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11 Proposed Lead Counsel for Proposed Lead Plaintiff
 12 Louisiana Municipal Police Employees' Retirement System

13 UNITED STATES DISTRICT COURT

14 DISTRICT OF ARIZONA

15 Alaska Electrical Pension Fund,
 15 Derivatively on Behalf of Apollo Group,
 16 Inc., et al.,

17 Plaintiffs,

18 v.

19 John G. Sperling, et al.,

20 Defendants,

21 and

22 Apollo Group, Inc., an Arizona
 23 corporation,

24 Nominal Defendant.

CV-06-2124-PHX-ROS (LEAD)
CV-06-2239-PHX-ROS
CV-06-2701-PHX-ROS

(Consolidated)

**LOUISIANA MUNICIPAL POLICE
 EMPLOYEES' RETIREMENT
 SYSTEM'S MEMORANDUM OF
 POINTS AND AUTHORITIES
 OPPOSING INDIVIDUAL
 DEFENDANTS' THIRD REQUEST
 FOR EXTENSION OF TIME TO
 ANSWER OR OTHERWISE
 RESPOND TO AMENDED
 VERIFIED COMPLAINT**

(Third Request)

1 Plaintiff Louisiana Municipal Police Employees' Retirement System ("LMPERS"
2 or "Plaintiff") respectfully submits the following Memorandum Of Points And
3 Authorities Opposing Individual Defendants' Third Request For Extension Of Time To
4 Answer Or Otherwise Respond To Amended Verified Complaint.

5 **I. INTRODUCTION**

6 The Individual Defendants' request for a *third* extension of time in which to
7 respond to Plaintiff's Amended Verified Shareholder Derivative Complaint ("Amended
8 Complaint") filed on February 26, 2007 lacks good cause and will only serve to inject
9 further undue delay into this proceeding.¹ The Individual Defendants mislabeled their
10 present motion as a "second" request and apparently omitted the original 45-day
11 extension granted by the Court. [Dkts. 89, 95].

12 The Individual Defendants' *first* request resulted in 45-days in which to respond.
13 *Id.* Their *second* request resulted in a 60-day extension. [Dkts. 96, 100,105] Now the
14 Individual Defendants seek in their *third* request an indefinite extension of more than 40
15 days ("a date chosen, following the report of the parties to the Court, at the status
16 conference on July 26, 2007") [Dkt. 108 at 6]. In total, the Individual Defendants seek
17 more than 145 days in which to respond to the Amended Complaint. There is no
18 showing of good cause to support their third request.

19 The Individual Defendants argument for the requisite "good cause" is contradicted
20 by their past representations to the Court. In support of their second request for an
21 extension, the Individual Defendants represented they would respond within five business
22 days of the denial of Apollo's motion to extend the stay. [Dkt. 96 at 6]. The Individual
23 Defendants made this representation to the Court because they realized that once the
24 Court denied Apollo's motion to extend the stay, no legitimate justification would remain
25 for failing to promptly respond to the Amended Complaint. As further explained below,

26
27 ¹ The "Individual Defendants" include John G. Sperling, Brian E. Mueller, Peter V. Sperling,
28 Kenda B. Gonzales, Todd S. Nelson, Daniel E. Bachus, Laura Palmer Noone, Anthony F. Digiovanni, J. Jorge Klor de Alva, Jerry F. Noble, John Blair, Dino J. DeConcini, Hedy F. Govenar, and John R. Norton, III.

1 the Individual Defendants’ rehashed argument that “good cause” exists because it would
2 be inefficient for them to respond to the Amended Complaint while Apollo’s Special
3 Litigation Committee (“SLC”) still considers recommending that the Company pursue
4 none, some, or all of the claims asserted in the Amended Complaint is baseless.

5 The SLC is and has been flawed in both its composition and investigative process
6 since its purported inception. As detailed below, Apollo’s recent public disclosures
7 confirm this fact. Thus, a stay until the SLC completes its investigation and makes
8 recommendations to Apollo’s conflicted Board of Directors (the “Board”) is
9 unwarranted. *See Biondi v. Scrushy*, 820 A.2d 1148, 1165 (Del. Ch. 2003) (“it would be
10 futile and wasteful to issue a stay when the undisputed facts will make it impossible for
11 the court later to accept a decision of the special litigation committee”); *see also Katz v.*
12 *Renyi*, 722 N.Y.S.2d 860, 861 (N.Y. App. Div. 2001) (denying a motion to stay the
13 proceedings because among other things, the SLC was possibly conflicted).

14 In fact, no good cause exists for the requested indefinite extension. The Individual
15 Defendants fail to cite any legal authority in support of their position that an individual
16 defendant in a derivative action is entitled to an indefinite extension in which to respond
17 to a complaint until after the company’s Board of Directors decides to support legal
18 action against the culpable parties. Even if such authority did exist, it certainly would not
19 apply here because the nominal defendant company is wholly controlled by the two most
20 culpable defendants who hand-picked the SLC members charged with investigating
21 Plaintiff’s claims – an investigation that has gone on for one full year without reaching
22 any conclusions. The Court recently denied the motion to stay and this action should
23 proceed.

24 **II. PROCEDURAL BACKGROUND**

25 Following the filing of the Amended Complaint on February 26, 2007, the
26 Individual Defendants requested an extension to answer or otherwise respond to the
27 Amended Complaint by April 12, 2006 – 45 days after it was filed. [Dkt. 89] Plaintiff
28 agreed to the Individual Defendants’ first request for an extension despite the fact that the

1 Amended Complaint contains no new counts, parties, or additional stock option grants.
2 Following the expiration of this extension, rather than answer or otherwise respond to the
3 Amended Complaint, the Individual Defendants moved the Court for a second extension,
4 wherein they specifically stated they would respond within five business days following
5 the Court's denial of Apollo's motion to extend the stay. [Dkt. 96, 100]

6 On April 11, 2007, the Court granted the Individual Defendants' motion, but
7 ordered them to "answer, move or otherwise plead in response to the Amended
8 Complaint no later than the fifth business day following either (i) the expiration of the
9 stay in the event that this Court grants Nominal Defendant Apollo Group, Inc's February
10 9, 2007 Motion to Extend the Stay of the Derivative Litigation, or (ii) the Court's denial
11 of the Stay Motion." [Dkt. 100]

12 On June 12, 2007, the Court denied Apollo's motion to extend the original 30-day
13 stay (which expired on February 9, 2007) for at least 60 more days. [Dkt. 105]. Thus,
14 the Individual Defendants must answer or otherwise respond to the Amended Complaint
15 by June 19, 2007.

16 Rather than litigate this case, the Individual Defendants now submit yet a *third*
17 request for additional time to answer or otherwise respond – this time without any
18 showing of good cause.

19 **III. ARGUMENT**

20 **A. Good Cause Does Not Exist** 21 **For A Third Extension**

22 The requested third extension contradicts Fed. R. Civ. P. 1, which provides that
23 the Federal Rules "shall be construed and administered to secure the just, speedy and
24 inexpensive determination of every action." Despite the fact that the Individual
25 Defendants have already had four months in which to answer or otherwise respond, they
26 now seek an indefinite extension in which to respond until some time after the July 26,
27 2007 status conference. The Individual Defendants should honor their representation to
28

1 the Court and answer within five business days following the Court's denial of Apollo's
2 motion to stay.

3 **1. The Individual Defendants Have**
4 **Had Four Months To Respond**

5 The Individual Defendants' request lacks good cause because they have already
6 had over four months in which to respond to the Amended Complaint. In fact, the
7 Individual Defendants have spent more time and effort seeking additional time to respond
8 than they would likely have spent simply responding. [Dkts. 89, 96, 108] The Individual
9 Defendants have not cited any legal authority supporting their position that their ability to
10 respond to the Amended Complaint is dependent upon the SLC completing its
11 investigation and making its recommendation whether or not to pursue litigation. Unlike
12 the Company, there are no financial statements for the Individual Defendants to restate as
13 a result of the fraudulent backdating scheme.

14 On February 26, 2007, LMPERS filed its Amended Complaint concurrently with
15 its opposition to the motion to extend the stay. [Dkts. 80, 81] On March 14, 2007,
16 Plaintiff agreed to Individual Defendants' first request to extend the time to answer the
17 Amended Complaint until April 12, 2007 (45 days after the Amended Complaint was
18 filed). [Dkt. 89] The Court entered the stipulation for this first request on April 5, 2007.
19 [Dkt. 95] Despite agreeing to answer or otherwise respond to the Amended Complaint
20 by April 12, 2007 (within 45 days of service), the Individual Defendants made their
21 second request for additional time to respond [Dkt. 96] which Plaintiff opposed. In
22 support of this second request, the Individual Defendants represented to the Court they
23 would be willing to respond or otherwise answer within five business days of the Court's
24 denial of Apollo's motion to extend the stay. [*Id.* at 6]

25 On April 11, 2007, the Court accepted the Individual Defendants' offer and
26 granted their motion. Consistent with the Individual Defendants' representation, the
27 Court ordered them to "answer, move or otherwise plead in response to the Amended
28 Complaint no later than the fifth business day following either (i) the expiration of the

1 stay in the event that this Court grants Nominal Defendant Apollo Group, Inc's February
2 9, 2007 Motion to Extend the Stay of the Derivative Litigation, or (ii) the Court's denial
3 of the Stay Motion." [Dkt. 100] Thus, the Individual Defendants second request resulted
4 in an additional 60-day extension.

5 In total, the Individual Defendants have had four months in which to respond to
6 the Amended Complaint. They have provided the Court with no explanation as to why
7 four months was insufficient time for them to respond.

8 **2. Defendants Should Answer At This**
9 **Time Because The SLC Is Conflicted**

10 Defendants' claim that it is inefficient to respond to the Amended Complaint by
11 June 19, 2007 in accord with the April 11, 2007 Order because Apollo's SLC may
12 recommend that the Company pursue none, some, or all of the claims asserted in the
13 Amended Complaint is without merit. Apollo's SLC cannot dismiss, amend, or alter the
14 Amended Complaint because it, along with Apollo's entire Board of Directors, is
15 conflicted. Courts will not stay a proceeding in favor of an SLC investigation if the
16 SLC's conflicted status renders its ultimate recommendation a foregone conclusion. *See*
17 *Biondi*, 820 A.2d at 1165 ("it would be futile and wasteful to issue a stay when the
18 undisputed facts will make it impossible for the court later to accept a decision of the
19 special litigation committee"); *see also Katz*, 722 N.Y.S.2d at 861 (denying a motion to
20 stay the proceedings because among other things, the SLC was possibly conflicted).

21 Significantly, Apollo is a "Controlled Company" whose voting stock is fully
22 controlled and dominated by Defendants John and Peter Sperling – two of the largest
23 beneficiaries of the backdating stock options scheme. Apollo's recently filed Form 10-K
24 confirms this status:

25 Dr. John G. Sperling, our Acting Executive Chairman of the Board
26 and Founder, and his son, Peter V. Sperling, who is also one of our
27 directors as well as our Senior Vice President and Secretary, control the
28 John Sperling Voting Stock Trust and the Peter Sperling Voting Stock
Trust, which together collectively own 99.9% of our voting securities,
Apollo Group Class B common stock. Through their control of these trusts,

1 Dr. Sperling, or Dr. Sperling and Mr. Sperling together, control the election
2 of all members of our Board of Directors and substantially all other actions
3 requiring a vote of our shareholders, except in certain limited
4 circumstances. [Declaration of Brett M. Middleton, filed herewith, ¶2,
5 Ex.A]

6 Thus, the two newly appointed members of the SLC, directors K. Sue Redman
7 (“Redman”) and James R. Reis (“Reis”), were not elected by disinterested shareholders
8 but rather were hand-picked by the Sperling Defendants. Even if the newly appointed
9 SLC is found to be independent, as specifically set forth in the Amended Complaint,
10 Apollo’s Board is not. Accordingly, it is highly improbable that the Board will accept a
11 “recommendation” by the SLC to pursue litigation against Defendants because doing so
12 would amount to electing to sue themselves.

13 Plaintiff’s Amended Complaint sets forth sufficient facts establishing that the SLC
14 is flawed in both its composition and investigative process and has been since its
15 purported inception. Apollo’s public disclosures confirm this fact. Due to these flaws,
16 the SLC is conflicted. *See Biondi*, 820 A.2d at 1166 (In addition to its conduct, the
17 composition of a special litigation committee must also instill confidence in the judiciary
18 and the stockholders.).

19 Throughout this litigation, Plaintiff exposed the conflicted nature of the SLC,
20 causing Apollo and Defendants to react by repeatedly replacing members of the two-
21 member committee. For example, in Plaintiff’s Opposition To Defendant Apollo Group,
22 Inc.’s Motion To Stay The Action filed on November 21, 2006, Plaintiff criticized the
23 conflicted nature of the two-member SLC by pointing out that Director Defendant Hedy
24 F. Govenar (“Govenar”) was conflicted and could not independently serve on the SLC.
25 [Dkt. 44 at 8-9] On December 4, 2006, the Court issued an Order stating that the Court
26 “can not conclude that the Special Committee is independent so long as a named
27 Defendant is one of its members.” [Dkt. 56 at 4] The Court indicated that it would enter
28 a limited stay if Apollo notified the Court “that Hedy F. Govenar has been replaced as a
member of the Special Committee with another Board member who is not a named

1 Defendant in this action.” *Id.* On December 8, 2006, Defendants appointed Redman to
2 replace Director Defendant Govenar on the SLC. [Dkt. 62; Dkt. 98, Ex. A]

3 Further, Plaintiff’s Opposition To Apollo Group, Inc.’s Motion To Extend Stay Of
4 Derivative Litigation, filed on February 26, 2007, exposed the fact that Director Daniel
5 Diethelm (“Diethelm”) was incapable of serving independently on the SLC because of
6 his personal and professional entanglements with other Company directors and officers.
7 [Dkt. 81] In response, Apollo filed a Supplemental Brief in support of its motion to
8 extend the stay on March 22, 2007, announcing that Diethelm, the Chair of the Special
9 Committee of the Company’s Board of Directors charged with investigating the
10 Company’s stock option granting practices, informed the Company of his resignation
11 from the Board of Directors. [Dkt. 92; Dkt. 98, Ex. B] Apollo also announced that
12 Defendants appointed Reis to replace Diethelm as the Chair of the SLC. *Id.* Thus,
13 director Diethelm, who is not a named defendant in this action, “resigned” from Apollo’s
14 Board and the SLC before he made any recommendations to Apollo’s Board as to
15 whether the Company should pursue litigation against Defendants.

16 Apollo’s subsequent remedial efforts to remedy the SLC’s conflicts failed to cure
17 its inherent flaws. This is because, according to Apollo’s own admissions, Director
18 Defendant Govenar and director Diethelm conducted the entire factual investigation into
19 Apollo’s improper backdating practices. Director Defendant Govenar remained on the
20 two-member SLC until after it completed its factual investigation. On December 14,
21 2006, Apollo announced that nearly a week before, “[o]n December 8, 2006, the Special
22 Committee of the Board and its independent counsel and accounting advisors
23 investigating the Company’s historic stock option grant practices presented their final
24 factual findings to the Board.” Middleton Decl. ¶2, Ex. A (emphasis added). The belated
25 appointment of new Board member, Ms. Redman, failed to remedy Director Defendant
26 Govenar’s involvement in the SLC’s factual investigation.

1 **B. Defendants’ Delay Tactics Will**
2 **Continue To Prejudice Plaintiff**

3 Granting the Individual Defendants a third extension is contrary to the important
4 goals of Fed. R. Civ. P. 1, which provides that the Federal Rules “shall be construed and
5 administered to secure the just, speedy and inexpensive determination of every action.”
6 On June 20, 2006 – the day after Apollo announced that it received a subpoena from the
7 United States Attorney for the Southern District of New York investigating option
8 backdating – an Apollo shareholder sent the first of several shareholder letters to Apollo,
9 demanding that the Board of Directors take action to remedy the harm caused by the
10 option backdating. Almost one year has passed since then and still Defendants have yet
11 to answer or otherwise respond to Plaintiff’s claims.

12 Staying this action further will hamper Plaintiff’s investigation of its claims and
13 prejudice Apollo and thereby its shareholders. This prejudice includes the exercising of
14 backdated grants by the Individual Defendants. Apollo admits in its Form 10-K that
15 three of the Individual Defendants failed to comply with Form 4 filing requirements as
16 recently as last year:

17 “During the fiscal year ended August 31, 2006, the following
18 individuals failed to timely file a Form 4: **Dr. John G. Sperling, Peter V.**
19 **Sperling and Todd S. Nelson**, each for a disposition of shares.”
 [Dkt. 104-5, Ex. E at 150-151] [emphasis added].

20 Not surprisingly, Defendants John Sperling, Peter Sperling and Todd Nelson are the three
21 largest beneficiaries of the backdating scheme. Further, Apollo states in its Form 10-K
22 that employees may be free to exercise their options now that the restatement is
23 concluded.

24 Additional prejudice can also take the form of dissipation of Defendants’ assets.
25 Further delay will prejudice Plaintiff’s ability to recover ill-gotten gains from Defendants
26 such as Nelson, who, according to Apollo’s recent 10-K, was paid \$32.3 million for his
27 unexercised options:
28

1 “On January 11, 2006, Todd S. Nelson, former Chief Executive Officer and
2 President (the “Former CEO”), resigned as a director and an officer of the
3 Company. As part of his Separation Agreement dated January 11, 2006,
4 the Company paid the Former CEO **\$32.3 million (\$18.0 million after-tax)**
5 **on January 26, 2006, which was primarily in exchange for the**
6 **cancellation of all of his outstanding vested and unvested stock**
7 **options.”**

[Dkt. 104-5, Ex. E at 156] [emphasis added].

8 Finally, delay can result in the potential destruction of documents and electronic
9 data (whether intentional or inadvertent), fading memories, and increased geographical
10 dispersion of percipient witnesses. *See, e.g., Pagtalunan v. Galaza*, 291 F.3d 639, 643
11 (9th Cir. 2002) (“Unnecessary delay inherently increases the risk that witnesses’
12 memories will fade and evidence will become stale.”).

13 Any further delay risks prejudicing Plaintiff’s ability to remedy the unlawful
14 conduct perpetrated by the Individual Defendants against Apollo and the Company’s
15 shareholders.

16 **IV. CONCLUSION**

17 For the foregoing reasons, LMPERS respectfully submits that the Court should
18 deny the Individual Defendants’ motion in its entirety and order all Defendants to answer
19 or otherwise respond to Plaintiff’s Amended Verified Shareholder Derivative Complaint
20 by June 19, 2007.

21 Dated: June 14, 2007

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Dated: June 14, 2007

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*Proposed Lead Counsel for Proposed Lead
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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on June 14, 2007, I electronically filed the foregoing with the
3 Clerk of the Court using the CM/ECF System which will send notification of such filing
4 to the e-mail addresses denoted on the attached Electronic Mail Notice List, and hereby
5 certify that I have mailed the foregoing document or paper via the United States Postal
6 Service to the non-CM/ECF participants indicated on the attached Manual Notice List.

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1 **Mailing Information for the following Cases:**

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1 **Manual Notice List**

2 The following is the list of attorneys who are not on the list to receive e-mail notices for
3 this case (who therefore require manual noticing). You may wish to use your mouse to
4 select and copy this list into your word processing program in order to create notices or
5 labels for these recipients.

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