

November 21, 2011 – SEC’s Responses to M. Perry’s First Set of Interrogatories

Federal Judge Rakoff: “Doesn’t the SEC have an interest in what the truth is?”

Matthew T. Martens, a senior lawyer at the SEC said that the government believed that the public knew the truth about Citi’s conduct because the government’s lawsuit laid out its claims against the bank.

Last time I checked, correct me if I am wrong, anyone can make an allegation,” said Judge Rakoff. “The mere fact that you say it’s so doesn’t make it so unless its proved.”

[The New York Times, 11/09/11](#)

Attached you will find the SEC’s response to my first set of interrogatories (I also plan to post my responses to the SEC’s interrogatories when they are filed). You can access that document by going to the SEC tab and scrolling down to the October 31, 2011 document entitled: “SEC’s Responses to M. Perry’s First Set of Interrogatories”.

I am not going to discuss these interrogatories in detail, but the SEC’s responses make clear that their case is exceedingly weak. In the vast majority of their responses, the SEC claims that it cannot fully answer the interrogatories because the litigation discovery process is not over. Is it really appropriate at this stage for the SEC to refuse to answer an interrogatory fully by saying, “we need to do further discovery”? The SEC has had access to all discoverable materials for over three years and has spent thousands of hours on this case and interviewed scores of witnesses under oath, including myself.

I also would like to discuss scienter and the improbability of the SEC’s allegations.

In this type of civil securities case, the SEC has to establish that the disclosures that they allege were omitted or misleading were BOTH material and made with scienter (I don’t plan to discuss materiality yet, but I am confident that they won’t be able to prove their disclosure allegations were material either and I plan to discuss the lack of materiality at the appropriate point).

The U.S. Supreme Court has defined scienter as follows:

“A mental state embracing intent to deceive, manipulate, or defraud.” [SEC.gov](http://www.sec.gov)

And according to information I have read, the 9th Circuit requires the plaintiffs to allege (and later prove) “deliberate recklessness” and “recklessness so severe that it strongly suggests actual intent”. Furthermore, the 9th Circuit has ruled that “Scienter could never be shown by motive and opportunity alone, and most other courts now hold that “motive and opportunity” alone cannot give rise to a strong inference of scienter. [LYLE ROBERTS ET AL., WILSON SONSINI GOODRICH & ROSATI, P.C., RECENT ISSUES IN THE PLEADING OF SCIENTER IN SECURITIES FRAUD CLAIMS 5 \(2005\), http://www.wsgre.com/PDFSearch/pleading_of_scienter.pdf](http://www.wsgre.com/PDFSearch/pleading_of_scienter.pdf)

Clearly, scienter is a very high burden for the SEC to prove.

I believe this is why the SEC announced in late September of this year that it was making a major shift away from scienter-based charges in their civil litigation, to the “easier to prove” negligence-based

charges.

Let's review the SEC's case briefly (see the SEC tab for more details): The SEC has alleged that CFO #1 and myself "knowingly or recklessly" made material omissions or misleading disclosures during a roughly 90-day period beginning sometime in February 2008 and ending on May 12, 2008. In addition, when CFO #1 had to take an emergency, medical leave of absence in late April 2008 and was replaced by CFO #2, the SEC alleges that CFO #2 almost immediately began to omit and mislead investors in Indymac's public disclosures, but he did so "negligently" rather than "knowingly or recklessly" (according to the settlement they reached with him). While I can't speak for him, I believe that CFO #2 settled this matter because the SEC used its awesome government power to intimidate him. In addition to not admitting or denying any of the SEC's negligence allegations, he was able to settle for about \$100,000 and is allowed (if he chooses) to be an officer or director of a public company. Yet, despite the fact that he did not admit to the allegations, his employment as a top manager at OneWest Bank was terminated shortly before the civil settlement was made public. He didn't do a thing wrong, yet he was forced into this civil settlement because of the time (years), cost (millions), and emotional toll it would have taken on him and his family to defend himself against this matter.

Think about it. CFO #2 stepped in when CFO #1 had an emergency medical issue and performed in an outstanding manner and disclosed everything properly. And for his significant efforts in helping Indymac in a crisis, the SEC comes after him, forces him into a public settlement with a fine and then that SEC enforcement action causes him to lose his job. It is not right that the SEC has that kind of power to intimidate honest Americans and that employers like OneWest, by their actions, essentially support this practice.

All of the SEC's allegations against me are common with either CFO #1 or CFO #2 and yet importantly in the SEC's answer to Interrogatory No. 25, the SEC says there was no collusion between any of us. Think about that for a minute. How in the world out of all of the hundreds (if not thousands) of disclosures we made during the period in question, could I and two different CFOs decide to omit or mislead on exactly the same disclosures without colluding? And it is not just one disclosure, it's numerous items: by my count, at least nine different types of disclosures. It's extremely unlikely that I and even one CFO would have randomly picked the same (one) disclosure item on which to purportedly omit or mislead investors, let alone nine or more. So unless the SEC has some evidence of collusion (and I can tell you they can't even prove their underlying misrepresentation allegation, let alone collusion), it is not logically (statistically) possible that we randomly picked the exact same disclosures to purportedly intentionally omit or mislead investors.

I guess the SEC could say, "Well, they didn't do it intentionally, but they were reckless". That's ridiculous. A long-time CEO and CFO (#1) who were both highly respected would all of a sudden decide to become reckless? And CFO #2 who had a distinguished record with the company somehow became negligent from nearly the first day he started and for just a few weeks thereafter? That makes no sense. If that's true, there would be a lot of evidence to support that allegation. Generally, if you are reckless, you are reckless. It would happen all the time -- not just in a 90-day period of time. There is no evidence whatsoever to support "recklessness." None.

To this point, in these interrogatories, we asked them "do you have any evidence or testimony from anyone who ever told Mr. Perry that he should have disclosed these omitted facts or that told him that these allegedly misleading disclosures were misleading"? Read their answer. I can tell you that, once you cut through all the legalese, their answer is "No, they don't". We had an extensive SOX certification

process where literally scores of managers provided formal, written certifications regarding disclosures for their areas to the CFO and me. Our Audit Committee, including its Chairman, carefully read our SEC disclosures and generally provided some edits. We had outside counsel and independent auditors review our public disclosures. We even had our banking regulators reading and reviewing our public disclosures. And we had a fabulous internal management team who prepared our public disclosures. All of them, thanks to my transparent communication, were aware of exactly the same issues I was. None of them thought we had omitted or misled on anything material, and none of them ever raised any of the alleged omissions or purported misleading statements with me or anyone else.

And what's the motive? None of us sold any stock (I hadn't sold a share since 2005), and in fact I bought several million dollars of stock during the 90 day period of time in question.

The SEC "bragged" last week that they had filed 735 enforcement actions in the 12 months ending September 30, 2011 (the most filed in a single year), and SEC Chairwoman Schapiro highlighted that many of the cases were "related to the financial crisis and its aftermath".

The SEC has formidable power, that's true. But the SEC should be more responsible in wielding that power, particularly in a case like this where the disclosures were in full accordance with the law. As Judge Rakoff has said, just because the SEC makes an allegation does not make it true.