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Denver, Colorado 80202</td><td rowspan="4">▲ COURT USE ONLY ▲

Case No. 2021SC000334</td></tr>
<tr><td>Court of Appeals No. 19CA1718
District Court, Denver County
Case No. 2017-CV-31757, Hon. Kandace C. Gerdes</td></tr>
<tr><td>Petitioners-Defendants: JAGGED PEAK ENERGY INC, JOSEPH N. JAGGERS, ROBERT W. HOWARD, SHONN D. STAHLECKER, CHARLES D. DAVISON, S. WIL VANLOH, JR., BLAKE A. WEBSTER, CITIGROUP GLOBAL MARKETS INC., CREDIT SUISSE SECURITIES (USA) LLC, J.P.MORGAN SECURITIES LLC, GOLDMAN, SACHS & CO., RBC CAPITAL MARKETS, LLC, WELLS FARGO SECURITIES, LLC, UBS SECURITIES LLC, KEYBANC CAPITAL MARKETS INC., ABN AMRO SECURITIES (USA) LLC, FIFTH THIRD SECURITIES, INC., PETRIE PARTNERS SECURITIES, LLC, TUDOR, PICKERING, HOLT & CO. SECURITIES, INC., BMO CAPITAL MARKETS CORP., DEUTSCHE BANK SECURITIES INC., EVERCORE GROUP L.L.C., and SCOTIA CAPITAL (USA) INC.

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AMICUS BRIEF OF THE SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION IN SUPPORT OF PETITIONERS

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the requirements of C.A.R. 32 and 53. It contains 4,250 words.

/s/ Jessica Black Livingston
Jessica Black Livingston

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IDENTITY AND INTERESTS OF AMICUS CURIAE

The Securities Industry and Financial Markets Association ("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 nearly 1 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 market operations and resiliency. SIFMA also provides a forum for industry policy and professional development. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA). For more information, please visit http://www.sifma.org.

INTRODUCTION

In *Cyan, Inc. v. Beaver County Employees Retirement Fund*, 138 S. Ct. 1061 (2018), the United States Supreme Court held that, notwithstanding the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"), federal and state courts have concurrent jurisdiction over class actions alleging violations of the Securities Act of 1933 (the "Securities Act"), and that removal from state to federal court is prohibited. This appeal involves a critical issue for the U.S. capital markets

generally, and for the financial services sector in particular, in the wake of *Cyan* – the need for **the substantive law** governing the sale of securities to investors to be uniform across state and federal courts nationwide. SIFMA respectfully urges this Court to reverse the Court of Appeals and dismiss Plaintiff's complaint to promote uniformity in the law governing securities offerings and to prevent Colorado from becoming a haven for weak securities class actions.

Here, the Court of Appeals departed from federal Securities Act case law in two ways. *First*, federal courts consistently dismiss Securities Act claims where the plaintiff challenges generalized statements of corporate optimism, typically referred to as "puffery." The rationale behind this rule is that, because stockholders do not rely on puffery in making investment decisions, vague but hopeful (or even boastful) statements concerning an issuer's goals and plans are immaterial as a matter of law. The Court of Appeals misapplied the puffery doctrine in this case, finding that statements by Jagged Peak, Inc. ("Jagged Peak") concerning its "focus," as well as the "experience and expertise" and "track record" of its management team, were actionable statements.

Second, federal courts have long held that a plaintiff in a Securities Act class action cannot plead falsity by hindsight, *i.e.*, by alleging that a statement in an offering document was false or misleading simply because the issuer encountered

post-offering difficulties that caused its results to be less successful than the plaintiff hoped at the time of the offering. Instead, a plaintiff must plead facts showing that the challenged statement was false **at the time it was made**.

For example, a plaintiff does not state a viable Securities Act claim by alleging that an issuer falsely projected that it would generate $100 in revenue in Q1 2022 solely by alleging that actual revenue recorded in that quarter was, in hindsight, only $80. In contrast, a plaintiff might have a viable Securities Act claim if it alleged that that issuer's only two customers responsible for 100% of revenue already had cancelled their contracts at the start of Q1 2022. Here, the Court of Appeals disregarded this federal precedent by concluding that Plaintiff stated a viable Securities Act claim by alleging that Jagged Peak misleadingly projected $527 million in capital expenditures for the drilling and completion of an operated well in 2017 only because actual costs for that year turned out to be $567 million.

If permitted to stand, the Court of Appeals' decision allowing puffery and hindsight pleading will adversely affect the U.S. capital markets. The decision will encourage stockholders to file weak securities class actions, contrary to the intent of Congress, which enacted the Private Securities Litigation Reform Act of 1995 (the "Reform Act") to curb abusive securities class action litigation that "was being

used to injure the entire U.S. economy." *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 81 (2006) (internal quotation marks omitted). The Reform Act made substantive and procedural changes to the federal securities laws that were intended to address "those suits whose nuisance value outweighs their merits." *Id.* at 82. Many of the Reform Act's changes were targeted at eliminating weak securities class action lawsuits as early as possible, typically at the motion to dismiss stage, in order to achieve two important policy goals: (a) avoiding the substantial cost, time, and distraction associated with the broad-ranging discovery demands typically seen in securities class actions; and (b) minimizing the incentive for plaintiffs to file baseless suits to force quick settlements. The puffery and falsity-by-hindsight doctrines that the Court of Appeals rejected here are designed to achieve the same goals – eliminating weak securities cases before the parties and the courts must invest substantial resources in discovery, class certification, and trial.

If weak securities cases survive motions to dismiss, there is a significant risk that the costs of discovery and the damages risk posed by class certification – not the merits of the case – will drive defendants to settle. These settlements will impact the capital markets and market participants – SIFMA's members, including the banks that underwrite initial public offerings ("IPOs") and secondary public

offerings (“SPOs”) – by subjecting them to unnecessary discovery and more frequent and expensive settlements that have little to do with the merits of cases. In turn, this will increase the costs of offerings and potentially stagnate the capital markets.

Finally, if the Court of Appeals’ decision is not reversed, Colorado state courts risk becoming a haven for plaintiffs filing weak securities class actions due to the application of more lenient pleading standards than those applied by federal courts in the same types of cases.

For these reasons, SIFMA respectfully requests that this Court reverse the ruling below and ensure that uniform standards govern Securities Act claims, whether brought in federal court or Colorado state court.

ARGUMENT

I. THE COURT OF APPEALS ERRED IN REVERSING THE DISTRICT COURT’S DISMISSAL ORDER.

A. The Court of Appeals Misapplied the Puffery Doctrine.

To state a claim under Section 11 or 12(a)(2) of the Securities Act, a plaintiff must demonstrate that the alleged misstatement or omission is **material**. 15 U.S.C. § 77k; 15 U.S.C. § 77*l*(a)(2). Information is material if there is “a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the ‘total mix’ of information

made available." *Basic Inc. v. Levinson*, 485 U.S. 224, 231–32 (1988) (quoting *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976)); *see also Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 38 (2011) (noting that courts must weigh materiality from the view of a "reasonable" investor).

Over several decades, federal courts have determined that some statements are *per se* immaterial. In particular, courts have decided that puffery – "[v]ague, optimistic statements" that "reasonable investors do not rely on" – cannot, as a matter of law, form the basis of a securities claim. *See Grossman v. Novell, Inc.*, 120 F.3d 1112, 1119 (10th Cir. 1997); *see also Nardy v. Chipotle Mexican Grill*, No. 17-cv-01760-WYD-STV, 2019 WL 3297467, at *13 (D. Colo. Mar. 9, 2019) (finding optimistic statement "immaterial as a matter of law because it would not have misled a reasonable investor"). Statements that are "'not capable of objective verification'" are typically deemed inactionable puffery. *In re Level 3 Commc'ns, Inc. Sec. Litig.*, 667 F.3d 1331, 1339 (10th Cir. 2012) (quoting *Grossman*, 120 F.3d at 1118).

Here, Jagged Peak's statements that its "focus" would "optimiz[e] completions and reduc[e] costs" and that Jagged Peak's management team had "experience and expertise" are the types of statements that federal courts routinely find to be puffery. *See, e.g.*, *Barilli v. Sky Solar Holdings, Ltd.*, 389 F. Supp. 3d

232, 252 (S.D.N.Y. 2019) (finding description of CEO as "a successful businessman" to be puffery).

The presence of factual statements near puffery does not change this analysis. *See, e.g.*, *Freeland v. Iridium World Commc'ns, Ltd.*, 545 F. Supp. 2d 59, 76 (D.D.C. 2008). If a historical statement and a statement of puffery appear near one another, the court must examine each statement independently and determine separately if the historical statement is false and if the puffing statement is immaterial puffery. *See, e.g.*, *Abramson v. Newlink Genetics Corp.*, 965 F.3d 165, 173–74 (2d Cir. 2020). In the case of Jagged Peak, the proper analysis would be to determine independently whether the statement promising to "[m]aximize returns" was puffery and whether the nearby table reporting Jagged Peak's past average drilling and completion costs contained accurate statements of historical fact.

In addition, permitting a claim based on puffery to proceed violates the bedrock "plausibility" pleading standard in *Ashcroft v. Iqbal* and *Bell Atlantic Corp. v. Twombly*. *Iqbal*, 556 U.S. 662, 678 (2009) (complaint must "'state a claim to relief that is plausible on its face'") (quoting *Twombly*, 550 U.S. 544 (2007) (complaint must move "across the line from conceivable to plausible")). It is simply not plausible to allege that investors made their decisions based on "[v]ague, optimistic statements," *Grossman*, 120 F.3d at 1119, that are "'not

capable of objective verification.'" *In re Level 3 Commc'ns, Inc.*, 667 F.3d at 1339 (quoting *Grossman*, 120 F.3d at 1119).

If the Court of Appeals' decision here is not overturned, Colorado's law on puffery will diverge sharply from federal law, which in turn will cause significant issues for the securities and financial markets industries.[1]

B. The Court of Appeals Erred in Sustaining Falsity-by-Hindsight Allegations.

To plead a viable Section 11 or 12(a)(2) claim, the plaintiff must identify a statement by the defendant that was false or misleading **at the time it was made**. *See Smallen v. Western Union Co.*, No. 17-cv-00474-KLM, 2019 WL 1382823, at *13 (D. Colo. Mar. 27, 2019). Accordingly, "a complaint 'may not simply contrast a defendant's past optimism with less favorable actual results in support of a claim of securities fraud.'" *Knox v. Yingli Green Energy Holding Co. Ltd.*, 242 F. Supp. 3d 950, 963 (C.D. Cal. 2017) (quoting *ACA Fin. Guar. Corp. v. Advest, Inc.*, 512 F.3d 45, 62 (1st Cir. 2008)); *see also Anderson v. Spirit Aerosystems Holdings, Inc.*, 827 F.3d 1229 (10th Cir. 2016); *Smallen*, 2019 WL 1382823, at *13 (citing *In re Sanofi Sec. Litig.*, 87 F. Supp. 3d 510 (S.D.N.Y. 2015), *aff'd sub nom. Tongue v. Sanofi*, 816 F.3d 199 (2d Cir. 2016)).

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[1] *See* Point II.B.-III, *infra*, at 14-19.

For example, in *Shetty v. Trivago N.V.*, the plaintiffs alleged that Trivago omitted facts related to a change in Trivago's advertising policy. 796 F. App'x 31, 33 (2d Cir. 2019). Before its IPO in December 2016, Trivago rejected advertisements from advertisers whose "landing page" did not meet Trivago standards.[2] *Id.* After December 2016, Trivago permitted advertisements even if the landing page did not meet Trivago standards, but the advertiser was required to pay a premium or else be given low prominence on the search results page. *Id.* The plaintiffs alleged that Trivago should have disclosed that: (1) before December 2016, Trivago allowed its largest advertiser to violate the landing-page policy; and (2) the new policy was likely to negatively affect revenue. *Id.*

The Second Circuit found that plaintiffs failed to allege that Trivago knew when it made the policy change that the change would adversely impact revenue. *Id.* at 33–34. That the change later lowered revenue "merely highlights the benefits of hindsight; it does not mean that outcome was reasonably foreseeable when . . . implemented." *Id.* at 34.

In this matter, Plaintiff failed to plead that Jagged Peak's statements that its "focus" would "optimiz[e] completions and reduc[e] costs" and that Jagged Peak's

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[2] A "landing page" is the page to which the user is transferred after clicking on an advertisement. *Id.*

management team had "experience and expertise" were false at the time of the IPO. *See, e.g.*, *McDonald v. Kinder-Morgan, Inc.*, 287 F.3d 992, 998 (10th Cir. 2002) ("It is well-established that the accurate reporting of historic successes does not give rise to a duty to further disclose contingencies that might alter the revenue picture in the future."). Permitting Plaintiff to use post-IPO events to prove the falsity of statements made at the time of the IPO would codify hindsight as a proper pleading tactic, contrary to established federal precedent.

II. INCONSISTENT APPLICATION OF SUBSTANTIVE SECURITIES LAW DOCTRINES WILL ADVERSELY AFFECT THE CAPITAL MARKETS.

A. Every Federal Court Applies the Puffery and Hindsight Doctrines at the Motion to Dismiss Stage to Curb Meritless Lawsuits.

In enacting the Reform Act, Congress specifically noted that it sought to "maintain confidence in our capital markets" because the "private securities litigation system is too important to the integrity of American capital markets to allow this system to be undermined by those who seek to line their own pockets by bringing abusive and meritless suits." H.R. REP. No. 104-369 (1995) (Conf. Rep.). The Reform Act also sought to ensure that "those suits whose nuisance value outweighs their merits" are "deter[red] or at least quickly dispose[d] of." *Dabit*, 547 U.S. at 82. Accordingly, the Reform Act requires that securities class action

complaints be rigorously examined at the motion to dismiss stage (with discovery automatically stayed during that process). *See* 15 U.S.C. § 77z-1.

Consistent with the Reform Act, federal courts apply substantive securities law doctrines to quickly identify cases that fail as a matter of law. Relevant here, courts in every federal circuit apply the puffery doctrine. *See Yan v. ReWalk Robotics Ltd.*, 973 F.3d 22, 32 (1st Cir. 2020) ("compelling" clinical data and "breakthrough" product are puffery); *Barilli*, 389 F. Supp. 3d at 251–53 (positive statements about CEO's management abilities are puffery); *Lord Abbett Affiliated Fund, Inc. v. Navient Corp.*, 363 F. Supp. 3d 476, 487–88 (D. Del. 2019) ("robust compliance driven culture" is puffery); *In re Under Armour Sec. Litig.*, 342 F. Supp. 3d 658, 676 (D. Md. 2018) ("a growing interest in performance products" and "strength" of the brand are puffery); *Elec. Workers Pension Fund, Local 103, I.B.E.W. v. Six Flags Ent. Corp.*, 524 F. Supp. 3d 501, 533 (N.D. Tex. 2021) (project "progressing nicely" is puffery); *In re TransDigm Grp., Inc. Sec. Litig.*, 440 F. Supp. 3d 740, 764–65 (N.D. Ohio 2020) ("value-based operating strategy" is puffery); *West Palm Beach Firefighters' Pension Fund v. Conagra Brands, Inc.*, 495 F. Supp. 3d 622, 653 (N.D. Ill. 2020) ("an outstanding investment opportunity" is puffery); *City of Plantation Police Officers Pension Fund v. Meredith Corp.*, 16 F.4th 553, 557 (8th Cir. 2021) ("hitting the ground running" is

puffery); *Greenberg v. Sunrun Inc.*, 233 F. Supp. 3d 764, 774–75 (N.D. Cal. 2017) ("predictable" pricing and customers' ability to "lock in long-term savings" are puffery); *In re Level 3 Commc'ns*, 667 F.3d at 1340–41 ("focused on integration and getting synergies" is puffery); *In re Airgate PCS, Inc. Sec. Litig.*, 389 F. Supp. 2d 1360, 1379 (N.D. Ga. 2005) (describing merger as "the opportunity to leverage," a "strategic combination," and providing "additional operating efficiencies, financial flexibility, and growth potential" is puffery); *Plymouth Cnty. Ret. Assoc. v. Advisory Bd. Co.*, 370 F. Supp. 3d 60, 82 (D.D.C. 2019) (describing a company's integration as a "substantial success" is puffery).

Likewise, federal courts nationwide agree that post-IPO developments cannot be used in hindsight to create a claim for securities fraud. *See Pension Tr. v. J. Jill, Inc.*, 360 F. Supp. 3d 17, 29 (D. Mass. 2018) (no false statement where prospectus allegedly omitted that "historic gross margin growth was not sustainable and would not continue"); *Scott v. Gen. Motors Co.*, 46 F. Supp. 3d 387, 396 (S.D.N.Y. 2014) (no false statement where registration statement said inventory management would strengthen company's performance but inventory continued to increase after IPO); *In re Donald J. Trump Casino Sec. Litig.*, 793 F. Supp. 543, 557 (D.N.J. 1992) (no false statement where prospectus projected profits that did not materialize); *In re Under Armour*, 342 F. Supp. 3d at 676 (no

false statement where prospectus indicated that demand was shifting toward issuer's products, but demand later decreased); *Firefighters Pension & Relief Fund of the City of New Orleans v. Bulmahn*, 53 F. Supp. 3d 882, 897 (E.D. La. 2014) (no false statement where company issued optimistic prospectus but then filed for bankruptcy); *In re EveryWare Glob., Inc. Sec. Litig.*, 175 F. Supp. 3d 837, 854–59 (S.D. Ohio 2016) (no false statement where company stated it was on track to meet financial commitments for 2013, but subsequently revised prediction downward); *Greer v. Advanced Equities, Inc.*, 683 F. Supp. 2d 761, 769 (N.D. Ill. 2010) (no false statement where plaintiffs alleged that defendants "should have known" that statements were false without "any facts in support of this conclusory assertion"); *Parnes v. Gateway 2000, Inc.*, 122 F.3d 539, 547 (8th Cir. 1997) (no false statement where prospectus projected growth but the company's post-offering results fell short of projections); *In re Restoration Robotics, Inc. Sec. Litig.*, 417 F. Supp. 3d 1242, 1265 (N.D. Cal. 2019) (no false statement where prospectus touted strong marketing support, but company did not generate expected leads); *Smallen v. Western Union Co.*, 950 F.3d 1297, 1309–10 (10th Cir. 2020) (no false statement where plaintiff failed to allege that defendants had knowledge of ongoing illegality at the time of the offering); *In re Greenlane Holdings, Inc. Sec. Litig.*, 511 F. Supp. 3d 1283, 1311–12 (S.D. Fla. 2021) (issuer's diversification of

production line did not indicate that defendants knew at the time of offering that key product faced regulatory difficulties); *Plymouth Cnty. Ret. Assoc.*, 370 F. Supp. 3d at 67 (no false statement where company fell short of CEO's growth projections).

If the decision of the Court of Appeals is not reversed, Colorado state law for Securities Act claims will break sharply with the settled law of the federal courts. This will impact the participants in the capital markets in numerous negative ways. *See* Points II-III, *infra*, at 14-19.

B. The Substantial Costs Associated with Litigation Beyond a Motion to Dismiss May Force Defendants to Settle Regardless of A Case's Merits.

Differing applications of established legal doctrines to Securities Act claims brought in federal and state court have altered, and will continue to alter, the incentives surrounding litigation and settlement. The Reform Act sought to eliminate "extortionate settlements." *Dabit*, 547 U.S. at 81; *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 740 (1975) ("[E]ven 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."). Failing to apply important doctrines, such as puffery and

hindsight pleading, in state court will subject the defendants sued in state court to the exact abuses that the Reform Act sought to curb.

Even prior to the United States Supreme Court's decision in *Cyan*, 138 S. Ct. at 1078, confirming concurrent jurisdiction over Securities Act claims, state court cases alleging Section 11 claims, or cases involving parallel state and federal claims, were settling at higher rates than comparable Section 11 claims filed solely in federal courts. Michael Klausner, *State Section 11 Litigation in the Post-Cyan Environment (Despite Sciabacucchi)*, 75 THE BUS. LAW. 1769, 1775 (2020). For example, from 2011 to 2015, the median settlement amount for Section 11 claims filed in California state court, which has become a haven for weak Section 11 claims, was more than **twice** the median settlement amount for cases filed in federal court. Joseph Grundfest, Sasha Aganin and Joseph Schertler, *After Cyan: Potential Trends in Section 11 Litigation*, Law360 (Mar. 27, 2018), https://www.law360.com/articles/1026323/after-cyan-potential-trends-in-section-11-litigation.

Creating a forum in which settled pleading rules do not apply at the motion to dismiss stage will exacerbate the issue, returning to the pre-Reform Act days of "extortionate" settlements. Moreover, a failure to eliminate frivolous lawsuits at the pleading stage will force defendants to engage in discovery. The cost of

discovery – coupled with the increasing risk of additional liability as the case continues – may cause the defendants to settle for high sums, regardless of the merits of the case. Thus, the outcome (settlement versus litigation) of two identical cases, one in federal court and one in Colorado state court, may be driven **solely** by the forum in which it is filed, a result that is neither contemplated by the Reform Act nor consistent with principles of equality, consistency, and judicial efficiency.

C. More Lenient Application of Key Securities Law Doctrines in Colorado State Court Will Burden the State with New Cases.

Since *Cyan*, there has been an increase in state-court filings for Securities Act claims, likely due to a perception among plaintiffs that state courts apply less rigorous pleading standards. If Colorado declines to follow the puffery and hindsight doctrines, plaintiffs are likely to view Colorado as a friendly forum and file more cases there, placing a burden on the resources of Colorado courts.

Based on the filing statistics related to Securities Act claims, plaintiffs already have begun to 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* Michael Klausner, *supra*, at 1775. After *Cyan*, from 2018 to 2019, the 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.[3]

The statistics reveal another troubling trend – 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. Klausner, *supra*, at 1775. In sharp contrast, 49% of all Securities Act claims 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.*

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[3] Securities Act filings dropped in 2020 but not to pre-*Cyan* levels. The drop in filings is due to a number of factors, including the COVID-19 pandemic, which delayed many IPOs to the second half of 2020. Jessica Chen and John Vetterli, *Global IPOs Hit Back Strongly After COVID-19 Crash*, WHITE & CASE (Mar. 8, 2021), https://www.whitecase.com/publications/insight/global-ipos-hit-back-strongly-after-covid-19-crash. The Delaware Supreme Court's decision in *Sciabacucchi* also may have turned some plaintiffs back to federal court. Following *Cyan* but before *Sciabacucchi*, 41% of Section 11 filings were state-only filings, but since *Sciabacucchi*, this number has dropped slightly to 32%. Cornerstone Research, *Securities Class Action Filings: 2021 Year in Review* (2022), https://www.cornerstone.com/wp-content/uploads/2022/02/Securities-Class-Action-Filings-2021-Year-in-Review.pdf, at 21.

Unless this Court reverses the decision below, plaintiffs may increasingly file weak Securities Act cases in Colorado state courts in the hope of surviving a motion to dismiss.

III. DEVIATING FROM WELL-ESTABLISHED FEDERAL LAW WILL INCREASE THE BURDENS AND COSTS ON CAPITAL MARKET PARTICIPANTS.

As repeat participants in the capital markets generally, and in IPOs and SPOs specifically, the banks that underwrite these offerings will be regularly subject to prolonged litigation, including expensive and expansive discovery, if Colorado state courts permit meritless Securities Act cases to survive motions to dismiss.

Most public offerings are underwritten by multiple banks. Those banks, in turn, have indemnification agreements with the issuers that cover the cost of defending securities class actions. Permitting more meritless Securities Act lawsuits to survive motions to dismiss and proceed in state court risks compounding costs for issuer defendants as well.

The explosion of Securities Act cases in state court also has cost market participants in other ways. For example, the cost of directors and officers insurance has **quadrupled** since *Cyan*. Priya Cherian Huskins, *Will D&O Insurance Rates End the IPO Party?*, WOODRUFF SAWYER (Jan. 15, 2020), https://woodruffsawyer.com/do-notebook/do-insurance-rates-ending-ipo-party/.

Insurers are "chopping coverage limits and requiring IPO clients to pick up more costs before a policy kicks in," as well as "requiring companies to pay a percentage of the eventual loss." Suzanne Barlyn, *D&O Insurance Costs Soar as Investors Run to Court Over IPOs*, INS. J. (June 18, 2019), https://www.insurancejournal.com/news/national/2019/06/18/529691.htm. Increased IPO costs have caused issuers to look to other options for going public. *See, e.g.*, Nicki Locker & Laurie Smilan, *Carving Out IPO Protections*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Feb. 25, 2020), https://corpgov.law.harvard.edu/2020/02/25/carving-out-ipo-protections (noting increased use of self-help strategies, direct listings, and carve-outs to IPO lock-up agreements). The use of these mechanisms reduces pressure on issuers to adopt governance reforms that protect investors, which undermines the ultimate purpose of the Securities Act. Brent J. Horton, *Spotify's Direct Listing: Is It a Recipe for Gatekeeper Failure?* 72 SMU L. REV. 177, 202–12 (2019).

If IPO costs remain high, or climb higher, non-issuer participants may begin to feel the impact as well. Underwriters, consultants, and experts all may demand higher fees or other more favorable terms before they are willing to participate in IPOs or SPOs.

CONCLUSION

For the foregoing reasons, SIFMA respectfully requests that this Court reverse the order of the Colorado Court of Appeals.

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CERTIFICATE OF SERVICE

This is to certify that on February 24, 2022, the foregoing **AMICUS BRIEF OF THE SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION IN SUPPORT OF PETITIONERS** was electronically filed with the Court and served, using Colorado Courts E-Filing, on all parties of record in this matter.

*/s/ Greg Apt*______________________
Greg Apt