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**UNITED STATES DISTRICT COURT**

**CENTRAL DISTRICT OF CALIFORNIA**

CITIGROUP GLOBAL MARKETS INC.,

Plaintiff,

v.

IMPAC SECURED ASSETS CORP., et al.,

Defendants.

Case No. 2:11-cv-04514-MRP-MAN

**MEMORANDUM OF DECISION AND ORDER RE CGMI'S REQUEST FOR PARTIAL SUMMARY JUDGMENT OF LIABILITY**

## I. INTRODUCTION & BACKGROUND

Plaintiff Citigroup Global Markets Inc. ("CGMI") has moved for summary judgment that Defendants Impac Secured Assets Corp. ("Impac Secured"), Impac Funding Corp. ("Impac Funding"), and Impac Mortgage Holdings Inc. ("IMH," collectively "Impac" or the "Impac Defendants") are liable in connection with CGMI's purchase of Certificates[1] issued by the Impac Secured Assets Corp. 2007-3 Trust (the "2007-3 Trust"). The broad statement of the case, upon which the parties agree, is as follows. The 2007-3 Trust was offered pursuant to a prospectus supplement (the "ProSupp"). However, the Trust is governed by a pooling and servicing agreement ("PSA"). In March and April of 2010 CGMI purchased 2007-3 Trust Certificates with a total par value of $8.13 million. CGMI purchased the most senior tranche offered, Class A1-A. The PSA that governs the 2007-3 Trust and that Impac delivered to the trustee (the "Correct PSA") explains that, generally, the trustee is to make distributions to Certificate-holders on a sequential basis, with the Class A1-A holders being paid first, the Class A1-B holders being paid second, and so on. However, the Correct PSA also contains a provision that, upon exhaustion of the mezzanine tranches, all holders of Class A Certificates are to be paid with equal priority on a *pro rata* basis. This provision (the "Trigger Provision") was in the ProSupp, but does not appear in the PSA that was filed on the SEC's Electronic Data Gathering, Analysis and Retrieval (EDGAR) website (the "Incorrect PSA").

CGMI alleges that it reasonably relied on the Incorrect PSA, that it therefore overpaid for the 2007-3 Trust Certificates, and that it was damaged when Impac corrected the error and it was revealed that the trustee was to pay Class A

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[1] A Certificate is a document that shows ownership of a mortgage-backed security. Each Certificate represents a particular tranche within an offering. Because "Certificate" refers to the document evidencing ownership of a specific tranche, the Court uses the terms "tranche" and "Certificate" somewhat interchangeably.

Certificate-holders on a *pro rata*, instead of sequential, basis. CGMI asserts claims under Section 18 of the Exchange Act, Section 20(a) of the Exchange Act, and for state law negligent misrepresentation. CGMI has moved for summary judgment on all but the damages element of each claim. As set out more fully below, the Court **GRANTS** CGMI's motion except with respect to the negligent misrepresentation claim against IMH.

## II. LEGAL STANDARD

Summary judgment should be granted "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c)(2); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986). "As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Summary judgment is not appropriate if a "reasonable jury could return a verdict for the non-moving party." *Id.* On a motion for summary judgment, our "function is not . . . to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Id.* at 249. "There is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Id.*

The moving party bears the initial responsibility to point to the absence of evidence of any genuine issue of material fact. *Celotex Corp.*, 477 U.S. at 323. "When the party moving for summary judgment would bear the burden of proof at trial, it must come forward with evidence which would entitle it to a directed verdict if the evidence went uncontroverted at trial. In such a case, the moving party has the initial burden of establishing the absence of a genuine issue of fact on each issue material to its case." *Miller v. Glenn Miller Prods., Inc.*, 454 F.3d 975,

987 (9th Cir. 2006) (internal quotation marks and citations omitted). By contrast, where the non-moving party "bears the burden of proof at trial, summary judgment is warranted if the nonmovant fails to 'make a showing sufficient to establish the existence of an element essential to [its] case.'" *Nebraska v. Wyoming*, 507 U.S. 584, 590 (1993) (quoting *Celotex Corp.*, 477 U.S. at 322) (alteration in original). "[T]he moving party can meet its burden by pointing out the absence of evidence from the non-moving party," and it "need not disprove the other party's case." *Miller*, 454 F.3d at 987 (citation omitted). Accordingly, "[t]he nonmoving party must come forward with specific facts showing there is a genuine issue for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (internal quotation marks and citations omitted). However, "[i]f the opposing party does not so respond, summary judgment should, if appropriate, be entered against that party." Fed. R. Civ. P. 56(e)(2); s*ee also Celotex Corp.*, 477 U.S. at 322 ("[T]he plain language of Rule 56(c) mandates the entry of 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, and on which that party will bear the burden of proof at trial."). The "opposing party may not rely merely on allegations or denials in its own pleading." Fed. R. Civ. P. 56(e)(2). "The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson*, 477 U.S. at 255

"Only admissible evidence may be considered in deciding a motion for summary judgment." *Miller*, 454 F.3d at 988. Under Federal Rule of Civil Procedure 56(e)(1), "[a] supporting or opposing affidavit must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant is competent to testify on the matters stated." *See also Block v. City of L.A.*, 253 F.3d 410, 418–19 (9th Cir. 2001). Neither an unverified complaint nor arguments in the parties' briefs constitute "facts" for purposes of a summary judgment motion. *See Moran v. Selig*, 447 F.3d 748, 759 & n.16 (9th Cir. 2006)

(noting that unverified complaint cannot be considered as evidence on motion for summary judgment); *British Airways Bd. v. Boeing Co.*, 585 F.2d 946, 952 (9th Cir. 1978) ("[L]egal memoranda . . . are not evidence[.]").

## III. DISCUSSION

CGMI has moved for summary judgment of liability on its Section 18, Section 20, and negligent misrepresentation claims. Impac has requested that the Court deny or defer CGMI's motion pending further discovery. The Court treats each request separately. References to a "Fact" refer to the Court's Findings of Fact, which are being released contemporaneously with this Order.

### A. SECTION 18

To recover under Section 18, a plaintiff must show (i) a material false statement in an Exchange Act filing; (ii) made or caused to be made by the defendant; (iii) that the plaintiff purchased a security in actual reliance on the false statement; and (iv) resultant damages. 15 U.S.C. § 78r. The parties agree that the Incorrect PSA constitutes a false statement in an Exchange Act filing, and CGMI has not moved for summary judgment on damages. The Court therefore addresses only the remaining portions of elements (i), (ii), and (iii). Impac raises the additional arguments that summary judgment is precluded by the statute of limitations, the safe harbor provision in 17 C.F.R. § 232.103, and the "good faith, no knowledge" safe harbor provided by Section 18. The Court addresses each objection in turn.

#### *1. A Material False Statement*

Impac concedes that the Incorrect PSA omits the Trigger Provision and should not have been filed. Fact 61. The May 25 Current Report was a false statement because it included the Incorrect PSA, and the Incorrect PSA misstates the terms of distribution for the 2007-3 Trust. A statement is material if there is a "substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of

information made available." *Basic Inc. v. Levinson*, 485 U.S. 224, 231–32 (1988) (internal citation omitted) (stating materiality standard in the Section 10(b) context). The ProSupp states that the PSA, not the ProSupp, is the "governing instrument" of the 2007-3 Trust. Fact 84. The waterfall in a PSA governs distributions to Certificate-holders, making the waterfall among the most important sections of any PSA. Any change to the most important section of the governing document for an MBS trust would significantly alter the total mix of information regarding that trust. The Incorrect PSA therefore constitutes a material false statement.

*2. Made by the Defendant*

Section 18 liability attaches to a defendant who makes a false statement or who causes a false statement to be made. 15 U.S.C. § 78r(a). Impac Funding and IMH argue that they are legally distinct entities from Impac Secured and that only Impac Secured could have been responsible for the Incorrect PSA. IS/IF Opp. at 2; IMH Opp. at 2.

Impac Funding's objection is poorly articulated and slightly bizarre. It appears to consist of the sole line "Impac Secured, Impac Holdings, and Impac Funding are three separate and distinct entities – only one of which (Impac Secured) could have been responsible for the inadvertent omission in the PSA." IS/IF Opp. at 2. It is undisputed that Impac Funding's signature appears on the Incorrect PSA. It is similarly settled that a party who signs an Exchange Act filing "makes" the statement for purposes of Section 18. *See Janus Capital Group, Inc. v. First Deriv. Traders*, 131 S. Ct. 2296, 2302 (2011) ("[A]ttribution within a statement or implicit from surrounding circumstances is strong evidence that a statement was made by–and only by–the party to whom it is attributed."); *Howard v. Everex Sys., Inc.*, 228 F.3d 1057, 1061–63 (9th Cir. 2000) (signature on an SEC-filed document constitutes "making" the statement under Section 10(b)). Impac Funding may be attempting to argue that it never authorized Thacher or Vintage to

affix its signature to the Incorrect PSA and that it never authorized Thacher or Vintage to file the Incorrect PSA. To the extent that this is Impac Funding's argument, it is too clever by half. The purpose of Section 18 is to ensure the accuracy of Exchange Act documents, and the purpose of EDGAR is to encourage reliance on such documents by (i) encouraging their dissemination and (ii) assuring investors that the documents are authentic.[2] To hold that a publicly filed document, signed by a party and filed on EDGAR by that party's agent,[3] is not "made" by that party would plunge the Court down a metaphysical rabbit hole too deep to contemplate and would be wholly contrary to the scheme of securities regulation in this country.[4]

IMH presents a much closer question. Unlike Impac Secured and Impac Funding, IMH's signature on the Incorrect PSA is explicitly limited to representations in Section 9.01. Jasper Decl. Ex. J, at 10. CGMI argues that IMH nevertheless "made" the statements because IMH participated in drafting the Incorrect PSA, signed off on that document, permitted its agents to file the document, and failed to correct the problem when it had the chance. Reply at 21. Recent Supreme Court authority makes clear that substantial participation by a related entity does not mean that the related entity "made" a statement within the meaning of the Exchange Act. *Janus*, 131 S. Ct. at 2305 ("Although JCM, like a

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[2] By "authentic," the Court invokes exactly the scenario presented here. One goal of a government-maintained electronic repository of public documents is to assure the investing public that they are relying on final, complete, and governing documents rather than incomplete documents, drafts, or forgeries.

[3] Brief protestations to the contrary, it is evident from Thacher's Opinion Letter and James Malloy's testimony that Thacher acted as an agent for all three Impac entities with respect to the filing. Facts 32; 33.

[4] One such problem: a member of the investing public would never be able to tell whether a signature appearing on EDGAR had been authorized or was the result of a mistake. Such a holding would make it impossible for any member of the public to rely on EDGAR filings.

speechwriter, may have assisted Janus Investment Fund with crafting what Janus Investment Fund said in the prospectuses, JCM itself did not 'make' those statements for purposes of Rule 10b–5."). The Incorrect PSA, like the prospectuses in *Janus*, is signed by and attributed to Impac Funding and Impac Secured. However involved IMH was in the securitization process, it did not "make" any false statement within the meaning of the Exchange Act.

Section 18 also provides liability for one who causes a false statement to be made. 15 U.S.C. § 78r(a). IMH owns Impac Funding and Impac Secured. Facts 1; 2. At the time of the securitization, Impac Secured had no employees of its own and was not intended to have any of its own assets. Fact 7. Rather, Impac Secured existed solely to serve as a secondary-market mortgage conduit for Impac Funding. Fact 6. Impac Funding, in turn, conducted IMH's MBS conduit operations, i.e., the purchase, sale, and securitization of mortgage loans. Fact 5. It is undisputed that the securitization was managed by James Malloy, that Malloy was an employee of IMH, that Malloy does not believe that he was ever an employee of Impac Secured, and that Malloy made no effort to work for any particular Impac entity in his role managing the securitization. Facts 22; 23; 24; 25. It is also undisputed that Ron Morrison participated in the preparation of documents for EDGAR; that Morrison did not typically distinguish between actions taken on behalf of IMH, Impac Secured, and Impac Funding; and that Morrison reported to IMH's CEO at all times relevant to this lawsuit. Facts 27; 28; 29. It is also undisputed that Thacher served as counsel for all three Impac Defendants in connection with the securitization of the 2007-3 Trust and that all three Impac Defendants had the power to direct Thacher's actions. Facts 32; 33.

Faced with these facts, the only reasonable conclusion is that IMH caused the material false statement to be made. Impac Secured is an indirect-but-wholly-owned subsidiary of IMH, meaning that IMH has the ultimate power to direct Impac Secured's actions. Impac Secured had no employees of its own, meaning

that it could only act as directed by IMH and Impac Secured. The securitization was overseen and managed by IMH employees who made no effort to take off one hat and put on another while performing their duties. The person who oversaw the securitization, James Malloy, does not appear to have ever been an employee of Impac Secured. Gretchen Verdugo signed on behalf of both IMH and Impac Secured. In short, there was no functional distinction between the Impac Defendants at the time the 2007-3 Trust was being securitized. IMH employees and agents acted on behalf of all three Impac entities, and IMH (as the parent entity) had the power to direct the actions of Impac Secured and Impac Funding. The Court therefore finds that IMH caused a false statement of material fact to be made.

*3. There is No Question of Fact as to Actual Reliance*

Section 18 requires the plaintiff to have purchased securities "in reliance upon" a misleading statement. 15 U.S.C. § 78r(a). This requirement means that the plaintiff must prove actual, "eyeball" reliance. *Howard v. Everex Sys.*, 228 F.3d 1057, 1063 (9th Cir. 2000). In contrast to a Section 10(b) case, where the plaintiff may satisfy the reliance element through demonstrating fraud on the market, Section 18 therefore requires the plaintiff to have actually seen and relied upon the "specific statements contained in the SEC filings at issue." *In re Suprema Specialties, Inc. Sec. Litig.*, 438 F.3d 256, 283 (3d Cir. 2006); *see also Howard*, 228 F.3d at 1063.

To avoid summary judgment, Impac must identify facts that, if believed, would permit a reasonable jury to find either that CGMI did not read the terms of distribution in the Incorrect PSA, or that CGMI did not rely on those terms of distribution in making its purchase decision. *Keenan v. Allen*, 91 F.3d 1275, 1279 (9th Cir. 1996) (nonmovant has the burden of identifying facts that preclude summary judgment with sufficient particularity).

CGMI has introduced the Declaration of Kevin E. Counihan II ("Counihan")

to address the question of reliance. Mr. Counihan is a managing director for CGMI who is responsible for trading MBS for CGMI's account. Counihan Decl. ¶¶ 2–3. Mr. Counihan declares that a member of his trading desk downloaded the Incorrect PSA from EDGAR before each transaction, that he personally reviewed the terms of distribution contained in the Incorrect PSA, and that he directed CGMI's purchases based on those terms of distribution. Counihan Decl. ¶ 7. At his deposition, Mr. Counihan testified that it was the practice of CGMI for a trader to review the terms of distribution for every MBS investment that CGMI made. Fact 79.

Mr. Counihan is the only person who knows with absolute certainty whether he actually downloaded and relied upon the Incorrect PSA. The summary judgment standard in a civil case requires the Court to determine whether Impac has identified any material fact that, if believed, would make it more likely than not that Mr. Counihan's testimony is false. Impac has not.

In his declaration and at his deposition, Mr. Counihan explained that it was CGMI's policy to review a PSA prior to making any investment for its own account. Fact 79. Mr. Counihan explained that this policy was enacted sometime in 2009, after it became clear that senior MBS tranches could take losses. *Id.* He testified that "[t]here are a number of deals where there's inconsistencies between the PSA and the prospectus," (Counihan Depo. at 233:6–8) and that it was therefore important to review both the PSA and the ProSupp. *Id.* at 234:14–17. He further explained that a trader uses Intex to determine the proper price to bid, and so it is therefore important that Intex's model conforms to the PSA. *Id.* at 253:10–11. Mr. Counihan further testified that, because of the different payment structure between the ProSupp and the Incorrect PSA, he specifically remembers looking at the Incorrect PSA prior to bidding on the Certificates. Counihan Supp. Decl ¶ 15.

Each of Mr. Counihan's statements is plausible. They comport with

common sense and sound business practices. Mr. Counihan was questioned exhaustively at his deposition. He did not back away from any statement in his declaration, nor did he say anything inconsistent with that declaration. Impac has introduced no percipient witness testimony to contradict any of Mr. Counihan's statements. Instead, Impac argues that several pieces of indirect evidence make it "highly unlikely [CGMI] actually read or relied on the PSA prior to entering into either transaction at issue." IS/IF Opp. at 9. The Court addresses each below.

***Expert Testimony and Attorney Arguments Regarding the ProSupp***

First, Impac argues that the "PSA contains no unique information relevant to a trader, [and that therefore] it is rarely necessary to review the PSA." *Id.* at 10. Impac bases its argument on the declaration of Robert Miller, who states that "any review of a PSA for information readily available in the ProSupp would likely be redundant and inefficient." Throughout this Order, the Court sets aside the questions of whether Mr. Miller is an expert and whether his testimony is properly the subject of expert testimony. Even if the Court accepts Mr. Miller's testimony, a general averment of industry practice is not an adequate counterpoint to Mr. Counihan's testimony. Especially so when the description of industry practice is several years out of date, not based on any experience at CGMI, contradicted by specific testimony regarding CGMI's practices, and further contradicted by even more specific testimony regarding CGMI's process for the Certificates-at-issue.

Even if the Court credits Mr. Miller's argument that traders generally review prospectus supplements but not PSAs, the overwhelming evidence indicates that CGMI based the particular purchase decisions in this case on something other than the ProSupp.

As discussed at length throughout this Order, the ProSupp indicated that distributions to the senior tranches would be *pro rata* upon the exhaustion of the mezzanine tranches. That distribution term would have, as of March 2010, meant that A1-A Certificates were worth forty to fifty cents on the dollar. Miller Decl. ¶

32. CGMI, by contrast, paid roughly ninety cents on the dollar for the Certificates. The striking difference indicates that CGMI did not believe that the ProSupp accurately reflected the Certificates' terms of distribution. Furthermore, the March 24, 2010 email soliciting bids for the 2007-3 Trust warned CGMI that "it appears that bloomberg has the cur sup wrong." Eisenhut Decl. Ex. G. CGMI was warned that the ProSupp was "wrong" and purchased the 2007-3 Trust at prices that greatly exceeded the price dictated by the ProSupp's terms of distribution. These facts compel the conclusion that CGMI made its purchase decision based on something other than the ProSupp. Mr. Miller's testimony regarding general industry practices, if admissible at all, is irrelevant.

***Timing of Trades***

Next, Impac argues that CGMI traders were too busy to have actually read PSAs prior to making an investment decision. According to Impac, CGMI's traders "often make up to 50 trades per day." IS/IF Opp. at 10. Impac claims that CGMI's traders "spend[] as little as 30 minutes reviewing documentation and researching before committing to a trade." *Id.* Mr. Miller argues that "[r]eading through an entire PSA would take several hours, which is not typically practical on a trading floor. It would be impossible for a trader to review the PSA for each trade." Miller Decl. ¶ 15.

Impac either misstates or misinterprets Mr. Counihan's testimony. First, while Mr. Counihan testified that he may bid on up to 50 items per day (Counihan Depo at 252:16-21), he also testified that CGMI acted as a riskless principal in roughly fifty percent of those trades. Counihan Depo at 206:5-7 ("I would say, in general, we probably do, you know, as many riskless principal trades as we do principal."). When acting as a riskless principal it was not Mr. Counihan's practice to review the PSA before bidding. Fact 80. More importantly, Mr. Counihan has never claimed that he "read through an entire PSA" before purchasing; he testified that he read the distributions section. Counihan Depo at

62:23–63:7, 222:3–10. The PSA for the 2007-3 Trust is hundreds of pages long, but the distributions section is only six pages. The Court read the Incorrect PSA's distribution section in approximately fifteen minutes; an experienced trader familiar with the vernacular and format of a PSA could have done so in much less time. Nothing about the length of PSA's or the frequency of CGMI's trading activity creates a material issue of fact as to Mr. Counihan's claim that he read and relied on the Incorrect PSA.

***Earlier Trades***

Finally, Impac points out that Citigroup "went forward with multiple trades" in the 2007-3 Trust during a time when Intex's modeling conflicted with the terms of distribution listed in the Incorrect PSA.[5] IS/IF Opp. at 10. Impac argues that these trades indicate that CGMI did not actually have, or did not follow, a policy of ensuring that the PSA matched Intex before investing. Impac refers to the following such trades:

- July 20, 2007 purchase of A1-A Certificates;
- March 24, 2009 purchase of A1-B Certificates;
- March 4, 2010 purchase of A1-B Certificates;
- March 4, 2010 purchase of A1-C Certificates.

Impac Proposed Statement of Genuine Issues No. 151.

Mr. Counihan submitted a supplemental declaration stating that he is "sure to a very high degree of confidence that CGMI facilitated the March 4 trades as a riskless principal." Counihan Supp. Decl. ¶ 13. Mr. Counihan bases his conclusion on the fact that CGMI resold both the A1-B and A1-C Certificates immediately after purchasing them, and that the resale was for a slightly higher price. *Id.* at ¶ 12. Mr. Counihan's trade blotter and CGMI's trade confirmation

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[5] Intex switched its modeling of the 2007-3 Trust from *pro rata* to sequential on March 19, 2010. Miller Decl. Ex. C.

slips support Mr. Counihan's conclusion. Faced with this evidence, any reasonable finder of fact would conclude that CGMI acted as a riskless principal with respect to the March 4, 2010 trades, and that CGMI would not therefore have been expected to review the PSA before submitting its March 4, 2010 bids.

The March 24, 2009 and July 20, 2007 trades took place one and three years, respectively, before the trades at issue in this case. Mr. Counihan was very explicit in his deposition that he began consistently reviewing PSAs and checking them against Intex "sometime in 2009." Counihan Depo at 158:16–21. The July 20, 2007 trade is clearly before CGMI began reviewing PSAs and comparing them to Intex; the March 24, 2009 trade "may or may not have" been.[6] *Id.* at 158:13. At best, Impac has introduced circumstantial evidence that in March of 2009, a full year before the trades at issue in this case, CGMI may not have followed a policy that may or may not have yet existed. Such evidence has little or nothing to do with what took place on CGMI's trading floor in March and April of 2010.

As discussed above, Impac has not introduced any evidence that directly contradicts Mr. Counihan's testimony. The indirect evidence that Impac cites is either irrelevant or does nothing to call Mr. Counihan's testimony into question. Accordingly, the Court finds no genuine issue of material fact with regards to actual reliance.

*4. Reasonable Reliance is Not Required*

Impac argues that Section 18 limits recovery to those who are damaged "based on their *reasonable reliance* as opposed to their own assumption of risk." IS/IF Opp. at 17. CGMI objects that reasonable reliance is neither an element of nor a defense to a section 18 claim. Mot. at 17. Impac concedes that the words

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[6] Nothing in the record indicates whether CGMI made the March 24, 2009 purchase for its own account or as a riskless principal. The Court assumes for purposes of this motion that CGMI purchased for its own account.

"reasonable" or "justified" do not appear in the text of Section 18. Rather, its argument for a justifiable reliance requirement rests on analogy to Rule 10b–5 cases. That analogy is imperfect because Section 18 actions, unlike Rule 10b–5 actions, are rooted in explicit statutory language.

Reliance, like many concepts in securities law, demands a modifier. In the context of materiality, the Supreme Court recognized that, even though every piece of information somehow alters the total mix of information, some information is just too trivial to matter. *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 448–49 (1976). The same is true of reliance; in some sense a party "relies" on any misrepresentation merely by absorbing it and updating the total mix of information accordingly. But just as a misrepresentation may be too trivial to matter, so too may it be too obviously false to have been relied upon. As with other concepts, there are many possible types of reliance. The Court considered one type in its discussion of actual "eyeball" reliance above. Here the Court considers a spectrum relating to how deeply buried the false statement is. On one side of the spectrum, a lie that the plaintiff could not possibly have uncovered; on the other, a representation that the plaintiff knows to be false. In the middle are situations where the plaintiff *could* have uncovered the misrepresentation, where the plaintiff *should* have uncovered the misrepresentation, and where the plaintiff was reckless or willfully ignorant in not uncovering the misrepresentation.

Rule 10b–5 actions are not explicitly sanctioned by the Exchange Act, but rather are a creation of the federal judiciary. Because there is no statutory cause of action, there is no official Congressional expression of the elements of a 10b–5 claim. Accordingly, courts have "backfilled" the elements of 10b–5 action by analogizing to state law fraud actions, by importing elements from other federal securities laws, and by applying common law principles. *See, e.g.*, *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 358–62 (1991) (explaining the "nontraditional origins of the § 10(b) cause of action" and

borrowing a statute of limitations from elsewhere in the Exchange Act); *Basic Inc. v. Levinson*, 485 U.S. 224, 231 (1988) (discussing sources for various "positive and common-law requirements for a violation of § 10(b)"). Free to develop their own rule, courts have imposed a "justifiable reliance" requirement. *Paracor Finance, Inc. v. General Elec. Capital Corp.*, 96 F.3d 1151, 1159 (9th Cir. 1996). In terms of the spectrum discussed above, justifiable reliance draws a line between "could have uncovered the falsehood" and "should have uncovered the falsehood."

Congress, unlike with Section 10(b), explicitly permitted a private cause of action under Section 18. Section 18 expressly includes a reliance element, and it further states what type of knowledge will defeat that reliance element: actual knowledge.[7] 15 U.S.C. § 77r(a) (plaintiff must have relied, "not knowing that such statement was false or misleading."); *see also Erath v. Xidex Corp.*, CIV-89-198TUCACM(NF), 1991 WL 338322, *11 (D. Ariz. Feb. 7, 1991), *aff'd*, 963 F.2d 378 (9th Cir. 1992) ("[Section] 18(a) requires a lack of knowledge of the misrepresentation on plaintiff's part for him to recover, not a lack of knowledge after investigation, reasonable or otherwise.").

The text of Section 18 is clear evidence that Congress knew how to limit the reliance element; it did so in the case where the plaintiff knows a misrepresentation is false. Congress has therefore expressed its view on what type of reliance is sufficient for a Section 18 claim. The Court sees no reason to import a judicially created limitation from a different portion of the Exchange Act.[8] The only case

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[7] In accordance with *Casella v. Webb*, 883 F.2d 805, 809 (9th Cir. 1989), the Court understands the "not knowing" language to impart an actual (as opposed to constructive) knowledge requirement. *Casella* is discussed in more detail later in this Section.

[8] Constitutional standing principles could conceivably impose some limit beyond "actual knowledge." Defendants have not raised any standing issue and, as discussed in Section III.A.5 below, CGMI's actions were reasonable under the

that is directly on point, *In re Adelphia Communications Corporation Securities and Derivative Litigation*, reached the same conclusion. 542 F. Supp. 2d 266, 268 (S.D.N.Y. 2008) ("It would, in the Court's view, be inconsistent with the language [of the statute] to [require] a plaintiff to show reasonable or justifiable reliance . . . rather than only that the plaintiff did not know that a specific statement in a specific document on which statement be relied was false or misleading.").

The Ninth Circuit has addressed this question in the context of an analogous Securities Act provision. Section 12(a)(2)[9] of the Securities Act of 1933 imposes liability for misleading statements in an offering prospectus. 15 U.S.C. § 77l. Section 12(a)(2) contains the express requirement that the "purchaser not know[] of [the] untruth or omission." *Id.* In light of the plain text of the statute, the Ninth Circuit rejected a constructive knowledge requirement. "A plaintiff under [§ 12(a)(2)] is not required to prove due diligence. All that is required is ignorance of the untruth or omission." *Casella*, 883 F.2d at 809. In *Casella*, the plaintiff purchased shares in a limited partnership based on oral representations, and did not read the Offering Memorandum that disclosed the truth. *Id.* at 806–807; 809. Notwithstanding the ease with which the *Casella* plaintiff could have discovered the truth, the Ninth Circuit held that only actual knowledge of falsity would defeat the claim. *Id.* at 809.

In light of the plain text of Section 18 and the Ninth Circuit's analogous holding in *Casella*, and in accordance with the persuasive reasoning in *Adelphia*, the Court determines that reliance for purposes of Section 18 need not be reasonable.

*5. Notwithstanding Section III.A.4, CGMI's Reliance Was Justified*

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circumstances. This makes it unnecessary to determine the precise type of reliance that is constitutionally permissible.

[9] The statute was known as Section 12(2) at the time *Casella* was decided, but the relevant provision remains unchanged.

Impac argues that several "red flags" should have triggered further investigation by CGMI, and that such investigation would have revealed the truth. When CGMI purchased the 2007-3 Trust, both the Incorrect PSA and the ProSupp were available on the EDGAR database. The ProSupp contained accurate terms of distribution, while the Incorrect PSA incorrectly stated that senior tranches would be paid sequentially. At the time that CGMI made its purchases, Mr. Counihan and traders in his department had access to both documents. Fact 77. Mr. Counihan states in his Declaration that he "was aware of" both documents. Counihan Decl. ¶ 8. It is not clear from Mr. Counihan's Declaration whether he "was aware of" the ProSupp generally, or knew specifically that the terms of distribution varied between the ProSupp and the Incorrect PSA. *Id.* In a supplemental declaration, Mr. Counihan testifies that he "noticed that the waterfall set forth in the [Incorrect] PSA . . . did not match the description of the waterfall listed in the prospectus supplement." Supp. Counihan Decl. ¶ 15. Impac argues that CGMI's knowledge of the discrepancy was a red flag that should have triggered further investigation by CGMI.

Second, on March 19, 2010, six days before CGMI made its initial purchase, the securities-modeling service Intex changed its modeling of the 2007-3 Trust from *pro rata* to sequential. This change corresponded with the price increasing from roughly fifty cents on the dollar in February 2010 to roughly ninety cents on the dollar in late March 2010. Eisenhut Decl. Ex. G. Impac argues that the change in modeling and concomitant price swing were red flags, that these red flags called into question the primacy of the Incorrect PSA, and that CGMI should therefore have investigated.

Third, by the time of CGMI's purchases, the ratings agencies had apparently downgraded the A1-A tranche to junk status. Miller Decl. ¶ 28. Impac argues that it is unusual for a junk-rated Certificate to trade at ninety cents on the dollar, and that CGMI should not have invested in such a Certificate without performing

further due diligence.

Finally, distribution to the mezzanine level of the 2007-3 Trust had dropped from 100% to roughly 7% by March 2010. Miller Decl. ¶ 21. Plummeting distributions to the mezzanine levels made it likely that the mezzanine tranches would be completely wiped out by April 2010. Once the mezzanine tranches were gone, the terms of distribution among the senior tranches became directly relevant to distributions. Impac argues that low distributions to the mezzanine level therefore increased the salience of the distribution terms (and therefore the salience of the divergence between the Incorrect PSA and the ProSupp). Impac argues that, given that the distribution terms were disputed and that those terms were unusually salient, it was not reasonable for CGMI to rely on the Incorrect PSA without conducting an investigation. IS/IF Opp. at 7.

The Court assumes, for purposes of this motion, that further investigation by CGMI would have revealed the Correct PSA. Impac's proposed expert, Mr. Robert Miller, suggests that CGMI should have contacted the trustee (Miller Decl. ¶ 23), the underwriter (*id.* at ¶ 24), the issuer (*id. at* ¶ 25), or the ratings agencies (*id.* at ¶ 28). Mr. Miller suggests that contacting any of these parties would have either revealed the truth or would have caused such discomfort that no reasonable trader would have invested in the 2007-3 Trust without yet further investigation. *Id.* at ¶ 31. Mr. Miller speaks assertively, but his conclusion is far from obvious. Because of the bid process, CGMI had less than a day to make its investment decision. Eisenhut Ex. G. The trustee, underwriter, issuer, or ratings agencies may or may not have responded to CGMI's hypothetical inquiry in time. Even if the trustee, underwriter, issuer, or ratings agencies responded, their response would depend on the question that CGMI had asked. The question proposed by Mr. Miller is "what terms the trustee was operating under." *Id.* at ¶ 23. But the answer to that question could as likely have been "the trustee distributes income in accordance with the waterfall provision in the PSA" as "the trustee distributes

income to the senior tranches on a *pro rata* basis upon exhaustion of the mezzanine level."[10] Speculative as Mr. Miller's conclusions may be,[11] a reasonable finder of fact could conclude that further investigation by CGMI would have revealed the Correct PSA or at least revealed enough warning signs that CGMI would not have made its purchases.

Notwithstanding that CGMI was aware of the various "red flags" identified by Impac and that further investigation would have revealed the Correct PSA, CGMI still acted reasonably in relying on the Incorrect PSA.[12] Impac's argument rests on the premise that the differences between the ProSupp and the Incorrect PSA needed to be reconciled, the conflict between them resolved. That premise is fallacious. Generally in securitization, the PSA is the governing document that dictates distributions while the prospectus supplement is a non-binding description of the security used to solicit initial purchasers. The 2007-3 Trust matches standard practice. The Incorrect PSA is signed by Impac Secured and Impac Funding and purports to govern the Trust. The ProSupp explicitly states that the PSA, not the ProSupp, is the "governing instrument" of the Trust. Fact 84. And the parties agree that the Correct PSA does actually govern the Trust. Facts 82; 83. Differences between a PSA and a prospectus supplement are not conflicts, because the documents are clear that any such differences redound in favor of the PSA. The Court agrees with Impac that the various "red flags" should have triggered some sort of an investigation. When one document clearly and unambiguously

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[10] The difficulty predicting an answer to this question admits the unlikely and unpredictable nature of the facts in this case.

[11] As before, the Court sets aside the questions of whether Mr. Miller is an expert and whether this issue was properly the subject of expert testimony.

[12] The "red flag" argument fails for the additional reason that Mr. Miller's declaration provides no foundation for his assertions regarding "junk" status or the status of the mezzanine tranches.

supersedes another, a reasonable investigation consists of locating the superseding document, confirming that it governs, and bidding based on its terms instead of any divergent document's terms. The uncontroverted evidence indicates that CGMI did exactly that.

CGMI performed an investigation; Impac's true grievance is with *what* CGMI investigated. CGMI's investigation consisted of resolving a discrepancy by reviewing and basing its decision on what it thought to be the Trust's governing document. Impac suggests that CGMI should have instead investigated whether the signed and publicly filed Incorrect PSA was actually the governing document.

Should a reasonable trader be alert to the possibility that an issuer may have filed one version of a PSA on EDGAR, and then sent a materially different version of that PSA to the Trustee?[13] To state the question is to answer it; no-one would purposefully do such a thing. None of the red flags that Impac identified even hint at the possibility that the Incorrect PSA might have differed from the one on file with the trustee. Nor does anything else in the record. Impac has presented no evidence that the problem of an incorrectly-filed PSA was a common one in the industry. On the contrary, Impac has argued repeatedly that the filing of the Incorrect PSA was a freak accident. Impac's good faith defense (discussed and dismissed on other grounds below) hinges on this very point. A freak accident, without apparent precedent in the industry, is the very definition of a condition that a reasonable trader need not be on alert for.

The only evidence that Impac points to is that a prospectus supplement and a PSA for the same trust should not differ in their material terms. The Court agrees. But, when an investor identifies such a divergence, the reasonable course of action

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[13] Impac disputes whether Impac or various third party defendants actually took these actions. To the extent that they are relevant, the Court addresses these objections elsewhere in this Order.

is to follow the governing document, not to suspect that the purported governing document is not the actual governing document due to a bizarre and still-not-fully-explained clerical error.

*6. Statute of Limitations*

Impac argues that CGMI's Section 18 claim is barred by Section 18's one-year statute of limitations. IS/IF Opp. at 13. Section 18 provides that, "[n]o action shall be maintained to enforce any liability created under this section unless brought within one year after the discovery of the facts constituting the cause of action and within three years after such cause of action accrued." 15 U.S.C. § 78r(c). CGMI filed its Complaint on May 25, 2011. ECF No. 1. A tolling agreement tolled CGMI's claims for 32 days. Fact 94. CGMI's Section 18 claim is therefore time-barred if "discovery of the facts constituting the cause of action" occurred before April 23, 2010. Impac filed an 8-K/A on April 29, 2010. Facts 88; 89; 90. That 8-K/A replaced the Incorrect PSA with the Correct PSA on EDGAR; it was the first public acknowledgment by Impac that the Incorrect PSA was not accurate.

Including the 32-day tolling period, CGMI filed its claim within one year of when Impac replaced the Incorrect PSA with the Correct PSA. CGMI's Section 18 claim is therefore timely unless CGMI should have discovered that the Incorrect PSA was missing the Trigger Provision *before* Impac filed the April 29, 2011 8-K/A and publicly revealed that the Incorrect PSA did not govern the Trust. As discussed in Section III.A.5 above, CGMI took reasonable steps to investigate the terms of distribution for the 2007-3 Trust and did not discover the missing Trigger Provision. The Trigger Event and subsequent *pro rata* distributions took place after April 23, 2010. Fact 87. Impac has not identified anything in the public record before the April 25 Trigger Event or the April 29, 2010 amendment that

would have put a reasonable investor on notice that the Incorrect PSA was other than the governing document of the Trust.[14] CGMI's Section 18 claim is therefore timely.

*7. Good Faith Safe Harbor*

A defendant is not liable under Section 18 if it can "prove that [it] acted in good faith and had no knowledge that [the] statement was false or misleading." 15 U.S.C. § 78r. Impac argues that it acted in good faith in 2007 when the Incorrect PSA was filed, that it did not know that the Inocrrect PSA had been filed, and that it acted expeditiously to correct the error once it discovered that the Incorrect PSA had been filed. IS/IF Opp. at 20–22.

The safe harbor protects a defendant who has "no knowledge that [the] statement was false or misleading." 15 U.S.C. § 78r. But Impac has never believed the Incorrect PSA to be accurate. Fact 65. If pointed out in 2007, Impac would have certainly admitted that the Incorrect PSA was wrong. It cannot therefore be said that Impac "had no knowledge that [the] statement was false or misleading." The Section 18 safe harbor has no place in this case.

Impac does not dispute that, in 2007, it knew the Incorrect PSA to be false. Rather, Impac argues that it did not know that the Incorrect PSA had been filed on EDGAR. Even were it credible, Impac's theory would not fit within the "good faith, no knowledge" safe harbor for the reasons set forth above. But it is not credible. Whatever "knowledge" means as applied to a corporate entity, a

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[14] A pre-*Merck* articulation held that Section 18's one-year statute of limitations begins to run when the plaintiff learns, or through the exercise of reasonable diligence should have learned, facts that would enable the plaintiff to sue. *In re Fed. Nat'l Mortg. Ass'n Sec., Derivative, & ERISA Litig.*, 503 F. Supp. 2d 25, 35 (D.D.C. 2007) (citing *Fujisawa Pharm. Co. v. Kapoor*, 115 F.3d 1332, 1336 (7th Cir.1997)). This standard comports with the *Merck* Court's recent explication of of identical language from 28 U.S.C. § 1658(b). *Merck & Co., Inc. v. Reynolds*, 130 S. Ct. 1784 (2010).

corporation certainly must have knowledge of its own public statements; more so when those statements are contained in heavily regulated, publicly filed, legal documents. The system of securities regulation in this country is premised on the notion that signing and filing a document indicates endorsement of that document's accuracy. The EDGAR system is designed to encourage reliance on such documents and the "failure-to-read" defense has been rejected as flatly inconsistent with the goals of securities regulation. *Gould v. Am. Hawaiian S.S. Co.*, 351 F. Supp. 853, 868 (D. Del. 1972) (failure-to-read defense in the context of Section 14(a) would "effectively emasculate" the section).

Impac argues that it did not actually sign the Incorrect PSA, it merely provided signature pages to its attorneys. Setting aside the question of whether that was reckless behavior, the fact remains that Impac Secured was the registrant and Impac Funding and IMH directed Impac Secured's actions. Impac Secured and Impac Funding's signatures appear on the Incorrect PSA, their agents are the ones who filed the Incorrect PSA, they are the ones responsible for the accuracy of the document. To find that Impac Funding and Impac Secured did not "know" the contents of their own filing would allow any signatory to avoid Section 18 liability by claiming that it (i) relied on an expert to draft the statement (good faith) and (ii) that they did not read the document (no knowledge).[15] This is not the law.

*8. 17 C.F.R. § 232.103*

Additionally, Impac argues that it is protected by a regulatory safe harbor provided in 17 C.F.R. § 232.103. The safe harbor immunizes a filer for errors and/or omissions that occur due to electronic transmission errors if the filer corrects the filing "as soon as reasonably practicable after the electronic filer

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[15] As noted above, the Court declines to address the related question of whether failure to read a filing and verify its accuracy may ever be deemed "good faith." So too the issue of whether waiting six weeks to make a corrected filing could possibly be considered "good faith."

becomes aware of the error or omission." 17 C.F.R. § 232.103.[16] A safe harbor is an affirmative defense. Like all affirmative defenses, it must be raised in the answer or is subject to waiver. *In re Adbox, Inc.*, 488 F.3d 836, 841 (9th Cir. 2007) ("[F]ailure to raise an 'affirmative defense' in [an] answer effects a waiver of that defense."). Impac did not raise 17 C.F.R. § 232.103 in its answer. It has therefore waived the affirmative defense.

Even if it had not waived the safe harbor defense, Impac acknowledges that it discovered the Incorrect PSA on or before March 12, 2010. Despite the fact that Impac had the Correct PSA in its possession on March 12, 2010, Impac did not correct the mistake until six weeks later. No reasonable finder of fact could find that six weeks constitutes "as soon as reasonably practicable." Even if it had not been waived, Impac would not be entitled to the Rule 103 safe harbor.

**B. SECTION 20(a) CONTROL PERSON CLAIMS**

In addition, CGMI has moved for summary judgment on its control person claims against IMH and Impac Funding. Under Section 20(a), a defendant may be liable for securities violations if (i) there is a violation of the Exchange Act and (ii) the defendant directly or indirectly controls any person liable for the violation. *SEC v. Todd*, 642 F.3d 1207, 1223 (9th Cir. 2011). "When determining 'control person' status, the issue is whether the defendant exercised power or control over the primary violator, and the plaintiff 'need not show that the defendant was a culpable participant in the violation.'" *Id.* In Section IV.A above, the Court granted summary judgment on CGMI's Section 18 claim. CGMI has therefore

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[16] The full text of the regulation is: "An electronic filer shall not be subject to the liability and anti-fraud provisions of the federal securities laws with respect to an error or omission in an electronic filing resulting solely from electronic transmission errors beyond the control of the filer, where the filer corrects the error or omission by the filing of an amendment in electronic format as soon as reasonably practicable after the electronic filer becomes aware of the error or omission." 17 C.F.R. §232.103

shown a primary violation of the securities laws. As discussed above, it is undisputed that Impac Secured is a wholly-owned subsidiary of Impac Funding and that Impac Funding is a wholly-owned subsidiary of IMH. For the same reasons set out in Section III.A.2 above, there is no material dispute that IMH and Impac Funding had the power to (and in fact actually did) direct Impac Secured's actions. IMH and Impac Funding have not raised Section 20(a)'s statutory safe harbor (for control persons who nevertheless "acted in good faith and did not directly or indirectly induce the act or acts constituting the violation"). 15 U.S.C. § 28t. To the extent that IMH and Impac Funding were to raise the safe harbor, it would fail for the same reasons set out in Sections III.A.2 and III.A.7 above. Summary Judgment is therefore appropriate on CGMI's Section 20(a) claims.

**C. NEGLIGENT MISREPRESENTATION CLAIM**

Finally, CGMI has moved for summary judgment on its claim of negligent misrepresentation. The elements of negligent misrepresentation are: "(1) the misrepresentation of a past or existing material fact, (2) without reasonable ground for believing it to be true, (3) with intent to induce another's reliance on the fact misrepresented, (4) justifiable reliance on the misrepresentation, and (5) resulting damage." *Apollo Capital Fund, LLC v. Roth Capital Partners, LLC*, 158 Cal. App. 4th 226, 243 (2d Dist. 2007). In Section III.A above, the Court found for CGMI on elements 1, 2, and 4. Impac raises two arguments that are specific to the negligent misrepresentation claim, and which the Court addresses below.

First, Impac argues that CGMI cannot show intent to induce reliance because, "Defendants were unaware any potentially misleading statement was being made." As in Section III.A.2, this argument shades toward the metaphysical. The entire purpose of EDGAR is to provide public filings on which the public may rely. Impac clearly intended the public to rely on its EDGAR-filed PSA, it just (arguably) did not know that the particular version of the PSA that it filed on EDGAR was false. The Incorrect PSA is a false statement of material fact, it was

made by Impac, and the entire purpose of filing a PSA on EDGAR is to induce reliance. That Impac thought it was telling the truth is immaterial; the same could be said for any negligent misrepresentation plaintiff.

Second, IMH argues that it did not "make" any statement that is actionable under negligent misrepresentation. In Section III.A.2 above, the Court found that IMH did not make a false statement itself, but rather that it caused Impac Secured and Impac Funding to make false statements. CGMI does not respond to this point in its Reply, and the Court has found no indication that California law extends negligent misrepresentation liability to one who causes a misstatement to be made. Accordingly, the Court **GRANTS** CGMI's Motion for Partial Summary Judgment on its negligent misrepresentation claim as against Impac Secured and Impac Funding. The Court **DENIES** the motion as to IMH.

**D. DISCOVERY**

Impac argues that Defendants "have been denied an opportunity to elicit discovery to establish more fully Defendants' good faith defense and Citigroup's lack of actual and reasonable reliance," and urges the Court to defer or deny ruling on CGMI's request for partial summary judgment. "The burden is on the party seeking additional discovery to proffer sufficient facts to show that the evidence sought exists, and that it would prevent summary judgment." *Nidds v. Schindler Elevator Corp.*, 113 F.3d 912, 921 (9th Cir. 1996) (citation omitted). Impac has failed to meet this burden.

Impac's discovery has been limited by order of the Court. This case has been the subject of repeated discovery battles. After the first skirmish, the Court limited discovery to six topics covering the elements of CGMI's claims and Impac's anticipated defenses. December 13, 2011 Minute Order re: Discovery, ECF No. 44. The Court did not foreclose other discovery, but required leave of Court before Impac could propound such discovery. Specifically, Impac was to explain, "(i) the type of information sought, (ii) the legal theory under which such

information would either prove or disprove an element of CGMI's claims (or any of Impac's anticipated defenses), and (iii) why such a request is narrowly tailored so as to avoid being unduly burdensome on CGMI." *Id.* at 3. Impac subsequently sought leave to propound additional discovery. Impac Letter re: Additional Discovery, ECF No. 47. The Court denied Impac leave, both because Impac had failed to comply with the procedure that the Court set out in its initial Minute Order re: Discovery, and because none of Impac's requests were "reasonably likely to lead to the discovery of admissible information." Minute Order re: Additional Discovery at 3, ECF No. 55.

Now, Impac argues that it needs additional discovery relating to CGMI's policies and procedures regarding risk-management. Impac argues that it needs additional documents and to depose Mr. Counihan's direct superior Paul Smiley, Mr. Counihan's colleague Oleg Saitskiy, and Mr. Saitskiy's supervisors Eliot Rubenzahl and Jeff Perlowitz. Christensen Decl. ¶¶ 14–20. If the question is actual eyeball reliance, then Impac has not explained why it thinks that such documents or testimony would contradict the specific and credible testimony of Mr. Counihan. If the question is reasonable reliance, the Court had held that reliance on the Incorrect PSA was reasonable even assuming that CGMI knew of the differences between it and the ProSupp. It is not clear how any further discovery from CGMI would be relevant to or change that conclusion.

Second, Impac argues that it needs additional discovery from Intex and from CGMI regarding CGMI's relationship with Intex. Christensen Decl. ¶¶ 21–23. The Court has accepted Impac's representations regarding Intex as true for purposes of this motion. Further discovery regarding Intex would therefore have no effect on the outcome of this motion.

Third, Impac argues that it needs discovery of the sellers of the 2007-3 Trust in order to determine whether the sellers might have communicated any information regarding the Incorrect PSA. Christensen Decl. ¶¶ 24–25. CGMI

admits that it read the conflicting ProSupp and Incorrect PSA. Given Mr. Counihan's unrebutted testimony and the fact that CGMI paid roughly 90 cents on the dollar for the Certificates, it is clear that CGMI relied on the Incorrect PSA. Accordingly, Impac has failed to show that discovery of the sellers would produce any admissible evidence or that any such evidence would change the outcome of this motion. *Nidds*, 113 F.3d at 921.

Finally, Impac argues that it needs further evidence regarding its good faith defense. Christensen Decl. ¶¶ 26–33. Impac's good faith defense fails as a matter of law on the "no knowledge" prong. Section III.A.7 *supra*. Further discovery as to whether Impac was reckless would therefore be unhelpful. Accordingly, the Court denies Impac's request for further discovery.

## IV. CONCLUSION

For the reasons set forth above, the Court **GRANTS** CGMI's Request for Partial Summary Judgment with respect to all claims except for the negligent misrepresentation claim against IMH.

**IT IS SO ORDERED.**

DATED: May 2, 2012

Mariana R. Pfaelzer

Hon. Mariana R. Pfaelzer
United States District Judge