No. 11-15599

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IN RE CENTURY ALUMINUM COMPANY SECURITIES LITIGATION

On Appeal from the United States District Court
for the Northern District of California
Honorable Susan Illston
No. C-09-1001-SI

JOINT BRIEF OF APPELLEES

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CORPORATE DISCLOSURE STATEMENT

Century Aluminum Company is a publicly-traded Delaware corporation (NasdaqGS: CENX) with its principal place of business in Monterey, California. Glencore AG, a Swiss corporation, owns more than 10% of Century Aluminum Company's stock. Glencore AG is a subsidiary of Glencore International AG, which in turn is a subsidiary of Glencore International plc, which is a public company whose stock is traded on the London and Hong Kong stock exchanges (LSE: GLEN.L).

Credit Suisse Securities (USA) LLC is a wholly owned subsidiary of Credit Suisse (USA), Inc., which in turn is a wholly owned subsidiary of Credit Suisse Holdings (USA), Inc. Credit Suisse Holdings (USA), Inc. is jointly owned by Credit Suisse and Credit Suisse Group AG. Credit Suisse is a wholly owned subsidiary of Credit Suisse Group AG. The shares of Credit Suisse Group AG are publicly traded on the Swiss Stock Exchange, and are also listed on the New York Stock Exchange in the form of American Depositary Shares.

Morgan Stanley & Co. LLC is a limited liability company whose sole member is Morgan Stanley Domestic Holdings, Inc., a corporation wholly owned by Morgan Stanley Capital Management, LLC, a limited liability company whose sole member is Morgan Stanley. Morgan Stanley is a publicly held corporation that has no parent corporation.

Based on Securities and Exchange Commission Rules regarding beneficial ownership, State Street Corporation ("State Street"), State Street Financial Center, One Lincoln Street, Boston Massachusetts 02111, beneficially owns 10.6% of Morgan Stanley's outstanding common stock (based on a Schedule 13G filed under the Securities Exchange Act of 1934 (the "Exchange Act") on February 11, 2011 by State Street (the "State Street Schedule 13G")). As reported in the State Street Schedule 13G, all of the securities are beneficially owned by State Street and its direct or indirect subsidiaries in their various fiduciary and other capacities.

According to a Schedule 13D filed under the Exchange Act on October 23, 2008, as amended on October 30, 2008, May 22, 2009, June 11, 2009, April 1, 2010, May 3, 2010, November 9, 2010 and April 25, 2011 (together, the "MUFG Schedule 13D") by Mitsubishi UFJ Financial Group, Inc. ("MUFG"), 7-1 Marunouchi 2-chome, Chiyoda-ku, Tokyo 100-8330, MUFG beneficially owned 22.56% of Morgan Stanley's outstanding common stock (assuming full conversion of all of the shares of Series B Preferred Stock held by MUFG at the Adjusted Conversion Rate and further assuming no conversion of any other securities not beneficially owned by MUFG that are convertible or exchangeable into shares of Morgan Stanley common stock with the number of shares of common stock outstanding as of March 31, 2011). Capitalized terms used and not defined in the description above shall have the meanings set forth in the MUFG Schedule 13D.

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JURISDICTIONAL STATEMENT

Plaintiff-Appellants ("Plaintiffs") asserted claims under federal statutes, including section 11 of the Securities Act of 1933 (the "33 Act"), 15 U.S.C. § 77k ("Section 11"), and thus raised federal questions within the meaning of 28 U.S.C. § 1331.

Nonetheless, this Court lacks subject matter jurisdiction because Plaintiffs lack standing under Article III, Section 2 of the United State Constitution and fail to meet its "case or controversy" requirement. The absence of Article III standing and subject matter jurisdiction is addressed in the Argument portion of this brief (pp. 48-58 below).

Appellees agree that this Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291 and that Plaintiffs timely filed a notice of appeal from the final judgment of the district court. Appellants' Excerpts of Record ("ER") 37, 65.

INTRODUCTION

Contrary to Plaintiffs' formulation of the issues and portrayal of the ruling below, this case presents a straightforward question under Rule 12(b)(6) of the Federal Rules of Civil Procedure. Appellants' Opening Brief refuses to deal fairly with the district court's decision and the basis on which the district court dismissed the Section 11 claim in Plaintiffs' Third Amended Complaint, ER 77-153

("TAC"). The ruling should be affirmed (1) on the ground on which the district court actually rendered its decision, (2) because Plaintiffs' attack on that decision is fundamentally misconceived, and (3) on a separate ground not reached in the opinion on which judgment was entered.

1. The district court's dismissal of the Section 11 claim was fully justified under Rule 12(b)(6). The TAC failed to meet pleading requirements for alleging that Plaintiffs' shares are traceable to the securities offering they challenge under Section 11, including the pleading requirements imposed by the Supreme Court in *Twombly* and *Iqbal*. The district court gave Plaintiffs several opportunities to meet those pleading requirements, but Plaintiffs repeatedly failed to plead facts suggesting any plausible basis to trace their shares to the securities offering at issue – the secondary offering made by Appellee Century Aluminum Co. on January 29, 2009 (the "Secondary Offering") – as opposed to the almost 50 million shares of stock already in the market before the Secondary Offering.

2. Plaintiffs' pronouncements that the district court reached its decision under Rule 12(b)(1), and based its ruling on affidavits and findings of fact, can only be attributed to overzealous advocacy. They have no foundation in the ruling itself. The decision was well within the bounds of Rule 12(b)(6), and Plaintiffs' failure to acknowledge the ground on which it was made merely concedes their inability to do so.

3. Although the district court did not rest its decision on subject matter jurisdiction, dismissal is also required for lack of standing and subject matter jurisdiction under Art. III, § 2 of the United States Constitution, because Plaintiffs failed to present a case or controversy. That the district court's decision was not rendered under Rule 12(b)(1) or based on the absence of subject matter jurisdiction does not preclude this Court from affirming the judgment on that ground. To present a case or controversy under Article III, a plaintiff must show that he is a proper party to invoke the jurisdiction of the federal courts. The issue was raised below, and it is clear Plaintiffs cannot meet that burden. Their attempt to plug that hole by recasting the question as one of "non-constitutional" "statutory" standing is wholly unavailing.

ISSUES PRESENTED FOR REVIEW

1. Whether the district court properly granted, pursuant to Federal Rule of Civil Procedure 12(b)(6), Appellees' motions to dismiss the TAC's purported claim under Section 11 of the Securities Act of 1933, 15 U.S.C. § 77k, for failure to plead facts regarding Plaintiffs' ability to trace their purchases of stock to the Secondary Offering.

2. Whether the district court's dismissal of the TAC's Section 11 claim should be affirmed on alternative grounds, including pursuant to Federal Rule of

Civil Procedure 12(b)(1), for lack of Article III standing and subject matter jurisdiction because Plaintiffs cannot show that their stock was issued pursuant to the registration statement that contained the alleged misstatements.

3. Whether the district court's dismissal of the Third Amended Complaint should be affirmed on alternative grounds, including Plaintiffs' failure to allege facts stating a claim under Section 11 of the Securities Act of 1933, 15 U.S.C. § 77k, that is "plausible" within the meaning of *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007), and *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009).

STATEMENT OF THE CASE

I. THE PARTIES.

Defendant-Appellee CENTURY ALUMINUM COMPANY ("Century") produces primary aluminum in domestic facilities and abroad. Appellees' Supplemental Excerpts of Record ("SER") 1266. Century was formed in 1995 by Glencore International AG ("Glencore"), a supplier and trader of commodities, to hold Glencore's aluminum-producing assets. Appellants' Excerpts of Record ("ER") at 81 (¶ 5), 88 (¶ 33). Century made its initial public offering of common stock in 1996 (SER 1266) and made the Secondary Offering on January 29, 2009. ER 1:26-2:4; ER 17:3-7; SER 894-947.

Defendants-Appellees CREDIT SUISSE SECURITIES (USA) LLC and MORGAN STANLEY & CO. LLC[1] (collectively, the "Underwriters") are diversified securities firms that (among other things) underwrite issuances of securities in the capital markets. As the underwriters of the Secondary Offering, the Underwriters purchased the 24,500,000 Offering shares from Century at a discount from the $4.50 public offering price, and distributed shares to investors at the offering price. SER 960.

The individual Defendants-Appellees are directors or officers of Century (the "Individual Defendants").[2] The Individual Defendants were sued as directors and because they signed the registration statement pursuant to which shares were issued in the Secondary Offering. ER 89-94 (¶¶ 34-45), 129 (¶ 133).

Plaintiffs allege they are owners of Century common stock who wish to represent a purported class of other similarly situated stockholders. ER 127 (¶ 123). Although Plaintiffs initially alleged they purchased their stock "pursuant and/or

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[1] Pursuant to a conversion from a corporation to a limited liability company, Morgan Stanley & Co. Incorporated recently has changed its name to Morgan Stanley & Co. LLC.

[2] Plaintiffs list Wayne Hale as one of the "Individual Defendants." Appellant's Opening Brief ("AOB" or "Opening Brief") 2 n.2. Hale was a defendant below but he is not an Appellee here because he was named as a defendant only in the claims brought under the Securities Exchange Act of 1934 (ER 93-94 (¶¶ 45-46), 129 (¶ 133)), and Plaintiffs have not appealed from the dismissal of those claims. *See* AOB 1 n.1, 3 n.4, 5 n.6.

traceable" to the Secondary Offering (SER 50 (¶ 127)), they now claim to have purchased shares ***traceable*** to the Secondary Offering only. AOB at 8. The certifications attached to their complaints and required by section 27(a)(2) of the '33 Act, 15 U.S.C. § 77z-1(a)(2), show, however, that no Plaintiff bought any Century stock on the date of the Secondary Offering (January 29, 2009) or in the Secondary Offering or at the Secondary Offering price; instead, all bought stock ***before*** the Secondary Offering and anywhere from a day to a month ***after*** the Secondary Offering. SER 57-60; ER 150.

II. THE SECONDARY OFFERING

The Secondary Offering was a "shelf" offering of 24,500,000 shares of common stock made pursuant to a Prospectus Supplement filed on January 29, 2009 to a Prospectus dated May 29, 2007 (and incorporated SEC filings), which together constituted the registration statement (the "Registration Statement"). SER 896. The Underwriters purchased the offering shares from Century at the "underwriting discount" (*id.*), and distributed them to investors who had been allotted stock in the Secondary Offering. Glencore International AG ("Glencore"), Century's largest shareholder, subscribed for and purchased 13,242,250 of the 24,500,000 offering shares in the Secondary Offering. SER 909.

As indicated by the January 28, 2009 closing price on the face of the Prospectus Supplement (SER 896), the Offering was priced after the market closed on

January 28, 2009. The shares were distributed to the investors who subscribed to the Secondary Offering on January 29, 2009. Thereafter, they could begin trading in the aftermarket, along with the 50 million shares issued pursuant to Century's prior registration statement (its IPO of 1996). SER 913.

III. CENTURY'S HEDGES AND THEIR TERMINATION – THE "TOUCH PASS" PAYMENT

The gist of Plaintiffs' substantive claim is that the Prospectus Supplement misstated certain cash flows, thereby portraying Century as "liquid and cash-rich, when – in reality – it was not." ER 86 (¶ 18). The Registration Statement did contain a technical presentation error, but it lacked any bottom line effects and its later correction had not one cent's effect on Century's assets, liabilities, shareholders' equity, net income (or loss), or beginning or ending cash position. SER 1136. The cash flows pertained to the termination in July 2008 of two hedges with Glencore (the "Hedges") entered into in November 2004 and June 2005.[3] SER 148-49, 1225.

[3] For years Century entered into hedges, usually with Glencore, as a partial hedge against volatility in the price of raw aluminum. SER 148-49, 1225. For each year starting in 2006 and continuing through 2015, the two Hedges at issue specified a minimum price and a maximum price, and specified two quantities of primary aluminum (expressed in metric tons), "Tonnage 1" and "Tonnage 2." There was a possible cash settlement each month. If the average London Metal Exchange ("LME") spot price for the month was below the *minimum*, Glencore paid Century the difference between the LME spot price and the minimum, multiplied by the quantity of Tonnage 1. If, however, the average LME spot price

The Hedges protected Century against declines in aluminum prices, but for most of the next three years after Century entered into them, aluminum prices rose (SER 1585), causing Century to sustain losses on the Hedges. By early 2008, tired of the losses, Century began protracted negotiations with Glencore to terminate the Hedges. SER 1225. These negotiations led to a set of agreements signed in July 2008, pursuant to which (1) Century discharged $1.832 billion of liabilities that Century owed to Glencore; (2) Century made a cash payment of $225 million and gave Glencore 160,000 shares of preferred stock, convertible into 16,000,000 shares of common stock; and (3) Glencore paid Century, in cash, the purchase price of the preferred stock, which sum Century immediately paid back to Glencore in partial settlement of Century's liabilities associated with the Hedges. SER 793-95; ER 18:7-14.

It is the accounting treatment of this last cash component – a payment made and instantly paid back that Appellees referred to in the district court as the "touch

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for the month was above the *maximum*, Century paid Glencore the difference between the LME spot and the maximum, multiplied by the sum of the quantities of Tonnage 1 + Tonnage 2. If the average LME spot price for the month was between the minimum and the maximum, neither party paid the other anything. All settlements were in cash; neither side actually delivered aluminum to the other as a result of the Hedges. ER 96 (¶ 55).

pass" (ER 15 n.5) – that underlies Plaintiffs' claim.[4] The cash Glencore paid to Century for the preferred stock Century immediately paid back to Glencore in partial settlement of Century's liabilities; the cash thus never really affected Century's cash position in any meaningful sense. *See* SER 1904:17-1905:15. Hence the original decision to net out the two payments, through a technical presentation error, certainly did not make Century appear "cash rich."

Century promptly disclosed every element of this transaction. On July 8, 2008, Century: (1) held a conference call with analysts and investors, with a slideshow, to explain the transaction (SER 363-98); (2) filed a Form 8-K announcing that it and Glencore had agreed to terminate the Hedges via the contemporaneous execution of four agreements, each of which were attached in their entirety to the 8-K (SER 234-332); and (3) filed a Form 13D/A detailing Glencore's purchase of preferred stock from Century, including all the cash that changed hands as part of this transaction (SER 348-52). Plaintiffs, throughout all four of their complaints, have never challenged any aspect of these disclosures.

After the third quarter, Century made an earnings release (filed as a Form 8-K), held a conference call with a slideshow, and then several weeks later, filed its

[4] A touch pass is a basketball passing technique in which a loose ball is immediately redirected to another player by tipping or slapping the ball without grabbing onto it. http://en.wikipedia.org/wiki/Basketball_moves#Touch_pass.

Form 10-Q. SER 676-868. The 10-Q incorporated by reference the agreements that terminated the Hedges. SER 858-59. As described below, Plaintiffs do challenge one aspect of the interim financial statements in the 10-Q: a technical presentation error that did not affect Century's assets, liabilities, shareholders' equity, net income (or loss), or beginning or ending cash position.

IV. THE REGISTRATION STATEMENT

The termination of the Hedges in July 2008 and the issuance of the 10-Q in October 2008 occurred in the third and fourth quarters of 2008, just as the financial markets were melting down. The fourth quarter brought disruption in the aluminum market too, as the recession really started to take hold. The spot price for aluminum fell precipitously after July 2008. SER 1676 (¶ 7), 1584-90; *see* AOB at 5 n.8. As a result, Century made a doleful series of announcements (via 8-K), including big operating losses, and a plant curtailment and layoffs of hundreds of employees. ER 82-83 (¶ 9), 97-101 (¶¶ 58-62); SER 869-87. Throughout this period, the price of Century's common stock also fell precipitously, from over $60 in July to under $10 in December. SER 1591-98.

The Prospectus Supplement poured no sugar on any of this gloomy news; indeed, the avowed purpose of the Secondary Offering was to raise cash because the drop in aluminum prices had made Century's operations cash-flow negative. The Registration Statement disclosed Century's cash situation and gloomy forecast

in cold and unsparing terms, and sometimes in boldface and italicized print, for example:

- ***"If prices remain at current levels or continue to decline, we will have to take additional action to reduce costs, including significant curtailment of our operations, in order to have the liquidity required to operate through 2009, and there can be no assurance that these actions will be sufficient."*** SER 901 (bold and italics in original).
- "[O]ur U.S. operations are not cash flow positive at recent aluminum prices." SER 901, 946.
- "If primary aluminum prices were to remain on average at or around recent levels for the entirety of 2009, or were to decline further, our liquidity would be at risk." SER 924.
- "[W]e do not have other committed sources of capital." SER 946.

The Secondary Offering occurred on January 29, 2009; Century offered 24.5 million shares of common stock at $4.50. SER 894-974. Glencore bought 54% of the Secondary Offering, or 13,242,250 shares. SER 896, 909. The market perceived the Secondary Offering as dilutive; Century's stock price dropped from $7.35 to $4.60 the day before the Secondary Offering. SER 2111. Throughout

February 2009, Century's stock price continued downward, starting the month at $3.70 and ending the month at $2.22. SER 2111.[5]

V. CENTURY'S RESTATEMENT OF MARCH 2, 2009

On March 2, 2009, Century filed a Restatement that informed shareholders and investors that the Company's "previously issued financial statements for the nine months ended September 30, 2008 . . . should no longer be relied upon as a result of an error in the interim consolidated statement of cash flows." SER 1135.

[5] Plaintiffs allege that, as a result of the Restatement, "the Company's shares on NASDAQ fell to $1.06, a 87% drop from the January 2009 Secondary Offering price of $8.00 slightly more than one month earlier." ER 83-84 (¶¶ 12 13), 126 (¶ 119). But the Secondary Offering price was $4.50, not $8. ER 135 (¶¶ 149-51); SER 896. Immediately before the Restatement, Century's stock had traded at under $2. SER 1591-1600, 1749-56. After bottoming at $1.06 on March 9, 2009, however, Century's stock increased steadily and by summertime was back over $10 a share. SER 1591-1600, 1749-56.

	As Reported	As Adjusted	Adjustment
CASH FLOWS FROM OPERATING ACTIVITIES:			
Net loss	$ (198,164)	$ (198,164)	$ —
Adjustments to reconcile net loss to net cash provided by (used in) operating activities:			
Unrealized net loss on forward contracts	605,105	605,105	—
Depreciation and amortization	62,912	62,912	—
Deferred income taxes	(198,352)	(198,352)	—
Pension and other postretirement benefits	11,677	11,677	—
Stock-based compensation	12,034	12,034	—
Excess tax benefits from share-based compensation	(657)	(657)	—
Loss on disposal of assets	248	248	—
Undistributed earnings of joint ventures	(12,466)	(12,466)	—
Change in operating assets and liabilities:			—
Accounts receivable - net	(22,403)	(22,403)	—
Purchase of short-term trading securities	(97,532)	(97,532)	—
Sale of short-term trading securities	348,416	348,416	—
Due from affiliates	(9,771)	(9,771)	—
Inventories	(36,119)	(36,119)	—
Prepaid and other current assets	(389)	(389)	—
Accounts payable, trade	15,266	15,266	—
Due to affiliates	(215,522)	(1,145,002)	(929,480)
Accrued and other current liabilities	(28,523)	(28,523)	—
Other - net	(5,001)	(5,001)	—
Net cash provided by (used in) operating activities	230,759	(698,721)	(929,480)
CASH FLOWS FROM INVESTING ACTIVITIES:			
Purchase of property, plant and equipment	(26,738)	(26,738)	—
Nordural expansion	(53,397)	(53,397)	—
Investments in and advances in joint ventures	(36,973)	(36,973)	—
Proceeds from sale of property, plant and equipment	47	47	—
Restricted and other cash deposits	(9,710)	(9,710)	—
Net cash used in investing activities	(126,771)	(126,771)	—
			—
CASH FLOWS FROM FINANCIING ACTIVITIES:			—
Repayment of long-term debt – related party	(480,198)	(480,198)	—
Excess tax benefits from share based compensation	657	657	—
Issuance of preferred stock	—	929,480	929,480
Issuance of common stock - net of issuance costs	443,646	443,646	—
Net cash provided by (used in) financing activities	(35,895)	893,585	929,480
NET CHANGE IN CASH	68,093	68,093	—
CASH, BEGINNING OF PERIOD	60,962	60,962	—
CASH, END OF PERIOD	$ 129,055	$ 129,055	$ —

As reflected in the table above, which was included in the Restatement (SER 1136), although it corrected a **technical presentation error**, the Restatement changed **nothing of substance**. The $929,480,000 associated with the "touch pass" moved from operating to financing, without **any** bottom line effects. The

Restatement had not one cent's effect on Century's assets, liabilities, shareholders' equity, net income (or loss), or beginning or ending cash position. SER 1136.

This error in the technical presentation of the "touch pass" provides the only basis for Plaintiffs' allegation that Century's November 2008 quarterly financial statement and the Registration Statement were false and misleading and misled investors into thinking that Century was "cash rich." ER 81 (¶ 10), 84 (¶ 13), 112-13 (¶¶ 85-88), 115-16 (¶ 92). Plaintiffs never have alleged that any other number was incorrect, or that the presentation error affected Century's bottom line. They instead allege that the "touch pass" should have been presented as "Cash Flows From Financing Activities," as opposed to "Cash Flows From Operating Activities," and, ignoring Century's disclosures to the contrary, argue that this presentation error misled investors who read the Registration Statement and bought in the Secondary Offering into thinking that Century was "cash rich" despite Century's repeated and stark announcements to the contrary.[6] ER 83 (¶ 10), 86 (¶ 18), 110-16 (¶¶ 79-92).

[6] Up until their termination, Century disclosed the Hedges, and marked them to market each quarter, disclosing in its 10-Qs and 10-Ks the change in their market value. *E.g.*, SER 204. This change in market value (realized and unrealized) since the last quarter was reflected on Century's books as an adjustment to "Net Income" ("Net loss on forward contracts") on the statement of operations; the non-cash (unrealized) portion was reflected as an adjustment to "Cash Flows From Operating Activities" ("Unrealized net loss on forward contracts") on the statement of cash flows. SER 189-90, 204-06.

VI. PLAINTIFFS' PURCHASES OF CENTURY STOCK

Plaintiffs allege that their stock is traceable to the Secondary Offering, which they say was an offering of 24.5 million shares. But over half – 13.2 million of the 24.5 million new shares – went to Glencore and not to the market. *See* SER 909. And before the Secondary Offering, there already were 49,052,692 shares in the market. ER 33:4-9; SER 913. Thus, after the Secondary Offering, approximately 11.3 million out of the total of 73.5 million shares in the aftermarket might be traced to the Secondary Offering: a mere 15.37%.[7] Plaintiffs therefore must – but here cannot – allege facts showing that the particular shares they purchased are among these 15.37%.

Plaintiffs' own certificates show they purchased Century stock on January 28 and 30, 2009 (and on several days after January 30), but **not** on the date of the Secondary Offering, January 29, 2009. *See* SER 57-60; ER 150. When they filed their Second Amended Complaint, they thought they had solved that problem via a new plaintiff (McNulty), whom they alleged bought stock on January 29, 2009. SER 1985 (¶ 140). But upon receipt of his certificate, they learned that McNulty actually bought his stock on January 28, 2009, and not January 29, so they had to

[7] Century offered 24.5 million shares in the Secondary Offering. Glencore purchased 13.2 million shares. Thus, 11.3 million shares went to investors other than Glencore. The preexisting shares plus the new shares equals 73.5 million shares. 11.3/73.5 = 15.37%.

file a Third Amended Complaint to correct that allegation. ER 131 (¶ 140); see also SER 2005:13-17.

Now – on appeal for the first time – Plaintiffs suggest that the Secondary Offering occurred on January **28**, 2009. *See* AOB 2, 5, 10. But that is not what the Third Amended Complaint alleges, or indeed any of their complaints alleged. ER 85, 112 (¶¶ 17, 83); SER 8 (n.4), 9-10 (¶ 17), 18-19 (¶¶ 55-56), 32-33 (¶ 79), 1680-81 (¶¶ 16, 17), 1691 (¶ 55), 1706 (¶ 79), 1939-40 (¶ 17), 1960 (¶ 72). And it is not what the Registration Statement shows. The SEC's electronic filing system, EDGAR, confirms that the final Registration Statement, while dated January 28, 2009, was not filed with the SEC until January 29, 2009, *see* http://www.sec.gov/Archives/edgar/data/949157/000095013409001432/0000950134-09-001432-index.htm (last accessed Aug. 1, 2011), whereas the "red herring" registration statement was filed with the SEC on January 27, 2009, *see* http://www.sec.gov/Archives/edgar/data/949157/000095013409001145/0000950134-09-001145-index.htm (last accessed Aug. 1, 2009).[8] The final Registration Statement could not have been filed earlier because it notes the January 28, 2009

[8] The district court took judicial notice of the Registration Statement and the other documents offered by Appellees; Plaintiffs objected to taking judicial notice of some of the documents, but did not object to taking judicial notice of the Registration Statement. ER 18-19.

closing price on its face: "On January 28, 2009, the last reported sale price of our common stock was $4.60 per share." SER 896.

Plaintiffs' purchases of January 28, 2009 thus occurred **before** the Secondary Offering and therefore cannot be traced to the Secondary Offering. Plaintiffs' purchases of January 30, 2009 (and later), were from a pool of over 73.5 million shares, of which the shares sold to the public via the Secondary Offering amounted to just 15.37%. All this can be gleaned from documents of which the district court took judicial notice without objection. One need not (and the district court did not) place any reliance on the declarations offered by Defendants. ER 66-67; SER 1792-1876, 2146-55. Yet these declarations constitute the only "extrinsic evidence" that Plaintiffs now attack (and misrepresent) on this appeal.

VII. PROCEDURAL HISTORY OF THE CASE.

A. Initial Proceedings.

Within days of the Restatement, several sets of plaintiffs filed complaints against Century, the Underwriters and the Individual Defendants. As required by section 27(a)(3) of the '33 Act, 15 U.S.C. § 77z-1(a)(3), the various plaintiffs filed motions seeking to be named lead plaintiff and the district court selected Messrs. Wexler, Abrams, Petzschke and McClellan to be lead plaintiffs. ER 162-67 (Dkt. 15-20, 32-37, 41-43, 45); *see In re Century Aluminum Co. Sec. Litig.*, No. C-09-1001-SI, 2009 WL 2905962 (N.D. Cal. Sept. 8, 2009). Thereafter, Plaintiffs filed a

consolidated complaint (the "Consolidated Complaint") – the first of four complaints they were to file. SER 1-61.

B. The Consolidated Complaint and the First Amended Complaint.

The Consolidated Complaint asserted four claims: (1) Section 10(b) of the Securities Exchange Act of 1934 (the "'34 Act"), 15 U.S.C. § 78j(b), and SEC Rule 10b-5, 17 C.F.R. § 240.10b-5; (2) Section 20(a) of the '34 Act, 15 U.S.C. § 78t(a); (3) Section 12(a)(2) of the '33 Act, 15 U.S.C. § 77l(a)(2); and (4) Section 15 of the '33 Act, 15 U.S.C. § 77o. SER 1-61. It alleges that the Secondary Offering took place on January 29, 2009. SER 8 (n.4), 6-7 (¶ 17), 18-19 (¶ 55, 56), 32 (¶ 79).

Defendants filed motions to dismiss. ER 168 (Dkt. 61-65). Eleven days later, Plaintiffs announced they wished to amend, both to add the Section 11 claim they say was inadvertently omitted, and "to add additional allegations" (ER 168; SER 1602), and filed a first amended consolidated class action complaint (the "FAC") (SER 1601-1737).

The gravamen of the FAC's Securities Act claims[9] was that the Registration Statement misstated its cash position in violation of Generally Accepted Accounting Principles ("GAAP") by presenting cash flows from the termination of the

[9] Plaintiffs' '34 Act claims, which alleged essentially the same facts, were dismissed by the district court. ER 21-29. Plaintiffs have not appealed this dismissal. AOB at 1 n.1, 3 n.4.

Hedges as "operating activity" rather than "financing activity" and then predicting Century might, or might not, be able to fund operations for the next 18 months. SER 1680-82 (¶¶ 17-20), 1721-25 (¶¶ 123-25). The FAC further alleged that Plaintiffs purchased shares of Century Aluminum common stock "*pursuant and/or traceable* to the [Secondary Offering]." SER 1680 (¶ 16), 1724 (¶ 129) (emphasis added).

C. The District Court's Order Dismissing the First Amended Complaint.

Again, Defendants moved to dismiss. ER 169-70 (Dkt. 69-71, 73-74). Defendants argued that the Section 11 claim should be discussed under Rule 12(b)(6) because (*inter alia*) the FAC did not allege facts showing that any of the shares Plaintiffs purchased could be traced to the Secondary Offering, and instead only contained boilerplate conclusions that Plaintiffs purchased their shares "pursuant to or traceable to the Secondary Offering." SER 1727-28 (¶¶ 143, 148, 151).

Defendants also argued that the Section 11 claim should be dismissed under Rule 12(b)(1) for lack of subject matter jurisdiction. Defendants based this argument on Plaintiffs' certifications of their stock purchases (which were incorporated by reference into the FAC, *see* SER 57-61) and also offered declarations confirming that Plaintiffs did not purchase in the Secondary Offering. SER 913, 1792-1876.

At the hearing on the motions to dismiss the FAC, the district court pressed for an explanation of how Plaintiffs might be able to meet their burden on Section 11 tracing, and counsel for Plaintiffs attempted to offer an explanation while acknowledging that "it's not easy to do": "You can ask for the original certificate and because all of the stock is held [in] street name, so you have to trace back through street name and trace back through the broker." SER 1921:11-13. In response to the district court's inquiry whether Plaintiffs had made that effort in this case, Plaintiffs' counsel reported that Plaintiffs were "in the process of requesting," and that she had spoken to "a couple of brokers" who had the "understanding" that "their firms got the stock from Morgan Stanley and Credit Suisse." SER 1921:11-23. The brokers reportedly had "reason to believe" that they had acquired stock issued in the Secondary Offering, but that "the only way" to be sure was "to trace back and get those certificates and it's not easy to do." SER 1921:20-1922:6.

The district court granted Defendants' motion. ER 16-36, reported at *In re Century Aluminum Co. Sec. Litig.*, 749 F. Supp. 2d 964 (N.D. Cal. 2010). Holding that Plaintiffs had neither alleged in the FAC nor articulated in their opposition "how to trace any particular shares in the 75 million share pool that existed after the secondary offering to show that those shares came from the secondary offering" (ER 33:7-10, 19-21), the court dismissed Plaintiffs' Section 11 claim "because

the complaint does not allege facts showing that the named plaintiffs' purchases are traceable to the January 29, 2009 offering." ER 33:19-21.

D. The Second Amended Complaint and the Third Amended Complaint.

On May 28, 2010, Plaintiffs filed their Second Amended Complaint ("SAC"). SER 1931-2003. The SAC added a new plaintiff, Chris McNulty, who purportedly bought stock on the day of the Secondary Offering, January 29, 2009. SER 1985 (¶ 140). And the SAC repeatedly alleged that the Secondary Offering occurred on January 29, 2009. SER 1939 (¶ 17), 1960 (¶ 72). But soon thereafter, Plaintiffs requested that Defendants stipulate to the filing of the TAC, to correct one mistake: new plaintiff McNulty had purchased Century stock "on January 28, 2009, not January 29, 2009." SER 2005:13-17.

On June 24, 2010, Plaintiffs filed the TAC, which asserts four claims: (1) Section 10(b) of the '34 Act and Rule 10b-5; (2) Section 20(a) of the '34 Act; (3) Section 11 of the '33 Act; and (4) Section 15 of the '33 Act. ER 77-151.[10] Like the FAC, the TAC alleged repeatedly that the Secondary Offering occurred on January 29, 2008. *See, e.g.*, ER 85 (¶ 17), 112 (¶ 83), 142 (¶ 169). The TAC did not allege that any of the Plaintiffs purchased Century stock in the Secondary Offering, on the date of the Secondary Offering, or at the Secondary Offering

[10] In the TAC, Plaintiffs chose to omit their claim under Section 12(a)(2) of the '33 Act. ER 7 n.6.

price. ER 130-31 (¶¶ 135, 137, 140, 143). Instead, four of the eight purchases that allegedly provide the basis for Plaintiffs' claims were made before the Secondary Offering and the rest were made after the Secondary Offering. ER 130-31 (¶¶ 135, 137, 140, 143).

Despite Plaintiffs' prior suggestions that stock certificates might enable them to meet their tracing burden (*see* p. 19 above), the TAC does not mention any stock certificate or explain how or why a stock certificate might enable Plaintiffs to trace any of their stock to the Secondary Offering. Plaintiffs instead only assert "on information and belief" as a conclusion, and without alleging a factual basis, that they purchased securities directly traceable to Century's Secondary Offering, adding that they are "unaware of any information" showing that their stock is not traceable to the Secondary Offering. ER 130-31 (¶¶ 134, 136, 139, 142). One of the Plaintiffs alleged that he purchased stock through a broker (Vanguard) who cleared trades through Citigroup, which he alleged was "indistinguishable from" Morgan Stanley because of a joint venture. ER 130-31 (¶ 138).

E. The District Court's Order Dismissing the Third Amended Complaint.

Defendants again moved to dismiss. ER 173-76 (Dkt. 101-19). At the hearing, Plaintiffs' counsel asserted that standing was established because Plaintiffs "have provided certifications that they owned the stock at the relevant time, believed that they suffered injury, and that's all that's necessary." SER 2279:5-8.

On March 3, 2011, the district court dismissed the TAC with prejudice. ER 1-15, reported as *In re Century Aluminum Co. Sec. Litig.*, No. C-09-1001, 2011 WL 830174 (N.D. Cal. Mar. 3, 2011). The order made clear that the Section 11 claim was being dismissed because "plaintiffs failed to follow the Court's instruction to plead facts to show how plaintiffs will be able to establish that their purchases are traceable to the Secondary Offering. Instead, plaintiffs simply reassert – without facts to support – that they purchased securities directly traceable to Century's Secondary Offering." ER 8:17-20. The order emphasized that it had asked Plaintiffs to provide factual allegations, not evidence:

> Plaintiffs also ignore that post-*Twombly* and *Iqbal*, a formulaic recitation of the elements of a cause of action are insufficient and plaintiffs must allege facts sufficient to raise a right to relief above "the speculative level." *See, e.g.*, *Twombly***,** 550 U.S. at 555. Here the Court has not asked plaintiffs to plead facts that prove their securities are traceable to the secondary offering here, but to plead facts showing how their shares can be traced.

ER 10:17-19 (citing ER 33).

The district court entered judgment for Defendants, and Plaintiffs appealed. ER 37, 65.

STANDARD OF REVIEW

This Court reviews *de novo* a district court's dismissal of a complaint under Fed. R. Civ. P. 12(b)(6). *Rubke v. Capitol Bancorp Ltd.*, 551 F.3d 1156, 1161 (9th Cir. 2009); *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1030 (9th

Cir. 2008). The same is true of a dismissal under Fed. R. Civ. P. 12(b)(1). *Carson Harbor Village, Ltd. v. City of Carson*, 353 F.3d 824, 826 (9th Cir. 2004).

To state a claim, Plaintiffs must allege facts supporting each element of the cause of action. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) ("Factual allegations must be enough to raise a right of relief above the speculative level."). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements" will not be accepted as true. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009). No longer should a complaint survive on speculation that discovery might turn up something that the complaint lacks. *See Twombly*, 550 U.S. at 560-63. Likewise, allegations contradicted by documents referenced in the pleadings or by judicially noticed information may be disregarded by the Court. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007); *Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir. 2007); *Steckman v. Hart Brewing, Inc.*, 143 F.3d 1293, 1295-96 (9th Cir. 1998).

SUMMARY OF THE ARGUMENT

The judgment in this case must be affirmed on three grounds, each of which is independently dispositive.

First, despite the attempt in Plaintiffs' Opening Brief to distort the basis of the ruling below, the opinion makes clear that the district court dismissed Plain-

tiffs' Section 11 claim pursuant to Rule 12(b)(6) for failure to state a claim upon which relief can be granted. The district court's ruling was fully justified under Rule 12(b)(6), and the pleading requirements set forth in *Twombly* and *Iqbal*.

The TAC's attempt to plead tracing under those rules fell far short of the mark. No Plaintiff purchased in the Secondary Offering, and no Plaintiff could demonstrate how he even possibly could show that his stock was issued pursuant to the Registration Statement for the Secondary Offering. Therefore, after giving Plaintiffs several opportunities to amend, the district court properly concluded that Plaintiffs could not plead a "plausible" claim for relief given their failure to plead the required element of tracing.

In an effort to evade that pleading failure, Plaintiffs distort the district court's ruling and the basis on which it was made, arguing that the Court relied on evidence and factual findings, and entered judgment under Rule 12(b)(1). That argument is groundless. As the ruling itself makes clear, the district court based its decision on the TAC's failure to allege facts – not evidence, declarations and factual findings – and the decision is fully supported on that basis.

Second, although not the basis of the district court's decision, dismissal of the Section 11 claim also is required for lack of standing and subject matter jurisdiction under Art. III, § 2 of the United States Constitution. To invoke the jurisdiction of the federal courts, Plaintiffs must present a "case or controversy." Plaintiffs

have the burden of showing that they have Art. III standing to assert the underlying claim, and that they suffered an injury caused by an invasion of the legally protected interest raised in the complaint. Plaintiffs did not – and cannot – do so here.

Section 11 protects against an injury resulting from the issuance of stock pursuant to a defective registration statement. Only purchasers of stock issued pursuant to the registration statement alleged to be defective have Article III standing to ask the court to adjudicate questions about Section 11 liability. Plaintiffs' inability to show that their stock was issued pursuant to the Registration Statement is fatal under Article III and the rules articulated by the Supreme Court. The concepts of "statutory" and "non-constitutional" standing cannot change that fundamental fact.

Third, the judgment also can be affirmed because Plaintiffs' Section 11 claim is contradicted by the Registration Statement on which it is purportedly based and because it rests on implausible allegations contradicted by the documents on which it rests, contrary to this Court's repeated holdings.

ARGUMENT

I. THE DISTRICT COURT PROPERLY DISMISSED THE SECTION 11 CLAIM UNDER RULE 12(b)(6).

A. Plaintiffs' Opening Brief Misstates the Basis of the District Court's Ruling.

Rather than acknowledging the basis on which the district court **actually** rendered its decision, Plaintiffs' Opening Brief constructs an Alice-in-Wonderland version of the ruling below, untethered from reality. The district court's order (ER 1-15) tells a fundamentally different story.

Plaintiffs proclaim that "the district court incorrectly dismissed Plaintiffs' TAC under Fed. R. Civ. P. 12(b)(1)," after concluding that Rule 12(b)(1) applied "as opposed to Fed. R. Civ. P. 12(b)(6)." AOB at 13. They then assert that the district court's supposed "application of the wrong standard foredoomed Plaintiffs' complaint," that "the court made impermissible findings of fact," and that "the court was primarily swayed by three self-serving affidavits submitted by Defendants, basing its factual findings on the assertions contained therein." AOB at 13, 29.

In sharp contrast to Plaintiffs' claims that the district court dismissed the TAC under Rule 12(b)(1), the Court's discussion of the applicable legal standards refers to Rule 12(b)(6) , and recites the principles governing dismissal for failure to state a claim on which relief can be granted. ER 3. The Court's discussion of the

applicable legal standards says **nothing whatsoever** about Rule 12(b)(1), subject matter jurisdiction or the rules governing standards that apply under Rule 12(b)(1).

Nor does the opinion's discussion of the Section 11 claim purport to apply Rule 12(b)(1), or rely on the declarations that Plaintiffs claim "primarily swayed" the Court and formed the basis for its purported "impermissible factual findings."[11] The Court began its discussion of the Section 11 claim by noting that "in the TAC, Plaintiffs failed to follow the Court's instruction to **plead** facts." ER 8 (emphasis added). The decision analyzed and explained why that pleading failed to state a claim upon which relief could be granted. ER 8-12. It discussed the TAC's pleading deficiencies against the backdrop of the applicable law (including *Twombly* and *Iqbal*), and concluded that Plaintiffs had not adequately ***alleged*** how they intend to trace their stocks to the Secondary Offering as required under Section 11." ER 12 (italics in original). The court further noted that Plaintiffs had been given every opportunity to **allege** how their shares could be traced to the Secondary Offering, but had failed to do so – either in their pleadings or in the briefs filed in opposition to defendants' motions to dismiss. ER 7, 10, 12, 33.[12]

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[11] The district court opinion refers to the declarations only in a footnote, and only on a peripheral point regarding one of the five plaintiffs that was not the basis of its decision. ER 9 n.7.

[12] Plaintiffs do not include among their three "issues presented" whether the district court improperly dismissed the Section 11 claim under Rule 12(b)(6). Instead,

Plaintiffs' claim that the Opinion "clearly demonstrates" that the Court made and relied upon a factual finding based on declarations (AOB at 29) is similarly baseless. The block quotation that Plaintiffs cite as the **only** example of the Court's "impermissible fact finding" and being "swayed by three self-serving affidavits" provides no support for those assertions.

First, the quotation is from the Court's retrospective recitation of the background of a prior ruling[13] – not an analysis of the TAC or the reasons for the dismissal of the Section 11 claim. ER 7. Second, the information in the quotation did not come from the declarations (*see* ER 66-69; SER 1792-1876, 2146-51); it came straight from the Registration Statement, of which the court took judicial notice without objection from Plaintiffs. Third, the "factual findings" supposedly made on the basis of the "self-serving affidavits" merely recite the number of shares issued in the Secondary Offering from the Registration Statement, which can unquestionably be considered under Rule 12(b)(6).

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they mistakenly claim (as noted above) that the claim was dismissed under Rule 12(b)(1). AOB at 1-2. Nonetheless, Plaintiffs attempt to grapple with 12(b)(6) issues in connection with their Section 11 claim at the back of their brief in a section they improperly style as "Section 11 Statutory Standing." AOB at 36-42. Plaintiffs did not re-plead their Section 12(a)(2) claim in the TAC, thereby conceding that no plaintiff actually purchased **in** the Secondary Offering itself.

[13] The prior order, which dismissed the FAC with leave to amend, was not the basis of the judgment and did not rely on the declarations. ER 32-34.

Although the district court used the phrase "evidence submitted by declaration" in referring to its prior opinion, the prior opinion makes explicitly clear that the numbers came from the Registration Statement. ER 30. The Registration Statement was furnished to the Court as Exhibit A to the Underwriters' unopposed Request for Judicial Notice. ER 33; SER 1876E; *see also* SER 894-971. It was, of course, filed with the SEC and cited, quoted and relied upon in each of the complaints that Plaintiffs filed in this action.

It is difficult to see how Plaintiffs could have been confused on this point. The prior decision cites "Underwriters RJN Ex. A at S-8" for the statement they characterize as a "factual finding" based on "self-serving affidavits." ER 33 (citing SER 1876E). Plaintiffs' attempt to make this **non-issue** the linchpin of this appeal bespeaks their desperation.

B. The TAC Failed to Allege Tracing Under *Twombly* and *Iqbal.*

The district court properly dismissed Plaintiffs' Section 11 claim under Rule 12(b)(6) for failure to allege specific and plausible facts to support the conclusion that Plaintiffs' shares were traceable to the Secondary Offering. *See* ER 3, 10 and 12. That ruling was compelled by the pleading requirements articulated by the Supreme Court in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007) ("*Twombly*"), and *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009) ("*Iqbal*"). *See* ER 3, 10 and 12.

1. Plaintiffs Must Plead Facts That "Actively and Plausibly" Show an Ability to Trace Their Stock to the Secondary Offering

As this Court has held, *Twombly* and *Iqbal* require district courts to reject at the pleading stage conclusory allegations which do not rise above the "speculative" level and do not state a claim which is "plausible on its face." *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 972 (9th Cir. 2009). *See, e.g., In re Cutera Sec. Litig.*, 610 F.3d 1103, 1107 (9th Cir. 2010) (a claim is "properly dismissed if it fails to plead enough facts to state a claim for relief that is plausible on its face.") (quoting *Twombly*, 550 U.S. at 570). The TAC's allegations fell far short of the controlling standards.

To survive a 12(b)(6) motion under *Twombly* and *Iqbal*, Plaintiffs must allege facts that actively and plausibly suggest the conclusions on which their claim depends. *See, e.g., Twombly*, 550 U.S. at 557; *Port Dock & Stone Co. v. Old Castle Northeast, Inc.*, 507 F.3d 117, 121 (2d Cir. 2007) (citing *Twombly*). If the well-pleaded facts do not show "more than the mere possibility" of liability, then the complaint "has **alleged**" but "not **shown**" that the pleader is entitled to relief, and "the complaint must be dismissed." *Iqbal*, 129 S. Ct. at 1950 (emphasis added) (internal quotations omitted). Legal conclusions couched as factual allegations are disregarded. *See, e.g., id.* at 1949-50; *Moss*, 572 F.3d at 972.

This Court, and district courts in the Ninth Circuit, have relied on these fundamental rules in dismissing Section 11 claims in circumstances far less compelling than those presented here.[14]

The concept of raising a claim above the level of speculation, and the question of whether allegations "actively and plausibly suggest" the existence of a claim must, of course, be evaluated in context. Some allegations are implausible because they are impossible (for example, no matter how detailed the underlying allegations, a claim that a cow can jump over the moon will not pass muster). But *Twombly* and *Iqbal* are not limited to contexts of impossibility.

In *Twombly*, for example, it was not impossible that the "baby Bells" had conspired to inhibit the growth of competitors, or to refuse to compete against each

[14] *See, e.g., Sherman v. Network Commerce Inc.*, 346 F. App'x 211, 213 (9th Cir. 2009) (affirming dismissal of Section 11 claim based on "unadorned allegation[s]" that Company did not disclose a general plan to pay senior executives additional compensation because allegations were not "facially plausible") (citing *Iqbal*, 129 S. Ct. at 1949). *See also In re Shoretell Ins. Sec. Litig.*, No. C 08–00271 CRB , 2009 WL 2588881, at *4, *7 (N.D. Cal. Aug. 19, 2009), (dismissing Section 11 claim alleging misstatements and omissions relating to the monitoring of key financial metrics and demonstration products); *Belodoff v. Netlist, Inc.*, No. SA CV 07-00677 DOC (MLGx), 2008 WL 2356699, at *11-12 (C.D. Cal. May 30, 2008), (dismissing Section 11 claim based on channel stuffing allegations under *Twombly* because "[w]ithout more allegations to flesh out how stuffing rendered the prospectus misleading, plaintiff's right to relief cannot rise above the speculative"). Other Circuits have done the same. *See, e.g., Garber v. Legg Mason Inc.*, 347 Fed. App'x 665, 669 (2d Cir. 2009) (dismissing Section 11 claim under *Twombly* finding insufficient "[f]actual allegations" to raise right to relief above "speculative level").

other, but in this context the Court said it was implausible, given common economic experience and the history of the AT&T divestiture. 550 U.S. at 564-70. Similarly, in *Iqbal*, it was not impossible that the Attorney General and the Director of the FBI had – post September 11, 2001 – decided to detain Arab Muslims and subject them to harsh confinement for improper or discriminatory reasons, but in this context the Court said it was implausible. 129 S. Ct. at 1951-52.

The Supreme Court's teachings apply perfectly here. As noted at pages 42-46 below, courts and commentators have recognized that after a secondary offering there is no practical means of sourcing aftermarket purchases to a particular registration statement. "The modern practice of electronic delivery and clearing securities trades, in which deposited shares of the same issue are held together in fungible bulk, makes it virtually impossible" to do so. *In re Initial Public Offering Sec. Litig.*, 227 F.R.D. 65, 118 (S.D.N.Y. 2004), *vacated on other grounds*, 471 F.3d 24 (2d Cir. 2006); *see* pp. 42-45 below. Thus, Plaintiffs' allegations that they can trace their stock to the Secondary Offering are **far** less plausible than the allegations rejected in *Twombly* and *Iqbal*. Similarly, "virtually impossible" does not rise to the level of "speculative," which would itself miss the mark.

Applying Section 11 according to its terms – and in light of those market realities – is not unfair. Nor does it deprive Plaintiffs of a statutory remedy, as

Plaintiffs suggest. As the district court noted in quoting Judge Lynch's decision in *Abbey v. Computer Memories, Inc.*, 634 F. Supp. 870, 875 (N.D. Cal. 1986):

> Section 11 limits its conclusive presumption of reliance to persons acquiring any securities issued pursuant to the registration statement, notwithstanding the obvious fact that a false or misleading statement in or an omission from a registration statement could easily affect the price of stock issued prior to the offering. **Section 11 simply was not intended to provide a remedy to every person who might have been harmed by a defective registration statement.** The Court believes that the language of section 11 and the existing case law indicate that a plaintiff who can only show that his or her shares might have been issued in the relevant offering should not be given the benefit of section 11's conclusive presumption of reliance; such a person should be treated the same as individuals whose shares clearly were not issued in the offering.
>
> It is important to note that **section 11's direct tracing requirement does not leave individuals who have been harmed by a defective registration statement completely without a remedy**. Abbey, for example, may still pursue his lawsuit under his 10b-5 claim. The "direct tracing" requirement simply precludes a shareholder from taking advantage of section 11's relaxed liability requirements when the shareholder's connection to the relevant offering is so attenuated that he or she cannot directly trace his or her shares to the offering.

ER 34 (emphasis added). *See also Krim v. pcOrder.com, Inc.*, 402 F.3d 489, 495-96 (5th Cir. 2005).

2. The Third Amended Complaint Failed to Plead Specific and Plausible Facts In Support of Tracing.

Plaintiffs' claim that the district court required them to make an "evidentiary showing" sufficient to "**prove**" that their stock was issued in the Secondary Offering. AOB at 34, 38. Not so. Rather, consistent with *Twombly* and *Iqbal*, the court

merely required them to **plead facts** to show "**how**" their shares could be could be traced to that offering. ER 10 (emphasis added).

Neither the TAC nor Plaintiffs' Opening Brief comes close to providing the facially plausible non-speculative showing required by *Twombly* and *Iqbal*. Instead, the TAC serves up conclusory assertions that Plaintiffs "purchased Century Aluminum stock directly traceable to the Company's Offering . . . ." ER 129-31 (¶¶ 134, 136, 139, 142).[15] Plaintiffs' Opening Brief adds nothing of substance. AOB at 38.

Piling one conclusory assertion atop of another, Plaintiffs allege that they purchased shares through unnamed brokers, who, on information and belief, satisfied their purchase orders with stock that came from the Secondary Offering. *See, e.g.*, ER 129-32 (¶¶ 135, 137, 140, 143). Instead of alleging the facts necessary to construct a facially plausible claim, the TAC relied on the **absence** of facts, including that Plaintiffs are "unaware of any information" suggesting that they **cannot** trace their shares to the Secondary Offering. ER 129-32 (¶¶ 135, 141, 143). Needless to say, this kind of wishful thinking does not begin to satisfy *Twombly* and *Iqbal*.

[15] Plaintiffs did not even attempt to plead facts in the TAC showing that plaintiff Eric Petzschke can trace his shares. *See* ER 129-35 (¶¶ 134-52).

Although Plaintiffs' Opening Brief notes (at 39) that the TAC alleges plaintiff Abrams' broker told him that his shares came "directly from Citigroup," which "has a direct brokerage and stock-trading relationship with Defendant Morgan Stanley," Plaintiffs conveniently ignore the fact that the joint venture between Citigroup's Smith Barney and Morgan Stanley was not consummated until May 31, 2009 – more than **four months after** the Secondary Offering and more than four months after Abrams' purchase of Century Aluminum shares. *See* SER 2231.[16] Abrams' purchases cannot possibly be traced to a joint venture with Morgan Stanley consummated more than four months after Abrams' trades, much less to the Registration Statement.

Even if the joint venture had been consummated before Abrams' purchase, the TAC pleads no facts whatsoever to suggest that Abrams could trace his stock to the Secondary Offering. To do so, he would have to allege facts demonstrating that the shares allegedly purchased through Citicorp came from the Secondary Offering (rather than the 50 million non-Secondary Offering shares trading in the aftermarket), and that Morgan Stanley did not hold shares obtained outside the

[16] In the district court Plaintiffs did not object to the Underwriters' Request for Judicial Notice. ER 2. In fact, Plaintiffs relied on it themselves to reference the date the joint venture agreement was announced, as opposed to the date the joint venture actually closed. ER 175 (Dkt. 111 at 4-5, n.14).

Secondary Offering. Plaintiffs do not – and could not possibly – allege any such "facts." *See Twombly*, 550 U.S. at 570.

The TAC's assertions, on "information and belief," regarding purchases of shares held in street name by unnamed brokers, and/or from unidentified intermediaries or designees (ER-129-32 (¶¶ 134-43) 175 (Dkt. 111at 3-4)), are equally wide of the mark. They do not come close to alleging "a right to relief above the speculative level." *Twombly*, 550 U.S. at 555. Brokers have no way of determining whether the shares they hold in street name came from a secondary offering or IPO (see pages 42-46 below), and the TAC makes no attempt to allege anything to the contrary.

As a review of the TAC demonstrates, the district court's conclusion that Plaintiffs failed to allege facially plausible non-speculative facts showing **how** they might be able to trace any of their shares to the Registration Statement and Secondary Offering is unassailable. *See, e.g., Sherman*, 346 F. App'x at 213 (affirming dismissal of Section 11 claim where allegations not "facially plausible"). *See also In re Shoretell, Ins. Sec. Litig.*, 2009 WL 2588881, at *4, *7 ; *Belodoff v. Netlist*, No. SA CV 07-00677 DOC (MLGx), 2008 WL 2356699, at *11-12 (C.D. Cal. May 30, 2008). Indeed, it is impossible to conclude that Plaintiffs' allegations on that point are anything **other than** speculative and implausible. *Iqbal*, 129 S. Ct. at 1949-50.

3. Plaintiffs' Abandonment of The Contention That They Could Trace Based on "Stock Certificates" Underscores The TAC's Pleading Deficiencies

At the hearing on the first round of motions to dismiss, Plaintiffs told the district court that they could trace shares to the Secondary Offering by obtaining stock certificates from brokers, and that although the task was "not easy" they had "started the process." SER 1920-21. Nothing came of Plaintiffs' representations; Plaintiffs abandoned the effort altogether. As the district court noted, the TAC is conspicuously silent on that point and fails to allege how Plaintiffs might be able to trace their shares to the Secondary Offering:

> Contrary to the assertions made during the oral argument on the prior motion to dismiss, there are no explanations of **how**, much less **whether**, the certificates for the purchases at issue have been located. Nor are there any facts explaining how, if located, the certificates can be used to tie each plaintiff's purchase of securities, out of a pool of 75 million shares, to one of the 24 million shares issued in the Secondary Offering, much less one of the 11.3 million shares that were actually available to the public.

ER 9 (emphasis added); SER 909.

4. Plaintiffs' Reliance on January 28 Purchases or Trading Volumes Is Wholly Unavailing

Plaintiffs allege that they made purchases on January 28, 2009 – the day before the Secondary Offering – at prices ranging from $4.10 to $5.00, but not at the offering price of $4.50. ER 130-32 **(**¶¶ 135, 137, 140, 143). Stock purchased **before** an offering obviously cannot be traced to that offering. *See, e.g., Grand*

Lodge of Pa. v. Peters, 550 F. Supp. 2d 1363, 1376 n.76 (M.D. Fla. 2008) (*citing Barnes v. Osofsky*, 373 F.2d 269, 273 (2d Cir. 1967)).

Plaintiffs cite what they characterize as high trading volume the day after the "red herring" prospectus (*see* page 15 above) and the day before the Secondary Offering to suggest that the Secondary Offering occurred a day early, on January 28, 2009. AOB at 10-12; ER 133-35 (¶¶ 147-49). Any such suggestion is implausible for several reasons:

First, Plaintiffs abandoned their Section 12(a)(2) claim and dropped their allegations that they purchased in the Secondary Offering. *Compare* ER 145-48 *with* SER 53, 1729. It is too late for them to reverse field again and suggest they did purchase in the Secondary Offering based on their purchases made on January 28, 2009.

Second, Plaintiffs simply ignore the fact that they **repeatedly** alleged (both in the TAC and FAC) that the Secondary Offering occurred on January 29, 2009. *See* ER 85 (¶ 17), 112 (¶ 83); SER 1680-81 (¶¶ 16, 17), 1691 (¶ 55), 1706 (¶ 79).

Third, after the '33 Act claims in the FAC were dismissed with leave to amend, Plaintiffs recruited a new class representative who they hoped might be able to show that he purchased in the Offering on January 29. The SAC alleged that plaintiff Chris McNulty purchased shares on January 29 (the actual offering date). SER 1985 (¶ 140). When Plaintiffs learned that McNulty actually pur-

chased on January 28, they had to amend their pleading and file the TAC in order to correct the error because they no longer had a Plaintiff who purchased on the date of the Secondary Offering. ER 131.

Fourth, any suggestion that the Secondary Offering commenced on January 28 is refuted on the face of the judicially noticed Registration Statement, which was filed with the SEC on January 29, and stated that the **closing price** on January 28 was $4.60 share. SER 896. Purchases made on January 28 necessarily occurred before the close of the market – and thus before the price for the Secondary Offering was even determined, and also before any stock was issued pursuant to the Registration Statement.

Nor would it matter if the Secondary Offering had occurred a day earlier. None of the plaintiffs who purchased stock on January 28 has come forward with any facts to suggest that the shares could be traced to the Secondary Offering particularly where the shares were still held in street name by brokers or unnamed intermediaries and so could have come from the 49 million shares that already existed in the market before, and on, January 28. *See* SER 913.

At most, Plaintiffs can speculate that high volume days suggest a greater likelihood that the shares they purchased in the days following the Secondary Offering might have come from the Secondary Offering. But any such speculation would be unavailing as a matter of law. Attempts to demonstrate tracing via prob-

abilities or statistical analysis are uniformly rejected. *See, e.g., Krim*, 402 F.3d at 492, 496-98, 502 (holding that 99.85% statistical likelihood of tracing shares to offering is insufficient).

5. Plaintiffs Rely Solely On Inapposite Pre-*Twombly* Authority

Before *Twombly* and *Iqbal*, some federal courts required plaintiffs to plead facts in support of tracing to survive the pleading stage, while others did not and permitted the pleading of legal conclusions. *See, e.g., Lilley v. Charren*, 936 F. Supp. 708, 716 (N.D. Cal. 1996) (granting motion to dismiss Section 11 claim because plaintiff failed to plead sufficient facts demonstrating tracing); *Lee v. Ernst & Young, LLP*, 294 F.3d 969, 978 (8th Cir. 2002) (Section 11 claim could proceed only if plaintiffs make "a *prima facie* showing" that the shares they purchased are traceable to the challenged registration statement).

It is telling that **all eight** cases cited in Plaintiffs' Opening Brief were decided before *Twombly* and *Iqbal*. *See* AOB at 40-41. As the district court noted: "While plaintiffs have cited cases holding that, at the pleading stage, mere allegations that shares will be traceable are sufficient to state a claim in a secondary offering case, those cases were decided before *Twombly* and *Iqbal*." ER 10 n.8.

While the fact that the pre-*Twombly/Iqbal* decisions have been superseded by Supreme Court authority is decisive, the cases relied on by Plaintiffs are also

factually distinguishable.[17] A conspicuous example is Plaintiffs' citation to *In re Suprema Specialties, Inc. Sec. Litig.*, 438 F.3d 256 (3d Cir. 2005). Not only was that case decided before *Twombly* and *Iqbal*, and therefore under superseded pleading standards, it is also distinguishable because in *Suprema*, the plaintiffs did not merely allege tracing; they also alleged that they purchased in the offering itself. *See* 438 F.3d at 274. Plaintiffs here have abandoned their claim that they purchased in the Secondary Offering.

6. The Reasons For Plaintiffs' Pleading Failures Are Readily Apparent.

The problem confronting Plaintiffs was not just that they failed to come forward with facts that might enable them to trace their shares to the Secondary Offering; it is that they cannot do so in the circumstances of this case. Plaintiffs who purchased common stock in the aftermarket through brokers following a secondary offering cannot source shares to particular offerings.

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[17] For example, *Schwartz v. Celestial Seasonings, Inc.*, 178 F.R.D. 545, 557 (D. Colo. 1998) was decided in the context of a motion for class certification and the court merely stated **conditionally** that plaintiffs might "have standing to bring § 11 claims, **provided that** they can trace their stock to one of the two offerings" (emphasis added). *In re Immune Response Sec. Litig.*, 375 F. Supp. 2d 983, 1039 (S.D. Cal. 2005) is unavailing because the issue in that case was whether or not plaintiffs purchased "in" the offering not tracing. Finally, *In re Seebeyond Tech. Corp. Sec. Litig.*, 266 F. Supp. 2d 1150, 1171-72 (C.D. Cal. 2003), involved positive allegations that the plaintiffs had purchased stock pursuant to the offering. No case holds that it tracing can never be resolved on a motion to dismiss. The TAC presents a paradigm example of allegations that compel such a dismissal.

In explaining what the author referred to as "the impossibility of the tracing requirement" after a secondary offering, a leading law review article stated the essence of the problem as follows: "Brokers hold shares in general accounts … neither the brokers nor the shareholders know which issue of a particular security is being transferred." Accordingly, "[s]hareholders who buy securities after the second offering will be **unable** to trace their shares to either offering . . . ." H. Sale, *Disappearing Without A Trace: Sections 11 and 12(a)(2) Of The 1933 Securities Act*, 75 Wash. L. Rev. 429, 466 (2000) (footnotes omitted).

Plaintiffs' inability to allege any facts to support their assertions that they directed brokers to purchase in the Secondary Offering and/or believe their brokers got stock issued in the Secondary Offering (ER 130-32 (¶¶ 135, 137, 138, 143); SER 1921-22) is understandable. Even when acting on directions to purchase stock from a secondary offering, brokers can neither ensure that the stock actually came from the offering, or know after the fact whether it did.

As the Sale article explains:

> Brokers cannot promise to provide only Offering Shares because of the fungibility of shares in brokerage accounts. Accordingly, the shares received may or may not be Offering Shares. And no matter what they receive, the purchasers cannot prove what type of shares they own.

Sale, *supra*, 75 Wash. L. Rev. at 467 (footnotes omitted).

Accordingly, multiple courts have found that tracing of aftermarket shares is often "virtually impossible where there are other identical shares available in the market at the time of the Offering." *Freeland v. Iridium World Communications, Ltd.*, 233 F.R.D. 40, 45 (D.D.C. 2006). Even before *Iqbal* and *Twombly*, courts dismissed Section 11 claims based on these fundamental market realities at all stages of litigation. *See, e.g., Krim v. pcOrder.com*, 402 F.3d 489 (5th Cir. 2005); *Barnes v. Osofsky*, 373 F.2d 269 (2d Cir. 1967); *Grand Lodge of Pa. v. Peters*, 550 F. Supp. 2d at 1373-77 ; *In re Quarterdeck Office Systems*, No. CV 92-3970-DWW(GHKx), 1993 WL 623310 (C.D. Cal. Sept. 30, 1993), ; *Abbey*, 634 F. Supp. at 875; *Kirkwood v. Taylor,* 590 F. Supp. 1375, 1383 (D. Minn. 1984), *aff'd*, 760 F.2d 272 (8th Cir. 1985); *Lorber v. Beebe*, 407 F. Supp. 279, 285-87 (S.D.N.Y. 1976), *amended by*, 1976 WL 768 (S.D.N.Y. Feb. 11, 1976).

The reasons that transactions through brokers make tracing extraordinarily difficult, if not impossible, after a secondary offering were further elucidated in *Kirkwood*:

> Purchases and sales are accomplished by book entries crediting or debiting the brokerage firm's account, facilitating the transfer of securities without requiring physical movement of any certificates.
>
> . . . The DTC holds all certificates, both old and new, in its nominee name as pooled shares in a fungible mass for the benefit of all of its members.

590 F. Supp. at 1378-79.

As the Second Circuit emphasized in 1967 – before the advent of computerization of the stock markets and fully electronic data entries that credit and debit undivided interests in massive accumulations of stock held by Depository Trust Corporation[18] – it was "often impossible to determine whether previously traded shares are old or new" because "brokerage houses do not identify specific shares with particular accounts but instead treat the account as having an undivided interest in the house's position." *Barnes*, 373 F.2d at 272. Brokers "neither know nor care" whether their customers "are getting newly registered or old shares." *Id*.

These structural impediments are further complicated by the computerization of the securities industry. A purchase of stock held in street name after a secondary offering is merely an electronic credit against a fungible account that "contains" shares from multiple offerings.[19] Looking at stock certificates, trading volumes or aftermarket trading records provide no basis for determining whether

[18] *See* Sale, *supra*, 75 Wash. L. Rev. 429 at note 236.

[19] *See*, *e.g.*, *id*. at 1380; *Krim*, 402 F.3d at 498, 499; *Abbey*, 634 F. Supp. at 875-76; *In re Initial Public Offering Sec. Litig.*, 227 F.R.D. 65, 118 (S.D.N.Y. 2004), *vacated on other grounds*, 471 F.3d 24 (2d Cir. 2006) ("The modern practice of electronic delivery of clearing of securities trades, in which all deposited shares of the same issue are held together in bulk, makes it virtually impossible to trace shares to a registration statement once unregistered shares have entered the market."); *In re Crazy Eddie Sec. Litig.*, 792 F. Supp. 197, 202 (E.D.N.Y. 1992) ("because the securities industry has been computerized this [tracing] requirement is now virtually impossible to meet.").

the purchase was of stock issued in an initial offering, or a subsequent offering of the same class of stock.

Moreover, even when the vast majority of the "fungible mass" is attributable to the offering at issue, a plaintiff even cannot satisfy Section 11's tracing requirement based on probabilities. *See, e.g.*, *Krim*, 402 F.3d at 492-99 (shares from offering comprising 99.85% of the certificate pool insufficient); *In re Quarterdeck*, 1993 WL 623310, at *2-*3 (97% probability insufficient).

7. Discovery Could Not Cure Plaintiffs' Failure To Plead Tracing.

Plaintiffs' claim that discovery will help cure the pleading defects of the TAC is likewise unavailing. S*ee* AOB at 16, 17, 33, 34, and 35. Although Plaintiffs make a request for discovery five times in their Opening Brief, they do not explain anywhere how discovery will enable them to plead tracing, or what they expect to get in discovery that will enable them to do so. *See Plichta v. Sunpower Corp.*, --- F. Supp. 2d ---, 2011 WL 1873310 (N.D. Cal. March 1, 2011) ("plaintiffs have not explained, however, how even with discovery, they hope to be able to prove that any of their shares are traceable to the original offering, given that the shares are fungible and that millions of shares were already being traded in the open market at the time of the offering").

8. Plaintiffs Were Given Opportunity To Amend To Properly Plead Tracing But Were Wholly Unable To Do So.

The failure to plead tracing in conformity with Rule 12(b)(6), and *Twombly* and *Iqbal*, mandated the dismissal of their Section 11 claim. Plaintiffs were given multiple opportunities to amend and in each instance failed to satisfy the pleading requirements. Indeed, they went backwards.

At the end of that process, the district court noted that Plaintiffs' **third** amended complaint still fell well short of Rule 12(b)(6)'s requirements. The district court offered a succinct summary of the infirmities of Plaintiffs' Section 11 claim:

> Given the particular facts of this case, where plaintiffs: (1) did not purchase shares in the Secondary Offering, but in the after-market; (2) purchased shares through brokers and brokers' third-parties, as opposed to through the underwriters; and (3) the market already contained 49 million shares when 11.3 million shares were made available to the public in the Secondary Offering, plaintiffs' naked allegations that their shares are "traceable" to the Secondary Offering are insufficient as a matter of law. Plaintiffs were given the opportunity to, but failed to explain in their TAC how they intended to trace their shares to the Secondary Offering.

ER 12.

Accordingly, at this point, after several attempts, amendment is futile. *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000) (holding a district court need not grant leave to amend where amendment would be futile). This Court should affirm

the judgment under Rule 12(b)(6) and the pleading standards set forth in *Twombly* and *Iqbal*.

II. THE JUDGMENT ALSO CAN BE AFFIRMED FOR LACK OF ARTICLE III STANDING AND SUBJECT MATTER JURISDICTION.

As demonstrated above, the district court's dismissal of Plaintiffs' Section 11 claim is fully supported under Rule 12(b)(6), the ground on which the Court made its ruling, and must be affirmed on that basis. Affirmance is also compelled based on the absence of standing and subject matter jurisdiction.

This Court may affirm (as distinguished from reverse) a district court judgment on any ground supported by the record, irrespective of whether the court below relied on that ground. *See, e.g., Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 322 F.3d 1064, 1076-77 (9th Cir. 2003); *Atel Financial Corp. v. Quaker Coal Co.*, 321 F.3d 924, 926 (9th Cir. 2003); *Cigna Property & Casualty Insurance Co. v. Polaris Pictures Corp.*, 159 F.3d 412, 418 (9th Cir. 1998).

Federal appellate courts have an independent obligation to examine their jurisdiction when there is a question of standing under Article III. *See, e.g., FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 230-31 (1990), *overruled on other grounds by City of Littleton v. Z. J. Gifts D-4, L.L.C.*, 541 U.S. 774 (2004); *Day v. Apoliona*, 496 F.3d 1027, 1029 n.2 (9th Cir. 2007); *Los Angeles County Bar Ass'n v. Eu*, 979 F.2d 697, 700 (9th Cir. 1992); *Coral Construction Co. v. King County*,

941 F.2d 910, 928-29 (9th Cir. 1991); *Ripplinger v. Collins*, 868 F.2d 1043, 1046-47 (9th Cir. 1989).

A. Plaintiffs Lack the Standing Required to Invoke the Jurisdiction of the Federal Courts.

1. Standing Implicates Subject Matter Jurisdiction Under Article III.

The rule that standing implicates subject matter jurisdiction under Article III's case or controversy requirement is beyond legitimate dispute. Indeed, it is black letter law, and there is no carve-out or special exception when the claim is brought under Section 11 of the Securities Act of 1933.

Dismissal pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction is appropriate "when the plaintiff lacks standing to bring the particular suit before the district court." CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE, § 1350 (3d ed. 2009) (citing cases). "As an element of subject matter jurisdiction, the issue of standing should be raised by a motion to dismiss for lack of jurisdiction over the subject matter." 15 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE - CIVIL § 101.30 ("Raising the Standing Issue") (3d ed. 2011) (citing cases).

As the Supreme Court has repeatedly held, "standing to sue" is "a threshold jurisdictional question" that "is part of the common understanding of what it takes to make a justiciable case" because "Art. III § 2 of the Constitution extends the

'judicial power' of the United States only to 'Cases' and 'Controversies.'" *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 102 (1998). *See, e.g., United States v. Hays*, 515 U.S. 737, 742 (1995); *Raines v. Byrd*, 521 U.S. 811, 818 (1997); *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990). This Court has fully embraced those bedrock principles. *See, e.g., Colwell v. Department of Health and Legal Services*, 558 F.3d 112, 1121-22 (9th Cir. 2007); *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000); *Bland v. Fessler*, 88 F.3d 779, 732 n.4 (9th Cir. 1996).

2. Plaintiffs' Reliance On The Concept of "Non-Constitutional" "Statutory" Standing Is Unavailing.

Plaintiffs do not – and cannot – dispute the fact that standing implicates Article III. Rather, they seek refuge in the concept of "statutory" standing, and argue that standing under Section 11 falls into that "non-constitutional" category. That effort fails on multiple grounds.

The Securities Act of 1933 deals with the issuance of stock pursuant to registration statements. Section 11 provides redress to purchasers of stock that was issued pursuant to a registration statement that contained a material misrepresentation or omission – and only to such purchasers. A plaintiff whose stock was not issued pursuant to the registration statement thus cannot **possibly** have suffered the injury required to confer constitutional standing under Article III's case or controversy requirement.

It does not matter what label is affixed to that fundamental defect. The cases – including the cases addressing standing under Section 11 and the Supreme Court decision that Plaintiffs' Opening Brief concedes establishes the "irreducible minimum" requirement for Article III standing – demolish Plaintiffs' attempt to recast the question in terms of "statutory" or "non-constitutional" standing.

a. The Section 11 Standing Cases Refute Plaintiffs' Argument.

A **host** of Section 11 cases have dismissed claims for lack of constitutional standing because plaintiffs' securities were not issued pursuant to the registration statement that contained the alleged misstatements. *See, e.g., Plumbers' Union Local No. 12 Pension Fund v. Nomura Asset Acceptance Corp.*, 632 F.3d 762, 768-71 (1st Cir. 2011); *Krim v. pcOrder.com, Inc.*, 402 F.3d 489, 494-500 (5th Cir. 2005); *In re Stec Inc. Sec. Litig.*, Nos. SACV 09–1304 JVS (MLGx), etc., 2011 WL 2669217, at 13-14 (C.D. Cal. June 17, 2011), etc., ; *Maine State Retirement System v. Countrywide Financial Corp.*, 722 F. Supp. 2d 1157, 1163-64 (C.D. Cal. 2010); *In re Indymac Mortgage-Backed Sec. Litig.*, 718 F. Supp. 2d 495, 501 (S.D.N.Y. 2010); *In re Wells Fargo Mortgage-Backed Certificates Litig.*, 712 F. Supp. 2d 958, 964-65 (N.D. Cal. 2010); *In re Lehman Bros. Mortgage-Backed Sec. & ERISA Litig.*, 684 F. Supp. 2d 485, 490-91 (S.D.N.Y. 2010); *In re Washington Mutual Inc. Sec., Derivative & ERISA Litig.*, 259 F.R.D. 490, 504 (W.D. Wash. 2009); *Grand Lodge of Pa. v. Peters*, 550 F. Supp. 2d 1363, 1376 (M.D. Fla.

2008); *Congregation of Ezra Sholom v. Blockbuster, Inc.*, 504 F. Supp. 2d 151, 159-60 (N.D. Tex. 2007); *Davidco Investors, LLC v. Anchor Glass Container Corp.*, No. 8:04CV2561T-24EAJ, 2006 WL 547989, at * 22-*23 (M.D. Fla. March 6, 2006), .

b. Plaintiffs Lack Article III Standing Under The Test That They Concede is Controlling

Plaintiffs agree that the basic test for determining "the irreducible constitutional minimum" of Article III standing is set forth in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). AOB at 1, 19. This Court has looked to *Lujan* and related decisions in determining Article III standing (including in cases cited by Plaintiffs). *See, e.g., Colwell*, 558 F.3d, at 1111-12; *Cetacean Community v. Bush*, 386 F.3d 1169, 1174-75 (9th Cir. 2004); *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1140 (9th Cir. 2003); *Scott v. Pasadena Unified School Dist.*, 306 F.3d 646, 654-56 (9th Cir. 2002).

Lujan shows clearly why this case raises an issue of constitutional – not statutory – standing under Article III, and why Plaintiffs cannot meet the applicable test. Under *Lujan*, a plaintiff "must have suffered an 'injury in fact'" in the form of "an invasion of a legally protected interest." The injury cannot be "conjectural," and must result from "the challenged action of the defendant." 504 U.S. at 560 (citations omitted). Plaintiffs cannot satisfy **any** of those elements unless they

can show that their stock was issued pursuant to the Registration Statement and came from the Secondary Offering.

First, a plaintiff who did not purchase shares that were issued pursuant to the registration statement at issue cannot suffer any injury – conjectural or otherwise – under Section 11. Any claim to the contrary is a non sequitur.

Second, there can be no "invasion" of the "legally protected" interest in such circumstances. Section 11 protects the interest of persons who acquire stock issued pursuant to a specific registration statement against misstatements in that document. If Plaintiffs did not purchase stock that came from the Secondary Offering, they have no legally protected interest, and no misstatement in the Registration Statement could ever "invade" any such interest.

Third, no injury that Plaintiffs might have suffered could have resulted from the "challenged action of the defendant." *Lujan*, 504 U.S. at 560. Injuries that are not related to the claim at issue are legally insufficient to create a case or controversy. "Plaintiffs in the federal courts 'must allege some threatened or actual injury resulting from **the putatively illegal action** before a federal court may assume jurisdiction.'" *O'Shea v. Littleton*, 414 U.S. 488, 493 (1974) (quoting *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 (1973)) (emphasis added). *Lujan* requires that there be a "causal connection between the injury and the conduct

complained of." 504 U.S. at 560. A plaintiff whose stock was not issued pursuant to the registration statement in question cannot possibly make such a showing.

The courts that have applied *Lujan* in the context of Section 11 have held that Plaintiffs who cannot show that the purchased shares issued pursuant to the "defective" registration statement fail to satisfy the controlling requirements. *See, e.g.*, *Maine State Retirement System*, 722 F. Supp. 2d at 1157 (noting that "[e]very court to address the issue in an MBS class action has concluded that a plaintiff lacks standing under Article III of the United States Constitution and under Sections 11 and 12(a)(2) of the 1933 Act to represent the interests of investors in MBS offerings in which plaintiffs did not themselves buy"). *See also In re Wells Fargo Mortgage-Backed Securities Certificates Litig.*, 712 F. Supp. 2d at 963-66; *Plumbers Union Local No. 12 Pension Fund*, 658 F. Supp. 299, 303-04 (D. Mass. 2009), *aff'd*, 632 F.3d 762 (1st Cir. 2011).

3. Plaintiffs Conflate Standing and Determinations on the Merits

Plaintiffs' attempt to recast the standing question as "non-constitutional" conflates two distinct concepts: (1) the merits of a claim; and (2) a plaintiff's entitlement to invoke the jurisdiction of a federal court to decide that claim. The other Supreme Court case cited as support for Plaintiffs' claim that this case does not implicate constitutional standing, *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998), underscores Plaintiffs' error in that regard.

Plaintiffs' Opening Brief correctly cites *Steel Co.* for the proposition that "'jurisdiction is not defeated by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover.'" AOB at 20 (quoting 523 U.S. at 89). Defendants' argument is that Plaintiffs lack Article III standing to assert a claim, not that the claim fails on the merits. The distinction is critical, as *Steel Co.* makes crystal clear.

After noting that the absence of a valid cause of action does not implicate the court's power to adjudicate the case (*id*. at 89), *Steel Co.* distinguished being able to state a claim on the merits from the "threshold jurisdictional question" whether the plaintiff had standing sufficient to present a case or controversy under Article III. *Id*. at 102. It then analyzed the standing question under *Lujan* (*id*. at 102-09), concluded that the plaintiff lacked standing, reversed the judgment below and directed that the case be dismissed because the federal courts lacked jurisdiction to entertain it. *Id*. at 109-10.

Defendants are not arguing that Plaintiffs lack standing because they cannot prevail on an element of their substantive claims – *e.g.*, because there was no misstatement, or a misstatement was immaterial or that Plaintiffs knew of the alleged misstatement. The defect is that under Article III's case or controversy requirement Plaintiffs lack standing to assert such claims, and the federal courts lack jurisdiction to entertain them.

As the Supreme Court emphasized in *Warth v. Seldin*, 422 U. S. 490, 518 (1975), "the question of standing is whether the litigant is **entitled to have the court decide** the merits of a dispute or of particular issues," not whether plaintiff can prevail on the merits. *Id.* at 498 (emphasis added). *Accord Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1, 11 (2004); *Allen v. Wright*, 468 U.S. 737, 750-51 (1984).

Demonstrating entitlement to have the court decide the merits of an issue or dispute requires plaintiff to show that he is the proper party to invoke the judicial power of the federal court: "It is the responsibility of the complainant clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute and the court's remedial powers." *Id.* at 518. That is precisely what Plaintiffs in this case cannot do, because they cannot show that their stock came from the Registration Statement and the Secondary Offering.

This Court's decision in *Scott v. Pasadena School District*, 306 F.3d 646 (9th Cir. 2002) reinforces these core principles. *Scott* relied on *Lujan*, *Warth* and *O'Shea* in the course of directing dismissal of a complaint for lack of Article III standing. Citing *Lujan* and *Warth*, it held that "[t]he burden of establishing Article III standing remains at all times with the party invoking federal jurisdiction," and that the plaintiff was required to demonstrate that he was "a proper party to invoke . . . the exercise of the court's remedial powers." 306 F.3d at 655 (citations omit-

ted). Citing *O'Shea* and *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983), this Court further held that the plaintiff must sustain an injury "resulting from the putatively illegal action" or conduct "challenged" in the lawsuit. *Id*. at 656 (citations omitted).

In *Warren v. Fox Family Worldwide*, 328 F.3d 1136 (9th Cir. 2003), this Court affirmed dismissal of a complaint for lack of subject matter jurisdiction under Rule 12(b)(1) because the plaintiff could not show that he was a legal or beneficial owner of the copyrights that were allegedly infringed by the defendants, and hence was not a proper party to invoke the Article III jurisdiction. 328 F.3d at 1139-40, 1145. The plaintiff lacked standing because he could not show that he owned the copyrights. *Id.* Plaintiffs here lack standing because they cannot show that they own stock issued pursuant to the allegedly defective Registration Statement, and are not proper parties to invoke the jurisdiction of the federal courts to adjudicate claims regarding that document.

4. Consideration of Extrinsic Evidence Is Appropriate In Resolving Challenges to Subject Matter Jurisdiction

As demonstrated at pages 26-29 above, the district court's dismissal of the TAC was not based on findings of fact or extrinsic evidence. Under settled law, the district court, and this Court, are nevertheless entitled to do so, including the

declarations that are in the record on appeal,[20] in determining whether there is Article III jurisdiction over the issues raised on appeal.

Motions under Rule 12(b)(1) can be either "facial" (on the face of the complaint) or "factual" (based on declarations or other evidence beyond the face of the complaint). *See, e.g.*, *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000). *See generally* 2 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE, § 12.30[4] (Facial vs. Factual Challenge) (3d ed. 2011). Numerous decisions of this Court and district courts within the Ninth Circuit permit consideration of evidence beyond the complaint when there is a factual challenge to subject matter jurisdiction under Rule 12(b)(1). *See, e.g.*, CHARLES A. WRIGHT AND ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1350 (3d ed. 2009 & 2010 update) (collecting Ninth Circuit cases in note 47).

In such circumstances, the court: (1) does **not** presume the truth of the complaint's allegations; (2) is restricted to the face of the pleadings; and **can** review declarations and other extrinsic evidence. *See, e.g., Robinson v. U.S.*, 586 F.3d 683, 685 (9th Cir. 2009); *Colwell v. Dept. of Health and Human Services*, 558 F.3d 1112, 1121 (9th Cir. 2009); *Rattlesnake Coalition v. EPA*, 509 F.3d 1095, 1102 n.1 (9th Cir. 2007); *Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 980 (9th Cir. 2007);

[20] *See* Declaration of Jill Ford, ER 66-67; Declaration of Scott A. Gregory, SER 2149-2151; and Declaration of Ryan E. Fitzpatrick, SER 2146-2148.

Savage v. Glendale Union High School, 343 F.3d 1036, 1039 n.2 (9th Cir. 2003); *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d at 1139, 1141 n.5; *White v. Lee*, 227 F.3d at 1242 (collecting cases); *St. Clair v. City of Chico*, 880 F.2d 199, 2001 (9th Cir. 1989).

When the moving party "submits affidavits or any other evidence properly before the court," it "becomes **necessary** for the party opposing the motion to satisfy its burden of establishing that the court, in fact, possesses subject matter jurisdiction." *Colwell*, 558 F.3d at 1121 (emphasis added) (quoting *St. Clair*, 880 F.2d at 201); *Savage*, 343 F.3d at 1039 n.2 (same). Defendants submitted declarations pursuant to Rule 12(b)(1) (ER 66-67; SER 2146-51). Plaintiffs flaunted that requirement, and made **no attempt whatsoever** to satisfy their "burden of establishing that the court, in fact, possesses subject matter jurisdiction." Indeed, they acted as if the motion simply did not exist. Dismissal under Rule 12(b)(1) was thus appropriate because Plaintiffs did not respond to the 12(b)(1) motion, and failed to discharge that burden.

B. The Section 11 Claim Could Have Been Dismissed For Lack Of Subject Matter Jurisdiction

Although the district court did not reach the issue, the Section 11 claim could have been dismissed for lack of subject matter jurisdiction (based either on the face of the complaint or pursuant to defendants' factual challenge).

The complaints' allegations and certifications regarding their stock purchases, which were incorporated by reference into Plaintiffs' pleadings, made clear that none of the Plaintiffs purchased in the Secondary Offering, on the Secondary Offering date or at the Secondary Offering price. SER 11-12 (¶¶ 28-31), 57-61; ER 131 (¶ 140), 150-51. Plaintiffs do not contest the point and effectively conceded that they did not purchase shares in the Secondary Offering by abandoning their prior claim under Section 12(a)(2) of the '33 Act, which required a purchase of shares in the offering.[21] Those acknowledgements are fatal because, as noted at pages 33-37 above, Plaintiffs cannot show that the stock they purchased in the aftermarket came from the Registration Statement.

Defendants' Rule 12(b)(1) motion reinforced these points by submitting declarations showing (among other things): (1) that the Secondary Offering occurred on January 29, 2009 at a price of $4.50 per share; (2) that no sales occurred in the market before January 29, 2009; (3) that the Secondary Offering was not priced until after the market closed on January 28, 2009; (4) that none of the five Plaintiffs purchased stock in the Secondary Offering; (5) and that grounds on which plaintiff Abrams suggested he might be able to trace stock to the Secondary Offering were baseless. *See* Ford. Decl., ER 66-67 (¶ 4); Gregory Decl., SER 2149-51

[21] Paragraphs 155-66 of the FAC (SER 1729-31) contained a Section 12(a)(2) claim, which was not re-alleged in the TAC.

(¶¶ 2, 4-7); Fitzpatrick Decl., SER 2146-48 (¶¶ 2, 5, 6). The 12(b)(1) motion also showed clearly why, absent a purchase in the Secondary Offering, none of the Plaintiffs could demonstrate that he purchased stock that was issued pursuant to the Registration Statement. ER 173 (Dkt. 103 at 1:13); ER 175 (Dkt. 118 at 6, 9-11).

Even now, Plaintiffs are unable to offer anything that might satisfy their Article III burden. *See* AOB at 8-12, 36-39. Accordingly, under *Lujan*, *Steel Company*, *Warth*, *O'Shea* and the other Supreme Court decisions discussed above, this Court's decisions in *Scott* and *Warren*, and the Section 11 cases addressing constitutional standing, Plaintiffs have failed to demonstrate that they are entitled to invoke the jurisdiction of the federal courts.

III. THE DISMISSAL SHOULD BE AFFIRMED FOR FAILURE TO ALLEGE FACTS SHOWING THAT THE ALLEGATION THAT CENTURY FALSELY PORTRAYED ITSELF AS "CASH RICH" IS PLAUSIBLE WITHIN THE MEANING OF *TWOMBLY* AND *IQBAL*.

This Court may affirm on any ground supported by the record, whether or not the district court dismissed the TAC on that ground. *Livid Holdings Ltd. v. Salomon Smith Barney, Inc.*, 403 F.3d 1050, 1058 (9th Cir. 2005); *Sec. Life Ins. Co. of Am. v. Meyling*, 146 F.3d 1184, 1190 (9th Cir. 1998). The linchpin of Plaintiffs' case – Plaintiffs' conclusory and implausible allegations that the Registration Statement portrayed Century as "cash rich" – cannot be deemed plausible in light of what the document actually says, and therefore cannot defeat a motion to

dismiss. *Iqbal*, 129 S. Ct. at 1949-50; *Moss*, 572 F. 3d at 969; *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001); ER 10, 21.

Because the TAC can **only** be based on the Registration Statement, Plaintiffs cannot avoid dismissal by mischaracterizing what it says. It is the document, not Plaintiffs' mischaracterization of it, that controls. *See, e.g., Steckman v. Hart Brewing Company, Inc.*, 143 F.3d, 1293, 1295-96 (9th Cir. 1998); *Warren*, 328 F.3d at 1139; *In re Infonet Servs. Sec. Litig.*, 310 F. Supp. 2d 1080, 1087-88 (C.D. Cal. 2003); *In re Calpine Corp. Sec. Litig.*, 288 F. Supp. 2d. 1054, 1078 (N.D. Cal 2003) .

Plaintiffs' claims are founded upon the two-pronged premise that (1) the Registration Statement and the financial statements it incorporated portrayed Century as a "cash rich" company with excellent liquidity that was well-positioned to weather a difficult business environment, and (2) there was a dramatic revision of Century's financial position, cash and liquidity after the Secondary Offering. Both prongs are false. Neither passes muster under the controlling pleadings rules.

The technical accounting error here was of no real significance; it merely decreased cash flows on one line, "Due to affiliates," and increased cash flows (by the same amount) on another line, "Issuance of preferred stock," and thus had no effect on Century's Net Change in Cash. SER 1136. Likewise, it had no effect on Century's assets, liabilities, shareholders' equity, net income (or loss), or begin-

ning or ending cash position. The error was thus "minor or technical in nature," rather than widespread and significant, as required by *In re Daou Systems, Inc.*, 411 F.3d 1006, 1017-18 (9th Cir. 2005).

The Registration Statement repeatedly cautioned investors that the world-wide financial crisis and the crash in aluminum prices meant that Century was operating at a loss and faced liquidity risks, including in the SEC filings it incorporated by reference. Throughout Q4 of 2008 and Q1 of 2009, Century repeatedly filed dreary 8-Ks detailing the downward trajectory of its operations. ER 102-06 (¶¶ 67-72); *see* AOB 5, n.8; SER 877, 886.

The Prospectus Supplement is like a prolonged cold shower. *See* pp. 7-12 above; SER 894-974. On page 1, it notes that while the year-end financials have yet to be finalized, Century expects Q4 operating losses of $60 million to $74 million, with worse results yet forecast for Q1 2009 because of the continued drop in aluminum prices. SER 899. After noting expected charges for impairment of assets and the like, the Prospectus states that U.S. operations are "**not cash flow positive at recent aluminum prices**" (SER 901) (emphasis added) and then, in bold type, said that Century might not have the liquidity to make it through 2009 (SER 901, 946). Century also announced that Moody's had downgraded its credit rating, and a page later said: "**None of our U.S. smelting capacity is profitable**

on a cash basis at recent primary aluminum prices." SER 929-30 (emphasis added).

Analysts also questioned Century's liquidity. While some thought the situation more serious than others, all thought Century's operations were cash-flow negative and all saw liquidity as an issue. *E.g.*, SER 1476, 1483-84, 1491, 1501, 1518.

Thus, it is no surprise that when Century publicly announced the Restatement to correct a technical presentation error, no analyst commented. *See* SER 1528-83. They and the investing public well knew Century's cash position; neither saw anything material about the restatement. Neither the error, nor Century's tepid forecast that it expected to survive 18 months, can possibly be deemed actionable. The TAC thus fails to allege a plausible cause under Section 11, and dismissal could be affirmed on this ground as well.

CONCLUSION

The Court should affirm the judgment of the district court.

Dated: August 8, 2011.

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STATEMENT OF RELATED CASES

Defendants-Appellants are aware of no cases that should be deemed related to this case within the meaning of Ninth Circuit Rule 28-2.6.

Dated: August 8, 2011

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DECLARATION PURSUANT TO NINTH CIRCUIT RULE 25-5(e)

I, BRUCE A. ERICSON, hereby declare pursuant to Ninth Circuit Rule 25-5(e), that I have obtained the concurrence in the filing of this document from each of the other signatories listed above.

I declare under penalty of perjury that the foregoing declaration is true and correct.

Executed on August 8, 2011, at San Francisco, California.

/s/ Bruce A. Ericson
Bruce A. Ericson

CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32(a)(7)(C), 32(a)(5)-(6) AND NINTH CIRCUIT RULES 28-4, 32-1

Case No. 11-15599

I certify that this joint brief complies with the enlargement of brief size permitted by Ninth Circuit Rule 28-4. This joint brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this joint brief contains 15,089 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in Times New Roman type style, 14-point font.

Dated: August 8, 2011.

/s/ Bruce A. Ericson

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ADDENDUM OF STATUTES, REGULATIONS AND RULES

1. Securities Act of 1933, § 11(a) (15 U.S.C. §77k(a))

2. United States Constitution, Article III, Section 2

3. Federal Rule of Civil Procedure 12(b)

Securities Act of 1933, § 11(a) (15 U.S.C. §77k(a))

Section 77k. Civil liabilities on account of false registration statement

(a) Persons possessing cause of action; persons liable

In case any part of the registration statement, when such part became effective, contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading, any person acquiring such security (unless it is proved that at the time of such acquisition he knew of such untruth or omission) may, either at law or in equity, in any court of competent jurisdiction, sue—

> **(1)** every person who signed the registration statement;
> **(2)** every person who was a director of (or person performing similar functions) or partner in the issuer at the time of the filing of the part of the registration statement with respect to which his liability is asserted;
> **(3)** every person who, with his consent, is named in the registration statement as being or about to become a director, person performing similar functions, or partner;
> **(4)** every accountant, engineer, or appraiser, or any person whose profession gives authority to a statement made by him, who has with his consent been named as having prepared or certified any part of the registration statement, or as having prepared or certified any report or valuation which is used in connection with the registration statement, with respect to the statement in such registration statement, report, or valuation, which purports to have been prepared or certified by him;
> **(5)** every underwriter with respect to such security.

If such person acquired the security after the issuer has made generally available to its security holders an earning statement covering a period of at least twelve months beginning after the effective date of the registration statement, then the right of recovery under this subsection shall be conditioned on proof that such person acquired the security relying upon such untrue statement in the registration statement or relying upon the registration statement and not knowing of such omission, but such reliance may be established without proof of the reading of the registration statement by such person.

United States Constitution, Article III, Section 2

Section 2.

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between a State and Citizens of another State;--between Citizens of different States;--between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Federal Rule of Civil Procedure 12(b)

(b) How to Present Defenses.

Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion:

(1) lack of subject-matter jurisdiction;

(2) lack of personal jurisdiction;

(3) improper venue;

(4) insufficient process;

(5) insufficient service of process;

(6) failure to state a claim upon which relief can be granted; and

(7) failure to join a party under Rule 19.

A motion asserting any of these defenses must be made before pleading if a responsive pleading is allowed. If a pleading sets out a claim for relief that does not require a responsive pleading, an opposing party may assert at trial any defense to that claim. No defense or objection is waived by joining it with one or more other defenses or objections in a responsive pleading or in a motion.

9th Circuit Case Number(s) 11-15599

NOTE: To secure your input, you should print the filled-in form to PDF (File > Print > *PDF Printer/Creator*).

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CERTIFICATE OF SERVICE
When All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) _____.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Signature (use "s/" format) _____

****

CERTIFICATE OF SERVICE
When Not All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) August 8, 2011 .

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

See attachment A hereto.

Signature (use "s/" format) s/ Bruce A. Ericson

ATTACHMENT A

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