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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

MICHAEL W. PERRY AND A. SCOTT KEYS,

Defendants.

Case No. CV 11-1309-R JC(x)

REPLY IN SUPPORT OF DEFENDANT MICHAEL W. PERRY'S MOTION FOR PARTIAL SUMMARY JUDGMENT CONCERNING PLAINTIFF'S RISK-WEIGHTING AND SECTION 17(a)(2) CLAIMS

Date: July 16, 2012
Time: 10:00am
Judge: Honorable Manuel L. Real
Courtroom: No. 8

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I. INTRODUCTION

The SEC once again tries to muddy the waters on summary judgment by overwhelming the Court with dozens of extraneous exhibits and extensively arguing a point — materiality — that is not even raised by Mr. Perry's motion. Contrary to the SEC's assertion, the question before the Court on the risk-weighting issue is *not* materiality. It is rather whether IndyMac's May 12, 2008 SEC filings were false or misleading. The SEC has failed to come forward with any evidence that they were. Because the SEC cannot meet its threshold burden of presenting evidence that the May 12 filings were false or misleading, Mr. Perry is entitled to summary judgment on the SEC's risk-weighting claim. The Court need not reach the separate and secondary issue of materiality.

IndyMac's May 12 Form 10-Q filing contained the following disclosures concerning IndyMac Bank's (the "Bank's") capital ratios:

- The 10-Q stated that the Bank's total risk-based capital ratio as of March 31, 2008 was 10.26 percent, and that such ratio was as "reported by the Bank on the Thrift Financial Report, which is filed quarterly with the Office of Thrift Supervision [OTS]." Levine Decl. Ex. 1 [Dkt. No. 108] at 10, 13;
- The 10-Q stated that the Bank's capital levels "exceed the levels defined as 'well capitalized' by our regulators." *Id.* at 7;
- The 10-Q contained a table comparing the 10.26 percent capital ratio at March 31, 2008 (which did not involve double risk-weighting of subprime assets) with the non-double risk-weighted capital ratios for prior quarters. *Id.* at 10;
- The 10-Q thoroughly disclosed the risk that the Bank might cease to be well capitalized, including a disclosure that the Bank's capital ratio at March 31 would have been 9.27 percent (73 basis points below the well-capitalized minimum) if an April 2008 downgrade of bonds held by the Bank had occurred a few weeks earlier. *Id.* at 49; and

- The 10-Q disclosed the potential adverse consequences if the Bank ceased to be well capitalized. *Id.* at 50.

None of these disclosures were false or misleading. The Court need look no further in granting Mr. Perry's motion.

The SEC argues that IndyMac should nonetheless have disclosed that the Bank's capital ratio would have been 9.96 percent with double risk-weighting of subprime assets, *i.e.*, 4 basis points below the well-capitalized minimum. But the 10.26 percent ratio *without* double risk-weighting was the operative capital ratio for the OTS in determining whether the Bank was well capitalized at March 31, 2008. That is clear from the fact that the OTS knew the Bank's capital ratio with double risk-weighting of subprime assets was 9.96 percent as of March 31, yet did not reclassify the Bank from a well-capitalized to an adequately-capitalized institution until July 1, 2008. (SUF ¶ 11; SEC Statement of Additional Material Facts ¶ 34.) There is no factual dispute on this dispositive point.

IndyMac had no duty to disclose in its SEC filings a capital ratio that unquestionably was *not* the operative one for the OTS for purposes of determining whether the Bank was well capitalized. The absence of that information did not render anything IndyMac said in its May 12, 2008 SEC filings false or misleading. Accordingly, it cannot be the basis for a fraudulent omission claim. *See, e.g.*, *Brody v. Transitional Hosps. Corp.*, 280 F.3d 997, 1006 (9th Cir. 2002) ("To be actionable under the securities laws, an omission must be misleading; in other words it must affirmatively create an impression of a state of affairs that differs in a material way from the one that actually exists."). Contrary to the SEC's contention, it is irrelevant whether analysts or investors might have wanted to know the additional information. *See, e.g.*, *In re Time Warner Sec. Litig.*, 9 F.3d 259, 267 (2d Cir. 1993) ("[A] corporation is not required to disclose a fact merely because a reasonable investor would very much like to know that fact.").

The SEC also cannot withstand summary judgment on its section 17(a)(2) claim. While the SEC dwells on the general requirement that there be an offer or sale of securities to support section 17(a) liability, the SEC cannot dispute that subsection 17(a)(2) of section 17(a) contains an additional, independent element: subsection 17(a)(2), by its terms, applies only if the defendant "obtain[ed] money or property" by means of a false statement or fraudulent omission. The SEC presents no evidence that Mr. Perry or IndyMac obtained money or property by means of any alleged false statements or fraudulent omissions in the May 12 filings here. That the SEC is forced to rely on the fact that IndyMac's DSPP administrator, Mellon Bank, briefly held money on account from DSPP bidders after May 12, 2008 before refunding it to the bidders underscores the baselessness of the SEC's section 17(a)(2) claim.

In sum, the issues raised by Mr. Perry's motion for partial summary judgment are simple and straightforward. The SEC has failed to meet its burden of establishing any genuine factual disputes concerning them. Accordingly, Mr. Perry's motion should be granted.

II. ARGUMENT

A. Mr. Perry Is Entitled to Summary Judgment on the SEC's Risk-Weighting Claim.

1. There Is No Genuine Dispute That the Bank's Operative Capital Ratio at March 31, 2008 Was 10.26 Percent.

The SEC makes the conclusory assertion that the issue of the subprime risk-weighting waiver is "hotly disputed." It has, however, failed to establish any genuine dispute of material fact on the issue. The undisputed facts establish that the waiver *was* granted and that 10.26 percent was indeed the Bank's operative capital ratio for purposes of determining whether the Bank was well capitalized at March 31, 2008.

As explained in our opening brief, former IndyMac CFO A. Scott Keys testified that he and Mr. Perry participated in a phone call with Darrel Dochow,

the OTS West Region Director, on February 26, 2008. Mr. Keys further testified that Mr. Dochow agreed to waive the subprime risk-weighting requirement during that call. (SUF ¶ 4.) This testimony is uncontroverted. It is likewise uncontroverted that Mr. Perry reported the subprime waiver to the IndyMac Board of Directors' Enterprise Risk Management Committee immediately after the call with Mr. Dochow.[1] (SUF ¶ 6.)

In response, the SEC has offered the declaration of an OTS accountant, Mary Garvin, but that declaration does not create a factual dispute concerning the waiver. Ms. Garvin was not a party to the February 26 call and does not claim to have been involved in the decision concerning whether to grant the waiver. The fact that she was not "aware" of what transpired during the February 26 call is thus irrelevant.[2]

What *is* relevant is that OTS documents subsequent to February 26 *objectively confirm* that the waiver was granted and that the Bank's operative capital ratio at March 31, 2008 was 10.26 percent. On May 12, 2008, IndyMac filed an amended TFR with the OTS reflecting that the Bank's total risk-based capital ratio was 10.26 percent as of March 31, 2008. (SUF ¶ 8.) On May 12, IndyMac also submitted to the OTS as supplemental information a "CCR Addendum" reflecting that the Bank's capital ratio at March 31 would have been 9.96 percent with double risk-weighting of subprime assets. (SUF ¶¶ 9–10.) The

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[1] While Mr. Dochow has stated that his recollection of the risk-weighting issue is "clouded," his declaration further corroborates Mr. Keys' testimony about the call and that, after February 2008, the OTS no longer required the Bank to formally report its double risk-weighted capital ratios. Levine Decl. Ex. 9 at 200, ¶ 5.

[2] It is likewise irrelevant whether Ms. Hunt-Fuhr of IndyMac recalls that the waiver was granted. In any event, Ms. Hunt-Fuhr testified that she *was* generally aware of the waiver. *See* Declaration of Nishchay H. Maskay ("Maskay Decl.") Ex. A (Hunt-Fuhr Dep. at 99:18–22) ("I think we did [obtain the waiver]").

OTS thus knew on May 12 that the Bank's capital ratio with double risk-weighting of subprime assets was less than 10 percent.

The OTS did not, however, reclassify the Bank from well-capitalized to adequately-capitalized status until July 1, 2008, almost two months later. (SUF ¶ 11.) An official letter dated July 1, 2008 from Mr. Dochow to the Bank's Board of Directors on OTS letterhead indisputably establishes this fact. Levine Decl. Ex. 7.[3] Accordingly, the SEC cannot reasonably dispute that the 10.26 percent capital ratio reported on the Bank's TFR was the operative one for purposes of determining whether the Bank was well capitalized at March 31.

Contrary to the SEC's assertion, the OTS's June 2000 "Approval of Acquisition" Order for IndyMac does not create a genuine factual dispute on the risk-weighting issue. The SEC focuses on paragraph 11 of the 2000 Order, but it ignores the preamble, which states that the conditions in the Order must be "*satisfied in a manner satisfactory to the West Regional Director or his designee (Regional Director).*" Chung Decl. Ex. 21 [Dkt. No. 115] (emphasis added). This specific grant of authority to the West Regional Director (*i.e.*, Mr. Dochow) allowed Mr. Dochow to provide relief from the double risk-weighting requirement.[4] *See* Maskay Decl. Ex. B (OTS Applications Handbook § 640.1 (Apr. 2001)) ("When given specific authority to approve certain applications, or to

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[3] Such reclassification occurred only after a bank run in late June precipitated by the public release on June 26, 2008 of a letter by Senator Charles Schumer expressing concerns about the Bank. *See* Maskay Decl. Ex. C (OTS fact sheet describing bank run caused by public release of Schumer letter). The OTS determined that the bank run caused by the release of the Schumer letter placed the Bank "in an unsafe and unsound condition to transact business." *Id.*

[4] The 2001 Guidance on which the SEC itself relies (SEC Opp'n at 17 n.4) further shows that Mr. Dochow had this authority. The Guidance states that OTS personnel were to "use judgment" on "a case-by-case basis" in determining the appropriate level of capital to support subprime lending activities. *See* Chung Decl. Ex. 23 at 313.

impose conditions by the applicable regulation, delegation, or Director's Order, the Regional Director, or their designee, may also modify those conditions.") [5]

In any event, the simple undisputed fact is that — as noted — the OTS *did* consider the 10.26 percent non-double risk-weighted ratio as the Bank's operative capital ratio as of March 31, 2008. That is the number that the OTS used in assessing whether the Bank was well capitalized at March 31, and that is the number IndyMac reported in its May 12 SEC filings. Whether or not Mr. Dochow "should" have granted the waiver in light of the June 2000 Order or whether he "should" have done so only after receiving a written submission is thus entirely beside the point. It is what Mr. Dochow and the OTS actually did that matters and there is no genuine dispute on that fundamental issue. As this Court recently stated, "[t]he relevant inquiry is whether a government regulator told Perry that certain conduct was permissible, not if such statements were in fact, quote, true." *See* Hr'g Trans. on Parties' Motions *In Limine* (June 18, 2012), at 8:6–9.

2. IndyMac Had No Duty to Disclose What the Bank's Operative Capital Ratio Might Have Been Absent the Waiver.

The SEC argues that IndyMac was nonetheless required to disclose what the Bank's March 31 capital ratio might have been absent the waiver. However, it offers no support for that assertion and there is no legal basis for its claim.

"To be actionable under the securities laws, an omission must be misleading; in other words it must affirmatively create an impression of a state of affairs that differs in a material way from the one that actually exists." *Brody*, 280

[5] The SEC's attempt to conflate the OTS's modification of the subprime double risk-weighting requirement with the mortgage servicing rights ("MSR") capital limitation is unavailing. Unlike the double risk-weighting requirement, which applied only to IndyMac, the MSR requirement was a formal, inter-agency requirement that applied to all regulated banks. *See*, *e.g.*, 12 C.F.R. § 567.12 (2008). Accordingly, any modification of the MSR requirement needed to be made pursuant to formal, inter-agency procedures, and not through the informal waiver process employed with respect to the risk-weighting issue.

F.3d at 1006; *accord Rubke v. Capitol Bancorp Ltd.*, 551 F.3d 1156, 1162 (9th Cir. 2009) (rejecting omission claim where there was "no indication that the omitted information . . . made any statement in [defendant's] registration documents false or misleading"). To support a fraudulent omission claim, the SEC "must 'specify the reason or reasons why the statements made by [IndyMac] were misleading or untrue, not simply why the statements were incomplete.'" *Id.* (quoting *Brody*, 280 F.3d at 1006).[6]

Here, IndyMac's capital ratio disclosures in its May 12 Form 10-Q were not rendered false or misleading by virtue of the alleged omissions. IndyMac disclosed that the capital ratio reported on the Bank's TFR was 10.26 percent and that the Bank thus was considered well capitalized by its regulator. (SUF ¶¶ 8, 16.d.) The 10-Q compared the 10.26 percent *non*-double risk-weighted ratio as of March 31, 2008 with the *non*-double risk-weighted ratios for prior quarters. (SUF ¶ 15.) And IndyMac thoroughly disclosed the risk that it might cease to be well capitalized and the potential adverse consequences of such a development. (SUF ¶ 16.) These disclosures were accurate. As in *Rubke*, there is "no indication that the omitted information . . . made any statement in [IndyMac's Form 10-Q] false or misleading." *See Rubke*, 551 F.3d at 1162.

Contrary to the SEC's assertion, it is irrelevant whether analysts or investors might have wanted to know the Bank's double risk-weighted capital ratio. As noted above, "a corporation is not required to disclose a fact merely because a reasonable investor would very much like to know that fact." *Time*

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[6] *See also Matrixx Initiatives, Inc. v. Siracusano*, ___ U.S. __, 131 S. Ct. 1309, 1321–22, 179 L.Ed.2d 398 (2011) ("[I]t bears emphasis that § 10(b) and Rule 10b–5(b) do not create an affirmative duty to disclose any and all material information. Disclosure is required under these provisions only when necessary 'to make . . . statements made, in the light of the circumstances under which they were made, not misleading.'") (quoting 17 C.F.R. § 240.10b-5(b)).

Warner, 9 F.3d at 267; *see also WPP Lux. Gamma Three Sarl v. Spot Runner, Inc.*, 655 F.3d 1039, 1048 (9th Cir. 2011) ("A duty to disclose does not arise from the mere possession of non-public information.") (internal quotation marks and citation omitted), *cert. denied*, No. 11-1069, 2012 WL 645058 (June 4, 2012).[7]

Nor is there a basis for the SEC's assertion that IndyMac had an obligation to disclose its double risk-weighted capital ratio in its SEC filings because that information was provided to the OTS. Mr. Keys' uncontroverted testimony is that, post-waiver, Mr. Dochow wanted IndyMac to continue providing the OTS with its double risk-weighted ratios merely for "informational purposes." Levine Decl. Ex. 2 at 150:11–12. Mr. Dochow's declaration similarly states that the OTS wanted the Bank to provide this information to the OTS post-waiver "in furtherance of the OTS's supervisory oversight of the Bank and its ongoing monitoring of the Bank's capital position." Levine Decl. Ex. 9 at 200, ¶ 5. The SEC offers no authority for its claim that data provided by the Bank to its banking regulator for the regulator's informational purposes needed to be disclosed in IndyMac's SEC filings.[8] And it certainly offers no support for the claim that IndyMac's SEC filings were rendered false or misleading through the absence of such information.

The SEC's contention that IndyMac's capital ratio reporting for the first quarter of 2008 was inconsistent with prior practice is also off base. IndyMac's practice was to report what it understood to be the Bank's *operative* capital ratios for purposes of determining whether the Bank was well capitalized. *See, e.g.*,

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[7] *Accord Backman v. Polaroid Corp.*, 910 F.2d 10, 12 (1st Cir. 1990) ("Even if information is material, there is no liability under Rule 10b-5 unless there [was] a duty to disclose it."); *Basic Inc. v. Levinson*, 485 U.S. 224, 239 n.17, 108 S. Ct. 978, 987 n.17, 99 L.Ed.2d 194 (1988) ("Silence, absent a duty to disclose, is not misleading under Rule 10b-5.").

[8] Indeed, most communications between the Bank and the OTS were confidential and could *not* be publicly disclosed. *See, e.g.*, 12 C.F.R. § 510.5 (2008).

Chung Decl. Ex. 2 (Q1-07 Form 10-Q) at 41–42; Ex. 3 (Q2-07 Form 10-Q) at 56, 58; Ex. 9 (Q1-05 Form 10-Q) at 176, 178. That is precisely what IndyMac did for the first quarter of 2008. IndyMac did not cite the 9.96 percent double risk-weighted ratio in its May 12, 2008 Form 10-Q for the simple reason that it was not the Bank's operative capital ratio as of March 31, 2008. *See* Levine Decl. Ex. 2 at 153:19–154:5 (Keys testimony explaining that IndyMac ceased reporting double risk-weighted ratio in SEC filings based on February 2008 waiver); Ex. 1 at 10 (Q1-08 Form 10-Q). While IndyMac did in the past disclose changes in the way subprime loans were *defined* under OTS policies (*see, e.g.*, Chung Decl. Ex. 8 at 157, 163; Ex. 11 at 203), that has nothing to do with the issue before the Court here, *i.e.*, disclosure of the operative capital ratio used by the OTS in determining whether the Bank was well capitalized.

Finally, the SEC asserts that IndyMac should have disclosed that the Bank's capital ratio would have been 9.96 percent with double risk-weighting of subprime assets to highlight the Bank's tenuous hold on well-capitalized status. As explained in our opening brief, however, IndyMac's May 12 Form 10-Q contained extensive disclosures about the risk that the Bank might cease to be well capitalized. *See* Perry Opening. Br. at 10–11; SUF ¶ 16. Indeed, IndyMac disclosed a scenario in which the Bank's capital ratio at March 31 would have been *much lower* than 9.96 percent at March 31. Levine Decl. Ex. 1 at 49 (disclosing that Bank's capital ratio at March 31 would have been 9.27 percent if an April bond downgrade had happened a few weeks earlier). In light of these frank negative disclosures, the SEC cannot plausibly argue that IndyMac hid the precariousness of the Bank's well-capitalized position.

Because the SEC cannot present evidence that the alleged omission of information about the Bank's double risk-weighted capital ratio rendered IndyMac's May 12, 2008 SEC filings false or misleading, Mr. Perry is entitled to summary judgment on the SEC's risk-weighting claim.

B. Mr. Perry Is Entitled to Summary Judgment on the SEC's Section 17(a)(2) Claim.

1. Section 17(a)(2), by Its Terms, Applies Only if the Defendant Directly or Indirectly "Obtain[ed] Money or Property."

The SEC fares no better in resisting summary judgment on its section 17(a)(2) claim. In the face of plain statutory language to the contrary, the SEC argues that section 17(a)(2) can apply even if neither Mr. Perry nor IndyMac obtained money or property by means of alleged false statements or omissions. The SEC is wrong.

Section 17(a)(2), by its terms, provides that it is unlawful for a person "*to obtain money or property*" by means of any untrue statement of a material fact or omission of material information necessary to make the statements made not misleading. 15 U.S.C. § 77q(a)(2) (emphasis added). The principles of statutory construction on which the SEC itself relies require that the Court give effect to this plain language. *See Conn. Dep't of Income Maint. v. Heckler*, 471 U.S. 524, 530 n.15, 105 S. Ct. 2210, 2213 n.15, 85 L.Ed.2d 577 (1985) ("[C]ourts should give effect, if possible, to every word that Congress has used in a statute."). Consistent with the statute's plain language, the Ninth Circuit has expressly held that there can be no violation of section 17(a)(2) unless "a party 'obtains money or property' by means of [a] prohibited statement or omission." *Sackett v. Beaman*, 399 F.2d 884, 891 (9th Cir. 1968).

The SEC's focus on the fact that section 17(a) requires an "offer or sale" of securities is beside the point. While an "offer or sale" is certainly a general requirement for liability under section 17(a), subsection 17(a)(2) imposes an *additional* requirement. For a defendant to be liable under that subsection, not only must there have been an offer or sale of securities, but the defendant also must, directly or indirectly, have "obtain[ed] money or property" through such offer or sale. That is the only way to "give effect . . . to every word" that Congress used when it enacted section 17(a)(2).

The cases cited by the SEC do not support its effort to read the "obtain money or property" requirement out of the statute. *United States v. Naftalin*, 441 U.S. 768, 99 S. Ct. 2077, 60 L.Ed.2d 624 (1979), involved liability under subsection (a)(1), not subsection (a)(2) of section 17(a), and thus focused only on section 17(a)'s general "offer or sale" requirement. *See* 441 U.S. at 770, 99 S. Ct. at 2080 ("The question presented in this case is whether § 17(a)(1) of the Securities Act of 1933 . . . prohibits frauds against brokers as well as investors."). Unlike subsection 17(a)(2), "obtain[ing] money or property" is not a necessary element for subsection (a)(1) liability. Other cases cited by the SEC similarly involve only the general "offer or sale" requirement of section 17(a) rather than the additional "obtain money or property" element specific to subsection (a)(2). *See SEC v. Am. Commodity Exch., Inc.*, 546 F.2d 1361, 1366 (10th Cir. 1976) (discussing general section 17(a) requirement that there be an offer or sale); *SEC v. Goldman Sachs & Co.*, 790 F. Supp. 2d 147, 164 (S.D.N.Y. 2011) (same).

SEC v. Wolfson, 539 F.3d 1249 (10th Cir. 2008), likewise does not support the SEC's position. That case does involve subsection (a)(2), but it expressly recognizes that an offer or sale of securities alone is *not* sufficient to give rise to liability under that provision. Rather, the court held that the defendants were liable under section 17(a)(2) because "there can be no real question that they *obtained money and property* from their fraudulent acts." *Id.* at 1264 (emphasis added). The other section 17(a)(2) cases cited by the SEC similarly recognize that the defendant must have "obtain[ed] money or property" to be liable under that provision. *See, e.g., SEC v. Stoker*, No. 11 Civ. 7388 (JSR), 2012 U.S. Dist. LEXIS 78658, at *16 (S.D.N.Y. June 6, 2012) (no section 17(a)(2) liability unless defendant either "obtained money or property for his employer while acting as its agent" or "personally obtained money indirectly from the fraud").

Finally, the remedial purposes of the securities laws cannot save the SEC's claim. "The broad remedial goals of the Securities Act are insufficient

justification for interpreting a specific provision more broadly than its language and the statutory scheme reasonably permit. We must assume that Congress meant what it said." *Pinter v. Dahl*, 486 U.S. 622, 653, 108 S. Ct. 2063, 2082, 100 L.Ed.2d 658 (1988) (citations and quotation marks omitted). Subsection 17(a)(2), by its unmistakably clear terms, applies only where the defendant has "obtain[ed] money or property" by means of an untrue statement or fraudulent omission. The SEC offers no valid basis for its contention that these plain words enacted by Congress should be ignored.

2. The SEC Has Presented No Evidence That Mr. Perry or IndyMac "Obtained Money or Property" by Means of Alleged False Statements or Fraudulent Omissions.

The SEC has not met its burden on summary judgment of coming forward with evidence that Mr. Perry "obtain[ed] money or property" through alleged false statements or fraudulent omissions in IndyMac's May 12, 2008 SEC filings. Indeed, it is undisputed that Mr. Perry received no bonus for 2007 or 2008, sold no IndyMac stock in 2007 or 2008, and lost virtually the entire value of his IndyMac stock holdings when the company filed for bankruptcy in July 2008. *See, e.g.*, Uncontroverted Facts and Conclusions of Law Regarding Motions for Summary Judgment ("Uncontroverted Facts") ¶¶ 7, 9–10 (Dkt. No. 88).

The SEC contends that Mellon Bank, the DSPP administrator, received money on account from DSPP bidders after May 12, 2008. But the SEC itself concedes that Mellon promptly refunded those monies because the minimum threshold trading price set by IndyMac was not satisfied. SEC Opp'n at 23:26–28. There is no evidence that IndyMac itself — much less Mr. Perry — ever received or used the funds.

The SEC also argues that Mr. Perry can be liable under section 17(a)(2) because, as an IndyMac shareholder, he "stood to indirectly benefit" from the alleged false statements and omissions. But section 17(a)(2) makes it unlawful for a defendant actually to "obtain money or property" by means of false statements

or omissions. "Standing to indirectly benefit" in the vague, amorphous manner suggested by the SEC is not enough — especially given that Mr. Perry did not sell a single share of his IndyMac stock in 2007 or 2008.

The single case relied on by the SEC itself makes this clear. As noted, the court in *SEC v. Stoker* held that a defendant can be liable under section 17(a)(2) only if he either "obtained money or property for his employer while acting as its agent" or "personally obtained money indirectly from the fraud." 2012 U.S. Dist. LEXIS 78658, at *16. The *Stoker* defendant was potentially liable under section 17(a)(2) because he allegedly was personally involved in securing tens of millions of dollars for his employer, and because his compensation markedly increased following the alleged fraud. *Id*. at *18–19. There is no evidence of anything like that here.[9]

Finally, there is no basis for the SEC's claim that Mr. Perry's mere receipt of his regular salary and benefits after May 12 is sufficient to satisfy section 17(a)(2). As explained in Mr. Perry's opening brief, to establish section 17(a)(2) liability, courts have required the SEC to prove that a defendant's compensation increased as a result of being "tied to company performance" or was otherwise directly linked to the alleged fraudulent statement. Perry Opening Br. at 14:5–14.

The case that the SEC cites regarding this issue, *SEC v. Hopper*, itself so holds. The defendant in *Hopper* was involved in an alleged fraud to inflate trading volumes and revenues through sham "round trip" transactions. Her liability hinged on the fact that there was a basis "to infer that those inflated

[9] Analogizing to the mail fraud statute, the SEC suggests that a shareholder's "right to monitor and to police the behavior of the corporation" counts as "property" under section 17(a)(2). SEC Opp'n at 24 n.9. Even if that were the case, however, there is no basis for a claim that Mr. Perry "obtain[ed]" such right "by means of" the May 12 filings, as he already was a significant IndyMac shareholder, as well as the company's CEO and Chairman.

trading volumes and revenues factored into the calculation of her bonuses, and hence, that [she] obtained all or part of those bonuses at least indirectly by means of the round-trip trading scheme in violation of § 17(a)(2)." *See Hopper*, Civ. No. H-04-1054, 2006 U.S. Dist. LEXIS 17772, at *44 (S.D. Tex. Mar. 24, 2006). By contrast, there is no evidence whatsoever that Mr. Perry's compensation increased as a result of what IndyMac said in its May 12, 2008 SEC filings.

In short, Mr. Perry did not "obtain money or property" by means of any false statement or omission alleged by the SEC. Because the SEC cannot present evidence on this essential element of its section 17(a)(2) claim, Mr. Perry is entitled to summary judgment on that claim. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23, 106 S. Ct. 2548, 2552, 91 L.Ed.2d 265 (1986) (court should grant summary judgment "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case . . .").[10]

III. CONCLUSION

For the foregoing reasons and for the reasons stated in our opening brief, Mr. Perry's motion for partial summary judgment should be granted.

Dated: July 2, 2012

Respectfully submitted,

/s/ D. Jean Veta
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[10] While the "obtain money or property" requirement does not apply to subsections (a)(1) or (a)(3) of section 17(a), those provisions have no relevance here. "[E]ach . . . subsection [of section 17(a)] proscribes a distinct category of misconduct." *Naftalin*, 441 U.S. at 774, 99 S. Ct. at 2082. The SEC acknowledges that "[t]his case is about false statements and omissions . . .". *See* Dkt. No. 85 at 1:12. Subsection 17(a)(2) is the sole subsection of section 17(a) that governs alleged false statements and omissions. *See* 15 U.S.C. § 77q(a).