UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

ADMINISTRATIVE PROCEEDINGS RULINGS
Release No. 2889/July 1, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16349

In the Matter of BARBARA DUKA	ORDER DENYING DIVISION OF ENFORCEMENT'S MOTION FOR PARTIAL SUMMARY DISPOSITION

The Securities and Exchange Commission (Commission) commenced this proceeding on January 21, 2015, with an Order Instituting Administrative and Cease-and-Desist Proceedings (OIP) against Barbara Duka, pursuant to Section 8A of the Securities Act of 1933 (Securities Act), Sections 15E(d) and 21C of the Securities Exchange Act of 1934 (Exchange Act), and Section 9(b) of the Investment Company Act of 1940.

The OIP alleges, in summary, that in late 2010 Standard & Poor's Rating Services (S&P), a nationally recognized statistical rating organization (NRSRO), changed its method for calculating a metric used in determining ratings of commercial mortgage-backed securities (CMBS). OIP at 2-3. The OIP further alleges that this change was made in order to attract more fee-paying customers to S&P because the new methodology resulted in more attractive credit ratings. *Id*. at 2, 5-7. According to the OIP, the change violated S&P's internal policies and procedures and caused reports and data published by S&P to be false and misleading. *Id*. at 2-3. Duka, who oversaw CMBS new issue ratings, is alleged to have aided, abetted, and caused S&P's violations. *Id*. at 10-11; Answer at 5-6, 10.

Duka filed her Answer on February 23, 2015. At a telephonic prehearing conference on February 25, 2015, the parties agreed to a briefing schedule for motions for summary disposition and I scheduled a hearing to begin on September 16, 2015, in New York City. Prehearing Transcript (Tr.) 11, 14; *see Barbara Duka*, Admin. Proc. Rulings Release No. 2354, 2015 SEC LEXIS 732 (Feb. 26, 2015). The Division also confirmed that it had made the investigative file available to Duka. Tr. 4.

On May 8, 2015, the Division filed a Motion for Partial Summary Disposition (Div. Motion), with attached exhibits (Div. Exs.) A-Z and AA-QQ. The Division seeks a finding on its motion for summary disposition that Duka is liable for aiding, abetting, and causing S&P's

violations of Exchange Act Section 15E(c)(3) and Rules 17g-2(a)(2)(iii) and 17g-2(a)(6).[1] Duka filed an opposition to the Division's Motion (Resp. Opp.) on May 22, 2015, with attached exhibits (Opp. Exs.) 1-56. The Division filed a reply on June 1, 2015 (Div. Reply), with attached exhibits (Reply. Exs.) A-I. Duka also filed a Motion for Summary Disposition (Resp. Motion) on May 8, 2015, with attached exhibits (Resp. Exs.) 1-62, to which the Division filed an opposition on May 22, 2015, with attached exhibits (Div. Opp. Exs.) A-O, and Duka a reply on June 1, 2015.

Summary Disposition Standard

After a respondent's answer has been filed and documents have been made available to that respondent for inspection and copying, a party may make a motion for summary disposition of any or all allegations of the OIP with respect to that respondent. *See* 17 C.F.R. § 201.250(a). A motion for summary disposition may be granted if there is no genuine issue with regard to any material fact and the party making the motion is entitled to summary disposition as a matter of law. 17 C.F.R. § 201.250(b). The facts on summary disposition must be viewed in the light most favorable to the non-moving party. *See Jay T. Comeaux*, Exchange Act Release No. 72896, 2014 WL 4160054, at *2 (Aug. 21, 2014). However, once the moving party has carried its burden of establishing that it is entitled to summary disposition on the factual record, the opposing party may not rely on bare allegations or denials, but instead must present specific facts showing a genuine issue of material fact for resolution at a hearing. *See id*.

For the purposes of my consideration of the Division's Motion, Duka's Answer has been taken as true, except as modified by stipulations or admissions made by her, by uncontested affidavits, and by facts officially noticed pursuant to Rule 323. *See* 17 C.F.R. § 201.250(a). Duka made numerous admissions in the investigative testimony she gave on October 22-24, 2013. Div. Ex. B; *see Robert L. Burns*, Investment Advisers Act of 1940 Release No. 3260, 2011 WL 3407859, at *1 (Aug. 5, 2011) (investigative testimony considered as part of summary disposition record demonstrating that a respondent improperly received gifts from brokers). Duka also made admissions in certain exhibits, in the form of, for instance, her own statements (in emails and other documents authored by her), the statements of her agent (her attorneys in this proceeding), or statements that she agreed are true. *See Wheat, First Sec., Inc.*, Exchange Act Release No. 48378, 2003 WL 21990950, at *12 & n.55 (Aug. 20, 2003) (certain admissions and statements by an opposing party may be considered non-hearsay, citing Federal Rule of Evidence 801(d)(2)).

I am unable to use the investigative testimony of individuals other than Duka in order to reject any facts asserted in her Answer, as such testimony does not fall within Rule 250(a)'s limited list of materials which may be used to modify her pleadings.[2] I note that the testimony of

[1] The Division does not seek summary disposition as to the alleged violations of Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act, or Exchange Act Rules 10b-5 and 17g-6(a)(2). Div. Motion at 2 n.4.

[2] The Division argues that I may consider investigative testimony because it is equivalent to affidavits and is routinely used to establish facts for the purposes of summary judgment motions under Rule 56 of the Federal Rules of Civil Procedure. Div. Reply at 6-7. However, this

certain other individuals at S&P (for example, Duka's subordinates) could be considered an admission made by Duka through application of the co-conspirator rule. *See* Fed. R. Evid. 801(d)(2)(E) (a statement offered against an opposing party is not hearsay if made by the party's co-conspirator during and in furtherance of the conspiracy). However, I do not apply that rule here because no party has alleged that any such person is a co-conspirator of Duka's. I am also unable to consider many of the other exhibits for the purpose of refuting Duka's Answer, as they likewise do not qualify as admissions made by Duka. *See* 17 C.F.R. § 201.250(a). Also, S&P's admission of the facts recited in Annex A to S&P's settled OIP do not constitute an admission by Duka, and such facts are "not binding on any other person or entity in this or any other proceeding." Div. Ex. A at 2 n.1 & Annex A; *see* Resp. Opp. at 19; Div. Reply at 10.

Background

A. S&P Ratings Process

S&P is an NRSRO that provided ratings opinions for CMBS. Answer at 3-4; Resp. Motion at 2. From 2009 to 2011, Duka was a managing director at S&P responsible for overseeing an analytical team that formulated ratings of CMBS new issuance transactions (CMBS NI). Answer at 3, 5. In early 2011, Duka's duties expanded to include overseeing the analytical team that assigned surveillance ratings to outstanding CMBS transactions (CMBS Surveillance and, together with CMBS NI, the CMBS Group). *Id*. As relevant here, Duka's subordinates in CMBS NI included David Henschke (Henschke) and Kurt Pollem (Pollem). Resp. Motion at 3. Henschke left S&P in January 2011 and was replaced by James Digney (Digney), who had previously been assigned to CMBS Surveillance. Div. Opp. Ex. A at 401; Resp. Motion at 3.

The allegations in the OIP relate to S&P's ratings of a specific type of new issuance CMBS known as conduit/fusion CMBS. *See* OIP at 3, 7. A conduit/fusion CMBS transaction involves securities that are backed by a pool of loans secured by commercial real estate, with the pool diversified by both property type and geography. Answer at 7; *see* Div. Ex. J at 3. A CMBS is divided into tranches, each with its own credit rating. Answer at 7.

In 2010 and 2011, issuers asked S&P to review and analyze potential CMBS conduit/fusion new issuances and their related loan pools and underlying real estate collateral. Answer at 9. S&P then provided feedback to the issuer and, if S&P were ultimately engaged by the issuer to rate its CMBS, members of CMBS NI performed further analysis and modeling of the transaction. *Id*. After this additional review, S&P informed the issuer of the ratings levels applicable to the various tranches of the CMBS. *Id*.

Part of this analysis involved S&P's calculation of the security's debt service coverage ratio (DSCR), approximately the ratio of cash flow to debt payments. Answer at 4. The CMBS Group calculated DSCRs in the course of modeling whether a commercial real estate loan in the loan pool underlying the CMBS would hypothetically default during the term of the loan. *Id*. at

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argument ignores the language of Rule 250, which requires affidavits to be "uncontested." *See* 17 C.F.R. § 201.250(a).

4. The DSCR is an important statistic that people in the credit rating industry reviewed in the context of CMBS transactions. Reply Ex. A at 464-65.

CMBS NI calculated the denominator in the DSCR by multiplying the original principal amount by a loan constant. Answer at 12. The allegations in the OIP center on the method by which the number used for the loan constant was chosen. *See* OIP at 2. All things being equal, using a higher loan constant lowers the debt service ratio and thus, puts more stress on the loan. Resp. Ex. 7 at 205-06; *see* Answer at 18. CMBS NI analyzed each CMBS transaction using an Excel spreadsheet into which analysts input data from the loans collateralizing the CMBS. *See* Div. Ex. W at 2. The spreadsheet contained formulas for the metrics used in S&P's analysis, including formulas for calculating the loan constant used in the DSCR. *See* Div. Ex. B at 701; Div. Ex. L at 3.

According to S&P's internal policies and procedures, CMBS ratings were to be issued in compliance with CMBS criteria. Answer at 10-11. The criteria were developed and amended periodically by S&P's CMBS Criteria Committee (CMBS Criteria Committee), which included members of CMBS NI and CMBS Surveillance. *Id*. at 10. S&P's CMBS criteria could not be approved without the agreement of the CMBS Criteria Committee. Opp. Ex. 1 at 209.

The criteria laid out the methodology and assumptions used by S&P when rating U.S. conduit/fusion CMBS transactions. *See* Div. Ex. J at 3. S&P's Criteria Process Guidelines provided detailed information on the criteria process, including how criteria were to be initiated, researched, approved, disseminated to the public, and periodically reviewed. *See* Resp. Ex. 15 at 6-7. The Criteria Process Guidelines published on September 7, 2010, provided that a new criteria recommendation should be submitted to the relevant criteria committee (in the case of CMBS criteria, the CMBS Criteria Committee), which generally must approve the criteria before they could become effective. *Id*. at 9-14. The Guidelines stated that they

> do not apply to *interpretations* of the application of our criteria to a particular circumstance which are expected to occur as a natural by-product of our analysis and committee process. Analysts are encouraged to consult with analytical managers, criteria committee members, and criteria officers with application and interpretation questions.

Id. at 1 (emphasis added).

B. Loan Constants

On or around June 26, 2009, S&P published new criteria entitled "U.S. CMBS Rating Methodology and Assumptions for Conduit/Fusion Pools" (Criteria Article). Answer at 11. The Criteria Article contained information on how S&P rated conduit/fusion CMBS transactions, and reflected changes to the methodology articulated in prior versions of the criteria. *Id*. at 18; Div. Ex. J at 3.

The Criteria Article referred to the concept of an "archetypical" pool of loans, which was "to be used as a general benchmark against which other conduit/fusion deal pools can be compared." Answer at 12; Div. Ex. J at 5; Resp. Motion at 9. Table 1 of the Criteria Article

listed by property type (e.g., retail, office, industrial) certain characteristics of the archetypical pool, including loan constants for each property type (the criteria constants). Div. Ex. J at 5; Resp. Motion at 9-10.

Shortly after publication of the Criteria Article, on or about July 31, 2009, S&P management held a meeting regarding whether, when applying the methodology outlined in the Criteria Article, the CMBS Group should use the criteria constants to calculate DSCRs. Answer at 13. Duka did not attend this meeting. *Id*. However, during her investigative testimony, Duka described another meeting held during the summer of 2009 on the same subject. Resp. Ex. 7 at 508-10. She recalled that at this meeting, the attendees discussed whether actual constants[3] or criteria constants should be used in calculating DSCRs, and that the attendees ultimately decided to use criteria constants. *Id*. at 509-11.

Later, in March 2010, Duka participated in a decision to use the higher of the actual constant and the criteria constant as the loan constant in the DSCR calculation, in lieu of always using the applicable criteria constant. Answer at 13; Resp. Ex. 7 at 205; *see* Div. Ex. L at 2. This decision was memorialized in a memorandum, signed by Duka, Pollem, and others, which outlined the agreed-upon updates to the model. Div. Ex. L at 1-3. In her investigative testimony, Duka described this as a "minor" change to the model. Opp. Ex. 1 at 210, 212, 214.

In or around mid-December 2010, the methodology for calculating the loan constant was changed again. Answer at 17-18. At that time, Frank Parisi (Parisi), the chief structured finance criteria officer at S&P, interpreted the CMBS criteria to permit CMBI NI to use as the loan constant the average of the actual constant and the criteria constant. *Id*. at 17-18, 20; *see* Resp. Motion at 13. This is described as the "blended constant." Answer at 18. According to a contemporaneous email and Duka's investigative testimony, this change was suggested by Henschke because the use of the higher of the actual constant and criteria constant was not having the intended result on the ratings analysis. Div. Ex. S at 9623; Resp. Opp. Ex. 1 at 365-66. In a meeting between Duka and Parisi on this subject, Duka agreed to disclose the change in application of the methodology (from using criteria constants to using blended constants) in two documents produced by S&P during the process of rating a CMBS transaction – the presale report and the Ratings Analysis and Methodology Profile (RAMP). Answer at 20; Resp. Ex. 7 at 584; Div. Ex. B at 605-06; Reply Ex. A at 410, 470.

Beginning in late December 2010, CMBS NI began to use the higher of the blended constant and the actual constant. Answer at 17-18; Div. Ex. B at 702. S&P ultimately used blended constants when analyzing eight CMBS new issuances in 2011 (the blended constant CMBS transactions). Answer at 20, 26; *see* Resp. Motion at 14.

C. Presale Reports

When S&P was engaged to rate a transaction, S&P published a document called a presale report that explained the analysis underlying S&P's provisional views of the ratings applicable to

[3] The actual constant is the amount the borrower would actually be required to pay under the terms of the loan. Resp. Motion at 10.

each CMBS tranche. Answer at 9-10; *see, e.g.*, Div. Ex. U at 4. Between February and July 2011, S&P published presale reports for each of the eight blended constant CMBS transactions. Answer at 5, 21, 26. CMBS NI contributed to these reports. *See id*. at 10. Attached to the Division's Motion are: (1) the complete presale report for Morgan Stanley Capital I Trust 2011-C1; (2) excerpts from the presale report for J.P. Morgan Chase Commercial Mortgage Securities Trust 2011-C4; (3) excerpts from the presale report for FREMF 2011-K14 Mortgage Trust; and (4) excerpts from the presale report for GS Mortgage Securities Trust 2011-GC4. Div. Exs. U, V, CC, DD. The names of the primary credit analyst and a secondary contact appear on the first page of the presale reports; Pollem and Digney, Duka's subordinates, are among the individuals listed. *See id*.

The presale reports outline in detail the factors considered by S&P when reviewing each CMBS transaction, with sections summarizing the transaction's strengths, mitigating factors, pool and loan characteristics, and overall structure. *See, e.g.*, Div. Ex. U. Each presale report submitted by the Division contains a short introductory paragraph under the heading "Rationale." Div. Exs. U at 5, V at 4-5, CC at 4-5, DD at 4-5. The Rationale section disclosed the pool's DSCR, beginning loan-to-value (LTV) ratio, and ending LTV ratio. For example, the following disclosure appeared in the Rationale section of the presale report for Morgan Stanley Capital I Trust 2011-C1:

> In our analysis, we determined that, on a weighted average basis, the pool has a debt service coverage (DSC) of 1.20x based on a weighted average Standard & Poor's Ratings Services loan constant of 8.46%, a beginning loan-to-value (LTV) ratio of 88.9%, and an ending LTV ratio of 78.5%.

Div. Ex. U at 5. Duka does not dispute that the "Standard & Poor's Ratings Services loan constant" is the criteria constant, not the blended constant actually used to rate the transactions. *See* Resp. Motion at 9-10. Each of the presale reports submitted by the Division includes a similar reference in the Rationale section to the criteria constants; the final two presale reports, from July 2011, also include DSCRs calculated from actual loan constants. Div. Exs. U at 5, V at 4-5, CC at 4-5, DD at 4.

In her Answer, Duka denied that the presale reports for the blended constant CMBS transactions failed to include DSCRs calculated from the blended constants. Answer at 21. However, when presented with several of the reports during her investigative testimony, she admitted that the reports lacked explicit references to the blended constants. Specifically, Duka agreed that the numbers from the blended constants did not appear in the J.P. Morgan Chase Commercial Mortgage Securities Trust 2011-C4 presale report, Div. Ex. B at 605, and admitted that the Morgan Stanley Capital One Trust 2011-C1 and FREMF 2011-K701 Mortgage Trust reports did not disclose that the DSCR was derived from a blended loan constant, Div. Ex. B. at 467, 499-500.

Each of the presale reports published from February 2011 through July 2011 contained the following sentence:

> In determining a loan's DSCR, Standard & Poor's will consider both the loan's actual debt constant and a stressed constant based on property type as further detailed in our conduit/fusion criteria.

Answer at 23. Duka approved the inclusion of this sentence in each of the reports. *Id*. She testified during the investigation that this disclosure was intended to inform the reader that S&P had changed its calculation of the loan constant and was considering both the actual and criteria constants in its analysis of the CMBS transaction. Opp. Ex. 1 at 475. Duka further testified that at the time the presale reports were published, she believed that to be an adequate disclosure of S&P's use of the blended constant, but she acknowledged that she "could have said something a little clearer." *Id*. at 475-76.

D. RAMPs

In connection with each CMBS new issuance, S&P also produced a RAMP. According to S&P's Global RAMP Guidelines dated August 1, 2010 (RAMP Guidelines), the RAMP's objective is to explain the analyst's rating recommendation to members of the S&P voting committee, who ultimately decided the transaction's rating. Div. Ex. Z at 2. The primary analyst rating the transaction used a template to prepare an initial version of the RAMP for the committee, and the document was finalized after the committee reached a ratings decision. *Id*.; *see* Div. Ex. B at 450. The RAMP Guidelines referred to the RAMP as the "definitive record of the rating" and directed that the RAMP capture "the key drivers of the issue being rated, the relevant facets of the analysis, the pertinent information considered, and the underlying criteria and applicable assumptions, as well as the committee's final decision and the rationale for the rating." Div. Ex. Z at 2.

S&P's Model Use Guidelines, dated September 7, 2010, contained additional instructions for S&P analysts when preparing RAMPs. *See* Div. Ex. AA. As relevant here, the Model Use Guidelines stated that

> The RAMP should outline the key assumptions used in the model and the reasons for their use (e.g., stress test assumptions). When key assumptions may be selected from several alternatives in accordance with our Criteria or may be selected as a point within a range, the RAMP should provide the Analyst's rationale for the selection. . .
>
> If a model provides a specific indicative rating level or credit enhancement levels, the RAMP should document the rationale for any material differences between the Credit Rating implied by the model and the final Credit Rating assigned or credit enhancement present in the transaction. . .
>
> All modifications to a model that provide significant input to the Rating Committee decision or to the model's approved assumptions, including their rationale and, where appropriate, their impact on the analysis, should be documented, prominently indicated in the RAMP, and discussed by the rating committee.

Div. Ex. AA at 5.

In her Answer, Duka denied that the RAMPs did not describe the use of blended constants, the data derived from blended constants, or the fact that the models applied blended constants. Answer at 25. However, as with the presale reports, the Division presented Duka during her investigative testimony with RAMPs for three of the blended constant CMBS transactions. *See* Div. Ex. B. at 469 (RAMP for Morgan Stanley Capital One Trust 2011-C1), 499 (RAMP for FREMF 2011-K701 Mortgage Trust), 605 (RAMP for J.P. Morgan Chase Commercial Mortgage Securities Trust 2011-C4). Duka agreed that the Morgan Stanley Capital One Trust 2011-C1 RAMP and the FREMF 2011-K701 Mortgage Trust RAMP did not disclose that the data in the RAMPs was based on a blended constant. *Id*. at 469, 499-500. She also agreed that the numbers from the blended constant were not in the RAMP for J.P. Morgan Chase Commercial Mortgage Securities Trust 2011-C4. *Id*. at 605. However, she testified that Tables 17 and 18 of the RAMP constituted the disclosure of the methodology that she had promised Parisi. *Id*. at 606. Table 17 contains the criteria constants, Table 18 shows the actual constants, and neither table lists the blended constants. *Id*. at 604-06; *see* Div. Ex. Y at 6.

E. Model Quality Review Report

In or around December 2010, S&P's Model Quality Review (MQR) group produced a draft report concerning a CMBS model. Answer at 16. Duka and others in the CMBS Group received a copy and circulated emails among the group regarding their comments on the draft. *See* Div. Ex. S; Resp. Ex. 44.

The model reviewed by the MQR group used the criteria constant in the DSCR calculation, not the blended constant. Answer at 16. Among Duka's comments on the draft report, which she circulated to members of the CMBS Group on December 12, 2010, was the following:

> In the second sentence, the loan constants were not derived based on the archetypical pool, they were vetted in a criteria committee. Further, we use the higher of the actual debt constant or the S&P debt constant. Henschke's starting to convince me that we should rethink this, as it doe[s] not have the intended result.

Div. Ex. S at 3. On January 28, 2011, Haixin Hu (Hu), a member of the MQR group, emailed Duka an updated draft of the MQR report and requested her corrections to and comments on the draft. Div. Ex. W at 2-3. In her Answer, Duka denied that she did not show CMBS NI's new model, which used blended constants for the purposes calculating DSCR, to the MQR Group. Answer at 24. However, during her investigative testimony, Duka admitted that she did not place the new model in the S&P repository, which Hu could access, or otherwise make sure that Hu had a copy. Div. Ex. B at 702.

Discussion

The Division seeks summary disposition on its claims that Duka aided, abetted, and caused S&P's violations of three Exchange Act provisions applicable to NRSROs. To establish liability for aiding, abetting, and causing, the Division must show that: (1) a primary securities law violation was committed by S&P; (2) Duka acted with the requisite scienter; and (3) Duka provided substantial assistance to S&P, the primary violator. *See Graham v. SEC*, 222 F.3d 994, 1000 (D.C. Cir. 2000). The scienter requirement for aiding-and-abetting liability may be satisfied by evidence that the respondent knew of, or was extremely reckless in disregarding, the wrongdoing and her role in furthering it. *Eric J. Brown*, Exchange Act Release No. 66469, 2012 WL 625874, at *11 (Feb. 27, 2012); *Howard v. SEC*, 376 F.3d 1136, 1143, 1149 (D.C. Cir. 2004). Negligence is sufficient to establish liability for causing a primary violation that does not require scienter. *See KPMG Peat Marwick LLP*, 54 S.E.C. 1135, 1175 (2001), *recon. denied*, Exchange Act Release No. 44050, 2001 SEC LEXIS 422 (Mar. 5, 2001), *pet. denied*, 289 F.3d 109 (D.C. Cir. 2002).

A. Primary Violations Alleged Against S&P

1. Exchange Act Rule 17g-2(a)(2)(iii)

Exchange Act Rule 17g-2(a)(2)(iii) requires NRSROs to make and keep accurate books and records relating to each of their current credit ratings, specifically:

> If a quantitative model was a substantial component in the process of determining the credit rating of a security or money market instrument issued by an asset pool or as part of any asset-backed securities transaction, a record of the rationale for any material difference between the credit rating implied by the model and the final credit rating issued.

17 C.F.R. § 240.17g-2(a)(2)(iii).

It is undisputed that a quantitative model was a substantial component in the determination of the credit rating for each of the blended constant CMBS transactions that S&P ultimately rated. Div. Motion at 19; Resp. Opp. at 20-21. The Division argues that the change in the model from using criteria constants to blended constants was material and was not properly disclosed in the RAMPs, thereby violating Rule 17g-2(a)(2)(iii). Div. Motion at 21. Duka disputes that the rule covers such an allegation, and argues that there was no material difference between the credit rating implied by the model and the final credit rating because the model used by CMBS NI incorporated the blended constants, which were in fact the basis of the final credit ratings issued by S&P. Resp. Opp. at 20-21. The Division argues that accepting this interpretation would eviscerate the rule, allowing an NRSRO analyst to simply alter the model at will in order to avoid having to explain and record any deviations from the original version of the model. Div. Reply at 11-12.

The Division's argument ignores both the plain language and the stated purpose of the rule. There was no "material difference" between the credit rating implied by the model used by

CMBS NI – a model which incorporated the blended constants – and the credit rating issued. The Division's argument, which boils down to the allegation that a quantitative factor used in the model was inappropriately changed, does not have anything to do with whether S&P violated Rule 17g-2(a)(iii). As explained in the adopting release, the rule was designed to make sure that an analyst did not alter the results implied by a quantitative model for a prohibited purpose. Amendments to Rules for Nationally Recognized Statistical Rating Organization, Release No. 59342, 2009 WL 233865, at *12 (Feb. 2, 2009). To that end, the rule requires documentation that any adjustments to the model's *results*, not the model itself, were motivated by a consideration of appropriate qualitative factors, as permitted by the NRSRO's documented procedures. *Id*. While the quantitative factors in a model could be altered for nefarious or self-serving reasons, such alteration is not itself a violation of Rule 17g-2(a)(iii), so long as the model and its output are consistent. There was therefore no primary violation by S&P, and the Division is not entitled to summary disposition on its claim that Duka aided and abetted and caused such a violation.

2. Exchange Act Rule 17g-2(a)(6)

The second provision at issue, Exchange Act Rule 17g-2(a)(6), requires NRSROs to make and retain "[a] record documenting the established procedures and methodologies used by the nationally recognized statistical rating organization to determine credit ratings." 17 C.F.R. § 240.17g-2(a)(6). The Division argues that, by failing to explain in the RAMPs the use of the blended constants and the change made to CMBS NI's model, S&P failed to maintain complete and current books and records documenting its established procedures and methodologies. Div. Motion at 26.

Duka disputes that Rule 17g-2(a)(6) has anything to do with the RAMPs. Opp. at 25. Instead, she argues that the "established procedures and methodologies" were documented in S&P's criteria, not in the RAMPs, and any errors or omissions in the RAMPs therefore do not violate Rule 17g-2(a)(6). *Id*. at 25-26. The Division disagrees, noting that a RAMP's objective is to explain the rating recommendation to voting committee members, and arguing that it is therefore "an integral and critical part of S&P's procedures to ensure criteria is followed." Reply at 17.

There remains a genuine issue of material fact regarding this alleged primary violation. First, it cannot be determined on the present record whether RAMPs document "established procedures and methodologies," as opposed to the specific quantitative model used for particular CMBS transactions. Second, it is not clear exactly what records exist documenting the use of blended constants for the blended constant CMBS transactions, and the degree to which such documentation is properly part of S&P's "record documenting the established procedures and methodologies." For example, an Excel spreadsheet used in one of the blended constant CMBS transactions appears to have been retained by S&P. Div. Ex. F. If that spreadsheet constitutes part of S&P's record, notwithstanding its inconsistency with its associated presale report and RAMP, then S&P may have made and retained a proper record within the meaning of Rule 17g-2(a)(6). The Division is thus not entitled to summary disposition on its claims that S&P violated Rule 17g-2(a)(6), and that Duka aided and abetted and caused such a violation.

3. Exchange Act Section 15E(c)(3)

The final provision, Exchange Act Section 15E(c)(3), requires each NRSRO to:

> establish, maintain, enforce, and document an effective internal control structure governing the implementation of and adherence to policies, procedures, and methodologies for determining credit ratings, taking into consideration such factors as the Commission may prescribe, by rule.

15 U.S.C. § 78*o*-7(c)(3). The Division argues that S&P violated this provision in four different ways: (1) violating the RAMP Guidelines by creating and submitting RAMPs that contained references to criteria constants but not blended constants; (2) violating the Model Use Guidelines by failing to document in the RAMPs the key assumptions used in the model and modifications made to the model; (3) failing to ensure that the disclosures in the presale reports and the RAMPs were consistent with the models used to rate the associated blended constant CMBS transactions; and (4) allowing the MQR group to review a model that continued to use criteria constants after CMBS NI had started using blended constants. Div. Motion at 24-25.

The Division's arguments miss the point, because they do not focus on whether S&P established, maintained, enforced, or documented "an effective internal control structure." 15 U.S.C. § 78*o*-7(c)(3). Instead, the Division's arguments focus on how Duka circumvented, or caused to be circumvented, S&P internal controls. *Compare* 15 U.S.C. § 78*o*-7(c)(3) (requiring NRSROs to "establish, maintain, enforce, and document" internal controls) *with* 15 U.S.C. § 78m(b)(5) (prohibiting knowing circumvention of an issuer's system of internal accounting controls). But S&P's internal controls may have been "effective" within the meaning of 15 U.S.C. § 78*o*-7(c)(3), even if Duka intentionally circumvented them: "Even a well-designed internal control structure cannot guarantee that a deficiency will never occur." Nationally Recognized Statistical Rating Organizations, Exchange Act Release No. 72936, 2014 WL 4538057, at *44 (Aug. 27, 2014). S&P's internal controls were not necessarily ineffective based on the present record, whether or not Duka intentionally failed to follow them. The Division is thus not entitled to summary disposition on its claims that S&P violated Exchange Act Section 15E(c)(3), and that Duka aided and abetted and caused such a violation.

B. Duka's Alleged Aiding and Abetting and Causing

Because the Division is not entitled to summary disposition on its allegations of primary violations, it is not entitled to summary disposition on its allegations of aiding and abetting and causing by Duka. Moreover, viewing the evidence in the light most favorable to Duka, genuine issues of material fact exist as to the extent of Duka's responsibility for the content of the RAMPs and the presale reports, S&P's records maintenance, and the MQR group's review of the CMBS model, and as to Duka's state of mind. As the Division notes in its opposition to Duka's Motion, "[c]onflicting testimony and credibility determinations cannot be resolved by motion." Div. Opp. at 7. Accordingly, even assuming primary violations by S&P, the record is not sufficient to determine as a matter of law that Duka aided and abetted or caused any violations that may have been committed by S&P.

Order

It is ORDERED that the Division of Enforcement's Motion for Partial Summary Disposition is DENIED.

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Cameron Elliot
Administrative Law Judge