APPENDIX

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APPENDIX A

Case 1:20-cv-07619-ALC

Document 156 Filed 12/28/23 USDC SDNY

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

KIRK, Plaintiff,

V.

CITIGROUP GLOBAL MARKET HOLDINGS, Defendant

OPINION & ORDER

ANDREW L. CARTER, United States District Judge

Pending before the Court is Defendant's motion to

dismiss Plaintiff's Fourth Amended Complaint pursuant to Rules 12(b)(6) and 9(b) of the Federal Rules of Civil Procedure. For the following reasons, Defendant's motion is GRANTED with prejudice.

The Court incorporates herein the factual and procedural background presented in the September 29, 2023 Order granting Defendant's prior motion to dismiss and references here only those relevant facts which have arisen since the prior dismissal. See ECF

No. 123. Upon request, Plaintiff amended his Complaint on October 26, 2023. The Complaint raises the same claims as previously lodged against Defendant—namely that Defendant violated Sections 11 and 12(a)(2) of the Securities Act and Section 10(b) of the Exchange Act, and common law fraud under New York state law. The only functional change made in the most recent Complaint is the allegation that the Defendant undertook "four additional days of fraud." Whereas the Third Amended Complaint stated only that the Velocity Shares 3x Long Crude Oil ETNs liked to the S&P GSCI Crude Oil Index ER New ("ETNs") failed to maintain an inverse relationship on March 19, 2020, Plaintiff now includes the allegation that this stock behavior persisted for four additional days—March 23, 2020, March 23, 2020,

March 31, 2020, and April 2, 2020—and Case 1:20-cv-07619-ALC Document 156 Filed 12/28/23 Page 2 of 4 argues that the marked statistical improbability of such fluctuations occurring absent fraudulent conduct is evidence of the Defendant's unlawful conduct. See, e.g., ECF No. 151 at ¶ 7; ECF No. 48.

Taken as true, Plaintiff's reference to four additional days of ETN valuation mistracking is insufficient to create a cognizable claim under the relevant statutes. As before, the Fourth Amended Complaint does not raise any instance in which the Defendant "represente[ed] that the value of the

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ETNs would faithfully track three times the Index on a daily basis for the duration of an ETN holder's investment." ECF No. 123 at 12 (citing Thomas v. CGMHI., No. 21-cv-3673 (VEC) (DF), 2022 WL 1051158, at *14 (S.D.N.Y. Mar. 1, 2022), report and recommendation adopted as modified, No. 21-CV-3673 (VEC), 2022 WL 951112 (S.D.N.Y. Mar. 30, 2022). Additionally, the most recent Complaint does not unseat the decision of this Court and others in this District that "the Pricing Supplement warn[ed] investors of the particular and heightened risks associated with investing in the ETNs." Id. at 11; see also id. at 11-13 (collecting comparable decisions).

Because the Fourth Amended Complaint has not identified a fraudulent statement or material misstatement or omission, it must be dismissed for the same reasons as raised in this Court's September 29, 2023 Opinion. See ECF No. 123.

Additionally, as before, there is no basis for an exercise of diversity jurisdiction over Plaintiff's common law fraud claim. The Fourth Amended Complaint now seeks $52,440 in compensatory damages. Even assuming arguendo that Plaintiff's independent addition of an inflation offset to the damages calculation was permissible, this is still well below the $75,000 statutory requirement for diversity jurisdiction. ECF No. 151 at ¶ 9.

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Additionally, Plaintiff also seeks $374.4 million in punitive damages which constitutes double the amount that Plaintiff Case 1:20-cv-07619-ALC Document 156 Filed 12/28/23 Page 3 of 4 claims Defendant received as a windfall from not only Plaintiff, but all similarly situated investors for their conduct inclusive of an inflationary offset. ECF No. 151 at ¶ 11. As this Court has stated previously, Plaintiff's plea for punitive damages fail because "[n]one of Plaintiff's contentions regarding Defendant's actions amount to either moral indifference or criminal

indifference to civil obligations." ECF No. 123 at 16. The Fourth Amended Complaint includes no claims which amount to anything greater than "ordinary" fraud that could support such a punitive damages award. Id. (citing Kruglov v. Copart of Connecticut, Inc., 771 F. App'x 117, 120 (2d Cir. 2019) (summary order)). Additionally, Plaintiff requests punitive damages here in excess of 7,000 times compensatory damages, which does not stand under the State Farm Mut. Auto. Ins. Co. v. Campbell. 538 U.S. 408 (2003) (finding a punitive damages multiplier of 145 violated due process); see also id. at 425 (stating that higher-than single-digit punitive damages multipliers "may comport with due process [unlike here] where a particularly egregious act has resulted in only a small amount of economic damages") (internal quotation omitted). Therefore, Plaintiff has again failed to meet the amount-in-controversy

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requirement of Section 1332(a).1 Additionally, even if the Court had subject-matter jurisdiction to hear Plaintiff's state law claim, the Fourth Amended Complaint does not raise a cognizable claim under the state law. Because "the elements of claims for federal securities fraud and New York common law fraud are identical" and because Plaintiff has failed to cure the deficiencies in the Complaint by pleading that Defendant made a false or fraudulent statement, the state law claim must once 1As previously, the Court again declines to exercise supplemental jurisdiction over the state law claim as neither Party has asked this Court to do so and because "all claims over which [the Court] has original jurisdiction" have been dismissed. 28 U.S.C.§ 1367(c)(3). Case 1:20-cv-07619-ALC Document 156 Filed 12/28/23 Page 4 of 4 again fail. Newman v. Fam. Mgmt. Corp., 530 F. App'x 21, 24 (2d Cir. 2013) (summary order); see also ECF No. 123 at 18.

Whereas the Court was previously unsure whether Plaintiff's acquisition of certain documents filed in this and related cases could cure the pleading deficiencies, no such confusion remains. Plaintiff filed the Fourth Amended Complaint with full benefit of all the documents which he previously requested of the Court and there remains no cognizable legal claim in this case. Therefore, because it appears that further amendment of the Complaint would be futile, Defendant's motion to

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dismiss is GRANTED with prejudice. The Clerk of the Court is respectfully directed to terminate this case.

SO ORDERED.

Dated: December 28, 2023 New York, New York ANDREW L. CARTER, JR. United States District Judge

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APPENDIX B

Case: 24-237, 03/10/2025, DktEntry: 33.1, 24-237

Kirk v. Citigroup Glob. Mkts. Holdings Inc.

At a stated term of the United States Court of

Appeals for the Second Circuit, held at the Thurgood

Marshall United States Courthouse, 40 Foley

Square, in the City of New York, on the 10th day of

March, two thousand twenty-five.

PRESENT: RICHARD J. SULLIVAN, EUNICE C. LEE, Circuit Judges,
CHRISTINA C. REISS,* Judge.

DAVID M. KIRK, Plaintiff-Appellant,

v.

CITIGROUP GLOBAL MARKETS HOLDINGS INC.,

Defendant-Appellee

* Chief Judge Christina C. Reiss, of the United States District Court for the District of Vermont, sitting by designation.

For Plaintiff-Appellant: David M. Kirk, pro se, Saint Johns, FL.

For Defendant-Appellee: Samuel J. Rubin, Goodwin Procter LLP, New York, NY; William E. Evans, Goodwin Procter LLP, Boston, MA; Brian T. Burgess, Goodwin Procter LLP, Washington, DC.

Appeal from a judgment of the US District Court for SDNY (Andrew L. Carter, Jr., Judge).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the December 28, 2023 judgment of the district court is AFFIRMED.

David Kirk, a Florida broker proceeding pro se, appeals from a judgment of the district court dismissing his claims, with prejudice, against Citigroup Global Markets Holdings Inc. ("Citigroup") for violations of federal securities laws and state common-law fraud. We assume the parties' familiarity with the facts, procedural history, and issues on appeal.[1]

[1]Although the district court did not enter judgment on a separate document as required by Federal Rule of Civil Procedure 58(a), the judgment became final 150 days after the order was entered on the docket, see Fed. R. Civ. P. 58(c)(2)(B), and we deem Kirk's notice of appeal to have been timely filed as of that date, see Fed. R. App. P. 4(a)(2); see also Fed. R. App. P. 4(a)(7)(B) ("A failure to set forth a judgment or order on a separate document when required by [Rule] 58(a) does not affect the validity of an appeal from that judgment or order.

We review a district court's dismissal of a complaint under Federal Rule of Civil Procedure 12(b)(6) de novo, "accepting all factual allegations in the complaint as true and drawing all reasonable inferences in the plaintiff's favor." Bangs v. Smith, 84 F.4th 87, 95 (2d Cir. 2023) (internal quotation marks omitted). To survive a Rule 12(b)(6) motion to dismiss, the complaint must allege "enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). Where, as here, the complaint alleges claims sounding in fraud, a plaintiff must further "state with particularity the circumstances constituting fraud." Fed. R. Civ. P. 9(b). Because Kirk is proceeding pro se, we construe his submissions "liberally" and interpret them "to raise the strongest arguments that they suggest." Meadows v. United Servs., Inc., 963 F.3d 240, 243 (2d Cir. 2020) (internal quotation marks omitted).

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1. Section 12 of the Securities Act of 1933

Kirk, who purchased exchange traded notes ("ETNs") issued by Citigroup, first challenges the dismissal of his claim for securities fraud in violation of section 12(a)(2) of the Securities Act of 1933, 15 U.S.C. § 77l(a)(2).[2] To state a claim under section 12(a)(2), a plaintiff must allege, at the very least, that the defendant made "an untrue statement of a material fact or omit[ted] . . . a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading." In re Morgan Stanley Info. Fund Sec. Litig., 592 F.3d 347, 359 (2d Cir. 2010) (internal quotation marks omitted).

[2]We previously vacated the district court's dismissal of Kirk's then-operative complaint, holding that the complaint's allegations could be construed to implicate both section 11 and section 12 of the Securities Act of 1933. See Kirk v. Citigroup Glob. Mkts. Holdings Inc., No. 22-179, 2022 WL 10218518, at *2 (2d Cir. Oct. 18, 2022). Because the challenged statements are contained in a Pricing Supplement, and not a registration statement, we apply section 12 rather than section 11, though the statutes are the same in all material respects. See In re Morgan Stanley Info. Fund Sec. Litig., 592 F.3d 347, 359 (2d Cir. 2010).

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We agree with the district court that Kirk has failed to allege that Citigroup made a materially false statement. In his fourth amended complaint ("FAC"), Kirk alleges that Citigroup misrepresented the performance of its ETNs by stating in its Pricing Supplement that they were designed to track the S&P GSCI Crude Oil Index at a "3x" rate, when in reality, the trading price of the ETNs Kirk held plummeted during the COVID-19 pandemic. But Citigroup clearly and repeatedly stated that the "indicative value" of the ETNs, which was derived from the crude-oil index, could differ from the ETNs' trading price in secondary markets. See Suppl. App'x at 17 ("[The] Indicative Value of the ETNs are not the same as the trading price of the ETNs, which is . . . a market-determined price that will reflect market supply and demand."). The Pricing Supplement further described how trading prices could be affected by "many unpredictable factors" that alter "global supply and demand for crude oil." Id. at 41. Accordingly, because the Pricing Supplement clearly warned investors about the risks associated with the ETNs, and because Kirk has not alleged any other facts that would render the statements made regarding the ETNs false, Kirk has failed to state a claim under section 12(a)(2). See Ashland Inc. v. Morgan Stanley & Co., 652 F.3d 333, 338 (2d Cir. 2011) (affirming the dismissal of a securities fraud claim when the defendant had

"explicitly disclosed the very . . . risks about which [the plaintiff] claim[s] to have been misled").

Section 10(b) of the Exchange Act of 1934 and Common-Law Fraud

Kirk also challenges the district court's conclusion that he failed to plausibly allege a claim under section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and for common-law fraud under New York law. To state a claim under section 10(b), a plaintiff must plead "that the defendant made a false statement or omitted a material fact." Kalnit v. Eichler, 264 F.3d 131, 138 (2d Cir. 2001) (internal quotation marks omitted). Similarly, to state a claim for common-law fraud under New York law, a plaintiff must allege that "the defendant made a material false representation." Eternity Glob. Master Fund Ltd. v. Morgan Guar. Tr. Co. of N.Y., 375 F.3d 168, 186–87 (2d Cir. 2004). Given that Kirk's section 10(b) and common-law fraud claims rely on the same allegations of falsity as his section 12(a)(2) claim, we agree with the district court that Kirk failed to state a claim that Citigroup made a material misrepresentation concerning the

performance of the ETNs.[3]

[3]The district court only reached the merits of Kirk's common-law fraud claim in the alternative, having initially concluded that it lacked subject-matter jurisdiction over that claim because Kirk had not alleged an amount in controversy exceeding $75,000. See 28 U.S.C. § 1332. But Kirk requested more than $75,000 when accounting for punitive damages, which "may be included in determining whether the jurisdictional amount is satisfied" where "punitive damages are permitted under the controlling law." See A.F.A. Tours, Inc. v. Whitchurch, 937 F.2d 82, 87 (2d Cir. 1991); see also Walker v. Sheldon, 10 N.Y.2d 401, 405 (1961) (allowing punitive damages for fraud claims where "the fraud, aimed at the public generally, is gross and involves high moral culpability" (emphasis added)). We therefore cannot say that it is a "legal certainty" that Kirk's alleged amount recoverable does not meet the jurisdictional threshold. See Wolde-Meskel v. Vocational Instruction Project Cmty. Servs., Inc., 166 F.3d 59, 63 (2d Cir. 1999). In any event, because Kirk's common-law fraud claim is premised on the same alleged misstatements as his federal claims, the district court clearly had supplemental jurisdiction over that claim pursuant to 28 U.S.C. § 1367(a).

2. Recusal

Finally, we reject Kirk's challenge to the district court's denial of his recusal motions. See United States v. Lovaglia, 954 F.2d 811, 815 (2d Cir. 1992) (reviewing the denial of a recusal motion for abuse of discretion). To begin, because we have

confirmed on de novo review that the district court correctly dismissed Kirk's FAC, his challenge to the court's recusal rulings is effectively moot. See Faulkner v. Nat'l Geographic Enters. Inc., 409 F.3d 26, 42 n.10 (2d Cir. 2005); see also Camacho v. Autoridad de Telefonos de Puerto Rico, 868 F.2d 482, 490 (1st Cir. 1989) (concluding that the judge's refusal to recuse was at most harmless error, and the "matter of disqualification [was] moot," where the circuit court "independently confirmed the correctness of the lower court's decision"). In any event, we are confident that Kirk's asserted bases for recusal – the district court's prior rulings against him, purported delays in the disposition of this case, and speculative conflicts of interest – would not have caused "an objective, disinterested observer fully informed of the underlying facts" to "entertain significant doubt that justice would be done absent recusal." United States v. Amico, 486 F.3d 764, 775 (2d Cir. 2007) (internal quotation marks omitted); see, e.g., Liteky v. United States, 510 U.S. 540, 555 (1994) ("[J]udicial rulings alone almost never constitute a valid basis for a bias or partiality [recusal] motion.");

United States v. Thompson, 76 F.3d 442, 451 (2d Cir. 1996) ("Disqualification is not required on the basis of remote, contingent, indirect or speculative interests." (internal quotation marks omitted)). In affirming the district court's recusal decisions, we commend Judge Carter for maintaining his decorum. Self-represented status does not relieve parties of the expectation that they will comport themselves civilly when addressing opposing counsel and the court.

* * *

We have considered Kirk's remaining arguments and find them to be without merit. Accordingly, we **AFFIRM** the judgment of the district court dismissing all of Kirk's claims with prejudice.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk of Court

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

DAVID M. KIRK, Plaintiff-Appellant

V.

CITIGROUP GLOBAL MARKETS HOLDINGS, INC. Defendant-Appellee

On Appeal from the United States District Court for the Southern District of New York

Petition for Rehearing

By Appellant David M. Kirk, Pro Se

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ARGUMENT

First and foremost, please be advised that I am frantically composing this petition in the very late-night hours of Thursday, 3/20/25 as I was only made aware hours ago of the 3/10/25 dismissal by this Honorable Court from getting word from a friend as I've received no notice to date in the mail or by email. My new case manager told me hours ago that the 14-day deadline to file this is Monday, so I consider my deadline as shortly after 8am Friday (only hours from now), as that seems to be the best time for emailing filings for them to be docketed fastest just as the court opens. This would still leave Monday in case it isn't docketed Friday.

In the dismissal, this court cited on page 5 from the stock prospectus "[The] Indicative Value of the ETN's are not the same as the trading price of the ETNs, which is...a market-determined price that will reflect market supply and demand". Critically omitted from this statement as cited below is the word Intraday, as I quoted from the prospectus in paragraph 4 my brief "Doc 156 cites from the prospectus 'The actual trading price of the ETNs in the secondary market may vary significantly from their Intraday Indicative Value." My complaints (in paragraph 6 of Docs 21,22, and 144) have continuously stated a 50% shortfall in value from

stock market closing on March 17, 2020 to closing on March 19, 2020 – value at 4pm market Closing, not Intraday. The use of "Intraday" in the prospectus would naturally cause readers to infer that such intraday variation would be corrected by 4pm market closing time.'" And my argument further expounded that not only was the stock 50% underpriced at 4pm closing, but this was never corrected for AND another four days of gross underpricing occurred in the brief two-week period between the announcement of stock liquidation and liquidation itself. AND that the inverse stock dwt which had faithfully inversely correlated to uwt stock for the 180 trading days since inception grossly didn't inversely correlate then nor in the four additional mentioned days. Obviously, the stock description in bold promising to follow 3X the change in the oil index and the history of doing so within an accuracy of 1% for the first 180 trading days in all the trading hours of all those days as well as the end of the day closing pricing trumps a 50% error in pricing never corrected for. The prospectus merely accounts for a variation in Intraday Indicative Value. This argument should be allowed to be presented to a fair-minded jury. As well as supporting arguments already presented that a computer program was almost

certainly used to keep the stock at the price targeted for all those hours of open trading for 180 days consecutively, and if the target price (of 3X the change in the oil index) got too high, Citi sold stock

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to bring the price down and vice versa is the price got too low. That is realistically the only way it could have tracked the price faithfully the first 180 days. Given the sudden 50% shortfall, the computer program must have drastically changed so Citi could reap the $154 million ill-gotten gain I mentioned. Citing this court's recent dismissal, page 5, that 'The Pricing Supplement further described how trading prices could be affected by "many unpredictable factors" that alter "global supply and demand for crude oil"'. The fluctuation in oil price has nothing to do with the stock tracking the price change in the specified oil index and I never stated that the change in the price of oil had any bearing on my case. Except that in addition to choosing the day they knew their main office would be closed and couldn't be served summons from courts in states other than New York, Defendant also benefited from timing the fraud when the price of oil was at a historic low to maximize their ill-gotten gain. That's likely why they chose to defraud the very day of then Gov Cuomo's order before the price of oil rebounded even at the risk of it making the timing of the fraud appear to so obviously border on criminal, knowing they couldn't be served summons from courts outside NY with their office closed. Regardless, the drop in oil price contributed in no way to the fraud and I never argued that it did. I only argued the gross fraud in the stock being allowed to drop 50% under the promised target price for the oil index it was

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promised to track. Paragraph one of my appeal "Statement of Case" calculated the odds of all these occurrences happening at random as 1 in 522 trillion. Remember that all 5 days of fraud and the timing of the office closure were all to the ill-gotten benefit of Citi. Not a single occurrence was to their detriment.

Quoting from page 5, paragraph 2 of my appeal, "Also, Defense Doc 152 supporting Motion to Dismiss on page 7 states 'As recognized by several courts in this District (including this Court), the Pricing Supplement explains that the UWT ETNs' trading prices are "market determined" prices that can "vary significantly" from the indicative values of the UWT ETNs based on the Index and used to value the notes at redemption or maturity.'" The 50% shortfall in value detailed in this brief and my Doc 144 complaint was never corrected for – in fact the four addition days of gross under tracking fraud after means the value of the notes at redemption

was 94% less than the indicative value as I stated in Doc 144 page 4 (end of paragraph 2) with the calculation proof in footnote 4." How is a 94% shortfall at maturity justified by the sentence above ending in the bolded words?

Once again, I assert that the fluctuation in the "temporary" Intraday Indicative Value because of "supply and demand" which this court cites in the 3/10/25 decision is not the issue – my case argued the end of day values from March 17,2020 to March 19,

2020. And the end of day values on the four additional days of fraud (though the additional days had no bearing on the amount of my loss as I had sold out by March 19, 2020, those days certainly show continued intent to defraud and strengthen the argument for punitive damages strongly).

I stated that I originally filed my case in my local district court for the Middle District of Florida and that my summons couldn't be served because the NY Secretary of State refuses to serve summons from courts outside the state of NY. And I stated that this was a clear violation of the United Stated Uniform Commercial Code by unduly restriction interstate commerce. Many fewer investors would purchase stock if they knew they could only file suit in NY – the home of many judges appointed by Senator Schumer whose third largest contributor is the Defendant and where similar contributors have become Defendants such as JP Morgan. Especially not when that fact is coupled with the obligation of judges not to recuse themselves without "direct conflict", even though a litany of "indirect conflicts" can abound - such as I stated that judge Carter's wife previously worked for JP Morgan, a co-defendant with Citi in a plethora of cases – so numerous that it's impossible to deny the existence of fraud cooperation between Citi and JP Morgan.

And that will certainly be emphasized in my writ of certiorari which I will be filing with the

US Supreme Court. I understand this Court's decision to deny my interlocutory appeal request for recusal, stating the conflicts of interest of Judge Carter are not deemed to be "direct" and recusal being moot anyway with the decision to uphold dismissal. However, such makes my argument that my original venue in the Middle District of Florida should have been able to be pursued without having to face judge(s) with any conflicts, direct or indirect, and the refusal of the NY Secretary of

State to serve out of state summons that much more unjust. My Motion for Change of Venue was also denied by judge Carter.

Respectfully submitted this 20th day of March, 2025

/s/David M. Kirk

David M. Kirk, Pro Se

Plaintiff – Appellant

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APPENDIX D

UNITED STATES COURT OF APPEALS for the SECOND CIRCUIT

At a Stated Term of the United States Court of

Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 2nd day of April, two thousand twenty-five,

Present: Richard J. Sullivan,

Eunice C. Lee,

Circuit Judges,

Christina C. Reiss,*

Judge. _____

David M. Kirk, Plaintiff - Appellant,

v.

Citigroup Global Markets Holdings Inc.,

Defendant - Appellee. _____

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ORDER Docket No. 24-237

Appellant David M. Kirk having filed a petition for panel rehearing and the panel that determined the appeal having considered the request,

IT IS HEREBY ORDERED that the petition is DENIED.

For The Court:

Catherine O'Hagan Wolfe,

Clerk of Court

*Chief Judge Christina C. Reiss, of the United States District Court for the District of Vermont, sitting by designation.