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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)

SUPPLEMENTAL BRIEF 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: September 10, 2012
Time: 10:00am
Judge: Honorable Manuel L. Real
Courtroom: No. 8

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I. INTRODUCTION

Defendant Michael Perry submits this short supplemental brief to highlight why he is entitled to summary judgment on the SEC's risk-weighting claim. To prove securities fraud, the SEC must first establish that Mr. Perry made a false statement or fraudulent omission. The SEC cannot meet that threshold burden.

The undisputed facts show that IndyMac Bank's (the "Bank's") operative capital ratio on March 31, 2008 was the ratio calculated without double risk-weighting subprime assets. IndyMac accurately disclosed that ratio in its May 12, 2008 SEC filings. IndyMac also thoroughly disclosed the tenuousness of the Bank's well-capitalized status. Its disclosures were neither false nor misleading.

Because the SEC cannot meet its threshold burden of establishing that the May 12 filings contained a false or misleading statement, the Court need not consider the separate and secondary issue of materiality. *See, e.g.*, *Methodist Med. Ctr. of Ill. v. Am. Med. Sec. Inc.*, 38 F.3d 316, 321 (7th Cir. 1994) ("Before a court may determine if a misrepresentation . . . was material, the court must find that a misrepresentation was made."). The SEC's heavy focus on materiality in its opposition is thus entirely beside the point. Summary judgment should be entered in Mr. Perry's favor.

II. ARGUMENT

A. IndyMac's Disclosures Were Neither False Nor Misleading.

As an initial matter, there are no genuine factual disputes on the risk-weighting issue. The SEC suggests that there is a dispute about the Bank's operative capital ratio as of March 31, 2008, focusing on the June 2000 OTS authorization order. But subsequent OTS documents conclusively demonstrate that the Bank's operative ratio as of March 31, 2008 (*i.e.*, the ratio used by the OTS in determining whether the Bank was well capitalized) was indeed the ratio calculated *without* double risk-weighting subprime assets: 10.26 percent. There is no evidence that the OTS has ever disputed that number.

As explained in our prior papers, the Bank submitted an amended Thrift Financial Report ("TFR") to the OTS on May 12, 2008 reflecting that the Bank's capital ratio at March 31, 2008 calculated without double risk-weighting subprime assets was 10.26 percent. (Statement of Uncontroverted Facts and Conclusions of Law ("SUF") ¶ 8 [Dkt. No. 107].)[1] An addendum to the TFR submitted to the OTS as supplemental information on the same day reflected that the Bank's capital ratio calculated *with* double risk-weighting subprime assets was 9.96 percent, *i.e.*, below the 10 percent minimum threshold for a well-capitalized institution. (SUF ¶¶ 9–10; Levine Decl. Ex. 6 [Dkt. No. 108-7].) Neither of these facts is disputed.

Despite knowing on May 12, 2008 that the Bank's capital ratio calculated with double risk-weighting of subprime assets was below 10 percent, the OTS did not reclassify the Bank from well-capitalized to adequately-capitalized status on May 12. Had the OTS concluded from the materials submitted by IndyMac on May 12 that the Bank's operative capital ratio was less than 10 percent, the OTS would have been required by regulation to downgrade the Bank to adequately-capitalized status effective March 31. *See*, *e.g.*, 12 C.F.R. § 565.4 (2008) (no discretion to treat institution as well capitalized if its total risk-based capital ratio is below 10 percent). Instead, the OTS continued to consider the Bank well-capitalized and did not reclassify it to an adequately-capitalized institution until July 1, 2008—a few days after the public release of a letter from Senator Charles Schumer precipitated a run on the Bank. (SUF ¶ 11; Levine Decl. Ex. 7 [Dkt. No. 108]; Maskay Decl. Ex. C [Dkt. No. 117-4]; Perry Reply Br. at 4–6 [Dkt. No. 117].) This also is not and cannot be disputed. The fact that the OTS did not

[1] *See also* Declaration of Jason A. Levine in Support of Supplemental Brief, Ex. 1 at 27 (Amended TFR for Q1 2008).

reclassify the Bank from well-capitalized to adequately-capitalized status until July 1, 2008 incontrovertibly shows that the OTS considered the 10.26 percent non-double-risk-weighted ratio to be the operative one in determining whether the Bank was well capitalized at March 31, 2008.

IndyMac duly disclosed the Bank's operative 10.26 percent capital ratio as of March 31, 2008 in its May 12, 2008 SEC filings. There was nothing false or misleading about the disclosure. Accordingly, the SEC cannot prevail on its risk-weighting claim.

B. IndyMac Had No Duty to Disclose That the Bank's Capital Ratio Would Have Been Below 10 Percent Had Double Risk-Weighting Been Required.

Contrary to the SEC's claim, Bancorp had no duty to disclose in its SEC filings that the Bank's capital ratio would have been slightly below 10 percent had the double risk-weighted ratio been the operative one for the OTS.

As explained in our prior papers, "[t]o 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 v. Transitional Hosps. Corp.*, 280 F.3d 997, 1006 (9th Cir. 2002); *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"). Moreover, there is no duty to disclose hypothetical information in SEC filings. *See, e.g., Hanon v. Dataproducts Corp.*, 976 F.2d 497, 504 (9th Cir. 1992); *In re Foxhollow Techs., Inc.*, No. C 06-4595 PJH, 2008 U.S. Dist. LEXIS 52363, at *63 (N.D. Cal. May 27, 2008), *aff'd*, 359 F. App'x 802 (9th Cir. 2009); Perry Opening Br. at 10 [Dkt. No. 106].

Here, IndyMac's capital ratio disclosure in its May 12 Form 10-Q was not rendered false or misleading by virtue of the alleged omission. 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.) 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.

C. IndyMac Had No Duty to Disclose the OTS Waiver.

Nor did IndyMac have a duty to disclose that the OTS had, on February 26, 2008, waived any requirement that the Bank double risk-weight subprime assets for purposes of calculating its operative capital ratio in the TFR.

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.'" *Rubke*, 551 F.3d at 1162 (quoting *Brody*, 280 F.3d at 1006). The alleged incompleteness of IndyMac's disclosure in the 10-Q thus cannot support the SEC's omission claim. It also is not sufficient that investors might have wanted to know additional details about how the Bank calculated its operative capital ratio. *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."); *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).

As noted above, the Court need not reach the secondary issue of whether the allegedly omitted information was material under *Basic, Inc. v. Levinson*, 485 U.S. 224, 108 S. Ct. 978, 99 L.Ed.2d 194 (1988). The antifraud provisions of the securities laws "do not create an affirmative duty to disclose any and all material information." *Matrixx Initiatives, Inc. v. Siracusano*, 131 S. Ct. 1309, 1321, 179 L.Ed.2d 398 (2011). Rather, disclosure is required only when necessary 'to make statements made, in light of the circumstances under which they were made, not

misleading.'" *Id.* (citing *Basic, Inc.*, 495 U.S. at 232); *see also Philco Investments v. Martin*, No. C-10-02785-CRB, 2011 WL 4595247, at *7 n.11 (N.D. Cal. Oct. 4, 2011) ("[W]hether a defendant owed a duty to disclose depends on whether the omission rendered his or her statement false or misleading, not whether the omitted information was material.") (citing *Siracusano*, 131 S. Ct. at 1321–22). Because the SEC cannot meet its threshold burden of establishing that IndyMac made a false or misleading statement in its filings here, it is irrelevant whether or not the allegedly omitted information about the OTS waiver was material.[2] *See Methodist Med. Ctr.*, 38 F.3d at 321 ("Before a court may determine if a misrepresentation . . . was material, the court must find that a misrepresentation was made.").

This is not a case like *Miller v. Thane International, Inc.*, 519 F.3d 879 (9th Cir. 2008). There, defendant corporation disclosed in a prospectus that it would obtain approval for its stock to be traded on the NASDAQ and that the shares would be listed upon completion of a merger, subject to an initial bid price requirement. *Id.* at 886. The defendant, however, never listed its stock, even after its stock price exceeded the requisite minimum. The court held that the statements in the prospectus contained the "clear implication" that the company would indeed list its stock on the NASDAQ once approval was secured and the bid price requirement was satisfied. *Id.* at 886–87. Accordingly, the company's failure to

[2] Should a trial be required, the evidence will show that the allegedly omitted information was *not* material under the *Basic* standard. Because Mr. Perry's motion is not based on materiality, however, there is no need for the Court to address or resolve that issue at this stage. There also is no need for the Court to consider scienter here, but if that issue ever needed to be tried, the evidence will show, *inter alia*, that Mr. Perry (a) never reviewed the May 12, 2008 TFR or the addendum to it, (b) was not aware that the Bank's capital ratio would have been slightly below 10 percent on a double risk-weighted basis, and (c) was not advised by anyone that IndyMac should make additional disclosures on the risk-weighting issue. Accordingly, if the case were to proceed to trial, the SEC would be unable to prove either materiality or that Mr. Perry acted with intent to defraud.

disclose that it had not listed its stock on the NASDAQ constituted an actionable omission: it rendered what the company *did* say in the prospectus false and misleading. *Id.* at 888. The court deemed it irrelevant that investors could have learned the truth from other sources because the prospectus *itself* contained statements that were false and misleading by virtue of the omission. *Id.* at 887.

Here, by contrast, IndyMac's statements about the Bank's capital ratios in the May 12, 2008 Form 10-Q did not create any kind of false implication. The Bank's operative capital ratio at March 31, 2008 as reported to its regulator on the TFR really was 10.26 percent and the OTS really did consider the Bank well capitalized on that date. There was no need for investors to go beyond the Form 10-Q itself to determine the truth about the Bank's operative capital ratio on March 31, 2008 or about whether the Bank was deemed well capitalized by its regulator on that date. Unlike the prospectus in *Miller*, which affirmatively misled investors into believing that the company's stock would be listed on the NASDAQ, the absence of information about the waiver in this case did not render anything IndyMac said about the Bank's operative capital ratio on March 31, 2008 false or misleading. The Court need proceed no further in its inquiry.

D. IndyMac Disclosed the Bank's Tenuous Hold on Well-Capitalized Status.

The SEC's claim on the risk-weighting issue ultimately is that IndyMac should have reported the hypothetical 9.96 percent double risk-weighted capital ratio to alert investors about the precariousness of the Bank's well-capitalized position, and that failure to do so rendered the 10-Q misleading. *See, e.g.*, *In re Convergent Techs. Sec. Litig.*, 948 F.2d 507, 512 (9th Cir. 1991) (disclosure required by securities laws is measured by "the ability of the material to accurately inform rather than mislead prospective buyers"). That claim, however, cannot withstand scrutiny because the 10-Q indisputably *did* warn investors about the Bank's tenuous hold on well-capitalized status.

As explained in our prior papers, not only did the 10-Q specifically disclose that the Bank might cease to be well capitalized and the potential risks if that occurred (SUF ¶ 16); it also explained that, if an April 2008 downgrade of bonds held by the Bank had occurred just a few weeks earlier, then the Bank's capital ratio at March 31 would have been **9.27 percent**—73 basis points below the 10-percent well-capitalized minimum. (SUF ¶ 17.) This warned investors of the precariousness of the Bank's well-capitalized position far more emphatically than could any putative disclosure that the Bank's capital ratio would have been 9.96 percent (*i.e.*, just *four* basis points below the well capitalized minimum) if, hypothetically, it were required to double risk-weight subprime assets in calculating its operative capital ratio.

Given IndyMac's frank disclosure that the Bank's capital ratio would have been just 9.27 percent if the bond downgrade had occurred in March rather than April, the SEC cannot viably contend that IndyMac needed to disclose a hypothetical 9.96 percent ratio to render the 10-Q non-misleading with respect to the precariousness of the Bank's well-capitalized position.

III. CONCLUSION

The SEC cannot meet its threshold burden of showing that IndyMac made a false statement or fraudulent omission concerning the risk-weighting issue in its May 12, 2008 SEC filings. Accordingly, Mr. Perry is entitled to summary judgment on that issue. For the reasons stated in our prior briefs, Mr. Perry is also entitled to summary judgment on the SEC's section 17(a)(2) claim.

Dated: August 22, 2012

Respectfully submitted,

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