

<p><b>COLORADO SUPREME COURT</b>  2 East 14th Avenue  Denver, CO 80203</p>	
<p><b>CERTIORARI TO THE COURT OF APPEALS</b>  Case No. 2023CA1214  Bernard, J.  Dunn and Moultrie, JJ., concurring</p>	
<p><b>BOULDER COUNTY DISTRICT COURT</b>  Case 2018CV30556  Lindsey, J.</p>	
<p><b>PETITIONERS:</b>  CenturyLink, Inc., et. al.,</p> <p>v.</p> <p><b>RESPONDENT:</b>  Dean Houser.</p>	<p>Case No: 2024SC644</p>
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<p align="center"><b>AMICUS BRIEF OF THE SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION IN SUPPORT OF PETITIONERS</b></p>	

## **CERTIFICATE OF COMPLIANCE**

I certify this brief complies with all the requirements of C.A.R. 29 and C.A.R. 32, including all formatting requirements listed in these rules. Specifically, the undersigned certifies that:

The brief complies with the applicable 4,750-word limit because it contains 4,748 words. The amicus brief complies with the content requirement and form in C.A.R. 29(c). I acknowledge my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 29 and C.A.R. 32.

May 12, 2025

*s/ Kendra N. Beckwith*

## TABLE OF CONTENTS

CERTIFICATE OF COMPLIANCE .....	ii
TABLE OF CONTENTS.....	iii
TABLE OF AUTHORITIES.....	iv
INTRODUCTION.....	1
AMICUS CURIAE IDENTITY AND STATEMENT OF INTEREST.....	2
ARGUMENT .....	3
I.    Allowing lawsuits to survive dismissal based on “borrowed plausibility” encourages plaintiffs to file speculative securities lawsuits in Colorado. ....	4
A.    Speculative securities lawsuits harm investors and corporations and pressure defendants to settle. ....	4
B.    “Borrowed plausibility” undermines the procedural safeguards protecting against speculative lawsuits, enticing forum-shopping plaintiffs to file these lawsuits in Colorado.....	8
C.    “Borrowed plausibility” creates practical problems in defending cases. ....	12
II.   This Court would be the first to adopt “borrowed plausibility” in lawsuits bringing claims exclusively under the Securities Act.....	15
III.  “Borrowed plausibility” encourages plaintiffs’ lawyers to behave unethically and file complaints with little or no verification. ....	18
CONCLUSION .....	22
CERTIFICATE OF SERVICE .....	23

## TABLE OF AUTHORITIES

### Cases

<i>380544 Canada, Inc. v. Aspen Tech., Inc.</i> , 544 F. Supp. 2d 199 (S.D.N.Y. 2008) .....	17
<i>Amorosa v. Gen. Elec. Co.</i> , No. 21-CV-3137, 2022 WL 3577838 (S.D.N.Y. Aug. 19, 2022) .....	17, 19
<i>Ass’n of N.J. Chiropractors, Inc. v. Data iSight, Inc.</i> , No. 19-21973, 2022 WL 4483596 (D.N.J. Sept. 27, 2022) .....	19
<i>ASTI Commc’ns, Inc. v. Shaar Fund, Ltd.</i> , 493 F.3d 87 (2d Cir. 2007) .....	16
<i>Blue Chip Stamps v. Manor Drug Stores</i> , 421 U.S. 723 (1975) .....	4, 6
<i>Brooks v. United Dev. Funding III, L.P.</i> , No. 4:20-cv-00150, 2020 WL 6132230 (N.D. Tex. Apr. 15, 2020) .....	19
<i>In re Connetics Corp. Secs. Litig.</i> , 542 F. Supp. 2d 996 (N.D. Cal. 2008) .....	20, 21
<i>Cyan, Inc. v. Beaver Cnty. Emps. Ret. Fund</i> , 583 U.S. 416 (2018) .....	8
<i>Elliot v. China Green Agrics., Inc.</i> , No. 3:10-CV-0648, 2012 WL 5398863 (D. Nev. Nov. 2, 2012) .....	20
<i>Fraker v. Bayer Corp.</i> , No. CV F 08-1564, 2009 WL 5865687 (E.D. Cal. Oct. 6, 2009) .....	20
<i>Geinko v. Padda</i> , No. 00 C 5070, 2002 WL 276236 (N.D. Ill. Feb. 27, 2002) .....	20
<i>Herman &amp; MacLean v. Huddleston</i> , 459 U.S. 375 (1983) .....	15, 16

<i>Homeward Residential Inc. v. Sand Corp.</i> , No. 12 Civ. 5067, 2014 WL 12791757 (S.D.N.Y. Mar. 31, 2014), <i>vacated in part on other grounds</i> , No. 12 Civ. 5067, 2014 WL 4680849 (S.D.N.Y. Sept. 17, 2014).....	18
<i>IBT Emp. Grp. Welfare Fund v. Compass Mins. Int'l, Inc.</i> , 706 F. Supp. 3d 1225 (D. Kan. 2023) .....	17
<i>Jagged Peak Energy Inc. v. Oklahoma Police Pension &amp; Ret. Sys.</i> , 2022 CO 54.....	9, 10
<i>In re Karagianis</i> , No. 09-1056, 2009 WL 4738188 (Bankr. D.N.H. Dec. 4, 2009) .....	20
<i>In re Lehman Bros. Sec. &amp; ERISA Litig.</i> , No. 10 Civ. 6637, 2013 WL 3989066 (S.D.N.Y. July 31, 2013).....	17, 20
<i>Luczak v. Nat'l Beverage Corp.</i> , 400 F. Supp. 3d 1318 (S.D. Fla. 2019), <i>rev'd in part on other grounds</i> , 812 F. App'x 915 (11th Cir. 2020).....	19
<i>Merrill Lynch, Pierce, Fenner &amp; Smith Inc. v. Dabit</i> , 547 U.S. 71 (2006) .....	6
<i>Morgan Stanley Info. Fund Sec. Litig.</i> , 592 F.3d 347 (2d Cir. 2010) .....	15
<i>Newton v. Merrill Lynch, Pierce, Fenner &amp; Smith, Inc.</i> , 259 F.3d 154 (3d Cir. 2001).....	5
<i>Plumbers &amp; Pipefitters Loc. Union #295 Pension Fund v. CareDx, Inc.</i> , No. 22-cv-03023, 2023 WL 4418886 (N.D. Cal. May 24, 2023) .....	18, 21
<i>Schwab Cap. Tr. v. Celegene Corp.</i> , No. CV 20-3754, 2021 WL 1085474 (D.N.J. Mar. 22, 2021) .....	17
<i>Secs. Exch. Comm'n v. Texas Gulf Sulphur Co.</i> , 401 F.2d 833 (2d Cir. 1968) (Friendly, J., concurring).....	4

<i>Stearns Mgmt. Co. v. Missouri River Servs., Inc.</i> , 70 P.3d 629 (Colo. App. 2003).....	21
<i>Stepanek v. Delta Cnty.</i> , 940 P.2d 364 (Colo. 1997) .....	22
<i>Strougo v. Barclays PLC</i> , 105 F. Supp. 3d 330 (S.D.N.Y. 2015) .....	17
<i>Tellabs, Inc. v. Makor Issues &amp; Rts., Ltd.</i> , 551 U.S. 308 (2007) .....	9, 16
<i>In re TEVA Securities Litig.</i> , 671 F. Supp. 3d 147 (D. Conn. 2023) .....	17
<i>Thompson v. RelationServe Media, Inc.</i> , 610 F.3d 628 (11th Cir. 2010) (Tjoflat, J., concurring in part) .....	5
<i>In re Trupp</i> , 92 P.3d 923 (Colo. 2004) .....	21
<i>In re UBS AG Sec. Litig.</i> , No. 07 Civ. 11225, 2012 WL 4471265 (S.D.N.Y. Sept. 28, 2012), <i>aff'd sub nom. City of Pontiac Policemen's &amp; Firemen's Ret. Sys. v.</i> <i>UBS AG</i> , 752 F.3d 173 (2d Cir. 2014) .....	18, 20
<i>Veal v. LendingClub Corp.</i> , 423 F. Supp. 3d 785 (N.D. Cal. 2019) .....	19
<i>VNB Realty, Inc. v. Bank of Am. Corp.</i> , No. 11 Civ. 6805, 2013 WL 5179197 (S.D.N.Y. Sept. 16, 2013).....	17, 20
<i>Waterford Twp. Police &amp; Fire Ret. Sys. v. Smithtown Bancorp., Inc.</i> , No. 10-CV-864, 2014 WL 3569338 (E.D.N.Y. July 18, 2014) .....	17

### Statutes

C.R.S. § 13-17-102 .....	14
C.R.S § 13-17-102(2) .....	13

C.R.S § 13-17-102(4) .....	13
15 U.S.C. § 77a <i>et seq.</i> .....	7
15 U.S.C. § 78j(b).....	16
15 U.S.C. § 78u-4(b)(1).....	16
15 U.S.C. § 78u-4(c)(1) .....	16
Private Securities Litigation Reform Act of 1995 .....	6, 9, 16, 18
Securities Act of 1933.....	<i>passim</i>
Securities Act of 1933, 48 Stat. 74 .....	7
Securities Exchange Act of 1934 .....	15, 16, 17

### **Rules & Regulations**

C.R.C.P. 11.....	<i>passim</i>
C.R.C.P. 11(a) .....	1
C.R.C.P. 11(b) .....	19
17 C.F.R. § 240.10b-5.....	16

### **Other Authorities**

Janet C. Alexander, <i>Do the Merits Matter? A Study of Settlements in Securities Class Actions</i> , 43 Stan. L. Rev. 497, 501 (1991).....	6
Stephen J. Choi, <i>The Evidence on Securities Class Actions</i> , 57 Vand. L. Rev. 1465, 1469 (2004).....	13
John C. Coffee, Jr., <i>Reforming the Securities Class Action: On Deterrence and Its Implementation</i> , 106 Colum. L. Rev. 1534, 1560 (2006).....	5

Edward Flores & Svetlana Starykh, <i>Recent Trends in Securities Action Litigation: 2024 Full-Year Review</i> , NERA, at 18 (Jan. 22, 2025), available at <a href="https://www.nera.com/insights/publications/2025/recent-trends-in-securities-class-action-litigation--2024-full-y.html?lang=en">https://www.nera.com/insights/publications/2025/recent-trends-in-securities-class-action-litigation--2024-full-y.html?lang=en</a> .....	6
Neil M. Gorsuch & Paul B. Matey, <i>Settlements in Securities Fraud Class Actions: Improving Investor Protection 2</i> (Wash. Legal Found. 2005), <a href="https://www.wlf.org/2005/04/08/publishing/settlements-in-securities-fraud-class-actions-improving-investor-protection/">https://www.wlf.org/2005/04/08/publishing/settlements-in-securities-fraud-class-actions-improving-investor-protection/</a> .....	13
Joseph Grundfest et al., <i>After Cyan: Potential Trends in Section 11 Litigation</i> (Mar. 27, 2018) .....	7
Michael Klausner et al., <i>State Section 11 Litigation in the Post-Cyan Environment (Despite Sciabacucchi)</i> , 75 Bus. Law. 1769 (2020).....	7, 8
Michael A. Perino, <i>Securities Litigation After the Reform Act</i> (2006).....	13
S. Rep. No. 104-98 .....	6

## INTRODUCTION

The Division boldly adopts an unprecedented rule of pleading in Colorado: a shareholder’s counsel does not violate C.R.C.P. 11 by copying allegations, including confidential witness statements, from another complaint without speaking to the witnesses, or potentially even knowing their identity (the “Division’s Rule”). Op. ¶ 54. This “borrowed plausibility” rule allows, as it did here, a shareholder’s counsel to simply cut and paste allegations from another lawsuit without any investigation.

Rule 11 requires a sacrosanct ritual in the practice of law—the attestation that, to the “best of [one’s] knowledge, information and belief, formed after reasonable inquiry,” an attorney’s signature is proof the complaint was “well grounded in fact” and warranted under the law. C.R.C.P. 11(a). The Division’s Rule reduces this ritual to a mere formality—allowing an attorney to avoid these once-weighty obligations with a couple of quick keystrokes to “borrow” allegations from another complaint.

This is particularly harmful in securities lawsuits, where even the specter of liability causes damaging ripple effects in the market, ultimately harming investors. Indeed, the weight of precedent is contrary to the Division’s Rule, reflecting its

wisdom: this Court would be the first in the country to allow “borrowed plausibility” under the circumstances here.

This is not—and cannot—be the law in Colorado. The Securities Industries and Financial Markets Association (“SIFMA”) strongly urges this Court to reject the Division’s Rule. Instead, it should confirm that Colorado law is in accord with the majority of courts in the country and still requires compliance with C.R.C.P. 11, as the prior division and district court previously ruled and CenturyLink advocates here.

#### **AMICUS CURIAE IDENTITY AND STATEMENT OF INTEREST**

SIFMA is the leading trade association for broker-dealers, investment banks, and asset managers operating in the U.S. and global capital markets. On behalf of the industry’s one million employees, SIFMA advocates on legislation, regulation, and business policy affecting retail and institutional investors, equity and fixed income markets, and related products and services.

SIFMA serves as an industry coordinating body to promote fair and orderly markets, informed regulatory compliance, and efficient and resilient market operations. It also provides a forum for industry policy and professional

development. With offices in New York and Washington, D.C., SIFMA is the United States regional member of the Global Financial Markets Association.

SIFMA's broker-dealer members comprise nearly 90% of U.S. market share by revenues and 80% of financial advisors managing \$13 trillion of client assets. Its asset management members manage over 50% of global assets under management.

SIFMA is interested in this case because its members are parties to many litigated disputes each year. Allowing "borrowed plausibility" to substitute for a plaintiff attorney's nondelegable duty to conduct a reasonable inquiry into the facts supporting a claim is an affront to both the legal profession and the judicial system and would impact SIFMA's members as well as the market as a whole.

### **ARGUMENT**

The Division's Rule creates severe problems for defendants defending against securities lawsuits in Colorado. "Borrowed plausibility" encourages speculative lawsuits, softens the procedural safeguards (Rule 11) intended to protect defendants in these circumstances, and creates practical problems for defense counsel in defending a case.

Further, the lack of precedent supporting the Division's Rule reflects the wisdom of Rule 11 requirements. If affirmed, this Court would be the first in the

country to allow “borrowed plausibility” in lawsuits asserting claims exclusively under the Securities Act of 1933 (“Securities Act”). It would also repudiate over two decades of well-reasoned nationwide authority rejecting “borrowed plausibility” as inconsistent with an attorney’s nondelegable Rule 11 obligations.

For these reasons, as explained below, this Court should reject “borrowed plausibility” and reaffirm Rule 11’s requirements persist, ruling in CenturyLink’s favor.

**I. Allowing lawsuits to survive dismissal based on “borrowed plausibility” encourages plaintiffs to file speculative securities lawsuits in Colorado.**

The problems the Division’s Rule invites into Colorado courtrooms are extensive, real, and harmful to investors and corporations alike.

**A. Speculative securities lawsuits harm investors and corporations and pressure defendants to settle.**

Securities litigation “presents a danger of vexatiousness different in degree and in kind from that which accompanies litigation in general.” *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 739 (1975). This area of unduly expansive civil liability leads to “large judgments, payable in the last analysis by innocent investors, for the benefit of speculators and their lawyers.” *Secs. Exch. Comm’n v. Texas Gulf Sulphur Co.*, 401 F.2d 833, 867 (2d Cir. 1968) (Friendly, J., concurring).

“The clearest loser is the small investor who buys and holds for retirement— exactly the profile of the retail investor.” John C. Coffee, Jr., *Reforming the Securities Class Action: On Deterrence and Its Implementation*, 106 Colum. L. Rev. 1534, 1560 (2006) (observing further that securities lawsuits tend to “transfer wealth systemically from ‘buy and hold’ investors (who bought on average outside the class period) to more rapidly trading investors (who purchase on average within the class period)”).<sup>1</sup> The corporation’s employees also lose, as those who hold stock through equity compensation and stock option plans suffer. *Id.*

Abusive securities litigation, particularly in the form of putative class actions, also discourages corporate America, “add[ing] significantly to the cost of raising capital and represent[ing] a ‘litigation tax’ on business.” *Thompson v. RelationServe Media, Inc.*, 610 F.3d 628, 667 (11th Cir. 2010) (Tjoflat, J., concurring in part) (quoting S. Rep. No. 104-98, at 9 (1995), *as reprinted in* 1995 U.S.C.C.A.N. 679, 688). This is because class actions—with the known risk of large judgments—may “place[] inordinate or hydraulic pressure on defendants to settle, avoiding the risk, however small, of potentially ruinous liability.” *Newton v. Merrill Lynch, Pierce,*

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<sup>1</sup> Any settlement or judgment is paid by current shareholders to plaintiff’s lawyers and to shareholders as of a previous point in time.

*Fenner & Smith, Inc.*, 259 F.3d 154, 164 (3d Cir. 2001); S. Rep. No. 104-98, at 6 (securities class actions have a “much higher settlement rate”).<sup>2</sup>

Further, more than in other types of lawsuits, in securities class actions, “even a complaint which by objective standards may have very little chance of success at trial has a settlement value to the plaintiff out of any proportion to its prospect of success at trial so long as he may prevent the suit from being resolved against him by dismissal or summary judgment.”<sup>3</sup> *Blue Chip Stamps*, 421 U.S. at 740. Concerns about coercive discovery tactics and high settlement pressures are what prompted Congress to enact the Private Securities Litigation Reform Act of 1995 (“PSLRA”). See, e.g., *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 81 (2006) (noting the PSLRA addressed “nuisance filings, targeting of deep-pocket defendants, vexatious discovery requests, and ‘manipulation by class

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<sup>2</sup> The statistics bear this out. In securities class actions that survive a motion to dismiss, only 17% of cases proceed to a motion for class certification. Edward Flores & Svetlana Starykh, *Recent Trends in Securities Action Litigation: 2024 Full-Year Review*, NERA, at 18 (Jan. 22, 2025), available at <https://www.nera.com/insights/publications/2025/recent-trends-in-securities-class-action-litigation--2024-full-y.html?lang=en>.

<sup>3</sup> Empirical studies have found that often “the merits do not matter” in a securities class action that survives dismissal. Janet C. Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 Stan. L. Rev. 497, 501 (1991).

action lawyers of the clients whom they purportedly represent’” (quoting H.R. Rep. No. 104-369, at 31 (1995))).

This is even more true in the context of state court class actions asserting Section 11 claims under the Securities Act, like this one. *See* Securities Act of 1933, 48 Stat. 74 (codified as amended at 15 U.S.C. § 77a *et seq.*). These state court cases settle at higher rates than comparable Section 11 claims filed solely in federal courts, even in cases involving parallel state and federal claims. Michael Klausner et al., *State Section 11 Litigation in the Post-Cyan Environment (Despite Sciabacucchi)*, 75 Bus. Law. 1769, 1776–78 (2020). From 2011 to 2015, the median settlement amount for Section 11 claims filed in California state court was more than twice the median settlement amount for cases filed in federal court. Joseph Grundfest et al., *After Cyan: Potential Trends in Section 11 Litigation*, Law360 (Mar. 27, 2018) (provided in Appendix).

**B. “Borrowed plausibility” undermines the procedural safeguards protecting against speculative lawsuits, enticing forum-shopping plaintiffs to file these lawsuits in Colorado.**

A plaintiff typically has options among state and federal courts in deciding where to bring a class action under the Securities Act.<sup>4</sup> Since *Cyan*, there has been an increase in state-court filings for Securities Act claims, likely due to a perception among the plaintiffs’ bar that state courts apply less rigorous pleading standards.<sup>5</sup> If Colorado permits “borrowed plausibility” under its Rule 11, plaintiffs are likely to

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<sup>4</sup> State courts have concurrent jurisdiction with federal courts over Securities Act claims. *Cyan, Inc. v. Beaver Cnty. Emps. Ret. Fund*, 583 U.S. 416, 427 (2018).

<sup>5</sup> Based on the filing statistics related to Securities Act claims, plaintiffs already concentrate their filings in state court. From 2011 to 2017, before *Cyan*, an average of 9.28 Securities Act cases were filed in state courts per year. *See* Klausner, *supra*, at 1775. After *Cyan*, from 2018 to 2019, this average quadrupled to 38.5 cases a year. *Id.* Nationwide, since *Cyan*, “cases filed exclusively in federal court comprise only 29 percent of section 11 filings, compared to 88 percent between 2011 and 2013, and 65 percent between 2014 and March 20, 2018, when *Cyan* was decided.” *Id.* at 1776.

These statistics also reveal an increase in parallel and duplicative state and federal court cases. From 2011 to 2013, only 7% of Securities Act claims were brought in both state and federal court; from 2014 until March 20, 2018, when *Cyan* was decided, the number of parallel suits grew to only 17% of Securities Act claims. *Id.* at 1775. In sharp contrast, half of all Securities Act claims plaintiffs filed between March 21, 2018, and December 31, 2019, were filed in both state and federal court. *Id.* At the same time, Securities Act cases filed exclusively in federal court dropped from 88% between 2011 and 2013 and 65% between 2014 and March 20, 2018, to just 29% after *Cyan*. *Id.*

view Colorado as a friendly forum and file more marginal and baseless cases here, placing a burden on court resources and industry defendants.

Congress has repeatedly recognized the problems associated with securities class actions discussed above. To combat those problems, it enacted the PSLRA as a safeguard to prevent exploitative litigation. *See Tellabs, Inc. v. Makor Issues & Rts., Ltd.*, 551 U.S. 308, 322 (2007) (explaining PSLRA’s “twin goals: to curb frivolous, lawyer-driven litigation, while preserving investors’ ability to recover on meritorious claims”). But this does not mean the state standards that were already in place, like C.R.C.P. 11, are any less important.

The crux of Section 11 claims under the Securities Act is the ability to plead the existence of an untrue statement of material fact or an omission of a material fact required to make other statements not misleading in a registration statement.

*Jagged Peak Energy Inc. v. Oklahoma Police Pension & Ret. Sys.*, 2022 CO 54, ¶ 27.<sup>6</sup>

Section 15 of the Securities Act extends liability to any person who ‘by or through stock ownership, agency, or

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<sup>6</sup> “To state a claim under [S]ection 11, plaintiffs must plausibly allege that (1) they purchased a registered security from the issuer or in the aftermarket following the IPO; (2) the defendant participated in the offering in such a way as to give rise to liability under the statute; and (3) the registration statement ‘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.’” *Id.* ¶ 27 (quoting *Morgan Stanley Info. Fund Sec. Litig.*, 592 F.3d 347, 358 (2d Cir. 2010)).

otherwise, or who, pursuant to or in connection with an agreement or understanding with one or more other persons by or through stock ownership, agency, or otherwise, controls any person who' is liable under sections 11 and 12, 'unless the controlling person had no knowledge of or reasonable ground to believe in the existence of the facts by reason of which the liability of the controlled person is alleged to exist.'

*Id.* ¶ 29.

The Division's Rule undermines the safeguards against meritless Securities Act cases in Colorado state courts by allowing a plaintiff to plead—without any appropriate investigation—the existence of a material misstatement or that individual defendants knew about the alleged statements or omissions giving rise to liability.<sup>7</sup> An assertion counsel reviewed other complaints and relied on the statements within them to support a factual allegation is merely a concession that counsel relied on someone else's factual investigation (or, even worse, mere recitation of the facts without due investigation). It is **not** the same as that attorney engaging in a reasonable inquiry to form independent knowledge, information, and

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<sup>7</sup> The Division concludes “copying allegations, including those from confidential witness statements, from [another] complaint without speaking to the witnesses” does not violate C.R.C.P. 11's duty to conduct a “reasonable inquiry.” Op. ¶ 54. This cannot be the “sole” or “exclusive” inquiry supporting the complaint. *Id.* ¶ 63.

belief as to the factual circumstances giving rise to a claim. C.R.C.P. 11. The Division's Rule impermissibly delegates the duty and lowers the standard.

The Division's Rule is also based on an implicit flawed assumption that because another attorney plead the facts in a complaint, that attorney satisfied Rule 11. One cannot simply assume the copied complaint complies with Rule 11. As a practical matter, this means untested or unverified allegations (many of which could have been copied from yet other lawsuits, depending on the jurisdiction) could continue to be recycled in Colorado without any meaningful ability to test their veracity at the pleading stage. Allowing an attorney to "borrow plausibility" in Colorado therefore makes it a more attractive jurisdiction to potential plaintiffs because the pleading standard is effectively easier to meet with less risk of sanctions.

And, as discussed earlier, in securities class actions in particular, the failure to eliminate frivolous lawsuits at the pleading stage forces defendants to engage in protracted and expensive discovery that pressures companies to settle, regardless of the merits. Thus, the outcome (settlement versus litigation) of two identical cases, one in federal or state court outside of Colorado and one in Colorado state

court, may be driven solely by this Court’s reading of C.R.C.P. 11. Such a result is inconsistent with principles of equality, consistency, and judicial efficiency.

Affirming the Division’s Rule will invite persistent plaintiffs’ lawyers to simply copy from other allegations made by other lawyers to overcome the pleading hurdle—regardless of the underlying merits—and then exert immense pressure on defendant companies to settle. Plaintiffs may increasingly file weak Securities Act cases in Colorado state courts in the hope of surviving a motion to dismiss that would otherwise have been granted in federal court. SIFMA therefore urges this Court to reverse the Division and reinstate the trial court’s dismissal, in accordance with Colorado law under Rule 11 and the majority of courts across the country.

**C. “Borrowed plausibility” creates practical problems in defending cases.**

“Borrowed plausibility” also creates serious practical problems in the litigation of a case. Where counsel has personally reviewed and investigated facts, the lawyer knows the source of those facts. If plaintiff’s counsel does not know the identity of the information underlying the complaint’s factual allegations—because the facts are “borrowed” from an unidentified confidential witnesses in another case with whom that counsel has never spoken—there is no ability to identify these

sources in C.R.C.P. 26(a)(1) disclosures or provide discovery from them. This means claims can proceed based on information and sources a defendant's counsel may **never** be able to discover or depose.<sup>8</sup> This is unprecedented and infects every further stage of a case. The inability to obtain discovery on core allegations increases the likelihood that (for a reason in addition to that discussed in Section I, *supra*) defendants will feel compelled to settle, potentially abandoning a meritorious defense, to avoid the cost and burden of discovery and risk of trial.<sup>9</sup>

The Division's proposed remedy for baseless lawsuits—sanctions—allows the harm to compound before it is remediated. The Division suggests Section 13-17-102(2), (4), C.R.S. (awarding attorney fees against an attorney or party who has brought a civil action that “lacked substantial justification”) will adequately deter counsel from misusing borrowed and unconfirmed statements from confidential witnesses. *See* Op. ¶ 60. This logic is flawed.

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<sup>8</sup> This is inconsistent with C.R.C.P. 26(a)(1) and 26(b)(1), in which the claims asserted define the scope of initial disclosures and further discovery.

<sup>9</sup> *See* Michael A. Perino, *Securities Litigation After the Reform Act 4013* (2006); Stephen J. Choi, *The Evidence on Securities Class Actions*, 57 *Vand. L. Rev.* 1465, 1469 (2004); Neil M. Gorsuch & Paul B. Matey, *Settlements in Securities Fraud Class Actions: Improving Investor Protection 2* (Wash. Legal Found. 2005), <https://www.wlf.org/2005/04/08/publishing/settlements-in-securities-fraud-class-actions-improving-investor-protection/>.

When counsel relies on statements from another case, counsel has no way to meaningfully determine if a case has or lacks substantial justification. If, under C.R.C.P. 11, a lawyer may rely on and adopt allegations from another case, it seems highly improbable (and perhaps improper) that a court would sanction the lawyer under Section 13-17-102 should the borrowed allegations prove baseless. And Section 13-17-102 provides no basis for reaching through to the lawyer in the relied-upon case. This means Section 13-17-102 is unlikely to provide any relief where borrowed allegations are baseless or even frivolous.

Further, the action is typically completed before a determination that a claim lacks substantial justification can be made (typically, further into the litigation than the pleading stage). But, as previously discussed, even unmeritorious securities class actions are highly likely to settle. A defendant would have to incur all the costs associated with bringing a case successfully to judgment before an opportunity to obtain relief under Section 13-17-102.

By contrast, the requirement to conduct a reasonable C.R.C.P. 11 investigation applies at the pleading stage and should act to prevent a baseless lawsuit from moving forward at all. Ensuring robust compliance with C.R.C.P. and not permitting “borrowed plausibility” prevents, rather than potentially cures,

harm. This is more efficient, and SIFMA urges this Court to reject the Division's Rule for this final reason as well.

**II. This Court would be the first to adopt “borrowed plausibility” in lawsuits bringing claims exclusively under the Securities Act.**

If this Court adopts the Division's “borrowed plausibility” Rule, it would be the first to do so in a lawsuit bringing claims solely under the Securities Act and, to the best of SIFMA's knowledge, the first state court to do so.

Unlike securities fraud claims under the Securities Exchange Act of 1934 (“Exchange Act”), plaintiffs bringing claims under the Securities Act “need not allege scienter, reliance, or loss causation.” *Morgan Stanley*, 592 F.3d at 359. Plaintiffs under the Securities Act “need only show a material misstatement or omission to establish [their] *prima facie* case.” *Herman & MacLean v. Huddleston*, 459 U.S. 375, 382 (1983) (observing further that liability against the issuer of a security “is virtually absolute”); *see also Morgan Stanley*, 592 F.3d at 360 (observing that Securities Act claims “apply more narrowly but give rise to liability more readily”). These claims are not subject to Rule 9(b) (requiring particular pleading of fraud allegations) and are, therefore, subject only to a plausibility standard governing motions to dismiss. *See Morgan Stanley*, 592 F.3d at 358, 359–60.

Exchange Act claims are different. These claims prohibit fraudulent or manipulative conduct related to the purchase or sale of securities. 15 U.S.C. § 78j(b); *see also* 17 C.F.R. § 240.10b-5 (implementing Section 10(b)). These claims require a plaintiff to show that a defendant (1) made misstatements or omissions of material fact; (2) with scienter; (3) in connection with the purchase or sale of securities; (4) on which the plaintiff relied; and (5) that the reliance was the proximate cause of the plaintiff's injury. *See Herman & MacLean*, 459 U.S. at 382.

Given these elements, Exchange Act claims are subject to several heightened pleading requirements. The circumstances constituting fraud must be alleged with particularity. *ASTI Commc'ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 99 (2d Cir. 2007) (citing Fed. R. Civ. P. 9(b)). In addition, these claims must also satisfy the pleadings requirements of the PSLRA, which imposes "heightened pleading instructions" and "[e]xacting pleading requirements." *Tellabs*, 551 U.S. at 321, 322; *see also* 15 U.S.C. § 78u-4(b)(1) (detailing exacting and heightened standard). This "prevent[s] a plaintiff from using vague or general allegations in order to get by a motion to dismiss for failure to state a claim." *Tellabs*, 551 U.S. at 334 (Alito, J., concurring). These standards are so exacting that the PSLRA compels a Fed. R. Civ. P. 11 review "after final adjudication of the action." 15 U.S.C. § 78u-4(c)(1).

**Every** case the Division cited concerning “borrowed plausibility” (whether accepting or rejecting the principle) concerns claims under the Exchange Act or substantially similar state law fraud claims. *See IBT Emp. Grp. Welfare Fund v. Compass Mins. Int’l, Inc.*, 706 F. Supp. 3d 1225, 1237 (D. Kan. 2023) (Exchange Act claim); *In re TEVA Securities Litig.*, 671 F. Supp. 3d 147, 163 (D. Conn. 2023) (same); *Amorosa v. Gen. Elec. Co.*, No. 21-CV-3137, 2022 WL 3577838, at \*3 (S.D.N.Y. Aug. 19, 2022) (same); *Schwab Cap. Tr. v. Celegene Corp.*, No. CV 20-3754, 2021 WL 1085474, at \*1 (D.N.J. Mar. 22, 2021) (same); *Strougo v. Barclays PLC*, 105 F. Supp. 3d 330, 335 (S.D.N.Y. 2015) (same); *380544 Canada, Inc. v. Aspen Tech., Inc.*, 544 F. Supp. 2d 199, 202 (S.D.N.Y. 2008) (concerning Exchange Act claims and common-law fraud under New York law); *Waterford Twp. Police & Fire Ret. Sys. v. Smithtown Bancorp., Inc.*, No. 10-CV-864, 2014 WL 3569338, at \*1 (E.D.N.Y. July 18, 2014) (concerning Exchange Act claims); *In re Lehman Bros. Sec. & ERISA Litig.*, No. 10 Civ. 6637, 2013 WL 3989066, at \*1 (S.D.N.Y. July 31, 2013) (concerning claims under the Exchange Act and New York common law); *VNB Realty, Inc. v. Bank of Am. Corp.*, No. 11 Civ. 6805, 2013 WL 5179197, at \*1 (S.D.N.Y. Sept. 16, 2013) (stating specifically that “VNB does not assert claims under [the Securities Act]” and asserts “only a fraud claim under the common law

of New York”); *In re UBS AG Sec. Litig.*, No. 07 Civ. 11225, 2012 WL 4471265, at \*1 (S.D.N.Y. Sept. 28, 2012) (addressing claims under both Acts), *aff’d sub nom. City of Pontiac Policemen’s & Firemen’s Ret. Sys. v. UBS AG*, 752 F.3d 173 (2d Cir. 2014); *accord Homeward Residential Inc. v. Sand Corp.*, No. 12 Civ. 5067, 2014 WL 12791757, at \*6–7 (S.D.N.Y. Mar. 31, 2014) (considering state fraud-related claims), *vacated in part on other grounds*, No. 12 Civ. 5067, 2014 WL 4680849 (S.D.N.Y. Sept. 17, 2014).

The Division is, as far as SIFMA has discerned, the first in the country to allow “borrowed plausibility” in a lawsuit brought exclusively under the Securities Act. This means, if affirmed, this Court would be the first to allow “borrowed plausibility” in securities lawsuits that do not require at least the additional safeguards of Rule 9 pleading requirements or the exacting standards of the PSLRA. This is beyond untenable—it places defendants at the mercy of lawsuits premised on a glorified game of telephone, as happened here. For this additional reason, this Court should reject the Division’s Rule.

### **III. “Borrowed plausibility” encourages plaintiffs’ lawyers to behave unethically and file complaints with little or no verification.**

For over two decades, courts across the country have rejected “borrowed plausibility” as offensive to a lawyer’s nondelegable Rule 11 obligations. *See, e.g.,*

*Plumbers & Pipefitters Loc. Union #295 Pension Fund v. CareDx, Inc.*, No. 22-cv-03023, 2023 WL 4418886, at \*4 (N.D. Cal. May 24, 2023) (applying Rule 11(b) to strike paragraphs “lift[ed]” from another complaint “without adequate independent corroboration”); *Ass’n of N.J. Chiropractors, Inc. v. Data iSight, Inc.*, No. 19-21973, 2022 WL 4483596, at \*3 (D.N.J. Sept. 27, 2022) (striking paragraphs where plaintiffs “took no steps to independently verify the accuracy of the allegations” from another action); *Amorosa*, 2022 WL 3577838, at \*2 (finding reliance on SEC order improper notwithstanding the assertion that the plaintiff “did his ‘own investigation and analysis’” that led to inclusion of additional “quotations from public filings” and “quotations from market analysts”); *Brooks v. United Dev. Funding III, L.P.*, No. 4:20-cv-00150, 2020 WL 6132230, at \*13 (N.D. Tex. Apr. 15, 2020) (striking paragraphs “taken from the complaint in the SEC Enforcement Action” under Fed. R. Civ. P 11(b)); *Luczak v. Nat’l Beverage Corp.*, 400 F. Supp. 3d 1318, 1327 (S.D. Fla. 2019) (“Plaintiff cannot merely crib allegations from a complaint in another jurisdiction as the sole source of support for his claims here.”), *rev’d in part on other grounds*, 812 F. App’x 915 (11th Cir. 2020); *Veal v. LendingClub Corp.*, 423 F. Supp. 3d 785, 812 (N.D. Cal. 2019) (“Plaintiffs may not rely on facts alleged in the FTC Action without providing any independent

corroboration.”); *VNB Realty, Inc. v. Bank of Am. Corp.*, No. 11 Civ. 6805, 2013 WL 5179197, at \*4 (S.D.N.Y. Sept. 16, 2013); *Lehman Bros. Sec. & ERISA Litigation*, 2013 WL 3989066, at \*3; *Elliot v. China Green Agrics., Inc.*, No. 3:10-CV-0648, 2012 WL 5398863, at \*3 (D. Nev. Nov. 2, 2012) (“When drafting a complaint, an attorney . . . may not rely entirely on other sources as the sole basis for the complaint’s allegations.”); *In re UBS AG Sec. Litig.*, No. 07 Civ. 11225, 2012 WL 4471265, at \*17 n.17 (S.D.N.Y. Sept. 28, 2012), *aff’d sub nom. City of Pontiac Policemen’s & Firemen’s Ret. Sys. v. UBS AG*, 752 F.3d 173 (2d Cir. 2014); *In re Karagianis*, No. 09-1056, 2009 WL 4738188, at \*4 (Bankr. D.N.H. Dec. 4, 2009) (holding “no authority stands for the proposition that an attorney can rely entirely on another complaint as the sole basis for the allegations”); *Fraker v. Bayer Corp.*, No. CV F 08-1564, 2009 WL 5865687, at \*3 (E.D. Cal. Oct. 6, 2009) (allegations from another complaint “cannot stand in for the entire body of substantive allegations in the present action”); *In re Connetics Corp. Secs. Litig.*, 542 F. Supp. 2d 996, 1006 (N.D. Cal. 2008) (striking paragraphs drawn from SEC complaint); *Geinko v. Padda*, No. 00 C 5070, 2002 WL 276236, at \*5-6 (N.D. Ill. Feb. 27, 2002) (rejecting as “improper” “hearsay allegations” “recited” from SEC complaint).

As one court explained, “[g]iven that [the Rule 11 certification] responsibility cannot be delegated to another member of the attorney’s firm, it would make little sense that an attorney ‘somehow can rely on the analysis of attorneys in *different actions* and who are presumably from different law firms.’” *Connetics*, 542 F. Supp. 2d at 1005 (emphasis in original) (internal citation omitted) (quoting *Geinko*, 2002 WL 276236, at \*6).

Indeed, another court rejected a scenario similar to the one here, where plaintiffs’ counsel spoke to the lawyer in the relied-upon case. *Plumbers & Pipefitters*, 2023 WL 4418886, at \*5. The court ruled a lawyer cannot, consistent with Rule 11, solely rely on investigation performed by some other counsel. *Id.*

These cases are better reasoned and more consistent with C.R.C.P. 11 and Colorado law. C.R.C.P. 11 imposes on an attorney who signs a complaint a pre-filing duty to conduct a reasonable inquiry into the facts to confirm the signer reasonably believes that the pleading is well grounded in fact. *See, e.g., Stearns Mgmt. Co. v. Missouri River Servs., Inc.*, 70 P.3d 629, 632–33 (Colo. App. 2003). This duty is personal to the signing attorney. *In re Trupp*, 92 P.3d 923, 928 (Colo. 2004)(holding “Rule 11 creates a duty upon every attorney to investigate . . . the facts . . . relevant to any pleading that the attorney files with the court”); *see also*

*Stepanek v. Delta Cnty.*, 940 P.2d 364, 370 (Colo. 1997) (extending Rule 11 duty to county attorneys because otherwise an attorney “could file a pleading without ever reading it” and “compromise the integrity of the judicial process”). Noticeably missing from the Division’s analysis is any statement that “borrowed plausibility” is consistent with Colorado’s well-developed body of Rule 11 jurisprudence. The reason is self-evident: It’s not. For this additional reason, SIFMA urges this Court to reject the Division’s Rule and reverse the Opinion.

### CONCLUSION

SIFMA respectfully joins CenturyLink in requesting the Division’s Rule be rejected and urges this Court to assure Colorado law still requires compliance with C.R.C.P. 11.

May 12, 2025

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**CERTIFICATE OF SERVICE**

I certify I filed the foregoing with the Colorado Supreme Court on May 12, 2025, and served on all counsel of record through Colorado Courts E-file.

/s Kendra N. Beckwith