T 510.725.3000 F 510.725.3001

Reed R. Kathrein
HAGENS BERMAN SOBOL SHAPIRO LLP
715 HEARST AVENUE, SUITE 202
BERKELEY, CA 94710
www.hbsslaw.com
Direct [redacted]

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Submitted via electronic filing: https://www.sec.gov/cgi-bin/ruling-comments

Mr. Brent J. Fields
Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington DC 20549

Re: SEC Notice of Filing of a Proposed Rule 6c-11 Regarding Exchange Traded Funds [Release Nos. 33-10515; IC-33140; File No. S7-15-18]

This comment requests confirmation of liability of ETFs under Sections 11 and 12 of the Securities Act of 1933 to investors in the secondary market under the proposed global exemptive rule and suggests new disclosures regarding discounts from the ETF's net asset value ("NAV") that are not captured by the proposed rules and take retail investors, and often their advisors, by surprise.

Dear Mr. Fields:

This letter responds to the request of the Securities Exchange Commission ("Commission" or "SEC") for comment on the proposed rule.

Hagens Berman[1] appreciates the SEC taking up this matter in an attempt to provide a more uniform structure to granting exemptions from certain restrictions under the Investment Company Act of 1940 ("ICA"). In so doing, however, now is the time for the Commission to confirm, that in allowing ETFs to have their securities traded on an exchange -- rather than directly to investors as contemplated by Congress when the ICA

[1] Hagens Berman is a national investor-rights law firm headquartered in Seattle, Washington with 80+ attorneys in 10 offices across the country. The firm represents both retail and institutional investors in complex securities fraud and derivative litigation. It is also the attorneys for investors in *Jensen, et al. v. iShares Trust, et al.*, (Superior Ct. of Calif., San Francisco, Case No. CGC 16-55257) involving claims against BlackRock and others for failing to disclose risks relating to trading in ETFs that do not apply to stock or mutual funds, including the dangers of using open market orders and stop-loss orders, trading at near the open or close, and the actual large disparities funds have experienced between their price and the underlying value of their portfolio in volatile times.

was enacted and amended -- ETFs remain liable to all investors under Sections 11 and 12 of the Securities Act of 1933.

This clarification should apply to past exemptive orders as well as those under the proposed new rule 6c-11. Leaving the SEC's grant of exemptive relief ambiguous in this regard is harmful to investors. Major ETF providers, such as BlackRock, have taken advantage of this ambiguity to claim they are not liable to retail investors for disclosure violations in their prospectus' or registration statements. Tthe disclosure requirements of the proposed global rule are meaningless without liability as contemplated by Congress in enacting the ICA.

Hagens Berman also encourages the Commission to revise the proposed order to require ETF's to disclose truly meaningful discount spreads from the ETF's net asset value ("NAV"); namely; those that occur in times of high but infrequent volatility or lack of liquidity such as in portions of a single day in 2008, 2010 and 2015, where ETF retail investors who had open orders or stop loss orders were wiped out in minutes. These "dislocations" would remain hidden under the proposed rule. The proposed disclosure of premium and discount spreads does not capture these break downs. Retail investors should be warned of these reoccurring spreads which have occurred and on how to avoid such risks.

THE SEC SHOULD MAKE EXPLICIT THAT GRANTING ETF'S THE NECESSARY EXEMPTIVE RELIEF TO TRADE ON SECONDARY MARKETS DOES NOT RELIEVE THE ETFS NOR THEIR SPONSORS AND SELLERS OF LIABILITY UNDER SECTIONS 11 AND 12

Both mutual funds and ETFs are governed by and operate under the ICA

Unlike traditional securities registered under the Securities Act of 1933, the ICA was created to deal with companies that held multiple securities of others and "which issued redeemable securities [in a] process of distribution and redemptions [that] is continuous."[2] As drafted, the ICA contemplated that open-ended companies and UITs

[2] 15 USCS § 80a-1(a)(1)

would issue and redeem shares directly with their investors, as mutual funds currently do.[3]

The ICA specifically provides that for the purposes of Section 11 liability, "the effective date of the latest amendment filed shall be deemed the effective date of the registration statement *with respect to securities sold after such amendment* shall have become effective.'[4] Similarly, for purposes of the statute of limitations for liability under Sections 11 "no such security shall be deemed to have been *bona fide* offered to the public prior to the effective date of the latest amendment filed pursuant to this subsection."[5] Accordingly, it is clear that under the ICA every sale of a share in a fund is part of a new issue, and every purchase is traceable to the most recent amended registration statement. If the continuous offerings of Investment Company securities were to be treated the same as traditional single issuer stock offerings, this statutory clarification would not be necessary.

ETFs, however, are a unique creation under the ICA. They exist only through exemptive orders of the SEC first conceived of in the 1990s; almost 50 years after the enactment of the ICA.[6] ETFs are not creatures of Congressional authority, except by narrowly tailored exemptive authority given to the SEC in the interest of investors. [7]

Like mutual funds, ETFs register an "indefinite amount" of shares which they continuously offer through a constant process of redemption and reissue. [8] Like mutual funds ETFs register using the Form N-1A. Unlike companies, which register to issue a set number of shares under the Securities Act of 1933, both ETFs and mutual funds must file annual amendments to their registration statements and issue prospectus with each.[9]

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[3] SEC Fast Answers, Mutual Funds, https://www.sec.gov/answers/mutfund.htm ("Mutual fund shares are "redeemable." This means that when mutual fund investors want to sell their fund shares, they sell them back to the fund, or to a broker acting for the fund…")

[4] Rule 24 15 U.S.C.A. § 80a-24(e).

[5] Rule 24 15 U.S.C.A. § 80a-24(e).

[6] See e.g., Testimony on "Oversight of the SEC's Division of Investment Management", Dalia Blass, Director, Division of Investment Management, Washington D.C.,.,Sept. 26, 2018.

[7] 15 U.S. Code § 80a–6(c).

[8] *See* Section 24(f) and Rule 24(f); 17 CFR 270.24f-2, requiring annual filing of Form 24(f) identifying amount redeemed and sold to be reported each year. *Compare,* iShares Trust Form 24F-2 Annual Notice of Securities Sold Pursuant to Rule 24F-2 dated July 25, 2017
https://www.sec.gov/Archives/edgar/data/1100663/000119312516656596/d232465d24f2nt.htm

[9] *See* 17 CFR 270.8b-16(a); 17 CFR 230.497(b).

These prospectuses must be available to any investor, and the SEC encourages every investor to carefully read the funds prospectus:

> Before investing in an ETF, you should read both its summary prospectus and its full prospectus, which provide detailed information on the ETF's investment objective, principal investment strategies, risks, costs, and historical performance (if any). The SEC's EDGAR system, as well as Internet search engines, can help you locate a specific ETF prospectus. You can also find prospectuses on the websites of the financial firms that sponsor a particular ETF, as well as through your broker.[10]

Unlike their mutual funds ---which have only one level of trading activity directly with the retail investor---the SEC has allowed ETFs to sell only to Authorized Participants ("AP") who then trade the ETF securities on exchanges with the intended investors.[11]

In granting ETFs exemptions under the Investment Company Act of 1940, the SEC has never explicitly exempted ETFs nor their sponsors from liability to investors who purchase their ETFs in the secondary market. Doing so was neither intended nor within the Commission's authority. Doing so would make the Commissions disclosure scheme meaningless.

Nor has the SEC implicity exempted ETFs from liability to retail investors. While ambiguous at best, the SEC has stated that because ETFs are distributed in a continuous manner, like mutual funds, broker-dealers that sell these securities are thereby constantly participating in the "distribution" of a new issue.[12] While this implies that such broker dealers may liable for failure to deliver a prospectus---which practice wildly varies--- it says nothing about liability of the ETF sponsor or provider for untrue statements or material omissions in the registration statement or prospectus.

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[10] *See* 15 U.S.C.A. § 80a-24; 15 U.S. Code § 77e (requirement that of delivery or prospectus); Exchange – Traded Funds(ETFs) https://www.investor.gov/introduction-investing/basics/investment-products/exchange-traded-funds-etfs

[11] A good graphical overview of the differences and process can be found at Flexshares, How ETFs work. https://www.flexshares.com/education/what-are-etfs/how-do-etfs-work

[12] SEC Release Release No. 34-75165; File No. S7-11-15 at 18. https://www.sec.gov/rules/other/2015/34-75165.pdf

BLACKROCK'S POSITION THAT THE SEC HAS EXEMPTED ETF PROVIDERS FROM DISCLOSURE LIABILITY TO RETAIL INVESTORS

BlackRock is the world's largest issuer of ETFs, and the biggest beneficiary of past exemptive orders and those likely the biggest beneficiary of the proposed new rule 6c-11. BlackRock has taken the position in court --- with full knowledge of the SEC[13]--- that ETFs are exempt from disclosure liability under Sections 11 and 12 of the Securities Act of 1933. BlackRock asserts that the exemptions which allow ETF shares to be traded on stock exchanges makes it impossible to trace ETF securities to any particular registration statement or prospectus. Hence, BlackRock argues the SEC *de facto* granted BlackRock immunity from disclosure liability.

In *Jensen, et al. v. iShares Trust, et al.,* (Superior Ct. of Calif., San Francisco, Case No. CGC 16-55257), BlackRock took the position that, because ETFs are traded on the secondary market, and not sold directly like the mutual, investor shares cannot be traced to any particular registration statement or prospectus. Accordingly, BlackRock took the position that it could not be held liable to retail investors for a false prospectus registration statement or prospectus. BlackRock's trial brief and the Court's opinion adopting BlackRock's argument, are attached.

BlackRock's position, and now the only court opinion on the subject, is not consistent with the purpose, intent and language of the ICA. BlackRock's position is also contrary to the SEC's own rulemaking concerning prospectus disclosure by ETFs. *See* Investment Company Act Release No. 28584, Enhanced Disclosure and New Prospectus Delivery Option for Registered Open–End Management Investment Companies (Jan. 13, 2009)[14] ("These amendments are intended to result in the disclosure of more useful information to investors who purchase shares of exchange-traded funds on national securities exchanges."); Investment Company Act Release No. 28193 (Mar.11,2008) [73 FR 14618 (Mar. 18, 2008)][15] (" [I]ndividual shares [of ETFs] can be bought and sold in

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[13] The author, in representing retail investors, has communicated with Division staff attorneys and has previously written a letter to the SEC Chairman copying all Commissioners concerning this ambiquity with no response.

[14] Investment Company Act Release No. 28584, Enhanced Disclosure and New Prospectus Delivery Option for Registered Open–End Management Investment Companies (Jan. 13, 2009)14 https://www.sec.gov/rules/final/2009/33-8998.pdf

[15] Investment Company Act Release No. 28193 (Mar.11,2008) [73 FR 14618 (Mar. 18, 2008)] ("ETF Proposing Release") https://www.sec.gov/rules/proposed/2008/33-8901.pdf

the secondary market through a broker-dealer"…"If adopted, broker-dealers selling ETF shares could deliver a summary prospectus in secondary market transactions.").

The SEC's authority requires any exemption be found to be "necessary or appropriate in the public interest *and* consistent with the protection of investors and the purposes fairly intended by the policy and provisions of" the ICA.[16] The "national public interest and the interest of investors [is] adversely affected—when investors purchase… securities issued by investment ***companies without adequate, accurate, and explicit information, fairly presented, concerning the character of such securities***…"[17] Relief from disclosure liability under the Act is contrary to that stated policy.

The SEC only briefly attempted to clarify an ETF's liability under Section 11 and 12(a)(2) in an iShares (BlackRock's predecessor) initial exemption order in In re iShares, Inc., Release No. 25623 (2002) where it stated:

> IT IS ORDERED, under section 6(c) of the Act, that the requested exemption from section 24(d) of the Act is granted, effective immediately, subject to the conditions contained in the application, as amended.
>
> The exemption from section 24(d) of the Act does not affect a purchaser's rights under the civil liability and anti-fraud provisions of the Securities Act. Thus, rights under section 11 and section 12(a)(2) of the Securities Act *extend to all purchasers who can trace their securities to a registration statement filed with the Commission*, whether or not they were delivered a prospectus in connection with their purchase.

But BlackRock takes the position that, after a fund exists for one year and files a new annual registration statement, ***no investor*** trading on an exchange (100% of the intended investors of ETFs) ***can trace*** their shares to any registration statement or prospectus.

Unaddressed, BlackRock's position, the *Jensen* court's opinion, and others which may follow, stand to eviscerate the SEC's disclosure scheme, eliminate any incentive of any ETF sponsor or issuer to comply, threatens the safe retirement of millions of

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[16] 15 U.S. Code § 80a–6(c).

[17] 15 U.S. Code § 80a-1(b)

investors, and bar investors of any remedy for an ETF's disclosure violations under the proposed rules.

THE PROPOSED ORDER SHOULD REQUIRE DISCLOSURE OF MATERIAL DISCOUNT SPREADS THAT ARE OBSCURED BY USING PRICING ONLY AT THE CLOSE OF THE DAY

The Commission should also revise the proposed order to require ETF's to disclose truly meaningful discount spreads from the ETF's net asset value ("NAV"). Discount spreads in excess of 60, 80 and 90 percent have occurred in times of unusual (but reoccurring) volatility or lack of liquidity, but would remain hidden under the proposed rule.

As the Commission is well aware, the arbitrage mechanism behind ETF's has broken down in times of volatility, causing hundreds of millions of dollars in damages to ETF investors who have traded with open or stop loss orders near the open or close of the trading day.[18] During periods of extreme volatility, discount spreads have grown to 80% or more because of a lack of liquidity.

For example, on May 6, 2010, numerous ETFs traded 60% lower than the value of their underlying assets. DVY plunged 63%. iShares. iShares IWF virtually disappeared plunging to $0.01. iShares IVW plunged to $0.10. iShares IWR lost 99% plunging to $0.13. iShares IJH plunged 84%. iShares IJR plunged over 50%.[19] In 2010, after the May 6, 2010 Flash Crash, BlackRock wrote to the SEC that it expected "Mini-Flash" crashes to occur again, and therefore ETF investors needed education on the use of market and stop-loss orders. BlackRock concluded that ETF investors did not understand the risks of using stop-loss orders and market orders. BlackRock also wrote that such common orders for trading ETFs contributed to trade executions occurring at irrational levels, that they did not provide investors who submit such orders with the benefits they are seeking, and that the SEC should require stop-loss orders to specify a limit price.[20]

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[18] "*Best Practices for ETF Trading: Seven Rules of the road*. Vanguard, https://pressroom.vanguard.com/nonindexed/Best_Practices_for_ETF_trading-Seven_Rules_of_the_road.pdf Are Stop-loss Orders Good When Trading ETFs? Investopedia, https://www.investopedia.com/articles/active-trading/121815/are-stoploss-orders-and-etfs-good-idea.asp

[19] Michael Johnston, *Ten Shocking Charts From the "Flash Crash*", May 7, 2010, ETF Database, http://etfdb.com/20 I 0/ten-shocking-etf-charts-from-the-flash-crash/

[20] June 2, 2010 Letter to Elizabeth Murphy, Secretary, SEC from Ira Shapiro, Managing Director, BlackRock Inc., https://www.sec.gov/comments/sr-nysearca-2010-41/nysearca201041-6.pdf ; see also, Revisiting the Flash

Then, on Monday August 24, 2015, BlackRock ETF investors who had placed market orders or protective stop-loss orders prior to or at the opening of the markets were slammed with drastic losses when 1 9. 2% of all ETFs experienced price declines of more than 20% (compared to only 4.7% of corporate securities). For example, BlackRock's iShares Select Dividend ETF ("DVY") dropped more than 35% by 9:42 a.m. EST while the underlying investments within the fund only dropped 2-4%, a disengagement of over 30%. BlackRock iShares Core S&P 500 ("IVV") similarly traded at a substantial discount to its NAV until 9:43 a.m. BlackRock's iShares S&P 500 Growth ETF ("IVW") dropped to a low near $87 compared to a peak price of $ 111 . BlackRock's iShares Morningstar Mid-Cap ETF ("JKG") dropped over 60% from $105 to $43 in the opening minutes.

The proposed disclosure of premium and discount spreads does not capture these break downs and the enormous spreads that follow. Investors should be warned of the potential spreads which have occurred.

Investors should also be informed on how to avoid such risk through proper trade orders, as is widely known to the ETF sponsors. However, ETF sponsors have been reluctant to warn of such risks in their offering documents. Clearly they fear highlighting the fact the ETFs have different dangers than regular stock and that normal trading order types should not be used, will drive potential ETF investors away from ETFs and back to mutual funds or stocks where the liquidity risk is less. No ETF currently warns of the risks and even investment advisors remain ignorant.[21]

CONCLUSION

For the reasons stated above, the new proposed global rules for providing ETF exemptions, which would allow funds formed under the ICA to have their shares trade in secondary markets, should confirm that neither the new rules nor past exemptions eliminate the liability of ETFs (and associated parties) under Sections 11 and 12 of the Securities Act of 1933 to investors in the secondary market under the proposed global exemptive rule. Specifically, they should clarify that the an investor in the secondary market can trace the shares to the most recent original or amended registration statement and prospectus filed or issued prior the purchase of those shares.

In addition, the new rule should require disclosure of the gross discount spreads that have reoccurred during times of high volatility or lack of liquidity. The rules should

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Crash, BlackRock ViewPoint, May 2011, https://www.blackrock.com/corporate/literature/whitepaper/viewpoint-revisiting-the-flash-crash-may-2011.pdf

[21] At best, Vanguard has a separate webpage devoted to ETF "trading strategies." See footnote 18.

also require the disclosure of the threat of loss from using open or stop loss orders – a threat that does not exist in equal proportion for regular stocks.

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We thank the Commission for providing us the opportunity to comment on the Release, and are eager to assist the Commission in any we can to ensure that the rule proposal will benefit ETF investors. Please contact the undersigned if you have any questions or comments regarding our views or our experience from representing investors in ETFs.

Sincerely,

HAGENS BERMAN SOBOL SHAPIRO LLP

Reed R. Kathrein
Partner

RRK:ll

RAOUL D. KENNEDY (SB #40892)
raoul.kennedy@skadden.com
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
525 University Avenue, Suite 1400
Palo Alto, California 94301
Telephone: (650) 470-4500
Facsimile: (650) 470-4570

SETH M. SCHWARTZ (*pro hac vice)*
seth.schwartz@skadden.com
JEREMY A. BERMAN (*pro hac vice)*
jeremy.berman@skadden.com
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
4 Times Square
New York, NY 10036
Telephone: (212) 735-3000
Facsimile: (917) 777-2710

EBEN P. COLBY (*pro hac vice)*
eben.colby@skadden.com
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
500 Boylston Street
Boston, Massachusetts 02116
Telephone: (617) 573-4800
Facsimile: (617) 573-4822

Attorneys for Defendants
iShares Trust, BlackRock, Inc., BlackRock Fund Advisors, BlackRock Investments, LLC, Manish Mehta, Mark Wiedman, Robert S. Kapito and Jack Gee

[Additional Counsel on Signature Page]

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO

GARTH JENSEN, PHILIP STEELE, SETH HARDY, RAY MOYLAN, KENNETH POWAGA, CYNTHIA POWAGA, ROGER FOSTER and ROBERT KACHELEK, INDIVIDUALLY and ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, Plaintiffs, v. iSHARES TRUST, et al., Defendants.	CASE NO.: CGC 16-552567 **DEFENDANTS' TRIAL BRIEF** Date: September 11, 2017 Time: 10:00 am Dept.: 304 Action Filed: June 16, 2016

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Pursuant to Case Management Order No. 2, defendants respectfully submit this brief in advance of the bench trial scheduled for September 11, 2017. The issue to be tried is: Do plaintiffs have standing to maintain the claims alleged in their First Amended Complaint ("FAC" or "Complaint") under Sections 11 and 15 of the Securities Act of 1933 (the "1933 Act")?[1] As shown below, the answer to this question is "no."

I. SUMMARY OF ARGUMENT

Plaintiffs purchased shares of certain iShares exchange traded funds ("ETFs" or "funds") in the secondary market on a national exchange. As secondary market purchasers, plaintiffs must satisfy a threshold standing requirement applicable to their claims. Specifically, plaintiffs have the burden of tracing their ETF shares to registration statements that were materially false and misleading when those shares were first issued for sale in the primary market.

As the evidence at trial will show, plaintiffs' shares represent a small fraction of the hundreds of millions of ETF shares issued in the aggregate over the years, most of which remain outstanding. The evidence will further establish that those shares are fungible and cannot be traced by plaintiffs to any particular registration statement or amendment thereto, much less one that was materially false and misleading when the shares were first sold in the primary market. Consequently, the evidence at trial and applicable law will compel the conclusion that this action should be dismissed on the ground that plaintiffs lack standing to maintain it.

[1] By Order entered on April 27, 2017, this Court partially granted defendants' motion for judgment on the pleadings to the extent of dismissing plaintiffs' claim under Section 12(a)(2) of the 1933 Act.

II. THE RELEVANT FACTS[2]

A. The Parties

Plaintiffs purchased and sold shares in ETFs managed by defendant BlackRock Fund Advisors (collectively, "iShares ETFs" or "Funds").[3] (FAC ¶¶ 28-35.) Those securities transactions were all executed in the secondary market on the New York Stock Exchange Arca. (*See* FAC ¶¶ 36, 59.)

Defendant iShares Trust is an investment company registered with the U.S. Securities and Exchange Commission (the "SEC"). It issues multiple series of common stock, with each series bearing the name of a different iShares ETF, and each ETF comprising an investment portfolio of mainly equity securities ("Portfolio Securities") tracking specific stock indices. By way of example, iShares Trust issues the shares of iShares Select Dividend ETF (the "DVY Fund"), an iShares ETF in which four of the plaintiffs invested. (*See* FAC ¶¶ 28-31.) Those shares represent interests in the DVY Fund and its underlying Portfolio Securities which, in this example, are primarily comprised of stocks that are components of the Dow Jones U.S. Select Dividend Index.

B. The Issuance of Funds Shares by iShares Trust

iShares Trust continuously issues and redeems ETF shares. It issues and sells new shares of each series in primary market transactions pursuant to registration statements or amended registration statements filed with the SEC.[4] It sells those shares only in large blocks, called "Creation Units," and only to certain broker-dealers ("Authorized Participants"), typically in

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[2] To the extent not previously admitted by plaintiffs in their First Amended Complaint, the facts set forth herein will be established through the evidence defendants intend to introduce at trial.

[3] The iShares ETFs are: iShares Core S&P Small-Cap ETF (IJR), iShares Russell 1000 Growth ETF (IWF), iShares Core S&P 500 ETF (IVV), iShares Russell Mid-Cap Growth ETF (IWP), iShares Russell Mid-Cap ETF (IWR), iShares Russell Mid-Cap Value ETF (IWS), iShares Select Dividend Fund ETF (DVY), iShares Morningstar Mid-Cap ETF (JKG), iShares Morningstar Large-Cap ETF (JKD), iShares U.S. Aerospace & Defense ETF (ITA) and iShares U.S. Preferred Stock ETF (PFF). (FAC ¶¶ 28-35.)

[4] Exhibit 1 hereto is a chart showing (a) the effective date of each iShares ETF registration statement and amended registration statement through August 12, 2015, and (b) the dates on which ETF shares were issued pursuant to each of those registration statements.

multiples of 50,000 shares. iShares Trust does not offer or sell Creation Units of any ETF directly to retail investors, such as plaintiffs here.

To pay for the ETF Creation Units they purchase, Authorized Participants transfer to iShares Trust consideration in the form of cash and/or a basket of securities generally mirroring the Portfolio Securities (the "Deposit Securities") in the ETF's investment portfolio. The value of that consideration equals the net asset value ("NAV") of the ETF Creation Unit(s) sold to Authorized Participants.

Authorized Participants may hold Creation Units for their own account, but they also may sell the shares comprising those Units into the secondary market. Retail investors are then able to purchase ETF shares on a stock exchange through a broker-dealer. In contrast to Creation Units, individual ETF shares purchased and sold in the secondary market are traded at prevailing market prices based on supply and demand for the shares. Those market prices may be less than, equal to or greater than the NAV of the shares. (FAC ¶¶ 57, 64.)

An Authorized Participant also may redeem Creation Units of ETF shares. To do so, the Authorized Participant may purchase a Creation Unit-size block of ETF shares in the secondary market and have the block redeemed by the ETF in exchange for cash and/or Portfolio Securities equal to the NAV of the Creation Unit.

The creation and redemption activity between iShares Trust and Authorized Participants is part of the primary or new issue market and is "analogous to an operating firm issuing new shares to raise additional capital for investment or retiring shares by buying them back."[5] On occasion, this activity may be initiated by Authorized Participants to capture arbitrage opportunities that may arise when there are disparities between the market prices and NAVs of ETF shares. For example, when the market price of ETF shares exceeds their NAV, *i.e.*, the shares trade at a premium to NAV, Authorized Participants may purchase newly issued Creation Units at NAV and sell them to

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[5] Rochelle Antoniewicz & Jane Heinrichs, Investment Company Institute, "Understanding Exchange-Traded Funds: How ETFs Work," at 14 (September 2014), www.ici.org/pdf/per20-05.pdf.

retail investors at market prices above NAV. Conversely, when ETF shares trade in the secondary market at a discount to NAV, ETFs may redeem Creation Units from Authorized Participants at NAV, enabling Authorized Participants to receive a premium over the prevailing market price. Under normal market conditions, these arbitrage transactions operate to minimize the trading of ETF shares at a premium or discount to NAV.

C. Transfers of ETF Shares

Both primary market transactions in Creation Units and secondary market transactions in ETF shares are executed without the physical transfer of share certificates. All Creation Units and ETF shares are held in fungible bulk by The Depository Trust Company ("DTC"), and registered in the name of its nominee, Cede & Co., the sole record owner of those shares. Through use of an electronic book-entry system, DTC transfers ETF shares by debiting and crediting the accounts of participating members of DTC, the so-called DTC Participants, who typically are broker-dealers, banks and other institutions. The transfers occur without any change in record ownership of the shares or the physical transfer of share certificates. Moreover, because all ETF shares are held in fungible bulk in DTC's vault, there is no record linking any identifiable individual shares to the Creation Units from which they originated, or to the retail investors who buy and sell ETF shares in the secondary market.

D. The Flash Crashes

A so-called flash crash occurred on the New York Stock Exchange on May 6, 2010 (the "2010 flash crash"). On that date, within approximately 30 minutes, the market prices of publicly traded securities declined precipitously, eventually returning to their pre-crash price levels by the end of the trading day. (FAC ¶ 70.) Among the sales orders pending at the time were stop loss orders placed on behalf of retail ETF investors. A stop loss order is a standing instruction by an investor to place an order to sell securities if the market drops below a specified "stop price." The 2010 flash crash caused market prices of ETF shares to decline rapidly which, in turn, automatically converted outstanding stop loss orders on those shares to market orders. Given the precipitous market drop, ETF shareholders with pending stop loss orders ultimately executed sell orders below their designated stop prices and the NAV of the shares. (*Id.* ¶ 76.)

A second flash crash occurred approximately five years later on August 24, 2015. Plaintiffs had stop loss orders pending on that date, which triggered the sale of their Fund shares at market prices below both their designated stop prices and the Funds' NAVs. (FAC ¶¶ 21, 28-35.)

E. **<u>The 2008 Credit Crisis</u>**

In their Complaint, plaintiffs allege that a "flash crash" occurred in September 2008, when stop loss orders purportedly "increased the volume of sell orders of ETFs, which as liquidity dried up, exacerbated price declines disproportionately in ETFs versus the ETF's [sic] underlying assets." (FAC ¶ 13.) In reality, there was no flash crash or any other event in 2008 that resembled the flash crashes of 2010 and 2015.

To be sure, Lehman Brothers filed for bankruptcy in September 2008, a development that triggered the global financial crisis known as the Great Recession. As a result, among other things, the U.S. corporate bond market became highly illiquid as investors sought safety in other, more liquid investments. In this "flight to quality," investors attempted to reduce their exposure to corporate bonds, but found few, if any, buyers for those securities. Certain investors therefore sought to hedge their exposure by selling shares of relatively liquid fixed income ETFs that held underlying investments in less liquid bonds. The resulting sales pressure depressed the market prices of those ETF shares, although their NAVs remained relatively stable given the paucity of new transactions in the underlying bonds. Consequently, in that timeframe, the shares of certain fixed income ETFs traded in the secondary market at discounts to NAV in the range of approximately 5-8 percent. (*See* FAC ¶¶ 9, 17.) By January 2009, following government intervention, the market prices of those ETF shares recovered and even commanded premiums to NAV.

In contrast, the 2010 Flash Crash principally affected only stock ETFs, lasted about 30 minutes on a single trading day, and caused discounts to NAV of more than 60 percent, with market prices rebounding to pre-crash levels later the same day. Nothing like this occurred in 2008. The Great Recession was an entirely different market event that gave no warning of the 2010 Flash Crash to come.

F. Allegations of the FAC

Plaintiffs' claims challenge the accuracy of disclosures made in iShares ETF registration statements issued between August 23, 2012 and August 24, 2015 (collectively, the "iShares Registration Statements"). (*See* FAC ¶¶ 88-89.) In that connection, the FAC alleges in essence that the iShares Registration Statements violated Section 11 of the 1933 Act by not disclosing the purported risks of using stop loss orders to sell ETF shares during a flash crash, "the known actual lack of liquidity in certain situations like the crashes of 2008 and 2010, and BlackRock's belief and expectation that it will happen again." (*Id.* ¶ 102; *see also id.* ¶¶ 101, 104, 107, 109.)

III. PLAINTIFFS CANNOT TRACE AND THEREFORE LACK STANDING TO SUE UNDER SECTION 11 OF THE 1933 ACT

Section 11 of the 1933 Act "provides a cause of action to any person who buys a security *issued* under a materially false or misleading registration statement." *See In re Century Aluminum Co. Sec. Litig.*, 729 F.3d 1104, 1106 (9th Cir. 2013) (emphasis added). A plaintiff need not have purchased her shares in an initial public offering to have standing to bring the claim, but secondary market purchasers have standing only if "they can trace their shares back to the relevant offering." *Id. See also Krim v. pcOrder.com, Inc.*, 402 F.3d 489, 498-99 (5th Cir. 2005); *Scott v. ZST Dig. Networks, Inc.*, 896 F. Supp. 2d 877, 887-88 (C.D. Cal. 2012).

When tracing is required, as it is in this case, "[t]he burden of tracing shares to a particular offering rests with plaintiffs." *Guenther v. Cooper Life Sci., Inc.*, 759 F. Supp. 1437, 1439 (N.D. Cal. 1990); *accord In re Puda Coal Sec. Inc. Litig.*, 11 Civ. 2598 (KEF), 2013 U.S. Dist. LEXIS 142081, at *18 (S.D.N.Y. Oct. 1, 2013), *vacated in part on other grounds,* 2014 U.S. Dist. LEXIS 49718 (S.D.N.Y. Apr. 7, 2014); *Abbey v. Comput. Memories, Inc.*, 634 F. Supp. 870, 876 n.5 (N.D. Cal. 1986). And where, as here, "a company has issued shares under more than one registration statement, the plaintiff must prove that her shares *were issued* under the allegedly false or misleading registration statement, rather than some other registration statement." *Century Aluminum*, 729 F.3d at 1106. (emphasis added).

A. Plaintiffs' Shares Are Not Traceable

As alleged in the FAC, plaintiffs purchased all of their ETF shares in secondary market transactions between 2007 and 2015, with most purchases occurring in 2014 and 2015, as illustrated in the chart annexed as Exhibit 2. (*See* FAC ¶¶ 59, 61, 63.) Long before plaintiffs executed those transactions, iShares Trust continuously issued and sold Creation Units directly to Authorized Participants. Indeed, between 2000 and May 6, 2010, the date of the 2010 Flash Crash, iShares ETFs collectively issued and sold Creation Units comprised of hundreds of millions of ETF shares in the aggregate ("Old Shares") to Authorized Participants in a series of primary market transactions pursuant to registration statements and amended registration statements filed at least annually with the SEC.[6] After May 6, 2010, millions of additional shares in the form of Creation Units (the "New Shares") were issued and sold directly to Authorized Participants. They were sold in primary market transactions pursuant to amended registration statements that were effective after that date. Under the circumstances, to establish standing under Section 11, plaintiffs must demonstrate that their shares are New Shares traceable to a false and misleading registration statement effective after May 6, 2010.[7] *Century Aluminum*, 729 F.3d at 1106. To that end, plaintiffs must "trace the chain of title for their shares back to the offering[s] [made after May 6, 2010], starting with their own purchases and ending with someone [an Authorized Participant] who bought directly in [those] offering[s]." *Id.* at 1106-07. Plaintiffs, however, cannot make this showing.

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[6] Defendants have separately submitted to this Court an Excel spreadsheet showing all initial issuances of ETF shares, the daily number of shares outstanding and the daily trading volume of the shares of each iShares ETF through August 12, 2015, the date of the last purchase of shares by any plaintiff. Because the spreadsheet contains a large volume of data, defendants have submitted it to the Court on a USB flash drive.

[7] Plaintiffs must trace to registration statements issued after May 6, 2010 given that (a) they have not alleged that iShares ETF registration statements issued before August 2012 were materially false and misleading (*see* FAC ¶¶ 88-89), and (b) as demonstrated *infra*, under plaintiffs' theory of the case, as a matter of law, no registration statement used to sell ETF shares before May 6, 2010 could be deemed materially false and misleading.

As illustrated by the chart attached as Exhibit 3, millions of Old Shares remained outstanding on each date of each plaintiff's purchase of ETF shares.[8] Because all those shares were held in fungible bulk at DTC, plaintiffs cannot trace *their* shares to any particular registration statement, let alone a registration statement used to issue New Shares after May 6, 2010. As explained by the Ninth Circuit Court of Appeals in language equally applicable here:

> [Plaintiff] cannot trace its shares to an offering made under a materially false and misleading registration statement. The . . . shares owned by [plaintiff] were part of a fungible mass of . . . shares held by a [DTC Participant]. . . . *Such situation effectively prevented any chain of title from ever being built because shares from several offerings were entirely indistinguishable*. Because [plaintiff] could not demonstrate that its shares originated from the relevant registration statement, it lacked standing to pursue its Section 11 claim.

Hemmer Grp. v. Sw. Water Co., 663 F. App'x 496, 498 (9th Cir. 2016) (emphasis added); *accord Puda Coal*, 2013 U.S. Dist. LEXIS 142081, at *24 (the "steps necessarily involving the [DTC] are fatal to traceability"); *Abbey*, 634 F. Supp. at 872-75 (plaintiff could not establish tracing where all CMI shares he purchased "were a part of the common pool of CMI shares held in DTC's vault on the day of the transfer").

B. <u>There Is No Automatic Tracing</u>

In prior briefing on defendants' motion for judgment on the pleadings, plaintiffs relied on Section 24(e) of the Investment Company Act of 1940 (the "ICA") to argue that the tracing requirements under Section 11 of the 1933 Act are not applicable to registered offerings of ETF shares. According to plaintiffs, the tracing requirements are relaxed for ETF shares because Section 24(e) purportedly makes "[e]very sale of an ETF [share] . . . traceable, by law, to the most recent pre-sale amended registration statement." The statute, however, does no such thing.

Section 24(e) of the ICA provides in pertinent part as follows:

> For the purposes of Section 11 of the [1933 Act], the effective date of the latest amendment filed shall be deemed the effective date of the registration statement with respect to securities sold after such amendment shall have become effective. For purposes of Section 13 of the [1933 Act], no such security shall be deemed to have been bona

[8] The backup for the data in Exhibit 3 is included in the Excel spreadsheet referenced in footnote 6, *supra*.

> fide offered to the public prior to the effective date of the latest amendment filed pursuant to this subsection.

15 U.S.C. § 80a-24(e). Contrary to plaintiffs' contention, this provision does not authorize automatic tracing to the amended registration statement last filed with the SEC, without regard to when plaintiffs' shares were originally issued. *See Guenther*, 759 F. Supp. at 1440 (rejecting argument that an "otherwise non-defective 1985 registration statement is rendered retroactively blemished by [a] defective 1986 amendment"). Indeed, Section 24(e) of the ICA does nothing to alter the tracing requirements applicable to all claims under Section 11 of the 1933 Act.

Far from being the game-changer plaintiffs have attempted to portray, Section 24(e) is "merely . . . a restatement of existing Section 11 law." A. Jacobs, 5 Disclosure and Remedies Under the Securities Laws § 3:72 (Apr. 2017) ("*Securities Laws*"); *accord Morse v. Peat, Marwick, Mitchell & Co.*, 445 F. Supp. 619, 623 (S.D.N.Y. 1977) (Congress viewed Section 24(e) as "simply a means of maintaining the status quo with respect to the liability of investment companies under § 11 of the Securities Act"). Thus, securities "sold" or "offered" within the meaning of Section 24(e) are "(1) securities sold pursuant to the registration statement after the effective date of the post effective amendment, *not* (2) securities sold in the open market after such effective date[.]" 5 *Securities Laws* § 3:72 (emphasis added). Section 24(e), therefore, does not apply to secondary market transactions. Consequently, Section 24(e) does not alter the requirement under Section 11 that plaintiffs (a) trace their ETF shares to the registration statement(s) in effect when the shares were first sold to Authorized Participants in primary market transactions, and (b) show that those registration statement(s) were materially false or misleading at the time of the initial sales. *See In re Countrywide Fin. Corp. Sec. Litig.*, 588 F. Supp. 2d 1132, 1166 (C.D. Cal. 2008); *Guenther*, 759 F. Supp. at 1440. As discussed above, plaintiffs cannot satisfy this requirement given that all outstanding iShares ETF shares are, and always have been, held in fungible bulk at DTC and cannot be traced to any specific registration statement. *See Hemmer*, 663 F. App'x at 498; *Puda Coal*, 2013 U.S. Dist. LEXIS 142081, at *24; *Abbey*, 634 F. Supp. at 872-75.

The foregoing requirement does not, as plaintiffs previously have argued, make tracing impossible for secondary market purchasers, such that "only [Authorized Participants] [may] trace their shares." The challenges of tracing secondary market purchases back to primary offerings are largely the same for the shares both of registered investment companies subject to Section 24(e) and other entities not subject to that statute. *See, e.g.*, *Century Aluminum*, 729 F.3d at 1106-07; *Countrywide*, 588 F. Supp. 2d at 1164-65. While "difficult to meet in some circumstances" – for investment company and non-investment company shares alike – "this tracing requirement is the condition Congress has imposed for granting access to the 'relaxed liability requirements' § 11 affords." *Century Aluminum,* 729 F.3d at 1107 (citations omitted).

C. **<u>Tracing Is Required Here</u>**

In prior proceedings in this action, this Court suggested that tracing may be unnecessary "[w]here all the potentially pertinent registration statements contain the same allegedly false or misleading language and each was at the time false and misleading." (4/27/17 Order at 5-6.) This scenario, as posited by the Court, does not exist here because plaintiffs have not challenged any registration statement disclosures made prior to the 2010 Flash Crash and, as a matter of law, none may be deemed materially false or misleading when made.

In their Complaint, plaintiffs are challenging registration statements that became effective *after* the 2010 Flash Crash, alleging that defendants should have disclosed certain risks that first emerged during the crash.[9] (FAC ¶¶ 88-89, 101, 102, 104, 107, 109.) Thus, to establish standing to sue, plaintiffs must trace their ETF shares to the registration statements covering Creation Units sold to Authorized Participants after May 6, 2010. Because plaintiffs cannot make that showing, they lack standing under Section 11.

Prior to May 6, 2010, defendants could not possibly have been required to disclose risks that had not yet materialized – namely, the risks of using stop loss orders in the event of a flash crash. Indeed, the "'securities laws do not require clairvoyance in the preparation of offering documents.'"

[9] As noted above, while plaintiffs have attempted to suggest that an earlier flash crash occurred in 2008, there was no such event at that time. (*See* page 5, *supra.*) But even if there had been a flash crash back then, plaintiffs still would lack standing because they cannot trace their own ETF shares to the registration(s) statements in effect at or after the time of the Lehman bankruptcy in 2008.

Lin v. Interactive Brokers Grp., Inc., 574 F. Supp. 2d 408, 421 (S.D.N.Y. 2008). Accordingly, to establish the existence of a disclosure duty under Section 11 of the 1933 Act, plaintiffs must demonstrate that "allegedly omitted facts *both* existed, *and* were known or knowable, at the time of the offering." *Id.* at 416 (emphasis added). And where, as here, the allegedly "adverse information is not known or knowable until after purchasers have made an irrevocable commitment to take shares, then there can be no duty to disclose the adverse information." *Id.* at 422; *accord Pehlivanian v. China Gerui Advanced Materials Grp., Ltd.*, 14 Civ. 9443 (ER) , 2017 WL 1192888, at *9 (S.D.N.Y. Mar. 29, 2017) (registration statements from 2009 to 2013 "could not be false or misleading as to conduct that did not even begin to take place until 2015"); *United Food & Commercial Workers Union v. Chesapeake Energy Corp.*, CIV-09-1114-D, 2013 WL 4494384, at *9 (W.D. Okl. Mar. 29, 2013) (to be actionable under Section 11, "'a statement or omission must have been misleading [when] made; liability cannot be imposed on the basis of subsequent events'"), *aff'd*, 774 F.3d 1229 (10th Cir. 2014); *Clinton Police & Ret. Sys. v. KKR Fin. Holdings*, 08 Civ. 7062 (PAC), 2010 WL 4642554, at *11 (S.D.N.Y. Nov. 17, 2010) (the "truth of a statement made in the registration statement "'is adjudged by the facts as they existed when the registration statement became effective'"); *Panther Partners, Inc. v. Ikanos Commc'ns, Inc.*, 538 F. Supp. 2d 662, 672 (S.D.N.Y. 2008) ("[i]t is obvious, of course, that a defect problem which does not emerge until January 2006 (at the earliest) cannot be disclosed in September 2005").

The 2010 Flash Crash was an extraordinary, unprecedented market event, neither known nor knowable by defendants prior to May 6, 2010. Thus, even if there were any merit to plaintiffs' claim that defendants had a duty to disclose the risks of possible future flash crashes *after* May 6, 2010 – a claim defendants vigorously dispute – as a matter of law, defendants had no such duty before that date, when the risks of stop loss orders in a flash crash had not yet materialized. Accordingly, to establish standing in this action, plaintiffs must trace the shares to the registration statements used to issue New Shares after May 6, 2010. Because plaintiffs cannot do so, the action should be dismissed for lack of standing.

IV. PLAINTIFFS FAIL TO STATE A CLAIM UNDER SECTION 15 OF THE 1933 ACT

Section 15 of the 1933 Act imposes liability on “control persons,” those who control defendants held liable for violating Section 11 of the statute. *See* 15 U.S.C. § 77o(a). Where, as here, plaintiffs have failed to state a claim under Section 11, they have no control person claim under Section 15. *See In re Morgan Stanley Info. Fund Sec. Litig.*, 592 F.3d 347, 366 (2d Cir. 2010); *Stichting Pensioenfonds ABP v. Countrywide Fin. Corp.*, 802 F. Supp. 2d 1125, 1131 (C.D. Cal. 2011).

CONCLUSION

For all of the foregoing reasons, and as will be established at trial, defendants respectfully submit that this Court should enter judgment in favor of all defendants dismissing the plaintiffs' First Amended Complaint with prejudice.

DATED: August 22, 2017

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP

By: /s/ Raoul D. Kennedy
RAOUL D. KENNEDY
Attorneys for Defendants
iShares Trust, BlackRock, Inc., BlackRock Fund Advisors, BlackRock Investments, LLC, Manish Mehta, Mark Wiedman, Robert S. Kapito and Jack Gee

STROOCK & STROOCK & LAVAN LLP

By: /s/ John R. Loftus
JOHN R. LOFTUS
Attorneys for Defendants
John Martinez, Cecilia H. Herbert, Charles A. Hurty, John Kerrigan, Robert H. Silver, Madhav V. Rajan and George G.C. Parker

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN FRANCISCO

GARTH JENSEN, ET AL.., Plaintiffs, vs. ISHARES TRUST, ET AL. Defendants.	Case No. CGC – 16- 552567 **Statement of Decision**

The parties in a September 11, 2017 bench trial presented the question whether plaintiffs have standing to pursue claims under §§ 11 and 15 of the Securities Act of 1933.[1]

Plaintiffs purchased shares of certain exchange traded funds ("ETFs" or "funds") in the secondary market on a national exchange. Plaintiffs claim that the funds were sold pursuant to unlawful registration statements or prospectuses due to a failure to disclose the lack of liquidity in situations such as the 'flash crashes' of 2008 and 2010.

Defendants argue that plaintiffs have standing only if they can trace their ETF shares back to shares that were originally sold pursuant to a materially false or misleading registration statement or prospectus. Plaintiffs contend that they have standing to sue if they purchased their ETF shares after defendants issued defective registration statements or prospectuses went into effect, regardless of what registration statements or prospectuses were in effect when the ETF shares were *first* sold.

[1] Trial was completed in less than a day, CRC 3.1590 (n), and no party requested a statement of decision triggering the processes of CRC 3.1590. Hence I simply issue this Statement.

There are no disagreements on the facts. It is clear that if defendants are right on the law, plaintiffs have no standing, and contrariwise if plaintiffs are right on the law, they do have standing. Plaintiffs cannot trace their shares back to the registration statements at issue in this case, as they agree; thus they have standing only if they need not trace their shares.

The statutes

"Section 11 of the Securities Act of 1933, 15 U.S.C. § 77k, provides a cause of action to any person who buys a security issued under a materially false or misleading registration statement." *In re Century Aluminum Co. Sec. Litig.*, 729 F.3d 1104, 1106 (9th Cir. 2013).[2]

15 U.S.C. § 77k(a) provides:

> 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 [certain persons.]
>
> 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.

15 U.S.C. § 77k(a).

15 U.S.C. § 77f(a) reads in part:

> A registration statement shall be deemed effective only as to the securities specified therein as proposed to be offered.

15 U.S.C. § 77f(a).

[2] Section 15 is a control person liability statute that depends on an underlying violation of other sections, including § 11. *Stichting Pensioenfonds ABP v. Countrywide Fin. Corp.*, 802 F.Supp.2d 1125, 1131 (C.D. Cal. 2011). Standing for §15 is entirely a function of standing under § 11, and so I will not further refer to § 15.

The Investment Company Act of 1940 (the "ICA"), provides in part:

> For the purposes of section 11 of the Securities Act of 1933, as amended, **the effective date of the latest amendment filed shall be deemed the effective date of the registration statement with respect to securities sold after such amendment shall have become effective**. For the purposes of section 13 of the Securities Act of 1933, as amended, no such security shall be deemed to have been bona fide offered to the public prior to the effective date of the latest amendment filed pursuant to this subsection. ....

15 U.S.C. § 80a-24(e) (emphasis supplied).

Parties' Position On Tracing

Under the '33 Act plaintiffs must prove their shares were issued under the allegedly false or misleading registration statement, *Century Aluminum*, 729 F.3d at 1106. Under this 'tracing' requirement plaintiff shows he purchased the shares directly under the misleading registration statement, or, if the shares were purchased in a secondary market, by tracing the chain of title of the plaintiff's shares back to a purchase under the misleading registration statement. *Id.* Plaintiffs argue that there is no tracing requirement here because they invoke the ICA, 15 U.S.C. § 80a-24(e), with a standing requirement different from that under the '33 Act. The ICA provides: "For the purposes of section 11 of the Securities Act of 1933, as amended, the effective date of the latest amendment filed shall be deemed the effective date of the registration statement with respect to securities sold after such amendment shall have become effective." 15 U.S.C. § 80a-24(e). Plaintiffs read this language to mean that the latest amendment governs all securities sold after the amendment goes into effect, however and without regard to whom they are sold.

Defendants argue that while the ICA applies, it has no effect on'33 Act standing requirements: the ICA's § 80a-24(e) does not apply to securities sold on the *open* (or secondary) *market*, only to the *initial* sale to the those initially authorized, known as Authorized Participants, such as broker dealers. The sales to the public in secondary markets are not those described by the ICA, they contend.

Discussion

15 U.S.C. § 80a-24(e) reads, "For the purposes of section 11 of the Securities Act of 1933, as amended, the effective date of the latest amendment filed shall be deemed the effective date of the registration statement with respect to securities ***sold*** after such amendment shall have become effective" (emphasis supplied). The issue devolves to the meaning of the word "sold."[3] Defendants contend it refers to the initial sale, plaintiffs contend it refers to any sale on the secondary market. Defendants' reading is consistent with the holdings of the Second Circuit: "aftermarket purchasers who can trace their shares to an allegedly misleading registration statement have standing to sue under § 11 of the 1933 Act." *DeMaria v. Andersen*, 318 F.3d 170, 178 (2d Cir. 2003), *citing Barnes v. Osofsky*, 373 F.2d 269, 272 (2d Cir. 1967).

The '33 Act focuses on the initial public offering. *Gustafson v. Alloyd Co.*, 513 U.S. 561, 572 (1995). It controls the relationship between the registration statements made for that offering and the stock issued pursuant to it. *DeMaria*, 318 F.3d at 177. Section 11 imposes strict liability, that is, scienter is not an element. *Omnicare, Inc. v. Laborers Dist. Council Const. Indus. Pension Fund*, 135 S. Ct. 1318, 1323 (2015). To be sure, subsequent purchasers can sue, *Barnes*, 373 F.2d at 272, *Rosenzweig v. Azurix Corp.*, 332 F.3d 854, 873 (5th Cir. 2003), but that is only because their shares are those issued in the pertinent initial offering. This is the tracing

[3] "Sale" and "Sell" are defined terms. *See* 15 U.S.C. § 80a-2(a)(34). "Sold," however, uses the passive voice, arguably creating ambiguity.

requirement.[4] It is the subject of court opinions precisely because those in the secondary market can sue; it would be superfluous to discuss were plaintiffs original purchasers.

One can conceive of a different approach, which, instead of focusing on the link between the registration statement and the initial offering, looked rather to the impact of a registration statement on the entire market including the secondary market, and holding defendants liable not just for the securities issued pursuant to a *specified* registration statement but to *any* statement with some arguable impact on the total mix of information available to any of the purchasers. In such a case, we might provide standing to a purchaser to challenge the registration statement most proximate to his or her purchase. In such a situation, tracing would be pointless. But, as I say, that is not what '33 Act regulates.

The issue thus is whether the focus of the '33 Act was shifted by the 1954 passage of the ICA, as plaintiffs here contend, to include secondary market impact, obviating the tracing requirement. No case since 1954 has so held, and plaintiffs here have not made this out.

I assume plaintiffs are right that the ICA was designed to ensure there was "no departure" from the rules of liability imposed by the '33 Act (Plaintiffs' trial brief at 6), but this undermines, and does not support, their view. And it is entirely true that the ICA has the language "sold after such amendment", Trial Brief at 2, 8, but that beg the issues, set out above, as to *which* sale is meant: the initial one or, also, those in the secondary market. The legislative background and other evidence plaintiffs have offered does plainly show that secondary market purchasers were to be protected, but we knew that already from e.g., *Barnes* and *Rosenzweig*; this material does not tell us whether "sold" also refers to sales in the secondary market. If plaintiffs are right and there is no tracing requirement, and plaintiffs need only show they bought in the secondary

[4] *The Hemmer Grp. v. Sw. Water Co.*, 663 F. App'x 496, 497 (9th Cir. 2016), citing *In re Century Aluminum Co. Sec. Litig.*, 729 F.3d 1104, 1106 (9th Cir. 2013).

market after an infirm registration statement, then all securities, including those sold in an initial offering *pursuant to a perfectly innocent registration statement*, could be the subject of a § 11 suit if the securities ended up in the hands of someone—anyone—after a much later infirm registration statement. Plaintiffs do not demonstrate this was the legislative intent behind the ICA.

Therefore plaintiffs have no standing to bring their § 11 or dependent § 15 claims in this case.

If the parties agree that judgment should now be entered, defendants should prepare a form of order, provide plaintiffs 5 days to review it, and send the results to me. If they disagree that judgment should now be entered, they should promptly contact the court's clerk to arrange for a status conference.

Dated: September 18, 2017

Curtis E.A. Karnow
Judge Of The Superior Court

CERTIFICATE OF ELECTRONIC SERVICE
(CCP 1010.6(6) & CRC 2.260(g))

I, DANIAL LEMIRE, a Deputy Clerk of the Superior Court of the County of San Francisco, certify that I am not a party to the within action.

On SEP 18 2017, I electronically served THE ATTACHED DOCUMENT via File & ServeXpress on the recipients designated on the Transaction Receipt located on the File & ServeXpress website.

Dated: SEP 18 2017

T. Michael Yuen, Clerk

By: ______________________
DANIAL LEMIRE, Deputy Clerk