation  
27 as part of the Vertical Group, can no longer participate in this case due to his professional time  
28 commitments. Mr. Anglim had suffered losses of approximately \$21,339 in connection with his  
purchases of Pegasus stock during the Class Period. Excluding Mr. Anglim’s losses, the Vertical  
Group has suffered approximately \$510,922 in losses from its Class Period transactions in Pegasus  
stock.

1 effectuate Congress' intentions, courts have interpreted the PSLRA to prohibit the aggregation of  
2 losses of unaffiliated and unrelated class members who were assembled by their attorneys in order  
3 to create a movant with "the largest financial interest in the relief sought by the class" under 15  
4 U.S.C. § 78u-4(a)(3)(B)(iii)(I)(bb). See, e.g., In re XM Satellite Radio Holdings Sec. Litig., 237  
5 F.R.D. 13, 19-20 (D.D.C. 2006) (in denying lead plaintiff motion submitted by Kahn Gauthier  
6 seeking appointment of unrelated class members that were aggregated in order to attain high  
7 PSLRA losses, the Court reasoned that "attempts to aggregate unrelated plaintiffs into artificial  
8 groups [was] the work of lawyers and in contravention of the policies underlying the PSLRA"); In  
9 re Gemstar-TV Guide Int'l, Inc. Sec. Litig., 209 F.R.D. 447, 451 (C.D. Cal. 2002) ("courts have  
10 uniformly refused to appoint as lead plaintiff groups of unrelated individuals, brought together for  
11 the sole purpose of aggregating their claims in an effort to become the presumptive lead plaintiff")  
12 (citing In re Razorfish, Inc. Sec. Litig., 143 F. Supp. 2d 304, 308-09 (S.D.N.Y. 2001), and six other  
13 cases); In re Critical Path, Inc. Sec. Litig., 156 F. Supp. 2d 1102, 1111 (N.D. Cal. 2001) ("The  
14 Court considers the existence of a preexisting relationship to be paramount in determining whether  
15 to accept a group; such a group is more likely to surpass a group of small size, but without any  
16 preexisting relationship in operating efficiency. A group is not a proper group unless its members  
17 have a relationship that predates the litigation."); Carson v. Clarent Corp., No. C 01-03361 CRB,  
18 2001 WL 1782712, at \* 2 (N.D. Cal. Dec. 14, 2001) (Breyer, J.) (declining the motion for  
19 appointment of lead plaintiff filed by "group" consisting of two class members with no pre-existing  
20 relationship) (citing In re Network Assocs. Litig., 76 F. Supp. 2d 1017 (N.D. Cal. 1999)); Aronson  
21 v. McKesson HBOC, Inc., 79 F. Supp. 2d 1146, 1153 (N.D. Cal. 1999) ("group" must have "a  
22 meaningful relationship preceding the litigation," and be "united by more than the mere  
23 happenstance of having bought the same securities"); Wenderhold v. Cylink Corp., 188 F.R.D. 577,  
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1 583-84 (N.D. Cal. 1999) (aggregation of unrelated plaintiffs would be inconsistent with the PSLRA  
2 and would threaten the interests of the class).<sup>2</sup>

3 Here, the “group” proposed by Kahn Gauthier is a vivid example of precisely the type of  
4 “lawyer driven” conduct that Congress intended to prohibit. In fact, none of the members of the  
5 Pournaras Group have any relationship or affiliation with each other – “pre-existing” or otherwise.  
6 While the Pournaras Group seeks appointment of their “group” on the ground that the aggregate  
7 losses of the “group” constitute the “the largest financial interest in the relief sought by the class,”  
8 none of the individual “members” of the Pournaras Group have suffered larger losses from their  
9 Class Period purchases of Pegasus stock than the approximately \$510,922 in losses of the Vertical  
10 Group.  
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13 Indeed, Kahn Gauthier recently attempted to secure lead plaintiff status in another case by  
14 arguing that the PSLRA prohibited the appointment of lead plaintiff movants with no preexisting  
15 relationship. In In Re Nature’s Sunshine Products Securities Litigation, 2:06cv00267TS  
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17 <sup>2</sup> District Courts in other circuits have reached the same result. See, e.g., In re Doral  
18 Fin. Corp. Sec. Litig., 414 F. Supp.2d 398, 402 (S.D.N.Y. 2006) (“allowing unrelated groups to  
19 aggregate investments in an effort to generate the ‘largest financial interest,’ a strong possibility  
20 emerges that lawyers will form such groups to manipulate the selection process, and thereby gain  
21 control of the litigation”); In re Telxon Corp. Sec. Litig., 67 F. Supp.2d 803, 809-13 (N.D. Ohio  
22 1999) (a group of persons cannot be “a mere assemblage of unrelated persons who share nothing in  
23 common other than the twin fortuities that (1) they suffered losses and (2) they entered into retainer  
24 agreements with the same attorney or attorneys.”); In re Donnkenny Inc. Sec. Litig., 171 F.R.D.  
25 156, 157-58 (S.D.N.Y.1997) (“To allow an aggregation of unrelated plaintiffs to serve as lead  
26 plaintiffs defeats the purpose of choosing a lead plaintiff. . . . To allow lawyers to designate  
27 unrelated plaintiffs as a ‘group’ and aggregate their financial stakes would allow and encourage  
28 lawyers to direct the litigation”); In re Landry’s Seafood Restaurant, Inc., Sec. Litig., 2000 U.S.  
Dist. LEXIS 7005 (S.D. Tex. March 30, 2000) (a group of person requires a “pre-litigation  
relationship based on more than their losing investment”); In re Waste Management, Inc. Sec.  
Litig., 128 F. Supp.2d 401, 413 (S.D. Tex. 2000) (group seeking appointment as lead plaintiff must  
have a pre-litigation relationship); Sakhrani v. Brightpoint, Inc., 78 F. Supp.2d 845, 853 (S.D. Ind.  
1999) (“[S]electing as ‘lead plaintiff’ a large group of investors who have the largest aggregate  
losses but who have nothing in common with one another beyond their investment is not an  
appropriate interpretation of the term ‘group’ in the PSLRA”).

1 (D. Utah 2006), Kahn Gauthier attempted to assemble a group of unrelated class members large  
2 losses by issuing a press release (purportedly on behalf of a client intending to move for  
3 appointment as lead plaintiff) inviting “significant investors” to join its client in her motion.  
4 Declaration of Michael D. Braun in Further Support of Motion of the Vertical Group for  
5 Appointment as Lead Plaintiff and Approval of Choice of Counsel Exhibit A (hereinafter “Braun  
6 Decl Ex. \_\_”). Apparently unable to locate “significant investors” to aggregate losses with the  
7 losses of its client, Kahn Gauthier then submitted briefing in connection with the lead plaintiff  
8 motion filed on behalf of its lone client which *attacked* a competing “group” of unaffiliated class  
9 members on the ground that it was *impermissible* under the PSLRA to aggregate class members  
10 with no pre-existing relationship for the purpose of creating a group with the largest financial  
11 losses. See In Re Nature’s Sunshine Products Securities Litigation, 2:06cv00267TS (D. Utah 2006)  
12 (See Opposition Brief at 7-8, Braun Decl. Ex. B).

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15 In contrast to the Pournaras Group, the members of the Vertical Group have a cohesive  
16 relationship that pre-dates this litigation by several years. Specifically, Class Member Robert  
17 Schaffer is a Principal of Class Member Vertical. In addition, Class Member Cody Corrubia has  
18 been acquainted with Mr. Schaffer for approximately three years.<sup>3</sup>

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21 Finally, that the Vertical Group is composed of an institutional investor and investment  
22 professionals only further demonstrates that it should be appointed as lead plaintiff in this litigation.  
23 Vertical is a Limited Liability Company incorporated in the state of New York. It is a licensed  
24 broker-dealer and is registered with the National Association of Securities Dealers (“NASD”) and  
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28 <sup>3</sup> If necessary, the members of the Vertical Group will submit a joint declaration with respect to the preexisting relationship of its members, the legal status of Vertical and the professional experience of Mr. Schaffer and Mr. Corrubia.

1 the Securities and Exchange Commission (“SEC”). Congress adopted the lead plaintiff provisions  
2 in order to encourage organized institutional investors to play a more prominent role in securities  
3 litigations: See H.R. Rep. 104-369, at 34 (1995) reprinted in 1995 U.S.C.C.A.N. 697,733 (“The  
4 Conference Committee believes that increasing the role institutional investors will ultimately  
5 benefit shareholders and assist courts by improving the quality of representation in securities class  
6 actions”). Courts in the Ninth Circuit and in other districts have found the appointment of  
7 institutional investors to be consistent with legislative intent. In re Cavanaugh, 306 F.3d, 726, 738  
8 (9<sup>th</sup> Cir. 2002) (the goal of the PSLRA is to attract institutional investors); Razorfish, 143  
9 F.Supp.2d at 311 (as an institutional investor the proposed lead plaintiff “closely fits the profile of  
10 the kind of lead plaintiff Congress had in mind when it enacted the Reform Act”); In re Peregrine  
11 Systems, Inc. Sec. Litig., 2002 WL 32769239, \*16 (S.D. Cal. October 11, 2002) (the court found  
12 that a large institutional investor was the kind of plaintiff the PSLRA sought to enable); In re  
13 Network Associates Sec Litig., 76 F. Supp.2d at 1025 (quoting an SEC Memorandum, “the ‘most  
14 adequate plaintiff’ requirement was intended to place responsibility for managing securities class  
15 action litigation in the hands of institutions.”); Tumolo v.Cymer, Inc., 1999 WL 1567741, \*2 (S.D.  
16 Cal. Jan 22, 1999) (“One of the primary purposes of the lead plaintiff provisions of the PSLRA was  
17 to encourage a meaningful investor with a substantial stake in the litigation, preferably a large  
18 institutional investor, to initiate and control the litigation (and the lawyers who are behind it”); In  
19 re Vicuron Pharm Securities Litigation, 225 F.R.D. 508,\*3 (E.D. Pa 2004) (one candidate’s status  
20 as an institution tipped the scales in favor of its appointment as lead plaintiff). In addition to  
21 having the largest losses, as an institution and sophisticated investment professionals, the Vertical  
22 Group is the only movant in this litigation that reflects the type of plaintiff that Congress envisioned  
23 to represent investors.  
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1 **III. THE COURT SHOULD APPROVE THE VERTICAL**  
2 **GROUP'S CHOICE OF COUNSEL**

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4 The Vertical Group has selected Schatz Nobel Izard, P.C. to serve as Lead Counsel and the  
5 Braun Law Group, P.C. to serve as Liaison Counsel. The firms are well qualified to represent the  
6 Class, as evidenced by their extensive experience prosecuting securities class actions. Therefore,  
7 the Court should approve the Vertical Group's selection of Schatz Nobel Izard, P.C. to serve as  
8 Lead Counsel and the Braun Law Group as Liaison Counsel.

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1 **IV. CONCLUSION**

2 For the foregoing reasons, the Vertical Group respectfully requests that this Court appoint it  
3 to serve as Lead Plaintiff and approve its selection of Schatz Nobel IZard, P.C. as Lead Counsel and  
4 the Braun Law Group as Liaison Counsel.  
5

6  
7 Dated: February 5, 2007

Michael D. Braun  
BRAUN LAW GROUP, P.C.

8  
9  
10 By: \_\_\_\_\_ /S/

11 Michael D. Braun  
12 12400 Wilshire Blvd., Suite 920  
13 Los Angeles, CA 90025  
14 Tel: (310) 442-7755  
15 Fax: (310) 442-7756

16  
17 **Proposed Liaison Counsel for Lead Plaintiff**  
18 **Movant The Vertical Group and the Class**

19 Andrew M. Schatz  
20 Jeffrey S. Nobel  
21 Nancy Kulesa  
22 SCHATZ NOBEL IZARD, P.C.  
23 One Corporate Center  
24 20 Church Street, Suite 1700  
25 Hartford, Connecticut 06103  
26 Tel: (860) 493-6292  
27 Fax: (860) 493-6290

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



1 One Corporate Center  
2 20 Church Street, Suite 1700  
3 Hartford, Connecticut 06103  
4 Tel: (860) 493-6292  
5 Fax: (860) 493-6290

6 Kim E. Miller, Esq.  
7 Michael A. Swick, Esq.  
8 KAHN GAUTHIER SWICK, LLC  
9 119 E. 39<sup>th</sup> Street  
10 New York, NY 10016  
11 Tel: (212) 920-4310  
12 Fax: (504) 455-1498

13 Lewis Kahn, Esq.  
14 KAHN GAUTHIER SWICK, LLC  
15 650 Poydras Street, Suite 2150  
16 New Orleans, LA 70130  
17 Tel: (504) 455-1400  
18 Fax: (504) 455-1498

19 Michael R. Reese, Esq.  
20 GUTRIDE SAFIER LLP  
21 230 Park Avenue, Suite 963  
22 New York, NY 10169  
23 Tel: (212) 579-4625  
24 Fax: (212) 253-4272

25 **Counsel for Plaintiffs**

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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 5, 2007, at Los Angeles, California 90025.

/S/ LEITZA MOLINAR  
Leitza Molinar

**Other Supporting Documents**

3:06-cv-06969-MHP Mitchell v. Pegasus Wireless Corporation et al

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**Case Number:** 3:06-cv-6969  
**Filer:** The Vertical Group  
**Document Number:** 27

**Docket Text:**

MEMORANDUM in Support *OF MOTION OF THE VERTICAL GROUP FOR APPOINTMENT AS LEAD PLAINTIFF AND APPROVAL OF CHOICE OF COUNSEL* filed by The Vertical Group. (Braun, Michael) (Filed on 2/5/2007)

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Michael David Braun service@braunlawgroup.com

Aaron H. Darsky adarsky@schubert-reed.com,

Lewis Stephen Kahn lewis.kahn@kglg.com

Kim E. Miller kmiller@milbergweiss.com

Juden Justice Reed jreed@schubert-reed.com, rschubert@schubert-reed.com

Robert C. Schubert rschubert@schubert-reed.com

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

**3:06-cv-6969 Notice will be delivered by other means to:**

Michael A. Swick  
Kahn Gauthier Swick, LLC  
119 E. 39th Street  
New York, NY 10016