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VIA HAND DELIVERY & E-MAIL

The application is DENIED. There are no grounds for reconsideration. SEC v Syron is not an intervening change in controlling law. Certification of an interlocutory appeal is not warranted. Even if the Appellate Court were to decide on the 17(a)(2) issue, the case would not be disposed of.

So ordered
Paul A Crotty

The Honorable Paul A. Crotty
United States District Judge
United States District Court
Southern District of New York
500 Pearl Street
New York, New York, 10007

Re: *SEC v. Mudd, et al.*, 11-cv-9202 (PAC) – Request for Limited Reconsideration or Certification for Interlocutory Appeal

Dear Judge Crotty:

We write on behalf of our client, Defendant Enrico Dallavecchia, and Defendant Daniel Mudd ("Defendants") to seek leave to file a motion for limited reconsideration of the Court's order on the Defendants' motion to dismiss (ECF 40) as to the SEC's Section 17(a)(2) claim only (Count II), or a motion to certify the issue for interlocutory appeal under 28 U.S.C. § 1292(b), because a new decision in a virtually identical case creates an irreconcilable split within this District.

On March 29, 2013, Judge Sullivan dismissed the SEC's Section 17(a)(2) claim against two former Freddie Mac executives. *SEC v. Syron*, -- F. Supp. 2d --, No. 11-cv-9201, 2013 WL 1285572, at *25-27 (S.D.N.Y. Mar. 28, 2013) (Ex. A). In so dismissing the claim, Judge Sullivan expressly disagreed with Judge Rakoff's interpretation of Section 17(a)(2) in *SEC v. Stoker*, 865 F. Supp. 457 (S.D.N.Y. 2012). This Court relied almost exclusively on the *Stoker* decision in denying Defendants' motion to dismiss the same claim. The SEC's complaints here and in *Syron* are nearly identical. Both complaints were filed on the same day (with sequential docket numbers); assert the same five claims; and allege similar factual theories against similarly situated defendants at sister companies, Fannie Mae and Freddie Mac. They were even announced in the same SEC press release.[1] The stark confusion and inequity of an intra-District split on the same legal question in similar cases presents a compelling basis for reconsideration. At a minimum, it demonstrates that a substantial difference of opinion exists on a controlling question of law, which only the Second Circuit will be able to settle through an interlocutory appeal in this case. *See Muniz v. Sabol*, 517 F.3d 29, 31-32 (1st Cir. 2008) (substantial ground for difference of opinion where there is split in district courts).

[1] *See* Press Release, SEC (Dec. 16, 2011) (Ex. B).

Background. On March 30, 2012, Defendants moved to dismiss the SEC's Complaint in its entirety. With respect to the SEC's Section 17(a)(2) claim, Defendants principally argued that the complaint did not allege (1) that Defendants actually obtained any money or property beyond their pre-established compensation "as FNMA executives," or (2) any facts plausibly tying any alleged misstatement or omission to Defendants' compensation. Def. Mem. at 42-43 (ECF 33) (internal citation omitted).

On June 6, 2012, after the SEC had already filed its opposition to Defendants' motion to dismiss, Judge Rakoff issued his opinion in *Stoker*, holding that Section 17(a)(2) merely requires a complaint to allege that a defendant directly obtained money or property for his employer, or personally obtained such indirectly. 865 F. Supp. at 463. At oral argument on the motion to dismiss, and without notice to Defendants, the SEC relied exclusively on *Stoker* in support of its Section 17(a)(2) claim. *See* 7/18/12 Hr'g Tr., at 32-33, *In re Fannie Mae 2008 Sec. Litig.*, No. 08-cv-7831 (PAC), at 50-52 (S.D.N.Y. July 18, 2012) (ECF 425). In response, Defendants orally requested permission to "to file a two-page letter . . . in response to the [SEC's] citation to a new authority, Judge Rakoff's decision," *see id.* at 92, which the Court denied. Thereafter, on August 10, 2012, the Court denied Defendants' motion to dismiss in its entirety. With respect to the Section 17(a)(2) claim, the Court relied almost entirely on *Stoker*. *SEC v. Mudd*, 885 F. Supp. 2d 654, 669-70 (S.D.N.Y. 2011).

The *Syron* Decision. In *Syron*, Judge Sullivan expressly disagreed with *Stoker*, holding that Section 17(a)(2) plainly requires the SEC to allege that a "defendant *personally* gain[ed] money or property from the fraud." *Syron*, 2013 WL 1285572, at 27 (emphasis added). Judge Sullivan rejected Judge Rakoff's conclusion that it was sufficient for the SEC to allege nothing more than that a defendant obtained money or property, in any fashion, for or from his employer. *See id.* at 26-27 (not enough that defendants may have "aided and abetted" its employer's, Freddie Mac's, obtaining money). Further, simply alleging that the *Syron* defendants' compensation was tied in part to a Freddie Mac loan program and quarterly financial results was too "tenuous [a] connection" for the SEC plausibly to allege that their compensation was "affected, in any way," by the Freddie Mac's stock offerings. *Id.* at 25, 27.

Reconsideration is Warranted. *Syron* is not binding on this Court. But *Syron* nevertheless presents "persuasive authority to the extent that [its] factual patter[n] align[s] with the instant case." *See Anwar v. Fairfield Greenwich Ltd.*, 884 F. Supp. 2d 92, 93 (S.D.N.Y. 2012). Indeed, the instant case and *Syron* are virtually identical proceedings against six former executives who held parallel positions at Fannie Mae and Freddie Mac. The SEC itself highlighted this when it

filed both suits the same day and issued a joint press release for them.[2] The SEC alleges the same types of theories and factual allegations here as it did in *Syron*. Specifically, the SEC alleges here that Defendants' compensation was tied to (1) Fannie Mae's "performance, measured by attaining corporate year-end goals," and (2) each Defendant's respective personal performance. *See* Compl. ¶¶ 41, 42, 59, 60. These are weaker allegations than those in *Stoker*, and just like the allegations dismissed in *Syron*. Indeed, the judicially noticeable facts here affirmatively demonstrate that Fannie Mae overhauled its bonus program in 2006 to focus on goals *unrelated* to its stock price. *See* Ex. C (Fannie Mae, 2006 Annual Report (Form 10-K), at 178-79 (Aug. 16, 2007)). Simply drawing a salary or bonus is too "tenuous [a] connection" to impose Section 17(a)(2) liability. *Syron*, 2013 WL 1285572, at 25. Because the SEC does not and cannot allege that Defendants "personally gained money or property from [Fannie Mae's] stock offerings," it "has not stated a claim under Section 17(a)(2)." *See Syron*, 2013 WL 1285572, at 27.

Defendants have presented the same basic arguments for dismissal as those adopted in *Syron*. They did not have a full opportunity to address and distinguish *Stoker*, on which the SEC and this Court ultimately relied. Defendants certainly did not have an opportunity to address *Syron*, as it was not decided until last week. The incongruity between the rulings here and in *Syron* on the SEC's identical Section 17(a)(2) claim is a new, persuasive development. Thus, this is exactly the type of rare, unforeseen circumstance that warrants reconsideration.

Ripeness for Interlocutory Appeal. Alternatively, Defendants respectfully request that they be allowed to file a motion for interlocutory appeal under 28 U.S.C. § 1292(b) asking this Court to certify this issue for appeal. Aside from the out-of-district case law previously cited by Defendants, it is now clear that even within this very District there is a controlling question of law on which there is substantial ground for difference of opinion, and an immediate appeal will materially advance and limit the scope of trial. *See Armstrong v. Collins*, No. 01-cv-2437 (PAC), 2011 WL 308260, at *2 (S.D.N.Y. Jan. 31, 2011). Defendants, however, do not seek a change in the current schedule and believe that discovery can move forward while any appeal is pending.

[2] Stating that the SEC has "charged six former top executives of [Fannie Mae] and [Freddie Mac] with securities fraud, alleging they knew and approved of misleading statements claiming the companies had minimal holdings of higher-risk mortgage loans, including subprime loans." *See* Ex. B.

Dechert LLP

Respectfully submitted,

Hector Gonzalez

Enclosures

cc: All counsel of record (by email)