

DBS  
W82/74-010

IN THE CIRCUIT COURT OF THE 15TH  
JUDICIAL CIRCUIT IN AND FOR  
PALM BEACH COUNTY, FLORIDA

CASE NO.: 502016CA014473XXXXMB  
Division: AE

JOHN LEOPOLDO FIORILLA  
as trustee f/b/o JOHN LEOPOLDO  
FIORILLA TRUST U/A/D 06-25-2003,

Plaintiff,

vs.

KLAYMAN & TOSKES, P.A., a Florida  
Corporation; LAWRENCE L. KLAYMAN;  
and STEVEN D. TOSKES,

Defendants.

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KLAYMAN & TOSKES, P.A., a Florida  
Corporation,

Counter-Plaintiff,

vs.

JOHN LEOPOLDO FIORILLA,  
as trustee f/b/o JOHN LEOPOLDO  
FIORILLA TRUST U/A/D 06-25-2003,

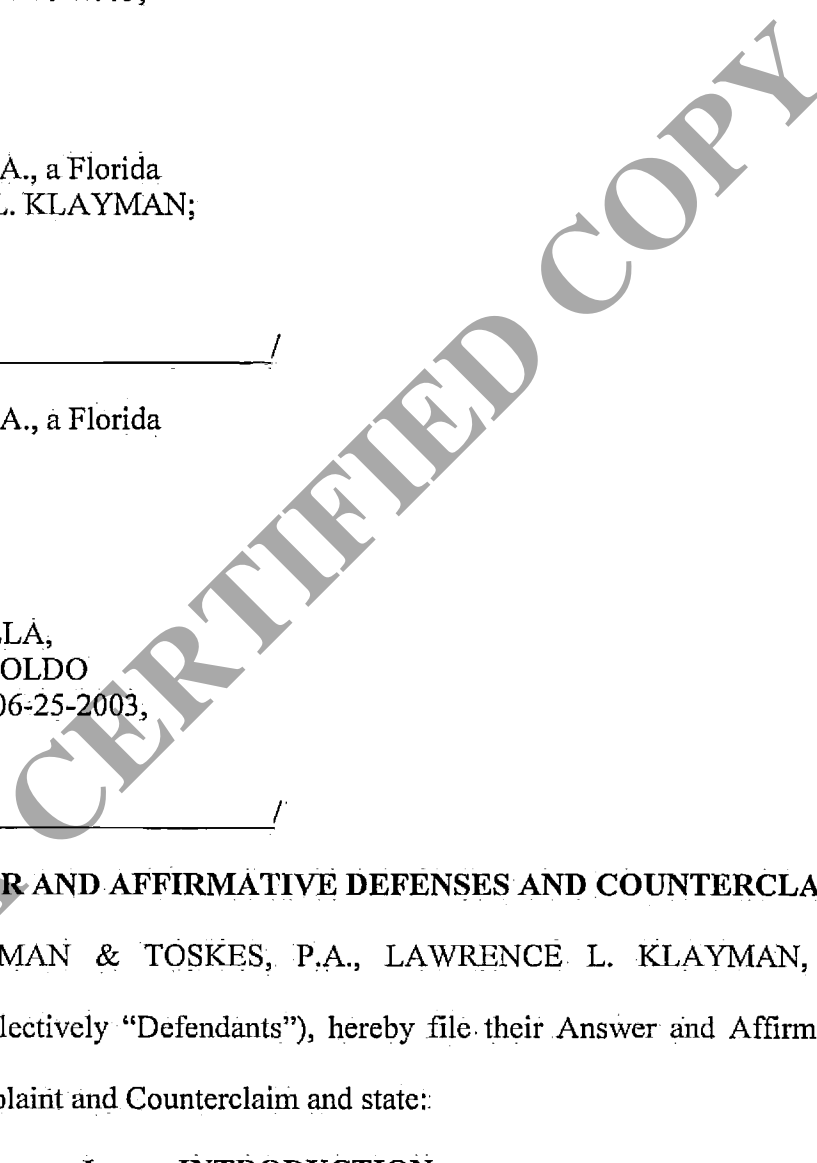
Counter-Defendants.

**DEFENDANTS' ANSWER AND AFFIRMATIVE DEFENSES AND COUNTERCLAIM**

Defendants, KLAYMAN & TOSKES, P.A., LAWRENCE L. KLAYMAN, and  
STEVEN D. TOSKES (collectively "Defendants"), hereby file their Answer and Affirmative  
Defenses to Plaintiff's Complaint and Counterclaim and state:

**I. INTRODUCTION**

In his continuing efforts to disavow a settlement he agreed to, Plaintiff, John Leopoldo  
Fiorilla, now attacks his own counsel, who worked diligently on his behalf to secure a substantial



settlement in a difficult securities arbitration against Citigroup Global Markets, Inc. (“Citigroup”). Mr. Fiorilla, whose background belies his self-portrayal as a “victim,” is the founder and managing partner of the Arabian Gulf Fund and Arabian Gulf Holdings, Ltd. in New York and Dubai. He prides himself on overseeing securities transactions in an aggregate amount of over \$10 billion. In 1994, he joined Triptych Holdings, a privately held investment firm based in New York, as a Principal. He is also a founder of Translux Limited, a Dubai-based commodities trading company. Before that, he started his career practicing law at the prestigious Wall Street law firm Sullivan & Cromwell LLP, after earning his Bachelor’s Degree at Seton Hall University, his law degree from the University of Pittsburgh, and his LLM in International Legal Studies with a concentration in Public International Law from New York University. He is admitted to practice law in New York, New Jersey, and the District of Columbia, as well as before the United States Supreme Court. He acted as an Of Counsel attorney for Studio Legale Carri-Maroncelli & Associati in Italy for over 20 years. Mr. Fiorilla, a Fellow of the Foreign Policy Association, member of the Economic Club of New York, advisor and counsel to the Vatican at the United Nations General Assembly and other UN bodies, and a sophisticated investor, is anything but a victim. Rather, he is an experienced and prolific litigant, having attempted to undo his settlement in numerous New York proceedings and improperly enforce a vacated arbitration award in a foreign proceeding in France. Now, in yet another attempt to re-litigate fanciful claims, Fiorilla accuses his lawyers of improper and unethical conduct despite the rejection of this very claim by both New York Courts and The Florida Bar. The Defendants in this case, Lawrence L. Klayman, Steven D. Toskes, and Klayman & Toskes, P.A., expressly dispute and deny all of the material allegations of this Complaint, and reject Mr. Fiorilla’s efforts

to rewrite history and overturn the decisions of The Florida Bar and New York Courts, which have repeatedly rejected his claims.

As a brief background of the New York Court proceedings, following the FINRA arbitration, Citigroup filed a Petition to Vacate the Arbitration Award and reinstate the settlement in the Supreme Court, New York County. Aside from the settlement, Citigroup also argued that the arbitration award should be vacated because of bias and disregard for the law by the arbitrators as a result of: (1) the failure of one arbitrator to disclose a past dispute with one of the petitioners; and (2) the failure of a different arbitrator to disclose a lawsuit accusing her of “intentional wrongdoing, including a challenge to her law license, which disclosure was required by the rules of the arbitral forum (FINRA).” On January 2, 2014, the N.Y. Supreme Court vacated the award on the basis of the prior settlement and reinstated the settlement agreement of \$800,000. The Court Order further noted that since the case was settled “there [was] no need to delve into the troubling allegations of misconduct by the arbitrators.” (emphasis supplied). Judgement was entered enforcing the settlement on May 12, 2014. Fiorilla appealed the decision to the Appellate Division - First Department and argued that the arbitration action, pursuant to an earlier stipulation of the parties, was governed by FINRA rules which require a written settlement agreement and since there was no written settlement agreement, the settlement was unenforceable. On April 9, 2015, the Appellate Court affirmed the lower court’s decision, finding there had been a settlement complete with all essential terms. Fiorilla filed a Notice of Motion for Reargument or, Alternatively, for Leave to Appeal to the New York Court of Appeals (New York’s Court of last resort), which was denied and then filed a 93 page Notice of Motion for Leave to Appeal with the New York Court of Appeals, which was also denied in October 2015.

Almost one year, on September 9, 2016, Fiorilla filed an Order to Show Cause and Memorandum of Law seeking to vacate the Judgment entered on May 12, 2014 claiming that the New York Court relied on Citigroup's counsel's testimony that a Florida tribunal found as fact that the matter was settled, but no such finding had been made (arguing that the Florida Bar disciplinary proceeding did not result in a finding of fact) and that the Court applied the incorrect standard in analyzing whether to vacate the arbitrator's ruling. At the same time, Citigroup moved for a Restraining Order and Injunction to prevent Fiorilla from continuing to circumvent the Court Order vacating the arbitration award through an *ex parte* proceeding filed in France to enforce the arbitration award without notice to Citigroup and serving seizure writs on multiple affiliates of Citigroup that operate in France as well as third parties who may owe Citigroup money or handle Citi's assets. The pending Motions were heard on October 11, 2016. The Court denied Fiorilla's Motion "as frivolous" and granted Citigroup's Motion for an Injunction in its entirety. The Court even advised Citigroup that: "I'd invite a motion for sanctions." On January 13, 2017, Fiorilla filed a Notice of Appeal of the Court's denial of his Motion to Vacate and granting of Citigroup's motion for injunction, which remains pending.

Defendants' answers to specific allegations of Plaintiffs' of Plaintiffs' Complaint follow.

## II. ANSWER TO COMPLAINT

1. With respect to Paragraph 1, Defendants admit that they were retained by Plaintiff to pursue legal claims on behalf of Plaintiff against Citigroup Global Markets, Inc. ("Citigroup"). Defendants deny all remaining allegations in Paragraph 1 and demand strict proof.

2. Defendants deny the allegations in Paragraph 2 and demand strict proof.

3. With respect to Paragraph 3, Defendants admit that Plaintiff terminated the relationship between Plaintiff and Defendants. Defendants deny all remaining allegations in Paragraph 3 and demand strict proof.

4. With respect to Paragraph 4, Defendants are without personal knowledge as to the arbitration proceeding between Plaintiff and Citigroup after Plaintiff terminated the relationship between Plaintiff and Defendants and therefore deny same and demand strict proof. Defendants further state that, pursuant to the Court Docket in *Citigroup Global Markets, Inc. v. John Leopoldo Fiorilla*, Supreme Court of the State of New York, County of New York, Index No. 653017/13 ("Underlying Litigation"), the New York Supreme Court vacated the award entered by the arbitration panel, which is and remains null and void, and of no force and effect in this or in any other matters. Defendants deny the remaining allegations in Paragraph 4 and demand strict proof.

5. Defendants deny the allegations in Paragraph 5 and demand strict proof.

### III. JURISDICTION, VENUE & PARTIES

6. With respect to Paragraph 6, Defendants admit that Plaintiff alleges damages in excess of \$15,000 solely for the purpose of establishing jurisdiction, but deny any liability for same and demand strict proof.

7. Defendants admit the allegations in Paragraph 7.

8. Defendants admit the allegations in Paragraph 8.

9. Defendants admit the allegations in Paragraph 9.

10. With respect to Paragraph 10, Defendants deny that Steven D. Toskes is an individual residing in Palm Beach County, Florida. Defendants admit the remaining allegations in Paragraph 10.

11. Defendants admit the allegations in Paragraph 11.
12. Defendants deny the allegations in Paragraph 12 and demand strict proof.
13. With respect to Paragraph 13, Defendants deny that Steven D. Toskes is an individual residing in Palm Beach County, Florida. Defendants admit that venue is proper in Palm Beach County, Florida, but deny liability for the allegations contained in Plaintiff's Complaint and demand strict proof.

#### IV. FACTUAL ALLEGATIONS<sup>1</sup>

##### A. Citigroup's Blatant Misconduct Causes Plaintiff to Lose More Than \$19 Million<sup>2</sup>

14. With respect to Paragraph 14, Defendants are without personal knowledge, but state that Plaintiff advised them that Plaintiff moved a portion of his assets to Citigroup in October 2006. Defendants deny the remaining allegations in Paragraph 14 and demand strict proof.

15. With respect to Paragraph 15, Defendants state that the value of the account and amount of stock in Royal Bank of Scotland ("RBS") in October 2006 is or should be reflected in statements from Citigroup, which speak for themselves. Defendants deny the remaining allegations in Paragraph 15 and demand strict proof. With respect to Footnote 1 of Plaintiff's Complaint, Defendants state that margin balance and net value of the Citigroup account as of October 2006 is or should be reflected in statements from Citigroup, which speak for themselves.

16. With respect to Paragraph 16, Defendants are without personal knowledge and therefore deny the allegations in Paragraph 16 and demand strict proof.

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<sup>1</sup> Defendants respect Plaintiff's designated headings in the Answer solely for convenient reference, but in doing so expressly dispute and deny them to the extent they are or may be considered to be material allegations of the Complaint itself.

<sup>2</sup> See Footnote 1. Defendants dispute and deny this heading to the extent it is or may be considered a material allegation of the Complaint and expressly dispute and deny this characterization and claim by Plaintiff.

17. With respect to Paragraph 17, Defendants state that the email referenced therein speaks for itself. Defendants deny the remaining allegations in Paragraph 17 and demand strict proof.

18. With respect to Paragraph 18, Defendants state that any option trades by Citigroup with respect to Plaintiff's account are or should be reflected in statements from Citigroup, which speak for themselves. Defendants deny the remaining allegations in Paragraph 18 and demand strict proof.

19. With respect to Paragraph 19, Defendants are without personal knowledge, but state that the value of RBS shares in late 2007 is a matter of public record, which speaks for itself. Defendants deny the remaining allegations in Paragraph 19 and demand strict proof.

20. With respect to Paragraph 20, Defendants are without personal knowledge, but state that the sale of Plaintiff's RBS stock and the value of Plaintiff's RBS stock in September 2008 are or should be reflected in statements from Citigroup, which speak for themselves. Defendants deny the remaining allegations in Paragraph 20 and demand strict proof.

21. With respect to Paragraph 21, Defendants are without personal knowledge, but state that margin calls in Plaintiff's account and the sale of Plaintiff's RBS stock in October 2008 are or should be reflected in statements from Citigroup, which speak for themselves. Defendants deny the remaining allegations in Paragraph 21 and demand strict proof.

22. With respect to Paragraph 22, Defendants are without personal knowledge and therefore deny the allegations in Paragraph 22 and demand strict proof.

**B. Plaintiff Hires Defendants to Prosecute His Claims Against Citigroup.<sup>3</sup>**

23. Defendants admit that Plaintiff retained them to pursue claims against Citigroup and that the parties entered into a Contingency Fee Agreement, but deny the remaining allegations in Paragraph 23 and demand strict proof. Defendants further state that Exhibit A to Plaintiff's Complaint speaks for itself.

24. Defendants admit the allegations in Paragraph 24.

25. With respect to Paragraph 25, Defendants admit that they discussed their experience handling concentrated stock cases and that they regularly arbitrated brokerage disputes like that of the Plaintiff. Defendants deny the remaining allegations in Paragraph 25 and demand strict proof.

26. With respect to Paragraph 26, Defendants admit that in August 2010, they filed a Statement of Claim with FINRA on behalf of Plaintiff to initiate the arbitration process with Citigroup.

27. With respect to Paragraph 27, Defendants state that the Statement of Claim filed with FINRA speaks for itself.

28. Defendants deny the allegations in Paragraph 28 and demand strict proof.

29. Defendants admit the allegations in Paragraph 29.

30. Defendants deny the allegations in Paragraph 30 and demand strict proof.

31. Defendants admit the allegations in Paragraph 31.

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<sup>3</sup> See Footnote 1. Defendants dispute and deny this heading to the extent it is or may be considered a material allegation of the Complaint and expressly dispute and deny this characterization and claim by Plaintiff.



**C. Defendants Bully Plaintiff to Settle During Pre-Arbitration Preparation.<sup>4</sup>**

32. With respect to Paragraph 32, Defendants admit that the parties arranged to meet from April 24 to April 27, 2012 at Defendants Boca Raton office to prepare for the Arbitration. Defendants further admit that as of April 26, 2012, they were in settlement discussions with Citigroup. Defendants deny the remaining allegations in Paragraph 32 and demand strict proof.

33. Defendants deny the allegations in Paragraph 33 and demand strict proof.

34. Defendants deny the allegations in Paragraph 34 and demand strict proof.

35. Defendants deny the allegations in Paragraph 35 and demand strict proof.

36. Defendants deny the allegations in Paragraph 36 and demand strict proof.

37. With respect to Paragraph 37, Defendants admit that Plaintiff left Boca Raton and returned to New York on April 27, 2012. Defendants deny the remaining allegations in Paragraph 37 and demand strict proof.

**D. Defendants Mislead Plaintiff Regarding His Prospects at Arbitration.<sup>5</sup>**

38. With respect to Paragraph 38, Defendants state that the email dated April 28, 2012 referenced therein speaks for itself. Defendants deny the remaining allegations in Paragraph 38 and demand strict proof.

39. With respect to Paragraph 39, Defendants state that the email dated April 28, 2012 purportedly referenced therein speaks for itself.

40. Defendants deny the allegations in Paragraph 40 and demand strict proof.

41. Defendants deny the allegations in Paragraph 41 and demand strict proof.

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<sup>4</sup> See Footnote 1 above. Defendants dispute and deny this heading to the extent it is or may be considered a material allegation of the Complaint and expressly dispute and deny this characterization and claim by Plaintiff.

<sup>5</sup> See Footnote 1 above. Defendants dispute and deny this heading to the extent it is or may be considered a material allegation of the Complaint and expressly dispute and deny this characterization and claim by Plaintiff.

42. Defendants deny the allegations in Paragraph 42 and demand strict proof.

**E. Defendants Settle Plaintiff's Claims Without Authorization.<sup>6</sup>**

43. Defendants admit the allegations in Paragraph 43.

44. Defendants deny the allegations in Paragraph 44 and demand strict proof.

45. With respect to Paragraph 45, Defendants state that the email dated April 28, 2012 referenced therein speaks for itself. Defendants deny the remaining allegations in Paragraph 45 and demand strict proof.

46. With respect to Paragraph 46, Defendants admit that they advised Plaintiff that they would not be able to reach a global settlement encompassing the separate "Loan Lawsuit." Defendants deny the remaining allegations in Paragraph 46 and demand strict proof.

47. With respect to Paragraph 47, Defendants admit that Plaintiff emailed Defendants authority to settle the claims against Citigroup for \$775,000 on April 29, 2012. Defendants state that the April 29, 2012 email speaks for itself. Defendants deny the remaining allegations in Paragraph 47 and demand strict proof.

48. With respect to Paragraph 48, Defendants admit that, pursuant to authority provided by Plaintiff, Defendants settled Plaintiff's claims with Citigroup for \$800,000 (the "Settlement"). Defendants deny the remaining allegations in Paragraph 48 and demand strict proof.

49. Defendants deny the allegations in Paragraph 49 and demand strict proof.

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<sup>6</sup> See Footnote 1 above. Defendants dispute and deny this heading to the extent it is or may be considered a material allegation of the Complaint and expressly dispute and deny this characterization and claim by Plaintiff.

**F. Defendants Refuse to Ameliorate Their Error.<sup>7</sup>**

50. With respect to Paragraph 50, Defendants admit that, on April 30, 2012, Toskes had a conference call with Mrs. Fiorilla and Plaintiff's attorney in the Loan Lawsuit, Jonathan Mazer, to discuss the Settlement. Defendants deny the remaining allegations in Paragraph 50 and demand strict proof.

51. Defendants deny allegations in Paragraph 51 and demand strict proof.

52. With respect to Paragraph 52, Defendants state that the May 9, 2012 email referenced therein speaks for itself. Defendants deny the remaining allegations in Paragraph 52 and demand strict proof.

53. With respect to Paragraph 53, Defendants state that the email communication between Klayman and Plaintiff referenced therein speaks for itself.

54. With respect to Paragraph 54, Defendants state that the email communication between Klayman and Plaintiff referenced therein speaks for itself. Defendants deny the remaining allegations in Paragraph 54 and demand strict proof.

55. With respect to Paragraph 55, Defendants state that the May 10, 2012 email communication between Plaintiff and Defendants referenced therein speaks for itself. Defendants deny the remaining allegations in Paragraph 55 and demand strict proof.

56. With respect to Paragraph 56, Defendants state that the communication between Klayman and Plaintiff on May 10, 2012 referenced therein speaks for itself. Defendants deny the remaining allegations in Paragraph 56 and demands strict proof.

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<sup>7</sup> See Footnote 1 above. Defendants dispute and deny this heading to the extent it is or may be considered a material allegation of the Complaint and expressly dispute and deny this characterization and claim by Plaintiff.

57. With respect to Paragraph 57, Defendants state that the May 10, 2012 communication between Klayman and Plaintiff and the attachments thereto speak for themselves. Defendants deny the remaining allegations in Paragraph 57 and demands strict proof.

58. Defendants deny the allegations in Paragraph 58 and demand strict proof.

59. Defendants deny the allegations in Paragraph 59 and demand strict proof.

60. With respect to Paragraph 60, Defendants state that the May 10, 2012 communication between Klayman and Plaintiff and the attachments thereto speak for itself:

61. Defendants deny the allegations in Paragraph 61 and demand strict proof.

62. Defendants deny the allegations in Paragraph 62 and demand strict proof.

**G. Plaintiff Recommences and Prevails in the Arbitration.<sup>8</sup>**

63. With respect to Paragraph 63, Defendants state that the May 11, 2012 communication between Plaintiff and FINRA speaks for itself. Defendants deny the remaining allegations in Paragraph 63 and demand strict proof.

64. Defendants admit the allegations in Paragraph 64. Defendants deny the allegations in Footnote 2 and demand strict proof.

65. With respect to Paragraph 65, Defendants are without personal knowledge as to the Arbitration proceedings between Plaintiff and Citigroup after Plaintiff terminated the relationship between Plaintiff and Defendants and therefore deny same and demand strict proof.

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<sup>8</sup> See Footnote 1 above. Defendants dispute and deny this heading to the extent it is or may be considered a material allegation of the Complaint and expressly dispute and deny this characterization and claim by Plaintiff. Also, although Plaintiff initially prevailed at Arbitration, the Arbitration Award has been vacated and is of no force and effect. Plaintiff did not finally prevail on the claim against Citigroup, other than in the settlement he authorized and agreed to while represented by Defendants.

66. With respect to Paragraph 66, Defendants are without personal knowledge as to the Arbitration proceedings between Plaintiff and Citigroup after Plaintiff terminated the relationship between Plaintiff and Defendants and therefore deny same and demand strict proof. Defendants further state that even if Citigroup filed a Motion to Enforce Settlement Agreement, the New York Court in the Underlying Litigation ultimately vacated the Arbitration Award, and enforced the settlement on the grounds that it was authorized and consented to by Plaintiff.

67. With respect to Paragraph 67, Defendants are without personal knowledge as to the Arbitration proceedings between Plaintiff and Citigroup after Plaintiff terminated the relationship between Plaintiff and Defendants and therefore deny same and demand strict proof. Defendants are without personal knowledge as to the allegations in Footnote 3. Even if Citigroup filed a Renewed Motion to Enforce Settlement Agreement, which was denied by the Arbitration Panel, the New York Court in the Underlying Litigation ultimately vacated the Arbitration Award, and enforced the Settlement on the grounds that it was authorized and consented to by Plaintiff.

68. With respect to Paragraph 68, Defendants are without personal knowledge as to the Arbitration proceedings between Plaintiff and Citigroup after Plaintiff terminated the relationship between Plaintiff and Defendants and therefore deny same and demand strict proof.

69. With respect to Paragraph 69, Defendants are without personal knowledge as to the Arbitration proceedings between Plaintiff and Citigroup after Plaintiff terminated the relationship between Plaintiff and Defendants and therefore deny same and demand strict proof.

70. With respect to Paragraph 70, Defendants are without personal knowledge as to the Arbitration proceedings between Plaintiff and Citigroup after Plaintiff terminated the relationship between Plaintiff and Defendants and therefore deny same and demand strict proof.

71. With respect to Paragraph 71, Defendants are without personal knowledge as to the Arbitration proceedings between Plaintiff and Citigroup after Plaintiff terminated the relationship between Plaintiff and Defendants and therefore deny same and demand strict proof. Further, Defendants state the New York Court in the Underlying Litigation ultimately vacated the Arbitration Award, and enforced the Settlement on the grounds that it was authorized and consented to by Plaintiff. As such, the Arbitration Award is null and void and of no further force and effect. Defendants further state that Exhibit B is a nullity, having been vacated by the Courts of New York.

**H. Citigroup Vacates the Award Based on Defendant's Unauthorized Settlement.<sup>9</sup>**

72. With respect to Paragraph 72, while Defendants are without personal knowledge, pursuant to the Court Docket in the Underlying Litigation, upon information and belief, Citigroup filed a Petition to Vacate the Arbitration Award with the Supreme Court of New York on August 28, 2013.

73. With respect to Paragraph 73, while Defendants are without personal knowledge, pursuant to the Court Docket in the Underlying Litigation, upon information and belief, Plaintiff filed an opposition to the Motion to Vacate on September 19, 2013.

74. With respect to Paragraph 74, while Defendants are without personal knowledge, pursuant to the Court Docket in the Underlying Litigation, upon information and belief, the New York Supreme Court granted Citigroup's Motion to Vacate on January 2, 2014. The Order granting the Motion speaks for itself.

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<sup>9</sup> See Footnote 1 above. Defendants dispute and deny this heading to the extent it is or may be considered a material allegation of the Complaint and expressly dispute and deny this characterization and claim by Plaintiff. Defendants admit that the Arbitration Award has been vacated and affirmatively allege that it is null and void and of no force and effect in this or any other proceeding.

75. With respect to Paragraph 75, while Defendants are without personal knowledge, pursuant to the Court Docket in the Underlying Litigation, upon information and belief, Plaintiff filed an Amended Notice of Appeal of the Supreme Court's Order and Judgment vacating the Arbitration Award on June 12, 2014.

76. With respect to Paragraph 76, Defendants admit that on April 9, 2015 the New York Appellate Division, First Department, affirmed the trial court's order vacating the Arbitration Award and held that the trial court "properly vacated the arbitration award based on a prior settlement agreement."

77. With respect to Paragraph 77, while Defendants are without personal knowledge, pursuant to the Court Docket and Appellate Docket in the Underlying Litigation, upon information and belief, Plaintiff filed a Motion for Leave to Appeal to the Court of Appeals on July 22, 2015.

78. With respect to Paragraph 78, while Defendants are without personal knowledge, pursuant to the Court Docket and Appellate Docket in the Underlying Litigation, upon information and belief, Plaintiff's Motion for Leave to Appeal to the Court of Appeals was denied on October 20, 2015.

79. Defendants deny the allegations in Paragraph 79 and demand strict proof thereof.

**I. Defendants Are Liable For The Losses Caused By Their Egregious Misconduct.<sup>10</sup>**

80. Defendants deny the allegations in Paragraph 80 and demand strict proof thereof.

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<sup>10</sup> See Footnote 1 above. Defendants dispute and deny this heading to the extent it is or may be considered a material allegation of the Complaint and expressly dispute and deny this characterization and claim by Plaintiff.

81. Defendants deny the allegations in Paragraph 81 and demand strict proof thereof. Specifically, Plaintiff has pending Motions and Appeals in the Underlying Litigation which have not been exhausted.

82. With respect to Paragraph 82, Defendants admit that Plaintiff retained the law firms of Babbitt & Johnson, P.A. and Morgan & Morgan, P.A. to represent him in this matter, but are without knowledge as to the remaining allegations in Paragraph 82 and therefore deny same and demand strict proof.

**COUNT I**  
**Legal Malpractice – Professional Negligence**  
**(Negligent Settlement)**

83. With respect to Paragraph 83, Defendants restate their responses to the allegations contained in Paragraphs 1 through 82 above as if set forth fully herein.

84. With respect Paragraph 84, Defendants state that Plaintiff has attempted to allege a claim for professional negligence, but Defendants deny any liability for same and demand strict proof.

85. With respect to Paragraph 85, Defendants admit that they were in the business of providing professional legal services for compensation to clients who retained them. Defendants deny the remaining allegations in Paragraph 85 and demand strict proof.

86. With respect to Paragraph 86, Defendants admit that Plaintiff retained them to pursue claims against Citigroup, and that the parties entered into a Contingency Fee Agreement. Defendants deny the remaining allegations in Paragraph 86 and demand strict proof.

87. Defendants admit the allegations in Paragraph 87.

88. Defendants deny the allegations in Paragraph 88 and demand strict proof.



89. Defendants deny the allegations in Paragraph 89, including subparts (1) and (2), and demand strict proof.

90. Defendants deny the allegations in Paragraph 90 and demand strict proof.

**COUNT II**  
**Legal Malpractice – Professional Negligence**  
**(Unauthorized Settlement)**

91. With respect to Paragraph 91, Defendants restate their responses to the allegations contained in Paragraphs 1 through 83 above as if set forth fully herein.

92. With respect Paragraph 92, Defendants state that Plaintiff has attempted to allege a claim for professional negligence, but Defendants deny any liability for same and demand strict proof.

93. With respect to Paragraph 93, Defendants admit that they were in the business of providing professional legal services for compensation to clients who retained them. Defendants deny the remaining allegations in Paragraph 93 and demand strict proof.

94. With respect to Paragraph 94, Defendants admit that Plaintiff employed them to pursue claims against Citigroup. Defendants deny the remaining allegations in Paragraph 94 and demand strict proof.

95. Defendants admit the allegations in Paragraph 95.

96. Defendants deny the allegations in Paragraph 96 and demand strict proof.

97. Defendants deny the allegations in Paragraph 97 and demand strict proof.

98. Defendants deny the allegations in Paragraph 98 and demand strict proof.

**COUNT III**  
**Breach of Fiduciary Duty**

99. With respect to Paragraph 99, Defendants restate their responses to the allegations contained in Paragraphs 1 through 83 above as if set forth fully herein.

100. With respect Paragraph 100, Defendants state that Plaintiff has attempted to allege a claim for breach of fiduciary duty, which is duplicative of Counts I and II of the Complaint, but Defendants deny any liability for same and demand strict proof.

101. With respect to Paragraph 101, Defendants admit that they assumed a duty to Plaintiff to advise, counsel and represent Plaintiff's interests with respect to the legal services for which Plaintiff retained Defendants. Defendants are without knowledge as to Plaintiff's beliefs and impressions and therefore deny the remaining allegations of Paragraph 101, and demand strict proof.

102. Defendants admit the allegations in Paragraph 102.

103. Defendants deny the allegations in Paragraph 103 and demand strict proof.

104. Defendants deny the allegations in Paragraph 104 and demand strict proof.

105. Defendants expressly deny all allegations not specifically admitted herein and demand strict proof.

106. Defendants demand trial by jury on all issues so triable as of right.

#### **AFFIRMATIVE DEFENSES**

107. As their First Affirmative Defense, Defendants state that Plaintiff's claims are premature. *Silverstone v. Edell*, 721 So. 2d 1173, 1175 (Fla. 1998); *Peat, Marwick, Mitchell & Co. v. Lane*, 565 So. 2d 1323, 1325 (Fla. 1990); *R.S.B. Ventures, Inc. v. Jeffrey S. Berlowitz, Esq. et al*, 2017 WL 362582, \_\_\_ So. 3d \_\_\_ (Fla. 4th DCA Jan. 25, 2017).

108. As their Second Affirmative Defense, Defendants state that Plaintiff's action is barred or should be reduced proportionately due to Plaintiff's comparative negligence.

109. As their Third Affirmative Defense, Defendants state that when Plaintiff retained Defendants, Plaintiff made several misrepresentations of material fact regarding the facts

included in the Statement of Claim filed with FINRA. The statements were false. Relying on Plaintiff's misrepresentations, Defendants filed the Statement of Claim and proceeded to prosecute the claim on Plaintiff's behalf. Defendants have been harmed by Plaintiff's misrepresentations. For these reasons, Plaintiff's allegations against Defendants fail.

110. As their Fourth Affirmative Defense, the doctrine of collateral estoppel precludes Plaintiff's allegations against Defendants based on the rulings in the Florida Bar proceeding filed by Plaintiff against Defendants. In the Florida Bar proceeding, the Florida Bar found that Plaintiff authorized the settlement of the Underlying Litigation. The allegations of the Complaint mirror the allegations asserted by Plaintiff against Defendants and rejected in the Florida Bar proceeding.

111. As their Fifth Affirmative Defense, the doctrine of res judicata precludes Plaintiff's allegations against Defendants based on the rulings in the Florida Bar proceeding filed by Plaintiff against Defendants. In the Florida Bar proceeding, the Florida Bar found that Plaintiff authorized the settlement of the Underlying Litigation. The allegations of the Complaint mirror the allegations asserted by Plaintiff against Defendants and rejected in the Florida Bar proceeding.

112. As their Sixth Affirmative Defense, the doctrine of collateral estoppel precludes Plaintiff's allegations against Defendants based on the rulings in the Underlying Litigation and appeals related thereto. In the Underlying Litigation and related appeals, the New York courts determined that Plaintiff authorized the settlement of the Underlying Litigation. The allegations of the Complaint mirror the allegations asserted by Plaintiff and rejected in the Underlying Litigation.

113. As their Seventh Affirmative Defense, the doctrine of res judicata precludes Plaintiff's allegations against Defendants based on the rulings in the Underlying Litigation and appeals related thereto. In the Underlying Litigation and related appeals, the New York courts determined that Plaintiff authorized the settlement of the Underlying Litigation. The allegations of the Complaint mirror the allegations asserted by Plaintiff and rejected in the Underlying Litigation.

114. As their Eighth Affirmative Defense, Defendants state that Plaintiff's claims are barred by the doctrine of unclean hands on the part of Plaintiff who knew, at a minimum, that the facts asserted in the Statement of Claim were untrue and that representations made by Plaintiff and others during the underlying Arbitration action were false or untrue.

115. As their Ninth Affirmative Defense, Defendants state that all damages, if any, should be reduced by the amount of any and all benefits or monies paid or payable to Plaintiff from any collateral sources, including but not limited to the Settlement with Citigroup.

116. As their Tenth Affirmative Defense, Defendants state that Plaintiff's claims are barred based on the representations and assurances made by Plaintiff to Defendants during Defendants' representation of Plaintiff.

117. As their Eleventh Affirmative Defense, Defendants state that Plaintiff authorized and consented the Settlement of the Arbitration matter and, relying on the authorization of Plaintiff, Defendants proceeded to settle the matter with Citigroup.

118. As their Twelfth Affirmative Defense, Defendants state that the Plaintiff procured the Arbitration Award through false representations and actual or potential fraud and therefore, to the extent liability is determined, the Arbitration Award should not be used as a measure of Plaintiff's purported damages.

119. As their Thirteenth Affirmative Defense, Defendants state that members of the Arbitration panel failed to disclose material information in violation of FINRA's rules which would have resulted in their disqualification or striking in the Arbitration matter and thus the Arbitration proceeding and subsequent award was tainted and subject to being vacated (irrespective of the authorized settlement). Therefore, to the extent liability is determined, the Arbitration Award is void, inadmissible, and cannot be used as a measure of Plaintiff's purported damages.

120. As their Fourteenth Affirmative Defense, Defendants states that Plaintiff's actions are barred by the doctrine of judgmental immunity. *Crosby v. Jones*, 705 So. 2d 1356 (Fla. 1998); *Air Turbine Technology, Inc. v. Quarles & Brady, LLC*, 165 So. 3d 816, 822 (Fla. 4th DCA 2015); *Inlet Condominium Ass'n, Inc. v. Childress Duffy, Ltd, Inc.*, 615 Fed. Appx. 533 (11th Cir. 2015).

121. Defendants reserve the right to add to or amend its Affirmative Defenses upon proper notice to the Court and all parties.

### COUNTERCLAIM

Defendant/Counter-Plaintiff KLAYMAN & TOSKES, P.A., a Florida Corporation, (hereinafter referred to as "K&T") files this Counterclaim against Plaintiff/Counter-Defendant JOHN LEOPOLDO FIORILLA, as trustee f/b/o JOHN LEOPOLDO FIORILLA TRUST U/A/D 06-25-2003, (hereinafter referred to as "Fiorilla") and alleges:

1. This is an action for damages more than \$15,000, exclusive of interest, costs, and attorneys' fees.

2. Counter-Plaintiff, KLAYMAN & TOSKES, P.A., is a Florida Corporation doing business in Palm Beach County, Florida.

3. Counter-Defendant JOHN LEOPOLDO FIORILLA is an individual residing in New York, New York. In addition, he is the trustee of the John Leopoldo Fiorilla Trust U/A/D 06-25-2003.

4. All conditions precedent to the filing of this counterclaim have been performed or have occurred.

5. Venue is proper in Palm Beach County, Florida because the cause of action accrued in Palm Beach County. In addition, Counter-Defendant Fiorilla consented to venue in Palm Beach County, Florida for resolution of any disputes arising as a result of his retention of Defendant/Counter-Plaintiff K&T to pursue claims against Citigroup.

**COUNT I  
BREACH OF CONTRACT**

6. K&T repeats the allegations contained in Paragraphs 1 through 5 as if set forth fully herein.

7. On February 16, 2010, Fiorilla executed a contract, the Contingency Fee Agreement ("Agreement"), a copy of which is attached as Exhibit A, in which Fiorilla engaged K&T to represent Fiorilla in an arbitration action or other litigation against Citigroup Global Markets, Inc. ("Citigroup").

8. Pursuant to the Agreement, Fiorilla agreed that: "If the case settles after the 20 Day Exchange or goes to a Final Hearing, the attorneys' fee will be 30% of the total recovery before any reductions of any kind." See Exh. A.

9. Pursuant to the Agreement, in the event Fiorilla recovered on his claim against Citigroup, K&T would be entitled to reimbursement for all fees and costs advanced by K&T. See Exh. A.

10. On April 29, 2012, pursuant to authority provided by Fiorilla, K&T settled the arbitration between Fiorilla and Citigroup for \$800,000.

11. K&T or its agents issued multiple demands for payment of its attorney's fees pursuant to the Agreement; however, Fiorilla refused to make payments as agreed for the legal services rendered by K&T pursuant to the Agreement.

12. Fiorilla breached the Agreement by failing to make payment as agreed for the legal services rendered by K&T.

13. Due to Fiorilla's breach of the Agreement, K&T has been damaged in the amount of \$240,000, or 30% of the settlement, plus additional sums due for costs advanced by K&T during its representation of Fiorilla.

WHEREFORE, Counter-Plaintiff KLAYMAN & TOSKES, P.A. demands judgment against Counter-Defendant JOHN LEOPOLDO FIORILLA, as trustee f/b/o JOHN LEOPOLDO FIORILLA TRUST U/A/D 06-25-2003, for all damages, plus pre and post-judgment interest and court costs.

**COUNT II  
BREACH OF CONTRACT**

14. K&T repeats the allegations contained in Paragraphs 1 through 5, 7 and 9 as if set forth herein.

15. Pursuant to the Agreement, "[i]f the client elects to terminate this Agreement after the three-day period, the client shall be responsible for all costs and expenses incurred by this firm, and in addition, shall be responsible for paying the attorney the reasonable value of services performed to date, or the appropriate percentage of the last settlement offer, whichever is greater. . . . The hourly rate for determination of reasonable value of services rendered is \$400.00 per hour." See Exh. A.

16. On May 11, 2012, after K&T secured an authorized settlement of the arbitration proceeding between Fiorilla and Citigroup, Fiorilla terminated K&T's representation of Fiorilla.

17. Following K&T's authorized settlement of the arbitration proceeding between Fiorilla and Citigroup and Fiorilla's termination of K&T's representation of Fiorilla, K&T or its agents issued multiple demands for payment of its attorney's fees pursuant to the Agreement; however, Fiorilla refused to make payments as agreed for the legal services rendered by K&T pursuant to the Agreement.

18. Fiorilla breached the Agreement by failing to make payment as agreed for the legal services rendered and costs advanced by K&T.

19. Due to Fiorilla's breach of the Agreement, K&T has been damaged in the amount of all costs and expenses incurred by K&T and the reasonable value of services performed by K&T from February 16, 2010 through May 11, 2012 or the appropriate percentage of the last settlement offer by Citigroup in the amount of \$800,000, whichever is greater, plus costs advanced on behalf of Plaintiff by K&T.

WHEREFORE, Counter-Plaintiff KLAYMAN & TOSKES, P.A. demands judgment against Counter-Defendant JOHN LEOPOLDO FIORILLA, as trustee f/b/o JOHN LEOPOLDO FIORILLA TRUST U/A/D 06-25-2003, for all damages, plus pre and post-judgment interest and court costs.

**COUNT III  
UNJUST ENRICHMENT/QUANTUM MERUIT**

20. K&T repeats the allegations contained in Paragraphs 1 through 5 as if set forth herein.

21. On February 16, 2010, Fiorilla engaged K&T to represent Fiorilla in an arbitration action or other litigation against Citigroup.



22. From February 16, 2010 through May 11, 2012, K&T performed legal services for Fiorilla.

23. The legal services were performed at the request of Fiorilla.

24. K&T performed all legal services agreed to between Fiorilla and K&T.

25. Fiorilla received a benefit from K&T's legal services which included a settlement of \$800,000 from Citigroup. K&T prepared, with the assistance of Fiorilla, a Statement of Claim which was filed with FINRA, engaged in discovery, entertained settlement negotiations and provided other legal services.

26. Fiorilla has failed to pay for the reasonable value of the unpaid services performed by K&T.

27. As a result of the labor and legal services rendered and performed by K&T for the benefit of and at the request of Fiorilla, and costs advanced on his behalf, Fiorilla has been unjustly enriched and Counter-Plaintiff has been damaged by Fiorilla's failure to tender payment.

WHEREFORE, Counter-Plaintiff KLAYMAN & TOSKES, P.A. demands judgment against Counter-Defendant JOHN LEOPOLDO FIORILLA, as trustee f/b/o JOHN LEOPOLDO FIORILLA TRUST U/A/D 06-25-2003, for all damages, plus pre and post-judgment interest, court costs and attorneys' fees.

WE HEREBY CERTIFY that on this 10th day of **March, 2017**, I electronically filed the foregoing with the Clerk of the Court by using the Florida Court's E-Filing Portal which will send a notice of electronic filing to all counsel on the attached Service List.

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By: s/ Dena B. Sacharow

D. David Keller  
Florida Bar No.: 288799  
Dena B. Sacharow  
Florida Bar No.: 84640

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*Counsel for: Plaintiff*

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**EXHIBIT A**

**NOT A CERTIFIED COPY**

**KLAYMAN & TOSKES, P.A.**

**CONTINGENCY FEE AGREEMENT**

CLIENT: JOHN LEOPOLDO FIORILLA, INDIVIDUALLY AND AS TRUSTEE  
MATTER: JOHN LEOPOLDO FIORILLA, ET AL. v. CITIGROUP GLOBAL MARKETS,  
INC.  
DATE: FEBRUARY 16, 2010

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This Contingency Fee Agreement, when executed by you, shall confirm the fee agreement between JOHN LEOPOLDO FIORILLA, INDIVIDUALLY AND AS TRUSTEE and KLAYMAN & TOSKES, P.A. You have retained this firm to represent you in an arbitration action or other litigation against CITIGROUP GLOBAL MARKETS, INC. and other responsible parties. You understand that our agreement does not extend to bringing or defending any claim in court or pursuing collection of an arbitration award; neither is this firm obligated to pursue or defend an appeal of any favorable or unfavorable arbitration decision.

**FEE: IF NO RECOVERY, THEN NO ATTORNEYS' FEES:**

Because of the amount of losses sustained in the brokerage accounts, KLAYMAN & TOSKES, P.A. has agreed to a contingency fee agreement that provides the Client with reduced fees if the case is resolved in a timely manner. It is expected that a large case can take anywhere from 12 months to 16 months from the filing of the Statement of Claim to the date of the Final Hearing. After the Statement of Claim is filed, if the case is settled within 200 days after the date the claim is filed, the attorneys' fee will be 20% of the total recovery before any reductions of any kind. If the case settled between 201 days up to the day prior to the disclosure of the Pre-Hearing Exchange of Factual and Expert Witnesses as well as the Disclosure of Documents that are intended to be used at the Final Hearing which occurs 20 days prior to the commencement of the Final Hearing, the attorneys' fee will be 25% of the total recovery before any reductions of any kind. If the case settles after the 20 Day Exchange or goes to a Final Hearing, the attorneys' fee will be 30% of the total recovery before any reductions of any kind. If there is no recovery, then there shall be no attorneys' fees due to KLAYMAN & TOSKES, P.A.

**COSTS:**

The client is solely responsible for and will pay all forum fees pursuant to the requirements of the arbitration forum. The client is also responsible for any expert fees which includes the cost of the expert to testify at the Final Hearing, if necessary. The firm shall advance all internal costs including, but not limited to, postage, photocopies, transportation, hotels and court costs, i.e., service of process and subpoena costs. Only in the event of a recovery shall our firm be reimbursed for these fees and costs.

JOHN LEOPOLDO FIORILLA, INDIVIDUALLY AND AS TRUSTER  
Contingency Fee Agreement  
Page Two

**CO-COUNSEL:**

At the sole discretion of KLAYMAN & TOSKES, P.A., and in the event it becomes necessary, KLAYMAN & TOSKES, P.A., reserves the right to retain co-counsel to assist in the prosecution of all claims. Attorney fees for co-counsel will be borne solely by KLAYMAN & TOSKES, P.A.

**SETTLEMENT:**

Settlement shall be made only with your express concurrence. Authority is irrevocably given to direct defendants to pay any and all settlements, awards or final judgments to the KLAYMAN & TOSKES, P.A. Trust Account.

**CANCELLATION AND DISCHARGE:**

This contract may be canceled by written notification to the attorneys at any time within three (3) business days of the date the contract was signed, as shown below, and if canceled the client shall not be obligated to pay any fees to the firm for work performed during this time. If the firm has advanced funds to others in representation of the client, the attorney is entitled to be reimbursed for such amounts advanced, either from the clients cost retainer or from the client directly. If the client elects to terminate this Agreement after the three-day period, the client shall be responsible for all costs and expenses incurred by this firm, and in addition, shall be responsible for paying the attorney the reasonable value of services performed to date, or the appropriate percentage of the last settlement offer, whichever is greater. Only in the event of a recovery by the Client, is the Client obligated to pay the attorneys' fee. The hourly rate for determination of reasonable value of services rendered is \$400.00 per hour. If the client does not obtain a recovery, the client will not be obligated for any costs and fees to the firm.

If the law firm for any reason determined that there exists a low probability of recovery or that the claims lack merit, or that it is not economically practical to pursue the claims, or if you decide not to accept a settlement offer that the law firm recommends, the law firm shall have the right and discretion to terminate the Agreement and be relieved of any obligation to prosecute your claims. If the law firm so terminates the Agreement, you hereby agree to the law firm's withdrawal of record in any related lawsuits or arbitration actions. A determination by the law firm to terminate the Agreement and withdraw from the client's case shall be binding upon the client and without further recourse. In the event that the law firm voluntarily withdraws from the case and the firm has advanced funds to others in representation of the client, the attorney is entitled to be reimbursed for such amounts advanced, either from the clients cost retainer or from the client, but if and only after the client recovers on the case. If the client does not obtain a recovery, the client will not be obligated for any costs and fees to the firm.

JOHN LEOPOLDO FIORILLA, INDIVIDUALLY AND AS TRUSTEE  
Contingency Fee Agreement  
Page Three

You agree that KLAYMAN & TOSKES, P.A. will not provide you with tax advice. You should consult your accountant or tax attorney regarding the tax consequences or structuring of any recovery, settlement, award or judgment.

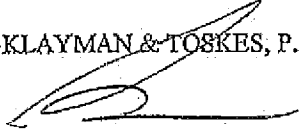
OTHER ISSUES:

If a dispute arises between you and this firm, any suit or other action shall be brought in Palm Beach County, Florida, where this agreement is deemed to be entered into and completed.

The law firm of KLAYMAN & TOSKES, P.A. and its staff look forward to the privilege of representing you in this matter.

Very truly yours,

KLAYMAN & TOSKES, P.A.



Steven D. Toskes, Esq.

Dated: \_\_\_\_\_

Read and Accepted this 16<sup>th</sup> day of February, 2010.

By:



JOHN LEOPOLDO FIORILLA