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12  
13 **UNITED STATES DISTRICT COURT**  
14 **CENTRAL DISTRICT OF CALIFORNIA**  
15 **WESTERN DIVISION**

16  
17 SECURITIES AND EXCHANGE  
COMMISSION,

18 Plaintiff,

19 v.

20 CITY OF VICTORVILLE, et al.,

21 Defendants.  
22  
23

Case No. 13-cv-0776-JAK (DTBx)

**MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
DEFENDANT KEITH C.  
METZLER'S MOTION TO  
DISMISS THE SEVENTH CLAIM  
FOR RELIEF IN PLAINTIFF'S  
COMPLAINT AND TO STRIKE  
PLAINTIFF'S PRAYER FOR  
DISGORGEMENT**

24 Date: September 16, 2013  
Time: 8:30 a.m.  
25 Judge: Hon. John A. Kronstadt  
Courtroom: 750

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1     **I.     INTRODUCTION**

2           Even after a three-year investigation in which it collected over a million  
3 pages of documents and took the sworn testimony of dozens of witnesses, the SEC  
4 is unable to allege facts sufficient to state a claim against Keith Metzler. The  
5 reason is simple—he did not violate the federal securities laws. The SEC alleges in  
6 conclusory fashion that Mr. Metzler—a career public servant who during the  
7 relevant time period served as the Director of Economic Development for the City  
8 of Victorville—“knowingly provided substantial assistance” to the Southern  
9 California Logistics Airport Authority (the “Authority”) in its alleged violation of  
10 the anti-fraud provisions of the federal securities laws. However, the SEC has  
11 failed to plead specific *facts* with the particularity required by Federal Rule of Civil  
12 Procedure 9(b) to support any of the elements of its aiding and abetting claim  
13 against Mr. Metzler, namely, that: (1) the Authority, acting with scienter,  
14 committed a primary violation by making material misrepresentations in the  
15 offering documents for its April 2008 bond issuance (the “April 2008 offering”);  
16 (2) Mr. Metzler had actual knowledge of that primary violation and his role in  
17 furthering the primary violation; and (3) Mr. Metzler provided substantial  
18 assistance in the commission of the alleged primary violation.

19           This case involves a financing mechanism called tax increment bonds. The  
20 underlying bonds, which the Authority issued to repay certain short term notes  
21 issued in a private placement, were secured by the property tax revenue attributable  
22 to the “incremental” increase in property values in the Authority’s project area. For  
23 each of its bond issuances, the Authority hired a fiscal consultant (the “Consultant”)  
24 to calculate the incremental increase in property values. The Authority also hired  
25 an underwriter, Kinsell, Newcomb & DeDios, Inc. (“KND”), to coordinate the bond  
26 offerings. The offering documents were drafted by the Authority’s lawyers, with  
27 figures regarding the incremental increase in property values provided by KND and  
28 the Consultant. The essence of the SEC’s claims against the Authority is that the

1 April 2008 offering documents overstated the amount of incremental tax revenue  
2 available to secure the bonds, because they incorporated an inflated estimate of  
3 property values for four airport hangars under construction.

4 Here is how the SEC asserts Mr. Metzler—who did not even have a formal  
5 position or role at the Authority—fits in: In connection with an earlier private  
6 placement by the Authority, Mr. Metzler was asked to provide estimated values for  
7 the four hangars, for which the county assessor’s office had not completed its  
8 valuation. Mr. Metzler provided the estimated amount of the construction costs for  
9 those four hangars—\$65 million—but made clear that the assessor’s office had not  
10 completed the valuation and that the estimate was subject to change. Subsequently,  
11 the assessor’s office concluded its valuation, determining that the appropriate value  
12 was lower than \$65 million. Weeks later, when the underwriter reached out to  
13 Mr. Metzler concerning the hangars in connection with the April 2008 offering that  
14 is the sole focus of the SEC’s claim against Mr. Metzler, Mr. Metzler caused the  
15 new information from the assessor—with the lower valuation—to be forwarded  
16 along. These are the facts alleged in the Complaint and they do not support any, let  
17 alone all, of the elements required to state an aiding and abetting claim.

18 First, the SEC’s claim that the Authority acted with scienter is premised  
19 entirely on its assertion that Mr. Metzler acted with scienter. But the Complaint  
20 contains *no facts* that establish Mr. Metzler knew, or was reckless in not knowing,  
21 that the correct information from the assessor’s office that he passed along to the  
22 underwriter did not make it into the offering documents. Indeed, the SEC does not  
23 even allege that Mr. Metzler reviewed the April 2008 offering documents, let alone  
24 the figures therein alleged to be misleading.

25 Second, the Complaint contains no facts showing that Mr. Metzler had actual  
26 knowledge of the alleged misstatements, or of his supposed role in furthering the  
27 alleged misstatements. Actual knowledge, not negligence or recklessness, was the  
28 state of mind required to establish aiding and abetting in the Ninth Circuit at the

1 time of the alleged conduct, and the SEC has failed to plead it.

2 Third, the Complaint utterly fails to allege how Mr. Metzler supposedly  
3 provided “substantial assistance” in the making of the Authority’s alleged  
4 misstatements. The SEC’s Complaint focuses not on Mr. Metzler’s affirmative  
5 actions, but rather his supposed *inaction*: namely, his supposed failure to provide  
6 the Consultant with the updated hangar valuations. *See, e.g.*, Compl. ¶ 5  
7 (Mr. Metzler allegedly “withheld this information”), ¶ 75 (Mr. Metzler allegedly  
8 “failed to inform Disclosure Counsel that the \$65 million estimated assessed value  
9 of the Hangars was wrong”). But as explained, the Complaint specifically alleges  
10 that Mr. Metzler provided the allegedly missing information to the underwriter.  
11 And the Complaint alleges no facts that suggest Mr. Metzler knew that the  
12 underwriter would not, or did not, pass along this truthful information to the  
13 Consultant or Disclosure Counsel. On these facts—which are taken from its own  
14 Complaint—the SEC cannot establish substantial assistance as a matter of law.

15 In addition to these fundamental defects in its substantive claim, the SEC’s  
16 Complaint against Mr. Metzler suffers from a further defect: the failure to plead a  
17 single fact to support its prayer for disgorgement of supposed “ill-gotten gains”  
18 from Mr. Metzler. Here, the Complaint nowhere alleges that Mr. Metzler received  
19 any ill-gotten gains and, in meet and confer discussions, the SEC acknowledged as  
20 much. Under these circumstances, the SEC’s prayer for disgorgement should be  
21 stricken.

22 Given the SEC’s lengthy investigation, its failure to plead the necessary facts  
23 is both inexcusable and telling. Since the SEC has not pled a satisfactory claim  
24 against Mr. Metzler despite the mass of evidence it collected before bringing its  
25 Complaint, there is no reason to believe that it could cure the defects in pleading if  
26 given leave to amend. Moreover, the mere pendency of the SEC’s baseless aiding  
27 and abetting fraud charge is highly disruptive to Mr. Metzler’s career and otherwise  
28 unblemished reputation. The SEC should not be allowed to further tarnish Mr.

1 Metzler's career and reputation for months if not years longer to embark on a  
2 fruitless fishing expedition to try to discover facts that it could not discover in its  
3 multi-year investigation. Accordingly, while we recognize that dismissal of an  
4 original complaint with prejudice is unusual, it is fully justified here.<sup>1</sup>

5 **II. STATEMENT OF FACTS<sup>2</sup>**

6 **A. Mr. Metzler**

7 Mr. Metzler has worked for the City of Victorville since 1996. He now  
8 serves as Assistant City Manager. Compl. ¶ 18. At the time of the events alleged  
9 in the Complaint, Mr. Metzler was the City's Director of Economic Development.  
10 *Id.* In that role, he was responsible for marketing development opportunities and  
11 directing commercial and industrial development activities. *Id.*

12 **B. The City of Victorville and the Airport Authority**

13 Victorville is a city of approximately 115,000 residents, located about 90  
14 miles northeast of Los Angeles. *Id.* ¶ 12. After the 1992 closure of George Air  
15 Force Base, the City, working together with San Bernardino County and other local  
16 municipalities, created the Authority as part of an effort to establish local industry  
17 and create jobs. *Id.* ¶¶ 20-21. The Authority operates in accordance with a  
18 redevelopment plan for the area in and around the former George Air Force Base,  
19 which would eventually become the Southern California Logistics Airport.  
20 *Id.* ¶ 21.

21 The five members of Victorville's City Council simultaneously serve as  
22 commissioners of the Authority, and the Mayor serves as the Authority's Chairman.  
23 *Id.* ¶ 13. In addition, the City Manager serves as the Authority's Executive Director  
24 and the City's Finance Director serves as the Authority's Treasurer. *Id.* By  
25 contrast, Mr. Metzler had no formal position or role at the Authority at the time of

26 \_\_\_\_\_  
27 <sup>1</sup> Dismissal also is appropriate for the reasons set forth in the Authority's  
28 concurrently filed motion to dismiss, which Mr. Metzler joins.

<sup>2</sup> Mr. Metzler accepts the well-pleaded factual allegations of the SEC's Complaint  
as true solely for the purposes of this motion.

1 the events alleged in the Complaint. *Id.* ¶ 18.

2 **C. The Airport Authority’s Tax Increment Bond Offerings**

3 In connection with its redevelopment efforts, the Authority issued several  
4 “tax increment” bonds to raise funds. *Id.* ¶ 23. Though the SEC alleges that “the  
5 Authority offered and sold at least four tax increment financings relevant to this  
6 action” (*id.* ¶ 29), only one such offering, the so-called April 2008 offering, forms  
7 the basis of the SEC’s claim against Mr. Metzler. *Id.* ¶¶ 153-154.

8 Tax increment bonds are secured by, and repaid from, the “incremental”  
9 increase in property tax revenue attributable to increased property values within a  
10 redevelopment project area. *Id.* ¶ 24. These increased property values can arise  
11 from new construction or from appreciation in the values of existing properties. *Id.*  
12 The total amount of tax “increment” available to secure tax increment bonds is  
13 calculated by subtracting the tax revenue attributable to the valuations of the  
14 relevant properties in a given “base” year (typically the year before the  
15 redevelopment plan was adopted) from the total current tax revenue attributable to  
16 those properties. *Id.* ¶ 26.

17 KND was the sole underwriter for all bonds the Authority issued between  
18 2001 and 2008, earning over \$5.1 million in underwriting fees. *Id.* ¶ 31. Jeffrey  
19 Kinsell (“Kinsell”) was the owner, Director and President of KND. *Id.* ¶ 16.  
20 Janees Williams (“Williams”) was the Vice President of KND. *Id.* ¶ 17.

21 For each of the Authority’s bond offerings, the Authority hired the  
22 Consultant to calculate the additional tax increment revenue available to secure the  
23 repayment of any new bond issue. *Id.* ¶ 33. To perform those calculations, the  
24 Consultant first looked to the county assessor’s most recent property rolls to  
25 determine the current value of property in the redevelopment area. *Id.* ¶ 34.  
26 However, the assessor’s rolls are updated only once each year, which means that  
27 the rolls often did not reflect the updated value of recently-sold properties and  
28 properties with new construction. *Id.* ¶ 35. The Consultant had to look elsewhere

1 to determine the value of those properties. *Id.* ¶ 36. Although the SEC admits Mr.  
2 Metzler had no formal position at the Authority, it asserts he was sometimes asked  
3 to serve in an information-gathering role with respect to estimated property values,  
4 and thus the Consultant typically received information regarding updated property  
5 values from Mr. Metzler’s office. *Id.*

6 Investors in the Authority’s bond offerings were provided with an “Official  
7 Statement” describing the terms and conditions of each bond. *Id.* ¶ 30. The  
8 Official Statements referenced and attached reports prepared by the Consultant,  
9 which set forth the amount of tax increment revenue available to serve as security  
10 for the bonds. *Id.* ¶ 37. The Official Statements were initially drafted by lawyers  
11 working for the Authority (“Disclosure Counsel”). *Id.* ¶ 82. KND drafted certain  
12 sections of the Official Statements (including sections that the SEC alleges to be  
13 materially misleading, *id.* ¶ 86), and had ultimate authority over those sections. *Id.*  
14 ¶¶ 82, 86. According to the SEC, Mr. Metzler, “[w]orking at the direction” of  
15 another City official, assisted in the drafting process by preparing descriptions of  
16 certain redevelopment projects. *Id.* ¶ 82. However, the SEC nowhere alleges that  
17 the language Mr. Metzler drafted or assisted in drafting was materially misleading.  
18 Specifically, despite alleging in a general fashion that Mr. “Metzler worked with  
19 the Disclosure Counsel and the underwriters at KND to draft sections of the Official  
20 Statements” and that he was the “‘point person’ concerning [the] Official  
21 Statements for all the bond issuances” (*id.* ¶¶ 82-83), the SEC has not pled at all,  
22 much less with the particularity required by Rule 9(b), that Mr. Metzler had any  
23 role in drafting or assisting to draft the alleged misstatements in the April 2008  
24 Official Statement.

25 **D. The February 2008 Private Placement**

26 In February 2008, the Authority borrowed \$35 million from a major  
27 commercial bank (the “Bank”) in a private placement offering (the “Private  
28 Placement”). *Id.* ¶ 47. As part of that deal, the Bank and the Authority entered into

1 an agreement that required the Authority to offer tax increment bonds in the future  
2 at a time of the Bank's choosing, with the proceeds going to pay down the debt  
3 owed to the Bank. *Id.* ¶ 48. However, the Authority was not obligated to issue  
4 future bonds unless there was a sufficient amount of tax increment revenue  
5 available to secure those bonds. *Id.* Accordingly, the Bank focused during the  
6 Private Placement negotiations on the estimated additional assessed value of new  
7 construction that had not already been used to secure previously-issued bonds.  
8 *Id.* ¶ 49. This new construction included, among other properties, four new  
9 airplane hangars (the "Hangars") at the airport. *Id.* ¶ 51. KND Affiliates (an  
10 affiliate of KND, the underwriter) was managing the construction of the Hangars.  
11 *Id.* ¶ 92.<sup>3</sup>

12 Before closing the Private Placement, the Bank asked the Consultant to  
13 certify the estimated tax increment revenues available to secure future bond  
14 issuances, and also asked Mr. Metzler to provide an affidavit, attached to a  
15 spreadsheet containing his estimates of assessed valuations, certifying that the  
16 estimates were correct to the best of his knowledge. *Id.* ¶ 50.

17 Because the assessor's office had not yet completed its valuation of all four  
18 Hangars at the time that the Private Placement closed, Mr. Metzler and KND,  
19 relying on an estimate provided by KND Affiliates, estimated that the assessed  
20 value of the Hangars would be \$65 million in the 2008-2009 fiscal year. *Id.* ¶¶ 54,  
21 57. This estimate was based on the costs of constructing the Hangars. *Id.* ¶ 54.

22 Mr. Metzler incorporated the \$65 million estimated value of the Hangars into  
23 the final version of the spreadsheet he prepared in connection with the Private  
24 Placement. *Id.* ¶ 61; Request for Judicial Notice ("RJN"), Ex. A, at 6. As the SEC  
25 admits (Compl. ¶ 61), in a certificate accompanying the spreadsheet, dated

26 \_\_\_\_\_  
27 <sup>3</sup> The SEC alleges that, as part of a separate scheme not implicating Mr. Metzler in  
28 any way, KND and KND Affiliates misappropriated over \$2.7 million of bond  
proceeds from the Authority and bondholders in connection with those construction  
efforts. *Id.* ¶ 89.

1 February 29, 2008, Mr. Metzler made clear both that the assessor's office had not  
2 yet completed its valuation of the Hangars and that the estimate could change if the  
3 assessor's office valued the property using a lease valuation method instead of  
4 relying on construction costs:

5 This value [for the Hangars] is based upon actual construction  
6 cost for all four hangars. The construction cost was obtained  
7 from KND Affiliates, the developer responsible for completing  
8 the four hangars. **Currently, the County of San Bernardino's**  
9 **Assessors Office is trying to complete its valuation of the**  
10 **facility leases for the subject hangars to complete its valuation**  
11 **for the hangars. It is possible that the actual assessed value**  
12 **by the Assessor's Office could be adjusted from the**  
13 **construction cost value as a result of it concluding its**  
14 **possessory interest valuation.**

15 RJN, Ex. A at 3-4 (emphasis added).

16 In conducting the tax increment analysis requested by the Bank, the  
17 Consultant relied upon the \$65 million estimate provided by Mr. Metzler. *Id.* ¶ 58.  
18 The Private Placement closed on February 29, 2008. *Id.* ¶ 47.

#### 19 **E. The Assessor Completes Its Valuation of the Hangars**

20 On March 10, 2008, Mr. Metzler's assistant, Jennifer Thompson, received an  
21 email from the assessor's office stating that the 2008-2009 assessed value for  
22 Hangar No. 3 would be \$9,483,260. *Id.* ¶ 67; RJN, Ex. B at 9.<sup>4</sup> The email also  
23 stated that if the assessor's office did not receive further information from KND  
24 Affiliates regarding the construction costs for Hangar No. 4, it would assess Hangar  
25 No. 4 at the same value as Hangar No. 3. *Id.* Assuming that Hangar No. 4 would  
26 be assessed at the same value as Hangar No. 3, and considering the assessor's  
27 already-determined values for Hangar Nos. 1 and 2, the total assessed value of the  
28 four Hangars in 2008-2009 would have been \$27.9 million, not \$65 million.

<sup>4</sup> The Complaint alleges that this email from the assessor's office was received by Mr. Metzler. Compl. ¶ 67. However, the email itself, which the Court may judicially notice, shows that it was addressed to Ms. Thompson, not Mr. Metzler. RJN, Ex. B.

1 Compl. ¶ 70.

2 As the SEC acknowledges, Mr. Metzler immediately provided this  
3 information to KND. He directed Ms. Thompson to forward the email from the  
4 assessor's office to Williams, with the dictated message: "FYI ... lower than we  
5 expected." *Id.* ¶ 67. Williams sent the email to Kinsell the same day. *Id.*

6 **F. The April 2008 Bond Offering**

7 In April 2008, the Bank exercised its option to require the Authority to issue  
8 additional tax increment bonds. *Id.* ¶ 62. That led to the April 2008 offering, in  
9 which the Authority offered \$13.335 million in tax increment bonds. *Id.* The  
10 proceeds from the April 2008 Offering did not fund the Authority's redevelopment  
11 projects, but instead went to repay part of the debt owed to the Bank. *Id.*

12 In connection with the April 2008 offering, the Consultant prepared a report  
13 containing tax increment projections. *Id.* ¶ 64. That report, which was eventually  
14 attached to the April 2008 Official Statement, stated that the increased assessed  
15 value due to new development at the Airport totaled \$111,309,322. *Id.* ¶¶ 64-65;  
16 *see also* RJN, Ex. C at 140. Although the Consultant's report did not separately  
17 break out an estimated value for the Hangars, the SEC alleges that the Consultant's  
18 estimate of \$111,309,322 included the \$65 million estimated value for the Hangars.  
19 Compl. ¶ 66.

20 On April 16, 2008, Williams sent an email to Mr. Metzler asking him to  
21 confirm, among other things, that: "4 Hangars approximately \$65,000,000 based  
22 on construction value." Mr. Metzler acted immediately to correct Williams' error.  
23 His assistant, acting at Mr. Metzler's direction, replied to Williams' email the same  
24 day, attaching the March 10, 2008 emails from the assessor's office containing  
25 assessed valuations for Hangar Nos. 1, 2 and 3, and the likely assessed valuation for  
26 Hangar No. 4. *Id.* ¶ 69.

27 According to the SEC, Williams and Kinsell both knew that the \$65 million  
28 estimate was no longer correct—having twice been alerted to that fact by

1 Mr. Metzler. *Id.* ¶ 87. But Williams nonetheless prepared a Debt Service  
2 Schedule, included on page 24 of the April 2008 Official Statement, which set forth  
3 figures relying on the \$65 million estimate. *Id.* ¶¶ 72-73 (“KND ... prepared the  
4 Debt Service Schedule”), 87; RJN, Ex. C at 39. KND had ultimate authority over  
5 the Debt Service Schedule. Compl. ¶ 86. The SEC alleges that the figures in the  
6 Debt Service Schedule prepared by KND, along with the property values listed in  
7 the Consultant’s report, were false and misleading. *Id.* ¶ 74.

8 Kinsell and Williams both reviewed and commented on draft official  
9 statements, the Consultant’s report, and other documents related to the April 2008  
10 Offering. *Id.* ¶ 87. The April 2008 Official Statement was signed by the  
11 Authority’s Executive Director. *Id.* ¶ 83; RJN, Ex. C at 64.

### 12 **III. THE SEC’S CLAIM AGAINST MR. METZLER**

13 The SEC alleges that the Authority violated the anti-fraud provisions of the  
14 securities laws, including Section 10(b) of the Securities Exchange Act of 1934 and  
15 Rule 10b-5 thereunder, by making material misrepresentations and omissions in the  
16 April 2008 Official Statement. Compl. ¶¶ 122-125. In its sole claim against  
17 Mr. Metzler, for aiding and abetting, the SEC alleges that Mr. Metzler “knowingly  
18 provided substantial assistance” to the Authority in its alleged violation of Section  
19 10(b) and Rule 10b-5. *Id.* ¶ 154. As described above, the SEC alleges that  
20 Mr. Metzler supposedly “provided substantial assistance” by failing to provide the  
21 Consultant or Disclosure Counsel with the corrected Hangar valuation numbers  
22 before the April 2008 Offering.

### 23 **IV. LEGAL STANDARD**

24 In order to survive a motion to dismiss, a complaint must contain sufficient  
25 factual allegations to “state a claim to relief that is plausible on its face.” *Ashcroft*  
26 *v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544,  
27 570 (2007)). To satisfy this standard, a plaintiff must plead sufficient factual  
28 content that would allow the court to draw a reasonable inference that the defendant

1 is liable for the misconduct alleged. *Iqbal*, 556 U.S. at 663.

2 While a court “must take all of the factual allegations in the complaint as  
3 true,” it is “not bound to accept as true a legal conclusion couched as a factual  
4 allegation.” *Id.* at 678; *see also Clegg v. Cult Awareness Network*, 18 F.3d 752,  
5 754-55 (9th Cir. 1994) (the court “is not required to accept legal conclusions cast in  
6 the form of factual allegations if those conclusions cannot be reasonably drawn  
7 from the facts alleged”); *SEC v. Daifotis*, 2011 WL 2183314, at \*3 (N.D. Cal.  
8 June 6, 2011) (“[c]onclusory allegations of law and unwarranted inferences are  
9 insufficient to defeat” a 12(b)(6) motion) (internal citation omitted). Nor is a court  
10 required to accept as true allegations that are “contradicted by documents referred  
11 to in the complaint.” *Steckman v. Hart Brewing, Inc.*, 143 F.3d 1293, 1295-96 (9th  
12 Cir. 1998); *see also Patel v. Parnes*, 253 F.R.D. 531, 544 (C.D. Cal. 2008). Courts  
13 regularly take judicial notice of documents referenced in a complaint on a motion to  
14 dismiss, even if they are not attached to the complaint, under the well-established  
15 doctrine of incorporation by reference. *See, e.g., In re Copper Mountain*, 311 F.  
16 Supp. 2d 857, 863 (N.D. Cal. 2004) (“[C]ourts are specifically authorized, in  
17 connection with a motion to dismiss a securities fraud complaint, to consider  
18 documents and filings described in the complaint under the incorporation by  
19 reference doctrine.”).

20 Where, as here, a plaintiff’s claims sound in fraud, Rule 9(b) requires the  
21 plaintiff to “plead with particularity the circumstances constituting fraud,”  
22 including “the who, what, when, where, and how” of the alleged misconduct.  
23 *Tanedo v. East Baton Rouge Parish Sch. Bd.*, 2012 WL 5447959, at \*7-8 (C.D. Cal.  
24 Oct. 4, 2012) (citing *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir.  
25 2003)). Although allegations regarding “malice, intent, knowledge, and other  
26 condition of mind of a person may be averred generally,” knowledge “must still be  
27 pleaded sufficiently to make entitlement to relief plausible.” *Id.* at \*8 (internal  
28 quotations omitted) (dismissing claim for failure to plead facts making general

1 allegation of scienter plausible).

2 **V. ARGUMENT**

3 **A. The SEC Has Failed To Sufficiently Allege That Mr.**  
4 **Metzler Aided And Abetted A Primary Violation Of The**  
5 **Securities Laws.**

6 To state a claim that Mr. Metzler aided and abetted a violation of the  
7 securities laws, the SEC must plead with particularity facts that, if proven, would  
8 show: “(1) the existence of an independent primary violation; (2) actual knowledge  
9 by the alleged aider and abettor of the primary violation and of his or her own role  
10 in furthering it; and (3) ‘substantial assistance’ by the defendant in the commission  
11 of the primary violation.” *SEC v. Fehn*, 97 F.3d 1276, 1288 (9th Cir. 1996)  
12 (citation omitted). The SEC’s Complaint fails on all three counts.

13 **1. The SEC Has Not Sufficiently Alleged That The**  
14 **Authority Violated Section 10(b) Or Rule 10b-5.**

15 **a. The SEC Has Not Sufficiently Alleged That**  
16 **Mr. Metzler Acted With Scienter.**

17 To establish its claim that the Authority violated the anti-fraud provisions of  
18 the securities laws, the SEC must plead and then prove that the Authority, acting  
19 with scienter, made a misstatement or omission of a material fact. *Fehn*, 97 F.3d at  
20 1289. Scienter is a “mental state embracing intent to deceive, manipulate or  
21 defraud.” *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 n.12 (1976). Scienter  
22 may be established by proof of recklessness, which requires a showing of “highly  
23 unreasonable” conduct, “involving not merely simple, or even inexcusable  
24 negligence, but an extreme departure from the standards of ordinary care, and  
25 which presents a danger of misleading buyers or sellers that is either known to the  
26 defendant or is so obvious that the actor must have been aware of it.” *SEC v.*  
27 *Rubera*, 350 F.3d 1084, 1094 (9th Cir. 2003) (quoting *Hollinger v. Titan Capital*  
28 *Corp.*, 914 F.2d 1564, 1569 (9th Cir. 1990)). In the Ninth Circuit, “scienter

1 requires either ‘deliberate recklessness’ or ‘conscious recklessness.’” *SEC v.*  
2 *Platforms Wireless Int’l Corp.*, 617 F.3d 1072, 1093-94 (9th Cir. 2010) (quoting  
3 *Gebhart v. SEC*, 595 F.3d 1034, 1041-42 (9th Cir. 2010)). Evidence showing that a  
4 defendant “did not appreciate the gravity of the risk of misleading others is  
5 relevant” to determining whether the defendant acted with scienter. *Platforms*  
6 *Wireless*, 617 F.3d at 1093-94.

7 Here, the SEC’s allegation that the Authority acted with scienter is premised  
8 entirely on its allegation that Mr. Metzler “knew, or was reckless in not knowing,  
9 that the April 2008 Official Statement materially misstated the tax increment and  
10 debt service ratio for the April 2008 Bonds.” Compl. ¶ 84. Because Mr. Metzler is  
11 alleged to have been “the agent for the Authority with regard to content in the  
12 Authority’s Official Statements,” the SEC contends that the Authority likewise  
13 “had actual knowledge of, or was reckless in not knowing, the falsity and  
14 misleading nature of the misstatements concerning the tax increments and the debt  
15 service ratio.” *Id.* ¶ 85. Thus, to state a claim against the Authority, the SEC must  
16 plausibly allege that Mr. Metzler acted with scienter. It has not done so.

17 Although the SEC alleges generally that Mr. Metzler “knew, or was reckless  
18 in not knowing, that the April 2008 Official Statement materially misstated the tax  
19 increment and debt service ratio for the April 2008 Bonds,” *id.* ¶ 84, the SEC must  
20 also satisfy the requirements imposed by the Supreme Court’s decisions in  
21 *Twombly* and *Iqbal*, by pleading **facts** that make that conclusory assertion of  
22 scienter plausible. See *Tanedo*, 2012 WL 5447959, at \*8 (“Although the Ninth  
23 Circuit has held that a claimant could allege scienter ‘simply by saying that scienter  
24 existed’ ... that authority predated *Twombly* .... *Twombly* explains that Rule 8  
25 requires the pleading of sufficient facts to establish plausibility. Other circuits have  
26 made clear that the requirement in Rule 8 of pleading sufficient facts to make a  
27 claim of fraud plausible applies to allegations of scienter as well.”). Here, the  
28 SEC’s conclusory assertion of scienter is gutted by the facts it has actually pled.

1 First, the Complaint contains no plausible allegation that Mr. Metzler had  
2 actual knowledge that the April 2008 Official Statement materially misstated the  
3 tax increment value and debt service ratio. In fact, the Complaint does not even  
4 allege that Mr. Metzler reviewed drafts of the April 2008 Official Statement, let  
5 alone that he reviewed the specific portions of the document (which together with  
6 its attachments totaled 170 pages) alleged to be misleading, or that he understood  
7 those portions to be misleading. Instead, the SEC alleges only that drafts of “the  
8 Authority’s Official Statements”—which specific Official Statements, the SEC  
9 does not say—“were circulated to an unofficial disclosure committee for  
10 comments,” and that “Metzler was a member of this committee.” Compl. ¶ 82.  
11 Similarly, although the Complaint alleges that the Authority’s Executive Director  
12 “tasked” Mr. Metzler “with reviewing the Official Statements to ensure they were  
13 accurate,” *id.* ¶ 83, the SEC never says that Mr. Metzler actually did review the  
14 April 2008 Official Statement, let alone that he reviewed the specific portions  
15 alleged to be misleading, knew that those portions were false, and chose not to say  
16 anything about it.

17 Nor does the Complaint sufficiently allege that Mr. Metzler recklessly  
18 disregarded “a danger of misleading buyers or sellers that ... [was] so obvious that  
19 [he] must have been aware of it.” *Rubera*, 350 F.3d at 1094. Even if Mr. Metzler  
20 reviewed drafts of the April 2008 Official Statement—a fact that the Complaint  
21 never alleges—there is no allegation from which one could reasonably infer that the  
22 alleged misstatements were so “obvious” that no reasonable person in Mr.  
23 Metzler’s shoes could have ignored them. The allegedly misleading Debt Service  
24 Schedule, which KND prepared (Compl. ¶¶ 73, 87), is on page 24 of the 170-page  
25 Official Statement. RJN, Ex. C at 39. The allegedly misleading section of the  
26 Consultant’s report is buried 131 pages into the document. *Id.* at 140. Neither the  
27 Debt Service Schedule nor the Consultant’s report gave an estimated value for the  
28 Hangars (*id.* at 39, 140); instead the SEC alleges that the Debt Service Schedule

1 and the report merely *incorporated* the \$65 million Hangar value into their  
2 calculations, a supposed fact that is nowhere apparent from the document itself. To  
3 sufficiently plead scienter, the SEC must do more than merely allege that  
4 Mr. Metzler knew that the \$65 million estimate for the Hangars was no longer  
5 valid; it must allege that Mr. Metzler knew, or recklessly disregarded, that the  
6 alleged misstatements in the Official Statement improperly relied on the \$65  
7 million value, thereby rendering the overall \$111 million valuation of new  
8 development at the Airport materially false or misleading. *See Schlifke v. Seafirst*  
9 *Corp.*, 866 F.2d 935, 946 (7th Cir. 1989) (“The question is not merely whether the  
10 Bank had knowledge of the undisclosed facts; rather, it is the ‘danger of misleading  
11 buyers [that] must be actually known or so obvious that any reasonable man would  
12 be legally bound as knowing.’”) (citation omitted). Although the SEC alleges  
13 generally that Mr. Metzler was tasked with reviewing the Official Statements for  
14 accuracy, there is no allegation that Mr. Metzler was charged with checking the  
15 Consultant’s and KND’s math.

16 Moreover, all of Mr. Metzler’s alleged conduct with respect to the April 2008  
17 Official Statement contradicts, rather than supports, the SEC’s bare assertion that he  
18 acted with scienter. In connection with the earlier February 2008 Private  
19 Placement, Mr. Metzler’s certification made clear that his \$65 million estimate was  
20 based on currently-known construction costs and that the estimate was subject to  
21 change based on the assessor’s final valuation. Compl. ¶ 61; RJN, Ex. A. When  
22 the estimate did change and Mr. Metzler learned that his previous estimate of  
23 \$65 million was no longer valid, he immediately forwarded the information to  
24 Williams at KND (Compl. ¶ 67), who had ultimate responsibility for preparing the  
25 Debt Service Schedule (*id.* ¶ 86). And when Williams later asked Mr. Metzler to  
26 confirm that the correct valuation for the Hangars was \$65 million, he immediately  
27 corrected her error and forwarded the correct information. *Id.* ¶ 69. It is  
28 implausible that Mr. Metzler, having *twice* provided the underwriter with the

1 *correct* hangar valuation data, knew or recklessly disregarded that the information  
2 would not be accurately captured in the Official Statement.

3 Finally, the SEC alleges no facts suggesting that Mr. Metzler had any motive  
4 to commit securities fraud, rendering its conclusory assertion of scienter even more  
5 implausible. The Authority had nothing significant to gain from the April 2008  
6 Offering, because the proceeds were used to repay the Bank, not to fund additional  
7 redevelopment projects. *Id.* ¶ 62. Moreover, under its agreement with the Bank,  
8 the Authority's obligation to issue bonds was dependent on the existence of  
9 sufficient tax increment to secure those bonds. *Id.* ¶ 48. The Authority therefore  
10 had no incentive to inflate the value of the bond offering. It is even more  
11 inconceivable that Mr. Metzler—a civil servant who had no formal role or position  
12 at the Authority, and who was merely serving in an on-call, intermittent,  
13 information-gathering role—had any incentive to mislead bond investors, and the  
14 SEC alleges none.

15 Because the SEC has failed to sufficiently allege that Mr. Metzler knowingly  
16 or recklessly disregarded the alleged misstatements in the April 2008 Official  
17 Statement, the SEC has not stated a tenable claim that the Authority committed a  
18 primary violation, and thus Mr. Metzler cannot be liable for aiding and abetting.  
19 The Court should dismiss the SEC's claim against Mr. Metzler for that reason  
20 alone.

21 **b. The SEC Has Not Sufficiently Alleged That**  
22 **The Authority's Alleged Misstatements Were**  
23 **Material.**

24 The SEC's claim that the Authority committed a primary violation fails for a  
25 separate and independent reason: as explained in the Authority's motion to  
26 dismiss, the SEC has failed to sufficiently allege that any of the alleged  
27 misstatements and omissions in the April 2008 Official Statement were material.  
28 Mr. Metzler joins in the Authority's motion to dismiss and incorporates it here.

1                   **2. The SEC Does Not Sufficiently Allege That Mr.**  
2                   **Metzler Had Actual Knowledge Of The Primary**  
3                   **Violation And Of His Own Role In Furthering It.**

4                   The SEC must also sufficiently allege that Mr. Metzler had “actual  
5 knowledge ... of the primary violation and of his ... own role in furthering it.”  
6 *Fehn*, 97 F.3d at 1288 (citation omitted). It has not done so. As explained above,  
7 the SEC has not made a plausible allegation that Mr. Metzler acted recklessly; it  
8 therefore cannot meet the even more exacting standard of actual knowledge.<sup>5</sup>

9                   Although the SEC parrots the statutory language in asserting that Mr. Metzler  
10 “knowingly provided substantial assistance to the Authority,” *id.* ¶ 154, the  
11 Complaint contains no facts that would make that assertion plausible. To satisfy  
12 the “actual knowledge” requirement, the SEC would have to plead and prove that  
13 Mr. Metzler: (1) reviewed the April 2008 Official Statement; (2) reviewed the  
14 specific portions of the April 2008 Official Statement alleged to be misleading; and  
15 (3) understood that the allegedly misleading figures—which did not even reference  
16 the Hangar valuations that he had previously provided—were inaccurate. The SEC  
17 pleads none of those three things in its Complaint. Nor does the Complaint make

18  
19 <sup>5</sup> The Dodd-Frank Act, enacted in 2010, loosened the “actual knowledge” standard  
20 by giving the SEC the authority to pursue defendants who “recklessly” provide  
21 substantial assistance in the commission of securities fraud. *See* Pub. L. 111-203,  
22 § 929O. However, all of the relevant conduct alleged in this lawsuit took place in  
23 2008 or earlier, before Dodd-Frank was enacted. Courts have consistently held that  
24 provisions of the Dodd-Frank Act, including the specific provision at issue here,  
25 were not meant to be applied retroactively. *See, e.g., SEC v. Wyly*, 2013  
26 WL 2450545, at \*9 n.104 (S.D.N.Y. June 6, 2013) (holding that Dodd-Frank  
27 provision instituting a recklessness standard for aiding and abetting claims did not  
28 apply retroactively); *SEC v. Daifotis*, 2011 WL 2183314, at \*13-14 (refusing to  
retroactively apply Dodd-Frank Act provision that “changed the liabilities,  
remedies and scope of authority” available to the SEC and dismissing with  
prejudice claims based on alleged misconduct that occurred before Dodd-Frank);  
*SEC v. Ficeto*, 839 F. Supp. 2d 1101, 1110 n.7 (C.D. Cal. 2011) (“Dodd-Frank did  
not contain any retroactive provisions”). The SEC appears to acknowledge that the  
actual knowledge requirement still applies in this action, alleging only that  
Mr. Metzler “knowingly” provided substantial assistance. Compl. ¶ 154. But even  
if the Court were erroneously to apply a recklessness standard here, the Complaint  
nonetheless fails to state a plausible claim for relief, for all the reasons explained  
*supra* at Section V.A.1.a.

1 even a conclusory assertion that Mr. Metzler was aware of his “role in furthering”  
2 the primary violation, let alone allege with particularity the nature of that supposed  
3 “role.”

4 **3. The SEC Does Not Sufficiently Allege That Mr.**  
5 **Metzler Substantially Assisted The Alleged Primary**  
6 **Violation.**

7 To sufficiently plead that Mr. Metzler provided “substantial assistance” in  
8 the alleged primary violation by the Authority, the SEC must plausibly allege that  
9 the supposed assistance was “a substantial factor in bringing about the violation.”  
10 *Mendelsohn v. Capital Underwriters, Inc.*, 490 F. Supp. 1069 (N.D. Cal. 1979); *see*  
11 *also Wright v. Schock*, 571 F. Supp. 642, 663 (N.D. Cal. 1983) (substantial  
12 assistance in the underlying violation “requires a significant and active, as well as  
13 knowing participation in the wrong,” not the “performance of mere ministerial  
14 tasks”). The SEC’s allegations of “substantial assistance” must also meet the  
15 heightened pleading requirements of Federal Rule of Civil Procedure 9(b), pursuant  
16 to which the Complaint must give Mr. Metzler “notice of the specific fraudulent  
17 conduct against which [he] must defend.” *Daifotis*, 2011 WL 2183314, at \*3, \*8.

18 The SEC has not met its burden. It does not (and cannot) plead how any of  
19 Mr. Metzler’s affirmative conduct was a “substantial factor in bringing about the  
20 violation.” Mr. Metzler did not prepare the allegedly misleading portions of the  
21 April 2008 Official Statement, and the Complaint does not even specifically allege  
22 that he *reviewed* those portions of the Official Statement, let alone that he approved  
23 them. And even if the Complaint did allege that Mr. Metzler reviewed and  
24 approved the allegedly misleading statements (it does not), that would nonetheless  
25 fall short of pleading “substantial assistance.” *See SEC v. Baxter*, 2007  
26 WL 2013958, at \*9 (N.D. Cal. Jul. 11, 2007) (“mere awareness and approval of the  
27 primary violation is insufficient to make out a claim for substantial assistance”)  
28 (citation omitted).

1           Moreover, although the SEC alleges that KND and the Consultant  
2 erroneously relied on the \$65 million estimate that Mr. Metzler had provided in  
3 connection with the *earlier* February 2008 Private Placement, it fails to explain  
4 why Mr. Metzler should be on the hook for knowingly aiding and abetting  
5 securities fraud because of the alleged mistakes that KND and the Consultant  
6 made—particularly when Mr. Metzler expressly cautioned that his February 2008  
7 estimate was only preliminary and when he later provided the *correct* information  
8 to KND on two separate occasions. RJN, Ex. A; Compl. ¶¶ 67, 69. Any plausible  
9 reading of the Complaint suggests that Mr. Metzler’s conduct made it *less* likely  
10 that the April 2008 Official Statement would misstate the available tax increment,  
11 not more so.

12           As shown above, the SEC’s claim against Mr. Metzler is based not on his  
13 affirmative actions, but rather on his alleged *inaction*, namely, that Mr. Metzler  
14 allegedly neglected to provide the Consultant with the lowered estimated values for  
15 the Hangars. Not only is that assertion contrary to the actual facts the SEC alleges,  
16 it is legally insufficient. “Inaction is insufficient [to make out a claim for  
17 substantial assistance] ‘unless it was designed intentionally to aid the primary  
18 violator or it was in conscious or reckless violation of a duty to act.’” *Baxter*, 2007  
19 WL 2013958, at \*9 (quoting *SEC v. Treadway*, 430 F. Supp. 2d 293, 339 (S.D.N.Y.  
20 2006)).

21           The SEC has not pled with particularity any way in which Mr. Metzler’s  
22 supposed failure to tell the Consultant about the updated Hangar values was  
23 “designed intentionally to aid” securities fraud by the Authority. Nor has the SEC  
24 pled any facts suggesting that Mr. Metzler had an independent duty to update the  
25 Consultant, let alone that he consciously or recklessly disregarded that duty. The  
26 Consultant was hired to determine the additional tax increment revenue available  
27 *for each new offering*, including the April 2008 Offering. Compl. ¶ 33. It was the  
28 Consultant’s responsibility to make that determination, not Mr. Metzler’s. There is

1 no allegation in the Complaint that the Consultant ever asked Mr. Metzler to  
2 provide updated information for the April 2008 Offering, or that Mr. Metzler  
3 otherwise had a duty to provide the updated Hangar values directly to the  
4 Consultant (in addition to KND, to whom he provided the information on two  
5 separate occasions). “The mere possession of information does not invoke a duty to  
6 disclose.” *Newman v. Comprehensive Care Corp.*, 794 F. Supp. 1513, 1523 (D. Or.  
7 1992). That the Consultant used the \$65 million estimate previously provided by  
8 Mr. Metzler—despite Mr. Metzler’s clear statement that the estimate was  
9 preliminary and subject to change and his subsequent provision of updated  
10 information containing lower valuation estimates—provides no basis for alleging  
11 that Mr. Metzler substantially assisted in the commission of securities fraud.

12 In sum, the SEC has failed to sufficiently allege any of the three required  
13 elements of an aiding and abetting claim. The claim against Mr. Metzler should be  
14 dismissed.

15 **B. The Court Should Strike The SEC’s Request For**  
16 **Disgorgement Because The Complaint Does Not Allege**  
17 **That Mr. Metzler Received Ill-Gotten Gains.**

18 The Court may “order stricken from any pleading ... any redundant,  
19 immaterial, impertinent, or scandalous matter.” Fed. R. Civ. Proc. 12(f).  
20 “Improper prayers for relief are proper subjects for a motion to strike.” *Santa Clara*  
21 *Valley Water District v. Olin Corp.*, 2007 WL 2890390, at \* 5 (N.D. Cal. Sept. 28,  
22 2007). Courts frequently strike demands for monetary relief where the complaint  
23 fails to allege facts supporting the plaintiff’s entitlement to the requested relief. *See*  
24 *Nichia v. Seoul Semiconductor*, 2006 WL 1233148, at \*2 (N.D. Cal. May 9, 2006)  
25 (striking prayer for treble damages where the complaint failed to include “any  
26 allegation that ... if proven, might support an award of treble damages”); *David v.*  
27 *Giurbino*, 488 F. Supp. 2d 1048, 1060 (S.D. Cal. 2007) (granting motion to strike  
28 claim for punitive damages where “Plaintiff has not alleged any facts” to

