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May 30, 2008

BY FEDERAL EXPRESS

Ms. Molly Dwyer
Clerk of the Court
United States Court of Appeals for the Ninth Circuit
95 Seventh Street
San Francisco, CA 94103-1526

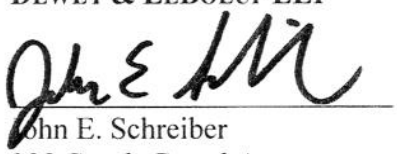
Re: *Central Laborers Pension Fund v. Merix Corporation, et al.*, No. 06-35894

Dear Ms. Dwyer:

On May 15, 2008, we submitted a letter brief on behalf of the Securities Industry and Financial Markets Association ("SIFMA") as *amicus curiae* in support of defendants-appellees' petition for rehearing en banc of the April 18, 2008 Panel decision in *Safron Capital Corporation v. Leadis Technology, Inc., et al.*, No. 06-15623. Because the issues involved in the above-referenced matter are substantially identical to those in *Leadis*, SIFMA respectfully requests that its May 15, 2008 letter (a copy of which is enclosed) also be considered on defendants-appellees' petition for rehearing en banc in this matter.

Respectfully submitted,

DEWEY & LEBOEUF LLP



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Enclosure

cc: Counsel of record (w/ enclosure)

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San Francisco, CA 94103-1526

Re: *Safron Capital Corporation v. Leadis Technology, Inc., et al.*, No. 06-15623

Dear Ms. Dwyer:

The Securities Industry and Financial Markets Association ("SIFMA") respectfully requests the Court's permission to submit this letter brief as *amicus curiae* in support of defendants-appellees Leadis Technology, Inc.'s petition for rehearing en banc of the April 18, 2008 Panel decision in the above-referenced matter. SIFMA believes that en banc review is warranted in this case to resolve a complex issue of exceptional importance to the securities industry -- namely, whether and under what circumstances a claim under Section 11 of the Securities Act of 1933 is subject to the heightened pleading requirements of Fed. R. Civ. P. 9(b). Fed. R. App. P. 35(a)(2). En banc review will also allow this Court "to secure [and] maintain uniformity of [its] decisions." Fed. R. App. P. 35(a)(1).

SIFMA is a trade association that brings together the shared interests of more than 650 securities firms, banks and asset managers. Many of these institutions serve as underwriters for, or otherwise participate in, securities offerings and, as such, they have a vital interest in the issues raised by this appeal. SIFMA's mission is to promote policies and practices that expand and improve markets, foster the development of new products and services and create efficiencies for member firms, while preserving and enhancing the public's trust and confidence in the markets and the industry.[1]

The Panel's decision in this case conflicts with this Court's prior decisions and indisputably lowers the pleading standard in this Circuit for claims brought under Section 11 based on

[1] SIFMA has offices in New York, Washington, D.C. and London and its associated firm, the Asia Securities Industry and Financial Markets Association, is based in Hong Kong.

misstatements in registration statements. Under prior Ninth Circuit case law, a Section 11 claim that either "sounded in fraud" or was "grounded in fraud" was subject to Rule 9(b)'s particularity requirement. *See In re Stac Elec. Sec. Litig.*, 89 F.3d 1399, 1405 (9th Cir. 1996); *In re Daou Sys., Inc.*, 411 F.3d 1006, 1027 (9th Cir. 2005).[2] This approach serves two important policy purposes. First, it prevents plaintiffs from using Section 11 to make an end-run around the heightened pleading requirements applicable to securities fraud claims under the Private Securities Litigation Reform Act of 1995 ("PSLRA"). Second, it serves Rule 9(b)'s purpose of "protect[ing] a defendant's good will and reputation when that defendant's conduct is alleged to have been fraudulent." *Wagner v. First Horizon Pharm. Corp.*, 464 F.3d 1273, 1278 (11th Cir. 2006).

The policy concerns behind the "sound in fraud" doctrine are no less relevant in cases where, as here, a plaintiff files a class action complaint that effectively accuses a defendant of securities fraud, but is careful to not actually use the word "fraud" and asserts only causes of action that do not necessarily require proof of fraudulent intent as an element. Not surprisingly, the public tends to focus on the nature of the allegations, not the specific legal claim asserted, in assessing the reputation of a defendant. As the Eleventh Circuit observed in *Wagner*, "[i]t would strain credulity to claim that Rule 9(b) should not apply" under these circumstances, where the complaint alleges, in effect, that "[t]he defendant is a no good defrauder, but, even if he is not, the plaintiff can still recover based on the simple untruth of the otherwise fraudulent statement." *Id.*

The Panel's decision in *Leadis* departs from this Circuit's precedent. It holds that Rule 9(b) applies to a Section 11 claim only in those rare instances where the complaint alleges "facts that necessarily constitute fraud." *Leadis*, Mem. at 4.[3] The application of Rule 9(b), however, should be based on the nature of the allegations, not whether the plaintiff is likely to be successful in establishing the existence of fraud. Requiring the pleading of "facts that necessarily constitute fraud" before applying Rule 9(b) will simply encourage plaintiffs to engage in artful pleading, a result that is directly contrary to the efforts of Congress (notably in the PSLRA) and the courts to limit the ability of plaintiffs to bring extortionate securities litigation.

In sum, the *Leadis* decision is contrary to public policy and, if allowed to stand, would adversely affect the securities markets by subjecting issuers, underwriters and other participants in the public offering process to an increased risk of securities litigation. Given the ongoing

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[2] *Stac* and *Daou* are consistent with the decisions of other circuits. *See, e.g., Wagner v. First Horizon Pharm. Corp.*, 464 F.3d 1273, 1277-78 (11th Cir. 2006); *Rombach v. Chang*, 355 F.3d 164, 171 (2d Cir. 2004); *California Pub. Employees' Ret. Sys. v. Chubb Corp.*, 394 F.3d 126, 161 (3d Cir. 2004); *Melder v. Morris*, 27 F.3d 1091, 1100 n.6 (5th Cir. 1994); *Sears v. Likens*, 912 F.2d 889, 893 (7th Cir. 1990).

[3] In reaching this conclusion, the Panel relied on *Vess v. Ciba-Geigy Corp., USA*, 317 F.3d 1097 (9th Cir. 2003), a case which did not involve a claim under Section 11, but rather claims under state common law.

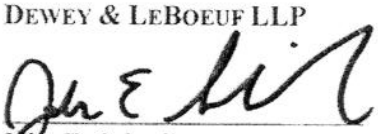
volatility of the financial markets, the concomitant increase in securities class action filings that has already occurred over the past year, *see* Cornerstone Research, Securities Class Action Case Filings, 2007: A Year in Review, at 6 (available at http://cornerstone.com/pdf/practice_securities/2007YIR.pdfm), and the growing consensus that securities litigation risks are adversely affecting the competitiveness of the U.S. capital markets, *see* Interim Report of the Committee on Capital Markets Regulation (Dec. 5, 2006) (available at http://www.capmktsreg.org/research.html), this is an issue of "exceptional importance" to the entire securities industry. *See* Fed. R. App. 35(a)(2) (en banc review appropriate to resolve "question of exceptional importance"). In addition, the issue is one of particular significance within this Circuit, where the district courts hear a significant percentage of the securities class actions filed each year. *See id.* at 18 (noting that from 1997 to 2006, more securities class action lawsuits were filed within the Ninth Circuit than any other Circuit).

Consideration by the full Court is necessary to address this important issue and to "secure and maintain uniformity of the court's [own] decisions." Fed. R. App. P. 35(a)(1). Indeed, as Judge Rymer suggested just last month in addressing these issues in her concurring opinion in *Central Laborers Pension Fund v. Merix Corp.*, No. 06-35894 (the companion case to this appeal), "[p]erhaps it is time we tried to straighten our law out." *Merix*, Mem. at 3. SIFMA respectfully agrees.

For the foregoing reasons, SIFMA believes that en banc review should be granted.[4]

Respectfully submitted,

DEWEY & LEBOEUF LLP



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[4] This letter brief complies with the requirements of Circuit Rule 29-2(c)(2), as it does not exceed 15 pages or 4,200 words.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30th day of May 2008, one (1) original and fifty (50) copies of the foregoing Amicus Letter in Support of Defendants-Appellees' Application for En Banc Rehearing were served via Federal Express upon the following:

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30th day of May 2008, copies of the foregoing Amicus Letter in Support of Defendants-Appellees' Application for En Banc Rehearing were served via Federal Express upon the following:

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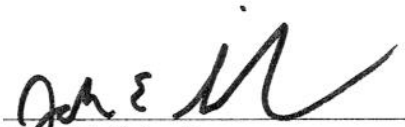
By: 

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