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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

U.S. SECURITIES AND EXCHANGE COMMISSION, Plaintiff, v. BRIAN H. STOKER, Defendant.	Case No. 11-CIV-7388 (JSR) ECF Case

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT BRIAN H. STOKER'S MOTION FOR SUMMARY JUDGMENT

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I. PRELIMINARY STATEMENT

After an exhaustive investigation into Citigroup's collateralized debt obligation ("CDO") business, in which it interviewed dozens of witnesses and reviewed "hundreds of thousands, if not millions" of pages of documents, the Securities and Exchange Commission brought an enforcement action against one person at Citigroup—Brian Stoker, a former mid-level director on the CDO structuring desk. The crux of SEC's Complaint is that Citigroup did not adequately disclose its role in the selection of collateral for a CDO called "Class V Funding III" or its short positions on certain of the Class V III collateral and that statements in two Class V III disclosure documents were thus misleading. Based on these alleged omissions, the SEC charges Mr. Stoker with negligently violating Sections 17(a)(2) and (a)(3) of the Securities Act of 1933.

Mr. Stoker is entitled to summary judgment on the SEC's Section 17(a)(2) claim for three reasons. First, the SEC cannot establish that Mr. Stoker was personally responsible for the alleged misleading statements. The SEC must prove that Mr. Stoker had ultimate authority over the statements at issue, but the evidence shows that responsibility for the statements was shared among Citigroup employees, Credit Suisse Alternative Capital ("CSAC"), the Class V III asset manager, and internal and external counsel. Indeed, many of the alleged misleading statements are found in a section of a presentation that warns that "Citigroup is not responsible for the content of [this] section."

Second, the Class V III disclosure documents were accurate. The SEC claims that it was misleading to state that CSAC "selected" the assets in the Class V III collateral portfolio. Yet, the undisputed fact is that CSAC selected the Class V III assets. The SEC also alleges that Citigroup did not sufficiently disclose that it had taken a short position on certain assets in the Class V III portfolio. The documents at issue, however, explicitly disclose that Citigroup would take short positions and that, as a result, "Citigroup … may be expected to have interests that are adverse to the interests of the holders of Securities." The SEC's own expert admitted that he could not identify any false or misleading statements in the disclosure documents.

Third, the SEC cannot prove that Mr. Stoker "obtain[ed] money or property by means of" the alleged omissions, as required by Section 17(a)(2). The undisputed evidence shows that Mr. Stoker's compensation was not connected to the performance of Class V III, much less to the allegedly misleading statements in the Class V III disclosure documents.

Mr. Stoker is also entitled to summary judgment on the SEC's Section 17(a)(3) claim. The SEC must prove that Mr. Stoker participated in a fraudulent course of business or performed an inherently deceptive act distinct from the alleged omissions from the Class V III disclosure documents. The SEC, however, did not allege any such conduct in the Complaint, and it has not adduced any evidence of such conduct.

Accordingly, the Court should grant summary judgment in favor of Mr. Stoker.

II. BACKGROUND FACTS[1]

In the fall of 2006, Citigroup and CSAC began discussing a potential "synthetic" CDO backed by other CDOs—a so-called "CDO squared" or "CDO^2"— in which Citigroup would serve as the arranging bank and CSAC as the asset manager. Dooley Decl. Ex. 35 at 19:15-24; Ex. 4 at 26:19-27:24. During this time, members of Citigroup's secondary CDO trading desk, syndicate desk, sales desk, and structuring desk, including Mr. Stoker, discussed a variety of potential structures and manager arrangements for the potential CDO^2. *See, e.g.*, Ex. 36; Ex. 37. In a synthetic CDO^2, the collateral consists of a revenue stream derived from derivative contracts ("credit default swaps" or "CDS") that are based on the performance of other CDOs. Ex. 27 at 16-18. "Sourcing" the CDO assets—including them in the asset portfolio—requires two parties to the CDS contract, a "protection buyer" and a "protection seller," so that the revenue from the CDS contract will fund the CDO^2. *Id.*

In connection with these ongoing discussions, on November 1, 2006, Citigroup provided CSAC with a list of assets that its secondary CDO trading desk was willing to source for the potential CDO^2. Ex. 38. In identifying the assets it was willing to source, Citigroup's

[1] Citations in Section II are to the exhibits to the Declaration of Brook Dooley, dated May 7, 2012, filed concurrently.

secondary trading desk looked for assets for which there existed buyers, so that Citigroup could offset its positions in those assets in the future. Ex. 30 at 26:14-27, 38:6-17, 45:11-46:9; Ex. 17 at 46:7-47:4, 51:21-52:6. As late as December 11, 2006, however, Citigroup and CSAC had not agreed to any particular structure or fee arrangement, and it appeared to Mr. Stoker that Citigroup "may not want to do the deal." Ex. 39.

In late December 2006, Citigroup and CSAC agreed on a general structure and fee arrangement for the potential CDO^2. Ex. 40. On December 21, CSAC provided Citigroup with a list of 128 CDOs that it had selected for potential inclusion in the CDO^2's portfolio. Ex. 19. CSAC selected these potential assets from a list of assets that it already owned in previous deals as well as from other deals with which it was familiar. Ex. 41.

In early January 2007, Citigroup and CSAC signed an engagement letter for the CDO that was then identified as Class V Funding III. Ex. 6. As part of creating the portfolio of assets, Citigroup agreed to buy protection with a notional value of $250 million on 25 of the assets that CSAC had previously selected for inclusion in the portfolio. Ex. 42. Citigroup subsequently agreed to double its exposure to these assets to a total notional value of $500 million. Compl. ¶ 41. At the same time, CSAC and Citigroup arranged for Citigroup to buy protection on 24 additional assets, which positions Citigroup then intermediated to other investment banks and hedge funds. Ex. 27 at 38, 39; Ex. 28.

Starting in early January 2007, Citigroup, CSAC, investors, and internal and external counsel began preparing the Class V III disclosure documents, including the Pitchbook and the Offering Circular. The Class V III Pitchbook is a Powerpoint presentation adapted from an earlier Citigroup-CSAC transaction. Ex. 5. The Citigroup structuring desk, internal Citigroup counsel, attorneys at Milbank, Tweed, Hadley & McCoy LLP ("Milbank"), acting as counsel for the Class V III Special Purpose Vehicle ("SPV"), CSAC employees, and CSAC's counsel all shared responsibility for creating and reviewing the Pitchbook. *See, e.g.*, Ex. 1 at 272:21-273:10; Ex. 2 at 164:20-165:6; Ex. 4 at 192:11-193:3, 194:4-14, 194:25-195:9. In particular, CSAC prepared the section of the Pitchbook titled "The Manager" and was responsible for ensuring that

the descriptions of the asset selection process in the Pitchbook were accurate. *See, e.g.*, Ex. 5 at CITI 09570344.

The Offering Circular is a 200-page legal document that explains in detail the economic terms and risks pertaining to Class V III. Ex. 12. Attorneys at Milbank maintained and edited the Offering Circular, while Citigroup, CSAC, and the investors contributed and provided feedback to Milbank on its drafts. *See, e.g.*, Ex. 10 at CITI 18428730; Ex. 1 at 287:11-21, 288:5-25; Ex. 3 at 22:7-23. As with the Pitchbook, CSAC prepared, and was responsible for the accuracy of, the section of the Offering Circular entitled "The Manager" and the other disclosures regarding the asset selection process. Ex. 12 at CITI 09572405. Milbank was responsible for ensuring the accuracy of the legal components of the Offering Circular, including the risk factors. Ex. 1 at 287:10-21; Ex. 2 at 165:21-166:11, 171:3-18. For its part, Citigroup's involvement was a collective effort of members of the structuring and syndicate desks, as well as internal and external counsel. Ex. 1 at 190:22-191:4, 191:11-17; Ex. 2 at 165:21-166:11.

Class V III closed on February 28, 2007, with a notional value of approximately $1 billion referencing a final portfolio of 49 synthetic CDO assets and 9 cash CDO assets. Ex. 27 at 39. The investors in Class V III were qualified institutional buyers under Rule 144A of the Securities Act, 17 C.F.R. § 230.144A, or accredited investors under Regulation D, 17 C.F.R. § 230.501(a). They included sophisticated investors such as Ambac Credit Products, Bear Stearns Asset Management, and several CDO asset managers. Ex. 43 at 0529. These investors did their own credit analyses of the Class V III reference assets, and they understood that the performance of Class V III was linked to the performance of the U.S. housing market. *See, e.g.*, Ex. 5; Ex. 24 at 99:8-100:17, 107:5-25, 111:16-112:11. They also understood that, because Class V III was largely synthetic, there were investors taking a short position on the reference assets. Ex. 27 at ¶ 33; Ex. 26 at 93:8-14.

As the U.S. housing market declined in 2007, the performance of CDOs backed by residential mortgages suffered, and Class V III was no exception. By November 2007, much of

the Class V III portfolio of assets had been downgraded, and an event of default was declared on November 19, 2007.

Nearly four years later, on October 19, 2011, after what the SEC described as an industry-wide investigation, dozens of witness interviews, and a "review of hundreds of thousands, if not millions, of pages of documents," Ex. 34 at 24:19-25, the SEC filed enforcement actions alleging negligence against Citigroup and Mr. Stoker. *See* Compl., *SEC v. Citigroup Global Markets Inc.*, No. 11-Civ-7387 (S.D.N.Y. Oct. 19, 2011); Compl., *SEC v. Stoker*, No. 11-Civ-7388 (S.D.N.Y. Oct. 19, 2011). The SEC alleges that Mr. Stoker negligently violated Sections 17(a)(2) and 17(a)(3) because he "did not ensure that the offering materials accurately described" (1) "Citigroup's substantial role in selecting names for Class V III"; (2) "That Citigroup had taken a $500 million proprietary short position on the Class V III collateral, including a $490 million naked short position"; and (3) "That Citigroup's proprietary short position was comprised of the names it had been allowed to select; while Citigroup did not short those names which it had no role in selecting." Compl. ¶¶ 4, 59.

III. LEGAL STANDARD

Summary judgment should be granted when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The party opposing summary judgment cannot rely on evidence that is "merely colorable" or "not significantly probative" to defeat the motion. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986). Rather, the non-moving party must offer "some hard evidence" in support of its assertions. *D'Amico v. City of New York*, 132 F.3d 145, 149 (2d Cir. 1998). Where a non-moving party "has failed to make a sufficient showing on an essential element of [its] case with respect to which [it] has the burden of proof" at trial, then summary judgment is appropriate. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

IV. MR. STOKER IS ENTITLED TO SUMMARY JUDGMENT ON THE SEC'S SECTION 17(a)(2) CLAIM.[2]

Section 17(a)(2) makes it "unlawful for any person in the offer or sale of any securities … to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statement made, in light of the circumstances under which they were made, not misleading." 15 U.S.C. § 77q(a)(2). To survive summary judgment, the SEC must provide sufficient evidence that (1) Mr. Stoker obtained money or property, (2) by means of an untrue statement or omission, (3) of a material fact, (4) with negligence, (5) in connection with an offer or sale of a security. *See SEC v. Monarch Funding Corp.*, 192 F.3d 295, 308 (2d Cir. 1999). For the reasons that follow, the SEC cannot provide sufficient evidence to survive summary judgment on its Section 17(a)(2) claim.

A. Mr. Stoker was not legally responsible for the allegedly misleading statements in the Class V III Pitchbook and Offering Circular.

1. The SEC must establish that Mr. Stoker had ultimate authority or personal and primary responsibility for the allegedly misleading statements.

The SEC cannot prove its Section 17(a)(2) claim against Mr. Stoker merely by showing that he was generally involved in preparing the documents containing the allegedly misleading statements. Rather, under the Supreme Court's decision in *Janus Capital Group, Inc. v. First Derivative Traders*, 131 S. Ct. 2296, 2302 (2011), the SEC must prove that Mr. Stoker was the person "with ultimate authority over the statement[s], including [their] content and whether and how to communicate [them]." Whether the SEC alleges liability under Section 17(a)(2) or under Rule 10b-5(b) does not alter this requirement; controlling Second Circuit law interprets Section 17(a)(2) and Rule 10b-5(b) coextensively. *Monarch*, 192 F.3d at 308; *SEC v. Espuelas*, 579 F. Supp. 2d 461, 472 (S.D.N.Y. 2008). Following this guidance, courts in this circuit have consistently held that Section 17(a)(2) claims, like Rule 10b-5(b) claims, require as a necessary

[2] Citations in Sections IV and V are to Defendant Brian H. Stoker's Statement of Undisputed Material Facts Pursuant to Local Civil Rule 56.1 ("UF") and the exhibits to the Declaration of Brook Dooley, dated May 7, 2012, both of which are filed concurrently.

element that the defendant have "made" the alleged misstatement or omission, *SEC v. KPMG, LLP*, 412 F. Supp. 2d 349, 376 (S.D.N.Y. 2006) (assessing whether defendant met the standard for having made the alleged misstatement as element of Section 17(a) claim); *SEC v. PIMCO Advisors Fund Mgmt. LLC*, 341 F. Supp. 2d 454, 467, 469-70 (S.D.N.Y. 2004) (no primary liability under Section 17(a) for defendant who did not meet the standard for having made the alleged misstatement). Although *Janus* did not explicitly address Section 17(a)(2), applying the *Janus* standard to the "made" requirement in Rule 10b-5(b) claims but not to the very same requirement in Section 17(a)(2) claims would be inconsistent with Second Circuit law. *See SEC v. Kelly*, 817 F. Supp. 2d 340, 345 (S.D.N.Y. 2011); *see also, In re Matter of Flannery*, 2011 WL 5130058, at *35 (SEC Rel. No. 438, Administrative Proceeding No. 3-14081, Oct. 28, 2011).

Even if the *Janus* standard were not to apply, pre-*Janus* law in the Second Circuit requires the SEC to prove that the defendant was "in fact … personally and primarily responsible for issuance of misleading communications" in order to establish that the defendant "made" the allegedly misleading statement for purposes of primary liability under Section 17(a)(2). *PIMCO*, 341 F. Supp. 2d at 466-67; *accord KPMG*, 412 F. Supp. 2d at 375.

The SEC has previously argued that *neither* the Supreme Court's decision in *Janus* nor this circuit's pre-*Janus* law should apply, and that it should be able to establish primary liability under Section 17(a)(2) without proving that the defendant "made" the allegedly misleading statement in any way. *E.g.*, Pl.'s Mem. of Law in Opp'n to Mot. to Dismiss 19-21, ECF No. 23 (*citing SEC v. Tambone*, 550 F.3d 106, 127 (1st Cir. 2008), *reh'g en banc granted and opinion withdrawn*, 573 F.3d 54 (2009), *and opinion reinstated in part*, 597 F.3d 1249 (2010) (en banc)). This result, and the out-of-Circuit case on which it relies, contravenes controlling law and common sense. It cannot be the case that *primary* liability can attach where a defendant did not make, or had no responsibility for, a statement. Under existing law, a Section 17(a)(2) claim premised on a statement for which someone else is responsible is a *secondary* liability claim. *See SEC v. Coven*, 581 F.2d 1020, 1030 (2d Cir. 1978) (alleged failure by defendant to disclose misstatement made by his client evaluated as a secondary violation of Section 17(a)). Such

secondary claims require proof of actual knowledge of the primary violation on the part of the secondary actor. *Id.* No such knowledge requirement exists for Section 17(a)(2) primary liability claims. *Espuelas*, 579 F. Supp. 2d at 472; *see also Coven*, 581 F.2d at 1030 (overturning a finding of secondary liability under Section 17(a) for the misstatements of another where the defendant lacked the requisite knowledge). The SEC's argument would permit it to circumvent this clear knowledge requirement by recasting as primary violations secondary claims based on alleged misstatements not made by the defendant. The law prohibits just this sort of blurring between primary and secondary liability. *Janus*, 131 S. Ct. at 2302.

2. Mr. Stoker did not have ultimate authority or personal and primary responsibility for the alleged misleading statements in the Pitchbook.

Responsibility for the Pitchbook was generally shared among the parties to Class V III, and CSAC was the party with specific responsibility for the statements in the Pitchbook that the SEC alleges were misleading.

a. Responsibility for the Pitchbook was shared.

There is no evidence that responsibility for the Pitchbook rested in any one person, much less in Mr. Stoker. Instead, it is undisputed that overall responsibility for the Class V III Pitchbook was shared by numerous people, including: Citigroup employees at the structuring desk; Citigroup counsel; attorneys at Milbank; CSAC employees; and in-house and external counsel for CSAC. UF 1. Keith Pinniger, a Vice President on Citigroup's structuring desk, testified that "the documentation process [for Class V III], the review of the documents, the assembly of the documents would have been a collective process" involving Mr. Pinniger and other Citigroup employees at the structuring desk, along with counsel for Citigroup, attorneys at Milbank, CSAC employees, and in-house and external counsel for CSAC. Ex. 1 at 272:21-273:10. Nestor Dominguez, Citigroup's CDO Group Global Co-Chair, testified that "there was a whole team that was involved," including "[CSAC] and … their attorneys and their senior portfolio managers." Ex. 2 at 164:20-25.

Furthermore, to the extent Mr. Stoker or the Citigroup structuring desk had any particular responsibility for the Pitchbook, it was primarily for assembling the document. UF 2. Mr. Dominguez explained that "the lead structurer had overall responsibility for getting the documents done, but the content, which can be very technical[,] … would come from specialty law firms." Ex. 2 at 171:5-18. Mr. Dominguez also testified that the responsibility of the Citigroup structuring desk with respect to the Pitchbook was "really to bring it together …. So it was basically a word processing exercise." *Id.* at 165:11-20.

b. CSAC was responsible for the specific statements in the Pitchbook alleged to be misleading.

The statements in the Pitchbook that the SEC claims were misleading were the responsibility of CSAC, not Citigroup or Mr. Stoker. Each of the statements in the Pitchbook that the SEC claims are misleading concerns Citigroup's role in selecting the Class V III reference assets, and each is found in the section of the Pitchbook titled "The Manager." *See* Compl. ¶ 49. The Pitchbook explicitly states, however, that "[i]nformation related to CSAC … has been provided by CSAC" and "Citigroup is not responsible for the content of the [Manager] section and has not independently verified any such information." UF 3. Mr. Stoker thus cannot be held responsible for the accuracy or completeness of these statements.

The CSAC witnesses confirm that CSAC was responsible for the statements in the Manager section of the Class V III Pitchbook. CSAC prepared the Manager section of the Pitchbook. UF 4. CSAC employees and counsel reviewed the Manager section. UF 5. Indeed, CSAC was responsible for providing and ensuring the accuracy of all information relating to CSAC in the Pitchbook. UF 6. Even the SEC's Complaint acknowledges that the statements in the Manager section were "originally provided by CSAC," with no allegation that Stoker or anyone else at Citigroup reviewed or edited these statements. Compl. ¶ 49.

The SEC reached the same conclusion in its administrative proceedings against CSAC and Samir Bhatt. The SEC admitted that "CSAC and [Mr.] Bhatt were responsible for the contents of [the] section of the pitch book, titled 'The Manager'"; that "[v]arious CSAC

personnel, including [Mr.] Bhatt, participated in the original drafting of the 'Manager' section in connection with previous transactions"; and that "[Mr.] Bhatt reviewed and commented on multiple drafts of the [Class V III] pitch book, including the 'Manager' section." UF 7.[3]

3. Mr. Stoker did not have ultimate authority or personal and primary responsibility for the alleged misleading statements in the Offering Circular.

Overall responsibility for drafting and revising the Offering Circular was held not by Mr. Stoker or the Citigroup structuring desk, but rather by attorneys at Milbank. To the extent that Citigroup was involved, neither Mr. Stoker nor any single Citigroup employee had primary responsibility for the Offering Circular. Moreover, parties other than Mr. Stoker were primarily responsible for the specific statements in the Offering Circular that the SEC claims were misleading. CSAC was responsible for the allegedly misleading risk factors regarding asset selection, and Milbank had primary responsibility for the risk factors regarding the position of Citigroup's trading desk with respect to Class V III.

a. Milbank had responsibility for drafting and revising the Offering Circular.

Milbank was responsible for creating the Class V III Offering Circular, and it maintained the document while soliciting and incorporating feedback from other parties, including CSAC, counsel for CSAC, and various Citigroup employees and counsel. UF 8. Milbank attorneys circulated the initial draft, collected and incorporated comments and edits, and circulated revised versions of the Offering Circular until the final version at closing. *See, e.g.*, Ex. 13; Ex. 8; Ex. 9. According to Darius Grant, Mr. Stoker's supervisor and the head of the CDO structuring desk, "deal counsel [Milbank]" was the party "whose responsibility [it] was to create the offering materials," and Citigroup "typically relied on the external counsel in … ensuring those were accurate." Ex. 3 at 22:13-17.

[3] The SEC's Complaint also alludes to a single statement in Appendix A to the Pitchbook, titled "Risk Factors," that CSAC "selected" the collateral securities for Class V III. Compl. ¶ 49. As discussed above, however, CSAC was responsible for statements regarding its role. UF 6.

b. To the extent Citigroup employees were involved in preparing the Offering Circular, such involvement was a collective effort.

No single Citigroup employee had primary responsibility for Citigroup's involvement in the preparation of the Offering Circular. UF 9. Mr. Pinniger testified that Citigroup's involvement was "a collective responsibility," and that it involved him and "others on the structuring desk, as well as our internal and external counsel." Ex. 1 at 190:22-191:4, 191:11-14. Mr. Dominguez likewise explained that there "was a whole team of people" that worked on the Offering Circular. Ex. 2 at 165:21-166:11.

Moreover, to the extent Mr. Stoker or Citigroup's structuring desk were involved in the preparation of the Offering Circular, their focus was on the economic terms of the transaction. UF 10. Mr. Grant testified that the structuring desk's role with respect to the preparation of the Offering Circular was to "make sure the mathematics—the capital structure was … accurate." Ex. 3 at 21:5-12. Mr. Dominguez likewise stated that the structuring desk was focused on "the economic terms." Ex. 2 at 165:21-166:11.

c. CSAC was responsible for the specific statements in the Offering Circular regarding asset selection alleged to be misleading.

The SEC's claim that the Offering Circular was misleading regarding Citigroup's role in the asset selection process is based on two sections. *First*, the SEC focuses on certain statements in the section of the Offering Circular titled "The Manager." As with the Pitchbook, CSAC was responsible for this section. UF 11. "The Manager" section of the Offering Circular includes an explicit statement that "[t]he information appearing in this section has been prepared by [CSAC] and has not been independently verified by the Co-Issuers, the Initial Purchaser, the Placement Agent, the Trustee or any other person." Ex. 12 at CITI09572405. Indeed, the SEC has admitted that, "[s]imilar to the pitch book, CSAC and Bhatt were responsible for the contents of [the] section titled 'The Manager' in the offering circular." Ex. 7 at 12.

Second, the SEC focuses on a single statement in the Risk Factors regarding "the investment strategy and investment process of the Manager in analyzing, selecting and managing

[the portfolio]." Compl. ¶ 54. It is undisputed that CSAC was responsible for this risk factor. UF 12. Furthermore, the engagement letter between Citigroup and CSAC confirms that CSAC was responsible for providing and ensuring the accuracy of all information in the Offering Circular relating to CSAC. Ex. 6 at CITI18318429.

d. Milbank was responsible for the risk factors regarding Citigroup's trading position.

The SEC also claims that the Risk Factors section of the Offering Circular contained misleading statements regarding Citigroup's trading position. With the exception of materials relating to the manager, as discussed above, however, Milbank was responsible for the Risk Factors in the Offering Circular. UF 13. Mr. Pinniger described the Risk Factors as a "legal document" that "would have been driven largely by counsel"; he stated that "the papers would have been run by [Milbank]," and that "lawyers would have been drafting the language." Ex. 1 at 287:10-21. Indeed, the contemporaneous emails that circulated and commented on drafts of the Offering Circular confirm that Milbank reviewed the Risk Factors. *E.g.*, Ex. 13 ("Please note that the risk factors are still being reviewed by [Milbank]").

B. The Class V III Pitchbook and Offering Circular did not contain misleading statements.

Summary judgment in favor of Mr. Stoker is also warranted because there were no misleading statements in the Class V III Pitchbook or Offering Circular. *In re IBM Corp. Securities Lit.*, 163 F.3d 102, 107-08 (2d Cir. 1998) (affirming summary judgment for defendant where statements were neither false nor misleading). The Pitchbook and Offering Circular accurately described both the asset selection process and the position of Citigroup's trading desk.

1. There were no misleading statements in the Pitchbook or the Offering Circular regarding the asset selection process.

a. The Pitchbook and Offering Circular accurately disclosed that CSAC selected the assets for Class V III.

CSAC selected the assets for the Class V Funding III portfolio. CSAC and Citigroup employees testified repeatedly that CSAC in fact selected the Class V III. UF 14. CSAC made

these selections on the basis of its own extensive research on and analysis of the assets, most of which CSAC already owned in other deals. UF 15. Thus, the disclosures that CSAC "selected" the Class V III assets were entirely accurate.

b. There was nothing about the Class V III asset selection process that required further disclosure.

The SEC claims the disclosures regarding the asset selection process were nonetheless misleading because they did not disclose that Citigroup "exercised significant influence over the asset selection process" or that Citigroup had a "substantial role in selecting the names for Class V III." Compl. ¶¶ 2, 59. The SEC's vague claims appear to be premised on the fact that Citigroup and CSAC discussed potential assets, that Citigroup provided a list of assets to CSAC that it was willing to source, and that CSAC provided Citigroup with a list of approved assets from which it could choose assets to source. *See* Compl. ¶ 59. None of these facts, however, suggests that Citigroup exercised significant or unusual influence over, or played a substantial role in, CSAC's asset selection.

First, as the SEC's own expert admits, there is nothing unusual or significant about an arranging bank and an asset manager discussing assets. UF 16. *Second*, there is nothing unusual or significant about an arranging bank providing a list of assets it is willing to source to an asset manager. UF 17. *Third*, as the SEC's expert also conceded, it is not unusual for an asset manager to provide an arranging bank with a list of approved assets from which the arranging bank can choose assets to source. UF 18.

The Class V III disclosures were thus not misleading for failing to disclose Citigroup's communications with CSAC, because there was nothing out of the ordinary about such communications. Indeed, the SEC's own expert admitted that he could not identify a single statement in the Pitchbook or Offering Circular that was false or misleading in light of the allegedly undisclosed communications between Citigroup and CSAC. UF 19.

2. There were no misleading statements in the Pitchbook or the Offering Circular regarding the positions of Citigroup's trading desk.

a. The Pitchbook and Offering Circular accurately disclosed that Citigroup would take initial short positions on the Class V III reference assets.

The Pitchbook and Offering Circular also accurately reflected the facts regarding the position of Citigroup's trading desk with respect to the Class V III assets. The SEC claims that statements in the Pitchbook and Offering Circular were misleading because they did not disclose that Citigroup had taken a short position on 25 of the reference assets in Class V III. Compl. ¶¶ 59, 60. Yet the Offering Circular disclosed that Citigroup, through its affiliate Citibank N.A., would initially purchase protection on—in other words, take a short position on—all of the synthetic assets in the Class V III portfolio in its role as the "Initial CDS Asset Counterparty." UF 20. The Offering Circular also disclosed that, "[i]n such capacity as swap counterparty, Citigroup … may be expected to have interests that are adverse to the interests of the Noteholders" and that Citigroup "will have no duty to act on behalf of the Noteholders and, directly or indirectly, may act in ways adverse to them." UF 21.

The Pitchbook included similar explicit disclosures. The Pitchbook warned that "Citigroup or an Affiliate thereof is expected to act as the initial CDS Asset counterparty pursuant to certain CDS Assets acquired by the Issuer" and that "[i]n such capacity …, Citigroup (or such affiliate) may be expected to have interests that are adverse to the interests of the holders of Securities." UF 22. The Pitchbook further disclosed that "[a]s such a swap counterparty, Citigroup will have no duty to act on behalf of the holders of Securities and, directly or indirectly, may act in ways adverse to them." *Id.*

Indeed, it was customary and well understood that, for synthetic CDOs, the arranging bank—in this case, Citigroup—would serve as the initial CDS counterparty and, in that role, buy protection on the assets in the portfolio. UF 23. The investors in Class V III were thus fully aware that Citigroup had taken short positions on the assets in the Class V III portfolio.

b. The Pitchbook and Offering Circular accurately disclosed that Citigroup's trading desk may retain its short positions.

Further, Citigroup accurately disclosed its intentions regarding its short positions. The Offering Circular states that "[t]he Initial CDS Asset Counterparty [Citigroup] may provide CDS Assets as an intermediary with matching off-setting positions requested by the Manager or may provide CDS Assets alone without any off-setting positions." UF 24. The undisputed evidence shows that this disclosure was entirely accurate.

First, Citigroup "provide[d] CDS Assets as an intermediary with matching offsetting positions requested by the manager." Ex. 12 at CITI09572393. Specifically, Citibank, acting as the initial CDS counterparty, bought protection on 24 synthetic assets in the Class V III portfolio and intermediated those positions in matching trades with other protection buyers. UF 25. Second, Citibank also "provide[d] CDS Assets alone without any offsetting positions." Ex. 12 at CITI09572393. Specifically, Citigroup, acting as the initial CDS counterparty, bought protection on 25 synthetic assets in the Class V III portfolio without intermediating those positions with other buyers. UF 26.

Thus, the Class V III disclosure documents were accurate. Indeed, the SEC's own expert admitted that he could not identify a single statement in the Pitchbook or Offering Circular that is false or misleading in light of Citigroup's trading positions. UF 27.

c. No further disclosures were required regarding the positions of Citigroup's trading desk.

The SEC claims that, notwithstanding these explicit disclosures, statements in the Pitchbook and Offering Circular were misleading because they did not disclose that Citigroup's trading desk intended to maintain its short positions on the 25 Class V III reference assets on which it bought protection without entering into intermediating trades. Compl. ¶¶ 55, 56. This claim is not supported by the facts or the law.

The undisputed facts show that Citigroup's trading desk had no intention to maintain its short positions in these 25 assets for any defined period of time. UF 28. Donald Quintin, the head of Citigroup's secondary CDO trading desk, testified that "prior to the date that … Class V

III closed," there was no "decision made at Citigroup to retain the short position on its assets it had after closing." Ex. 30 at 157:14-19. Mr. Quintin further testified, "the intent initially was … we'll try to cover this in the market …. [T]hat's why the names that were agreed were names that we felt relatively comfortable that we could cover." Ex. 29 at 57:14-58:3.

More generally, Citigroup's secondary trading desk, like all trading desks, decided whether or not, and to what extent, to trade out of its short positions on a day-by-day basis. UF 29. The SEC's own expert explained that "trading desks do not know how long they will hold most positions when they initiate a trade" and that "Citigroup's CDO secondary trading desk had the option to keep the short on as long as it wanted, and could retain the short or offset the position at any time." Ex. 21 ¶ 12.[4]

In fact, Citigroup did not retain its short positions with respect to all of the 25 assets. Beginning before Class V III closed on February 28, 2007, Citigroup partially offset its short positions on at least 11 of the 25 assets, and as of June 8, 2007, the trading desk had entirely offset its short position with respect to 8 of the 25 assets. UF 30.

The Offering Circular is also not misleading because it explicitly disclosed that Citigroup had the option to maintain its short positions. As the Second Circuit recently held, a reasonable investor would have understood the word "may" to indicate that Citigroup was permitted either to retain its short positions or offset them. *Wilson v. Merrill Lynch & Co.*, 671 F.3d 120, 133 (2d Cir. 2011); *see also*, *Mendell v. Greenberg*, 927 F.2d 667, 679 (2d Cir. 1990) (proxy statement was not misleading for stating that defendant "may" receive additional compensation despite

[4] Given that the Citigroup trading desk did not have an intent to retain its short positions for any defined period of time, it cannot be the case that Mr. Stoker should reasonably have known of such an intent. Moreover, the evidence shows that the Citigroup secondary CDO trading desk did not disclose its trading positions to the structuring desk. Dooley Decl. Ex. 2 at 167:7-168:2; *id.* Ex. 17 at 98:3-99:6. As Mr. Dominguez testified, "Trading positions were confidential"; knowing them was "just not part of the structure[r]'s job description." Dooley Decl. Ex. 2 at 167:21-22.

evidence that the additional compensation was already accounted for).[5]

C. Mr. Stoker did not obtain money or property by means of the alleged omissions from the Class V III Pitchbook or Offering Circular.

1. The SEC must produce evidence that Mr. Stoker personally obtained money or property by means of the alleged omissions.

Section 17(a)(2) makes it unlawful for "any person" to "obtain money or property by means of" any untrue statement or omission of a material fact necessary in order to make the statement not misleading. 15 U.S.C. § 77q(a)(2). Section 17(a)(2) is a primary liability statute, and its plain language directly connects the subject "any person" to the verb "obtain." Thus, the SEC must point to facts that allow for the reasonable inference that Mr. Stoker, the "person" who is the subject of the SEC's allegations, "actually obtained money or property by means of the untrue statements." *SEC v. Norton,* No. 95 Civ. 4451(SHG), 1997 WL 611556, at *3 (S.D.N.Y. Oct. 3, 1997). In other words, the SEC must prove that "the defendant *himself* … obtained money or property." *SEC v. Daifotis*, No. C 11-00137 WHA, 2011 WL 2183314, at *10 (N.D. Cal. June 6, 2011); *see also SEC v. Forman*, No. 07-11151-RWZ, 2010 WL 2367372, at *8 (D. Mass. June 9, 2010) (granting summary judgment where defendant's bonus was predetermined and not tied to corporate performance); *SEC v. Glantz*, No. 94 Civ. 5737 (CSH), 1995 WL 562180, at *5 (S.D.N.Y. Sept. 20, 1995) (holding that defendant must "obtain money or property through *his* misconduct") (emphasis added); *SEC v. Burns*, No. 84-0454, 1986 WL 36318, at *3 (S.D. Cal. Feb. 19, 1986) ("[T]he literal language of the statute requires a finding that the Defendant, quote, 'obtain money or property,' end of quote.").

The SEC has failed to produce any evidence that Mr. Stoker obtained money or property by means of the allegedly misleading statements in the Class V III Pitchbook and Offering Circular. Instead, the SEC claims that it is enough that Citigroup profited from Class V III. That

[5] *Cf. Dodona v. Goldman Sachs*, No. 10 Civ. 7497 (VM), 2012 WL 935815, at *13, 17-18 (S.D.N.Y. March 21, 2012) ("may" disclosure was inadequate given the defendants' awareness of "singularly prohibitive risks" associated with the CDO's in question, including "nonpublic information regarding the deteriorating credit quality" of the assets).

is not sufficient. *First*, "when the language of the statute is clear, its plain meaning ordinarily controls its construction." *United States v. Proyect*, 989 F.2d 84, 87 (2d Cir. 1993). Here, "[t]he plain meaning of this text requires that the defendant himself … obtained money or property," *Daifotis*, 2011 WL 2183314, at *10.[6]

Second, to find Mr. Stoker liable because Citigroup obtained money or property would impermissibly create negligent aiding and abetting liability, which does not exist for Section 17(a)(2). *Compare* 15 U.S.C. § 78t(e), *with* 15 U.S.C. § 77q(a). The Supreme Court has ordered courts to maintain a "clean line" between "those who are primarily liable … and those who are secondarily liable" under the securities laws, *Janus*, 131 S. Ct. at 2302, and this line must be drawn across all elements of a cause of action. Accordingly, the SEC must proffer sufficient evidence that Mr. Stoker himself meets all the elements of Section 17(a)(2) and (a)(3).

The need to distinguish between primary and secondary liability emphasized in *Janus* applies with even greater force in the case of Section 17(a)(2), where the SEC need only prove negligence and not *scienter*. Allowing the SEC to impose liability where the defendant both (i) lacked intent to commit fraud, and (ii) did not personally obtain money or property from the transaction invites the SEC to allege securities fraud against any employee who unintentionally participated in the omission of a material fact without making any money as a result.

2. Mr. Stoker obtained his salary and bonus wholly independent from Class V III and regardless of the alleged omissions.

Nor can the SEC claim that it is enough that Mr. Stoker was paid for his work as a structurer at Citigroup. Such a low standard would eviscerate the requirement that Mr. Stoker obtained money and property "by means of" the alleged omissions from the Class V III disclosure materials. Instead, the SEC must offer evidence of a factual nexus between Mr. Stoker's compensation and the allegedly misleading statements. *Forman*, 2010 WL 2367372, at *8. The SEC cannot offer such evidence.

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[6] The only case cited in support of the SEC's position, *SEC v. Delphi Corp.*, No. 06-14891, 2008 WL 4539519 (E.D. Mich. Oct. 8, 2008), entirely ignores the plain meaning of the statute.

There is no evidence that any of Mr. Stoker's compensation was tied to Class V III, much less to the alleged omissions from the Pitchbook and Offering Circular. Neither Mr. Stoker's salary nor his bonuses would have been any different had the Pitchbook or Offering Circular disclosed additional information or had Class V III performed any differently.

a. Mr. Stoker's salary was fixed based on his position and was unrelated to Class V III or the alleged omissions.

Mr. Stoker's annual salary was set based on his position at Citigroup and was not related to his job performance or the success, failure, or existence of any deal. UF 31. Salaries at Citigroup were "fixed by Citigroup policies, depending on rank," Ex. 2 at 145:15-16, and were not "based on how well an employee did his job," *id.* at 102:18-19. Thus, Mr. Stoker did not obtain his salary by means of Class V III, much less by means of the alleged omissions from the Pitchbook or Offering Circular.

b. Mr. Stoker's 2006 bonus was unrelated to Class V III or the alleged omissions.

Mr. Stoker also did not obtain his 2006 bonus by means of Class V III or the alleged omissions from the Pitchbook and Offering Circular. The SEC cannot cite to any evidence that Class V III played any role in the award or calculation of Mr. Stoker's 2006 bonus. Moreover, it is undisputed that Mr. Stoker's 2006 bonus was set by Citigroup management by December 15, 2006, and approved by Citigroup's board in early January 2007. UF 32. The engagement letter between Citigroup and CSAC regarding Class V III was not signed until January 8, 2007, UF 33, and Class V III did not close until February 28, 2007, UF 34. Thus, Class V III could not have played any role in Citigroup's determination of Mr. Stoker's 2006 bonus. Nestor Dominguez confirmed that Mr. Stoker's compensation in 2006 did not "depend[] upon the performance of any deals" and that nothing "that could have happened in 2007 … would have affected Mr. Stoker's compensation for 2006." Ex. 2 at 156:15-25.

c. Mr. Stoker's 2007 bonus was unrelated to Class V III or the alleged omissions.

Finally, Mr. Stoker did not earn his 2007 bonus by means of Class V III or the alleged omissions. Mr. Stoker's guaranteed 2007 bonus was awarded because Citigroup wanted to retain him at Citigroup and was not awarded based on Mr. Stoker's work on any particular deal, much less Class V III. UF 35. As Mr. Dominguez explained:

> People would get guarantees if we were hiring them on a competitive basis away from, you know, a competitor and we had to guarantee, give them a year or two of certainty. Or they were being offered a guarantee away and because they wanted to be -- somebody was recruiting them away from our team.

Ex. 2 at 145:24-146:6. In Mr. Stoker's case, Merrill Lynch tried to hire him away from Citigroup starting in October 2006, and made him a formal offer in February 2007. Ex. 33. Shortly thereafter, Mr. Stoker told his supervisor Darius Grant that "he had an offer from Merrill Lynch and that he would like to stay at Citi, but that we would have to match the Merrill offer." Ex. 3 at 150:19-151:25. Mr. Grant then recommended to Citigroup management that Mr. Stoker receive a guaranteed bonus, and Citigroup agreed to guarantee Mr. Stoker's salary and bonus for 2007. Ex. 3 at 150:19-151:25; Ex. 35; Ex. 32. This undisputed evidence shows that Mr. Stoker's 2007 bonus was unrelated to the performance of Class V III or the alleged omissions from the Class V III Pitchbook and Offering Circular.

Furthermore, Mr. Stoker's 2007 compensation, including his 2007 bonus, was approved and guaranteed on February 26, 2007, two days before Class V III closed on February 28. UF 36. This is further undisputed evidence that neither Class V III nor its performance factored into the award or calculation of Mr. Stoker's 2007 bonus.

Finally, it undisputed that Mr. Stoker's 2007 bonus was guaranteed as of February 26, 2007, and could not have been modified regardless of whether Class V III closed and regardless of Class V III's performance. UF 37. Thus, by the time Class V III closed and the Offering Circular issued, Citigroup had no discretion to change Mr. Stoker's 2007 bonus.

Even under the broadest construction of Section 17(a)(2)'s "by means of" requirement, there must be some connection between Mr. Stoker's compensation and the alleged omissions

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regarding Class V III. The SEC has no evidence to establish such a connection. Given the undisputed evidence here, no reasonable juror could find that Mr. Stoker "obtain[ed] money or property by means of" the alleged omissions from the Class V III Pitchbook or Offering Circular.

V. MR. STOKER IS ENTITLED TO SUMMARY JUDGMENT ON THE SEC'S SECTION 17(a)(3) CLAIM.

Under Section 17(a)(3), it is unlawful "to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser." 15 U.S.C. § 77q(a)(3). To survive summary judgment on a Section 17(a)(3) claim, the SEC must proffer sufficient evidence such that a reasonable juror could find (i) the existence of a scheme or practice that operated as a scheme, (ii) engaged in by Mr. Stoker, (iii) with negligence. *Id.*; *Monarch Funding Corp.*, 192 F.3d at 308; *Kelly*, 817 F. Supp. 2d at 344.[7]

Summary judgment should be granted in favor of Mr. Stoker on the SEC's Section 17(a)(3) claim. As alleged in the Complaint, the SEC's Section 17(a)(3) claim is nothing more than a repackaging of its Section 17(a)(2) negligent omission claim. To the extent that the SEC now contends that Citigroup and Mr. Stoker engaged in an inherently deceptive or sham transaction as is required under Section 17(a)(3), the evidence does not support such a claim.

A. A scheme claim under Section 17(a)(3) is distinct from an omission claim under Section 17(a)(2) and requires proof of different conduct.

The Second Circuit and other circuit courts have consistently affirmed dismissal of scheme claims "where the sole basis for such claims [was] alleged misrepresentations or omissions." *Lentell v. Merrill Lynch & Co.*, 396 F.3d 161, 177 (2d Cir. 2005); *see also WPP Lux. Gamma Three Sarl v. Spot Runner, Inc.*, 655 F.3d 1039, 1057 (9th Cir. 2011) ("[a] Rule 10b-5(a) and/or (c) claim cannot be premised on the alleged misrepresentations or omissions that

[7] "[C]laims under subsections (1) and (3) of Section 17(a) are treated the same as claims under subsections (a) and (c) of Rule 10b-5 …." *Kelly*, 817 F. Supp. 2d at 346. Thus, the case law defining scheme liability under Rule 10b-5(c) is equally applicable to scheme liability under Section 17(a)(3). Indeed, the language of Rule 10b-5(c) and Section 17(a)(3) is virtually identical, with only the scienter requirement as a significant point of departure. *See Monarch Funding Corp.*, 192 F.3d at 308.

form the basis of a Rule 10b-5(b) claim."); *Benzon v. Morgan Stanley Distributors, Inc.*, 420 F.3d 598, 610 (6th Cir. 2005) ("Rules 10b-5(a) and (c) encompass conduct beyond disclosure violations. Indeed, the SEC as much as conceded that liability may arise under Section (a)(3) only "where it is alleged that the defendants 'undertook a deceptive scheme or course of conduct that went beyond the misrepresentations.'" Plaint.'s Opp'n to Def.'s Motion to Dismiss at 22 (quoting *In re Alstrom SA Sec. Litig.,* 406 F. Supp. 2d 433, 475 (S.D.N.Y. 2005)).

The SEC must point to evidence of Mr. Stoker's involvement in "a scheme or deceptive course of conduct that encompassed more than the making of … misrepresentations." *Alstrom*, 406 F. Supp. 2d at 476. The SEC must proffer evidence of a fraudulent course of business, "the performance of an inherently deceptive act that is distinct from an alleged misstatement," *Kelly*, 817 F. Supp. 2d at 344, or similarly distinct "manipulative" conduct, *KPMG,* 412 F. Supp. 2d at 371; *see also In re Parmalat Sec. Litig.*, 376 F. Supp. 2d 472, 505 (S.D.N.Y. 2005) (dismissing scheme claim because the transactions at issue were "not inventions, projects, or schemes with the tendency to deceive" and because "[a]ny deceptiveness resulted from the manner in which [the defendants] described the transactions."); *SEC v. Steffelin*, No. 11-CV-04204 (MGC) (S.D.N.Y. Oct. 25, 2011), Transcript at 36–38 (dismissing the SEC's Section 17(a)(3) claim on the ground that the complaint alleged only "a material omission").

B. There is no allegation in the Complaint that Citigroup or Mr. Stoker engaged in any fraudulent course of business or performed an inherently deceptive act that is distinct from the alleged omissions.

As Mr. Stoker detailed in his Motion to Dismiss, the SEC does not allege that Citigroup or Mr. Stoker engaged in any fraudulent course of business or performed an inherently deceptive act. Instead, the Complaint alleges only that the Class V III Pitchbook and Offering Circular omitted facts related to the selection of the Class V III reference assets and Citigroup's financial interest in those assets and that Mr. Stoker failed to ensure that these documents were accurate. Compl. ¶¶ 2, 3, 4, 51, 52, 59, 64.[8] For this reason alone, the Court should grant judgment in

[8] The SEC also told this Court that its basis for bringing this action against Mr. Stoker was his alleged failure to ensure that the disclosure documents were accurate. Ex. 34 at 25:24-26:2.

Stoker's favor on the SEC's Section 17(a)(3) claim.

C. Neither Citigroup nor Mr. Stoker engaged in a fraudulent course of business or performed an inherently deceptive act with respect to Class V III.

The SEC cannot save its Section 17(a)(3) claim by re-characterizing the allegations in the Complaint as it did in response to Mr. Stoker's Motion to Dismiss. As stated in the SEC's Opposition to Mr. Stoker's Motion to Dismiss, the SEC now claims that Class V III was "intended by Citigroup as a vehicle to position it to profit from the downturn in the United States housing market" by "includ[ing] in the transaction assets that it believed had a strong likelihood of failure." Pl.'s Mem. of Law in Opp'n to Mot. to Dismiss 24, ECF No. 23. The evidence does not support this allegation.

1. There is no evidence of intentional fraud by Mr. Stoker or others at Citigroup.

There is no evidence of any intentional fraud or deception. It is undisputed that the SEC does not have sufficient evidence to support a finding that any person at Citigroup acted with *scienter*. UF 38. The SEC admitted before this Court that "based on the facts and circumstances, including our interview of witnesses, our review of hundreds of thousands, if not millions, of pages of documents, the numerous instances of testimony we took, our evaluation of the law that applies, we concluded that in this instance, there was not sufficient evidence to support a finding of scienter." Ex. 34 at 24:19-25. Indeed, the SEC's complaint against Citigroup is conspicuous in alleging only negligent violations of Section 17(a). *See* Compl., *SEC v. Citigroup Global Markets, Inc.*, No. 11-CV-7387 (S.D.N.Y. Oct. 19, 2011), ¶¶ 6, 65. Given the SEC's admissions, there is no basis for a claim that Class V III operated as an intentionally fraudulent course of conduct.

2. Citigroup's secondary CDO trading desk did not intend to retain its short positions in Class V III "to profit from the downturn in the United States housing market."

The SEC's new scheme claim is contradicted by the undisputed evidence. First, it is undisputed that Citigroup's secondary trading desk decided whether to retain its short positions

on a day-by-day basis. UF 29. As Brian Carosielli of Citigroup's secondary trading desk explained, the desk's trading positions were based on a "dynamic process, looking at how the book is evolving on a daily basis, and saying, based on to where things are today, we want to be a little bit more short, we want to be a little less short, we want to cover some, we want to put more on." Ex. 23 at 144:2-6.

Second, the secondary CDO trading desk never had an intention to maintain its short position in the 25 assets in the Class V III portfolio that it did not offset immediately for any defined set of time. UF 28. As noted above, Mr. Quintin actually testified that "the intent initially was … we'll try to cover this in the market…. [T]hat's why the names that were agreed were names that we felt relatively comfortable that we could cover." Ex. 34 at 57:14-58:3.

Third, the trading desk ultimately offset many of the short positions it took on the 25 assets in the Class V III portfolio that it did not offset immediately. UF 30.

Finally, Mr. Quintin specifically denied that Class V III was viewed as transactions where Citigroup would benefit from a decline in the housing market. Ex. 29 at 90:14-91:14. Indeed, as Mr. Quintin explained, the SEC's claim makes little sense given that Citigroup intermediated many of the initial short positions it took as the CDS counterparty: "If we had a view that the market was going to zero, we would have kept the protection on the entire transaction." *Id.* at 90:14-91:2.

3. Citigroup did not believe that the Class V III reference assets "had a strong likelihood of failure."

Likewise, the evidence does not support that Citigroup believed that the Class V III reference assets "had a strong likelihood of failure." The SEC cannot cite to any evidence showing that Citigroup performed analyses of the Class V III reference assets to determine their "likelihood of failure." In fact, Citigroup's secondary CDO trading desk did not have any unique knowledge about the likely performance of the reference assets in the Class V III portfolio or about the direction of the housing market generally. UF 39. According to Mr. Quintin, the trading desk "didn't know which way the market was going to go…. We didn't know what

would happen to the protection markets.... We didn't know what would happen to the underlying mortgage market. We didn't know what would happen to the CDO market." Ex. 30 at 92:13-23.

In fact, the secondary CDO trading desk's willingness to source certain assets in the Class V III portfolio was based on the assets' liquidity, not on their likely performance. According to Mr. Carosielli, the trading desk's interest in sourcing assets "was a function of where [it] thought [it] had customer demand for the names." Ex. 17 at 46:12-13. The trading desk was "looking to accept names that [it] felt that there would be demand for in the protection market." Ex. 29 at 27:2-4.

VI. CONCLUSION

For the foregoing reasons, Mr. Stoker respectfully requests that the Court grant summary judgment in his favor on both of the SEC's causes of action.

Dated: May 7, 2012

Respectfully submitted,

By: */s/ John W. Keker*

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