

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

11	AVI GOLD, individually and	)	Case No. CV 07-00931 DDP (JTLx)
12	on behalf of all others)	
12	similarly situated,	)	ORDER GRANTING MOTIONS TO DISMISS
13		)	WITH LEAVE TO AMEND
13	Plaintiff,)	
14	v.	)	[Motions filed on November 2,
14		)	2007]
15	BRAD A. MORRICE, TAJ S.	)	[Joinder filed by Defendant
16	BINDRA, ROBERT K. COLE,	)	William J. Popejoy on November
16	PATTI M. DODGE, NEW CENTURY	)	19, 2007]
17	FINANCIAL CORP.,)	
17		)	[Motion filed by Defendant KPMG
18	Defendants.	)	on November 20, 2007]
18	_____)	
19)	

20 This matter arises from the collapse of New Century Financial
21 Corporation in the wake of the subprime mortgage crisis, and
22 allegations of securities law violations that drastically reduced
23 the value of stock owned by shareholders. On September 14, 2007,
24 lead plaintiff New York State Teachers' Retirement System filed a
25 consolidated class action complaint. On November 2, 2007,
26 Defendants filed several separate motions to dismiss claims alleged
27 in the complaint. These motions are currently before the Court.

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1 After reviewing the papers submitted by the parties and
2 considering the arguments therein, the Court is able to rule on the
3 motions without oral argument. The Court dismisses Plaintiffs'
4 complaint with leave to amend.

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6 **I. BACKGROUND**

7 New Century Financial Corporation ("New Century") became one
8 of nation's largest mortgage finance companies by focusing on
9 subprime lending. (Compl. ¶ 2.) In June 2005 and August 2006, New
10 Century made offerings of preferred stock: Series A stock and
11 Series B stock respectively. In February 2007 and the months that
12 followed, New Century made several disclosures regarding errors in
13 its previously reported financial statements. After these
14 disclosures, New Century stock experienced a 97% decline in value,
15 and shareholders suffered significant losses.

16 Plaintiffs filed this lawsuit alleging securities violations
17 against various officer, director, underwriter, and auditor
18 Defendants in connection with the issuance of New Century's Series
19 A and Series B stock. Specifically, Plaintiffs allege that
20 Defendants made false or misleading statements in violation of
21 Section 11 and Section 12(a) of the Securities Act,¹ and securities
22 fraud against the Officer Defendants under Sections 10(b) and 20(a)
23 of the Exchange Act.

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¹ Plaintiffs also allege control liability claims predicated
on the Section 11 and Section 12(a) claims.

1 **II. DISCUSSION**

2 A. Legal Standard

3 Federal Rule of Civil Procedure 8(a) provides that a complaint
4 need only contain "(1) a short and plain statement of . . .
5 jurisdiction, . . . (2) a short and plain statement of the claim
6 showing that the pleader is entitled to relief, and (3) a demand
7 for judgment for the relief the pleader seeks. Under Federal Rule
8 of Civil Procedure 12(b)(6), a complaint must be dismissed when a
9 plaintiff's allegations fail to state a claim upon which relief can
10 be granted. In deciding motions to dismiss, a court may "generally
11 consider only allegations contained in the pleadings, exhibits
12 attached to the complaint, and matters properly subject to judicial
13 notice." Swartz v. KPMG LLP, 476 F.3d 756, 763 (9th Cir. 2007).

14 A court properly dismisses a complaint on a Rule 12(b)(6)
15 motion based upon the "lack of a cognizable legal theory" or "the
16 absence of sufficient facts alleged under the cognizable legal
17 theory." Baliesteri v. Pacifica Police Dept., 901 F.2d 696, 699
18 (9th Cir. 1990). Recently, in Bell Atlantic Corp. v. Twombly, 127
19 S. Ct. 1955 (2007), the Supreme Court emphasized that "a
20 plaintiff's obligation to provide the grounds of his entitlement to
21 relief requires more than labels and conclusions, and a formulaic
22 recitation of the elements of a cause of action will not do." Id.
23 at 1964-65 (internal quotation marks and alterations omitted).²

25 ²In doing so, the Supreme Court rejected a literal
26 interpretation of the longtime rule from Conley v. Gibson, 355 U.S.
27 41, 45-46 (1957), that "a complaint should not be dismissed for
28 failure to state claim unless it appears beyond doubt that the
plaintiff can prove no set of facts in support of his claim which
would entitle him to relief." See Twombly, 127 S. Ct. at 1969.

1 The Court made clear, however, that its holding did "not require
2 heightened fact pleading of specifics, but only enough facts to
3 state a claim to relief that is plausible on its face." Id. at
4 1974.³

5 When considering a 12(b)(6) motion to dismiss for failure to
6 state a claim, "all allegations of material fact are accepted as
7 true and should be construed in the light most favorable to the
8 plaintiff." Resnick v. Hayes, 213 F.3d 443, 447 (9th Cir. 2000).
9 Dismissal without leave to amend is appropriate only when the Court
10 is satisfied that the deficiencies in the complaint could not
11 possibly be cured by amendment. Jackson v. Carey, 353 F.3d 750,
12 758 (9th Cir. 2003) (citing Chang v. Chen, 80 F.3d 1293, 1296 (9th
13 Cir. 1996)).

14 B. Analysis

15 1. Claims Under Section 11 and 12(a) of the Securities 16 Act

17 Section 11 creates a private cause of action when a
18 registration statement "contain[s] an untrue statement of material
19 fact or omitted to state a material fact required to be stated
20 therein or necessary to make the statements therein not
21 misleading." 15 U.S.C. 77k(a).⁴ "The plaintiff in a § 11 claim

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23 ³ Twombly warns of the insufficiency of complaints filled with
24 "legal conclusion[s] couched as [] factual allegation[s]."
25 Twombly, 127 S. Ct. at 1965 (internal quotation marks omitted).
26 However, the Court does not read Twombly to fundamentally alter the
27 requirement of notice pleading, which is designed to "give the
28 defendant fair notice." See id. at 1964 (internal quotation marks
omitted).

⁴ Those against whom a plaintiff may bring a Section 11 claim
include "every person who signed the registration statement,"
"every person who was a director . . . of the issuer at the time of
(continued...)

1 must demonstrate (1) that the registration statement contained an
2 omission or misrepresentation, and (2) that the omission or
3 misrepresentation was material, that is, it would have misled a
4 reasonable investor about the nature of his or her investment." In
5 re Stac Elecs. Sec. Litig., 89 F.3d 1399, 1403-04 (9th Cir. 1996)
6 (citation and internal quotation marks omitted).

7 Section 12(a) creates a private cause of action, against
8 "[a]ny person who . . . offers or sells a security" when a
9 registration statement or oral communication "includes an untrue
10 statement of a material fact or omits to state a material fact
11 necessary in order to make the statements, in the light of the
12 circumstances under which they were made, not misleading. . . ."
13 15 U.S.C. § 771(a)(2). "To prevail under Section 12(a)(2) [of the
14 Act], a plaintiff must demonstrate (1) an offer or sale of a
15 security, (2) by the use of a means or instrumentality of
16 interstate commerce, (3) by means of a prospectus or oral
17 communication, (4) that includes an untrue statement of material
18 fact or omits to state a material fact that is necessary to make
19 the statements not misleading." Miller v. Thane Int'l, Inc., 508
20 F.3d 910, 916 (9th Cir. 2007). No scienter is required for
21 liability under either section 11 or 12(a). Id.; In re Daou
22 Systems, Inc., 411 F.3d 1006, 1027 (9th Cir. 2005).

23 Rule 8 requires that a complaint give "fair notice to
24 defendants of what plaintiff's claim is and the grounds upon which

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26 ⁴(...continued)
27 the filing of the part of the registration statement with respect
28 to which his liability is asserted," "any person . . . [who has]
prepared or certified any report or valuation which is used in
connection with the registration statement," and "every underwriter
with respect to such security." 15 U.S.C. 77k(a).

1 it rests." Dura Pharmaceuticals, Inc. v. Broudo, 544 U.S. 336,
2 346-47 (2005); see also Tellabs, Inc. V. Makor Issues & Rights,
3 Ltd., 127 S. Ct. 2499, 2507 (2007). "[C]onclusory allegations of
4 law and unwarranted inferences are insufficient to defeat a motion
5 to dismiss for failure to state a claim." In re Daou, 411 F.3d
6 1006, 1013. This indicates the need for a complaint to enable a
7 court to evaluate plausible inferences that can be drawn from the
8 factual allegations to the legal conclusions.

9 In its current form, Plaintiffs' Complaint lacks clarity in
10 articulating the grounds for its claims. Although the Complaint
11 contains many detailed factual allegations, it does not clearly
12 identify the allegedly false statements or which of the factual
13 allegations support an inference that particular statements are
14 false or misleading. The Court believes this is largely due to a
15 lack of organization and somewhat unclear presentation of the
16 allegations. Many allegations contain underlined statements from
17 stock offering documents, press releases, or other communications,
18 which the Court agrees is a useful practice. However, for many
19 statements, the Complaint either lacks facts to support that the
20 statements are false or misleading or provides those facts in a
21 different paragraph without guidance for cross-reference.⁵ At
22 times, the Complaint also does not distinguish allegations with
23 respect to the Series A and Series B stock. As a result, the Court
24 has difficulty in determining whether Plaintiffs have stated a
25 claim.

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27 ⁵ The Court encourages Plaintiffs to underline allegedly false
28 or misleading statements, but also, to clearly articulate the
grounds for an inference that the statements were in fact false or
misleading.

1 The Court, therefore, grants dismissal without prejudice and
2 grants Plaintiffs leave to amend their complaint. Plaintiffs may
3 be able to resolve deficiencies in the complaint by simple
4 reorganization, revision, and clarification of the currently long
5 and at times, meandering set of allegations. The Court recommends
6 that Plaintiffs be clear and concise in identifying false
7 statements and articulating the factual allegations supporting an
8 inference that the statement is false or misleading.⁶ For each
9 allegedly false or misleading statement, the Complaint should
10 identify some facts suggesting that the statement is false or
11 misleading, and preferably in the same or a paragraph following the
12 statement.

13 Additionally, the Court instructs Plaintiffs to attach a chart
14 as an exhibit to its amended complaint. That chart should set
15 forth for each claim (I) the alleged false or misleading
16 statements, including the source of the statement in a registration
17 statement where a required element of the claim; (ii) the
18 supporting factual allegations; and (iii) the ultimate conclusion.

19 2. Claims Under Section 10(a) and 20(b) of Exchange Act

20 Fraud claims under the Private Securities Litigation Reform
21 Act ("PSLRA") are subject to the heightened pleading requirement
22 "that a complaint plead with particularity both falsity and
23 scienter." In re Vantive Corp. Sec. Litig., 283 F.3d 1079, 1084

25 ⁶ The Court should not have to comb through the complaint to
26 identify reasonable inferences from the factual allegations to the
27 legal conclusions. Plaintiffs do far better articulating the
28 relationship between their factual allegations and legal
conclusions in opposition to these motions than on the face of the
complaint. The Court suggests that Plaintiffs take this approach
in amending their complaint.

(9th Cir. 2002) (citing Ronconi v. Larkin, 253 F.3d 423, 429 (9th Cir. 2001)). To meet the PSLRA's heightened pleading requirement, a complaint must:

(1) "specify each statement alleged to have been misleading [and] the reason or reasons why the statement is misleading," 15 U.S.C. § 78u-4(b)(1)); and

(2) "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind," 15 U.S.C. § 78u-4(b)(2).

See also Tellabs, Inc., 127 S. Ct. 2499, 2508 (2007).

As with the Section 11 and 12(a) claims, the Court also dismisses these claims with leave to amend. The Court recognizes that Plaintiffs have offered additional factual allegations with respect to their fraud-based claims against Officer Defendants. (Compl. ¶¶ 290-387.) However, to the extent Plaintiffs reallege allegations from earlier in the Complaint and which the Court considers in need of reorganization, revision, and clarification, the Court grants Plaintiffs leave to amend these claims as well.

III. CONCLUSION

For the foregoing reasons, the Court GRANTS:

1. Independent Director Defendants' Motion to Dismiss
2. Defendant Robert Cole's Motion to Dismiss
3. Underwriter Defendants' Motion to Dismiss
4. Defendants Morrice, Gotschall, and Dodge's Motion to Dismiss
5. Defendant KPMG's Motion to Dismiss

The Court dismisses Plaintiffs' complaint without prejudice and with leave to amend. Plaintiffs shall file an amended class

1 action complaint by February 25, 2008. Defendants shall answer,
2 move to dismiss, or otherwise respond on or before March 10, 2008.
3 Plaintiffs shall file its opposition to any motion to dismiss on or
4 before March 24, 2008. Defendants shall file a reply brief on or
5 before April 7, 2008. A hearing on any motion to dismiss filed by
6 any Defendant shall be held April 21, 2008 at 10:00 AM.

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8 IT IS SO ORDERED.

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11 Dated: January 31, 2008



12 DEAN D. PREGERSON

13 United States District Judge)
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