THE SECURITIES AND EXCHANGE COMMISSION

In the matter of

INDYMAC BANCORP, INC. (LA-3517)

WELLS SUBMISSION ON BEHALF OF MICHAEL W. PERRY

D. Jean Veta
Benjamin J. Razi
David M. Weiss
Michael M. Maya
COVINGTON & BURLING LLP
1201 Pennsylvania Avenue, NW
Washington, D.C. 20004
Telephone: 202-662-6000
Facsimile: 202-662-6291

TABLE OF CONTENTS

INTRODUCTION AND EXECUTIVE SUMMARY 1

FACTUAL BACKGROUND 4

A. Mr. Perry's Background 4

B. IndyMac's Business 4

C. The Worst Financial Crisis Since the Great Depression 5

1. The Housing and Credit Crisis of 2007 and 2008 5

2. IndyMac's Proactive Response 6

a) Capital Raising Efforts in 2007 6

b) Continued Capital Raising Efforts in 2008 6

D. IndyMac's Transparent and Rigorous Disclosure Processes 8

E. IndyMac's Robust Disclosures Regarding the Effect of the Housing and Credit Crisis 9

1. IndyMac Promptly and Fully Disclosed Credit Problems in 2007. 9

2. IndyMac's Transparent Disclosures Continued in 2008 as the Financial Crisis Worsened. 10

a) Disclosures Regarding 2007 Results and Forecast for 2008 11

b) Disclosures Regarding DSPP Sales 12

c) Disclosures Regarding First Quarter 2008 Financial Results 12

DISCUSSION 13

PART I: THERE IS NO BASIS FOR FRAUD CHARGES AGAINST MR. PERRY. 13

I. ELEMENTS OF A SECURITIES FRAUD CAUSE OF ACTION 13

A. Falsity 14

B. Materiality 14

C. Scienter 14

II. THE STATEMENTS CITED BY THE STAFF ARE NOT ACTIONABLE 15

A. 2007 10-K: "We may be required to raise capital at terms that are materially adverse to our shareholders." 15

1. The Statement Was Not False. 15

2. The $11 Million Raised Through the DSPP Was Not Material. 16

B. Mr. Perry's May 1, 2008 "Turned the Corner" Opinion Is Not Actionable.......... 17

1. Mr. Perry's Opinion that IndyMac Had "Turned the Corner" Was Not False.......... 17

2. Mr. Perry's Opinion that IndyMac Had "Turned the Corner" Was Inactionable Puffery. 19

C. The May 12, 2008 Statement Regarding the $88 Million Capital Contribution is Not Actionable.......... 20

1. The $88 Million Statement Was Not False. 20

2. The Phrase "During Q1 08" In The $88 Million Statement Was Not Material To Investors.......... 21

III. THE ALLEGED OMISSIONS CITED BY THE STAFF ARE NOT ACTIONABLE.......... 22

A. The Information Allegedly Withheld From the Market At Large Was Not Required to be Disclosed.......... 22

1. OTS Relief From Double Risk Weighting Subprime Assets Was Immaterial.......... 23

a) 2007 Form 10-K 23

b) First Quarter 2008 Form 10-Q.......... 24

2. IndyMac's First Quarter 2008 Form 10-Q Contained No Material Omission Regarding the $18 Million Receivable. 25

B. The Information Allegedly Withheld From DSPP Purchasers Was Not Required to be Disclosed. 25

1. IndyMac Did Not Have a Duty to Disclose Internal Forecasts. 25

2. IndyMac Had No Duty to Update DSPP Purchasers About the Other Alleged Omissions Cited by the Staff. 26

a) IndyMac's Statement about Cash at the Holding Company Did Not Concern Fundamental Company Changes and Was Never Radically Altered. 27

b) Mr. Perry's Statement about the Suspension of Trust Preferred Dividends Was Not Actionable and Did Not Trigger a Duty to Update. 29

C. The Alleged Omissions Were Not Material to the Sophisticated Investors in IndyMac's DSPP 30

IV. MR. PERRY DID NOT ACT WITH SCIENTER. 31

A. Ernst & Young and OTS Approval Negate Any Inference of Scienter. 32

B. The Facts Negate Any Inference of Scienter With Respect to the Three Alleged Misstatements. 32

C. Mr. Perry Could Not Have Acted With Scienter With Respect to Details That Nobody Ever Considered Disclosing. 33

D. An Allegation of Scienter is Wholly At Odds With Mr. Perry's Open and Transparent Management Style. 33

E. Mr. Perry's Stock Purchases Negate Any Inference of Scienter. 34

PART II: THERE IS NO BASIS FOR NON-FRAUD CLAIMS AGAINST MR. PERRY 35

I. THERE IS NO BASIS FOR A CLAIM AGAINST MR. PERRY UNDER SECTION 13 OF THE EXCHANGE ACT. 35

II. ALLEGED VIOLATIONS OF SARBANES-OXLEY CERTIFICATION REQUIREMENTS DO NOT GIVE RISE TO A CAUSE OF ACTION 36

CONCLUSION 37

INTRODUCTION AND EXECUTIVE SUMMARY

The Staff has informed counsel for Michael W. Perry that it is considering recommending that the Commission bring a civil injunctive action and institute a public administrative proceeding against Mr. Perry, alleging that he violated Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act, and Rules 10b-5 and 13(a)-14(a) thereunder, and that he aided and abetted violations of Section 13(a) of the Exchange Act and Rules 12b-20, 13a-1, 13a-11, and 13a-13 thereunder.[1] For the reasons explained in this Wells Submission, there is no basis for any such charges.

Like hundreds of other institutions, IndyMac could not survive the worst financial crisis since the Great Depression. On July 11, 2008, before the government began bailing out troubled banks, the U.S. Office of Thrift Supervision ("OTS") seized IndyMac Bank, installing the Federal Deposit Insurance Corporation ("FDIC") as receiver. The SEC began its formal investigation of IndyMac management just a few weeks later, on July 31, 2008. Over the next 22 months, the Staff conducted an exhaustive, painstaking review into the conduct of IndyMac management, including that of former IndyMac CEO Michael W. Perry. The Staff subpoenaed and reviewed many millions of pages of documents — including thousands of emails and other documents authored by Mr. Perry — and took testimony from dozens of witnesses.

Following this thorough investigation, and in stark contrast to most "fraud" cases (including those involving other mortgage banks leveled by the financial crisis), the current Wells Notice is significant for what it does not include:

- There is no allegation of stock selling by Mr. Perry or other insiders — in fact, Mr. Perry bought millions of dollars' worth of IndyMac stock during the relevant time period;
- There is no allegation that Mr. Perry (or other IndyMac managers) expressed views internally that differed from the views disclosed publicly;
- There is no allegation of any improper reserving practices or improper application of mark-to-market accounting principles;
- There is no allegation of false or misleading disclosures with respect to IndyMac's business model (originating, securitizing, and servicing Alt-A mortgage loans) or its material business risks; and
- There is no allegation of a material misstatement in IndyMac's financial statements.

[1] By e-mail dated May 12, 2010, the Staff informed counsel that it had withdrawn its potential claims based on alleged violations of the books and records requirements of the Exchange Act.

The Staff investigated all of these issues and appropriately found no basis for charges against Mr. Perry or any other IndyMac managers.

In the absence of any evidence of self-dealing, intentional misconduct, or reckless conduct by Mr. Perry or others, the Staff is instead positing a handful of alleged misstatements or omissions based purely on 20-20 hindsight and without regard to the extensive and transparent disclosures Mr. Perry and IndyMac did make throughout the financial crisis. For its potential case against Mr. Perry, the Staff cites three allegedly false statements and several alleged omissions. But the charges being considered by the Staff are wholly unsupported by these statements and alleged omissions or by any other evidence.

First, contrary to the Staff's assertions, IndyMac's 2007 Form 10-K was accurate in all material respects. The Staff contends that the 10-K statement that IndyMac "may be required to raise capital at terms that are materially adverse to [its] shareholders" was false and misleading because IndyMac had resumed stock sales through the Direct Stock Purchase Program ("DSPP") three days before the 10-K was filed. However, this argument misunderstands the nature of the statement at issue, which referred not to routine DSPP activities, but instead to a much larger equity capital raise that IndyMac was considering at the time. Moreover, the argument focuses myopically on one general disclosure that does not even include the word "DSPP," while ignoring numerous other more specific statements emphasizing the routine nature of DSPP capital raising by IndyMac. Even if the statement did relate to the DSPP (which it did not), IndyMac followed a consistent approach to its disclosure of DSPP and the 2007 Form 10-K is no exception to that pattern. In addition, the alleged statement was immaterial because investors would have been nonplussed by the fact that IndyMac was on track to raise far less DSPP capital in 2008 than it had raised in 2007. Indeed, the market's actual response once the DSPP sales were disclosed in the ordinary course confirms the point: the price of IndyMac's stock actually increased.

Second, Mr. Perry's May 1, 2008 statement that he "believed" IndyMac had "turned the corner" is not actionable. The opinion was based on specific information available to Mr. Perry at the time, including the fact that IndyMac's quarterly loss for the first quarter of 2008 was approximately half the Company's loss for the prior quarter. Mr. Perry's expression of opinion reflected his genuine and reasonable belief based on objective measures that he specifically disclosed alongside his opinion. Moreover, it is well-settled that such corporate "puffery" does not provide the basis for a fraud claim.

Third, the statement in IndyMac's first quarter 2008 investor presentation that "Bancorp contributed $88 million to the Bank during Q1 08" was accurate. The $18 million receivable booked on May 9, 2008 was approved by the OTS and IndyMac's outside auditors, Ernst & Young. Even if the Staff were right that IndyMac should have said "as of March 31, 2008" or something similar instead of "during Q1 08," these semantic distinctions would not have been material to any reasonable investor. The financial statements of IndyMac Bancorp and IndyMac Bank were presented on a consolidated basis, so it would have made no difference to shareholders whether the $18 million was at Bancorp or the Bank. And, to the extent the Staff's concern is informing the market that IndyMac was at risk of losing its "well-capitalized" status, as defined by OTS, that risk was amply disclosed elsewhere in IndyMac's first quarter 2008 SEC filings.

Fourth, the Staff's omissions case misses the forest for the trees. IndyMac's detailed and robust disclosures throughout the financial crisis provided shareholders and potential shareholders with more than enough information to know that investing in IndyMac stock — right in the middle of the housing and credit crisis — was a very risky proposition. Indeed, it was Mr. Perry himself who openly and frankly told investors that "2007 was a terrible year for our industry, for IndyMac, and for you, our owners,"[2] and who, during the roughest part of the financial crisis in 2008, freely disclosed that there were scenarios in which IndyMac could lose its "well-capitalized" status with OTS. The added disclosures proposed now by the Staff — which not a single IndyMac employee, outside counsel, or outside independent auditor proposed at the time — would have added nothing to the "total mix of information" available about IndyMac, which was almost entirely and intensely negative.

This is especially true with respect to Bear Stearns and the other highly sophisticated investors in IndyMac's DSPP. The DSPP purchasers were arbitrage players who were shorting IndyMac's stock. These institutional investors had access to much better information about market trends than Mr. Perry or anyone at IndyMac. Given their sophistication and the flood of negative information disclosed by IndyMac, none of the details highlighted by the Staff would have been news to the DSPP purchasers. Nor would these details have been important to the DSPP purchasers because of their very short-term arbitrage investment strategies.

Finally, in light of Mr. Perry's unquestioned transparency with investors and his years of honest service to IndyMac shareholders, no jury could reasonably conclude that Mr. Perry acted with scienter. IndyMac's fulsome disclosures speak for themselves and are flatly inconsistent with an intent to deceive investors. The Staff has spent almost two years looking for evidence that Mr. Perry's outlook for IndyMac was different from that which he publicly disclosed. No such evidence has been found because none exists. The only fair conclusion on this record is that Mr. Perry reasonably believed in the accuracy of each of the statements the Staff is now challenging, and that he believed IndyMac's SEC filings were fully accurate without inclusion of the immaterial details fixated on now by the Staff with the benefit of hindsight. Perhaps the best evidence of Mr. Perry's indisputable good faith is the fact that he bought millions of dollars' worth of IndyMac stock — and did not sell even a single share — during the period of supposed "fraud" envisioned by the Staff. Likewise, during the worst part of the financial crisis, in February 2008, Mr. Perry wrote a long letter to shareholders critiquing his performance as CEO and outlining various "mistakes" he believed he and IndyMac had made. He then offered to resign as CEO — and forfeit millions of dollars of severance — if shareholders decided not to re-elect him as a Director (he was re-elected with over 97% of the vote). Under these circumstances, a jury would not find that Mr. Perry intended to deceive investors.

In sum, the alleged misstatements were not false. Nor were they material. The same is true of the information allegedly omitted from IndyMac's SEC filings. And, Mr. Perry

[2] Throughout this submission, unless otherwise indicated, any emphasis in quotations is added, and any internal quotation marks or citations are omitted.

did not act with fraudulent intent with regard to either the alleged misstatements or the alleged omissions. No enforcement action against Mr. Perry is warranted on the existing record. If this matter is litigated, we are confident that a fuller record — including discovery by Mr. Perry of the highly sophisticated DSPP purchasers like Bear Stearns and others — will underscore that no reasonable investor in fact considered the issues of interest to the Staff to be material, that no one was misled, and that Mr. Perry acted entirely in good faith.

FACTUAL BACKGROUND

A. Mr. Perry's Background

Michael W. Perry, 47, was born and raised in Sacramento, California. He graduated from California State University at Sacramento in 1984, with a bachelor of science degree in business administration. After college, Mr. Perry earned his CPA license and worked for a few years at Peat, Marwick, Mitchell & Co. in Sacramento. In 1987, he began his career in banking, joining Commerce Security Bank ("Commerce"). Mr. Perry stayed at Commerce for over five years, starting out as controller before being promoted to chief financial officer and later heading up Commerce's mortgage banking division.

In January 1993, Mr. Perry was hired by Countrywide Mortgage Investments, Inc. ("Countrywide Mortgage Investments") as chief operating officer. Countrywide Mortgage Investments was a publicly-traded real estate investment trust ("REIT") engaged in the mortgage lending and mortgage securitization businesses. In the mid-late 1990s, the company changed its name to IndyMac Mortgage Holdings, Inc. and Mr. Perry became CEO. In 2000, IndyMac Mortgage Holdings, Inc. terminated its status as a REIT and purchased the parent of First Federal Savings and Loan Association of San Gabriel Valley. (IndyMac Bancorp, Inc. Annual Report (Form 10-K), at 4 (Mar. 1, 2007) ("2006 10-K").) In connection with these transactions, the company changed its name to IndyMac Bancorp, Inc. ("Bancorp" or "the Company") and renamed the subsidiary thrift IndyMac Bank, FSB ("the Bank"). (*Id.*) Bancorp was a holding company whose only material asset was the Bank. Mr. Perry led Bancorp and the Bank as CEO and Chairman from 2000 until the FDIC takeover in July 2008.

Mr. Perry currently resides in San Marino, California, with his family. Mr. Perry and his wife of over 20 years have three children.

B. IndyMac's Business

IndyMac was organized around a hybrid thrift/mortgage banking business model. The mortgage bank originated, sold, and securitized mortgage loans — primarily, "Alt-A" mortgage loans[3] — and related assets, and also performed loan servicing. This segment earned revenue largely from the sale of loans, interest earned while loans were held for sale, and income

[3] IndyMac's Alt-A loans included primarily "[f]irst mortgage loans for sale that ha[d] prime credit characteristics, but d[id] not meet the GSE underwriting guidelines." (2006 10-K at 29.)

from retained mortgage servicing rights ("MSRs"). IndyMac's products included adjustable-rate mortgages ("ARMs"), intermediate term fixed-rate loans, fixed-rate mortgages (both conforming and non-conforming), construction-to-permanent loans, home equity lines of credit ("HELOCs"), reverse mortgages, and a limited number of subprime mortgages. IndyMac sold the majority of the loans that it originated or purchased through private label securitizations or to the government sponsored enterprises ("GSEs"), primarily Federal National Mortgage Association ("Fannie Mae") and Federal Home Loan Mortgage Company ("Freddie Mac"). IndyMac's thrift segment principally invested in single-family residential mortgage loans, construction and builder financing, HELOCs, mortgage-backed securities ("MBS"), and warehouse lines of credit. (2006 10-K at 5-6, 9.) By 2007, IndyMac was the seventh largest savings and loan and the second largest independent mortgage lender in the U.S. (*Id.* at 4.)

C. The Worst Financial Crisis Since the Great Depression

The disclosures at issue in this case were made in the midst of the worst financial crisis since the Great Depression. During 2007 and 2008, hundreds of financial institutions were either shut down, suspended operations, or sold at bargain basement prices. Under Mr. Perry's leadership, IndyMac's management team did everything it could to combat the effects of the financial crisis on the Company and to keep shareholders informed of the many risks the Company faced.

1. The Housing and Credit Crisis of 2007 and 2008

The following brief summary makes clear the massive scope of the financial tsunami that took down IndyMac. On February 7, 2007, HSBC, one of the world's largest banks, became the first to report major mortgage-related losses, announcing that its charge for bad debts would be more than $10.5 billion for 2006 because of problems in its mortgage portfolio. *HSBC Reports Rise in Troubled Loans*, Reuters (Feb. 8, 2007). On April 2, 2007, mortgage lender New Century Financial filed for bankruptcy. (Federal Reserve Bank of St. Louis, The Financial Crisis: A Timeline of Events and Policy Actions.[4]) On July 17, 2007, Bear Stearns announced that two hedge funds heavily invested in MBS had lost nearly all of their value amid the rapid decline in the mortgage market. (*Id.*) On August 6, 2007, American Home Mortgage Investment Corporation — a major Alt-A lender — filed for bankruptcy. (*Id.*) Many more bank failures were to come. Indeed, in the months that followed:

- Bank of America purchased Countrywide in a fire sale (January 11, 2008);
- the Federal Reserve Bank of New York funded JP Morgan Chase's acquisition of Bear Stearns (March 24, 2008);
- the OTS closed IndyMac (July 11, 2008);

[4] Available at http://timeline.stlouisfed.org/index.cfm?p=timeline.

- the Federal Housing Finance Agency placed Fannie Mae and Freddie Mac in conservatorship (September 7, 2008);
- Bank of America purchased Merrill Lynch in a fire sale (September 15, 2008);
- Lehman Brothers filed for bankruptcy (September 15, 2008);
- the OTS closed Washington Mutual Bank before selling its operations to JP Morgan Chase (September 25, 2008); and
- Congress passed the $700 billion Troubled Asset Relief Program (October 2008) and various other measures aimed at saving the relatively few financial firms that remained intact. (*Id.*)

2. IndyMac's Proactive Response

Beginning in early 2007, when it first appeared that the real estate market might be headed for a downturn, Mr. Perry directed a host of comprehensive actions aimed at saving the Company from what became the worst financial crisis since the Great Depression — all of which was timely disclosed to the market. Under Mr. Perry's leadership, IndyMac transformed itself from a hybrid thrift/mortgage banker with dozens of non-conforming mortgage product offerings and nearly 9,000 employees into a leaner, conforming-product focused, GSE-oriented lender. As pertinent to the Staff's allegations, Mr. Perry also led an ambitious capital raising effort aimed in part at bolstering the Bank's regulatory capital ratios. Notably, Mr. Perry initiated these capital raising efforts as a precaution even before IndyMac ever suffered a loss for any quarter (the first such loss was in the third quarter of 2007).

a) Capital Raising Efforts in 2007

The bulk of capital raised by IndyMac in 2007 was attributable to the sale of approximately $500 million of Bank preferred stock. (IndyMac Bancorp, Inc. Annual Report (Form 10-K), at n.24 (Feb. 29, 2008) ("2007 10-K").) As it had routinely done in the past, the Company also raised capital in 2007 through its DSPP from a limited number of highly sophisticated, institutional investors. In the second quarter of 2007, IndyMac raised $74.2 million through the DSPP. (IndyMac Bancorp, Inc., Third Quarter 2007 Report (Form 10-Q), at 44 (Nov. 6, 2007) ("Third Quarter 2007 10-Q").) The Company raised an additional $71.4 million through its DSPP in the fourth quarter of 2007, for a total of $145.6 million for 2007. (2007 10-K at 59.) Including the Bank preferred stock sales, IndyMac raised a total of over $646 million in new capital in 2007.

b) Continued Capital Raising Efforts in 2008

In 2008, as market conditions continued to deteriorate at a speed and to a degree that no one anticipated, IndyMac, under Mr. Perry's leadership, again pursued capital raising initiatives. As relevant here, from January 1, 2008 to May 9, 2008, IndyMac raised $97 million through the DSPP from nine highly sophisticated, institutional investors including Bear Stearns (the Wall Street firm with the number one ranked MBS underwriting and securitization "franchise"[5]). (IndyMac Bancorp, Inc., First Quarter 2008 Report (Form 10-Q), at 4 (May 12, 2008) ("First Quarter 2008 10-Q").) In addition to Bear Stearns, the other purchasers of IndyMac shares through the DSPP in 2008 were Garnet Advisors, Kamco Investments, Royal Capital Investments, Inc., Royal Capital Management, Southridge Partners, LP, Trillium Partners, LP, and Vreeland Partners II, LP (collectively, "the 2008 DSPP Purchasers").

The 2008 DSPP Purchasers were not long-term investors. Instead, they were arbitrage players who bought shares through the DSPP to earn the spread between the discounted DSPP price and the market price. (*See* Michael Perry SEC Testimony (Dec. 16, 2009) at 157:1-10 ("Perry Testimony Day One") (2008 DSPP investors "really weren't owning the stock"; rather, they "were shorting it on a daily basis during their investment period to earn the arbitrage of the one percent discount"); (A. Scott Keys SEC Testimony (Nov. 19, 2009) at 125:3-7 ("Keys Testimony Day One") (DSPP purchasers "would enter into short sales of the amount" of stock they sought to purchase through DSPP, after which IndyMac "would issue the shares to those buyers and they would use those shares to close their short position"); *see also* Pam Marsh SEC Testimony (Nov. 5, 2009) at 25.)

In a further effort to bolster capital levels at the Bank, IndyMac Bancorp contributed a total of $88 million to the Bank as of March 31, 2008, just as it had contributed capital to the Bank from time to time throughout the Bank's history. (IndyMac Bancorp, Inc., First Quarter Earnings Review (Form 8-K, Ex. 99.2), at 6 (May 12, 2008) ("First Quarter 2008 Earnings Review").) These capital contributions — both in the first quarter of 2008 and previously — were aimed, in particular, at maintaining the Bank's "well capitalized" status, as determined by OTS.[6]

The details of the capital raised in the first quarter of 2008 figure prominently in the Staff's potential case against Mr. Perry, so we provide the following additional detail. On March 31, Bancorp contributed $70 million to the Bank. At that time, Bancorp had additional cash that it did not contribute to the Bank. Based on forecasts at that time, those funds did not appear necessary for the Bank to continue to be "well capitalized" under OTS rules.

In early May, when the Company was closing its books for the first quarter, Ernst & Young informed CFO Blair Abernathy of certain unresolved audit differences (which had been waived in prior quarters due to immateriality). If all these audit differences had been applied, the Bank's total risk-based capital may have fallen below 10%, dropping the Bank from "well capitalized" to "adequately capitalized." Although Mr. Abernathy believed the audit differences could be resolved favorably, as a precautionary measure, Mr. Perry began taking steps to book a receivable at the Bank in the amount of cash ($18 million) that was available at the holding company at March 31, 2008, but that had not yet been contributed down to the Bank. On the morning of May 9, 2008 — before the books for the first quarter had closed — Mr. Perry authorized IndyMac Treasurer Francisco Nebot to direct an additional $50 million contribution

[5] Bear Stearns 2006 Annual Report, at 11 (Dec. 31, 2006).

[6] Under OTS regulations, a "well capitalized" institution, for purposes relevant here, is one whose "total risk based capital ratio" is 10.0% or greater. *See* 12 C.F.R. § 6.4(b).

from the holding company to the Bank. (Michael Perry SEC Testimony (Dec. 17, 2009) at 430:17-19 ("Perry Testimony Day Two").)

Later that same day, Mr. Perry called Darrell Dochow, OTS's Western Region Director, to request permission to book $18 million of the $50 million contribution as a receivable on the Bank's first quarter 2008 balance sheet. (*Id.* at 439:3-16.) Mr. Perry requested permission to book a receivable of $18 million and no more because that was the amount of cash available for contribution to the Bank on March 31, 2008. Mr. Dochow, with full knowledge of the circumstances, communicated OTS's approval. (*Id.* at 441:1-16.) Mr. Dochow also directed Mr. Perry to amend the Bank's Thrift Financial Report to reflect the $18 million receivable. (*Id.* at 443:2-3.) After a second call involving Mr. Dochow of OTS, Ernst & Young, and Mr. Perry, Ernst & Young also signed off on the OTS-approved treatment of the $18 million contribution. (*Id.* at 447:4-18; *see also* Email from Brian Carter to Peter Luttenberger et al. (May 9, 2008); (Ernst & Young Q1 2008 OTS Review (Mar. 31, 2008) ("E&Y Q1 2008 Review").)

D. IndyMac's Transparent and Rigorous Disclosure Processes

A hallmark of Mr. Perry's leadership style was transparency — with IndyMac's employees, with its management team and independent directors, with its shareholders, and with its principal federal regulator, the OTS. Indeed, the OTS expressly highlighted Mr. Perry's candor and accessibility, including during the crisis periods in 2007 and 2008. As noted in an Ernst & Young memorandum produced to the SEC Staff:

> [OTS regulators Steve] Gregovich and [David] Hewes commented [that] management cooperation and transparency was very good and consistent with prior periods. They also acknowledged the CEO of IndyMac [Mr. Perry] provides periodic email updates to the OTS on all significant developments at IndyMac, positive or adverse, and the OTS has no management-related issues.

(E&Y Q1 2008 Review.)

IndyMac's SEC disclosure process was marked by this same transparency. IndyMac's Form 10-Ks and Form 10-Qs were prepared by a team headed up by Chief Accounting Officer Greg Sosnovich. As Mr. Sosnovich testified, IndyMac followed a variety of appropriate processes and relied on individuals with appropriate expertise to ensure that these filings were properly prepared. (Gregory Sosnovich SEC Testimony (Nov. 12, 2009) at 18:4-23 ("Sosnovich Testimony").)

The Form 10-Q preparation process, for example, began when Mr. Sosnovich and his team prepared a "bare bones draft" during the month after quarter end. (*Id.* at 19.) A draft 10-Q would then be forwarded to Investor Relations and the Disclosure Committee, both of which would provide comments. (*Id.*) The draft filing would be further revised after the books for the quarter were officially closed. (*Id.*) Thereafter, the draft filing would be circulated to the Audit Committee (whose Chairman was former Ernst & Young Vice Chairman Hugh Grant) as well as inside and outside counsel, and revisions would continue as needed. (*Id.*) IndyMac received extensive advice regarding the accuracy and adequacy of the SEC filings at issue in this

Wells Submission from two leading international law firms, Alston & Bird LLP ("Alston & Bird") and Orrick LLP, as well as its outside auditors at Ernst & Young.[7]

In addition to soliciting the input of the relevant internal managers, accountants, lawyers, and Investor Relations personnel, as well as outside counsel and the Company's independent auditors, IndyMac followed a rigorous Sarbanes-Oxley certification process prior to submitting any filing with the SEC. (Keys Testimony Day One at 21:24-23:2.) This process included quarterly certifications to the CEO and CFO by scores of senior managers and other key accounting, legal, and finance personnel regarding the accuracy of IndyMac's financial statements and disclosures. (*See, e.g.*, Perry Testimony Day Two at 247:16-25.) None of the disclosure details of concern to the Staff was brought to Mr. Perry's attention by anyone at the Company, either through the Sarbanes-Oxley certification process or otherwise.

IndyMac's disclosure process with respect to the DSPP prospectus — a focus of the Staff — was similarly sound. Pam Marsh, head of Investor Relations, worked with outside counsel at Alston & Bird to write and review the DSPP prospectuses. (*See, e.g.*, Sosnovich Testimony at 38:24-39:7; Keys Testimony Day One at 144:18-23; Email from Pam Marsh to Peter Luttenberger (April 1, 2008) ("[The DSPP prospectus] has been drafted by A&B and we are planning to file on Thursday.").)

E. IndyMac's Robust Disclosures Regarding the Effect of the Housing and Credit Crisis

Throughout the unprecedented financial crisis, IndyMac regularly updated shareholders on the difficult market environment and its negative effects on the Company. As Mr. Perry bluntly put it on December 6, 2007, IndyMac was "in the eye of [the] storm." (IndyMac Bancorp, Inc., Indymac Responds to Another Shareholder Suggestion (Form 8-K, Ex. 99.1) (Dec. 6, 2007) ("December 6, 2007 Response to Shareholder Suggestion").) IndyMac's robust disclosures were fully understood by investors, who responded by selling shares at such a rapid clip that the price of IndyMac's stock dropped precipitously — from over $40 per share at the beginning of 2007 to between $3 and $8 during the time period focused on by the Staff.

1. IndyMac Promptly and Fully Disclosed Credit Problems in 2007.

In the Company's 2006 annual report — filed on March 1, 2007 — IndyMac publicly anticipated "that there will be a continuation of tough conditions for loan originations, credit performance and in the secondary market, that competition will be fierce and that the housing market will be challenging." (2006 10-K at 65.) "[I]n 2007," IndyMac told its investors and potential investors, "our revenue margins will remain under pressure and credit quality will likely worsen." (*Id.*)

[7] In light of this extensive involvement, Mr. Perry reserves the right to rely on advice of counsel as a defense — in addition to the many other defenses set forth in this Wells Submission — if the Commission decides to proceed with charges.

On April 26, IndyMac reported more bad news. During the first quarter of 2007, earnings had declined to $0.70 per share, while non-performing assets rose by 241 percent from very low levels. (*See* IndyMac Bancorp, Inc., Earnings Press Release (Form 8-K, Ex. 99.1), at 1-2 (Apr. 26, 2007).) Lest there be any doubt about the difficult situation confronting the Company, Mr. Perry also warned that credit losses likely would "go up many times over the next several quarters." (*Id.*)

On November 6, IndyMac, like many financial institutions involved in mortgage and asset-backed securities, reported a net loss (of $2.77 per share) for the third quarter of 2007. (*See* IndyMac Bancorp, Inc., Earnings Press Release (Form 8-K, Ex. 99.1), at 1 (Nov. 6, 2007).) In his quarterly conference call, Mr. Perry pointed to several things IndyMac "could have done better" and noted that the Company had "underestimated the length and severity of the housing downturn." (*See* Tr. of Nov. 6, 2007 Earnings Call, at 9.)

Analysts immediately understood from Mr. Perry's candid disclosures that IndyMac had serious problems, as at least four firms maintained or adopted "Sell" ratings (or their equivalents) for the Company's stock within the next week. (*See* FBR Analyst Report (Nov. 7, 2007); KBW Analyst Report (Nov. 7, 2007); Lehman Brothers Analyst Report (Nov. 8, 2007); Fox-Pitt Kelton Analyst Report (Nov. 9, 2007); S&P Analyst Report (Nov. 10, 2007).) As one observer noted at the time, IndyMac was "likely [to] suspend the dividend and seek to raise capital (mainly to appease regulators), which will likely be in the form of a dilutive . . . offering." (Fox-Pitt Kelton Analyst Report (Nov. 9, 2007).)

2. IndyMac's Transparent Disclosures Continued in 2008 as the Financial Crisis Worsened.

The beginning of 2008 brought additional robust, negative disclosures regarding IndyMac. As one newspaper reported on the eve of the new year, "[f]ew companies were caught in the crossfire like IndyMac Bancorp Inc., and the fallout is clearly evident in the company's stock performance." Kevin Smith, *IndyMac Stock Nears 52-Week Low*, San Gabriel Valley Tribune, Dec. 31, 2007. According to one analyst, "most [IndyMac] investors now don't really believe in an upside because of all the problems . . . . Most IndyMac shareholders have probably bailed and sold off their stock, while others have hung in there only to see the stock 'continue to bleed, almost on a daily basis.'" *Id.* The next day, the *American Banker* reported that "IndyMac Bancorp . . . [was] among 2007's worst-performing banking and thrift company stocks." Matthias Rieker, *Stock Forecasts: Relief Isn't Around the Corner*, American Banker, Jan. 2, 2008.

Two weeks later, on January 15, 2008, IndyMac again highlighted the difficult situation facing the Company by announcing a workforce reduction of over 2,400 people. (*See* IndyMac Bancorp, Inc., Indymac Announces Further Right-sizing of its Workforce (Form 8-K, Ex. 99.1), at 1 (Jan. 15, 2008).) Mr. Perry stated at the time that the Company had been "forced to undertake another round of additional guideline cuts in the products we offer" due to the lack of liquidity in the secondary market, that "our pipeline fell 28% in December," and that "we have had to trim our forecast for 2008 volume to $43 billion, compared to $78 billion in 2007 and $92 billion in 2006." (*Id.*) IndyMac's layoffs, along with the Company's poor performance, made the national news. *See Lender to Cut 2,400 Employees, Including Sales Staff in India*, N.Y. Times, Jan. 16, 2008.

a) Disclosures Regarding 2007 Results and Forecast for 2008

On February 12, 2008, IndyMac reported its disappointing results for the fourth quarter of 2007. In addition to the required, robust SEC disclosures, Mr. Perry included a remarkably candid letter to shareholders: "2007 was a terrible year for our industry, for IndyMac, and for you, our owners," the letter began. (IndyMac Bancorp, Inc., 2007 Annual Shareholders Letter (Form 8-K, Ex. 99.1), at 1 (Feb. 12, 2008) ("2007 Shareholders Letter").) "All home lenders," Mr. Perry wrote, "including IndyMac, were a part of the problem, and, as IndyMac's CEO, I take full responsibility for the mistakes that we made." (*Id.* at 3.) The letter explained in detail that non-performing assets had increased eight-fold from 0.63% at December 31, 2006 to 4.61% at December 31, 2007. (*See id.* at 1.)

In a quarterly conference call with investors, Mr. Perry expounded openly on IndyMac's "terrible" 2007 performance and its bleak prospects for 2008. Mr. Perry plainly informed investors that IndyMac experienced "really horrible roll rates" during 2007 and was "going to have more . . . long-term credit default losses." (Tr. of Feb. 12, 2008 Earnings Call, at 4-5, 7.) Mr. Perry also expressly conceded the possibility of large-scale capital raising and/or eliminating dividend payments on the Company's trust preferred securities. In particular, on the February 12, 2008 investor call, Mr. Perry stated:

- "[I]n the worst case scenario . . . we have to be prepared to raise capital and maybe raise capital at a dilutive level." (*Id.* at 14.)

- "[T]here could come a point where we do have to raise dilutive capital. I hope we don't have to do that. I don't think we're going to have to do that. But it is not out of the realm of possibility that we would[] have to do that." (*Id.* at 18.)

- "[I]n the event that the worst case, that we ran out of cash at the holding company, where we weren't able to raise common stock, we have the right to defer those dividends on that trust preferred for up to five years." (*Id.* at 3.)

In addition, IndyMac freely disclosed the possibility that its risk-based capital ratio could fall below 10%. IndyMac's fourth quarter 2007 earnings presentation, issued on February 12, 2008, illustrated a scenario in which the Company's total risk-based capital ratio for 2008 would be 9.78%, which is under the well-capitalized minimum. (IndyMac Bancorp, Inc., Fourth Quarter Earnings Review (Form 8-K, Ex. 99.3), at 26 (Feb. 12, 2008) ("Fourth Quarter 2007 Earnings Review").)

On February 29, 2008, IndyMac filed its Form 10-K for 2007. The Company noted that it had recorded "significant charges" related to credit risk, as well as "valuation adjustments." (2007 10-K at 19.) In addition, "delinquency and repurchase demand trends . . . increased significantly." (*Id.*) As a result, "virtually all" of IndyMac's operating segments reported "material losses in 2007." (*Id.*)

Less than two weeks after filing its annual report, IndyMac provided updated guidance to investors, stating that "significant[ ]" widening of credit spreads, due to "panic market conditions," was "expected to have a negative effect on the value of IMB's MBS portfolio, and therefore on the first quarter 2008 forecast presented to shareholders on February 12, 2008." (IndyMac Bancorp, Inc., Statement on the Impact of the Current State of the Capital Markets to the Company's First Quarter 2008 Forecast (Form 8-K, Ex. 99.1) (Mar. 11, 2008).) The next day, the press reported widely on IndyMac's statement that write-downs on 17 percent of the Company's MBS portfolio would "directly affect earnings and capital." *E.g.*, Harry Terris, *IndyMac: Spreads Will Hurt Results*, American Banker, Mar. 12, 2008.

In addition to taking full responsibility for IndyMac's situation, in a letter to shareholders dated March 24, 2008, Mr. Perry even went so far as to state that if shareholders were unhappy or displeased with his or IndyMac's performance, they could vote against his re-election as director. (IndyMac Bancorp, Inc. Proxy Statement (Form 14A) at 2-3 (Mar. 24, 2008) ("March 24, 2008 Proxy Statement").) And, if that happened, Mr. Perry promised to respect the shareholder vote and resign as President and CEO of IndyMac, as well as forfeit all of the multi-million dollar severance package that he would otherwise have been entitled to receive. (*Id.*) In response, "the votes cast with respect to CEO Mike Perry were 97.2% in favor of his re-election." (Press Release, IndyMac Bancorp, Inc. (May 1, 2008); *see also* Tr. of May 12, 2008 Earnings Call, at 2.)

b) Disclosures Regarding DSPP Sales

On April 3, 2008, IndyMac filed a prospectus announcing an offering of an additional 10 million shares through the DSPP. (*See* IndyMac Bancorp, Inc., Direct Stock Purchase Plan Prospectus (Apr. 3, 2008) ("April 3, 2008 DSPP Prospectus").) The price of IndyMac's stock, which had been continuously battered as a result of repeated negative disclosures over the previous year, actually increased over the next two trading days, from $4.88 per share on April 3, 2008 to $5.07 per share on April 7, 2008.

c) Disclosures Regarding First Quarter 2008 Financial Results

On May 12, 2008, at the end of the period relevant to the Staff's potential claims, IndyMac announced its first quarter results and provided yet another round of detailed negative disclosures. In particular, IndyMac made abundantly clear that the Company was teetering on the edge of becoming "adequately capitalized" as defined by OTS. As Mr. Perry stated:

- IndyMac had decided to "defer the interest on our trust preferred securities at the holding company and suspend the dividends on our non-cumulative, perpetual preferred stock at Indymac Bank." (IndyMac Bancorp, Inc., Earnings Press Release (Form 8-K, Ex. 99.1), at 3 (May 12, 2008).)

- IndyMac contributed $88 million from the holding company to the Bank during the first quarter of 2008 to remain "well capitalized." (Tr. of May 12, 2008 Earnings Call, at 4.)

- Although IndyMac remained "well capitalized," its capital ratios "clearly [had] been depleted," and there were "scenarios in this environment where we could not be well capitalized and end up being adequately capitalized for a short period of time." (*See id.*)

IndyMac's Form 10-Q, filed the same day, explicitly described the precariousness of the Company's regulatory capital situation:

> Moody's Investor Services ("Moody's") and Standard and Poor's Rating Services ("S&P") downgraded the ratings on significant number[s] of MBS backed by non-agency collateral, including certain of those issued by Indymac and for which Indymac has retained interests in its MBS portfolio. . . . Had these ratings been in effect at March 31, 2008, our capital ratios would have been 5.74% Tier 1 core, 8.01% Tier 1 risk-based and 9.27% total risk-based.

(First Quarter 2008 10-Q at 31.)

DISCUSSION

The Staff is considering charging Mr. Perry with alleged violations of (1) the anti-fraud provisions of the securities laws; (2) reporting requirements; and (3) Sarbanes-Oxley certification requirements. As demonstrated below, there is no basis for any such charges.

PART I: THERE IS NO BASIS FOR FRAUD CHARGES AGAINST MR. PERRY.

I. ELEMENTS OF A SECURITIES FRAUD CAUSE OF ACTION

The Staff proposes to charge Mr. Perry with violations of Section 17(a) of the Securities Act of 1933, Section 10(b) of the Exchange Act of 1934, and Rule 10b-5 promulgated thereunder. *See* 15 U.S.C. § 77q; 15 U.S.C. § 78j(b); 17 C.F.R.§ 240.10b-5. The SEC must prove that Mr. Perry, with fraudulent intent, made a material misstatement, or omitted to disclose material information that he had a duty to disclose.[8]

[8] The Staff has not indicated which sub-section(s) of § 17(a) provide the basis for its claims against Mr. Perry. To the extent such claims are based on § 17(a)(1), the Staff must make the same showing as under § 10(b) of the Exchange Act and Rule 10b-5 thereunder. *See SEC v. Dain Rauscher, Inc.*, 254 F.3d 852, 856 (9th Cir. 2001). To the extent the Staff's claims are based on § 17(a)(2) or § 17(a)(3), the Staff need not demonstrate that Mr. Perry acted with scienter. *See id.* All of the arguments set forth below, however, with the exception of those arguments based on the scienter requirement applicable to any fraud claims, apply with equal force to any claims brought under § 17(a)(2) or § 17(a)(3).

A. Falsity

First, the SEC must prove that Mr. Perry made a false or misleading statement. A false statement requires proof that the stated facts were not as represented when the statement was made. Thus, the occurrence of later events that render an earlier statement false, or a general statement expressing a personal opinion or judgment, do not satisfy this element. *See Elam v. Neidorff*, 544 F.3d 921, 927 (8th Cir. 2008) (falsity not established "with allegations that defendants made statements and then showing in hindsight that the statement is false"); *Malin v. XL Capital Ltd.*, 499 F. Supp. 2d 117, 145 (D. Conn. 2007) (statement of opinion "cannot be false at all unless the speaker is knowingly misstating his truly held opinion") (quoting *Podany v. Robertson Stephens, Inc.*, 318 F. Supp. 2d 146, 154 (S.D.N.Y. 2004)).

B. Materiality

Second, the SEC must prove that each alleged misstatement or omission was material. 17 C.F.R. § 240.10b-5(b). A false but immaterial statement or omission is not actionable. *Basic, Inc. v. Levinson*, 485 U.S. 224, 238 (1988) ("It is not enough that a statement is false or incomplete, if the misrepresented fact is otherwise insignificant.").

A fact is material if there is a substantial likelihood that a reasonable investor would consider it important in deciding whether to buy or sell the security at issue. *Id.* at 231-32; *see also No. 84 Employer-Teamster Joint Council Pension Trust Fund v. Am. W.*, 320 F.3d 920, 934 (9th Cir. 2003). Put another way, a fact is material only if there is a substantial likelihood that a reasonable investor would have viewed the misrepresented or omitted fact as "having significantly altered the 'total mix' of information made available." *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976). Like falsity, materiality must be established as to each alleged misstatement or omission. Thus, some alleged misstatements may be material while others are not, just as some statements may be false while others are not. *See Garber v. Legg Mason, Inc.*, 537 F. Supp. 2d 597, 612-14 (S.D.N.Y. 2008) (conducting an independent materiality analysis for each purported material omission), *aff'd*, No. 08-1831-cv, 2009 WL 3109914 (2d Cir. Sept. 30, 2009).

C. Scienter

Third, the SEC must prove that Mr. Perry acted with scienter when he made the allegedly material misstatements or omissions. Scienter is a "mental state embracing an intent to deceive, manipulate or defraud." *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 n.13 (1976). The SEC must prove that each misstatement or omission was made with "deliberate recklessness" that strongly suggests "actual intent" to deceive investors. *In re Silicon Graphics Sec. Litig.*, 183 F.3d 970, 977, 979 (9th Cir 1999). Scienter is not "negligence or even gross negligence." *In re Gander Mountain Co. Sec. Litig.*, Civil No. 05-183 (DWF/AJB), 2006 WL 140670, at *7 (D. Minn. Jan. 17, 2006) (citing *In re K-Tel Int'l, Inc. Sec. Litig.*, 300 F.3d 881, 893 (8th Cir. 2002)). As the Supreme Court recently reiterated, a plaintiff cannot demonstrate scienter "without proving that a defendant made a material misstatement with an intent to deceive — not merely innocently or negligently." *See Merck & Co. v. Reynolds*, No. 08-905, slip op. at 13 (U.S. Apr. 27, 2010) (emphasis in original).

II. THE STATEMENTS CITED BY THE STAFF ARE NOT ACTIONABLE.

The Staff's potential case against Mr. Perry is predicated largely on three statements by Mr. Perry or the Company. None of the three statements was false when made, nor were the statements material. And, like the rest of the Staff's potential "fraud" case against Mr. Perry, there could be no showing in any event that Mr. Perry made these statements or authorized them with the intent to deceive investors.

A. 2007 10-K: "We may be required to raise capital at terms that are materially adverse to our shareholders."

The first statement about which the Staff has expressed concern — which was contained in IndyMac's 2007 Form 10-K filed on February 29, 2008 — noted that the Company "may be required to raise capital at terms that are materially adverse to [its] shareholders." (2007 10-K at 69.) According to the Staff, the use of the word "may" somehow misled investors into thinking that IndyMac had not engaged in DSPP sales in 2008, even though such sales had in fact begun three days earlier, on February 26, 2008. As discussed below, however, this statement was not false, and in any event, the roughly $11 million that IndyMac raised between February 26 and February 29, 2008 was not material.

1. The Statement Was Not False.

IndyMac's statement about the possibility of raising dilutive capital was not false because investors had no reason to believe that IndyMac had ever ceased DSPP sales. Indeed, the disclosure focused on by the Staff does not even refer to DSPP sales, but is instead focused on the possibility of a much more substantial (and dilutive) equity capital raise or re-capitalization. (*See, e.g.*, Perry Testimony Day Two at 426:14-19 (describing 2008 efforts to raise "[a] big slug of capital" with assistance of JP Morgan Chase); Email from Michael Perry to Board (Feb. 28, 2008).) And, we are aware of no evidence adduced during the Staff's more than 22-month investigation suggesting that this disclosure related to the Company's routine, ongoing capital raising through the DSPP.

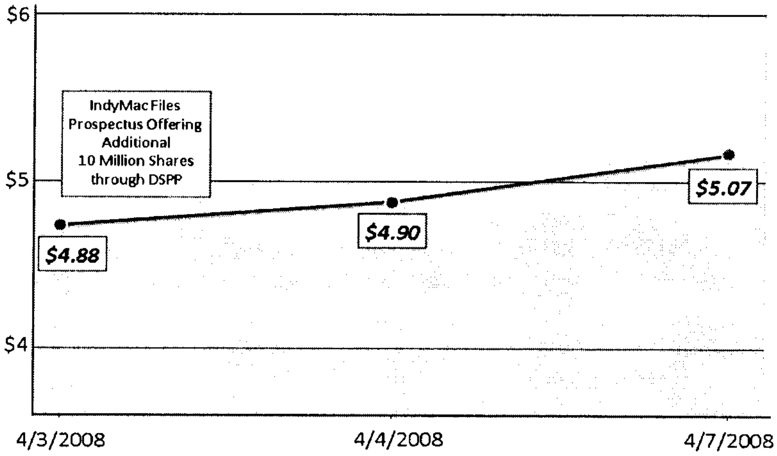
IndyMac's DSPP-related disclosures in the 2007 10-K were entirely consistent with its past disclosures on the topic and were fully accurate. IndyMac first launched its DSPP in 2002. (*See* IndyMac Bancorp, Inc., Direct Stock Purchase Plan Prospectus (July 31, 2002).) From that time forward, the Company followed a consistent disclosure practice regarding the DSPP. The DSPP prospectus in effect in February 2008 made explicitly clear that IndyMac would utilize the DSPP "from time to time." (IndyMac Bancorp Inc., Direct Stock Purchase Plan Prospectus (Oct. 11, 2007) ("October 11, 2007 DSPP Prospectus").) In addition, IndyMac regularly reported the specific amount of capital raised through the DSPP after the capital had been raised. (*See, e.g.*, 2007 10-K at 13, 59; IndyMac Bancorp, Inc., Current Report (Form 8-K), at 42 (Feb. 12, 2008) ("Feb. 12, 2008 8-K"); Third Quarter 2007 10-Q at 44.) When no capital was raised through the DSPP in a given quarter, IndyMac reported that fact, too. (*See, e.g.*, IndyMac Bancorp, Inc., Second Quarter 2007 Report (Form 10-Q), at 41 (July 31, 2007); IndyMac Bancorp, Inc., First Quarter 2007 Report (Form 10-Q), at 56 (Apr. 26, 2007).) Consistent with its established practice, IndyMac's 2007 10-K reported that the Company raised $145.6 million through the DSPP in 2007. (*See* 2007 10-K at 57.)

Put simply, neither the 2007 10-K nor any of IndyMac's other filings gave investors reason to believe that the DSPP was inactive or unavailable. In fact, the very filing relied upon by the Staff made clear that the opposite was true, stating in no uncertain terms that IndyMac raised $145.6 million through the plan during 2007 and that the Plan remained a "principal source[ ] of cash" for the Company. (*See* 2007 10-K at 57, 59.) Under these circumstances, no reasonable investor could have been misled — and there is no evidence that anyone was misled — into believing that IndyMac would not access the DSPP at all in 2008.

2. The $11 Million Raised Through the DSPP Was Not Material.

The small amount of capital — $11 million — raised by IndyMac through the DSPP from January 1 to February 29, 2008 was not material in any event. At this pace, IndyMac could have been expected to raise $66 million through the DSPP for all of 2008, which would have been considerably less than half the amount raised in 2007 ($145.6 million). (*See* 2007 10-K at 59.) Given the extent to which the company accessed the DSPP in 2007, we are hard-pressed to understand how any reasonable investor would have considered it material to his investment decision that IndyMac had raised a mere $11 million through the program through the first two months of 2008. *See* SEC Staff Accounting Bulletin No. 99, 17 CFR Part 211 (1999).

Fortunately, there is no need to speculate about whether investors considered this to be material negative information, because we know they did not based on their response when the information was disclosed. If IndyMac's DSPP sales from February 26-29, 2008 were material to investors, the price of the Company's stock would have dropped after April 3, 2008, when the Company highlighted its ongoing DSPP activities by filing a prospectus for the sale of an additional 10 million shares through the program. (*See* April 3, 2008 DSPP Prospectus.) In fact, however, over the next few trading days, the price of IndyMac's stock increased, from $4.88 on April 3 to $5.07 per share on April 7, 2008:



The market's reaction provides clear proof that the DSPP sales were not a material negative event. *See, e.g.*, *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1425 (3d Cir. 1997) ("[T]he concept of materiality translates into information that alters the price of the firm's stock."); *Home Solutions of Am. Investor Group v. Fradella*, No. 3:06-CV-1096-N, 2008 WL 1744588, at *5 (N.D. Tex. Mar. 24, 2008) (statement not material where "market did not respond" to disclosure of true facts and plaintiffs "offered no theory to save them from the unresponsive market"); *In re Fidelity/Apple Sec. Litig.*, 986 F. Supp. 42, 48 (D. Mass. 1997) (one test of materiality in "a fraud-on-the-market case is an obvious one, whether the alleged misrepresentation in fact had an effect on the market").

B. Mr. Perry's May 1, 2008 "Turned the Corner" Opinion Is Not Actionable.

The Staff has indicated that it intends to allege that Mr. Perry committed fraud by stating, in IndyMac's May 1, 2008 Form 8-K, that he "believe[d]" IndyMac had "turned a corner" and that IndyMac's "business [was] improving." (*See* IndyMac Bancorp, Inc., Indymac Announces CFO Changes, Provides Update on Q108 (Form 8-K, Ex. 99.1) (May 1, 2008) ("May 1 2008 8-K Ex. 99.1").) As discussed below, this statement was not false, and in any event, it constituted nothing more than inactionable puffery. Accordingly, it cannot serve as the basis for a securities fraud claim.

1. Mr. Perry's Opinion that IndyMac Had "Turned the Corner" Was Not False.

Mr. Perry's statement that he "believe[d]" IndyMac had "turned the corner" was not false because Mr. Perry's belief was genuine and reasonable. *In re Apple Computer Sec. Litig.*, 886 F.2d 1109, 1113 (9th Cir. 1989). As the Ninth Circuit has held, "[t]he fact that [a] prediction proves to be wrong in hindsight does not render the statement untrue when made." *In re Verifone Sec. Litig.*, 11 F.3d 865, 871 (9th Cir. 1993).

In the May 1, 2008 Form 8-K, Mr. Perry set forth fully the factual bases for his opinion that IndyMac had "turned the corner." Indeed, he identified six very specific reasons for his outlook:

1. "Our loss for Q108 will decline by roughly 50% to 65% from Q407 . . .

2. Our credit costs in Q108 will be down roughly fourfold from the $863 million we had in Q407.

3. Our operating liquidity remains strong at roughly $4 billion, about the same as a year ago, but our liquidity needs are significantly lower, as last year we had roughly three times the mortgage production as we currently have and our current production is far more liquid.

4. We raised over $670 million in new capital in 2007, in advance of the current crisis and the major capital raises recently completed by other financial institutions impacted by the crisis, and we continue to raise capital every day through our Direct Stock Purchase Plan (DSPP). Since recommencing the DSPP on February 26, we have raised $84 million in new capital through today, including $45 million in the first month of Q208 alone.

5. While mortgage production is a struggle in the current environment, we continue to successfully convert our production to a GSE/FHA/VA model . . .

6. Our forecasts show continued declines in credit costs and in our overall losses each quarter for the remainder of the year."

(May 1 2008 8-K Ex. 99.1.)

The Staff has not suggested that any of the factual assertions underpinning Mr. Perry's opinion were false, and indeed, they were true. For instance, as IndyMac reported in its Form 10-Q for the first quarter of 2008, its loss for the quarter did in fact decline 64% from the fourth quarter of 2007, and its credit costs decreased by 71% over the same period. (*See* First Quarter 2008 10-Q at 3, 4.) Because Mr. Perry set forth his rationale, reasonable investors did not need to rely on the top-line "turned the corner" opinion. Instead, they could look to his underlying factual bases and determine for themselves whether Mr. Perry was focusing on the right indicators or interpreting the indicators correctly. Under these circumstances, Mr. Perry's "turned the corner" opinion cannot be considered "false" within the meaning of the securities laws. *See, e.g.*, *In re Apple Computer Sec. Litig.*, 886 F.2d at 1113 ("statement of belief" actionable only if it is not "genuinely believed," it is made without a "reasonable basis," or speaker is aware of "undisclosed facts tending to seriously undermine the accuracy of the statement").

The full context of the Form 8-K in which Mr. Perry stated his belief that IndyMac had "turned the corner" further demonstrates that the statement was not false. After setting forth the factual bases for his opinion, Mr. Perry noted:

> With the above said, our stock remains under pressure because, as the last major independent home lender, we are at the center of the current storm in the housing and mortgage markets, and, to sustain sufficient capital levels to keep Indymac Bank safe and sound through this crisis period, we have been raising capital every day through the DSPP, which itself puts pressure on our stock price.

(May 1 2008 8-K Ex. 99.1.) Mr. Perry thus made it clear that IndyMac's outlook remained highly uncertain. Although the Staff has focused on three words written by Mr. Perry in the May 1, 2008 Form 8-K, the document, when read in full, contains a robust and nuanced description of IndyMac's prospects. This context makes clear that the statement was not false or misleading. *See, e.g.*, *In re Convergent Techs. Sec. Litig.*, 948 F.2d 507, 512 (9th Cir. 1991).

That Mr. Perry genuinely believed IndyMac had "turned the corner" also is demonstrated by the fact that he did not sell a single share of IndyMac stock during the relevant time period. In fact, on February 15, 2008, Mr. Perry purchased 328,987.99 shares, more than doubling his holdings in the Company. (*See* IndyMac Bancorp, Inc., Statement of Changes in Beneficial Ownership (Form 4) (Feb. 19, 2008) ("Feb. 19, 2008 Form 4").) There is no evidence in this case, whether documentary or testimonial, suggesting that Mr. Perry had a different view of IndyMac's prospects than the opinion he expressed publicly. As a result, this case is the polar opposite of the Commission's case against the former Chairman and CEO of Countrywide Financial Corporation, who is accused of publicly touting Option-ARM loans while at the same time selling company stock and internally expressing serious concerns about the credit risk presented by such loans. (*See, e.g.*, Compl., *SEC v. Mozilo*, No. CV09-03994 VBF (C.D. Cal.)

¶¶ 58-72, 91-100, 111.) Here, because Mr. Perry reasonably believed that IndyMac had in fact "turned the corner," his statement was not false.

2. Mr. Perry's Opinion that IndyMac Had "Turned the Corner" Was Inactionable Puffery.

Mr. Perry's "turned the corner" opinion also is protected from liability under the well-established "corporate puffery" rule. "[S]oft, puffing statements generally lack materiality because the market price of a share is not inflated by vague statements predicting growth." *Parnes v. Gateway 2000, Inc.*, 122 F.3d 539, 547 (8th Cir. 1997); *Lasker v. N.Y. State Elec. & Gas Corp.*, 85 F.3d 55, 58-59 (2d Cir. 1996); *Raab v. Gen. Physics Corp.*, 4 F.3d 286, 289 (4th Cir. 1993). Such statements are characterized by "loose predictions," *Raab*, 4 F.3d at 290, and general expressions of "optimis[m]," *San Leandro Emergency Med. Group Profit Sharing Plan v. Philip Morris Cos.*, 75 F.3d 801, 811 (2d Cir. 1996); *see also Alfus v. Pyramid Tech. Corp.*, 745 F. Supp. 1511, 1519 (N.D. Cal. 1990) ("The courts have held that vague expressions of optimism as to future performance are mere puffing and are not actionable under the securities laws."). As the Fifth Circuit has noted, "generalized positive statements about a company's progress are not a basis for liability." *ABC Arbitrage Plaintiffs Group v. Tchuruk*, 291 F.3d 336, 359 (5th Cir. 2002); *see also In re Peritus Software Servs., Inc. Sec. Litig.*, 52 F. Supp. 2d 211, 220 (D. Mass. 1999) ("corporate puffery" rule covers "loose optimism about . . . an issuer's current state of affairs").

Puffery is inactionable because "[n]o reasonable investor would rely on [puffing] statements, and they are certainly not specific enough to perpetrate a fraud on the market." *Raab*, 4 F.3d at 290. Indeed, "[t]he role of the materiality requirement is not to attribute to investors a child-like simplicity but rather to determine whether a reasonable investor would have considered the omitted information significant at the time." *Parnes*, 122 F.3d at 547.

Mr. Perry's statement that he "believe[d]" IndyMac had "turned a corner" fits squarely within this rule. In *Malin v. XL Capital Ltd.*, 499 F. Supp. 2d 117 (D. Conn. 2007), the court considered a nearly identical statement, in which the defendants said, among other things, "we think we've turned a corner now," *id.* at 144, and, as here, the prediction ultimately proved inaccurate. After reviewing the relevant caselaw, the court found that "no reasonable investor reading these statements would view them as guarantees that [the defendant company's] loss reserves were sufficient; the statements are properly characterized as non-actionable statements of opinion." *Id.* at 145.[9]

Numerous other courts, both within and outside of the Ninth Circuit, likewise have held that statements similar to Mr. Perry's "turned the corner" opinion are not actionable.

[9] The same is undoubtedly true of President Obama's recent remark, in reference to the economy, that "[w]e are beginning to turn the corner." The White House, Office of the Press Secretary, Remarks by the President in a Discussion on Jobs and the Economy in Charlotte, North Carolina, Apr. 2, 2010, *available at* http://www.whitehouse.gov/the-press-office/remarks-president-a-discussion-jobs-and-economy-charlotte-north-carolina.

See, e.g., *In re Copper Mountain Sec. Litig.*, 311 F. Supp. 2d 857, 880 (N.D. Cal. 2004) (statements characterizing business as "solid" and "on track" were "inactionable puffery"); *Steiner v. Tektronix, Inc.*, 817 F. Supp. 867, 879 (D. Or. 1992) (statement that company was "surely turning around" not actionable); *Rintel v. Wathen*, 806 F. Supp. 1467, 1470 (C.D. Cal. 1992) (statement that officer "would expect improved margins and also progressive growth" not material); *see also In re John Alden Finan. Corp. Sec. Litig.*, 249 F. Supp. 2d 1273, 1283 (S.D. Fla. 2003) (statement that company was "on track for an excellent year" not material). Like the statements in these cases, Mr. Perry's speculation was nothing more than one vague expression of optimism. No reasonable investor could have relied on Mr. Perry's general "turned the corner" opinion, especially when considered in the context of the sea of much more specific, negative disclosures made by IndyMac and by Mr. Perry during this period.

C. The May 12, 2008 Statement Regarding the $88 Million Capital Contribution is Not Actionable.

The Staff claims that the following statement in IndyMac's May 12, 2008 First Quarter Review was fraudulent: "The Bancorp contributed $88 million to the Bank during Q1 08." According to the Staff, this statement was materially false because $18 million of the $88 million total was not wired to the Bank until May 9, 2008, even though the funds were available to be wired on March 31, 2008, if needed to keep the Bank "well capitalized," and a receivable was booked on the Bank's balance sheet as of March 31, 2008. As discussed below, the $88 million statement was correct, and was by no means materially false.

1. The $88 Million Statement Was Not False.

The $88 million statement was correct as a matter of accounting and therefore it was correct as a matter of fact. As noted previously, on March 31, 2008, Bancorp contributed $70 million in cash to the Bank. Then, on May 9, 2008, the Bank recorded an $18 million receivable on its balance sheet reflecting an additional contribution from Bancorp. As an initial matter, it bears noting that the Staff is not questioning IndyMac's accounting for the receivable. That is, IndyMac's decision to record a receivable on the Bank's books as of March 31, 2008 — a decision that was approved by both OTS and Ernst & Young before the transaction occurred — is not at issue.

Instead, the Staff claims that use of the phrase "during Q1 08" was false because the $18 million receivable was not recorded until after March 31. However, this position misunderstands the nature of both accrual and bank regulatory accounting. As IndyMac's Chief Accounting Officer Gregory Sosnovich explained, "[s]ince the cash was at the holding company level and it was the company's stated intention to continue to fund the bank and continue to make capital contributions to the bank, I viewed it as something that we . . . could have done at 3/31, . . . and we are now reflecting it as a 3/31 transaction." (Sosnovich Testimony at 118:12-119:10.) Moreover, as an OTS-regulated thrift, it was OTS who had the final say regarding IndyMac Bank's capital levels. After being provided all the relevant information, OTS's Western Region Director (Darrel Dochow) approved IndyMac's booking of the $18 million as of March 31, 2008. In fact, he specifically directed Mr. Perry to amend the Bank's Thrift Financial Report for March 31, 2008 to include the receivable. Once the TFR was amended, it was simply a fact — from an accounting and economic standpoint — that Bancorp had contributed $88 million to the Bank during the first quarter.

That the intent of the statement was to accurately reflect IndyMac's finances is made plain by the fact that it was IndyMac's Chief Accounting Officer who proposed changing the language. Mr. Sosnovich testified that an earlier draft said "$70 million" had been contributed "during" the first quarter and he suggested that the number be changed to "$88 million" to reflect the receivable:

> Q. Did you recall any comments to that particular disclosure?
>
> A. My recollection is that for this draft . . .with the $18 million capital contribution that we now considered to be a first quarter capital contribution, that the $70 million should have been $88 million. . . .
>
> Q. Wait, so you're saying that was your comment to the earnings presentation?
>
> A. I believe it was my – it could have been others as well, I'm not going to take sole credit for it, but I believe based on the events we just talked about a few minutes ago – because again, just looking at this right here, that I – it just stuck out and hit me, so I would think I would have had that comment.

(Sosnovich Testimony at 135-36.)

In other words, after the receivable had been booked, it was not accurate to say that only $70 million was contributed in the first quarter; the accurate number was $88 million. The $18 million in question was a legitimate asset on the Bank's first quarter 2008 balance sheet pursuant to IndyMac's regulator-approved and auditor-approved accounting practices. In fact, the $18 million receivable was paid off on May 9, 2008, before the Company's books were closed or its financial statements filed. The $88 million statement therefore was not false; it was accurate.

2. The Phrase "During Q1 08" In The $88 Million Statement Was Not Material To Investors.

Even if characterizing all of the capital contributions as occurring "during Q1 08" was not fully descriptive, the use of that phrase was not material for at least three reasons:

First, the financial statements of Bancorp and the Bank subsidiary were presented on a consolidated basis. Regardless of whether the Company accounted for the $18 million as cash on the Bancorp balance sheet or as a receivable on the Bank balance sheet, the $18 million would have been accounted for as an asset on the consolidated balance sheet, the only balance sheet disclosed to investors in IndyMac's SEC filings. Thus, investors were presented with the exact same March 31, 2008 balance sheet data to assess IndyMac's financial position.

Second, to the extent that the Company's accounting treatment of the $18 million contribution affected the Bank's capital ratios, investors were already put on notice in the same disclosure that IndyMac might lose its "well capitalized" status. This material issue was fully, extensively, and repeatedly disclosed. Indeed, IndyMac's May 12, 2008 First Quarter Review expressly stated that the Bank's "total risk-based capital ratio of 10.26% at 3/31/08 is close to the well capitalized minimum" (First Quarter 2008 Earnings Review at 3), and "[t]here are scenarios in which we could be adequately capitalized during this crisis." (*Id.*)

Third, even if the May 12, 2008 presentation had detailed the separate contribution date of the $18 million, the Bank's capital ratios would not have changed. (*See, e.g.*, Michael Perry SEC Testimony (Dec. 18, 2009), at 494:10-17 (separate contribution date would not have been "a material issue"; investors "just cared whether we were well capitalized or not, as deemed by our regulators").) IndyMac's March 31, 2008 balance sheet, and thus its capital ratios, were calculated in full accordance with accrual accounting practices and OTS regulations on capital. Investors would not have gained any additional information if IndyMac had disclosed the contribution date of the $18 million. With or without a more detailed disclosure on the $18 million contribution, the Bank remained well-capitalized at March 31, 2008. Accordingly, the distinction between "during Q1 08" and "as of March 31, 2008" or some similar formulation would not have been important to investors.

III. THE ALLEGED OMISSIONS CITED BY THE STAFF ARE NOT ACTIONABLE.

The remainder of the Staff's potential fraud claims against Mr. Perry are based on alleged omissions. These alleged omissions consist of information the Staff believes should have been disclosed to the market at large and/or to the 2008 DSPP Purchasers. Specifically, the Staff claims that IndyMac should have disclosed to all investors (1) in its 2007 10-K and first quarter 2008 10-Q, that OTS changed the manner in which IndyMac was required to risk-weight subprime assets for purposes of calculating regulatory capital ratios; and (2) in its first quarter 2008 10-Q, that, although the Bank was well-capitalized, it may not have been had OTS not permitted IndyMac to book the $18 million receivable as of March 31, 2008.

In addition, the Staff contends that IndyMac should have disclosed to the 2008 DSPP Purchasers: (1) mid-quarter internal forecasts showing lower capital ratios than those forecasted in the February 12, 2008 presentation; (2) the amount of cash remaining at Bancorp after a March 31, 2008 capital contribution to the Bank; and (3) that it was "inevitable" on April 24, 2008 that the Company would have to suspend payment of trust preferred dividends (this decision was made subsequently and disclosed on May 12, 2008).

As discussed below, however, none of this information was material to investors or otherwise required to be disclosed.

A. The Information Allegedly Withheld From the Market At Large Was Not Required to be Disclosed.

The Staff argues that IndyMac should have disclosed to the market at large (1) OTS's removal of the requirement that IndyMac double risk-weight its subprime loans, and

(2) that, but for OTS's approval of the $18 million receivable, IndyMac may not have been "well-capitalized" as of March 31, 2008. In fact, neither of these details were material.

1. OTS Relief From Double Risk Weighting Subprime Assets Was Immaterial.

In earlier years, OTS required that IndyMac, in calculating its risk-based capital ratios, assign double weight to subprime assets. On February 26, 2008, in a phone call with CFO Scott Keys, OTS agreed to waive this historical requirement due to a recognition that IndyMac had a very limited amount of subprime assets. (Keys Testimony Day One at 133-36.) It is undisputed that OTS authorized this change in the Company's calculation of its risk-based capital ratios, which were defined and monitored by OTS.

a) 2007 Form 10-K

In prior years, IndyMac's SEC filings stated in a footnote that subprime assets were attributed double weight in calculating risk-based capital ratios. In the 2007 10-K, because OTS no longer required double-risk weighting, this disclosure was removed. The decision to remove the language from the 2007 10-K was made by CFO Scott Keys, in consultation with Pam Marsh (Head of Investor Relations), Meg Wade (also in Investor Relations), Ruthann Melbourne (Chief Risk Officer), Ernst & Young, and Alston & Bird. (*Id.* at 137-39.) Mr. Perry was not consulted with respect to this disclosure issue. (Perry Testimony Day Two at 254:6-13.) Nobody suggested to Mr. Perry that the OTS's double risk-weighting relief should be disclosed, or even that it was an issue worthy of his attention. The Staff, however, seems to contend that Mr. Perry should have overruled the sensible judgment of his managers and IndyMac's outside advisors and personally caused the Company to disclose the OTS's double risk-weighting relief. This is incorrect because the relief from double risk weighting was not material.

Regardless of whether IndyMac did or did not double risk-weight its subprime assets, the Bank was comfortably "well-capitalized" as of December 31, 2007. The Staff's materiality theory in this case is that minutiae like double risk-weighting were important because they made the difference as to whether the Bank retained its "well-capitalized" status with OTS. But there can be no dispute that double risk-weighting relief was not such a tipping point issue in connection with the Bank's year-end 2007 results. As Mr. Keys testified, the relief from OTS's double risk-weighting requirement "made a 31 basis point difference as of December 31, 2007 to total risk based capital." (Keys Testimony Day One at 137:1-4.) Total risk based capital without double weighting of subprime loans, as reported in the 2007 10-K, was 10.81%. (2007 10-K at n.22.) OTS's "well-capitalized minimum requirement" was 10.00%. (*Id.*) Thus, without the double risk-weighting relief, IndyMac's total risk based capital ratio would have still been 10.50%, 50 basis points above OTS's baseline well-capitalized requirement. With or without the relief, as of the end of fiscal year 2007, IndyMac remained comfortably "well-capitalized." As Scott Keys testified, there were never "any concerns" that IndyMac would "not be above the ten percent" threshold as of December 31, 2007. (Keys Testimony Day One at 89:18-20.) Under these circumstances, even under the Staff's materiality theory, the double risk weighting relief was not a material issue in the 2007 10-K.

Moreover, IndyMac did, in fact, disclose both the pre-subprime risk-weighted and subprime double risk-weighted total risk based capital ratios. When it released its earnings for 2007 on February 12, 2008, the Company disclosed its capital ratios using double risk weighting for subprime assets. (*See* Fourth Quarter 2007 Earnings Review at 3.) And, it did so again in the 2007 10-K. Whether or not this was a drafting error, note 22 in the 2007 10-K showed only the pre-subprime risk-weighted total risk based capital ratio (10.81%); and page 16 of the same document presented a total risk based capital ratio that included double risk-weighting (10.50%). So, even assuming this issue was material to investors reading the 2007 10-K, the double-risk weighted capital ratios were disclosed.

b) First Quarter 2008 Form 10-Q

A similar analysis applies with respect to IndyMac's First Quarter 2008 Form 10-Q. Here again, the central issue was that IndyMac was close to falling below "well capitalized." And, IndyMac disclosed that fact extensively.

IndyMac's Form 10-Q disclosed that its regulatory capital ratios were 5.74% Tier 1 Core, 9.00% Tier 1 risk-based, and 10.26% total risk-based. (First Quarter 2008 Earnings Review at 6.) In describing these results to investors, Mr. Perry underscored that, although IndyMac remained "well capitalized," the Bank's capital ratios "clearly [had] been depleted," and there were "scenarios in this environment where we could not be well capitalized and end up being adequately capitalized for a short period of time." (Tr. of May 12, 2008 Earnings Call, at 4.)

And, the Form 10-Q outlined in detail one of these scenarios: Subsequent to quarter end, Moody's and S&P had downgraded the ratings on a significant number of MBS held on IndyMac's balance sheet, and these downgrades had severely weakened IndyMac's capital ratios. As the 10-Q stated, "[h]ad these ratings been in effect at March 31, 2008, our capital ratios would have been 5.74% Tier 1 core, 8.01% Tier 1 risk-based and 9.27% total risk-based." (First Quarter 2008 10-Q at 31.) The 10-Q thus left no doubt that IndyMac was precariously close to falling below "well-capitalized" status. As Mr. Abernathy testified, the above-referenced disclosure was made "to inform the reader that there was that risk . . . there was a very real possibility that we could become less than well capitalized." (Blair Abernathy SEC Testimony (Dec. 11, 2009) at 435:22-437:5 ("Abernathy Testimony Day Two").)

The Staff believes that IndyMac should have included a similar disclosure regarding the removal of the double-risk weighting requirement. Such a disclosure would have said, in essence, *"had we been required to double risk weight our subprime assets, our total risk based capital ratio would have been a few basis points above or below 10%."* It is hard to understand how any reasonable investor would believe such a statement materially added to the total mix of information available. At the end of the first quarter, IndyMac was, by its own admission, at risk of losing its "well-capitalized" status. And, it specifically disclosed one scenario — out of many possible scenarios — that would have knocked the Bank down to "adequately capitalized" by a margin much greater than that resulting from other possible scenarios. With this disclosure, the point was made: *These are difficult times. Although we are now deemed "well-capitalized" by OTS, that could change at any time.*

Investors well understood the import of IndyMac's transparent disclosures on May 12, 2008. On the first trading day after the First Quarter 2008 10-Q was filed, the price of IndyMac's stock dropped over 34%.

2. IndyMac's First Quarter 2008 Form 10-Q Contained No Material Omission Regarding the $18 Million Receivable.

The Staff also contends that IndyMac's first quarter 2008 Form 10-Q should have disclosed that the Bank may not have been "well capitalized" if OTS had not permitted IndyMac to book the $18 million receivable as of March 31, 2008. But this detail was not material for the same reason that the change in risk-weighting of subprime assets was not material.

As discussed above, the material issue — if there was one — was that the Bank was close to falling to "adequately" capitalized. And this issue was disclosed repeatedly. As Mr. Perry said in no uncertain terms on the May 12, 2008 earnings call, there were "scenarios in this environment where we could not be well capitalized and end up being adequately capitalized for a short period of time." (Tr. of May 12, 2008 Earnings Call, at 4.) This disclosure along with the detailed MBS downgrade disclosure made crystal clear that the Bank was very close to potentially losing its "well capitalized" status with OTS. The Staff has not explained why — nor will it be able to prove that — each and every "but for" event affecting IndyMac's capital ratios needed to be explained to investors. Indeed, if the Staff's approach were adopted, there would be no stopping point. Companies would be required to prepare at least two sets of disclosures: one reflecting actual results based on events that actually happened; and one hypothesizing what the results might have been had each of the events not occurred.

B. The Information Allegedly Withheld From DSPP Purchasers Was Not Required to be Disclosed.

The Staff's "ongoing offering fraud" theory faces at least three insurmountable hurdles. First, IndyMac had no obligation to disclose its internal mid-quarter forecasts, which were fluid and constantly evolving in a period of unprecedented turbulence in the financial markets. Second, the information that the Staff believes DSPP investors would have wanted to know in fact was not material to any investor. Third, in light of their unique sophistication and investment strategies, the information allegedly omitted by IndyMac would have been especially unimportant to the 2008 DSPP Purchasers.

1. IndyMac Did Not Have a Duty to Disclose Internal Forecasts.

The Staff has suggested that, during IndyMac's offering of stock through its DSPP, the Company and Mr. Perry specifically had a "duty to update" potential investors about changes in the Company's forecast for 2008 presented to the market on February 12. However, it is well-settled that there is no duty to disclose internal forecasts. *See, e.g.*, *In re Verifone Sec. Litig.*, 11 F.3d 865, 869 (9th Cir. 1993); *In re Convergent Techs. Sec. Litig.*, 948 F.2d 507, 516 (9th Cir. 1991)). In rejecting such an obligation, the Ninth Circuit has emphasized the uncertainty surrounding intra-period projections. *See In re Convergent Techs.*, 948 F.2d at 516. The court has also questioned whether, in the absence of specific evidence to the contrary, such projections are "made with such reasonable certainty even to allow them to be disclosed to the public." *Id.* (emphasis in original).

IndyMac's efforts to predict its capital ratios for the first quarter of 2008 demonstrate the seriousness of this concern. During February and March 2008, interest rates were subject to significant fluctuations, which caused the value of IndyMac's Mortgage Servicing Rights Asset — a key factor in the Company's capital ratios — to fluctuate as well. (*See* Keys Testimony Day One at 93:14-95:10.) In an attempt to manage this volatility, the Company ran forecasts based on "shocks" of the prevailing market view of future interest rates. (*Id.* at 152:9-18.) Given the instability in the market, IndyMac often produced multiple forecasts in a single business day. And, depending on the underlying assumptions used, these internal forecasts showed total risk-based capital ratios for March 31, 2008 ranging from a low of about 9% to a high of over 13%. Under such circumstances, it would have been irresponsible for IndyMac to disclose its internal forecasts, and the Company was under no obligation to do so.

2. IndyMac Had No Duty to Update DSPP Purchasers About the Other Alleged Omissions Cited by the Staff.

The Staff also claims that IndyMac and Mr. Perry specifically had a "duty to update" potential investors in the DSPP about (1) the amount of cash on hand at IndyMac Bancorp; and (2) the purportedly impending decision to suspend payments of dividends on the holding company's trust preferred securities. As discussed below, there was no duty to disclose this information.

The Ninth Circuit has never endorsed a "duty to update true statements in the event that circumstances change." *See In re Foxhollow Techs., Inc. Sec. Litig.*, No. 08-16469, 2009 WL 4913215, at *1 (9th Cir. Dec. 4, 2009). Courts that have recognized such a duty have found it implicated only where "statements that, although reasonable at the time made, become misleading when viewed in the context of subsequent events." *See United States v. Schiff*, 602 F.3d 152, 170 (3d Cir. 2010); *In re Int'l Bus. Machs. Corp. Sec. Litig.*, 163 F.3d 102, 110 (2d Cir. 1998); *see also Basic*, 485 U.S. at 239 n.17 ("Silence, absent a duty to disclose, is not misleading under Rule 10b-5.") In particular, a duty to update "has only been plausible in cases where the initial statement concerns fundamental[ ] change[s] in the nature of the company — such as a merger, liquidation, or takeover attempt — and when subsequent events produce an extreme or radical change in the continuing validity of that initial statement." *Schiff*, 602 F.3d at 170 (alterations in original).

Relying principally on *Shaw v. Digital Equip. Corp.*, 82 F.3d 1194 (1st Cir. 1996),[10] the Staff has asserted that, during an ongoing sale of stock through a Form S-3 shelf registration statement, a company has a heightened duty to update. In *Shaw*, the First Circuit

[10] The Staff has also relied on *Gallagher v. Abbott Labs.*, 269 F.3d 806 (7th Cir. 2001). That case, however, did not deal with an alleged misstatement or omission in a registration statement or prospectus, and thus, its discussion of a company's duty to disclose information in connection with such documents is pure *dicta*, *see id.* at 810-11.

considered whether a company was required to disclose information about the quarter then in progress. *See id.* at 1207. The defendant argued, "in essence, that there can never be a duty to disclose internally known, pre-end-of-quarter financial information." *Id.* at 1210. The court rejected this *per se* argument and held: "If, as plaintiffs allege here, the issuer is in possession of nonpublic information indicating that the quarter in progress at the time of the public offering will be an extreme departure from the range of results which could be anticipated based on currently available information, it is consistent with basic statutory policies favoring disclosure to require inclusion of that information in the registration statement." *Id.*

Consistent with more recent caselaw on the duty to update, *see, e.g.*, *Schiff*, 602 F.3d at 170, *Shaw* turned largely on the allegation that the defendant company had information "indicating some substantial likelihood that the quarter would turn out to be an extreme departure from publicly known trends and uncertainties," *see Shaw*, 82 F.3d at 1211. Where, as here, the allegedly undisclosed information does not meet *Shaw*'s stringent standard, however, there is no duty to update. *See e.g.*, *SEC v. Butler*, No. 00-1827, 2005 WL 5902637, at *7 (W.D. Pa. Apr. 18, 2005) (meetings attended by defendant "did not indicate a 'disastrous quarter-to-date' performance"); *In re Turkcell Iletisim Hizmetler, A.S. Sec. Litig.*, 202 F. Supp. 2d 8, 12 (S.D.N.Y. 2001) (plaintiffs failed to show that "9% drop in operating income" met *Shaw*'s "extreme departure" standard); *In re N2K Inc. Sec. Litig.*, 82 F. Supp. 2d 204, 208 (S.D.N.Y. 2000), *aff'd* 202 F.3d 81 (2d Cir. 2000) (losses for "the interim period in question were not beyond the range of plausible results based on available information at the time of the offering").

a) IndyMac's Statement about Cash at the Holding Company Did Not Concern Fundamental Company Changes and Was Never Radically Altered.

IndyMac's February 12, 2008 Earnings Review presentation stated that, as of December 31, 2007, IndyMac had roughly $64 million in cash at the holding company. (*See* Fourth Quarter 2007 Earnings Review at 5.) According to the Staff, Mr. Perry had a duty to update this statement after a March 31, 2008 capital contribution from the holding company to the bank. This is incorrect.

IndyMac's statement did not concern a "fundamental change" at the Company. *See Schiff*, 602 F.3d at 170. Even assuming a statement about something other than a "merger, liquidation, or takeover attempt," *see id.*, may trigger a duty to update under certain circumstances, the Company's statement about the amount of cash at the holding company does not fall anywhere close to this line. Indeed, the officers most involved with preparing IndyMac's SEC filings — former CFOs Scott Keys and Blair Abernathy — never even considered disclosing this detail or discussed doing so with anyone. (A. Scott Keys SEC Testimony (Nov. 20, 2009) at 249; Abernathy Testimony Day Two at 297.) Under these circumstances, there is no basis for concluding that the change in the level of cash at the holding company represented a "fundamental change" triggering the duty to update.

Moreover, the Staff's focus on the cash level on only one specific day — March 31, 2008 — ignores the fact that this figure was in flux. By May 2. 2008 (about a month later), the holding company's cash had risen back up to $64,774,000. (IndyMac Bank Daily Treasury/Corporate Finance Report (May 5, 2008).) Given these fluctuations, and the lack of operations at the holding company, there is no reason to believe investors cared about the day-to-day or week-to-week moves in the holding company's cash level. Stockholders understood that Bancorp was a holding company with no operations and that their investment was in the Bank. (*See* Fourth Quarter 2007 Earnings Review at 5 ("100% of our operating activities are housed in the bank.").) As far as we can determine, no analyst or investor ever asked about the amount of cash at the holding company during IndyMac's extensive quarterly earnings webcasts (*see* Tr. of Feb. 12, 2008 Earnings Call; Tr. of May 12, 2008 Earnings Call), and we are not aware of any analyst report that ever commented on the issue. In light of the complete lack of evidence that investors cared about the amount of cash at the holding company, the changes in this figure in early 2008 — both downward and upward — did not represent "extreme departures" from public expectations concerning the Company and were not required to be disclosed.

Finally, the point Mr. Perry was making with respect to the level of cash at the holding company was that the obligations at the holding company would not threaten the viability of the Bank. As Mr. Perry explained on the earnings call:

> [W]e haven't operated any of our business activities outside our thrift. As a result, we don't have any business or operations at our holding company, and we only have one creditor at our holding company, which is $441 million of 30-year trust preferred securities, where we pay a quarterly dividend payment of $7.3 million. The only asset that we have at the holding company is cash, and we essentially have two years of the dividend payments for that debt obligation at the holding company. We can pay all of '08's and all of '09's dividend without any dividends from the bank. In addition, at some point, we believe that we will be able to raise some capital, which will also contribute to paying that dividend.
>
> The bottom-line though is in the event that the worst case, that we ran out of cash at the holding company, where we weren't able to raise common stock, we have the right to defer those payments on that trust preferred for up to five years. And obviously, we don't expect to exercise that right. But the bottom line is, we feel that our holding company is in pretty good shape to weather this storm from a liquidity standpoint.

(Tr. of Feb. 12, 2008 Earnings Call, at 3.)

The crux of this statement (and the accompanying slide) was that the holding company would not be the cause of a liquidity crisis. This did not change as a result of the capital contribution to the Bank: there were no business operations at the holding company that could have triggered a liquidity event. To the contrary, the holding company's primary obligation was the payment of dividends on the trust preferred securities. And, because of the ability to unilaterally defer the dividend payments on those securities, the precise amount of cash available at the holding company did not materially affect the holding company's viability.

b) Mr. Perry's Statement about the Suspension of Trust Preferred Dividends Was Not Actionable and Did Not Trigger a Duty to Update.

On February 12, 2008, during IndyMac's quarterly investor earnings call, Mr. Perry stated that he did not "realistically see that [IndyMac] would ever defer [ ] payment" on the holding company's trust preferred securities. (*See* Tr. of Feb. 12, 2008 Earnings Call, at 22.) According to the Staff, Mr. Perry had a duty to update this statement by April 24, 2008 when, the Staff asserts, it became "inevitable" that IndyMac would suspend payment of dividends on such securities. As set forth below, however, Mr. Perry had no duty to update this statement.

As a preliminary matter, Mr. Perry's statement itself was not actionable. In the same quarterly investor call in which he made the statement in question, Mr. Perry expressly admitted the possibility of suspending dividend payments on the holding company's trust preferred securities. (*See* Tr. of Feb. 12, 2008 Earnings Call, at 3 ("[I]n the event that the worst case, that we ran out of cash at the holding company, where we weren't able to raise common stock, we have the right to defer those dividends on that trust preferred for up to five years.").) Moreover, the Staff has not asserted, and there is no evidence to suggest, that at the time this statement was made, IndyMac had plans to suspend the trust preferred dividend. Under such circumstances, Mr. Perry's statement cannot give rise to a claim of securities fraud. As one court has explained:

> [A]ny statement of a company executive, or even a member of the Board, from which an investor might infer the likelihood of a particular level of dividend continuing in the future comes inherently qualified as to time and authority. No matter how couched, it is, at best, a short-term prediction by someone who lacks both actual and apparent authority to make the relevant decision. Even if wrong, such statements of opinion are not actionable.

In re Int'l Bus. Machs. Corp. Sec. Litig., 954 F. Supp. 81, 84 (S.D.N.Y. 1997), *aff'd*, 163 F.3d 102 (2d Cir. 1998) (finding inactionable Board member's statement that he had "no plan, no desire, and [saw] no need to cut the dividend").

Mr. Perry's prediction about the future viability of dividend payments on the holding company's trust preferred securities also did not give rise to a duty to update. In particular, the statement was accompanied by extensive disclosures of the risks that might cause actual events to differ from Mr. Perry's prediction. As the Form 8-K filed February 12, 2008 stated, "Actual results and the timing of certain events could differ materially from those projected in or contemplated by [ ] forward-looking statements due to a number of factors, including: the effect of economic and market conditions." (Feb. 12, 2008 8-K at 3.) The Form 8-K further cautioned: "Indymac does not undertake to update or revise forward-looking statements to reflect the impact of circumstances for events that arise after the date the forward-looking statements are made." (*Id.*)

These warnings insulate Mr. Perry from liability because, to the extent an officer or director discloses forward-looking information to the market, no claim for securities fraud will lie if "precise cautionary language elsewhere in the document adequately discloses the risks involved." *See In re Worlds of Wonder Sec. Litig.*, 35 F.3d 1407, 1413 (9th Cir. 1994); *see also Grossman v. Novell, Inc.*, 120 F.3d 1112, 1122 (10th Cir. 1997). Here, the warnings in IndyMac's Form 8-K, filed the same day as Mr. Perry made the statement the Staff asserts he was required to update, fully disclosed the risks related to any prediction about IndyMac's future, including any prediction about whether the Company might or might not suspend the payment of dividends on its trust preferred securities.

Moreover, IndyMac's decision to suspend trust-preferred dividend payments was timely disclosed on May 12, 2008, only a few days after it was made. (Abernathy Testimony Day Two at 346:18-22.) The Staff contends that the decision to suspend the trust-preferred dividend was a *fait accompli* by April 24, 2008, but this is not supported by the record. In fact, on May 6, 2008 — weeks after the Staff alleges the decision had been made — IndyMac CFO Blair Abernathy recommended in an email to Mr. Perry that the Company "continue to pay the dividends for one more quarter." (Email from Blair Abernathy to Michael Perry (May 6, 2008).) Although, in the end, the Board decided to suspend the dividend notwithstanding the CFO's May 6 recommendation, the fact remains that the decision was not made until it was made. As Mr. Abernathy explained, "until the board approve[d] [the decision] with their expertise and with their decisionmaking authority," the decision had not been made. (Abernathy Testimony Day Two at 353:12-19.)

C. The Alleged Omissions Were Not Material to the Sophisticated Investors in IndyMac's DSPP.

The Staff's DSPP purchaser fraud theory also is undermined by the highly sophisticated nature of the 2008 DSPP Purchasers and their investment strategies. As the Ninth Circuit has made clear, in determining whether allegedly undisclosed information is material to a distinct group of investors, a district court may consider the sophistication of those investors. *See McGonigle v. Combs*, 968 F.2d 810, 817 (9th Cir. 1992). In *McGonigle*, the court explained: "The investors here were by no means neophytes or persons otherwise unacquainted with business and financial affairs. The district court was entitled to take that fact into account in determining whether a reasonable shareholder in their position would consider the [information] significant." *Id.*; *see also Paracor Finan., Inc. v. Gen. Elec. Capital Corp.*, 96 F.3d 1151, 1159 (9th Cir. 1996) ("The investors were not novices in financial markets; these statements, although hedged with reassurances, were sufficient to put them on notice that [the defendant's] fan sales were not breezing along as usual").

The 2008 DSPP Purchasers were led by Bear Stearns — at the time a Wall Street powerhouse with deep experience in the capital markets. Given their sophistication, these institutional investors knew full well that IndyMac was, as Mr. Perry disclosed, "at the center of the storm." Specifically, by February 13, 2008, the day after IndyMac released its fourth quarter 2007 financial results and before any alleged omission had occurred, the 2008 DSPP Purchasers knew that the price of IndyMac's stock had dropped to $8.03 from as high as $40 just a year earlier. These highly sophisticated investors also were well aware that at least five analysts had given the stock a rating of "Sell" or its equivalent. (*See* FBR Analyst Report (Nov. 7, 2007);

Lehman Brothers Analyst Report (Nov. 8, 2007); S&P Analyst Report (Nov. 10, 2007); RBC Analyst Report (Feb. 13, 2008); KBW Analyst Report (May 12, 2008) (showing rating history for prior dates).) IndyMac's difficulties had been fully and candidly documented in the Company's own disclosures and in the reports of market analysts and the news media. In light of the flood of negative information to which the Company had been subject over the previous year, no reasonable investor could have failed to understand that IndyMac was in trouble. *See, e.g.*, *In re Convergent Techs. Sec. Litig.*, 948 F.2d 507, 513 (9th Cir. 1991) (omission "is materially misleading only if the information has not already entered the market").

The investors in IndyMac's DSPP, however, were not simply average reasonable investors — they were nine highly sophisticated institutions that well understood the challenges confronting IndyMac and sought to profit from them. Indeed, the record is clear that the 2008 DSPP purchasers were engaged in short sales of IndyMac stock in order to profit from the difference between the market price of the stock and the price at which it was offered through the DSPP. (*See* Perry Testimony Day One at 157:1-10 (2008 DSPP investors "really weren't owning the stock"; rather, they "were shorting it on a daily basis during their investment period to earn the arbitrage of the one percent discount"); Keys Testimony Day One at 125:3-7 (DSPP purchasers "would enter into short sales of the amount" of stock they sought to purchase through DSPP, after which IndyMac "would issue the shares to those buyers and they would use those shares to close their short position").)[11]

Given all of the information known to the market and all of the experience possessed by the 2008 DSPP Purchasers, it hardly seems possible — let alone likely — that a reasonable investor in their position would have considered any of the allegedly undisclosed information significant.

IV. MR. PERRY DID NOT ACT WITH SCIENTER.

Even assuming that the Staff could establish that Mr. Perry made materially false statements or omissions (and the facts do not support this), a jury would not find fraud here. Given Mr. Perry's transparency and openness with investors (and other stakeholders), his good faith belief in the truth of his statements, and his personal investment in IndyMac stock (which cost him many millions of dollars), the only reasonable conclusion is that any misstatements or omissions were made inadvertently, with no intent to deceive (and without negligence).

To prevail in a fraud case, the Staff must prove that Mr. Perry acted with scienter, or fraudulent intent. His conduct must have been an "extreme departure" from the standards of ordinary care, which presented a danger of misleading investors that was "known" to Mr. Perry

[11] Additional proof that investors were well aware of the issues facing IndyMac is provided by the large amount of short interest in the Company's stock. For example, according to one analysis conducted in March 2008, IndyMac had the seventh highest short interest ratio (13.9%) among the top 100 stocks traded on the New York Stock Exchange. *See* Michael McDonough, *Short Interest Ratio NYSE Top 100*, Fiat Economics (Mar. 28, 2008), *available at* http://fiateconomics.blogspot.com/2008/03/short-interest-ratio-nyse-top-100_2262.html.

or was "so obvious that [he] must have been aware of it." *See Provenz v. Miller*, 102 F.3d 1478, 1490 (9th Cir. 1996). Any omission relied upon by the Staff must have been "highly unreasonable." *Zucco Partners, LLC v. Digimarc Corp.*, 552 F.3d 981, 991 (9th Cir. 2009). The Ninth Circuit has described the relevant standard as one of "deliberate recklessness," since it requires "some degree of intentional or conscious misconduct." *S. Ferry LP, No. 2 v. Killinger*, 542 F.3d 776, 782 (9th Cir. 2008). As the Supreme Court recently reiterated, a plaintiff must prove that a defendant "made a material misstatement with an intent to deceive — not merely innocently or negligently." *See Merck & Co. v. Reynolds*, No. 08-905, slip op. at 13 (U.S. Apr. 27, 2010) (emphasis in original).

A. Ernst & Young and OTS Approval Negate Any Inference of Scienter.

Mr. Perry unquestionably did not act with scienter with respect to any of the statements or alleged omissions identified by the Staff. Several of the statements and omissions pertain to matters that were expressly approved by IndyMac's outside auditors, Ernst & Young and the OTS (in addition to outside counsel, IndyMac's independent directors, and dozens of senior managers). Specifically, IndyMac's accounting for the $18 million receivable was approved by these independent entities. In addition, Mr. Keys discussed the subprime risk-weighting change in the Form 10-K with the FDIC, OTS, and E&Y and none of them objected. Under these circumstances, any inference of scienter on the part of Mr. Perry that might exist is negated by auditor and regulator approval. *See, e.g.*, *In re REMEC Sec. Litig.*, --- F. Supp. 2d ---, No. 04-CV-1948-MMA (AJB), 2010 WL 1676741, at *33 (S.D. Cal. Apr. 21, 2010) ("Plaintiffs' speculation that [an individual defendant] knew the company's goodwill was impaired . . . is negated by Ernst & Young's opinion that the assumptions were reasonable."); *In re Cirrus Logic Sec. Litig.*, 946 F. Supp. 1446, 1465 (N.D. Cal. 1996) (even if plaintiffs had raised material issue of fact that company violated GAAP, Ernst & Young's "review and approval" of audit procedures "would have negated any inference of scienter").

B. The Facts Negate Any Inference of Scienter With Respect to the Three Alleged Misstatements.

Scienter cannot be established with respect to any of the three alleged false statements for other reasons as well. As previously discussed, when Mr. Perry said in the 2007 Form 10-K that IndyMac "may be required to raise capital at terms that are materially adverse to [its] shareholders," he was focusing on a major capital raise, not the Company's periodic access to the DSPP. Given the Company's prior use of the DSPP and all of the negative disclosures about capital already present in the 2007 Form 10-K, what possible motive would Mr. Perry have had to intentionally deceive investors on this issue? There is not a single document or a single shred of testimony to suggest that Mr. Perry was seeking to mislead investors on the use of the DSPP. Indeed, this point is proven out by the fact that IndyMac's stock rose shortly after the access to the DSPP was announced, thus further negating the assertion that Mr. Perry was seeking to hide this purportedly negative material information from the market.

Similarly, no scienter can be established when Mr. Perry said he "believed" IndyMac had "turned the corner." As explained above, Mr. Perry's belief was genuinely held and was based on six very specific reasons that Mr. Perry identified at the time he expressed his opinion. Moreover, in the same disclosure, Mr. Perry expressly caveated his opinion, noting that "we are at the center of the current storm." (May 1 2008 8-K Ex. 99.1.) Such a fact pattern is hardly suggestive of scienter, and, under applicable caselaw, no scienter can be found.

Finally, the Staff cannot establish scienter when Mr. Perry said Bancorp had contributed $88 million to the Bank "during Q1 08." We have already explained how the express approval of the $18 million receivable by the OTS and E&Y negates any inference of scienter. However, the point holds based purely on common sense: if Mr. Perry had intended to deceive the market about IndyMac's capital contributions to its subsidiary Bank, he surely would not have explained the transaction in exquisite detail in a conversation with the OTS Regional Director and then a follow-up conversation with both the OTS Regional Director and E&Y. That Mr. Perry said "during Q1 08" rather than some other formulation preferred by the Staff is at most linguistic fine-tuning — a far cry from scienter.

C. Mr. Perry Could Not Have Acted With Scienter With Respect to Details That Nobody Ever Considered Disclosing.

With respect to the other alleged omissions, there is literally no evidence — no documents and no witnesses — suggesting that Mr. Perry (or anyone else at IndyMac) intended to hide information from investors. The Staff has not asserted, and there is no evidence to suggest, that anyone ever advised Mr. Perry to disclose any of the information that the Staff alleges was omitted. In fact, IndyMac had a formal Sarbanes-Oxley certification process created for the purpose of facilitating discussion of concerns or issues with the Company's financial statements or disclosures. None of the scores of senior managers and other key accounting, legal, and finance personnel involved in this process ever brought to Mr. Perry's attention contemporaneously any of the details highlighted by the Staff in retrospect. Under these circumstances, it would be extremely difficult — if not impossible — for the Staff to prove scienter. *See, e.g.*, *Durgin v. Mon*, 659 F. Supp. 2d 1240, 1256 (S.D. Fla. 2009) (plaintiff failed to adequately plead scienter where there were no allegations that "anyone advised Defendants or expressed concern to Defendants that the Company was engaging in fraud"); *SEC v. Coffman*, No. 06-cv-00088-REB-BNB, 2007 WL 2412808, at *14 (D. Colo. Aug. 21, 2007) (SEC failed to establish scienter where there was "no evidence that anyone suggested to [the defendant] that . . . assets were impaired").

D. An Allegation of Scienter is Wholly At Odds With Mr. Perry's Open and Transparent Management Style.

The Staff's scienter challenge in this case is magnified by many times because of Mr. Perry's open and transparent management style. In fact, when it comes to disclosures, the record developed by the Staff's investigation is replete with examples of Mr. Perry's tendency to share more rather than less. For instance, as Ernst & Young noted in a memo subpoenaed by the Staff:

> [OTS regulators Steve] Gregovich and [David] Hewes commented [that] management cooperation and transparency was very good and consistent with prior periods. They also acknowledged the CEO of IndyMac [Mr. Perry] provides periodic email updates to the OTS on all significant developments at IndyMac, positive or adverse, and the OTS has no management-related issues.

(E&Y Q1 2008 Review.)

To prevail on its "fraud" theory, the Staff would need to show that, at the same time Mr. Perry was sharing "all significant developments at IndyMac, positive or adverse" with OTS, he was somehow hiding information from shareholders. Such a theory is unsound on its face.

Other examples similarly undermine any allegation of scienter. Mr. Perry testified that the financial metrics he disclosed to shareholders were the same metrics he used to run the Company. (*See, e.g.*, Perry Testimony Day One at 142:19-21.) And Mr. Perry is hardly one who shied away from tough issues when communicating with shareholders:

- It was Mr. Perry who told investors in no uncertain terms on December 6, 2007 that IndyMac was "in the eye of [the] storm." (December 6, 2007 Response to Shareholder Suggestion.)

- It was Mr. Perry who, in his 2007 Annual Shareholders Letter, said "2007 was a terrible year for our industry, for IndyMac, and for you, our owners," and that "[a]ll home lenders, including IndyMac, were a part of the problem, and, as IndyMac's CEO, I take full responsibility for the mistakes that we made." (2007 Shareholders Letter at 1.).

- And, it was Mr. Perry who, in IndyMac's March 24, 2008 Proxy Statement, told shareholders that if they were unhappy with his or IndyMac's performance, they could vote against his re-election as director and he would resign as President and CEO of IndyMac and voluntarily forfeit the right to his multi-million dollar severance package. (March 24, 2008 Proxy Statement at 2-3.)

This kind of candor and acceptance of responsibility is entirely inconsistent with a charge of scienter, and any reasonable jury will conclude as much.

E. Mr. Perry's Stock Purchases Negate Any Inference of Scienter.

In addition to the specific scienter deficiencies noted above, there is another insurmountable problem with showing Mr. Perry's scienter, namely, his IndyMac stock purchases during the relevant time period. Herein lies the irony of the Staff's potential claims. Mr. Perry (who supposedly defrauded investors) did not sell a single share of his IndyMac stock from January 2006 through IndyMac's failure. Indeed, Mr. Perry actually purchased additional shares (twice) at allegedly inflated stock prices. On March 23, 2007, Mr. Perry paid more than $1 million for 35,000 shares of IndyMac. (*See* IndyMac Bancorp, Inc., Statement of Changes in Beneficial Ownership (Form 4) (Mar. 23, 2007)). Then, nearly 11 months later, on February 15, 2008, right in the middle of his supposed fraud, Mr. Perry purchased an additional 328,987.99 shares — at a cost of more than $2.6 million — more than doubling his holdings. (*See* Feb. 19, 2008 Form 4.)

Courts routinely hold that stock purchases negate any inference of scienter. *See In re Bristol-Myers Squibb Sec. Litig.*, 312 F. Supp. 2d 549, 561 (S.D.N.Y. 2004) (defendants increased holdings during class period are "wholly inconsistent with fraudulent intent"); *see also Malin v. XL Capital Ltd.*, 499 F. Supp. 2d 117, 152 (D. Conn. 2007) (same); *In re First Union Corp. Sec. Litig.*, 128 F. Supp. 2d 871, 899 (W.D.N.C. 2001) (defendants increased holding during class period "wholly inconsistent" with knowledge of "undisclosed negative information"). The Ninth Circuit has gone even further, holding that "minimal sales of stock . . . negate[ ] an inference of scienter." *See In re Worlds of Wonder Sec. Litig.*, 35 F.3d 1407, 1425 (9th Cir. 1994) (noting officers acting in bad faith "probably would have bailed out of their substantial holdings").

The fact that Mr. Perry twice purchased, and never sold, and that he actually doubled his IndyMac holdings in the middle of the purported fraud, are specific facts that must be evaluated by any court ruling on the sufficiency of any claims the Staff decides to bring.

* * * * *

In sum, the record simply does not support the Staff's implicit claim that, after years of openness and transparency with IndyMac's shareholders and regulators, Mr. Perry decided to change his approach by 180 degrees for a few months in the beginning of 2008.

PART II: THERE IS NO BASIS FOR NON-FRAUD CLAIMS AGAINST MR. PERRY

I. THERE IS NO BASIS FOR A CLAIM AGAINST MR. PERRY UNDER SECTION 13 OF THE EXCHANGE ACT.

The Staff also has indicated that it is considering recommending claims against Mr. Perry based on alleged violations of section 13(a) of the Exchange Act, and Rules 12 b-20, 13a-1, 13a-11, and 13a-13 thereunder. To establish violations of these provisions, the SEC must show that IndyMac's public filings contained material misstatements or omissions.

Specifically, Section 13(a) of the Exchange Act, 15 U.S.C. § 78m(a), requires issuers to file (1) "such information and documents . . . as the Commission shall require to keep reasonably current the information and documents required to be included in or filed with an application or registration statement," and (2) such annual and quarterly reports "as the Commission may prescribe." *See* 15 U.S.C. § 78m(a). The Ninth Circuit has stated that in order to prove a violation of § 13, "the SEC must establish that the alleged misstatement or omission was material." *SEC v. Gillespie*, 349 Fed. App'x 129, 131 (9th Cir. 2009); *see also, e.g.*, *SEC v. Yuen*, No. CV 03-4376 MRP, 2006 WL 1390828, at *41 (C.D. Cal. Mar. 16, 2006).

Where, as here, however, potential claims brought under § 10(b) and Rule 10b-5 would fail, and the Commission's § 13 claims are based on the same factual allegations as the potential § 10(b) claims, the § 13 claims would fail for the same reasons. *See, e.g.*, *SEC v. Cedric Kushner Promotions, Inc.*, 417 F. Supp. 2d 326, 336-37 (S.D.N.Y. 2006). Accordingly, for the same reasons discussed above in regard to the Commission's potential fraud claims, the

Staff should not recommend that the Commission bring claims against Mr. Perry for alleged violations of reporting requirements.

II. ALLEGED VIOLATIONS OF SARBANES-OXLEY CERTIFICATION REQUIREMENTS DO NOT GIVE RISE TO A CAUSE OF ACTION.

Lastly, the Staff has indicated it is considering recommending that the Commission bring a claim against Mr. Perry for purported violations of the certification requirements of the Sarbanes Oxley Act, 15 U.S.C. § 7241, and Exchange Act Rule 13a-14, 17 C.F.R. § 240.13a-14. Violations of these provisions, however, do not give rise to an independent cause of action.

As one court has found in the context of private securities litigation, "there is nothing in either the [Exchange Act] or the Sarbanes-Oxley Act and implementing regulations that authorizes plaintiffs to base a claim for securities fraud on an alleged misstatement in a Sarbanes-Oxley certification." *In re Silicon Storage Tech. Secs. Litig.*, No. C-05-0295 PJH, 2007 WL 760535, at *17 (N.D. Cal. Mar. 9, 2009). Further, no court has held "that a statement in a [Sarbanes Oxley] certification . . . is independently actionable under § 10(b) or Rule 10b-5." *Id.* Rather, courts have found "that SOX certifications themselves are not actionable."[12] *In re Radian Sec. Litig.*, 612 F. Supp. 2d 594, 620 (E.D. Pa. 2009); *see also In re Huffy Corp. Sec. Litig.*, 577 F. Supp. 2d 968, 1020 (S.D. Ohio 2008) (court "agrees" that SOX certifications "are not separately actionable"); *In re Intelligroup Secs. Litig.*, 469 F. Supp. 2d 670, 706-07 (D.N.J. 2006) (no private right of action for Sarbanes-Oxley violations); *cf. Backe v. Novatel Wireless, Inc.*, 642 F. Supp. 2d 1169, 1182 (S.D. Cal. 2009).

The rule is the same when an action is brought by the SEC. *See SEC v. Black*, No. 04 C 7377, 2008 WL 4394891, at *17 (N.D. Ill. Sept. 24, 2008). In *SEC v. Black*, the court noted that such an outcome was supported by prior precedent, as well as by an SEC Release issued at the time the Commission proposed Rule 13a-14. *See id.* On the issue of "[l]iability for [f]alse [c]ertification," that release states:

> An issuer's principal executive and financial officers already are responsible as signatories for the issuer's disclosures under the Exchange Act liability provisions and can be liable for material misstatements or omissions under general antifraud standards and under our authority to seek redress against those who cause or aid or abet securities law violations. An officer providing a false certification potentially could be subject to Commission action for violating Section 13(a) or 15(d) of the Exchange Act and to both

[12] Although Sarbanes-Oxley certifications may, in certain circumstances, be relevant to the issue of scienter in a Rule 10b-5 case, even then such certifications "add nothing substantial to the scienter calculus." *Zucco Partners, LLC v. Digimarc Corp.*, 552 F.3d 981, 1004 (9th Cir. 2009).

> Commission and private actions for violating Section 10(b) of the Exchange Act and Exchange Act Rule 10b-5.

Certification of Disclosure in Companies' Quarterly and Annual Reports, SEC Release No. 8124, 2002 WL 31720215, at *9 (Aug. 28, 2002). The Release makes clear that an officer who makes a material misstatement or omission may be liable under the Exchange Act, but the same officer cannot also be liable under the Sarbanes-Oxley Act. Had the SEC intended false certifications themselves to be independently actionable, it could have so stated in the Release. It did not do so.

In *Black*, the Commission attempted to persuade the court to create an exception for Sarbanes-Oxley certification claims in cases brought by the SEC, but the court flatly rejected such a special rule. *See Black*, 2008 WL 4394891, at *16-*17. The court pointed out that the cases cited by the SEC, in which claims brought under Rule 13a-14 were allowed to proceed, dealt only with the sufficiency of factual allegations in a complaint and did not address "whether a false certification can stand as an independent claim." *Id.* at *16 (citing *SEC v. Brady*, No. 05-CV-1416-D, 2006 WL 1310320, at *5 (N.D. Tex. May 12, 2006); *SEC v. Sandifur*, No. C 05-1631C, 2006 WL 538210, at *8 (W.D. Wash. Mar. 2, 2006)). Thus, the court held, "[c]onsistent with the SEC Release and the two cases that have addressed the issue [i.e., *Silicon Graphics* and *Intelligroup*] . . . a false Sarbanes-Oxley certification does not state an independent violation of the securities law." *Id.* at *17.

The reasoning of *Black* has not been challenged by any court. As Release Number 8124 and the cases discussed above demonstrate, there is no independent cause of action for an alleged violation of Sarbanes-Oxley certification requirements.

CONCLUSION

Following the demise of IndyMac, a thorough and comprehensive SEC investigation was to be expected. The Staff has now completed its review, finding no evidence of self-dealing, intentional misconduct, or reckless conduct by Mr. Perry (or other senior IndyMac officers). Just as it was the SEC's duty to thoroughly investigate this matter, so too it is the Staff's and Commission's obligation to review the investigation's results fairly and objectively. The record demonstrates beyond dispute that Mr. Perry led IndyMac through the worst financial crisis since the Great Depression with honesty and integrity. His disclosures to shareholders were remarkable in their candor and transparency. Because it would be grossly unfair to charge Mr. Perry with "fraud" under these circumstances, and for all the other reasons set forth above, the Staff should not recommend an enforcement action against Mr. Perry. Or, if an enforcement action is recommended, the Commission should reject such a recommendation.

Respectfully submitted,

By:

D. Jean Veta /BJR

DATED: June 1, 2010

D. Jean Veta
Benjamin J. Razi
David M. Weiss
Michael M. Maya

Attorneys for Michael W. Perry