

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK**

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**In re: INITIAL PUBLIC OFFERING  
SECURITIES LITIGATION**

**This Document Relates To the Following Actions:**

01 CV 5902; 01 CV 2359; 01 CV 10901; 01 CV 3360;  
01 CV 6890; 01 CV 5446; 01 CV 2858; 01 CV 10827;  
01 CV 9883; 01 CV 6397; 01 CV 6613; 01 CV 6271;  
01 CV 10839; 01 CV 5937; 01 CV 6222; 01 CV 7669;  
01 CV 10971; 01 CV 5575; 01 CV 7044; 01 CV 10943;  
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01 CV 7000; 01 CV 10944; 01 CV 3792; 01 CV 4942;  
01 CV 11231; 01 CV 6887; 01 CV 5948; 01 CV 6242;  
01 CV 7467; 01 CV 9411; 01 CV 9414; 01 CV 6775;  
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01 CV 6277; 01 CV 9922; 01 CV 10969;  
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01 CV 9442; 01 CV 4147; 01 CV 6661; 01 CV 3483;  
01 CV 6757; 01 CV 10990; 01 CV 6627; 01 CV 7726;  
01 CV 9651; 01 CV 4183; 01 CV 3910; 01 CV 7028;  
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01 CV 9348; 01 CV 9604; 01 CV 5739; 01 CV 10999;  
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01 CV 6906; 01 CV 9514; 01 CV 10833; 01 CV 10092;  
01 CV 10053; 01 CV 6768; 01 CV 10830; 01 CV 10638;  
01 CV 4779; 01 CV 5074

**21 MC 92 (SAS)**

**NOTICE OF OMNIBUS MOTION FOR INTERVENTION**

PLEASE TAKE NOTICE THAT, pursuant to Federal Rule of Civil Procedure 24, the Class members named on Exhibit 1 attached hereto hereby move the Court to intervene as class plaintiffs in those coordinated actions indicated in Exhibit 1. The movants intend to assert rights individually and on behalf of the Classes alleged in the respective cases, arising out of the same transactions or occurrences, or series of transactions or occurrences alleged therein.

Dated: September 2, 2003

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**Plaintiffs' Executive Committee**

**UNITED STATES DISTRICT COURT  
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**21 MC 92 (SAS)**

**MEMORANDUM OF LAW IN SUPPORT OF OMNIBUS MOTION FOR  
INTERVENTION**

The Class members named in Exhibit 1 (the “Proposed Intervenor Class Representatives”), by and through their undersigned attorneys, respectfully submit this memorandum of law in support of their motion to intervene in the above-captioned actions.<sup>1</sup>

**I. BACKGROUND**

The Proposed Intervenor Class Representatives seek permission to join the litigation to serve as representatives of those Classes identified in Exhibit 1. Many of the intervening plaintiffs already serve as Lead Plaintiffs or named plaintiffs in one or another of the coordinated cases.<sup>2</sup>

**II. LEGAL ARGUMENT**

**A. The Court Should Allow The Proposed Intervenor Class  
Representatives To Join As Plaintiffs In The Actions**

Federal Rule of Civil Procedure 24(b) provides that:

anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene;

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<sup>1</sup> The names of the individuals and entities who seek to join as Class plaintiffs in each of the coordinated actions are set forth in Exhibit 1 attached to the motion to intervene. Each of them is a member of the Class defined in the Amended Complaint for which joinder is sought because they purchased the particular IPO securities during the relevant Class Periods and were damaged thereby.

<sup>2</sup> For example, Michael Atlas was appointed Lead Plaintiff in the Apropos Technology, Nuance, and Radio Unica actions and is a named plaintiff in the F5 and Mediaplex actions. He continues to serve in those capacities. In addition, he seeks permission to become a Class representative in the Agency.com, Cybersource, E-loan, Goto.com, Niku, Stamps.com, Telaxis, Tut, and Viant actions as well. Because each of the coordinated actions is a separate litigation, it is necessary for Mr. Atlas and others in his position to seek leave to intervene in the other actions.

Intervention is not necessary for those plaintiffs who previously filed actions that have been coordinated with these proceedings, even if they were not included as named plaintiffs in the Amended Complaints, because their actions have never been dismissed. For administrative convenience, the names of those plaintiffs have been included in Exhibit 1 together with the names of individuals and entities that have not otherwise been plaintiffs in any of the coordinated cases.

or (2) *when an applicant's claim or defense and the main action have a question of law or fact in common*. . . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

Fed. R. Civ. P. 24(b) (emphasis added). Rule 24(b) allows permissive intervention if three grounds are met: (i) the intervenor shows an independent ground for jurisdiction; (ii) the motion is timely; and (iii) there exists a common question of law and fact between the intervenor's claim and the main action. *See Comer v. Cisneros*, 37 F.3d 775, 801 (2d Cir. 1994). The decision whether to allow intervention under Rule 24(b)(2) rests within the Court's sound discretion. *See German v. Federal Home Loan Mortgage Corp.*, 896 F. Supp. 1385, 1391 (S.D.N.Y. 1995) ("The Rule is to be construed liberally"); *McNeill v. New York City Hous. Auth.*, 719 F. Supp. 233, 250 (S.D.N.Y. 1989). *See generally* 7C C.A. Wright, A.R. Miller & M.K. Kane, *Federal Practice and Procedure Civil 2d* § 1911 at 355 (1986).

**(1) There Is An Independent Ground For Jurisdiction**

Each of the Proposed Intervenor Class Representatives has claims against one or more of the Underwriter Defendants that arise under the federal securities laws, identical in all material respects to those alleged in the individual Complaints in those actions in which intervention is sought. Therefore, pursuant to 28 U.S.C. § 1331(a), the Court has subject-matter jurisdiction over the claims of the Proposed Intervenor Class Representatives, just as it has jurisdiction over those actions.

**(2) The Motion Is Timely**

In considering the timeliness issue, courts consider three factors: (i) the stage of the proceeding at the time the applicant seeks to intervene; (ii) prejudice to the existing parties from applicant's delay in seeking leave to intervene; and (iii) any reason for the length of delay in seeking intervention (how long the prospective intervenor knew or reasonably should have

known of her interest in the litigation). *See United States v. Washington*, 86 F.3d 1499 (9<sup>th</sup> Cir. 1996); *Engra, Inc. v. Gabel*, 958 F.2d 643, 644 (5<sup>th</sup> Cir. 1992).

Here, the Proposed Intervenor Class Representatives' motion is timely. The litigation is still in its early stages; document discovery has just begun and merits depositions have yet to commence. Defendants will not be prejudiced by the intervention, as they already are on notice as to the claims alleged against them and have been preparing for the commencement of depositions. Finally, there has been no unnecessary delay in seeking intervention in these actions. Intervention is being sought in connection with the omnibus class certification motion at the earliest time after the need for intervention has been identified and before any other proceedings took place.<sup>3</sup>

**(3) There Exist Common Questions Of Law And Fact Between The Intervenors' Claims And The Underlying Actions**

The Proposed Intervenor Class Representatives' claims are based upon the same alleged violations of federal securities law as the underlying actions: the Underwriter Defendants' industry-wide scheme to manipulate the IPO stock prices and to conceal and cover up their wrongdoing from the investing public. The movants do not seek amendment of either the Master Allegations or of any individual Complaint. Thus, it is indisputable that the intervenors' claims and the claims asserted in the underlying actions have common -- indeed identical -- questions of law and fact. *Diduck v. Kaszycki & Sons Contractors, Inc.*, 149 F.R.D. 55, 59 (S.D.N.Y. 1993) (intervention granted where "the intervenor's claims raise identical questions of law and fact to those currently before the Court"); *McNeill*, 719 F. Supp. at 250 (same).

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<sup>3</sup> The intervenors are represented by counsel for the Lead Plaintiffs and the proposed classes so "undue delay, complication, or procedural difficulty remain unlikely." *McNeill*, 719 F. Supp. at 250; *see also German v. Federal Home Loan Mortgage Corp.*, 899 F. Supp. 1155, 1166-67 (S.D.N.Y. 1995) (intervention appropriate where intervenors were represented by same counsel as other named plaintiffs).

**(4) Policy Considerations In Class Actions  
Strongly Favor Granting Intervention Motions**

In class actions, intervention is “highly desirable” “to ensure adequate class representation.” *Trief v. Dun & Bradstreet Corp.*, 144 F.R.D. 193, 202 (S.D.N.Y. 1992) (rejecting defendants’ argument that intervention was untimely). Intervention in class actions is also important because “members of a class are normally bound by the judgment in the class action.” *Diduck*, 149 F.R.D. at 58. It is not uncommon that “replacement of the class representative may become necessary,” in which event courts should “permit intervention by a new representative.” David Herr, *Annotated Manual For Complex Litigation*, § 30.17 at 228 (3d ed. 1999).

Moreover, the case law recognizes that intervention is proper when a plaintiff can no longer serve as a class representative. *See Brooks v. Flagg Bros., Inc.*, 63 F.R.D. 409, 412-14 (S.D.N.Y. 1974) (when class representatives’ claim for injunction was dissipated, intervention was granted for new class representative with same legal issues); *Trief*, 144 F.R.D. at 202 (motion granted where in response to defendants argument that proposed class representatives did not purchase shares after specific date, plaintiffs filed motion for intervention of new class representative).

The decision in *Shields v. Washington Bancorporation*, Civ. A. No. 90-1101, 1992 WL 88004 (D.D.C. Apr. 7, 1992), is instructive. In *Shields*, the court denied a motion for class certification because the plaintiff was not an adequate class representative. *Id.* at \*1. Subsequently, a new plaintiff moved to intervene as the class plaintiff. *Id.* The court noted that the underlying action “appears appropriate for resolution through a class action suit” and that “judicial economy will be preserved if this action continues as a class action; denial [of the intervention] motion will trigger a slew of interventions or individual suits.” *Id.* at \*2-3.

