UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re BARCLAYS BANK PLC SECURITIES LITIGATION	:	Master File No. 1:09-cv-01989-PAC
	:	CLASS ACTION
This Document Relates To:	:	
ALL ACTIONS.	:	

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO
THE UNDERWRITER DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

[CONFIDENTIAL – FILED UNDER SEAL]

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Plaintiff and Class Representative Dennis Askelson, individually and on behalf of the Class ("plaintiff"), respectfully submits this memorandum of law in opposition to the Underwriter Defendants' ("Underwriters" or "defendants") Motion for Summary Judgment.

I. INTRODUCTION

In April 2008, Barclays was in desperate need of capital to shore up its balance sheet from losses and exposure to the turbulent credit markets – losses that prompted its U.K. regulator to urgently demand that Barclays raise its capital levels. But investors in the Series 5 Offering were not informed of the true state of affairs and the actual risks that Barclays' credit market positions presented. Through the defective and materially misleading Offering Materials, Barclays raised $2.5 billion in desperately needed capital from the Series 5 investors, while the Underwriters made tens of millions of dollars in fees. While the offering went forward at $25 per share, just a year later the Series 5 shares had collapsed in value to $6 per share. This is the story that plaintiff will tell at trial.

The Underwriters move this Court to rule as a matter of law that they are entitled to the due diligence affirmative defense under §11(b)(3) of the Securities Act of 1933 ("Securities Act") with respect to all alleged material misstatements and omissions. This defense requires a highly fact-intensive inquiry, and "courts must be 'particularly scrupulous in examining [the Underwriters'] conduct.'" *In re WorldCom, Inc. Sec. Litig.*, 346 F. Supp. 2d 628, 662 (S.D.N.Y. 2004).[1] To succeed on this defense, the Underwriters ***must*** demonstrate that a jury could possibly reach "'***only one*** conclusion about'" whether the Underwriters: (1) conducted a "reasonable investigation" of statements in the Series 5 Offering Materials; and (2) "had reasonable ground to believe and did believe" the Offering Materials contained no material misstatements and omissions. *In re Software*

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[1] Citations and footnotes are omitted and emphasis is added throughout unless otherwise noted.

Toolworks Sec. Litig., 50 F.3d 615, 621-22 (9th Cir. 1995); 15 U.S.C. §77k(b)(3). The Underwriters fail to make this evidentiary showing as a matter of law and their motion should be denied.

The Underwriters' "investigation" was hardly an "investigation" at all, and was certainly not "reasonable." Barclays conducted the offering at a time when credit markets were extremely volatile, and market participants were particularly concerned with banks' exposure to credit market assets.[2] In this context, described by the Underwriters as the "worst financial crisis since the Great Depression," the Underwriters failed to take appropriate action in the face of numerous red flags. Rather, they simply took at face value the representations of Barclays' management, without conducting their own independent investigation into those representations. *See infra* §IV.

Plaintiff's due diligence expert, Professor Richard Puntillo, details a host of facts and circumstances of which the Underwriters were aware and that required additional investigation – investigation the Underwriters never performed. For example, Barclays' responses to questions the Underwriters posed during an April 3, 2008 due diligence call concerning Barclays' interim financial results and writedowns raised a red flag that the Underwriters should have investigated and resolved. Instead the Underwriters ignored Barclays' statements, failed to investigate Barclays' comments or the amount of the writedowns, did not review any relevant financial reports or schedules, and conducted no analysis of the issue whatsoever. *See infra* §IV.A.1. Additional unresolved red flags and due diligence failures include:

- Failing to investigate and resolve material discrepancies between how Barclays reported information concerning its credit market exposures internally and to regulators on the one hand, and how it disclosed that same information in the Offering Materials, on the other. *See infra* §IV.A.2.

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[2] *See, e.g.*, *Freidus v. Barclays Bank PLC*, 734 F.3d 132, 140 (2d Cir. 2013) ("In a quickly deteriorating credit market, we believe the particulars about a firm's exposure to that market could assume a level of importance, and hence materiality, that may not have been the case in less economically stressful times.").

- Failing to investigate and discover that the FSA approached Barclays in March 2008 to discuss Barclays' "alarming" Tier 1 equity ratio and instructed Barclays to increase its equity ratio to 5.25% by year-end 2008. *See infra* §IV.A.3.

- Failing to investigate and resolve PricewaterhouseCoopers LLP's ("PwC") April 8, 2008 "Comfort Letter," which relied largely on inquiries to Barclays' management and noted profit before tax ("PBT") for the period January 1, 2008 to February 29, 2008 ***decreased by 9.48%*** as did PBT for the period from January 1, 2008 to April 4, 2008, drastically out of line with market expectations. *See infra* §IV.A.4.

- Failing to investigate and resolve the discrepancy created by a February 20, 2008 Citi research analyst report which projected Barclays would recognize £1.518 billion in writedowns during 2008, yet approximately ***80%*** of the writedowns Citi projected for all of 2008 had already been recognized by the time of the Series 5 Offering. *See infra* §IV.A.5.

The rest of the underwriting syndicate relied entirely upon the lead underwriter, Citi, to perform the Series 5 due diligence. They performed no substantive investigation of their own and are therefore "'bound' by the lead underwriter's failure to conduct adequate due diligence." *In re WorldCom, Inc. Sec. Litig.*, No. 02 Civ. 3288 (DLC), 2005 U.S. Dist. LEXIS 2216, at *32 (S.D.N.Y. Feb. 18, 2005).[3]

Having conducted virtually no independent investigation, the Underwriters seek to salvage their defense by "relying" on the work of others. First, the Underwriters point to ***post-Offering*** certifications provided by Barclays' management, in which Barclays assured it had "carefully examined" the Offering Materials and found no material misstatements therein, as proof of the ***Underwriters***' due diligence. This of course ignores that it is the ***Underwriters***' duty under §11(b)(3) to investigate, "'discover and compel disclosure of essential facts about the offering.'" *WorldCom*, 346 F. Supp. 2d 662. Such "[t]acit reliance on management assertions is unacceptable." *Feit v. Leasco Data Processing Equip. Corp.*, 332 F. Supp. 544, 582 (E.D.N.Y. 1971).

[3] *See, e.g.*, Declaration of Ken Harris ("Harris Decl."), ¶6 ("Citi performed certain due diligence . . . on behalf of the underwriting syndicate"); Declaration of Carolyn Coan Hurley ("Hurley Decl."), ¶9 (same). It follows, then, that rebutting the lead underwriter's claim of due diligence necessarily rebuts the syndicates' claim as well.

The Underwriters also point to certifications from Barclays' and the Underwriters' counsel, again provided ***after the offering***.[4] But these certifications expressly disclaimed "any responsibility for the accuracy, completeness or fairness of the statements in the Offering Documents." Plaintiff's Response to the Local Rule 56.1 Statement in Support of the Underwriter Defendants' Motion for Summary Judgment; Further Statement of Undisputed Facts ("SOF"), ¶¶405-409; *see also infra* §IV.B.2. Moreover, while the Underwriters contend they "relied" on counsel's work, these counsel's findings were in turn based in part on the ***Underwriters'*** representations. SOF, ¶409. Such circular reliance on each other's representations is not a reasonable investigation.

Making matters worse, the Underwriters intentionally limited the information they sought from Barclays to "public" information.[5] For example, Citi testified it did not "perform any independent analyses of its own to determine what the amount of the writedowns were that Barclays took in January and February 2008" because doing so would have required "access to [this] information," which was "internal" to Barclays. *See, e.g.*, *infra* §IV.B.1; SOF, ¶303. Nor is their investigation saved by Citi's claimed reliance on the "reservoir of knowledge" gleaned from the Underwriters' work on earlier offerings. The Underwriters fail to specify what ***specific*** information filled this "reservoir of knowledge," or how ***exactly*** this "reservoir" of information from 2006 and 2007 aided their understanding of Barclays' financial condition in April 2008. The rapidly changing landscape leading up to the Series 5 Offering undoubtedly ***required*** the Underwriters to supplement their stale "reservoir" with ***current***, ***internal*** information unavailable to investors.

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[4] *See, e.g.*, The Underwriter Defendants' Memorandum of Law in Support of Their Motion for Summary Judgment ("UW Mtn.") at 9, 19; Declaration of Jack D. McSpadden ("McSpadden Decl."), ¶49.

[5] *See, e.g.*, SOF, ¶¶247, 303; Hurley Decl., Ex. 6 at 156 ("[f]or clarity we do not expect you to provide Wachovia with any non public information or commentary").

II. STATEMENT OF FACTS

The Underwriters had five weeks to complete their due diligence for the Series 5 Offering. During those five weeks, the Underwriters made ***zero*** effort to review Barclays' internal financial and business position, or attempt to independently verify the accuracy of the Offering Materials. Instead, the Underwriters spent the first few weeks in March 2008 receiving proposed questions to ask management, and reviewing publicly available documents. Not until April 3, 2008, ***five days before the Offering Materials were filed***, did the Underwriters have any substantive contact with Barclays' management. By then it was too late to undertake the reasonable diligence required, and the Underwriters simply took Barclays, its auditor PwC, and counsel at their word – despite disconcerting market and Barclays-provided information that raised red flags regarding the offering. To have conducted an appropriate investigation at that point would have delayed the offering at a critical time when Barclays needed to raise capital. SOF, ¶¶431-437.[6]

Barclays invited the Underwriters to participate in the Series 5 Offering at the end of February 2008. Once the Underwriters had been notified, they held a "kick off" call on March 5, 2008, leaving only about five weeks to conduct their due diligence. SOF, ¶457; McSpadden Decl., Ex. 13 at 899. Despite the increasing dislocation in the financial markets, the Underwriters simply reused a compressed schedule from the Series 4 Offering, indicating they had already decided not to conduct additional due diligence specific to the Series 5 Offering. SOF, ¶259. The Underwriters showed no urgency in conducting due diligence and instead focused on self-interested tasks, such as

[6] *See also* Plaintiff's Response to the Barclays Defendants' Local Rule 56.1 Statement and Counterstatement of Additional Material Facts ("Pltf's. Barclays 56.1 Stmt."), §III.C. Plaintiff incorporates by reference the facts set forth in Plaintiff's Memorandum of Law in Opposition to the Barclays Defendants' Motion for Summary Judgment, filed contemporaneously herewith.

share allocations, pricing and marketing to potential investors. SOF, ¶¶265, 349. The Underwriters sat idle while Barclays' counsel prepared the Offering Materials. SOF, ¶260.

On March 17, 2008, nearly two weeks after the beginning of the due diligence period, the Underwriters held a call and identified "[d]ue diligence updates" as a topic to be addressed at a later time. McSpadden Decl., Ex. 14 at 297-98. To address these issues, a set of draft questions were circulated to the syndicate, which were to be asked of Barclays' management. SOF, ¶¶267-271. On April 3, 2008, the Underwriters held the business due diligence call with Barclays' management who provided answers to the prepared questions, and a couple follow-up questions reconfirming what had already been stated on the call. SOF, ¶¶287-322. This call was not focused on the Series 5 Offering because non-underwriters were also invited to the call. In fact, no references to the Series 5 Offering were even permitted. SOF, ¶267.

The accounting due diligence call with PwC was held the same day. Like the business due diligence call, prepared questions were purportedly answered by PwC but there is no evidence in the record of what actually transpired. SOF, ¶¶323-325. The Underwriters had not yet received PwC's signed comfort letter or "bring-down" comfort letter to interrogate PwC about its position, and thus simply took PwC at its word without further investigation. SOF, ¶¶343-348, 350. A few days later on April 7, 2008, after a "go-no go" call, Barclays announced the offering, and submitted the prospectus supplement to the SEC the next day. On April 8, 2008, certain Underwriters participated on a pre-pricing due diligence call and a financial due diligence call with Barclays' management. As the offering documents were being filed that same day, the Underwriters could not, and did not do any other investigation.[7] The Underwriters' involvement in preparing for the call was minimal, as

[7] The Underwriters also participated on an April 11, 2008 pre-settlement due diligence call with Barclays, but due to the timing, there was no opportunity for the Underwriters to independently verify any representations. This call was "very short" and consisted of simple responses that there

they added no questions to the accounting draft questions. There is no evidence in the record of what transpired on this call. SOF, ¶¶326-337.

During the same period, PwC, Barclays' counsel, and the Underwriters' counsel, Linklaters, were drafting comfort letters and management certifications upon which the Underwriters were planning to rely for their due diligence. The Underwriters received these documents at the time of or after the Series 5 Offering, and thus, there was no opportunity to address any red flags known or visible to the Underwriters.[8] Rather, these letters from counsel and management certifications were merely ***a condition of closing***, and their timing precluded them from being an aid to the Underwriters' due diligence. SOF, ¶¶350, 405-409. Moreover, these letters contained disclaimers which stripped the Underwriters of any ability to reasonable rely on them without further investigation. SOF, ¶¶405-408. In the case of PwC's bring-down comfort letter, it only covered January and February 2008, and gave no more than limited "directional" comfort to the Underwriters for the remaining time period up to the offering. SOF, ¶¶355-363, 365-366. The Underwriters did nothing in response to all of this.

III. LEGAL STANDARD

On this motion for summary judgment, the burden is on defendants to establish that there are no genuine issues of material fact in dispute and that they are entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). In reviewing

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were no updates to the prior false and misleading representations. Declaration of Andrew J. Brown in Support of Plaintiff's Opposition to Underwriter Defendants' Motion for Summary Judgment ("Brown Decl."), Ex. 16 at BARC-ADS-00824503.

[8] PwC signed the comfort letter on April 8, 2008, and the bring-down comfort letter April 11, 2008. UW 56.1, ¶25; SOF ¶¶350, 364. Linklaters did not provide its comfort letter until April 11, 2008, and April 22, 2008 for the greenshoe. Management provided its certifications on April 11, 2008 and April 22, 2008 for the greenshoe option. SOF, ¶¶405-408; UW 56.1, ¶34.

the record, a court must "construe all evidence in the light most favorable to the nonmoving party, drawing all inferences and resolving all ambiguities in its favor." *Dickerson v. Napolitano*, 604 F.3d 732, 740 (2d Cir. 2010). "'[S]ummary judgment may be granted only when reasonable minds could not differ on the issue.'" *Richardson v. N.Y. State Dep't of Correctional Serv.*, 180 F.3d 426, 437 (2d Cir. 1999). In an offering transaction such as this, underwriters bear a "'moral responsibility to the public [that] is particularly heavy'" and must take all reasonable steps to ensure that the offering materials do not omit material facts or present them "'in such a way as to obscure or distort their significance.'" *WorldCom*, 346 F. Supp. 2d at 657.

Accordingly, it is well established that the Underwriters had an affirmative duty to perform comprehensive due diligence:

> No greater reliance in our self-regulatory system is placed on any single participant in the issuance of securities than upon the underwriter. He is most heavily relied upon to verify published materials because of his expertise in appraising the securities issue and the issuer, and because of his incentive to do so. He is familiar with the process of investigating the business condition of a company and possesses extensive resources for doing so. . . . Prospective investors look to the underwriter . . . to pass on the soundness of the security and the correctness of the registration statement and prospectus.

Chris-Craft Indus. v. Piper Aircraft Corp., 480 F.2d 341, 370 (2d Cir. 1973).

Under Securities Act §11, if there is a material false or misleading statement or omission in a registration statement, the Underwriters will be liable. 15 U.S.C. §77k(a). However, the Underwriters may prove, as an affirmative defense, that they "had, after reasonable investigation, reasonable ground to believe and did believe . . . that the statements therein were true and that there was no omission to state a material fact." 15 U.S.C. §77k(b)(3); *Software Toolworks*, 50 F.3d at 621. The Underwriters fail to carry their burden of proof here.

IV. ARGUMENT

A. The Underwriters Failed to Investigate and Resolve Red Flags

The Underwriters repeatedly violated the standard of care and custom and practice applicable to due diligence performed in the context of a securities offering by failing to reasonably investigate and resolve multiple red flags of which the Underwriters were aware or should have been aware prior to the date of the Offering Materials.[9] Specifically, the Underwriters failed to reasonably investigate and resolve: (1) comments made by members of Barclays' senior management during an April 3, 2008 due diligence call; (2) the inconsistency between the disclosures in the Offering Materials and Barclays' internal reporting and analysis; (3) concerns regarding Barclays' capital adequacy raised by regulators; (4) information contained in the comfort letters provided by PwC in connection with the Series 5 Offering; and (5) Citi's own research projecting £1.518 billion of writedowns for the entire year 2008, when Barclays' writedowns already exceeded that number by the time of the Offering.

1. The Underwriters Failed to Investigate and Resolve Issues Created by Barclays' Comments on the April 3, 2008 Due Diligence Conference Call

The responses provided by Barclays' management during the April 3, 2008 business due-diligence conference call to the Underwriters' questions regarding Barclays' financial results and writedowns subsequent to year-end 2007 presented a glaring red flag that the Underwriters were required to investigate and resolve because, among other things, (a) the Underwriters learned that January and February 2008 interim financial results were already complete, and that an "early look" at the March 2008 financial results would be available on or about April 4, 2008; (b) Christopher

[9] The Underwriters rely on cases in which the courts looked for "red flags" to undermine reliance on audited, or "expertised," financial statements. *See* UW Mtn. at 11-12. There are no such expertised statements at issue here. SOF, ¶¶355-363, 365-366, 369-370.

Lucas ("Lucas") explicitly stated that market conditions in March 2008 would result in Barclays "taking further write downs;" (c) Lucas informed the Underwriters that Barclays had no plans to make an announcement regarding post-2007 writedowns prior to the offering; and (d) credit markets were in a state of extreme volatility and market participants were particularly concerned with the exposure that financial companies had to these assets.[10]

Jack D. McSpadden ("McSpadden), Managing Director of Citi's Transaction Execution Group, and designated witness pursuant to Fed. R. Civ. P. 30(b)(6), confirmed that the Underwriters were aware of this red flag and failed to perform any investigation.[11] Had the Underwriters made a reasonable investigation into Barclays' post-2007 writedowns, they could have learned: (a) the substantial magnitude of the writedowns recorded in January and February 2008; (b) the substantial amount of preliminary writedowns recorded for March 2008; and (c) that additional writedowns were likely in March 2008 prior to closing of the books for 1Q 2008. SOF, ¶¶293-316; *see* Rebuttal Report of Professor Richard Puntillo, dated February 2, 2016 ("Puntillo Rpt.") at 13-15 (Brown Decl., Ex. 7). Thus, it was made clear to the Underwriters that turbulence in the market created a wide range of potential first quarter 2008 writedowns that could increase beyond what was already known or disclosed in the Offering Materials.

The Underwriters violated the custom and practice by failing to reasonably investigate and resolve these issues to determine whether additional disclosure was necessary. Puntillo Rpt. at 15-17. They did not review any internal documents – not even documents reflecting the writedowns

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[10] *See, e.g.*, Deposition Transcript of Jack D. McSpadden dated August 13, 2015 ("McSpadden Depo. Tr.") (Brown Decl., Ex. 5) at 130:5-25 ("The markets had begun to deteriorate for financial institutions, and everyone within Citi was very focused on financial institutions and the concerns around them.").

[11] *See* McSpadden Depo. Tr. (Brown Decl., Ex. 5) at 215:5-216:25; Brown Decl., Ex. 11; McSpadden Depo. Ex. 23 (transcript of call).

Lucas referenced. UW Mtn. at 21-22; SOF, ¶¶293-308. While the Underwriters assert an April 8, 2008 call (the day of the offering) with Barclays' Jonathan Britton fulfilled their duties, there is no evidence in the record showing what happened on this call. SOF, ¶¶336-337.[12] Apparently, the Underwriters took at face value the responses they were provided on the April 8 call (whatever they were) and didn't pursue the issue further. UW Mtn. at 21; Local Rule 56.1 Statement in Support of the Underwriter Defendants' Motion for Summary Judgment ("UW 56.1"), ¶42.

The Underwriters assert they were under no duty to perform "additional due diligence" into these issues in light of PwC's "clean audit report and comfort letter." But PwC's audit of the 2007 consolidated financial statements did not cover these 2008 writedowns, or the results Lucas referenced on the April 3 call. SOF, ¶¶238-245, 355-363, 365-366. And "[c]omfort letters do not expertise any portion of the registration statement that is otherwise non-expertised" – such as events post-dating December 31, 2007. *WorldCom*, 346 F. Supp. 2d at 665 ("The SEC addressed the circumstances in which an accountant's opinion can be considered an expert's opinion for purposes of Section 11(b) and made it clear that reviews of unaudited interim financial statements do not constitute such an opinion."). Accordingly, "[u]nderwriters may not rely on an accountant's comfort letters for interim financial statements in presenting such a [reliance on auditor] defense." *WorldCom*, 346 F. Supp. 2d at 666.[13]

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[12] This absence of evidence precludes summary judgment. *Cf. In re Livent, Inc. Noteholders Sec. Litig*., 355 F. Supp. 2d 722, 729-30 (S.D.N.Y. 2005) ("if Plaintiffs show that there is an absence of evidence in support of [a] due diligence affirmative defense, they will be entitled to summary judgment on their Section 11 claim unless the defendants come forward with evidence supporting each essential element of the defense").

[13] *See also WorldCom*, 346 F. Supp. 2d at 666 ("SAS 71 reports and SAS 72 letters are not expertised statements within the meaning of the Section 11 reliance defense"); *id*. ("'underwriters should not be able to rely on SAS No. [71] reports on interim financial data included in a registration statement as statements "purporting to be made on the authority of an expert . . . ." Rather, ***underwriters*** and directors ***should be required***, as has previously been the case whenever unaudited

2. The Underwriters Failed to Investigate and Resolve Disclosure Differences Between the Offering Materials and Barclays' Internal Reporting Regarding Its Credit Market Exposure

The substantial difference between Barclays' internal reporting and analysis, and what Barclays disclosed in the Offering Materials, created another known circumstance requiring investigation and resolution by the Underwriters. *See* SOF, ¶¶414-430; Puntillo Rpt. at 18-28. Had the Underwriters performed reasonable due diligence they would have known that: (a) there was a material discrepancy between the manner in which Barclays' management and Board of Directors internally reported and analyzed information regarding monolines and other credit market exposures, and the way that such credit market exposures were disclosed in the Offering Materials; (b) Barclays' reporting and analyses of its monoline and other credit market exposures in the Offering Materials were inconsistent with the manner in which it presented these exposures to its regulators; and (c) prior to the Series 5 Offering, Barclays made selective disclosures (upon request) to sophisticated potential investors regarding, among other things, its notional exposure to monoline insurers and interim 2008 exposures to other credit market instruments, but failed to make similarly detailed disclosures in the Series 5 Offering Materials. *See* SOF, ¶¶274-279; Puntillo Rpt. at 18-28.

The Underwriters failed to reasonably investigate and resolve these issues. Customary underwriter due diligence required a reasonable investigation to understand and evaluate not only the nature and risk profile of the gross credit market positions, but also the nature and risk profile of the counterparties providing protection. *See* Puntillo Rpt. at 28. Detailed information on which monolines were providing wraps to Barclays' CDOs, CLOs and other products was readily available

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financials are included in a registration statement, ***to demonstrate affirmatively*** under Section 11(b)(3)(A) that, after conducting a reasonable investigation, they had reasonable ground to believe, and did believe, that the interim financial data was true.'") (quoting *Accountant Liability for Reports on Unaudited Interim Financial Information Under Securities Act of 1933*, SEC Release No. 6173, 1979 WL 169953, at *4 (Dec. 28, 1979)).

to the Underwriters. SOF, ¶¶414-430. Yet, ***no*** investigation into these facts was performed. SOF, ¶¶414-416, 430. The Underwriters made no inquiries of Management, nor did anything else to reasonably investigate and resolve this red flag. *See* SOF, ¶¶414-416, 430; *see also* Puntillo Rpt. at 29-32. Nor do the Underwriters argue that a reasonable investigation would ***not*** have uncovered these discrepancies – the evidence is to the contrary. UW Mtn. at 22-23 (Puntillo Rpt. at 17-32; SOF ¶¶414-430).

3. The Underwriters Failed to Investigate and Resolve Issues Concerning Barclays' Capital Adequacy

The Underwriters also failed to properly investigate and resolve Barclays' perilous Equity Tier 1 Ratio. Prior to the offering, Citi flagged Barclays' capital adequacy as a "key issue" (UW 56.1, ¶201), and a heightened concern among market participants as the credit markets deteriorated in 2007 and into 1Q 2008. *See* SOF, ¶¶275-277, 281-286, 306. A February 20, 2008 research report shows Citi reduced its projections of Barclays' equity ratio for each of 2008, 2009 and 2010, including a projection for the ratio of just 5.1% by the end of 2008. *See* SOF, ¶¶374-375.

The Underwriters contend they sufficiently investigated issues surrounding Barclays' capital ratios because they asked ***two questions*** regarding capital ratios during one of the due diligence calls, and reviewed a handful of publicly available analyst reports concerning Barclays (some dated seven months before the offering). UW 56.1, ¶¶197-206; UW Mtn. at 24. But the record shows Barclays provided short, generic responses to these two questions during the April 3 call, responses the Underwriters do not even discuss.[14] These responses necessitated further investigation in accord with custom and practice, as Barclays noted that the FSA had established "minimal [capital] requirements" for Barclays. Had they taken further actions, the Underwriters could have discovered

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[14] SOF, ¶¶317-322; Brown Decl., Ex. 11 at 43:21-45:13.

that the FSA's Chairman held multiple meetings with Barclays in March 2008 to discuss Barclays' "alarming" Tier 1 equity ratio and to instruct Barclays that it needed to increase its equity ratio to 5.25% by year-end 2008. SOF, ¶431; Puntillo Rpt. at 34. This meant Barclays would have to either sell off assets at distressed prices (buyers of which were scarce), or issue a substantial amount of additional equity. *See, e.g.*, Brown Decl., Ex. 30 at 316-17 (November 21, 2007 Barclays internal e-mail discussing need to "shed rwa" and "begin group wide reduction as much as possible"); *id.* at 317 (addressing need to "raise in the region £2.3bn of lower tier 2 capital" by year end).[15]

The credit rating and equity research reports submitted by the Underwriters as information considered during their due diligence demonstrate Barclays' capital adequacy was a key concern to the market, and warranted further investigation by the Underwriters.[16] For example, Standard & Poor's ("S&P") warned in a January 30, 2008 report Barclays' "negative rating action could follow if profitability declines materially." Slyz Decl., Ex. 4 at 984. Unbeknownst to S&P and investors, Barclays' profitability ***had*** declined drastically (by 9.48%) for the period January 1, 2008 to February 29, 2008, compared to the corresponding period in 2007. SOF, ¶351; Brown Decl., Ex. 14 at 77. Moreover, a February 20, 2008 Merrill Lynch report stated it did "not foresee the need for substantial capital issues," even though Barclays was weeks away from raising $2.5 billion in the Series 5 Offering, and was also courting private investors for large equity capital raises. SOF, ¶¶274-279.

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[15] *See also generally* Pltf's. Barclays 56.1 Stmt., §III.C.

[16] *See* Declaration of Yurij Slyz ("Slyz Decl."), Exs. 4, 5; McSpadden Decl., Ex. 9; Declaration of Richard Doyle ("Doyle Decl."), Ex. 7.

4. The Underwriters Failed to Investigate and Resolve Exceptions in the PwC Comfort Letter

Days before the offering, the Underwriters were informed that Barclays' PBT for the period January 1, 2008 to February 29, 2008 had decreased by 9.48% compared to the same period the prior year, and decreased by an undisclosed amount for the period January 1, 2008 to April 4, 2008, compared to the same period in 2007. SOF, ¶351; Brown Decl., Ex. 14 at 77-78**.** The 9.48% decrease in PBT was an issue the Underwriters should have, but failed to, investigate and resolve. The Underwriters were aware that (1) the 9.48% decline in PBT from the equivalent period the year before exceeded by as much as ***32 times*** Citi's analyst estimates ***for the entire year*** of 2008 (SOF, ¶374); (2) PwC was unable to comment on the profit change from March 2008 to the offering date despite its knowledge of Barclay's difficulties in March 2008 (SOF, ¶¶351-354); (3) Linklaters specifically identified the change in PBT as a relevant area of concern (SOF, ¶351); and (4) the "lack of visibility on number for [Barclays'] peers to support comparing that change in profit with peer institutions." SOF, ¶371. The sharp drop in PBT, viewed in the context of a cascading credit crisis, massive undisclosed writedowns, and capital adequacy issues, required the Underwriters to investigate and resolve the issue. Puntillo Rpt. at 41-44. Instead, the Underwriters curtly declared they were "comfortable" with the drop and took management representations at face value. SOF, ¶¶371, 381.[17]

The Underwriters provide scant evidence to characterize the profits as "consistent" with their expectations, and they provide no basis to justify not investigating further.[18] The Underwriters point

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[17] By comparison, Merrill Lynch's own analysts projected Barclays' PBT for ***all of 2008*** would decrease by only 2.388% – about ***a quarter*** of the amount it ***actually*** decreased in just the ***first two months of 2008***. *See* SOF, ¶378.

[18] Brown Decl., Ex. 14 at 76-77; *see also* SOF, ¶371; McSpadden Depo Tr. (Brown Decl., Ex. 5) at 75:2-7 (acknowledging interim data can be circled up, but "[i]t was not the case in this offering

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to a cursory review of the 9.48% profit decline as evidence they conducted a reasonable investigation, but the cited evidence undermines their assertion and merely creates triable factual issues. Upon receipt of the estimated January and February 2008 PBT from PwC on April 8, 2008, Underwriters' counsel set up a call to discuss this red flag. The record shows the Underwriters listened to Barclays' responses to questions posed by Linklaters[19] (UW Mtn. at 25), received responses which they failed to independently verify, and did not investigate the matter further. Citi never asked PwC what schedules or spreadsheets it had reviewed in connection with its "circle-up" work for purposes of issuing the comfort letter, or asked Barclays to see any of the schedules or spreadsheets provided to PwC for purposes of its "circle-up" work. *See* SOF, ¶¶367-368.

The Underwriters also assert Underwriter staff internally discussed the change in PBT, but the evidence cited simply confirms additional review was needed. First, none of evidence cited by the Underwriters' analyst reports suggests that a 9% year-over-year decrease in PBT was widely expected. SOF, ¶¶371-378, 382-384. Indeed, many analysts' PBT estimates for the ***entire year*** of 2008 amounted to a fraction of the amount it actually dropped in January-February 2008. SOF, ¶¶374, 378. For example, the 9.48% two-month drop exceeded by 32 times the 0.296% decline Citi projected for all of 2008. Meanwhile, multiple analysts projected PBT would ***increase*** in 2008. SOF, ¶¶382-384. Nor is there any evidence the Underwriters asked to see additional March 2008 information prior to the greenshoe offering, to verify the PBT for March 2008. The Underwriters have failed to set forth any evidence that they investigated this red flag beyond asking management,

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circular"). Moreover, the comfort letter merely ensures that financial information is "accurately reproduced" and seeks to avoid "rounding errors or transpositions." McSpadden Depo. Tr. (Brown Decl., Ex. 5) at 72:7-19.

[19] McSpadden Decl., Ex. 25 at UW_Barclays_000018137-39 (David Ludwick from Linklaters wrote the questions).

and have identified no evidence that they could blindly rely on management's representation given the change in Barclay's business and the dislocation of the markets.[20]

5. The Underwriters Failed to Investigate and Resolve Issues Identified in the Citi Research Report

Citi's own February 20, 2008, analyst report, estimating £1.158 billion in writedowns at Barclays for the entire 2008 year, also raised a red flag that the Underwriters failed to properly investigate or resolve. SOF, ¶¶374-377; Puntillo Rpt. at 44-46. The record shows Barclays' "best case scenario" for ***just the first quarter*** of 2008 was £1.549 billion in writedowns, surpassing Citi's estimate for ***all of 2008***. SOF, ¶¶314-315.[21] The Underwriters acknowledge this report was discussed internally, and do not dispute Citi's estimate for 2008 writedowns were dwarfed by Barclays' own figures. But they cite no evidence indicating they requested or obtained any internal analyses from Barclays regarding its writedowns, and instead took at face value managements' unverified "satisfactory responses" during due diligence calls. UW Mtn. at 25; UW 56.1, ¶¶35-36. It is not enough, however, to simply ask questions of management without undertaking any efforts to test or verify management's responses, or to perform independent analyses of the company relevant to its business and the offering. *Escott v. BarChris Constr. Corp.*, 283 F. Supp. 643, 697 (S.D.N.Y. 1968); *see supra*, §IV.A.1., 3.-4.[22]

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[20] Brown Decl., Ex. 13 (e-mail dated April 8 states that "Barclays and the Manager group need to consider whether the information provided in the private comfort letter needs to be disclosed in the Prospectuses appending the Registration Statement"). This was never followed up with management.

[21] Barclays' undisclosed 1Q 2008 writedowns surpassed other analysts' expectations as well. *See, e.g.*, Doyle Decl., Ex. 7 at 528 (February 20, 2008 Merrill Lynch analyst report projecting "possibility of incremental write-downs" of £1.5 billion for all of 2008).

[22] On November 29, 2007, Barclays reprimanded Citi for publishing negative research regarding Barclays in the midst of the Series 4 Offering. *See* SOF, ¶256 (Barclays forwarding to Citi a research note titled "The Runaway Balance Sheet," in which Citi projected a "2% drop in [Barclays

In light of the Underwriters' failure to investigate and resolve any of the above red flags, they have not met their heavy burden to show, as a matter of law, that they conducted a reasonable investigation of the Offering Materials, or that they had reasonable ground to believe and did believe, that they were not misleading.

B. The Underwriters Fail to Establish a Due Diligence Defense

A reasonable due diligence investigation requires a fact-intensive inquiry. When, as here, underwriters are "well aware of [a company's] deteriorating financial position in a troubled industry . . . a reasonable investigation would . . . entail[] a more searching inquiry." *WorldCom*, 346 F. Supp. 2d at 683; *Freidus*, 734 F.3d at 140-41. As the Underwriters put it, investors in the Series 5 Offering were solicited in the "worst financial crisis since the Great Depression," and "an extremely volatile period for credit markets." Thus, a searching inquiry was required to satisfy their due diligence obligations. The Underwriters fail to meet this standard.

By their own admission, the Underwriters relied on little more than publicly available information – published financial information and SEC filings, analyst reports, and news regarding financial and business development. UW Mtn. at 16; UW 56.1, ¶¶61, 82, 94, 106, 118. The only "internal" reviews were counsel reviews of the draft prospectus supplements, and an internal Underwriter approval review using the same public information already made available to the Underwriters. UW Mtn. at 18-19; UW 56.1, ¶¶64-65, 75, 85, 97, 109-110, 121, 131, 140. In truth, the Underwriters did not even ask for information internal to Barclays as part of their investigation, even if such information was relevant to the issues that arose during the investigation. SOF, ¶247

Capital] pre-tax profits in 2008E, leading to zero group EPS growth" stating to Citi: "Please remind me – we are paying you to sell our preference shares, when your research guys wouldn't touch us with a barge pole.").

("[f]or clarity we do not expect you to provide Wachovia with any non public information or commentary").

The Underwriters argue that because they followed the bare minimum of the procedures listed in SEC Rule 176, they conducted a reasonable investigation per a "'statutory standard.'" UW Mtn. at 17. There is no basis in the law or the SEC guidance for this position. Indeed, "the SEC's own commentary on the rule makes clear that Rule 176 did not alter the fundamental nature of underwriters' due diligence obligations." *WorldCom*, 346 F. Supp. 2d at 669; *id*. (it "was intended to 'simplify disclosure and reduce unnecessary repetition and redelivery of information,' not to 'modify the responsibility of underwriters and others to make a reasonable investigation'") (quoting *Circumstances Affecting the Determination of What Constitutes Reasonable Investigation and Reasonable Grounds for Belief Under Section 11 of the Securities Act*, SEC Release No. 6335, 1981 WL 31062, at *10 (Aug. 6, 1981) ("SEC Rel. 6335")).[23]

1. The Underwriters Failed to Review Internal and Non-Public Information

The Underwriters made no meaningful effort to review any Barclays' internal financial information, or verify Barclays' statements. Indeed, the record shows the Underwriters lacked access to important, internal information relevant to the Offering Materials. SOF, ¶303. Citi, the lead underwriter testified:

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[23] The Commission specifically rejects the suggestion that the underwriter needs only to read the incorporated materials and discuss them with representatives of the registrant and named experts. Because the registrant would be the sole source of virtually all information, this approach would not, in and of itself, include the element of verification required by the case law and contemplated by the statute.

SEC Rel. 6335, 1981 WL 31062, at *10 (citing *Escott*, 283 F. Supp. at 697).

> Q. In the context of the Series 5 offering, did Citi ever inquire of Barclays whether it could inspect any of the daily, weekly, or monthly reports that Mr. Lucas referenced during this April 3rd, 2008, call?
>
> A. ***To my knowledge, no***.

McSpadden Depo. Tr. (Brown Decl., Ex. 5) at 219:8-14 (objection removed).

> Q. Following this April 3rd, 2008, call, did Citi request to review any financial reports or schedules of Barclays that may reflect the amount of write-downs that Barclays had taken in January and February, 2008, as Mr. Lucas stated during the April 3rd call?
>
> A. ***Not to my knowledge***.
>
> Q. Did Citi perform any independent analyses of its own to determine what the amount of the write-downs were that Barclays took in January and February 2008 that Mr. Lucas commented on during the April 3rd, 2008, call?
>
> A. ***Not to my knowledge, but independent analysis implies access to information, by definition. This was internal information***. The next opportunity for one to review information would have been when the first-quarter earnings were released, without cooperation from Barclays.

McSpadden Depo. Tr. (Brown Decl., Ex. 5) at 207:13-208:7 (objections removed). The Underwriters' reluctance to even ask for, let alone obtain and analyze, any internal information relevant to such issues including Barclays' credit market exposures, discussions with regulators, capital raising efforts, and monoline exposure, proves a lack of diligence and reasonableness in the Underwriter's investigation. In truth, the Underwriters totally abdicated their "gatekeeper" role, and simply relied on ***Barclays*** to determine whether "disclosure was necessary." SOF, ¶¶304-305.

Conveniently, Citi now declares it "was satisfied with the responses provided on each of the due diligence calls." McSpadden Decl., ¶29. The other Underwriters offer the same blanket assertion, regardless of whether they actually participated in the calls.[24] McSpadden repeatedly

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[24] Three of the underwriters did not even attend all of the due diligence calls. Banc of America participated in zero calls. *See* Declaration of Andrew R. Karp. RBC "participated" in only one due diligence call prior to the offering. Harris Decl., ¶9; *see also* Slyz Decl., ¶14.

testified, however, that he could not remember Barclays' responses, the same responses he now declares "satisfied" Citi and the other underwriters. *See, e.g.*, SOF, ¶¶326-332, 397-400. Other times McSpadden stated he did not understand Barclays' responses to due diligence questions. McSpadden Depo. Tr. (Brown Decl., Ex. 5) at 291:8-20. And there are no records at Citi that reflect Barclays' due diligence call responses, or names of persons that would remember its response.[25] Citi's blanket assertion it was "satisfied" with Barclays' responses is not just highly dubious, there is no evidence in the record to support such a claim was reasonable. The absence of such evidence is dispositive and summary judgment must be denied.

The Underwriters' assertion that they are absolved from liability because they relied on PwC's comfort letter fares no better. "Comfort letters do not 'expertise any portion of the registration statement that is otherwise non-expertised'" and, accordingly, "[u]nderwriters may not rely on an accountant's comfort letters for interim financial statements in presenting such a [reliance on auditor] defense." *WorldCom*, 346 F. Supp. 2d at 666.

The Underwriters cleverly try to side-step this problem by calling it an "audit." *See* UW Mtn. at 21-22 ("Plaintiff also disregards the Underwriters' reasonable and justified reliance on PwC's analysis of Barclays' 2008 write-downs in its clean audit report and comfort letter. The Underwriters were entitled to rely on such expertised information without additional due diligence . . . ."). This is a misrepresentation of fact by the Underwriters – PwC did not conduct an audit of the 2008 interim financials – they are not "expertised." SOF, ¶¶355-363, 365-366.

Even so, PwC's comfort letter was limited due to the unavailability of financial statements for the period from March 1, 2008 through the cut-off date for PwC's review of April 3, 2008, and by PwC's acknowledgment that its review was limited to Management inquiries for this period.

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[25] SOF, ¶¶333, 404.

SOF, ¶¶357, 360, 362. Moreover, less than three weeks after the offering, Linklaters e-mailed Barclays a summary of the "the types of numbers that PWC previously agreed to give comfort on in [the Series 5 Offering], ***which they are now declining to give*** . . . they are now saying that due the applicable US standards as to what may be comforted (which they argue is more restrictive than in the UK) they are unable to do so – in effect they are saying that it was a mistake to circle them in Rimu." SOF, ¶¶410-413. The Underwriters were obligated to investigate these non-expertised portions notwithstanding the comfort letter, and indeed the letter itself raised red flags that the Underwriters should have – but failed to investigate. *See supra* §IV.A.4.[26]

2. The Underwriters' Reliance on Post-Offering Certifications Was Not Reasonable

All of the Underwriters admit their due diligence "investigation" relied on ***Barclays***' own "examin[ation]" of the Offering Materials, and management's certification the materials were accurate and complete. *E.g.*, Harris Decl., ¶16; Doyle Decl., ¶26 (same); Hurley Decl., ¶21 (same). But underwriters "may not rely solely on the company's officers or on the company's counsel. A prudent man in the management of his own property would not rely on them." *Escott*, 283 F. Supp. at 697.[27] And underwriters are not permitted to take at face value the representations made by the

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[26] Defendants complain that the "red flags" cited by plaintiff rely on "hindsight," but all of the issues plaintiff points to are supported by ***information that existed prior to the offering and was readily accessible to the Underwriters***. UW Mtn. at 3.

[27] *Escott*, 283 F. Supp. at 697 ("[U]nderwriters are made responsible for the truth of the prospectus. If they may escape that responsibility by taking at face value representations made to them by the company's management, then the inclusion of underwriters among those liable under Section 11 affords the investors no additional protection."); *Feit*, 332 F. Supp. at 582 ("***Tacit reliance on management assertions is unacceptable***; the underwriters must play devil's advocate."); SEC Rel. 6335, 1981 WL 31062, at *9-*10 ("'In order to make the underwriter's participation in this enterprise of any value to the investors, the underwriters must make some reasonable attempt to verify the data submitted to them. They may not rely solely on the company's officers or on the company's counsel. A prudent man in the management of his own property would not rely on them.") (quoting *Escott*, 283 F. Supp. at 697).

company's management. *Escott*, 283 F. Supp. at 697; *New High Risk Ventures*, SEC Release No. 5275, 1972 WL 125474, at *5 (July 26, 1972) "[T]he underwriter is peculiarly able to demand access to information which verifies the statements in the registration statement.").

The Underwriters were required to ***investigate and verify*** the representations made to them by Barclays' management, including in managements' certifications. Yet they provide no evidence demonstrating that they verified, through independent investigation any of the assertions in Barclays' certifications. The Underwriters' facile reliance on management certifications does not satisfy their duty to independently "verify management's representations." *Escott*, 283 F. Supp. at 697.

In any event, those certifications did not even exist at the time of the Series 5 Offering. UW 56.1, ¶¶33-34. An underwriter's investigation in connection with an offering is of no help to investors if the offering has already taken place, and the securities have already been sold to investors. In this case, the certifications were received on April 11, 2008 and April 22, 2008, ***after*** the Offering Materials were filed with the SEC on April 9, 2008. UW 56.1, ¶¶33-34; Declaration of Thomas C. White, Ex. 3 (Prospectus Supplement dated April 8, 2008). This timing precluded the Underwriters from acting on any information they may have learned from the certifications in time for the offering. As these could not have provided any information to the Underwriters during their review period, they cannot constitute evidence of a reasonable investigation by the Underwriters.

Like management's representations, the Underwriters cannot blithely rely on representations of counsel as "[n]either the lawyer for the company nor the lawyer for the underwriters is an expert within the meaning of Section 11." *Escott*, 283 F. Supp. at 683. The Underwriters must conduct an independent investigation regarding the representations of counsel. The Underwriters' motion, however, demonstrates they took counsel's representations and opinions at face value, without investigating the basis for those opinions.

In circular fashion, counsel themselves relied on information provided by Barclays and the Underwriters, and did not themselves conduct an independent review. SOF, ¶409. Even so, counsel disclaimed "any responsibility for the accuracy, completeness or fairness of the statements in the [offering documents]." SOF, ¶¶405-408. Finally, like the management certifications, these letters from counsel were received after the offering date, as a condition for closing, not as part of the diligence exercise of the Underwriters. SOF, ¶¶405-408.[28]

3. The Underwriters' "Reservoir of Knowledge" Is Bone-Dry

The Underwriters attempt to rely on a "reservoir of knowledge" about Barclays – information learned from prior offerings – to salvage their lack of investigation in this offering. But the Underwriters offer no evidence of such a "reservoir" to support this claim. This is not surprising, because the Underwriters substantially limited any discovery pertaining to the Series 2, 3, and 4 Offerings on the basis that the information was not relevant because those offerings were dismissed. *See* Brown Decl., Ex. 3 at 2, 17 (objecting to requests for, *inter alia*, "documents concerning any affirmative defense(s), and any other defense(s)" "to the extent they seek documents relating to the claims dismissed by the Court"); Brown Decl., Ex. 4 at 1 ("[w]e never agreed to produce" "'documents relevant to the Series 2-4 Offerings'"; "the [Underwriters] specifically objected to producing documents relating to the Series 2, 3 and 4 Offerings"); McSpadden Depo. Tr. (Brown Decl., Ex. 5) at 275:14-19 (objecting to question that purportedly sought information regarding "due diligence on a different deal"); McSpadden Depo. Tr. (Brown Decl., Ex. 5) at 303:16-19 (objecting

[28] Lawrence Reply Report, ¶34 (Brown Decl., Ex. 8). Indeed, the timing of these certificates supports plaintiff's position that the investigation was ***unreasonable***, as the Underwriters failed to get any certification from management concerning the accuracy of the Offering Materials prior to the offering.

to question on grounds it pertained to another offering). Defendants cannot now rely upon their work on the Series 2-4 Offerings to support their due diligence defense.[29]

V. CONCLUSION

For all the above reasons, the Underwriters are not entitled to summary judgment. Accordingly, their motion for summary judgment should be denied.

DATED: December 14, 2016

Respectfully submitted,

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[29] The Underwriters' investigation in this case was significantly inferior to those described in the cases they rely upon. For example, the underwriters' due diligence in *Software Toolworks* was extensive and included independent outside-company surveys of retailers and customers. 50 F.3d at 622. Similarly, the underwriters' due diligence in *Int'l Rectificer* included interviews of middle managers, inspection of factories, review of "internal financial forecasts and other important documents," and the creation of ***the underwriters' own*** financial models which the underwriters ***compared*** to the company's internal models. *In re Int'l Rectifier Sec. Litig.*, No. CV91-3357-RMT(BQRx), 1997 WL 529600, at *4 (C.D. Cal. Mar. 31, 1997). And the court in *Met. Sec. Litig*. denied summary judgment when there was a "dramatic change in the companies' business model," but there was no further examination of internal files by the underwriter. *In re Met. Sec. Litig.*, No. CV-04-25-FVS, 2010 WL 424625, at *4 (E.D. Wash. Jan. 28, 2010).

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CERTIFICATE OF SERVICE

I hereby certify that on December 14, 2016, true and correct copies of Plaintiff's Memorandum of Law in Opposition to the Underwriter Defendants' Motion for Summary Judgment, dated December 14, 2016, along with all exhibits referenced therein, were served via electronic mail on all counsel of record.

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ANDREW J. BROWN