UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DISTRICT

- - - - - - - - - - - - - - - - - - - X
SECURITIES AND EXCHANGE :
COMMISSION, : Case No.
Plaintiff, : CV-11-1309-R
v. : (JCx)
MICHAEL W. PERRY and A. SCOTT :
KEYS, :
Defendant. :
- - - - - - - - - - - - - - - - - - - X

Los Angeles, California
Tuesday, April 17, 2012

Deposition of MICHAEL PERRY, Volume 1, a witness herein, called for examination by counsel for Plaintiff, pursuant to Notice, taken at 5670 Wilshire Boulevard, 11th Floor, Los Angeles, California, beginning at 9:07 a.m. and ending at 5:54 p.m., Tuesday, April 17, 2012, before Lisa Moskowitz, California Certified Shorthand Reporter No, 10816, RPR.

APPEARANCES:
On behalf of the Plaintiff:
DONALD W. SEARLES, ESQ.
NICHOLAS S. CHUNG, ESQ.
SECURITIES AND EXCHANGE COMMISSION
5670 Wilshire Boulevard, 11th Floor
Los Angeles, California 90036
(323) 965-4573

On behalf of the Defendant Michael W. Perry:
D. JEAN VETA, ESQ.
BENJAMIN J. RAZI, ESQ.
COVINGTON & BURLING
1201 Pennsylvania Avenue, NW
Washington, DC 20004-2401
(202) 662-6000

On behalf of the Defendant A. Scott Keys:
JULIE A. SMITH, ESQ.
JESSICA L. MATELIS, ESQ.
WILLKIE FARR & GALLAGHER, LLP
1875 K Street, NW
Washington, DC 20006-1238
(202) 303-1000

Also Present:
MICHAEL GAINES, Videographer

I N D E X

WITNESS
MICHAEL PERRY PAGE NO.
By Mr. Searles 8

E X H I B I T S

PLAINTIFF'S EXHIBIT NO. PAGE NO.
918 - Factiva Stock List 61
919 - DSPP Capital Raising List 88
920 - E-mail Chain from Michael Perry, dated 2/10/06 127
921 - E-mail Chain from Michael Perry, dated 8/31/07 130
922 - E-mail from Michael Perry, dated 9/6/07 135
923 - E-mail Chain from Joe Ventura, dated 3/26/08 172
924 - E-mail Chain from Michael Perry, dated 3/18/09 211
925 - E-mail Chain from Michael Perry, dated 4/14/08 223
926 - E-mail from Joe Ventura, dated 8/15/07 232
927 - E-mail from Michael Perry, dated 8/6/07 240
928 - E-mail from Michael Perry, dated 1/4/08 261
929 - Q4 2007 Earnings Call, dated 2/12/08 267

E X H I B I T S (Cont'd)

PLAINTIFF'S EXHIBIT NO. PAGE NO.
563 - E-mail Chain from Michael Perry, dated 3/3/08 185
571 - E-mail Chain from Michael Perry, dated 4/14/08 180
595 - E-mail from Michael Perry, dated 5/5/08 189
620 - Forecast Update, dated 5/2/08 25
666 - E-mail Chain from Michael Perry, dated 3/26/08 164
711 - Form 8-K, dated 2/12/08 25
712 - Form 10-Q, dated 3/31/07 270
716 - Form S-3, dated 6/30/06 276
720 - Q3 2007 Earnings Call, dated 11/6/07 54
727 - E-mail from Brian Carter, dated 5/1/08 34
742 - E-mail from Andrew Millward, dated 3/24/08 175
743 - E-mail from Michael Perry, dated 11/20/07 106
744 - E-mail from Michael Perry, dated 3/13/08 206
752 - E-mail Chain from Michael Perry, dated 4/29/08 138
758 - E-mail Chain from Pam Marsh, dated 5/13/08 112
762 - E-mail from Richard Ainsberg, dated 3/29/04 151
768 - E-mail Chain from Michael Perry, dated 10/23/07 96

EXHIBITS PREVIOUSLY MARKED

PLAINTIFF'S EXHIBIT NO.	PAGE NO.
769 - E-mail from Michael Perry, dated 11/19/07	100
774 - E-mail Chain from Pam Marsh, dated 2/15/08	177
775 - IndyMac Bancorp Direct Stock Purchase Plan Prospectus, dated 10/11/07	277
791 - E-mail from Michael Perry, dated 3/12/08	204
795 - IndyMac Bancorp Direct Stock Purchase Plan Prospectus, dated 4/3/08	279
797 E-mail Chain from Michael Perry, dated 4/7/08	212
798 - E-mail Chain from Michael Perry, dated 4/8/08	216
802 - E-mail Chain from Michael Perry, dated 4/14/07	140
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PROCEEDINGS

THE VIDEOGRAPHER: Good morning. We are now on the record in the matter of the Securities & Exchange Commission versus Michael Perry and Scott Keys. Today's date is Tuesday. It is April the 17th, 2012. The time now is 9:07 a.m. This is the video recorded deposition of Mr. Michael Perry. This is volume No. 1 being taken at the Securities & Exchange Commission offices at 5670 Wilshire Boulevard, 11 Floor, in Los Angeles, California.

I am the certified legal video specialist. My name is Michael Gaines. I'm here in association with Alderson Reporting located at 1155 Connecticut Avenue Northwest, Washington, D.C. The court reporter this morning is Ms. Lisa Moskowitz, also in association with Alderson Reporting.

Will all attorneys present please identify themselves and the parties they represent beginning with the party noticing this proceeding.

MR. SEARLES: Donald Searles on behalf of the Commission.

MR. CHUNG: Nicholas Chung on behalf of the Commission.

MS. SMITH: Julie Smith, Willkie Farr & Gallagher, on behalf of Scott Keys, defendant.

MS. MATELIS: Jessica Matelis on behalf of Scott Keys.

MR. RAZI: Benjamin Razi, Covington & Burling on behalf of Mr. Perry.

MS. VETA: Jean Veta, Covington & Burling, on behalf of Mr. Perry.

THE VIDEOGRAPHER: Thank you. Will the reporter please administer the oath.

whereupon,

MICHAEL PERRY,

was called as a witness by counsel for Plaintiff and having been duly sworn by the court reporter, was examined and testified as follows:

EXAMINATION

BY MR. SEARLES:

Q. Good morning, Mr. Perry. I'm Don Searles. Except for this morning we haven't met before. With me is Nick Chung, who I believe you met during your testimony two years ago now probably.

During the course of the deposition, if any of my questions are unclear, just say so and I'll attempt as best I can to ask a better question. If you have any desire to consult with your counsel, you're free to do so. I'd ask that if a question is pending that you

answer the question, and then if you need a break, you're welcome to have one.

Have you been deposed before other than the Commission testimony you gave some time ago?

A. I have.

Q. In -- how frequent -- well, when were you last deposed?

A. Probably, you know, roughly a month ago, plus or minus a few weeks, in one of the FDIC matters.

Q. I see.

And since your testimony before the Commission, how many times have you been deposed?

A. I have a vague recollection of that, but I have been deposed by the FDIC and then deposed in the FDIC's homebuilder matter.

Q. Any other actions?

A. Not that I recall.

Q. Okay. How are you currently employed?

A. I'm self-employed. I have my own firm. It's a start-up.

Q. Doing what type of work?

A. Well, it's a start-up. It's not doing anything yet.

Q. I see.

A. It's in the financial services, deposit

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services area.
Q. Okay. And how long have you been involved in that endeavor?
A. I've been since I believe it was like July of 2010.
Q. Okay. And when did you depart IndyMac?
A. July 11, 2008.
Q. Okay. And between then from 2008 to 2010 --
A. Well, let me correct that. I would say that's when I physically departed the premises.
Q. I see.
A. I think I resigned as chairman and CEO of the holding company when the holding company filed bankruptcy, you know, weeks or months later.
Q. Okay.
A. A month later or so.
Q. During the period after you left IndyMac and when you started your start-up in July of 2010, what did you do for those approximate two years?
A. I did some consulting work, and then spent a lot of time dealing with my civil litigation.
Q. Okay. Did you review your prior testimony before the Commission in preparation for your deposition here today?
A. I just reviewed some pieces of it last night.

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Q. Okay. And the portions that you reviewed, do they remain accurate in your mind?
A. Well, I think there's one issue that, based upon the information that I've -- and the work that I've done in preparation for my defense, that I've got new information I don't believe was accurate in my testimony.
Q. Okay. But at the time you provided your testimony before the Commission, it was to the best of your knowledge accurate and complete?
A. Yes.
Q. All right. And then since then you've come to learn of new information?
A. Correct.
Q. All right. Who did you learn that new information from?
A. Primarily from myself.
Q. I see.
A. But with some assistance from counsel.
Q. Okay. While we're on the subject, what is the issue that you believe you have new information on that might shed light on the accuracy of your prior testimony?
A. Well, it's, as I recall, towards the end of maybe my first or second day deposition. It involved

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the issues surrounding the booking of the audit differences for 3/31, the cumulative audit differences, both in the current period and prior period and the $18 million receivable.
Q. And what -- I believe you testified -- I'll summarize your prior testimony, but with respect to booking of the $18 million receivable on May 9 of 2008, it was your understanding at the time that had that $18 million contribution not been booked as of March 31 and in lies review differences had been recorded to the books of the bank, the capital ratio would have fallen below 10 percent; correct?
MS. VETA: Object to the form.
BY MR. SEARLES:
Q. That accurately kind of summarizes --
A. Yes. And I no longer believe that's correct.
Q. All right. And what is your current understanding?
A. Well, based upon my review of the public filings and in particular that 10-Q for the first quarter of 2008, I think it's on -- in the capital section -- my vague recollection is page 31 there's a table that shows the capital ratios for -- the actual ones, the required minimum for well capitalized and then it shows a dollar amount for the capital in actual

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dollars over the well-capitalized minimum. And, you know, three of those ratios are way over the well-capitalized minimum, but the one that we're at issue on is the total risk-based capital.
In that table, it was $47 million. So if you take $47 million, you take out the $18 million receivable, you have 29 million. I think that's right if my math is right there. And then if you take out the total audit differences after tax of 26 million, you're still a well-capitalized institution.
So the receivable, you know, with the benefit of hindsight didn't need to be booked, and with the review that I'm saying, we would have been well capitalized whether that receivable had been booked or not.
Q. I see.
A. And including, you know, booking all the prior period audit differences.
Q. All right. But it was your understanding at the time in May of 2008 when that transaction occurred that had the $18 million contribution not been made and the audit review differences had been booked, the bank would have been below the well-capitalized 10 percent threshold; correct?
A. Yeah. It was my understanding, but that was

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just based upon representations, you know, made to me by my team.
Q. I see.
A. I didn't do any work on my part to --
Q. Okay.
A. -- verify that myself.
Q. All right. We'll probably, at some point during the course of this deposition, get into the math a bit more in detail on that subject.
A. I'm prepared to do that.
Q. Okay. Any other corrections to your prior testimony before the Commission other than that issue?
A. Yeah. I mean, I didn't go through it with the intent to, you know, identify corrections. I did, you know, kind of just last night late, you know, note that there are some date issues, that are 2007, 2008, some of those types of errors in the testimony. But I can't recall. You know, I wasn't doing my review for kind of a fact-checking purpose.
Q. Yeah. No. And I didn't want to spend my time going over your prior testimony. I was just hoping to have you concur that it was accurate to the best of your knowledge and ability at the time you gave it before the Commission.
A. I'm confident that what I said was accurate.

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I didn't review the actual written transcript to say the same.
Q. All right. Other than reviewing your testimony before the Commission, have you reviewed any other testimony that's been given in this case, either during the investigation or during the depositions that have recently been conducted?
A. I have.
Q. Both?
A. Can you repeat that question for me?
Q. Well, I'll break it.
Up. With respect to the deposition transcripts that have recently -- the depositions that have recently been taken in this case, have you reviewed those transcripts?
MS. VETA: Object to the form.
THE WITNESS: I reviewed Mr. Sosnovich's.
BY MR. SEARLES:
Q. I see.
Have you reviewed any others?
A. Not that I recall, no.
Q. I see.
Why did you focus on Mr. Sosnovich's?
A. My attorneys provided it to me and thought I should look through it a little bit.

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Q. I see.
And the prior investigative testimony before the Commission, have you reviewed any of those transcripts?
A. Other than my own last night, not that I recall.
Q. All right. And your position with IndyMac, you were the chairman of the board and the chief executive officer of the IndyMac Bancorp; correct?
A. And I believe IndyMac Bank too.
Q. So you were both CEO and chairman of the board of both entities?
A. I believe that's correct.
Q. All right. If -- during your tenure as chairman of the board and CEO, if you wanted to hold a board meeting of the Bancorp, how long would it take for you to convene a meeting?
A. If we wanted to hold --
MS. VETA: Object to the form.
MS. MATELIS: Join.
THE WITNESS: -- a meeting of Bancorp's board?
BY MR. SEARLES:
Q. Yes.
A. A special, you know -- a special type meeting that was not a regularly scheduled one is what you're

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asking the question?
Q. Yes.
If you had a need to convene a meeting and you felt that it was urgent to do so, how long would it take?
MS. VETA: Object to the form.
THE WITNESS: Well, I think it would depend on whether we could, you know, obtain a quorum. If it was some emergency issue, it's possible that we could -- I would work, you know, through our team and generally either, you know, one of my senior managers or our corporate secretary and have her informally talk to directors and see if we can get a quorum together if it was an emergency issue. It's possible that it could be done, you know, that same -- that same day.
BY MR. SEARLES:
Q. I see.
A. Or more likely, you know, we'd have to coordinate schedules with directors. If it wasn't an emergency issue, it might take, you know, a day or two or three or four.
Q. I see.
All right. And with the Bancorp, how many members of the board were there in 2008 approximately?
A. I mean I'd have to kind of like count them on

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my fingers. But I mean if you just wanted me to without doing that --
Q. Yeah.
A. -- eight or nine or eight to ten, seven to ten, you know, somewhere in that range.
Q. All right. And a quorum would consist of what then?
MS. VETA: Object to the form.
THE WITNESS: I don't remember now. It's been a while. I can't remember if it's a majority or some sort of supermajority, but something in that vein.
BY MR. SEARLES:
Q. All right. And with respect to the bank, if you wanted to hold a meeting of the board at the bank, how long would it take?
MS. VETA: Object to the form.
MS. MATELIS: Join.
THE WITNESS: I don't think there would be -- there would be any difference. There were two different directors as I recall. There were two independent bank-only directors. At least that's my recollection.
BY MR. SEARLES:
Q. I see.
So a total of three then including yourself?
A. No, no, no.

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Q. I'm sorry.
A. They were all overlapping between the two boards, but there were maybe actually three directors of the bank that were not directors of the holding company. One, my recollection is Richard Wohl who was an insider who was president of the bank got -- became a board member at a point in time, and then my recollection is that the OTS required us to have two directors who were independent of the holding company on the bank's board only.
Q. Okay. So provided you could obtain a quorum and contact the board members, it's possible to hold a board meeting on the same day you decide to have one; correct?
MS. VETA: Object to the form.
THE WITNESS: Yeah, it's possible that that might occur if it was an emergency situation. That would be, you know --
MR. SEARLES: Okay.
THE WITNESS: -- relatively infrequent.
BY MR. SEARLES:
Q. All right. And I've seen in the records on occasion IndyMac held telephonic board meetings; is that correct?
MS. VETA: Object to the form.

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Mischaracterizes the documents.
THE WITNESS: Yeah, it was not a regular occurrence to hold a telephonic meeting. That typically would be, you know, for some -- some issue that was --
MR. SEARLES: All right.
THE WITNESS: -- more current.
BY MR. SEARLES:
Q. But in terms of holding a meeting, it could be done telephonically rather than physically gathering everyone in the same room like we are here today?
MS. VETA: Object to the form.
THE WITNESS: Yeah, I believe so.
BY MR. SEARLES:
Q. Okay. Could board action also be accomplished in the absence of any meeting just through a unanimous written consent?
A. Yeah, I mean I don't know all the technical aspects of the governance related to that, but my recollection is that there were some issues that were resolved in that manner.
Q. I see.
All right. Directing your attention to the latter half of 2007, did you have the understanding that IndyMac's stock price was trading below its book value?
MS. VETA: Object to the form.

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THE WITNESS: You're talking about in the, you know, November, December time -- time frame?
BY MR. SEARLES:
Q. Well, I was thinking the second half of 2007. I haven't pinpointed exactly the date on which the scales tipped, but at some point in that time period, did IndyMac's stock price trade below its book value?
MS. VETA: Object to the form.
THE WITNESS: Yeah, at some point, my recollection is that it did trade below its GAAP book value per share.
BY MR. SEARLES:
Q. All right. And did you have an understanding that selling shares of the bank -- of IndyMac that are below book value would serve to dilute existing shareholders?
A. From a book value per share standpoint, that -- that would be accurate on the margin. It depended on how many, you know -- it would obviously depend on how many shares that you issued, whether that was material or not.
Q. I see.
One share probably would not be material?
A. That's right.
Q. What in your mind would be a material amount

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of shares that would materially affect or dilute the book value?
MS. VETA: Object to the form.
MS. MATELIS: Join.
THE WITNESS: Well, I think there were other factors that diluted book value per share. If you look at 2000 -- if you're asking about 2007, book value, my recollection, declined from around $27 at the beginning of the year to 16.60ish. So it declined about $11 or maybe like 40 percent during the year. All of that decline can be explained by realized losses, you know, earnings loss per share, unrealized losses converted to a per share basis, and the dividends that were paid because they were now paid out of retained earnings as opposed to earnings for the year.
And so even though there was some minor dilution possibly on some of the shares that were issued in the latter part of 2007 below book value per share, it wasn't meaningful or material in any way. And that same thing occurred in the first quarter of 2008 too.
BY MR. SEARLES:
Q. Getting back to my question then, what would be a -- what in your mind would have a material affect on book value in terms of selling shares other than the factors that you described a moment ago in terms of why

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the book value fell from 27 to 16? Just looking at the issue of selling additional shares into the market at below book value.
MS. VETA: Object to the form.
BY MR. SEARLES:
Q. What would be a -- do you have any sense of what in your mind would be a material amount of sales that would have an effect on diluting book value of IndyMac?
MS. VETA: Object to the form.
MS. MATELIS: Join.
THE WITNESS: Well, I think it would depend on the relative basis relative to the decline in book value per share that was being caused by both realized and unrealized losses and dividends paid out of retained earnings. So in my example, those combined were roughly the entire decline.
So, you know, I don't have a fixed percentage that I would say is material or not material, but I can tell you that the dilutive aspect on the margin of the direct stock purchase plan in 2007 and the first quarter of 2008 was immaterial in my judgement.
BY MR. SEARLES:
Q. When you say "on the margin," what do you mean by that?

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A. Well, what we were just talking about, if, you know -- just take a simple example. If book value per share is -- you know, this is just a theoretical example. If book value per share is $20 and the market value of the stock is $10, that's, you know -- and if you issued an infinite number of shares, you would -- through, you know, capital raising you would dilute book value per share by about 50 percent. So on the margin, one share on the margin is highly dilutive, 50 percent. But from an overall standpoint, it would depend upon the number of shares that are outstanding, and the difference between the market value and book value per share of the stock.
Q. Well, if you increased IndyMac's --
Are you familiar with the term "float"?
A. I mean if you're talking about shares outstanding?
Q. Right. Okay.
So in terms of shares outstanding of IndyMac, if the shares outstanding were 80 million at the beginning of 2000 -- or at the end of 2007 and increased to 140 million at 2008 where the book value is $16 and IndyMac's share price was trading in the vicinity of between 6 and $3, would you consider that type of fundraising issuance of shares to be materially

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dilutive?
MS. VETA: Object to the form.
THE WITNESS: I mean I'd have to do the math. I think you're giving me a theoretical example that didn't happen.
BY MR. SEARLES:
Q. Well, let me show you Exhibit 711, which is IndyMac's Form 8-K issued on February 12.
Do you recognize this exhibit?
A. It looks like some pages are missing -- no, I guess it's two-sided.
THE VIDEOGRAPHER: Excuse me. I need to go off the record for a moment. The time is 9:29 a.m.
(Recess taken from 9:29 a.m. to 9:31 a.m.)
THE VIDEOGRAPHER: We are back on the record. The time is 9:31 a.m.
BY MR. SEARLES:
Q. Mr. Perry, I erroneously gave you Exhibit 711. I'd like to -- we'll undoubtedly get to that later.
But I'd like to show you what's previously been marked as Exhibit 620.
Do you recognize this exhibit?
A. Well, I wouldn't say I recognize it. I recognize it generally as one of, you know, many forecasts that were being done during 2008 as a result

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of the volatility in the marketplace.
Q. All right. All right. On the subject of dilutive sales through the DSPP, I'd like to direct your attention to the second page of the exhibit, IndyMac Bancorp, Inc., P&L. Are you with me?
A. I am.
Q. And if you go down about a little less than half the page, you get to an item called "Diluted shares."
Do you see that?
A. I see that.
Q. All right. And is that the shares outstanding? What does diluted shares mean to you?
A. I believe that would be some sort of share -- you know, amount of shares outstanding.
Q. All right. That would be the float, in other words, we talked about earlier.
MS. VETA: Object to the form.
THE WITNESS: I don't know if I would use that term, but it would be the shares outstanding, you know --
MR. SEARLES: All right.
THE WITNESS: -- common shares outstanding.
MR. SEARLES: All right.
THE VIDEOGRAPHER: I'm sorry. I need to go

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off the record. The time is 9:34 a.m.
(Recess taken from 9:34 a.m. to 9:45 a.m.)
THE VIDEOGRAPHER: We are back on the record. The time now is 9:45 a.m.
BY MR. SEARLES:
Q. Mr. Perry, directing your attention again to Exhibit 620, and we were on the line on the second page with respect to diluted shares, which I think we agreed was the number of shares outstanding. If you go to the column actual Q1 2008, do you see an entry of 81,177? That's what -- I believe 81 million shares outstanding at that time; is that correct? Is that your understanding of this document?
A. Yeah. I mean it would be the more -- the precise number would be in the 10-Q for the first quarter.
Q. Okay. And the year concluded, actual FY 2007, of approximately 74 million shares?
A. No, that's incorrect.
MS. VETA: Is that the question?
MR. SEARLES: Oh, I'm sorry.
THE WITNESS: That's -- I think the average is 74.
BY MR. SEARLES:
Q. Oh, the average, okay. Oh, I see. I'm sorry.

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So the column to the left actual Q4 '07 is 79 million, so the year concluded was 79 million shares outstanding.
A. I mean, I think, you know, you -- again, this is an unaudited non-certified forecast.
Q. Okay.
A. So your more precise number would be out of the 10-K or the fourth quarter 8-K filed on 2012.
Q. Okay.
MS. VETA: Mr. Searles, please let Mr. Perry answer his question.
BY MR. SEARLES:
Q. Did I interrupt you?
A. I didn't notice.
Q. Okay. Thank you.
The forecast here projected Q4 '08 indicates 147 million shares at the end of '08. Nearly a doubling of the outstanding shares over the course of the year if this forecast had been acted upon.
MS. VETA: Object to the form.
MR. SEARLES: I haven't asked a question yet.
MS. VETA: I'm sorry.
BY MR. SEARLES:
Q. Assuming that to be the case, that the shares outstanding doubled through issuance of shares under the

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DSPP, would you consider that volume of shares to be materially dilutive to book value?
MS. VETA: Object to the form.
THE WITNESS: Under this -- under your theoretical assumption something that didn't happen, is that what you're asking me -- that's what you're asking me?
BY MR. SEARLES:
Q. Yes, I'm asking you a question based on the May 2, 2008, forecast.
A. Well, I think you can see here that book value per share declines from 10.95 actual at the end of the first quarter here -- and, again, this is a forecast. So I would caution that I'm not sure if any of these numbers are accurate at all, right? And that the forecast that we actually provided to shareholders were ones that went through a Sarbannes-Oxley-type certification process.
So when I get a document, being a former auditor, that hasn't gone through that process, I'm not sure what I'm looking at here --
Q. Okay.
A. Okay? With respect to this interim May 2 forecast.
But if you're asking me with just all of that

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theoretical behind it would, you know, going from 81 million theoretical shares at the end of the first quarter to 147.9 at the end of the fourth quarter with whatever assumption -- I'm not sure what assumption they used in terms of the market value of the stock. Stock could have gone back up towards book value as the losses came down and you wouldn't have any dilution, but they obviously probably used some more conservative assumption in this forecast, because you do see book value per share decline from 10.95 at the end of the first quarter to 6.64 at the end of the year.

That's a similar decline percentage-wise, just eyeballing it, to the prior year which the decline was caused, as I discussed earlier in my testimony, by realized and unrealized losses and dividends paid out of rained earnings.

Q. All right. But, again, the question here with respect to the forecast from May 2, 2008, and the forecast of it increased in shares outstanding from 79 million at the end of the year to 147 million at the end of the following year 2008, with the issuance of that additional type of shares cause the book value -- assuming that the stock price did not rise -- would that result in a material dilution to book value?

MS. VETA: Object to the form.

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THE WITNESS: Well, I don't know what market value per share they used in this assumption. It's not evident from this analysis.

I mean if you told me or we could sit here and I can pull out my calculator and we could try to mathematically come up with what the assumption is for market value per share.

MS. VETA: Just let Mr. Searles ask the questions.

BY MR. SEARLES:

Q. What did you mean by -- when you said "I don't know what market value per share," what are you referring to by "market value per share"?

A. The stock price --

Q. Okay.

A. -- at what -- at what these theoretical shares are issued at.

Q. I see.

Well, what was the stock trading at in the first six months of 2008? Do you recall?

MS. VETA: Object to the form.

THE WITNESS: You know, I don't. Lots of different prices.

BY MR. SEARLES:

Q. All right. Well, if the book value is $16 and the share price is $6 and the issuance of shares nearly doubles from 79 to 147 million and assuming those facts to be the assumptions based in this forecast, would you say that that would have a material dilutive effect on book value?

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MS. VETA: Object to the form.

THE WITNESS: It may -- at May 2 the book value wasn't 16.60.

BY MR. SEARLES:

Q. Okay. Well, assuming those to be true, those facts to be true, if the book value at the end of 2007, according to this document, is $16.61 -- do you see that?

A. I do.

Q. All right. And assuming this forecast is acted upon, the shares outstanding are nearly doubled and the share price is trading at $6, would that result, in your opinion, in a materially dilutive effect to book value?

MS. VETA: Object to the form.

THE WITNESS: I mean making all of those assumptions in theory, right, assumptions that didn't occur, none of this occurred --

MR. SEARLES: Well, the bank went out of business.

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MS. VETA: Object to the form.

And, Mr. Searles, please let him finish his answer.

Go ahead, Mr. Perry, what were you saying -- you were saying -- could you read back Mr. Perry's answer?

(Record read.)

MS. VETA: You can continue with your answer.

THE WITNESS: The -- the book value that you see here, you know, for the end of the first quarter 10.95 -- I'm not sure. We'd have to get the Q out to determine, but that's like in the ballpark of what book value per share was at the end of the first quarter of 2008, and almost all of the decline in book value in the first quarter was caused by realized losses per share, unrealized losses that flowed through other comprehensive income of equity converted to per-share basis, and a small amount of common dividend.

The dilution from the direct stock purchase plan to book value per share was immaterial in the first quarter. Okay? We disclosed in an 8-K on May 1, the day before this theoretical May 2 forecast, the amount of shares that we had issued through the direct stock purchase plan year to date in 2008 and that we were raising capital every day through the direct stock

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purchase plan and an 8-K filed on May 1 and our stock went up. So I mean, I think, you know, things changed. Our forecast changed. This forecast -- there were hundreds of forecasts prepared during 2008 as a result of the volatility in the marketplace. I'm not sure I even saw this May 2 forecast. So I mean what you're asking me to comment on is theoretical issues that never actually happened.

BY MR. SEARLES:

Q. I'd like to show you Exhibit 727 just to establish that you, in fact, saw Exhibit 620.

Do you recognize this exhibit?

A. Well, it looks like it's the same document with an e-mail on the front of it.

Q. Right.

And then with an agenda on the second page, "Senior Manager Agenda Meeting, Friday, May 2, Discussion Topics," you would be addressing the preliminary first quarter '08 earnings and 2008 forecast as well as an update on capital raising activities. So it appears, correct me if I'm wrong, that you actually spoke to this forecast at that meeting.

MS. VETA: Object to the form.

BY MR. SEARLES:

Q. Do you recall doing so?

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A. You know, I don't recall doing so, but I'm not, you know, saying that I didn't --

MS. VETA: Let him finish.

THE WITNESS: I would agree with your statement.

BY MR. SEARLES:

Q. All right. Well, back to my question though.

With respect to the issuance of shares under this forecast, raising the outstanding shares from 79 million to 147 million over the course of 2008 and assuming the stock price remained at or about $6 a share, would the issuance of that type -- that volume of shares result in material dilution to the book value of the company?

MS. VETA: Object to the form.

MS. MATELIS: Join.

THE WITNESS: It would be impossible for me to make that determination because you're asking about a book value at 3/31. The book value had obviously deteriorated further in April and May as a result of continuing losses in the business. So I mean as of May 2, I don't have -- I don't know what the book value per share is and whether book value had already declined to $6 or not.

BY MR. SEARLES:

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Q. Okay. Well, let's add that variable then into the hypothetical, and assuming there are no further losses by the bank --

A. Okay.

Q. -- and the book value starts at the beginning of the year at $16 --

A. Yes.

Q. -- and you nearly double the shares from 79 million to 147 million over the course of the year with sales at $6 a share, would that result in material dilution to book value?

MS. VETA: Object to the form.

MS. MATELIS: Join.

THE WITNESS: Yes.

BY MR. SEARLES:

Q. Thank you.

A. Under that -- all those theoretical assumptions you just gave.

Q. All right. Did you have a concern in 2000 -- the second half of 2007 or the first half of 2008 about the dilutive effect of issuing shares under the DSPP?

MS. VETA: Object to the form.

THE WITNESS: I'm sorry. I got lost halfway through that. Can you repeat that, please.

BY MR. SEARLES:

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Q. Did you have a concern in the second half of 2007 or the first half of 2008 about the dilutive effect of issuing shares under the DSPP?

MS. VETA: Same objection.

THE WITNESS: Well, on the margin, issuing -- issuing stock through the direct stock purchase plan could be dilutive on the margin. You know, as CEO, you care about every dollar that the company is spending or issuing. So on a marginal basis, if -- if you're issuing shares below book value, it's dilutive to book value per share. Okay. But it's the book value at the time, not at a prior, you know, period. We were having losses during that period of time, so book value was declining each day as a result of realized and unrealized losses that were occurring.

In terms of did I have a concern about the dilutive nature of it, if we, you know, as I said, if we issued an infinite number of shares at a substantial -- at a market price substantially below book value, yes, I would have had a concern about it, but at the level that we were issuing shares in the second half of 2007 and in early 2008, the answer is no, that that was not materially dilutive to book value per share.

BY MR. SEARLES:

Q. So is it your testimony, then, in the second

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half of 2007 and in the first half of 2008, you did not have a concern --
MS. VETA: Object to the form.
MR. SEARLES: Let me first ask my question and then you can object to it and then we can get an answer. So don't interrupt me, please.
MS. VETA: I apologize. I thought you were finished with your question.
MR. SEARLES: All right. Well, I have a tendency to speak slowly so you'll realize --
MS. VETA: I'm sure I'll pick up your cadence. And by the same token, I'd appreciate it when Mr. Perry answers, if you wouldn't say okay in the middle of his answer because then I think you're trying to cut him off. So I'll try to pay attention to that.
MR. SEARLES: Okay.
MS. VETA: Thank you.
BY MR. SEARLES:
Q. Is it your testimony, then, that you did not have a concern about the dilutive effect of the issuance of shares under the DSPP in the first half -- the second half of 2007, the first half of 2008?
MS. VETA: Object to the form.
THE WITNESS: I knew on the margin that issuing a share of stock below book value per share

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could have some dilutive effect. On a marginal basis, it would cause book value per share to decline a little bit. But as I said in my previous testimony, the decline in book value per share in 2007 and the first quarter of 2008 mathematically was almost all caused by realized losses per share, unrealized losses per share that flowed through other comprehensive income if you convert those to a per share basis and dividends paid out of retained earnings. It was the dilution caused by the direct stock purchase plan in the second half of 2008 and the first quarter of 2008 -- second half of 2007, first quarter of 2008 was immaterial, significantly immaterial in relation to those other effects that reduced book value per share, the diluted book value per share.
BY MR. SEARLES:
Q. Okay. I understand. I don't believe you're answering my question though.
A. Okay.
Q. What I'm trying to find out is whether it's your testimony that you did not have a concern in the second half of 2007 and in the first half of 2008 over the dilutive effect of issuing shares under the DSPP plan.
MS. VETA: Object to the form.

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THE WITNESS: I believe I asked and answered that.
As I said, a, you know, CEO cares about every dollar of expenditure. And on the margin issuing even one share of stock below your book value per share, at a market value below your book value per share, is dilutive to book value per share. So yes, on the marginal basis, I had a concern about the dilutive nature of the direct stock purchase plan, but the amount of shares that we were issuing in 2007 and the first quarter of 2008 were not materially dilutive to book value per share.
BY MR. SEARLES:
Q. I believe you said that they were not materially dilutive to book value compared to these other larger events like the enormous losses --
A. Both. Both.
Q. Let me -- I'll try to articulate my question and then -- then you can answer.
Is it your testimony that the relative dilution from the issuance of shares to the DSPP were less material than the other factors of these large losses the bank was reporting, the payment of dividends?
MS. VETA: Object to the form.
THE WITNESS: Well, I mean I've done the math

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and I don't have it, you know, right off the top of my head, but if you take -- in 2007, if you take the loss per share that we suffered in 2007, if you take the change in other comprehensive income, which is an after-tax loss, and convert that to a per share basis, and you take the dividends that were paid out of retained earnings, they explain roughly 100 percent of the decline in book value per share in 2007. Okay?
So I do know that, you know, mathematically the direct stock purchase plan had some minor impact in diluting book value per share in 2007, but it was not material. In the first quarter of 2008, book value per share declined from something like 16.60 to, what, 10.90ish. The -- the -- the -- if you go in mathematically and look at the components of that, something like 92 percent of the decline in book value per share in the first quarter was caused by realized losses, unrealized losses per share that flowed through other comprehensive income, and the dividend. So less than 10 percent of the book value per share dilution in the first quarter, significantly less than 10 percent was caused by the direct stock purchase plan. In fact, in the first quarter, you know, you focused on that 16.60 book value per share at the end of 12/31/07. The direct stock purchase plan reduced book value per share

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by 2 1/2 percent in the first quarter. I would not consider that to be material. Roughly 2 1/2 percent.
BY MR. SEARLES:
Q. In addition to the dilutive effect of issuing shares under the DSPP plan to the book value of the company, did you also have an understanding that issuing shares under that plan would place a downward pressure on the stock price of IndyMac?
MS. VETA: Object to the form.
MS. MATELIS: Join.
THE WITNESS: A temporary downward pressure during the investment period of the arbitrage players who were investing in the direct stock purchase plan for just a temporary period.
BY MR. SEARLES:
Q. All right. So if IndyMac as it was issuing or attempting to issue DSPP shares beginning on February 26 on a daily basis through the period of May 12 when the 10-Q was filed, on a -- there would be a downward pressure on price on a daily basis during that period; correct?
MS. VETA: Object to the form.
MS. MATELIS: Join.
THE WITNESS: The -- the investors in that program, as I understood it, were all investors who were

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arbitrage players who were investing to earn the 1 or 2 percent discount between -- that they got from the market price. And so they would short, as I understood it, an equal amount of shares to what they were buying so that they could earn that discount or arbitrage spread. And so yes, they would place, you know -- if we were raising capital every day through the direct stock purchase plan, it would have some impact, in my opinion. You may -- I'm not expert in this area, but some impact on the stock price and place some downward pressure on the stock while you were raising the shares. That's pretty typical of all capital raising activities.
BY MR. SEARLES:
Q. And the cause of the downward pressure is what, in your understanding?
A. In my understanding, it's the shorting of the stock.
Q. Meaning what?
A. They're borrowing other shares and shorting them so that they are not -- they're not as at much -- it's not complete zero risk, but so they're substantially reducing their risk of owning equity in IndyMac and instead are earning the arbitrage discount or spread.
Q. All right. And did you understand that the

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IndyMac would offer its shares to these institutional investors at a discount?
A. That was the program.
Q. All right. At a discount to what?
A. To, I believe, the market price. There's, you know, a mathematical or mechanism in that plan that explained how it worked, but it was, you know, some sort of average of the high and low for a day. And then I believe a 1 or 2 percent discount from that. But I'm just -- I wasn't as involved in that program in the latter years; and so I can't give you a precise number.
Q. All right. Just so I understand your testimony, would the discount that IndyMac is offering the DSPP shares at, a discount to the trading price, would that contribute to the downward pressure on price as a result of issuing shares under the DSPP program?
A. That's a good question. I don't know. That wasn't what I was commenting on.
Q. Okay. You were commenting on the practice of their shorting the shares --
A. Yes.
Q. -- is what's causing a downward pressure on price?
A. Correct.
Q. All right. And did you take any economics in

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college?
A. A little bit, yes.
Q. All right. I'm on dangerous ground myself. But you're familiar with supply and demand; right?
A. I am.
Q. All right. And if you increase the supply, demand remains constant, price goes down; correct?
MS. VETA: Object to the form.
THE WITNESS: Generally, all other things being equal, that's my understanding.
BY MR. SEARLES:
Q. All right. So if you're issuing additional shares under the DSPP program, new shares that are going into the market, would that fact also contribute to the downward pressure on price?
MS. VETA: Object to the form.
BY MR. SEARLES:
Q. In your opinion.
A. I think, you know, that's definitely something that -- I think that's a roughly accurate statement.
Q. All right. And did you have that understanding back in the second half of 2007, first half of 2008, that the issuance of additional shares into the market would cause a downward pressure on the

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stock price?
MS. VETA: Object to the form.
THE WITNESS: I think that the question really is, you know, without a commensurate rise in demand, because these investors were arbitrage players, and if they were not permanent holders, which I don't believe they were, you have to have some other buyer on the end for that supply. So that was part of the program that you had to look at how much volume was trading in the stock and there was an amount that could be issued relative to that volume without having a big impact on the stock, you know, or not.
BY MR. SEARLES:
Q. Do you -- IndyMac had a -- correct me if I'm wrong, but IndyMac had a practice of announcing at the end of a quarter in its 10-Q or 10-K the amount of money raised under the DSPP program; correct?
A. Well, we had a practice of filing a prospectus supplement before we raised capital so a DSPP prospectus supplement with the potential maximum number of shares and the market value price announcing that we had availability under our shelf registration, so we did that before we raised capital. And then each quarter we had a practice, you're correct, where we would disclose how much we had raised in total dollar and shares

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through the direct stock purchase plan during that quarter.
Q. All right. So other than the -- what's your understanding of the investors who participated in the waiver program in 2008? How would you -- what word would you use to describe them? Institutional investors? I just want to make sure we're on the same page.
A. Generally arbitrage players --
Q. Arbitrage players.
A. -- is what I would say. You know, I think, you know, my understanding is most were institutions, but, you know, some may have been sophisticated individual investors who were arbitraging.
Q. Okay. During the course of the quarter before IndyMac would announce at the end of the quarter through it's 10-Q or 10-K that it raised X number of dollars under the DSPP, other than the arbitrage players and these institutional investors who were participating in the waiver program, would common shareholders have any understanding of how many shares were issued under the DSPP plan or how much money had been raised?
MS. VETA: Object to the form.
MS. MATELIS: Join.
THE WITNESS: So during -- so during the

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quarter?
BY MR. SEARLES:
Q. Right.
A. Actually as a result of the direct stock purchase plan prospectuses, they could calculate the maximum potential impact based on those shares in that program.
Q. But they could not calculate how quickly those shares would be sold under a particular prospectus; correct?
MS. VETA: Object to the form.
THE WITNESS: What they could do -- and I'll answer it in kind of two parts. They could take the shares -- if it's a $10 million prospectus, 10 million share prospectus, they could take the 10 million shares times the current market price and compare that to book value and calculate maximum accretion or dilution against book value per share of that prospectus filing ahead of time, and then at the end of the quarter, we would disclose exactly what we had raised during a quarter.
BY MR. SEARLES:
Q. Are you aware of any shareholders actually engaging in that type of calculation?
MS. VETA: Object to the form.

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MS. MATELIS: Join.
THE WITNESS: I thought we were efficient markets here, and that if you disclosed it, you would assume they could calculate it.
BY MR. SEARLES:
Q. All right. Well, getting back to my question, if IndyMac, as it did, filed a prospectus in October of 2007 registering an additional 10 million shares, simply from that prospectus, would any common shareholder have an understanding of how quickly the shares would be sold under that prospectus?
MS. VETA: Object to the form, asked and answered.
THE WITNESS: Yeah. As I said, they could calculate based upon stock price, what the current stock price, what the maximum accretion or dilution to book value per share was of those shares, but no, they would not have an understanding about how quickly that would be utilized. They potentially can gain an understanding if we were filing prospectuses -- they would definitely gain an understanding every quarter because we disclosed what raised in a quarter. And if we were running out of room under that prospectus, we would file another prospectus so they would get some sense there about the volume of shares we were issuing by the filing of those

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DSPP prospectuses.
BY MR. SEARLES:
Q. All right. And it's possible under filing of a DSPP prospectus that IndyMac would sell no shares; correct?
MS. VETA: Object to the form.
THE WITNESS: It's possible, yes.
BY MR. SEARLES:
Q. All right.
A. And we had the opportunity to and we did, you know, move in and out of investing -- raising capital through that program throughout a year.
Q. All right. It stopped and started, in other words?
MS. VETA: Object to the form.
THE WITNESS: It was a program that was available all the time.
BY MR. SEARLES:
Q. But whether IndyMac was selling shares under that program, that stopped and started; correct?
MS. VETA: Object to the form.
THE WITNESS: It was a program that we consistently used throughout 2006, 2007, and 2008, shareholders were very aware of that program, and we disclosed, you know, as we discussed, very consistently

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the capital we raised each quarter.
BY MR. SEARLES:
Q. All right. But the sales did stop and start; correct, under that program? That wasn't a continuous capital raising --
A. Not every day.
Q. Okay. Not every day.
Other than the peered from February 26 until the program stopped sometime in May; correct?
MS. VETA: Object to the form.
THE WITNESS: I'm not sure if it was every day, but it -- but it was more frequently used during that period of time in terms of the number of days that we were using it.
BY MR. SEARLES:
Q. And there was a threshold price set; correct, for the issuance of shares?
A. As I understand it, that's part of the program, yes.
Q. All right. And at the threshold price -- what is the threshold price?
MS. VETA: Object to the form.
THE WITNESS: You know, I don't recall specifically. It was the minimum -- if the -- my recollection is it's the -- if you took the average of

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the high and low for the day -- and I could be getting this wrong because I wasn't administering this program in the latter years and so -- but my recollection from long ago, was it was the average of the high and low for the day, and you would set a threshold and if the stock -- the average of the high and low fell below that threshold, the investors did not invest that day.
BY MR. SEARLES:
Q. Okay. And that would be an example of a potential reason why shares were not sold on a particular day because the threshold price was not met?
A. Or we weren't offering investment at that time.
Q. Okay. Do you recall, subsequent to or beginning on February 26, was it your understanding that IndyMac was at least trying to raise funds on a daily basis under the DSPP?
MS. VETA: Object to the form.
THE WITNESS: I don't know that on February 26 we had made the decision we were going to raise funds every day at that point in time. I don't recall that. But we had begun to use the program again just as we had begun to use it again in latter parts of 2007.
BY MR. SEARLES:
Q. And what's the purpose of setting a threshold?

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Do you have an understanding?
MS. VETA: Object to the form.
THE WITNESS: The purpose of setting a threshold is if you have like some, you know, major market move or major, you know, stock price move, you may not want that capital at that price. So it's to protect you against, you know, stock market collapse. You don't want to be investing if, you know, the entire -- you don't want to have people investing in some bargain basement price and the next day the market's all come back, you know, like that flash trading issue that happened a couple of years ago.
BY MR. SEARLES:
Q. Was the threshold price set in part to avoid sales of stock at such a low price that it would be more dilutive to book value?
MS. VETA: Object to the form.
MS. MATELIS: Join.
BY MR. SEARLES:
Q. Is that a factor in setting the threshold?
A. You know, I don't think that that was -- no, I don't think that that was why the threshold price was set. I think it was really a protection mechanism. I mean you had to consider dilution just in general, and we did consider dilution in general as we discussed.

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But here, I think the threshold is really more to protect against, you know, some, you know, significant volatility in a given day or given period either in your individual stock or the stock market as a whole.
Q. I'd like to show you what's been marked as Exhibit 720.
A. Is there some specific piece that you want me to focus on this?
Q. Yeah. Let me back up for one moment though, and then we'll get to this exhibit.
Was there any attempt to limit the number of shares under the DSPP as a percentage of the trading volume of the stock in order to minimize the price of the -- the downward price effect of issuing shares under that program?
MS. VETA: Object to the form.
THE WITNESS: I'm not -- I'm not sure. What period of time are you asking about that?
BY MR. SEARLES:
Q. Well, I guess in my mind, I'm imagining some sort of mathematical equation that kind of limits how many shares can be issued under the DSPP as a function of the outstanding shares in the market. I don't recall if -- was there such a calculus conducted within IndyMac as to how many shares could be issued?

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MS. VETA: Object to the form.
THE WITNESS: My recollection, as I said, I wasn't close to the mechanism and the workings of that program in the, you know, 2006 to 2008 time period. So I don't have the details the way some of the other managers who were administering it do. But my recollection is that there was some combination of math and, you know, art or judgment and that that was a combination of us consulting with the outside plan administrator, which I believe -- in the early days, when I was involved was Bear Stearns, but in the latter years, I believe was Mellon.
BY MR. SEARLES:
Q. And in the early days, you were involved in the administration of the DSPP?
A. In the very early days, yes.
Q. Was it known as the DSPP in those days?
A. Well, we were -- in the early days, we were a real estate investment trust who paid out dividends, so my recollection it was called a dividend reinvestment plan, and it had a similar exception to it. It was called a DRIP --
Q. Okay.
A. -- versus a DSPP.
Q. But a similar plan in concept?

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MS. VETA: Object to the form.
THE WITNESS: Roughly similar, yes.
BY MR. SEARLES:
Q. Okay. And do you recall when you were involved in administering that plan what the math was in terms of what the restrictions were and how many shares could be issued versus the volume of shares outstanding?
MS. VETA: Object to the form.
THE WITNESS: Just vaguely that there -- you know, for the plan to work best and not put, you know, pressure on the stock that there was a percentage of your daily trading volume.
BY MR. SEARLES:
Q. Do you recall what that percentage was?
A. I don't.
Q. Approximate?
A. I don't.
Q. Single digits?
MS. VETA: Object to the form, asked and answered.
THE WITNESS: I don't think it was that low, but I don't remember.
BY MR. SEARLES:
Q. 50 percent?
MS. VETA: Object to the form.

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BY MR. SEARLES:
Q. Too high?
A. I'd just be guessing.
Q. I see.
All right. Back to 720 then. I'm sorry for the interruption. I'd like to direct your attention to --
First of all, do you recognize this exhibit?
A. I mean I recognize it. I don't recall reviewing it back in 2007 after the call was done. But I've seen it in subsequent to 2008.
Q. Okay. And do you recall speaking at this Q3 2007 earnings call?
A. No, I don't recall it, but I know I did because I was the person who did these calls.
Q. Okay. Any reason to doubt the accuracy of the transcript that we're looking at here?
A. I mean I haven't read it. I mean there's no reason on my part to doubt the accuracy of it generally. There might be something that's inaccurate in here, but, you know, I'd be happy to try to address that.
Q. Well, let's cut to the chase then. If you could turn to page 17 of 22, looking at the pages at the bottom of the exhibit. And it's a -- what I'm focusing on is a dialogue, a Q&A that you had with Manuel Ramirez

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at KBW. Are you with me?
A. Okay.
Q. Do you have an understanding of who Manuel Ramirez was?
A. I believe he was an equity analyst for KBW.
Q. Okay. You're stating at the bottom of page 17 of 22 in answering Mr. Ramirez's question, you state in this last paragraph on that page, "I think with respect to capital, obviously, as you know, Manny, when stock is trading far below your book value, it does, even though we have a lot of capital excess, capital cushion in relation to the well-capitalized limits, it does become a concern for you, right? Because if you're raising capital, you're raising it at a dilutive level."
Do you recall making those comments?
A. Can you give me a minute and let me just read this little section here?
Q. Sure. Page 17 and then basically the dialogue with Mr. Ramirez, on those two pages.
A. Yeah. Okay.
Okay. I'm sorry?
Q. Okay. My question to you was, after reading that last paragraph on page 17 of 22, do you recall making those comments?
A. You know, I don't recall specifically making

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those comments back in November of 2007, but I don't doubt that I made them, the accuracy of them.
Q. All right. And do you recall at that time of November 6 of '07 that IndyMac stock was trading far below its book value?
A. You know, I mean there's no numbers here. We were probably trading below book value in November of '07, but I'm not sure how far below book value we were.
Q. Okay. I'd like to mark a new exhibit.
All right. What I've provided to you is a stock price list for IndyMac that -- if you could turn to Exhibit -- excuse me, to the page regarding November 6 of 2008. These numbers are not -- these pages are not numbered unfortunately. November 6 of 2007. I'm sorry.
A. Yeah, I see it.
Q. Okay. It appears the stock price was trading at 12.49 on the 6th, and it dropped to 11.08, $11.08 on the 7th.
Do you see that?
MS. VETA: First of all, I'm going to object to the form.
What page are you on?
MR. SEARLES: It's on a page -- if you look at the left-hand column by date and go through there to the

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page reflecting November of '07, you'll get to the same page we're all on.
MS. VETA: Okay. I'm going to object to the form to the extent that you're representing that these are the stock prices, and I see down in the bottom it says "Preliminary Draft Privileged and Confidential Prepared at the Request of Counsel." So I have no idea what this document is.
MR. SEARLES: It's just a summary of stock prices.
Why don't we take our first break for the morning, and I'll get you a different stock price chart.
THE VIDEOGRAPHER: We are going off the record. This is the end of tape No. 1 in the continuing testimony of Mr. Michael Perry, Volume 1. The time now is 10:31 a.m.
(Recess taken from 10:31 a.m. to 10:40 a.m.)
THE VIDEOGRAPHER: We are back on the record. This is the beginning of tape No. 2 in the continuing testimony of Mr. Michael Perry, Volume 1. The time now is 10:40 a.m.
MR. SEARLES: I'd like the court reporter to mark what will be Exhibit 918, the prior version is withdrawn.

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(Exhibit No. 918 was marked for identification.)
BY MR. SEARLES:
Q. Mr. Perry, the court reporter has just handed you another stock price list drawn from Factiva, which at a later date in the case, I'm sure defense counsel and the Commission will agree on an accurate stock price chart. But I'm representing to you that this is assumed to be accurate. If you can turn to the entry for November 6 and 7 of 2007. Are you with me?
A. I am.
Q. And I believe on the 6th, the stock price was trading at $12.49, on the 7th it was $11.08. The following day it went down to $10.38. Assuming those stock prices are accurate as reflected in Exhibit 918, would you agree that IndyMac's stock is trading far below book value as you stated to Mr. Ramirez as reflected in Exhibit 720?
MS. VETA: Object to the form.
THE WITNESS: Well, I mean I think this is something that I've had kind of the benefit of hindsight in analyzing. And, you know, my comment was based on the book value at 9/30. But as we know, we're sitting here on November 6, and we had a massive loss in the fourth quarter which dramatically reduced book value per

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share in the fourth quarter. So we're kind of almost midway through the fourth quarter and book value is much lower than I actually realize. And I think this gets to the point, you know, there's a theory in finance, in economics that your market value -- issuing stock at market value is never dilutive. That the market value of your stock more accurately reflects the true economic value per share of the institution so any stock issued at market value is not dilutive economically to shareholders.

And I think, you know, to this point, if you look at page 12, you know, I was referencing, you know, a book value per share at 9/30 of $24.30. The fact of the matter is book value per share declined during the quarter to 16.60 as we've discussed. So in my mind when I'm thinking about this and saying it here, I'm talking about $24. The reality is book value per share ended the quarter at 16.60. So on this date, book value per share is somewhere between those two numbers and is less dilutive than I thought.

BY MR. SEARLES:

Q. But would you --

A. And then to my other point, I'm talking about on the margin, one share, not in relation to IndyMac's total shares outstanding which, as we discussed, I've

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said that the book value per share dilution from the direct stock purchase plan was almost nill for 2007 and immaterial for the first quarter of 2008.

Q. But assuming that the book value was somewhere -- did you have an understanding of what the book value was of the company's shares on November 6, 2007?

A. No.

Q. Somewhere between 24 and 16?

A. No, I had no understanding of what the book value was at November 6 because I had no understanding of what the loss was going to be in the fourth quarter. It was a surprise to everyone including management.

Q. All right. So the best information you had on November 6 was the book value as of the close of the quarter on September 30; correct?

A. That's correct. And that was not accurate by any stretch of what the real book value per share was on November 6.

Q. All right. But would you then agree that if the book value were 26 and the stock was trading at 11, that that would be trading at well below book value --

MS. VETA: Object to the form.

BY MR. SEARLES:

Q. -- as you stated to Mr. Ramirez?

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MS. MATELIS: Join.

THE WITNESS: On a marginal basis issuing one, you know, share. In other words, as I discussed in my earlier testimony, if you issued an infinite number of shares, yes, that would be highly dilutive. But if you issued a small amount of shares like we were doing relative to our shares outstanding, that book value per share dilution was not material to IndyMac as a whole.

BY MR. SEARLES:

Q. All right.

A. But it was material -- it was significant on the margin share by share, but not material overall.

Q. When you stated to Mr. Ramirez that the stock is trading far below book value, did you believe that to be an accurate statement at the time?

A. I did.

Q. All right. And on page 18 of 22, you state in this second full paragraph, "Now, the capital raising alternatives for us aren't great; right? You're not going to go out" -- "we're not going to go out and raise capital through the direct stock purchase plan."

Do you see that?

A. I do.

Q. Do you recall telling Mr. Ramirez that?

A. I don't recall telling him that, but I have no

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doubt I did.

Q. All right. And then you go on in the third paragraph, you say, "The key to me is preserving book value per share, okay? And that is going to be our focus in here," and it goes on from there.

Then in the latter part of that paragraph, it says, "But if we have a loss in the fourth quarter, I would say that we will -- I would be recommending to substantially cut our current dividend. That raises 75 million of capital a year, okay? That's a lot cheaper for -- that's a prudent, safe way to raise capital without diluting shareholders. Okay?"

Do you recall telling Mr. Ramirez that?

A. No, I don't recall telling him, but I have no doubt that it's accurate.

Q. So the choice, if there were a loss at the end of the fourth quarter as there was, the choice that you believe to be the appropriate one would be to suspend the dividend as opposed to raising additional capital under the DSPP because of the dilutive effect of raising capital under the DSPP; correct?

MS. VETA: Object to the form.

MS. MATELIS: Join.

THE WITNESS: Well, I think what you're trying to do here is you're trying to put facts stated on

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November 6 and compare them to an unprecedented loss that I had no idea was coming, as I discussed in my earlier testimony. This massive loss in the fourth quarter of '07 that was a complete surprise to management as well as the entire industry. Okay? So on November 6 when I'm making this question, when I'm answering this question, I'm expecting a profit to maybe a small loss, nowhere near the massive loss that we suffered in the fourth quarter of 2007.
BY MR. SEARLES:
Q. All right.
A. So I think it's really important to put that in that context first.
Q. I understand.
A. Now, can you ask me that question again and I'll try to answer it.
Q. Well, just in terms of your mental state on November 6 of '07, not knowing how bad the quarter would be by the end of the year, but you're stating here that if we have a loss, so you're anticipating potentially some amount of loss in the fourth quarter, and in the face of that loss, what you would propose doing or at least what you told Mr. Ramirez is the choice would be to suspend the dividend as opposed to raising dilutive capital under the DSPP to make up for that loss;

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correct?
MS. VETA: Object to the form.
THE WITNESS: I think you need to also put in context to, you know, where we are here in November 6. We just have reported our first loss since the global liquidity crisis, first quarterly loss since the global liquidity crisis in 2000 and in 1998. Okay? So we've had one quarter of loss. Okay? We had raised capital just before that quarter of 500 million in the bank through a bank preferred. So we had, at this point in time, in my opinion, very strong capital ratios, regulatory capital ratios in all respects. And we'd had this loss. We covered that loss even with some raising through the direct stock purchase plan in September and October.
So all I was saying here is that, at this moment in time, I didn't see us having a need to raise a significant amount of capital especially given that our stock price was trading below book value per share.
BY MR. SEARLES:
Q. All right. And with respect to this third full paragraph on page 18, with respect to the suspension of the dividend, you state that raises 75 million of capital a year. You're talking -- this is the common dividend; correct?

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A. I believe so, yes.
Q. So suspending the common dividend would save the company 75 million a year approximately? That was your understanding?
A. Approximately, yes.
Q. All right. And you're telling Mr. Ramirez that that would be a more prudent way to go as opposed to raising capital that would be dilutive to shareholders; correct?
MS. VETA: Object to the form.
THE WITNESS: Well, generally banks don't pay dividends out of retained earnings. In other words, if banks are having losses, right --
BY MR. SEARLES:
Q. Right.
A. -- they're not -- you know, they're regulators -- it's not safe and sound.
Q. Right.
A. And we made very clear in 2007 and 2008 our top priority was to keep IndyMac Bank safe and sound. It was the only asset for the holding company. We had to keep that institution safe, sound, and well capitalized, and all I'm saying is that on the margin here, at this moment in time, where we've only had one quarter of loss where we raised all this capital before

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that quarter of loss, where we raised capital subsequent to that loss in September and October, that I didn't see the need given our stock being below book value per share, currently trading below book value per share, to be out raising common equity capital given all the capital we had previously raised and my not knowing that the fourth quarter loss was going to be anywhere near where it actually turned out to be.
BY MR. SEARLES:
Q. All right. Would you consider raising $75 million in capital not through suspending the dividend but through issuing dilutive shares under the DSPP to result in a material dilution to the book value of the company?
MS. VETA: Object to the form.
MS. MATELIS: Join.
THE WITNESS: It depends on the math. As I said, I went through the math with you earlier on 2007, and I'd be happy to walk you through each number on that precisely. I can go through the math for you in the first quarter of 2008.
BY MR. SEARLES:
Q. All right. Well --
A. The direct stock purchase plan was not dilutive in any material respect in 2007 or 2008 to book

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value per share.
Q. All right. In stating to Mr. Ramirez on November 6 of 2007, you're telling him in summary that if there is a loss in the fourth quarter, what you would recommend doing is suspending the common dividend that would save $75 million to the bank as opposed to issuing dilutive shares under the DSPP plan. So my question to you is: If IndyMac had instead chosen the other course and had issued $75 million worth of shares under the DSPP plan, would that have resulted in a material dilution to book value?
MS. VETA: Object to the form.
THE WITNESS: In the fourth quarter, is that what you're saying?
BY MR. SEARLES:
Q. Well, when would this action be taken in terms of suspending the preferred versus -- excuse me, suspending the dividend versus raising capital through the DSPP?
A. Well, we would have suspended the dividend, you know, post 2007; right? Because you wouldn't know your results till until early 2008 for the fourth quarter; right?
Q. Right. And had you taken --
A. In fact, we did that. I think my recollection

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is we eliminated the common dividend which was the prudent thing to do to keep IndyMac Bank safe and sound.
Q. All right. So had you taken the alternative course of action and raised an equivalent to $75 million through the DSPP, when would that have occurred? Prior to the close of the quarter 12/31?
MS. VETA: Object to the form.
THE WITNESS: It's such a theoretical question. I'm not even sure -- if you tell me, Mike, I want you to raise 75 million starting on X date and I got your chart, book value per share, I'm happy to calculate that at lunch for you. You know, but I mean there's just no way that I can, off the top of my head, say that. We're sitting here, you know, four years after IndyMac failed, and I haven't seen anything that you guys have even provided us with respect to the dilution of the direct stock purchase plan from a book value per share standpoint. And you expect me to, like, do that off the top of my head?
BY MR. SEARLES:
Q. No, no. I'm just simply asking you what I thought was a relatively simple question. You're telling Mr. Ramirez on November 6 of 2007 that IndyMac has no plans to raise capital through the DSPP because the share price is well below book value, and you tell

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Mr. Ramirez we're not going to go out and raise capital through the direct stock purchase plan, period.
My question to you is: Had you instead gone forward and raised $75 million in capital under the DSPP plan, would you have considered that to be dilutive?
MS. VETA: Object to the form.
MS. MATELIS: Join.
THE WITNESS: I mean I think there's two points to that question. As we discussed, when I'm referring to the direct stock purchase plan being dilutive or significantly dilutive, I'm referring to it on the margin. I'm not referring to it in terms of IndyMac in total and whether it was material to our financial statements taken as a whole. Okay? Those are two different issues.
BY MR. SEARLES:
Q. Okay.
A. Significant dilution on the margin, one share at a time, which CEOs care about managing their business on the margin. Okay? That's how you make money for your shareholders and provide returns to shareholders. With respect to actually calculating the math of issuing a theoretical 75 million of stock, you tell me what date you want me to do that and give me the share price table, and I will try to estimate book value per share

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because, as we discussed, every day that you have to do this theoretical dilution, you have to make an estimate of what the book value per share is that day, not at 9/30.
BY MR. SEARLES:
Q. In your conference call transcript that we're looking at here, your statement to Mr. Ramirez, isn't it true that what you're telling him is that you believe that issuing shares under the DSPP plan would be dilutive and, therefore, IndyMac won't do that?
MS. VETA: Object to the form.
MS. MATELIS: Join.
THE WITNESS: What I'm saying is that given all the capital that we raise, given that we've only had one quarter of loss, given that I have a view at this point in time that we're going to have a profit to a small loss -- that's my recollection of what our forecast was for the fourth quarter -- that on the margin, issuing capital through the direct stock purchase plan given that our stock price is now trading below book value on the margin, it has some dilution. Okay? And so we're going to try to avoid doing that if we can.
But shareholders were made incredibly clear that our paramount goal was to keep IndyMac Bank safe

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and sound and well capitalized. They knew that that was our paramount goal and that we would have to do anything that we had to do to do that was protecting them as shareholders because this was the only asset that the holding company had, the bank.
BY MR. SEARLES:
Q. Aren't you telling Mr. Ramirez on November 6 of 2007 that IndyMac will not issue shares under the DSPP because of its dilutive effect of doing so?
A. Well, I --
Q. Isn't that what you told Mr. Ramirez, we're not going to out and raise capital through the direct stock purchase plan?
A. You know, I -- you know, when you talk in these calls, right, there is not an expectation that after every sentence that you verbally state that you issue a qualifier. Okay? That's what your public filing are for in writing. Okay? And our public filings made incredibly clear all of the issues with respect to our plans and forecasts. Okay? And gave the qualifiers. You don't talk that way in a call, and I don't think there's any expectation of a CEO having to do that.
Q. But that's not --
A. So I'm not -- so my plan at that moment was to

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try to avoid issuing capital through the direct stock purchase plan. Market events changed. This was an unprecedented market and the best laid plans changed throughout this period of time and changed significantly.
Q. And why would you try to avoid issuing stock under the DSPP plan?
A. I think we asked and answered -- I asked and answered that question. Because we had already raised, like, $650 million of capital for the bank in, you know, prior to either the third quarter loss or, you know, in the third and fourth quarter with the direct stock purchase plan. We'd had just one quarter of small loss, and we were projecting not a material, you know, loss, not anywhere close to the loss that we were surprised to get when we, you know, as the quarter progressed and, you know, as the end of the quarter came. Just like the entire industry. It was surprising.
Q. But that doesn't answer the question of why you would seek to avoid raising capital through the DSPP. What you just articulated --
A. No, no --
Q. Let me finish my question.
What you just articulated is the bank has sufficient capital so it doesn't need to. My question

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is: Why would you avoid raising capital under the DSPP? Isn't the answer to that question because of its dilutive effect as you told Mr. Ramirez?
MS. VETA: Object to the form.
THE WITNESS: I already asked and answered that. I said because it was marginally dilutive.
MR. SEARLES: Okay.
THE REPORTER: Excuse me. I need you to wait until they get their questions and objections out so I can get all of the testimony.
THE WITNESS: Okay.
BY MR. SEARLES:
Q. I'd like to show you what I think we already have, Exhibit 711.
Do you recognize this exhibit?
A. I do.
Q. All right. Could I direct your attention to a particular page?
A. Sure.
Q. If you go to -- the first is page 2 of 95. And after you get through that, you'll come to a press release, 2 of 7, and then a shareholder letter, 2 of 17. And if you could turn to page 10 of 17 of the shareholder letter.
A. Okay.

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Q. The shareholder letter itself is under your signature; correct? This is a letter from you?
A. Yes.
Q. All right. What role did you have in drafting the shareholder letter?
A. Substantial role. I largely wrote it and then had our head of communications, is my recollection, edit it and other people including, I think, directors, as I recall, but I'm not a hundred percent sure, read it and comment on it before we issued it.
Q. I see. All right.
Turning to page 10 of 17, there's a section called "Looking Ahead."
A. Yes.
Q. And at the very last two words of that paragraph on that page continuing on to the next, it says, "With that said, we want to try and avoid raising capital externally right now given our current stock price relative to book value per share as any capital raise would be highly dilutive to existing shareholders."
A. I'm sorry. Where is that at?
Q. Bottom of paper 10 of 17.
A. Okay.
Q. It begins with "with that" and then continues

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on to the next page at 11 of 17.
A. Okay.
MS. VETA: You have to turn that page over.
THE WITNESS: Oh, I see. That's why I'm having a problem. Okay.
BY MR. SEARLES:
Q. Do you recall this portion of your shareholder letter?
A. You know, I don't recall it specifically, but I have no doubt that that's what I said and meant and wrote.
Q. Okay.
A. At the time.
Q. All right. And if you turn to the very end of the Exhibit 711, there's a 2008 forecast detail.
A. I'm sorry. Where are you at?
Q. This should be at the very end, page 34 of 39, the last few pages of this exhibit.
A. Yes.
Q. And the second page of this forecast detail, which is 35 of 39, the IndyMac Bancorp P&L, there's an entry again for diluted shares that we saw in the prior exhibit.
Do you see that?
A. Yeah, I do.

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Q. Okay. And the amount of shares outstanding are not forecasted to increase; correct, they're 81, 81, 81, 81 million?
A. That's correct.
Q. All right. Turning back then to your statement in the shareholder letter here, would you consider or did you consider at the time you drafted this letter that raising capital through the DSPP program would be a form of raising capital externally?
A. You know, I think that -- I'm going to ask and answer that question slightly differently. I think there's, you know, accessing capital markets. I mean did I view direct stock purchase plan capital raising as equity raising, yes. Did I consider it, you know, a capital markets transaction? My recollection is, you know, it's kind of like, you know, this whole debate in banking about proprietary trading these days. What's proprietary trading? I didn't, per se, consider, even though others would, that this would be a capital markets transaction because it was an ongoing shelf registration that we had used very consistently and normally over time.
Q. All right. But as we saw in your, I believe, it was Exhibit 720, the conference call transcript with your dialogue with Mr. Ramirez where you're telling him

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we won't be raising capital under the DSPP because of its dilutive effect, the language here that is in the shareholder letter of February 12, "We want to try to avoid raising capital externally right now because any capital raise would be highly dilutive to existing shareholders," did this statement encompass capital raising under the DSPP?
MS. VETA: Object to the form.
THE WITNESS: Let me, you know, as I said, these were unprecedented times and events, you know, you didn't have perfect information, you didn't have timely information, right, GAAP accounting is not timely information. Values of assets were difficult to value. It was very hard to determine, you know, where you stood at each moment in time, and the environment was extremely uncertain. Okay? And so, you know, you reference the call with Mr. Ramirez where I said our plan was to not raise capital through the direct stock purchase plan. My recollection is then we had a shareholder e-mail me in December of '07 and say, hey, how come your stock is trading below book value? You had raised this bank preferred. You said you're going to buy back shares. How come you're not buying back shares? And I provided a response directly to him that we posted on the blog at IMBreport.com, and our

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attorneys advised us they thought we should file an 8-K with that.
And my recollection is in September of '07, I said very clearly, not only are we not buying back shares, we're out raising capital right now, attempting to raise capital at prices below book value per share. So, you know, my point in raising that is circumstances change because of the circumstances that we were seeing on the ground. It was an extremely highly volatile time. At every moment that I made a statement, it was factual to the best of my knowledge with the information I had. But events changed. And that's why in your public filings we said that our plans are just that. They're plans.
And in fact, if you look at this shareholder letter, later on in it we talk about on page 8 of the shareholders letter, what happens if we're wrong? And credit costs are higher or profitability is delayed further? With the above plan including the dividend cut and balance sheet shrinkage, we'd have capital above, you know, the well established limit of over 671 million, blah-blah-blah. And, you know, then it goes on and yes, things could get worse including potentially incurring more right sizing costs or selling nonperforming assets in bulk at a loss or having to

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raise very dilutive capital. Okay.
So I think, you know, we laid out what we believed was a credible and realistic plan. It was a bottoms up plan. There was no influence from anybody here. That plan, you're correct, did not include direct stock purchase plan capital raising at the times, okay, in the plan because the shares aren't growing at all, but we also warned that things could go wrong, that may not come about. We did so in the shareholders letter. We did so in our 8-K filing on 2/12, and we talked about the risk of raising potentially very dilutive capital. We did so in our 10-K on 2/29 and in the earnings call -- I don't know if you have it here somewhere, but the earnings call related to this 2/12, my recollection is an equity analyst asked us the same question, and I said, look, the timing of all of this balance sheet shrinkage and other issues may not work out, and we may have to raise, you know, capital as a result of that.
So I mean I think we made incredibly clear that our paramount goal was to keep IndyMac Bank safe and sound and well capitalized and we would do everything we had to do to do that. But our plan and our goal was to try to preserve as much book value per share as we possibly could and, in that vein, we were going to pursue the alternatives that did not dilute

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book value per share first, shrinking the balance sheet, eliminating dividends. But if push came to shove, we might have to issue highly dilutive capital to protect the only asset for shareholders and keep the bank well capitalized.
BY MR. SEARLES:
Q. When you say you might, if all these eventualities came to fruition, you might have to issue highly dilutive capital to protect the only asset for shareholders, when you're referring to highly dilutive capital, are you referring to issuances of shares under the DSPP?
A. I think we were referring to a bigger slug of capital.
Q. I'm just asking what you just testified to when you said we might have to issue highly dilutive capital to protect the only asset for shareholders as that being the last resort as opposed to shrinking the balance sheet and selling assets. Does that phrase "issuance of highly dilutive capital" encompass selling shares under the DSPP?
MS. VETA: He was answering that question.
THE WITNESS: I think with respect to that issue in my mind it encompassed raising any form of capital. The dilutive nature of the direct stock

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purchase plan was, as I discussed earlier, was relatively immaterial. So that was a better alternative than going out as I discussed. If you went out and your stock theoretically -- you like to do theoreticals -- if your book value is 20 and market value is 10 and you issue an infinite number of shares, however you issue them, you know, in a big slug or all at once through the direct stock purchase plan, you're going to dilute your share price by 50 percent. Okay?
So the direct stock purchase plan diluted -- if it was trading below book value, diluted the share price substantially less and so we felt that was a far better alternative and we had already disclosed the worst case. The worst case is we've got to go out and raise half a billion or a billion dollars of capital all at once in a highly dilutive manner. We made incredibly clear we might have to do that. So going out and using balance sheet shrinkage, cutting dividend and raising a little capital through the direct stock purchase plan that was immaterially dilutive in 2007 and 2008 was a far more prudent plan. We had already disclosed the worst case which is raising a big slug.
BY MR. SEARLES:
Q. Getting back to my question with respect to the statement on page 11 of 17 where in your shareholder

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letter you're stating, "We want to try and avoid raising capital externally right now given our stock price relative to book value per share as any capital raised would be highly dilutive to existing shareholders."
Did that statement encompass in your mind raising capital through the DSPP at the time you wrote this letter?
A. I'm not sure, but, you know, I certainly think that capital raised through the direct stock purchase plan was marginally dilutive.
Q. All right.
A. A move on the margin.
Q. All right. So you would agree that this statement that I just read on page 11 of 13 of the shareholder letter would include capital raising activity under the DSPP?
A. I'm not sure that, like, when I wrote it, that that -- you know, I mentally focused on that, but I don't have a problem with you saying that.
Q. You would agree with that then?
MS. VETA: Objection. Asked and answered.
THE WITNESS: I think I answered that. I said I don't have a problem with you saying that. I don't know that that, in my mind when I wrote it, that I was focused on the direct stock purchase plan because, as I

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said, the direct stock purchase plan was so perfunctory and so normal and so immaterial, it wasn't a focus in my mind that this was a big problem. On a marginal basis issuing even one share on the margin had significant dilution on that one share. But overall, as I've discussed, mathematically, the direct stock purchase plan was immaterially dilutive to book value per share in 2007 and the first quarter of 2008.

MS. VETA: Mr. Searles, when you get to a good stopping point, can we take a short break?

MR. SEARLES: Sure, we can -- I guess we can do it now.

MS. VETA: Thanks.

THE VIDEOGRAPHER: We are going off the record. The time now is 11:15 a.m.

(Recess taken from 11:15 a.m. to 11:22 a.m.)

THE VIDEOGRAPHER: We are back on the record. The time now is 11:22 a.m.

BY MR. SEARLES:

Q. Mr. Perry, again, with reference to Exhibit 711, if you could turn to -- there's a slide deck starting a few pages after your shareholder letter. It starts with page 2 of 39, Exhibit 99.3.

A. Okay.

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Q. What involvement did you have in the preparation of the slide deck, Exhibit 99.3, to the 8-K?

A. I usually had pretty significant involvement in preparing those.

Q. Okay. And did you have sort of final control over the final words of the document? You were the last one to approve it?

MS. VETA: Object to the form.

MR. SEARLES: Not very articulate.

THE WITNESS: I might parse it into two different pieces, which is yeah, I had final editorial control of that document but not necessarily -- there was a whole group that checked it for accuracy.

BY MR. SEARLES:

Q. Okay. If you turn to page 6 of 39 of the slide deck, this is similar to the statement made in your shareholder letter that we looked at. This slide is entitled "Due to our low stock price to book value per share, our 2008 plan does not rely on the capital markets for raising capital. Instead we plan to eliminate the dividend and shrink the balance sheet."

Do you recall this slide?

A. I do.

Q. All right. And the plan of not relying on the capital markets for raising capital, did that include

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the DSPP, raising capital through the DSPP?

A. I mean I think it's pretty clear from the financial projection that there was no plan for issuing any equity in this plan.

Q. All right. And in fact, during this time period, there were no shares being issued under the DSPP; correct?

A. That's my recollection.

Q. Okay. I'd like to show you Exhibit 919 soon to be marked.

(Exhibit No. 919 was marked for identification.)

BY MR. SEARLES:

Q. This is a document, Bates number at the bottom IMB indicating it was produced by IndyMac.

Do you recognize this exhibit at all?

A. I mean I just -- no, I don't recognize the exhibit. I understand what's on it though.

Q. I see.

And what do you understand is depicted here?

A. It looks like this is the DSPP capital raising in 2008.

Q. Okay. And it indicates from this document that that commenced on February 26 of 2008; correct?

A. That's correct.

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Q. Is that your understanding of when capital raising did commence under the DSPP?

A. That's my recollection.

Q. All right. There was no statement by the market -- excuse me, by the company on that date announcing the DSPP sales had resumed; correct?

A. No, because that hadn't been our pattern and practice ever in terms of how -- you know, as we previously discussed in my testimony, we would file a DSPP prospectus in periods before we would raise the capital which would allow the market to understand that we had that available and could issue it at any time and then we had disclosed in our public filings, for example, in the 10-K that we had an active program and that we had disclosed at each quarter and, as we previously discussed in my testimony, the actual dollar amount and number of shares that we issued through the plan.

Q. In light of your statements in your shareholder letter and in the slide deck that's part of the February 12 8-K regarding the company's plan for 2008 did not contemplate raising capital through the capital markets, once IndyMac resumed sales under the DSPP plan on February 26, did you seek advice of counsel either internally or from external counsel as to whether

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IndyMac had an obligation to make the resumption of those sales known to the public?
MS. VETA: Object to the form.
THE WITNESS: I mean normally that wouldn't have been my role in that time period. My role as part of the, you know, disclosure process was to keep my whole team informed of all the activities that we were doing and clearly, you know, everyone was informed that we were raising capital through the direct stock purchase plan, you know, again, on February 26. And so, you know, I would have expected, you know, someone else, if they thought that that was appropriate, to check with counsel, but I don't really think that was necessary given the fact that we had said this was a plan. We had the -- the 2/12 was a plan and we had disclosed very clearly in those public filings all of the issues that could go wrong with plans and the fact that we did not have an obligation to update our plans.
BY MR. SEARLES:
Q. So you personally did not consult either with internal or external counsel as to whether IndyMac should disclose the resumption of the DSPP sales in light of the statements to the public on February 12 that it would avoid or not raise capital through the capital markets?

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MS. VETA: Object to the form.
THE WITNESS: I mean I think as CEO you don't have -- you're not living daily should I disclose this? What you're doing as part of the, you know, Sarbannes Oxley financial reporting control process is you're making your team aware, and we had a full-time disclosure committee and full-time people in financial reporting and legal and outside counsel, and I copied, you know, virtually everyone on every issue. I don't recall how many people -- it was widely known that we -- you know, inside the company that we had recommenced the direct stock purchase plan on February 26.
BY MR. SEARLES:
Q. All right. But although it was well known within the company, it was not publicly known other than to the participants, the institutional arbitrage players under the waiver program; correct?
MS. VETA: Object to the form.
MS. MATELIS: Join.
THE WITNESS: I'm sorry, can you repeat that question for me?
BY MR. SEARLES:
Q. You said the resumption of the DSPP sales on February 26 was well known within the company. But was it well known publicly?

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A. Well, you added a -- you had a second part about the arbitrage players.
Q. Right.
It would only be known to the arbitrage players participating in the waiver program. It would not be public knowledge to all IndyMac's common shareholders, would it?
MS. VETA: Object to the form.
THE WITNESS: You know, that's correct. Even though I said that, you know, various of my subordinates would have been the ones checking with counsel on that, in my opinion, I don't think there was a need to disclose it. That was not our pattern and practice of how we disclosed our direct stock purchase plan in the past. As I said, we filed the direct stock purchase plan prospectus before we raised shares, and we had an open and active one. We had a 10-K that said we had an open and active program, and then we disclosed after the fact the number of shares that we raised. And the other point that, you know, we've discussed in my previous testimony is the capital raising that we were doing through the direct stock purchase plan not only was ordinary and normal course, but it wasn't material to IndyMac.
BY MR. SEARLES:

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Q. So the answer to my question of whether you personally solicited the advice of inside or outside counsel with respect to whether IndyMac should disclose the resumption of the DSPP sales on February 26 in light of IndyMac's prior statements as reflected in its February 12, 8-K that it would not raise capital through the capital markets, you did not personally seek or obtain any advice from counsel on that issue; correct?
MS. VETA: Object to the form.
THE WITNESS: I think that was a pretty long question, but one of the words that I caught in it was "not." I think that we said nothing was in that strong of a vein with respect to our plan. It was we would try. We would plan. This was our plan. Okay?
BY MR. SEARLES:
Q. All right. Well, the document will speak for itself --
MS. VETA: Let him finish his answer.
BY MR. SEARLES:
Q. In the interest of time --
A. And then we warned about the fact on all of the issues that could cause a plan to not come to fruition and the fact that we had no obligation to update our plans.
Q. Okay. The answer to my question -- my

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question is whether you personally solicited and obtained advice from either inside or outside counsel on whether IndyMac should disclose the resumption of the DSPP sales in light of its statements on February 12.
A. I didn't personally solicit, but I might have copied or someone else on my team had copied outside counsel informing them of that fact, and the pattern and practice would have been they would have read that and they would have provided some feedback if they thought that was something that needed to occur.
Q. All right.
A. I don't know if that happened or not.
Q. Okay. And you did not personally solicit advice --
A. Not that I recall.
Q. And as to whether outside counsel may -- or other counsel may have been advised, it's just speculation on your part; correct?
MS. VETA: Object to the form.
THE WITNESS: Well, I think it's more than speculation because we had, you know, as a result of the culture that I built at IndyMac, you can see that on almost every key issue, good or bad, I copied a lot of people. And generally on almost everything in 2007 and '08, I copied outside counsel, our independent auditors,

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and our regulators, our board and our management team. So I guess I would say that it's a little more than speculation. It's an educated guess that they were likely informed.
BY MR. SEARLES:
Q. All right. But it's still a guess?
A. Yes, educated.
Q. And with respect to IndyMac's past use of the DSPP program and its practice of disclosing amounts raised at the end of the quarter, other than in November of '07, again in February of '08, and those prior periods, IndyMac stock price was not trading below book value; correct?
MS. VETA: Object to the form.
THE WITNESS: Well, you know, I can't speak for, you know, all of the prior periods. I mean I just, you know, don't have them off the top of my head, but I mean I understand your point. And I would largely concede your point.
BY MR. SEARLES:
Q. All right. And with respect to those prior periods, those periods had not been prefaced by comments by the company that it would avoid raising capital under the DSPP plan because of its dilutive effect; correct?
MS. VETA: Object to the form.

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THE WITNESS: Well, I think it was prefaced by those that it would try to avoid -- that it was going to try to avoid doing that. But it was also prefaced with that we would do everything to stay well capitalized and that we may have to issue dilutive capital.
BY MR. SEARLES:
Q. No, I'm sorry. You misunderstood my question.
With respect to prior periods where IndyMac stock price was not trading below book value --
A. Okay.
Q. -- the company or you did not come out and affirmatively state either in shareholder letters or in slide decks or in earnings presentations or earnings call that the company would avoid raising dilutive capital under the DSPP; correct?
MS. VETA: Object to the form.
THE WITNESS: That's correct.
BY MR. SEARLES:
Q. All right. I'd like to show you what's been previously marked as Exhibit 768.
A. Okay.
Q. Do you recognize this exhibit?
A. I do vaguely recall it, yes.
Q. Okay. This is an e-mail from you, dated April 23, 2007, to -- who is it directed to? Are these

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all the board members?
A. Yes. I think it's -- it's a chain of e-mails; right, that started with it looks like an e-mail from Aries Capital to our CFO, and then it's to all our directors. Pat Haden, one of our directors, responded to me regarding the information about this potential capital raising alternative.
Q. I see.
In the second paragraph of your e-mail to Mr. Haden you state, "Raising capital at our current stock price, about 50 percent of book value, is now really expensive through the direct stock purchase program."
Do you recall writing that?
A. I don't recall, but I don't doubt it.
Q. Okay. Can you explain to me how raising capital through the direct stock purchase program is really expensive?
A. Well, this is -- I think I've asked and answered this. On the margin, you know, if you have a book value per share in a theoretical basis of 20 and you have a market value of 10, issuing that one share is 50 percent dilutive on that one share. If you issued infinite number, it would dilute the company's book value per share in half. Okay. And so on a marginal

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basis issuing stock was highly dilutive, but in small amounts, it was not materially dilutive to IndyMac's book value per share.
Q. All right. Well, when you wrote this e-mail to Mr. Haden on October 23, was it your understanding that raising capital under the DSPP plan was really expensive?
A. On the margin, yes.
Q. A question on your math. When you say issue an infinite number of shares, so if IndyMac were to issue -- it had 81 million shares outstanding, if it issued a hundred billion shares, that's approximating infinite.
A. Right.
Q. What effect does that have on book value?
MS. VETA: Object to the form.
THE WITNESS: It would cause it to go in half.
BY MR. SEARLES:
Q. Just in half?
A. Yes. It can't be more than half. You're getting money in for -- at $10.
Q. I see.
A. It's not a loss. It's not like a loss.
Q. All right.
A. You're actually getting $10 of book value per

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share in cash in. So it causes the book value to decline in half if you issued an infinite number of shares.
Q. Okay. And if the book value is 16 and the stock price was trading as of May, 2008, at $3 share, then what would be the maximum dilutive effect of issuing an infinite number of shares under the DSPP?
MS. VETA: Object to the form.
BY MR. SEARLES:
Q. It would be more than half; correct?
A. Well, you have two different dates. Remember we said that you have to put book value per share and the market value per share on the same date --
Q. All right.
A. -- to calculate dilution.
Q. Okay. Let's work with your hypothetical then.
A. Okay.
Q. If it's $20 book value, $10 per share, maximum effect of raising an infinite number of shares under the DSPP is a 50 percent drop in book value; correct?
A. That's correct.
Q. All right. So then if the share price is not $10 but $2, what's the maximum effect of issuing shares under the DSPP in terms of diluting book value?
MS. VETA: Object to the form.

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THE WITNESS: If you issued an infinite number of shares in that theoretical assumption, it would be 90 percent of my math.
BY MR. SEARLES:
Q. Okay. All right.
A. You know, is correct.
Q. Okay. Thank you.
A. Okay.
Q. I'd like to show you what's been previously marked as Exhibit 769.
A. I'm not -- for the sake of time, I won't read the whole thing. But I can read sections if you want.
Q. Okay. No, I'm just waiting. When you raise your head, it's a signal that you're ready to talk again.
A. Okay. Okay.
Q. All right. This is an e-mail from yourself, dated November 19, 2007, again, to the members of the board.
A. Yes, it appears to be.
Q. Do you recall drafting this e-mail?
A. I don't recall drafting it, but I have no doubt it's an e-mail that I wrote.
Q. Okay. And in this e-mail, you're discussing, what, six main options for raising capital?

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A. Yes.
Q. All right. And one of those options in this time period was No. 4, "Continue to raise capital through the direct stock purchase program to cover any losses projected during each quarter."
Do you see that?
A. I do.
Q. And turning to the second page, you're discussing option No. 4, and I think the first paragraph on that second page you state, "The most dilutive way to raise capital would be to do No. 3, sell the entire company."
And then with respect to the direct stock purchase program of the six different options, you state "Let's now look at the next most dilutive transaction which would be No. 4, raise 200 million of common equity through the direct stock purchase program."
Do you recall having an understanding that raising capital of that magnitude would be dilutive to book value in November of 2007?
MS. VETA: Object to the form.
THE WITNESS: Yeah, I mean I think with all the caveats that I, you know, previously said about, you know, the book value -- not knowing what the book value per share was on November 19, right, and matching it up

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to that and not knowing -- you can see here, you know, I was discussing in my earlier testimony, I was -- we were projecting at November 19 a 52 million loss for the fourth quarter. So that would have had relatively modest reduction in book value.

So we had no idea that our book value was going to actually end up at 16.60 at the end of 12/31. But, you know, we thought it was closer to being the 9/30 book value. So, you know, with perfect information now with the benefit of hindsight, all of these were less dilutive than they actually were. So do you understand what I'm saying? With the perfect knowledge of hindsight and what these losses were, all of what we thought was wrong and that these were all less dilutive alternatives. Do you see that what I'm saying?

BY MR. SEARLES:

Q. Less dilutive?

A. Less dilutive than we thought at the time. In other words, because we were using 9/30 book value and not thinking that 12/31 book value would have changed materially. Do you see what I'm saying?

Q. I understand.

A. And the other thing that is, you know, not on this list is just the raising a big slug of capital. That certainly would have been more dilutive,

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substantially more dilutive than raising capital, you know, on a monthly or quarterly basis to the direct stock purchase plan.

Q. All right. And when you say a big slug of capital, what number do you have in mind?

A. You know, pick it. You know, 250 to a billion.

Q. That you would consider to be a big slug of capital?

A. Yeah. I probably would say maybe 250 is too small, but certainly a half a billion to a billion.

Q. Is a big slug of capital?

A. Absolutely.

Q. And if that were raised in an equity transaction, that would result in a material dilution to book value?

A. Yeah, it would result in a material dilution of book value per share. Absolutely.

Q. And if you were to raise an equivalent amount of equity through the DSPP plan of 500 million, would that have the same effect -- material effect on dilution of book value?

MS. VETA: Object to the form.

THE WITNESS: It's more of a theoretical because you don't know what the market value of your

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stock price is going to be over a longer period of time. One, you have the certainty of dilution today. If you raise half a billion to a billion, you have the certainty of dilution.

BY MR. SEARLES:

Q. Because you're doing it on one particular day?

A. Yes.

Q. All right.

A. Right. At a price below book value. The other you have the chance that as your earnings recover, that your stock price recovers, you know, once you get through the crisis. So it's not certain that you're going to have anywhere near the dilution raising the same amount of capital through the direct stock purchase plan over time that you are raising a big slug all at once.

Q. It would be a risk of that eventuality; correct?

MS. VETA: Object to the form.

THE WITNESS: Yes.

BY MR. SEARLES:

Q. Did IndyMac ever publicly disclose in the first half of 2008, between February and beginning of May of 2008, that it was seeking to raise a big slug of capital in a one-day transaction?

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MS. VETA: Object to the form.

THE WITNESS: My recollection is we disclosed that risk -- the risk that we might have to raise significantly dilutive capital.

BY MR. SEARLES:

Q. Did IndyMac ever disclose that its business plan changed from February 12 to relying on raising capital through the DSPP up to $500 million over the course of the year?

MS. VETA: Object to the form.

THE WITNESS: I don't believe that our business plan, the 2/12 business plan where we didn't have any capital raising in it, that we had made a decision that we were going to raise half a billion dollars. We debated a lot of different ideas for raising capital, you know, post 2/12.

MR. SEARLES: All right.

THE WITNESS: And but I do recall that in March, like March 11, we disclosed in an 8-K filing that the 2/12 forecast as a result of market conditions especially in the mortgage market -- I think Bear Stearns failed a week later -- that the 2/12 forecast was going to be negatively impacted.

BY MR. SEARLES:

Q. While we're on that subject, the March 11 8-K,

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was there any consideration of disclosing at that time that IndyMac had resumed sales under the DSPP plan? That's not included in the March 11 8-K.

MS. VETA: Object to the form.

THE WITNESS: Yeah. No, it's not. I --

BY MR. SEARLES:

Q. Do you recall any discussion on that subject as to whether --

A. I don't recall any discussion. I think, you know, people thought we had, you know, disclosed that program very clearly, as we've discussed in, you know, my previous testimony, and that we weren't raising an amount of capital that was unusual or material in any way. And it wasn't, as I discussed, it wasn't in the first quarter of 2008 materially dilutive to book value per share.

Q. And do you recall in connection with the March 11 8-K an actual discussion of where that is being discussed of whether to disclose the DSPP sales that had resumed on March 26 and that analysis that you just went through? Do you recall an actual discussion on that subject?

A. No, I don't.

Q. I'd like to show you what's been previously marked Exhibit 743.

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A. Okay.

Q. This is an e-mail dated November 20 from yourself, again, to the board; correct?

A. Yes.

Q. All right. And do you recall sending out this e-mail?

A. Just generally. I have no doubt that I sent out this e-mail.

Q. All right. In the first paragraph, fourth line down, you're referencing the book value of the company, and you state that "Given the fact our stock is trading well below book value which makes raising capital externally" -- excuse me -- "which makes raising capital extremely dilutive to existing shareholders."

Do you recall writing that?

A. No, I don't recall writing that, but I have no doubt I wrote it.

Q. And this raising capital externally, would that include sales under the DSPP program?

A. Yeah, I would say so, yes.

Q. All right. So then did you then have an understanding that raising capital under the DSPP program in this time period of November would be extremely dilutive to existing shareholders?

A. Well, as I said in my previous testimony, you

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know, with the benefit of hindsight, we now know that book value -- that the loss for the fourth quarter was substantially larger than we thought on November 20, and so book value per share on November 20, I didn't know what it really was, and it was substantially lower than book value at 9/30. So it still may have been dilutive. It still may have been substantially dilutive on the margin. But what I'm saying is even though it was sub- -- it could have still been substantially dilutive on the margin, the amount of capital that we raised in 2007 and through the first quarter of 2008 was not materially dilutive to book value per share.

Q. Let me just go through a little bit of math, which is a dangerous thing. There's a reason I'm a lawyer.

A. Okay.

Q. If you could look back at Exhibit 918.

A. 918?

Q. This is the stock price chart.

A. Yeah.

Q. So going back to the end of the third quarter, November -- or excuse me, September 30 of 2007, which is on page 5 of 9 of this chart --

A. Yes.

Q. -- the stock price on that date is trading at

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23.61.

Do you see that?

A. I'm sorry. Which date? I know how to read it. Just tell me the date again.

Q. 28th of September, 2007. Stock price closed at 23.61.

A. Yes.

Q. All right. And the book value at that time, the close of the third quarter, do you recall what that was?

A. It was on one of the previous documents, but I don't recall exactly. I saw it on one of the previous documents.

Q. Yeah. I think if you go to Exhibit 727, it has the forecast.

A. Okay.

Q. Third page. Are you with me?

A. I am.

Q. End of third quarter it appears the book value per share is 24.31.

A. I think the only caveat I have, you know, as I said, with this forecast is that this is not a certified forecast that we disclose publicly. So the better data would come out of the Q or the K, but for shortcut purposes, I'm fine using this.

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Q. Okay. And this is a historical fact we're looking at now.
A. Yeah, I mean this could be an error.
Q. Okay.
A. You know, that's all I'm saying.
Q. Relying on IndyMac's own forecast regarding historical facts, assuming this to be a correct entry for the book value as of the close of the third quarter is 24.31; correct?
A. That's correct.
Q. All right. And the share price is 23.61.
A. Right.
Q. So would you consider that differential to be extremely dilutive to existing shareholders?
A. No.
Q. All right. So then when you do state in November that raising capital under the DSPP would be extremely dilutive, let's look at the share prices in November. I think we were just looking at, what, November 20?
A. Yeah.
Q. So if you look at November 20, the share price now is at $8.39; correct?
A. November which date?
Q. November 20, 2007. I believe the last exhibit

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we were just looking at was dated that date.
A. November 30?
Q. No. 20. I'm sorry. November 20. Bottom of the third page.
A. 839.
Q. 839?
A. Yeah.
Q. All right. And would you consider, then, if IndyMac's book values were $24 as reflected in Exhibit 727, would you consider capital raising at $8.39 a share price extremely dilutive as you stated in Exhibit 720?
MS. VETA: Object to the form.
THE WITNESS: Well, I mean as we discussed, the book value on November 20 which had been a little more than halfway through the quarter was something lower than this $24 number. It would have been somewhere between 24 and the 16.60; right --
MR. SEARLES: Okay.
THE WITNESS: -- but, like, even if you took the end, 16.60, which is, you know, a simple number because this is 8 bucks. Right? That's about our 50 percent dilution. So if we issued an infinite number of shares, you know, and you were using the end, 12/31, book value, that would result in about 50 percent

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dilution. Yes, I would say that's materially dilutive.
But the point is, we weren't issuing an infinite number of shares. We weren't even doubling our shares. We weren't even increasing our shares by 10 percent.
MR. SEARLES: All right.
THE WITNESS: We were issuing it in a much smaller increment which -- so marginally, it was significantly dilutive, but it was not materially dilutive to IndyMac's overall book value per share.
BY MR. SEARLES:
Q. And in Exhibit 743, the exhibit we were just looking at dated November 20 of 2007 --
A. Yes.
Q. -- you state there to the board of IndyMac that since your stock is trading well below book value it makes raising capital extremely dilutive to existing shareholders.
Is that your understanding at the time you wrote this e-mail?
A. Yes.
Q. I'd like to show you what's been previously marked as Exhibit 758.
Do you recognize Exhibit 758, Mr. Perry?
A. You know, I mean I just recognize it

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generally. I think my recollection is on Tuesday, that Tuesday I was either preparing or had it out to try to raise a significant amount of capital that our regulators had asked us to try to do. So I might have been -- I might have literally been flying out that day to New York. But I mean I recognize it generally. I don't recall whether I read it or not.
Q. I see.
When you say your regulators had asked you to go out and raise a significant amount of capital, what do you recall about those conversations? How much capital did the regulators want IndyMac to raise?
A. I mean I think my recollection and I think -- you know, it was in my previous deposition with you guys was that this was after WAMU had successfully raised several billion dollars of capital through private equity investors, and I recall right after that -- my recollection is right after that I got a call from Mr. Dochow, who was the western region director at the OTS saying, "Mike, we want you guys to do the same, try to raise a big amount of capital."
Q. Did you have any understanding of the consequence if IndyMac failed in that endeavor from a material perspective?
MS. VETA: Object to the form.

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THE WITNESS: If you have a document that refreshes my memory, just off the top of my head, I didn't -- you know, I don't recall a specific understanding, no.
BY MR. SEARLES:
Q. All right. With respect to this exhibit before us, Exhibit 758, this appears to be a collection of analyst reports or excerpts of analyst reports provided by Ms. Marsh to yourself and others within IndyMac commenting on IndyMac's disclosures on May 12. Would you agree?
A. Yes.
Q. All right. And one of two concerns -- she says, "There are basically two themes running through all of them. One, a concern the credit cost could still be far worse than our forecast, and two" --
MS. VETA: I don't think that's what it says, Mr. Searles.
BY MR. SEARLES:
Q. Okay. I could have marbles in my mouth.
"There are basically two themes running through all of them. One, concern that credit cost could still be worse than our forecast, and, two, concern with respect to the impact on book value of the dilutive capital raising given our current stock price."

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Do you recall analysts having that concern in May of 2008 --
A. I don't recall that specifically, but I think that those are legit -- were legitimate concerns at that point in time.
Q. I see.
And why were they legitimate concerns?
A. Because of the, you know, significant problems in the mortgage and housing markets and their impact on lots of financial institutions. A lot of them were addressing these same types of issues. This is, you know, why the government had to come in and recapitalize the too-big-to-fail banks because their stocks were so low they couldn't raise capital in the marketplace. I think Washington Mutual was the last -- as I recall, was the last big private capital raise, and what happened with that deal, those investors who were very sophisticated and did weeks of due diligence lost all their money.
Q. Well, the two basic themes, the second one being the "concern with respect to the impact on book value of the dilutive capital raising given our current share price," did you believe that to be a legitimate concern?
A. At that point in time, yes.

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Q. And why did you believe it to be a legitimate concern at that point in time?
A. Well, because our forecasts were coming in worse, and our actual results were coming in -- continuing to come in worse than forecasts, like, pretty much everyone, and so you were seeing no end in sight in terms of these losses, and you had regulatory pressure to keep your capital levels above the well-capitalized limit. And so mathematically the only way to do that is to raise capital, and given that our stock had been driven so low by a combination of the overall marketplace, our business being mortgage banking, and so our stock price was well below book value per share, you know, at all -- at this point in time and that the regulators wanted us to raise capital, there was no place to go but other than dilute shareholders.
But at the bottom line is it's either save the bank and dilute shareholders, which benefit shareholders, and I think my recollection is we got an opinion from counsel around this time or somewhere in this time period that talked about the fact that, you know, raising capital, even if it's materially dilutive, was in shareholders' best interest.
Q. That's from the perspective of the bank, though, isn't it?

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A. No. There was no other asset at the holding company. If the holding company shareholders and preferred holders lost the bank, that's, you know, why the holding company had to file bankruptcy when we lost the bank after July 11.
Q. Correct me if I'm wrong, from the perspective of IndyMac, someone inside IndyMac, the perspective is it's better to raise dilutive shares than to let the bank fail?
MS. VETA: Object to the form.
BY MR. SEARLES:
Q. Is that correct?
A. From whose perspective?
Q. Those within IndyMac, yourself, for example, people inside the bank. It's preferable to raise dilutive capital than to let the bank fail.
MS. VETA: Object to the form.
BY MR. SEARLES:
Q. Is that correct?
A. No. That's not correct. You know, first of all, I was perfectly aligned with shareholders, right, I hadn't sold a share since 2005. I had -- I think I was the -- my recollection is I was the largest individual shareholder. No one lost more money on IndyMac shares than I did. No one. Okay? And so the bottom line is,

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we had no choice. We had to protect the holding company's only asset by this point in time, which was the bank, and that's why everyone, including internal people, were coming to realize that we did not have -- we did not have a choice at this point in time, That we had to go try to raise capital. I didn't think it was very realistic that we would get it done, and, in fact, I was right. We were not able to get it done.

And so once, you know, we were not able to get it done, we went back to the regulators, both the OTS and the FDIC and said, "Look, we're going to cut production completely out. We're going to shrink this balance sheet down, lower the risk profile," and the regulators supported that plan and told us they would support us and didn't want to seize us.

Q. In the Lehman Brothers, in the sell side summary, there's a paragraph, "Lehman Brothers: Direct Purchasing -- Direct Purch Plan Diluting IMB Investors." Do you see that?

A. I do.

Q. The direct purch plan, do you understand that to be a reference to the DSPP?

A. Yes.

Q. And do you understand that to be the headline of their report on or about May 13?

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MS. VETA: Object to the form.

THE WITNESS: I'm not sure, but I don't doubt its accuracy.

BY MR. SEARLES:

Q. All right. On the fourth line, fifth line from the bottom, it states, "If the stock" -- the Lehman Brothers commentary, "If the stock price remains at current levels, this will be materially dilutive to current shareholders" -- let me back up.

The Lehman Brothers entry reads in the middle of the paragraph, "In addition to suspending the dividend, management plans to raise capital through its direct purchase plan, which according to management's own model, could increase the diluted share count by 1.7 times, fourth quarter of '07 to fourth quarter of '08. If the stock price remains at current levels, this will be materially dilutive to current shareholders pulling the current GAAP book value of 10.92 shares -- per share down to $7 a share of our net current estimate for additional losses."

Would you agree with the Lehman Brother analysis that the plan, if stock prices remain at current levels, would be materially dilutive to current shareholders?

A. Yes, I would, but I would also point out

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that -- because I did some work on this Lehman equity analysis report because you guys have a declaration related to that. And he issued a report, I believe, like on 4/30 and came to a conclusion that -- his ultimate -- first of all, he had us adequately capitalized in that report and that was publicly disclosed -- okay. Do you want to stop?

Q. No. We're about to change the tape in one minute so unless you --

A. No, I can't answer in one minute.

Q. Okay. I apologize for interrupting.

A. No, that's fine.

THE VIDEOGRAPHER: We are going off the record. This is the end of tape No. 2 in the continuing testimony of Mr. Michael Perry. The time now is 12:10 p.m.

(Recess taken from 12:10 p.m. to 12:16 p.m.)

THE VIDEOGRAPHER: We are back on the record. This is the beginning of tape No. 3 in the continuing testimony of Mr. Michael Perry. The time now is 12:16 p.m.

BY MR. SEARLES:

Q. Mr. Perry, when we broke, you were in the middle of an answer. I don't know how good your memory

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is.

A. Can you start the question again for me?

Q. All right. That's fine.

With respect to the Lehman Brothers commentary on the company's plans to increase the diluted share count by 1.7 times over the course of the year, at Lehman this analyst concludes "This will be materially dilutive to current shareholders."

Would you agree with that assessment?

MS. VETA: Object to the form.

THE WITNESS: I think from a book value standpoint, I generally would agree. But I'd also point out that this analyst, my recollection, is he issued a report on April 30, and, you know, you can talk about all the different things that were in that report.

One of the things that was in there, interestingly enough, is he had us adequately capitalized by a fair amount at 3/31/08. The market absorbed that and no real issue with us being adequately capitalized. But that's not directly the point.

The bottom line point was he didn't have direct stock purchase plan capital raising in that 4/30 report and then now he has it in this report. And he had the same targeted stock price for the company at $6 a share. So in other words, this equity analyst

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absorbed that information, came to the same stock price conclusion before knowing about the direct stock purchase plan and after.

It was the next day on 5/1 that we -- as part of the 8-K that we filed with Mr. Keys leaving, that we disclosed, you know, just a business update, and one of the things that we did disclose in that business update was the capital that we had raised year to date from February 26 through I believe 4/30 and the dollar amount of that and the shares that we had issued.

And my recollection is you had that Lehman report on 4/30 adequately capitalized, not knowing about the direct stock purchase plan, $6 targeted price. On 5/1, we had that 8-K where we filed -- where we disclosed all the shares we raised under the direct stock purchase plan, and then a few days after the market absorbed that, my recollection is the stock price went up.

So I mean I think that that plus, you know, the fact that this analyst didn't change his targeted price is a good indication of the -- that the capital raising we had done to date had not been materially dilutive. Okay?

Now, the capital raising going forward clearly was going to be more materially dilutive because of the

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size and scale of it. But that was new plans. Plans had changed by this point in time. There wasn't any intent to hide anything or deceive. Just things were changing because of the uncertain environment.

BY MR. SEARLES:

Q. And with respect to the plans had changed, you're referring to the, at least in part, the increase in DSPP shares of increase in the diluted share account by 1.7 times?

MS. VETA: Object to the form.

THE WITNESS: Well, I think what these analysts are responding to and just regurgitating out -- because equity analysts, you know, largely act like journalists. And he's responding to the plan that we published along with the 8-K filing on May 12. So he -- in that plan, we are showing significant share issuance, is my recollection, to the direct stock purchase plan and, as a result, given the stock price, more significant dilution going forward. Okay? And you know, so I mean that's -- yeah, that might have been a surprise to the marketplace. But so were our losses. Everything was a surprise in this environment to all financial institutions.

BY MR. SEARLES:

Q. Did you believe that the analyst reports that

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are expressing a concern about book value, whether their concern about the declining book value of the company was a legitimate concern?

MS. VETA: Object to the form.

THE WITNESS: On May 12 -- on May 13 and May 12?

BY MR. SEARLES:

Q. Uh-huh.

A. Yes, I believe it was a legitimate concern.

Q. Would you believe that regardless of time the concern over decreasing book value would be legitimate at any point in time?

MS. VETA: Object to the form.

MS. MATELIS: Join.

THE WITNESS: Yeah, with the caveat of all my previous testimony on all of the factors that affected book value per share decline including losses, both realized and unrealized, and dividends paid out of retained earnings. Yes, for financial institutions, declining book value per share is a negative factor.

BY MR. SEARLES:

Q. And the Fox-Pitt-Kelton commentary second to the last line, "IBM" -- excuse me, "IMB," IndyMac, "continues to aggressively issue stock through its direct issuances shelf. We note at the current stock

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price, $3.25, it would take essentially a doubling of shares to reach the 11 percent total risk-based capital required."

Would you consider if IndyMac were unsuccessful in raising a big slug of capital through an equity investment and relied solely or had to rely solely on the DSPP shares as a source of capital, would you consider a doubling of the shares under that program to be materially dilutive to book value?

MS. VETA: Object to the form.

THE WITNESS: On a go-forward basis, you know, it depends on what, you know, the stock price is; right? And but I would say just all other things being equal, if your stock price is below your book value per share and you don't have losses going forward, yes, that would be -- that level of share issuance would be, you know, materially dilutive.

But I think these analysts got it. They got it all year through 2008 in terms of -- almost all of them had sell ratings or underperform ratings on IndyMac. So I mean our disclosures did the job. These analysts got the big picture, maybe with the exception of this Fox-Pitt. He was the -- I think the one buy all the way till July of 2008. But all the rest of these guys, they got it.

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BY MR. SEARLES:
Q. Would you consider the fact that IndyMac had decided to resume sales under the DSPP program on February -- or February 26 of 2008 and assuming it had a plan to raise between 1 and $3 million a day under that plan or between 260 and $520 million over the course of the year, whether that would be material information to a shareholder?
MS. VETA: Object to the form.
MS. MATELIS: Join.
THE WITNESS: Well, we didn't have a plan on February 26 to raise.
MR. SEARLES: All right.
THE WITNESS: -- 260 to 520 million --
MS. VETA: Let him finish. Let him finish.
BY MR. SEARLES:
Q. I'm just -- that's fine.
But assuming that to be the case, would you consider that to be material information to a shareholder?
MS. VETA: Object to the form.
THE WITNESS: If that was a plan that you -- you know, was your honest plan that you had gotten approved by your board and your regulators as your plan, yeah, I think that would be something that would rise to

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that -- probably rise to that level.
BY MR. SEARLES:
Q. Okay. I'd like to show you what's going to be marked as Exhibit 920.
(Exhibit No. 920 was marked for identification.)
BY MR. SEARLES:
Q. Do you recognize this exhibit?
A. No. I mean I don't recall it, but I mean I have no doubt that it's accurate. No reason to doubt that it's not accurate.
Q. Okay. Yeah, this is a trip down memory lane, 2006.
A. Yeah.
Q. So this is an e-mail from yourself to Scott Seymour, cc Mr. Keys.
MS. VETA: John Seymour.
MR. SEARLES: I'm sorry.
BY MR. SEARLES:
Q. Who is Mr. Seymour?
A. He was one of our independent directors, and I believe during this time he was probably our lead director.
Q. Okay. In the e-mail, you're commenting about -- "Capital Raising Through the DSPP Waiver

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Program" is the subject of your e-mail, and you're commenting during the pricing period due to the investors shorting the stock, that it may have some impact on price, but you say you and Mr. Keys spoke and given the volume of 25,000 shares a day, it should not have a material impact given the 800,000 shares that are traded -- shares a day that trades.
Do you see that?
A. Yeah.
Q. And the math of 25,000 into 800,000 is about 3 percent, would you agree?
A. Yeah.
Q. Did you have an understanding of at what level issuance of shares under the DSPP program relative to the shares trading per day would approach having a material impact?
MS. VETA: Object to the form.
THE WITNESS: That's what we had discussed in my testimony earlier. I don't recall -- I mean I had at one time an understanding of that, what the view was about that, but, you know, I think one of the things that, you know, if you step back from this, there, you know, like, somebody says stock market today down 2 percent. China does X. That may or may not be the case that it was China that caused the stock market to

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be down. It could be Soros sold all its positions, or you know, a million factors that could come about. This is just, you know, I think we're being very, you know, flippant here in this e-mail in saying -- and maybe that's not the right word -- in saying that we know that the -- why the stock moved one way or the other. The reality is you really don't. Okay? Just like you don't know why the stock market moved in general one day, you know, to the next.
What we're saying here is that -- and, you know, to step back, investors have told us, you know, like the administrator, that there's a percentage that your daily volume that you want to go -- generally don't want to go over without having some negative impact temporarily on your stock.
BY MR. SEARLES:
Q. As you sit here today, you can't recall --
A. I don't know --
MS. VETA: Let him finish his question, and then you give an answer to his question, and he'll ask the next question.
Go ahead, Mr. Searles. I'm sorry.
MR. SEARLES: I'll let her beat up on you.
BY MR. SEARLES:
Q. But with respect to not really knowing what

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effect or what may affect stock price, you can at least have an educated guess like you did with this -- as you described earlier with respect to whether counsel may have advised the company on X, Y, and Z, you can have an educated guess that flooding the market with DSPP shares may have an affect on the price of the stock; correct?
MS. VETA: Object to the form.
MS. MATELIS: Join.
THE WITNESS: Yeah, I mean I think that there's some -- at some level of volume it's going to have a negative impact on the stock price --
MR. SEARLES: All right.
THE WITNESS: -- in relation to the daily trading volume. I don't remember what that would be.
BY MR. SEARLES:
Q. I'd like to show you what will soon be marked Exhibit 921 on the same subject.
(Exhibit No. 921 was marked for identification.)
BY MR. SEARLES:
Q. Do you recognize this exhibit?
A. I recall this exhibit, yes.
Q. Okay. And this is an e-mail from yourself, dated August 31, 2007, to various members of the board; correct?

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A. Well, it's a chain of e-mails, but yes, the top one is from myself to various board members.
Q. All right. The last one in time at the top of the page is the one of interest where you say, "FYI, as we discussed, we're going to raise 75 million of equity capital through our direct stock purchase program from September 6 through September 22. During that period, the stock price may receive some minor downside pressure due to the short selling."
And that was your understanding of the effect of issuing shares under the DSPP waiver program?
MS. VETA: Object to the form. You didn't read the full --
MR. SEARLES: I know. Just in the interest of time, but the document will speak for itself. But that was your understanding --
THE WITNESS: That was my understanding, yes.
BY MR. SEARLES:
Q. All right. Can you turn back to Exhibit 919 briefly? It's a summary of the DSPP sales.
We saw in that earlier exhibit of issuing 25,000 shares when there's outstanding trading of about 800,000 of 3 percent wouldn't, in your opinion, have an effect on or significant effect on stock prices.
Assuming this summary of the DSPP activity in

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the first half of 2008 is correct, do you see the column "Percent of Daily Volume"?
A. I do.
Q. And on some dates, the amount being traded is 33 percent, 31 percent, 29 percent, 27 percent, a significant, at least in my mind, the percent of daily volume.
Given that type of percent of daily volume of the DSPP sales versus the total trade, would you consider that to have a downward pressure on price?
MS. VETA: Object to the form.
THE WITNESS: Well, I mean the first thing I -- it's the first time I've seen this --
BY MR. SEARLES:
Q. I understand.
A. That I recall seeing this. And I would have confessed I thought it would have been a much bigger number, percentage of the daily volume, given how low the stock price was. So, you know, it's certainly better the lower it is. The average here for 2008 was, what, 16 percent -- 15 or 16 -- 16 percent I guess is the number, and the second quarter it got a little higher at 18 percent.
You know, the way I'd answer that question is I don't know. You know, clearly lower is better.

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Higher is -- puts some temporary pressure on the stock price. But I would say the overall number here positively surprises me seeing this at, you know, 16 or 18 percent.
I think, you know, I'm not an expert to know that 30 percent would be a problem or not. What I'd want to do is I'd want to look at is there any statistical correlation between, you know, the higher daily percentage volume and the beginning of the day and the end of day stock prices during that period of time to be able to answer that question intelligently.
Q. You're not aware of any such statistical analysis?
A. You could do it with this.
Q. How would you go about doing it?
A. You would go -- I mean there's maybe not enough data points but, you know, to be significantly significant, but you could go in to this and check, you know, group the, you know, the ones that are above 30, the ones from 25 to 30, you know, pick some cut-offs and look at what the stock price did on those days. It may not be statistically significant with this small of a sample size, but you can get a -- get probably some idea.
Q. Something for Mr. Lane to look into.

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MS. VETA: We'll make a note of that.
BY MR. SEARLES:
Q. With respect to Exhibit 921, there appears to be a plan of raising 75 million in equity during this two-week period in September. Do you recall what was the purpose of doing that capital raise?
MS. VETA: Object to the form.
THE WITNESS: I think -- I mean -- I've got to get my dates right here. I'm not sure on August 31 whether we -- you'd have to kind of give me some data to refresh my memory whether I knew about the third quarter loss at this stage or not. It might have been related to that. In other words, I was starting to get a whiff that we were going to have a -- report a loss for the third quarter. Right around this time, like, the whole private capital markets collapsed. Right? Those Bear Stearns hedge funds collapsed. Countrywide had its bank run. So it could have been, like, any or all of the -- our nonperforming assets were growing. So it could have been any or all of those things that we just felt, even though we raised half a billion in bank preferred in, what, May or June and had strong capital ratios, it was just prudent to do that. Right?
Because in another e-mail that you gave me or testimony, I noted that we had covered the loss in the

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third quarter through the DSPP capital raising we did in September or October or something like that.
BY MR. SEARLES:
Q. I would --
MR. SEARLES: Can we go off the record for a moment?
THE VIDEOGRAPHER: We are going off the record. The time now is 12:40 p.m.
(Lunch recess taken from 12:40 p.m. to 1:32 p.m.)
THE VIDEOGRAPHER: We are back on the record. The time now is 1:32 p.m. BY MR. SEARLES:
Q. All right. Mr. Perry, I'd like to show you --
MR. SEARLES: What are we up to, 922?
THE REPORTER: 922.
MR. SEARLES: What will soon be marked as Exhibit 922.
(Exhibit No. 922 was marked for identification.)
BY MR. SEARLES:
Q. All right. Excuse me, Mr. Perry.
Do you recognize this exhibit?
A. I mean I don't recall this e-mail, but it looks correct to me.
Q. Okay. This, again, is an e-mail dated

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September 6, 2007, from yourself to various members of the board; correct?
A. And the senior management team.
Q. Okay. And this, again, concerns the $75 million capital raise under the DSPP in the first two weeks of September?
A. I think it was a little later in September but in September.
Q. Oh, I'm sorry. Yes. In two weeks in September?
A. Yeah.
Q. Great. Thank you.
So did you have an understanding then -- it appears that you do at this time period of selling 250 to 300,000 shares per day into the market would place a downward pressure on the stock price?
A. That's what it says here. And, you know, I think it was my view at that time.
Q. Okay. In the March, April time period, do you recall filing a prospectus on April 3 or the company filing a prospectus on April 3 to register another 10 million shares?
MS. VETA: Object to the form. Which year are you talking about?
BY MR. SEARLES:

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Q. Oh, I'm sorry. 2008.
A. I mean in my preparations, yes.
Q. Okay. And then another one was filed on, I believe, it was May 2, 2008, for an additional 10 million shares?
A. Yes.
Q. Is it fair to assume that during that one month period that 10 million shares were introduced into the market during that period of April?
A. I think it's fair to assume that mote -- probably most, right, that we were running out as we were raising more capital, you know, as conditions had deteriorated in the overall marketplace, and, you know, we were doing our best to stay well capitalized.
Q. All right. So during that period in April, then, was the company introducing approximately 300,000 shares into the market each day?
MS. VETA: Object to the form.
THE WITNESS: It would be on that schedule that you showed me earlier. I'm not sure how much.
BY MR. SEARLES:
Q. Okay. And you're referring to Exhibit 919, the schedule?
A. Yes, the schedule you have in your hand.
Q. All right. And the number of shares, I guess,

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ranges, but you can see at the beginning of February 26 when the DSPP program was resumed for that year a little over 500,000 shares were issued in the last three days of February, and then it ranges from -- as the numbers are reflected in Exhibit 919.

Do you see that?

A. I see that.

Q. Okay. So would you assume that based on Exhibit 922 where you appear to have an understanding that there would be a downward pressure on price as a result of the issuance of 250 to 300,000 shares under the DSPP program on a daily basis, do you think that the issuance of shares in 2008 of an approximately equivalent magnitude as reflected in Exhibit 919 would have an equivalent downward pressure on the stock price?

MS. VETA: Object to the form.

THE WITNESS: I mean I think all other things being equal, yes.

BY MR. SEARLES:

Q. Okay.

A. But I don't know for sure but, yes.

Q. Okay. I'd like to show you what's been previously marked as Exhibit 752.

A. Okay.

Q. Do you recognize this exhibit?

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A. Vaguely, yes. I have no doubt that it's accurate.

Q. Okay. And this is, just for the record, an e-mail from yourself dated April 29, 2008, to -- is it senior managers --

A. To Stan Joseph, an individual senior manager and then copying senior managers and the board.

Q. Okay. Again, this is on the same subject we were talking about, the downward pressure on price as a result of the DSPP sales --

MS. VETA: Mr. Searles, just so the record is clear, when you're asking Mr. Perry who e-mails are sent to --

MR. SEARLES: Yes.

MS. VETA: -- I mean the documents speaks for itself to the extent there are blind copies. You're just identifying the document; correct?

MR. SEARLES: Yes, just kind of a brief summary, for the record, so that we have some idea what we're talking about when reading the transcript without the exhibit. It's not meant to be entirely accurate nor do I want to read the entirety of everyone who received the e-mail --

MR. VETA: Thank you.

MR. SEARLES: -- or we'll be here for a long, long time.

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BY MR. SEARLES:

Q. In your e-mail to Mr. Joseph, you're stating in the context of the stock price, "It's hard to tell but likely a temporary negative. Our stock has been pounded of late partly because of the daily capital we are raising. Right now we are raising over 2 million per day."

And this is in reference to the DSPP capital raising efforts; correct?

A. Yeah -- yes. The daily capital we're raising, yes.

Q. All right. This -- was it your understanding in late April, 2008, that the DSPP's capital raising efforts were placing a downward pressure on the stock price?

A. Well, I mean you can see here I said partly, and, you know, as I said in my previous testimony, I think with the benefit of hindsight, you really don't know exactly why. I mean there were -- there was a huge short position in our stock already from short sellers who were attacking all the financial institutions in 2008; so that could have had an impact too.

Q. Okay. I'd like to show you what's been previously marked as Exhibit 802.

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A. Okay.

Q. Do you recognize this exhibit?

A. You know, I recall it, yes.

Q. All right. And for a brief summary, for the record, this is an e-mail dated April 14, 2008, from yourself to Ms. Marsh and others and senior managers at IndyMac; correct?

A. And the board, yes.

Q. Okay. The reason I'm showing it to you, I'm wondering again you're reporting to Pam. She's reporting in an earlier e-mail to you on the efforts of raising capital under the DSPP program?

A. Right.

Q. And you're reporting back to her on April 14. "That is good. Let's keep raising as much as we can while recognizing it's limited to a percentage of our daily trading volume times our stock price."

Seeing that, do you have any recollection of what that equation was that places a limit on how much can be raised under the DSPP?

A. No, that doesn't -- you can see that I didn't put a percentage because I didn't know what that percentage was. At least that's, maybe you can't see it, but that's definitely why I wrote it the way I wrote it. If I knew the number, my recollection would be I

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would have said it.
Q. I see.
Were you attempting in any way to monitor the amount of sales under the DSPP in this time period to make sure that it complied with the limit that was a function of the percentage of the daily trading volume times the company stock price?
A. Well, I mean you used a lot of very fancy words in that response. You know, complied with a limit, and I would say it wasn't that kind of a formality. It was -- as I said, it was math and judgment and there is no precise answer to that question. And you really don't know. You know, all things being equal, there should be some pressure caused by the direct stock purchase plan stock being shorted during the investment period. But how much and how much it's really impacting and what other factors could have impacted it, it's hard to say.
Q. All right. Well --
A. So I wasn't monitoring it. You know, Pam was an executive committee member. She was a very experienced manager. She was very experienced in administering this program, and, you know, I totally delegated that to her and her team.
Q. Okay. So if I understand you correctly, there

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was no hard and fast limit that could not be exceeded?
A. I'm not sure that -- my perception is that it wasn't a hard and fast limit, that it was, you know, a judgment call and that there was a range that was reasonable and a range that maybe was not as reasonable. But I'm not sure.
Q. I see. Okay.
I'd like to show you what has been marked as Exhibit 805.
A. Okay.
Q. And do you recognize this series of e-mails?
A. I mean I don't recall it specifically, but I have no doubt that it's accurate.
Q. Okay. In the first e-mail in time from Ms. Marsh to yourself and others at IndyMac, dated May 2, 2008, at 11:21 in the morning, she reports, "The price target was lowered to $3 from $5 due to dilutive capital raising. This could be hurting our stock some today."
Do you have an understanding of what she's referring to there?
A. Well, I don't think her wording is right. You know, you don't wordsmith e-mails, when -- but I think that what she's saying here is the price target was lowered from $3 -- to $3 from $5 due to the fact that

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the stock price is closer to $3 than 5. That's really what I think what she means there.
Q. And this is in the context of the price target for the DSPP sales? Is that your understanding?
A. That's my understanding, yes.
Q. Is this the price threshold that she's referring to?
A. That's my understanding, yes.
Q. All right. And the subject of her e-mail, "FBR Report," do you know what that refers to?
A. I think that probably refers to that May 1 8-K that we filed where we, you know, under the rule where you have a top executive officer leave, we had to file within four days an 8-K related to Scott's departure on a medical leave, and then we gave a brief business update that also included something that we hadn't done as a pattern or practice which is we gave an update on the DSPP capital raising that had occurred from 2/26 through April 30 and said we were out raising capital every day through that program.
Q. I'm not sure if there's a causal connection between that announcement and Ms. Marsh's e-mail to you of lowering the price target from $5 to $3.
MS. VETA: Object to the form.
BY MR. SEARLES:

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Q. Do you understand?
A. No, no, you asked me the question of what was FBR. FBR was probably covering that 8-K filing and issuing some sort of -- FBR, I think, stands for Friedman Billings and Ramsey and is probably their analyst report covering that 8-K announcement that we had the day before. But my recollection is the stock price after the 8-K filing, as I discussed in my previous testimony, actually moved up after we disclosed the DSPP capital raising on May 1 for the few -- the day or few days after we disclosed that.
Q. And in here in your -- you're responding to her, "This is what we were discussing at the senior management meeting today." You go on to say, "Our forecast assumes we keep raising through the DSPP all year at $3 per share."
Do you recall that being the forecast that was being discussed at the senior management meeting on May 2?
A. No. I mean I don't recall that other than, you know, I just have seen some documents that show that vaguely.
Q. Okay. Was that the plan --
A. Again, I have no reason to believe this is inaccurate, what it's saying here.

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Q. Okay. And then based on -- you go on to say, "Based on that and our earnings forecast, we have roughly $7 of book value per share at the end of the year."
And I believe at the beginning of the year it was around $16; correct?
A. 16.60, yes.
Q. All right. And how much of the DSPP fundraising at $3 a share for the rest of the year -- how much of that would contribute to the decline in book value from 16 to 7? Do you have any idea?
MS. VETA: Object to the form.
THE WITNESS: Well, I mean a little bit of an idea. It's mathematically hard for me to do without, you know, sitting down with all the data and a calculator and --
MR. SEARLES: Right.
THE WITNESS: -- a piece of paper. But, you know, I know that at 12/31/07 book value per share was 16.60, right, and that at 3/31/08, my recollection is book value was like 10.90ish, okay, so we're following each other there.
BY MR. SEARLES:
Q. Uh-huh.
A. So that's -- does that you sound right?

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Q. If you look at Exhibit 727, you won't have to guess. I guess that's the forecast that was under discussion on May 2 that we've shown you earlier.
A. I mean I'd love to -- I'm a little skeptical because, you know, I did some work on this that I don't recall the difference from 16.60 to 10.95 being over $6 -- actually maybe that's not -- do my math. No, that's right. That's about right. That's like 5.65, right, or 5.66, something like that?
Q. It's close, right.
A. $5.66 difference between the two. So my recollection, when I was doing some back of the envelope math for that first quarter of 2007, is the direct stock purchase plan of that decline in book value per share was about 47 cents of the $5.66 decline. The rest was a combination of the realized loss, you know, that loss per share that we reported, the unrealized loss per share which is the change in other comprehensive income, net of tax which was big in the first quarter as a result of the fair value right down of the mortgage-backed securities portfolio and a small amount of dividends.
So the 10.95 really is a better starting point for looking at dilution of this plan, my point is, because it only includes 46 cents of direct stock

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purchase plan dilution. You know, so you could add that back. 10.95 and 46 cents, 11.30ish so you're going from 11.30 to 7 by the end of year.
Q. And this calculation that you did, is this something you did after the fact or is this --
A. Yes.
Q. Okay. All right. Looking at 727 -- and that's the first page of the P & L where it talks about the diluted shares and book value?
A. Yes.
Q. Actual Q4 '07, $16.61 book value.
A. Right.
Q. Q1 '08 it's fallen to 10.95, right?
A. That's right.
Q. And the earnings per share is negative 2.29.
A. Yeah.
Q. And is that a function of the loss that's been recorded --
A. That's the real -- that's what I'm calling the realized loss.
Q. All right.
A. The unrealized loss that flowed through other comprehensive income was actually bigger than 2.29 a share. My recollection it was maybe 2.45 a share.
Q. Well, is there any simple math that you

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subtract the 2.29 of the earnings per share from the book value per share of 16.61 to get to the net which would be 14.32?
MS. VETA: Object to the form.
THE WITNESS: Well, a better way to do it, if you'd like, is grab the change in shareholders equity for the first quarter of 2008 that's in the 10-Q that we filed on May 12, and I can walk you through, and you can see the dilution that's caused by both this 2.29 unrealized loss per share, and then I can show you the other comprehensive income loss that's bigger than this.
BY MR. SEARLES:
Q. All right. Well, we'll turn to that in a moment. But working with these numbers here, just so I can try to understand your math, in terms of the decline in book value --
A. Yes.
Q. -- if there were no issuance of shares and just simply a loss --
A. Yes.
Q. -- would the book value decline from 16.61 to the minus 2.29?
A. If there were no what? No issuance of shares?
Q. Right.
A. No.

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Q. I see.
A. It would decline to 11.30 something, 11.30 something.
Q. All right. All right. We'll get into that calculation later with the 10-Q.
A. So really, you know, what we're comparing if you were comparing apples and oranges, you're looking at a book value of, like, around 11.30ish plus or minus, you know, 10 cents to this $7. And that was, you know, clearly things had changed, that things had -- by May 2, you know, things had gotten a lot tougher for IndyMac and the entire industry, and we were being forced to issue dilutive capital, and that was what we were disclose -- we were building plans around this time, working to get those plans audited and certified because we didn't just take a plan and throw it out willy-nilly to shareholders. We had a Sarbannes Oxley process to get those certified, and we got it approved by the board and we disclosed it on May 12. And, yeah, it was a surprise, but it was a surprise to everyone that things continued to deteriorate.
Q. All right. So as of May 2, 2008, when you speak of "Our forecast assumes we keep raising through the DSPP all year at $3 per share," is it fair to say that that was the plan as of that date?

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MS. VETA: Object to the form.
THE WITNESS: It was one of many scenarios, right? We were pursuing all options to keep IndyMac Bank safe and sound at this point in time including raising, you know, as I discussed in my previous testimony, a big amount of capital in a one-time shot.
BY MR. SEARLES:
Q. Okay. Well, in the absence of succeeding in that endeavor, of raising a big slug of capital in a one-time shot, was the plan then to continue raising capital under the DSPP?
MS. VETA: Object to the form.
MS. MATELIS: Join.
THE WITNESS: The plans that we were working on but hadn't finalized as of this date were in that direction, yes.
BY MR. SEARLES:
Q. I see.
I'd like to show you what's been previously marked as Exhibit 762.
A. Okay.
Q. All right. Do you recognize this e-mail and the attachment?
A. You know, I don't recognize it other than I'm, you know, aware that Bear Stearns was our administrator

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before Mellon and was the original one that I remember, and I recognize one of the names on the list of the Bear Stearns contacts.
Q. Who do you recognize?
A. Mark Fuhr.
Q. Okay. Where is he?
A. He's on the second page.
Q. On the second page?
A. Yes.
Q. Okay. You had described earlier when you were -- is it fair to say you were in charge of the DSPP plan when it was a DRIP?
A. No, it's not fair to say I was in charge. It's fair to say I was more involved at some point when it was initially set up --
Q. I see.
A. -- and became less involved over the years.
Q. Okay. Do you recall the -- the slide deck associated with this e-mail says, "Direct stock purchase plans with a waiver feature. Alternative method of raising equity capital."
Do you recall around this time period there was some sort of a change being contemplated with respect to IndyMac's DRIP or DSPP plan or moving from one to the other?

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A. I mean this is 2004. I don't recall that and I just kind of skimmed through this document and I'm not detecting anything material from the plan we put in place years earlier when we were a mortgage real estate investment trust --
Q. Okay.
A. -- other than the name was called DRIP then, dividend reinvestment plan.
Q. I was just exploring perhaps why Bear is sending IndyMac this slide deck.
On the second page of this Exhibit 762, Bear -- I believe this is a commentary by Bear Stearns on the advantage of this program. Do you see in the third paragraph on the second page of this exhibit, "Overall the DSPP can be turned on" --
A. No, I'm not following where you're at. I'm sorry.
Q. Oh, I'm sorry. If you look at -- it's a two-sided copy again.
A. Oh, okay. Okay. Got it.
Q. Okay. If you look at third paragraph there.
MS. VETA: Let him read the whole second page.
MR. SEARLES: Okay.
THE WITNESS: Okay.
BY MR. SEARLES:

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Q. All right. In the third paragraph, Bear Stearns is stating, "Overall the DSPP can be turned on and turned off from month-to-month."
Do you see that?
A. I do.
Q. And was that your understanding of how the DSPP would operate? It could be turned on and turned off?
MS. VETA: Object to the form.
THE WITNESS: Well, I think that that's just language here. The program was open and available as long as you had a registered S-3 filing, a shelf registration, that was on file and that you had an active prospectus open.
BY MR. SEARLES:
Q. Right.
But that doesn't necessarily imply that IndyMac is using the DSPP on a continuous basis; correct?
A. Right. And we never used it on a continuous basis.
Q. Right.
A. We used it from time to time --
Q. Okay.
A. -- and, you know, generally most years we

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raised some capital through it as we discussed in my previous testimony.
Q. All right. Well, then would you agree that since IndyMac used it from time to time, would you agree with Bear Stearns' statement in this e-mail that it could be turned on and turned off?
MS. VETA: Objection. Asked and answered.
THE WITNESS: Yeah, I mean that's just different language to what I'm saying. I'm saying that the program is -- and they're saying the same thing, that the program is open and active and that you can raise capital on a monthly basis or not.
BY MR. SEARLES:
Q. All right. And Bear Stearns goes on to comment, "And most importantly there are no signals sent to the market when the company decides to grant waivers."
Was that your understanding of one of the benefits of the DSPP waiver program?
MS. VETA: Object to the form.
THE WITNESS: It certainly wasn't my focus in any way, shape, or form as a benefit when I set the program up because I remember very clearly what the benefits were.
BY MR. SEARLES:

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Q. All right. And I believe we went over this this morning. Was it your understanding that the only persons or entities that would be aware of waivers being granted when the DSPP program is turned on would be those who are actually purchasing the stock, i.e., these institutional arbitraging investors; correct?
MS. VETA: Object to the form.
THE WITNESS: I'm sorry. Can you ask me that question again, please?
BY MR. SEARLES:
Q. Well, with respect to when the company decides to grant waivers --
A. Yeah.
Q. -- they're granting them at least in the second half of '07, first half of '08, to, I believe, you called them arbitraging traders?
A. That's my understanding as what they generally were --
Q. All right.
A. Earning the discount.
Q. All right. So when the DSPP waiver program is turned on, it would not be known that it was turned on to common shareholders; correct?
MS. VETA: Object to the form.
MS. MATELIS: Join.

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THE WITNESS: Well, my understanding -- and I could be wrong about this because I wasn't, you know, the guy who filed it -- that this was explained very clearly how this program worked in the S-3 and/or the prospectus for this program, how the mechanism worked and then, you know, as we discussed earlier, there was a pattern and practice that we had developed which is we'd file a DSPP prospectus so that the market would be aware that we had shares available that we could issue from the -- issue out of the program from time to time and did and that we disclosed those each quarter as we -- after we had issued those shares. And because they were not material and, as we've discussed earlier, not materially dilutive in 2007 and '8 even when our stock went below book value per share, that there really wasn't a need to change the way we disclosed that information.
BY MR. SEARLES:
Q. Did you consider it an advantage of the DSPP program, the waiver program, that capital raising could be done in a manner where no signals are sent to the market?
MS. VETA: Object to the form.
MS. MATELIS: Join.
THE WITNESS: I was hoping you were going to

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ask me a second question. I'm glad that we got back to that. That's not the advantage I saw with respect to this program. The advan -- this program was set up back in -- my recollection is, you know, I came aboard in January of 1993 and took over a struggling publicly-trading mortgage REIT. And in those first few years, we had to do two or three additional public offerings, you know, S-1 type filings. I think it was S-1. I think that's the term, S-1. You know, you had to go out and hire an investment banker. You had to have a law firm review the prospectus. You had to have an accounting firm issue an opinion. You had an underwriting fee discount of generally 4 or 5 or 6 percent, and then I had to be out on the road selling stock. Okay?

And Bear Stearns, this Mark Fuhr, who my recollection is the assistant treasurer, came out and approached us at some point and said, you know, Mike, you've been raising capital through these S-1 filings. There's a more efficient way to raise capital. It's cheaper instead of a 4 or 5 percent discount. It's 1 or 2 percent discount. It's less expensive. You don't have to file S-1s all the time. You can do it off a shelf registration. And you don't have to go out on the road from a road show perspective.

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So, you know, those were all the advantages that I focused on. I think this language that you're focused on here, I mean that may have been their view about it. It wasn't my view about what the advantage of this program was.

BY MR. SEARLES:

Q. Do you recall in issuing -- if that's the correct word or filing the prospectuses under the DSPP program in October of '07, April of '08, again in May of '08, each of those prospectuses were for 10 million shares. Do you recall that?

A. Yes.

Q. Do you recall any consideration of, for example, the April, '03, prospectus, registering 10 million shares --

MS. VETA: I'm sorry. You said April '03?

THE WITNESS: April 3. I knew what he was saying, yeah.

BY MR. SEARLES:

Q. With respect to the April 3, 2008, prospectus, with the plan being of raising one to $3 million in capital on a daily basis under that program, that would exhaust the shares under the prospectus, the 10 million shares in a month.

A. Yeah.

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Q. Do you recall any consideration being made at that time that perhaps when the company should register additional shares or, if not, the reason being that the company didn't want to spook the market by issuing a prospectus registering 100 million shares or some far greater number. Do you recall any consideration of those issues coming into play with respect to the April, '08, prospectus?

MS. VETA: Object to the form.

MS. MATELIS: Join.

THE WITNESS: You know, I mean I know where you're getting at this, but the truth is no one discussed that with me, and we had no thought and consideration. We were, you know -- we were in the middle of a financial crisis, and we were doing our very best to address all of the issues, whether they were disclosure issues or keeping the bank safe and sound. And I don't recall anybody ever discussing with me the concept that -- and I wasn't involved in the filing of those prospectuses. All I was focused on is we need to raise capital. We need to keep the bank safe and sound. This is right now the only realistic way to raise capital through the direct stock purchase plan, and we need to do it.

And so there wasn't, like, a bigger picture

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thought process in my mind on that March -- excuse me, April 3 8-K -- DSPP prospectus, you know, that we needed to register more shares. I certainly think that if we had had more filings, we would have said why are we doing these -- now we're starting to do these so quickly together, we should do one of bigger shares. I certainly think that would have been ultimately a discussion that we had at some point relatively soon, but we just start -- the timing of those started to get closer together because of the need to raise capital and given the fact that our stock price had come down.

BY MR. SEARLES:

Q. So before I leave this subject, it's your testimony, then, that you did not believe that the fact that capital could be raised without any signals to the market was an advantage under the DSPP program?

A. Never -- I never heard that until I saw this in this document.

Q. All right. So there's no advantage to raising capital quietly under the DSPP?

MS. VETA: Object to the form.

THE WITNESS: We -- we didn't raise it quietly under the DSPP. We issued a prospectus before we raised the capital which showed the maximum shares and the maximal -- maximum potential effect that that could have

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on our outstanding shares. You take the existing outstanding shares plus the new prospectus times the stock price, and you can calculate book value per share accretion or dilution in total before we issued one share. Then we disclosed after the fact every quarter exactly what we raised. That plan is exactly what we did every single time. The only time we did anything different was when we disclosed more on May 1 in that 8-K filing because we felt that it was a positive that we were raising capital and keeping the bank safe and sound. We felt the direct stock purchase plan capital raising was a positive for shareholders. I certainly did as a big shareholder.

BY MR. SEARLES:

Q. Do you recall what IndyMac's stock price did following the filing of the April 3 prospectus?

A. I don't.

Q. Do you know what IndyMac's stock price did following the filing of the May 2 prospectus in 2008?

A. I don't.

Q. If you can turn to page 14 of the same Exhibit 762, you'll see page numbers at the bottom right-hand corner, comparison of capital raising efforts -- comparison of capital raising methods. There's a plan with a waiver feature, follow on

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offerings, continuous equity offerings.

Are you with me?

A. I am.

Q. All right. You'll see -- I think it's apropos of what you just spoke about earlier with the follow-on offerings, indirect cost, there's legal, marketing, accounting, road show cost, you recall sort of in line with what your commentary was with respect to the cost of raising capital on the road; right?

A. Yeah, plus management time away from running the company.

Q. All right. And then going down to the timing of the offering, again, on the same subject, you'll see on the third bullet point or dash, "No signals to the market when choosing whether or not to grant waivers."

Do you recall any discussions with anyone at Bear Stearns or within IndyMac that that was, at least according to Bear Stearns, one of the advantages of a DSPP program?

MS. VETA: Object to the form, asked and answered.

THE WITNESS: I don't recall that ever being -- and it goes against my entire grain -- my whole body of stuff which is be transparent and disclose everything. So, you know, you're asking me to look at a

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document from 2004 that I wasn't a party to that was provided by a third party vendor, Bear Stearns, you know, that I'm not even sure I was aware of. But if I was aware of it, I wouldn't have focused on that part because I didn't see -- I saw the benefit of this program being the factors I already discussed.

BY MR. SEARLES:

Q. All right. Well, let me show you what's been previously marked as Exhibit 666.

A. Okay.

Q. Do you recall this series of e-mails?

A. Yeah, I think so, yes. I have no doubt it took place.

Q. All right. Directing your attention to the first e-mail in time at the bottom of the page from yourself to Darrell Dochow and David Hewes at OTS along with others at IndyMac dated March 26 of 2008.

Do you recall the purpose of why you're updating Office of Thrift Supervision on the direct stock purchase plan?

A. Well, I mean this was just part of my pattern and practice to keep everyone updated especially, you know, our banking regulators, our primary regulator, the OTS. But as well we have, you know, our board, the management team, you know, our outside lawyers and

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accountants also very apprised of everything, as I said earlier, good or bad.

Q. And at this time, had OTS requested that you raise capital through the direct stock purchase program?

A. You know, I don't recall whether they had requested it at this point in time. I mean your regulator always wants more capital. Especially in a time where you've just suffered two unprecedented quarterly losses and your industry is suffering significant problems.

Q. All right. Do you recall the office of OTS requesting IndyMac to raise capital under the DSPP?

A. No, I don't recall that.

Q. Or what time they asked you to do that?

MS. VETA: Object to the form.

THE WITNESS: Any capital raising or DSPP capital raising?

BY MR. SEARLES:

Q. Well, my question was directed to DSPP capital raising.

A. I don't recall the OTS ever requesting us to raise capital through the direct stock purchase plan.

Q. All right. Do you recall OTS requesting IndyMac to raise capital?

A. My recollection is that, you know, at one

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point, Darrell sent me a note kind of saying, you know, capital is thin, you know, work on that. My recollection is that when we received our informal, you know, memorandum of understanding -- and I can't remember when that date was but maybe like March, April of '08, in that one-page memorandum of understanding there was a keep doing what you're doing to raise capital, you know, in efforts to raise capital.

And then as I disclosed this morning in my testimony or discussed this morning in my testimony, my recollection is that after Washington Mutual raised their big slug of multibillion in capital, that the western region director called me and said this is -- I want you to raise, you know, half a billion to a billion or whatever you can raise.

Q. Okay. With respect to this e-mail that you wrote to Mr. Dochow and Mr. Hewes at OTS on March 26, on the second page -- it's double sided --

A. Yeah, I got it.

Q. The first full paragraph on the second page, you say, "Bottom line, for now the DSPP is working well for us and could allow us to raise 200 to 350 million of more capital from Q2 '08 to Q4 of '08 all pretty quietly."

A. Right.

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Q. What did you mean by that phrase?

A. Well, what I meant, I think that's tied in with the PS that's here. I was extremely skeptical of us going out and raising a big slug of capital and being successful at that. And I was especially concerned that if we went and tried to do it and failed, that that information would get leaked into the marketplace and be a safety and soundness concern. You know, the Federal Reserve had similar concerns about a lot of the too-big-to-fail banks on these very types of issues. And so, you know, that's what I was talking about is if we had a failure in the direct stock purchase plan that we didn't get investment funds for a day, that's very quiet. It's not a big deal. No one -- you don't have a bunch of people who know. When you're going back to New York and raising a half a billion to a billion dollars of equity and you're sitting in a meeting like this, you don't know who's a friend or enemy. It could be a short seller sitting there across the table, and when you don't -- you fail at raising the half a billion to a billion dollars, they're, you know, going out there both, you know, attacking your institution so that's what I'm talking about here is the risk of failure.

Q. So to that extent, then, there is an advantage under the DSPP program of being able to raise capital quietly?

MR. VETA: Object to the form.

BY MR. SEARLES:

Q. It would not reveal to the market a failure, if there were a failure in that regard?

MS. VETA: Object to the form.

MS. MATELIS: Join.

THE WITNESS: You can have -- you can have multiple little immaterial, oh, we didn't invest today, let's try again tomorrow. It's not we didn't -- we had no interest in raising a half a billion to a billion and then you're done. You went to New York. You went to Boston. You went to Chicago, and you couldn't get it done. That's a bigger deal.

BY MR. SEARLES:

Q. Did you consider it as a sign of weakness by IndyMac to be raising capital through the DSPP program at a point in time when its stock price was significantly below its book value?

MS. VETA: Object to the form.

MS. MATELIS: Join.

THE WITNESS: Well, I considered it that we were -- that we had a lot of issues like everybody who was in the financial services sector and, in particular, everybody who was in housing and mortgage banking. And,

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you know, those were well-known issues. You could see those in our losses, in our nonperforming loans, in our deterioration of our capital ratios. So did we have weakness? Yeah, we had weakness. Was having to raise capital at a price below book a weakness? Yes, everything was a weakness during this time period. That's how all financial institutions were.

BY MR. SEARLES:

Q. Would you have considered a signal to the market a weakness that IndyMac is raising capital under the DSPP program at a point in time when its stock price is well below its book value?

MS. VETA: Object to the form.

THE WITNESS: Well, I think that we made incredibly -- we gave a bigger signal to the market. We disclosed on 2/12 and 2/29 that we might have to raise severely dilutive capital to our shareholders.

BY MR. SEARLES:

Q. On neither of those dates -- well, on February 12, you were not raising dilutive capital under the DSPP program, were you?

A. No, but we warned about it is what I'm saying. So --

Q. And --

MS. VETA: Let him finish his answer,

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Mr. Searles.
THE WITNESS: And that was, you know, potentially a very big slug of highly dilutive capital that we're warning we may have to do.
BY MR. SEARLES:
Q. Referring to the DSPP?
A. No, not referring to the DSPP -- it doesn't matter. If you say -- if you disclose we might have to raise significantly dilutive capital, it could include the DSPP, it could include a billion dollar equity offering at a dollar a share. It's anything and in between. If you look, you know, at a highly dilutive billion dollar offering, which, you know, the 2/12 and 2/29 disclosures were completely adequate, more than adequate disclosing that risk. The DSPP on the scale of that versus no dilution, was closer to no dilution.
Q. On February 12, at most, you're warning the market, you may, if your forecast doesn't prove out to be correct and your business plan doesn't prove to be viable, you may have to raise a big slug of dilutive capital. At no time in February of 2008, did IndyMac come out and say as a matter of historical fact it had resumed raising dilutive capital under the DSPP program; correct?
MS. VETA: Object to the form.

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THE WITNESS: Well, can you ask me that question again, please?
BY MR. SEARLES:
Q. At no time in February, 2008, did IndyMac state to the market that as a matter of historical fact it had resumed raising dilutive capital under the DSPP program; correct?
A. We didn't disclose in that time period that we had begun raising dilutive capital, but, as I previously discussed, while that was on the margin significantly dilutive, it was not materially dilutive to IndyMac as a whole.
Q. Who is -- in 2008, what position did Christina Ching have at IndyMac?
A. I believe in 2008 she was corporate secretary.
Q. What were her responsibilities in that position generally?
A. You know, generally, you know, she was responsible for, you know, coordinating board and other governance issues.
Q. And how frequently did you communicate with her in 2008?
A. Infrequently.
Q. I'd like to show you -- oh, shoot, I only have one copy of this.

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A. I mean I don't want to, you know, once a week, once every other week, once a month. I don't recall specifically.
Q. Okay.
A. But not daily.
Q. All right.
MR. SEARLES: I need to make copies of this one exhibit. I just have one copy. Take five minutes.
MS. VETA: Okay.
THE VIDEOGRAPHER: We are going off the record. This is the end of tape No. 3 in the continuing testimony of Mr. Michael Perry, volume 1. The time now is 2:27 p.m.
(Recess taken from 2:28 p.m. to 2:38 p.m.)
THE VIDEOGRAPHER: We are back on the record. This is the beginning of tape No. 4 in the continuing testimony of Mr. Michael Perry, volume 1. The time now is 2:38 p.m.
BY MR. SEARLES:
Q. Mr. Perry, I'd like to show you what's to be marked Exhibit 923.
(Exhibit No. 923 was marked for identification.)
BY MR. SEARLES:
Q. Do you recognize any of the e-mails depicted

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in Exhibit 923?
A. No.
Q. In the first e-mail in time at the bottom of the page, Christina Ching is sending an e-mail to Joe Ventura.
Do you know who he is?
A. Well, I had to have my memory refreshed, but I think he's the securities counsel at Alston & Bird.
Q. All right. And Dwight Smith, what type of counsel is he at Alston & Bird?
A. My recollection he was primarily a regulatory counsel, but he also handled, you know, more general matters for us, as I recall.
Q. All right. So Mr. Smith is more the banking regulatory counsel?
A. Yeah, and I would say more the -- and the coordinating partner with IndyMac.
Q. Do you know whether Mr. Ventura was even a partner at Alston & Bird at this time?
A. I don't -- I don't have a recollection.
Q. All right. This is an e-mail March 18, 2008, a few weeks before the company issued its April 3, 2008, prospectus. Ms. Ching is asking Mr. Ventura on the second page, "Also, do you have an opinion on how many shares we request the board to approve at this time.

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The current strategy is to raise 2 1/2 million a day which equates to 500,000 shares a day based on a $5 share price, 10 million shares per month. It may be most practical to have the board approve 100 million at a time, but is this prudent?"

Does this refresh your recollection at all as to any discussion surrounding the April 3 prospectus as to how many shares should be registered under that prospectus given the fact if it's only 10 million, you're going to go through it in a month?

A. No, it doesn't. I don't think I was ever a party to any of the discussions involved in that.

Q. All right. Going up on the first page of this exhibit, the second e-mail in time, March 26, 2008. Now, this is approximately a week before the prospectus is filed, and Ms. Ching is reporting in the second sentence, "We're sensitive to how the market may react to the board's approving a significant number of shares at once. We plan to register in 10 million blocks."

Do you recall any discussion around the board's sensitivity to the issue of how many shares should be issued under this prospectus and what signals may be sent to the market if something larger than 10 million is being registered?

A. Well, I think you're either misreading this or

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misstating it. It's not the board's sensitivity. She said, "We're sensitive."

Q. We're sensitive.

A. Yeah, about the board approving a significant number of shares at once.

Q. Okay. Thank you for the correction.

MS. VETA: Let him finish the answer.

THE WITNESS: I'm not sure who "we're" is. I don't think it was me because I don't recall this issue of the number of shares ever coming up to me.

BY MR. SEARLES:

Q. I'd like to show you what's been previously marked as Exhibit 742.

A. I mean I haven't read this whole thing, but I'll try to answer your question related to it.

Q. Okay. This appears to be minutes of a meeting of the capital funding and liquidity committee on February 14 of 2008. Would you agree?

A. It appears to be a management committee.

Q. All right. Is the capital funding and liquidity committee a management committee?

A. It looks like it based on the members you see here in the minutes.

Q. All right. And were you a member of that committee or not?

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A. No.

Q. On February 14, in the 8-K that the company issued and the shareholder letter --

A. February 12?

Q. I'm sorry. February 12. Thank you.

There was no plan at that time to raise capital under the DSPP program that was announced. If you turn to page -- I'm not sure what page this would be. The third full page. There's a paragraph F. It's under "Priority Items," and then there's a paragraph F.

Are you with me?

A. Yeah, I see the paragraph F.

Q. All right. And then Mr. Keys is advising the committee he expects to raise new capital through the direct stock purchase plan in March. Adding this may be challenging given the current market environment and IndyMac's current stock price.

Were you aware as of February 14 that Mr. Keys appeared to have a plan to raise capital under the DSPP?

MS. VETA: Object to the form.

MS. MATELIS: Join.

THE WITNESS: You know, as I said, I wasn't a member of this committee and wasn't copied on these minutes. So I really couldn't comment on the accuracy

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of that statement that's here in these minutes because I didn't attend that meeting.

BY MR. SEARLES:

Q. Do you recall any discussions with Mr. Keys shortly after the February 12 earnings announcement where he was discussing with you his expectation of raising additional capital under the DSPP in March?

A. The first part of that question? In what time frame?

Q. On or around February 14.

A. No, I don't recall being aware of this statement around that time period.

Q. Or any conversations with Mr. Keys --

A. Or any conversations.

Q. I'd like to show you what's been marked as Exhibit 774.

A. Okay.

Q. You're not copied, I believe, on any of the e-mails reflected in Exhibit 774; correct?

A. It doesn't look like it.

Q. All right. Proceeding on the assumption that you're the only Mike at IndyMac, directing your attention to the first e-mail in time from Robert Abeles -- how do you pronounce his name?

A. I think it was Abeles.

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Q. Abeles.
Friday, February 14, 2008. This is now a day after the capital liquidity minutes that we just looked at. Mr. Abeles is stating to Pam Marsh, Mr. Keys and others regarding the direct stock purchase program, "Despite our current stock price, it may be appropriate to consider raising capital through the direct stock purchase program. Mike suggested that I coordinate a meeting with the four of you to think through in what circumstances we would consider raising equity in this manner.
Does this sort of refresh your recollection as to any decision-making within IndyMac on or around February 15 -- or resuming sales under the DSPP?
MS. VETA: Object to the form.
THE WITNESS: I mean not really. I don't recall having any meeting with Bob with respect to the direct stock purchase plan.
BY MR. SEARLES:
Q. You do recall the plan was resumed on February 26; correct?
A. Yes, we've discussed that previously.
Q. Do you recall what the decision-making was behind resuming sales at that time, what the factors were?

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A. My recollection is it was tied not to -- it was actually tied to a positive event in that the value of our mortgage servicing rights were increasing as a result of rising interest rates, but because we hedged those, the value, you know, net net, there was no P&L impact so no build-up of capital, but the asset grew. So as a result of that growth in that asset, as a result of its increase in value due to rising rates, we were butting up -- and because of the financial crisis where our capital levels had declined, we were butting up against this regulatory capital limit on total risk-based -- on risk-based capital where your servicing asset, I believe, couldn't exceed one times your net worth or something like that, and that if it exceeded that, then you had to deduct it dollar for dollar from capital.
So that was -- we were butting up against that limit and that was what precipitate -- it was kind of, you know, a surprising issue that came up at that point.
Q. All right. So at first the positive news was actually negative because it caused the bank to butt up against this regulatory limit?
MS. VETA: Object to the form.
THE WITNESS: I would say, you know -- I wouldn't even say it that -- I would say it was negative

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news, you know, that we're butting up against this limit as a result of the asset rising in value. We hedged the asset so we weren't getting -- we were prudently hedging that asset. Okay? So, you know, we were butting up against that limit; so it was negative news, and it was, you know, a change and something we had to prudently address to keep the bank safe and sound and well capitalized.
BY MR. SEARLES:
Q. Okay. I'd like to show you what's been previously marked as Exhibit 571 which I think addresses what you were just speaking about.
A. Okay.
Q. Do you recall this exhibit?
A. I do.
Q. And just for the record, to summarize, this is an e-mail dated February 19, 2008, from Mr. Perry to a number of individuals within IndyMac; correct?
A. Right. The executive committee, certain financial management and the board. And it was also copied on this our regulators at the OTS and some other, I think, potentially other outsiders.
Q. And this addresses the subject you were just talking about; correct?
A. Yes, essentially.

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Q. Butting up this regulatory limit relating to MSRs?
A. On one of our capital ratios, yes.
Q. All right. To alleviate that negative impact, according to this e-mail, you are authorizing Mr. Keys and the group to pursue $50 million in capital being raised through the DSPP; correct?
A. That's right.
Q. You state here -- and you say, "Let's try and complete 10 to 15 million in a two-to-four-day window, and if that goes well, keep doing more. The dilution is relatively minimal, less than $1 per share versus anything else we can do if we can get it done."
Do you recall what, if any, calculations you went through to determine the dilutive effect of being approximately a dollar per share?
A. Yeah, I have a vague recollection that there was some work done and maybe a grid of stock prices and book value dilution. But, you know, as I discussed in my previous testimony, the dilution for the DSPP, as I said here, is minimal for the first quarter of 2008, for the entire quarter was under 50 cents a share.
Q. Here you're calculating -- it appears you're calculating that the capital ratio -- I'm not sure. The dollar per share, is that a function of 10 to 15

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million, or is that a function of 50 million?
MS. VETA: Well, first of all, it doesn't say a dollar per share. It says less than a dollar per share.
BY MR. SEARLES:
Q. Oh, I'm sorry. Less than one dollar per share.
A. I don't think I was being that precise. I was saying that this is not a significantly -- you know, it's minimal. The dilution is minimal, and I wasn't really trying to say this with precision. I mean the bottom line is, as we had very thoroughly disclosed and every investor understood, our paramount responsibility was to keep IndyMac Bank safe and sound and well capitalized.
Q. And not to -- well, I guess to parse words with you. In your e-mail, you say that "Dilution is relatively minimal, less than one dollar per share . . . versus anything else we can do."
So is it relatively minimal versus the other options facing the bank in terms of capital raising? Is that what you're saying here?
A. Well, I think the other options and also relative to the dilution that we experienced already in 2007 as a result of the realized and unrealized losses

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and the dividends that we paid out of retained earnings.
Q. And how did you arrive at the figure of 50 million of raising capital under the DSPP? Do you recall?
A. I don't recall specifically. I don't think it was -- I'm not sure. I don't recall specifically. Probably had to do with some judgment call based upon some of the forecasts that were being provided to me at the time.
Q. Was it a function of seeking to avoid diluting book value of limiting the capital raise to 50 million and not more was one of the concerns to raise more would be more dilutive to book value?
A. I don't recall that being the focus. I think that, you know, the focus was that we had a new issue that came up which is that we were butting up against this servicing cap as a result of rising interest rates. One of the things that we disclosed as a risk in our capital section in our 10-K, as I recall, and maybe even the 8-K on 2/12, was the risk of interest rate changes on our regulatory capital levels. And so, you know, that risk actually had occurred, and we were taking steps to, you know, prudently address that to keep IndyMac well capitalized and safe and sound.
Q. Going back to Exhibit 571, the plan if

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there -- well, you're saying, "I'm authorizing you to pursue 50 million in capital being raised through the DSPP. Let's try and complete 10 to 15 million and if that goes well, keep doing more."
As of the 19th, if all things went well, you would expect a capital raise of $50 million through the DSPP?
A. I'm sorry. Ask that question again, please.
Q. It appears in your e-mail that you're authorizing raising up to $50 million through the DSPP in increments of 10 to $15 million?
A. Yeah, that's correct.
Q. And if all goes well, you'll raise up to 50 million; correct?
A. Right. I'm not sure what period of time, whether that's, you know -- I don't have a good sense here in writing this. This is, you know, an ad hoc solution to a problem that just came up.
Q. Right.
A. You have to make a quick decision on because your paramount goal is to keep the institution well capitalized --
Q. Right.
A. -- and so -- but between, you know, over a period of time, yeah, raising 50 million of capital if

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all goes well through the direct stock purchase plan which would be a de minimis amount of capital and a de minimis amount of dilution to book value per share was what we were -- what I authorized here.
Q. And over what period of time did you have an expectation that if all went well, the $50 million would be raised?
A. Yeah, I don't remember specifically if I had that kind of an expectation. I just was very much just addressing on a quick ad hoc basis the fact that I had been told and shown schedules that said that we were at risk because of this artificial regulatory risk-based capital barrier that limited the amount of servicing assets that could count towards regulatory total risk -- to one of our capital ratios.
Q. I'd like to show you what's been marked as Exhibit 563.
A. Okay.
Q. Do you recognize this series of e-mails?
A. I do generally, yes.
Q. All right. In the first in time on February 29 at 3:13 p.m., Pam Marsh is reporting on having raised 11.2 million of capital in the DSPP for the week. And then she reports, "The stock price fell below the threshold price today with all the market

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weakness. We did not raise any capital."
I believe we discussed earlier it was your understanding that if the threshold price can not be met, then sales will not occur; correct?
A. That's correct.
Q. All right. But it appears that there was at least an effort to try to make sales and they would have occurred if not for the threshold price not being met?
A. That's correct.
Q. And then she's reporting in the last paragraph in this e-mail, "We also granted another 15 million of new waiver requests for the DSPP to price next week, Tuesday to Friday, with a threshold price of 6." And she concludes, "But for now, the capital picture looks solid."
And you respond to this, "This is great news," in your e-mail to her; correct?
A. Yes.
Q. You didn't stop raising capital under the DSPP in the face of this news, did you?
MS. VETA: Object to the form.
MS. MATELIS: Join.
THE WITNESS: My recollection is we did not stop, and the reason behind it, you know, I mean I would point out, you know, one of the things that you guys

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highlighted in your allegations against me was that we had a forecast that we didn't disclose when we filed the 10-K that had us below the well-capitalized limit on total risk-based capital, and here you can see on the day we filed the 10-K, we have actually a forecast at the end -- showing at the end of the quarter without any capital raising that will be at 10.61. So, you know, you can see the volatility that interest rates is having on our total risk-based capital as a result of the unusual environment we find ourselves in, and IndyMac's business model where we have a lot of capitalized servicing asset in our business model.
I think the, you know, the positive is, you know, here when we filed that 10-K on 2/29, the forecast that we had at that moment in time showed us being at 10.61 without any capital raising. The negative, though, is it shows the volatility of our total risk-based capital to interest rates, which we disclosed. We disclosed that risk very clearly in our filings on 2/12 and 2/29, but because of that volatility and that risk, I felt that it was prudent that we continue to raise capital through the DSPP because you never know. Interest rates had fallen here and they could have risen back up and we could have had the capital problem again. So not only did we raise capital

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through the DSPP, but we went to our regulators and said this is nonsensical. This is a non -- this is truly a non-risk issue, and we think that you need to look at this and consider giving us a waiver with respect to this one time servicing limit.
BY MR. SEARLES:
Q. Okay. The non-risk issue being the MSR servicing limit, is that what you're talking about?
A. That's correct.
Q. The non-risk?
A. Yes.
Q. All right. So hedging against the continued volatility of interest rates through the quarter concluding on March 31, you believed it was prudent to continue raising dilutive capital under the DSPP?
MS. VETA: Object to the form.
MS. MATELIS: Objection.
THE WITNESS: Can you -- can you --
BY MR. SEARLES:
Q. You believed it was prudent given the volatility of interest rates at this time, notwithstanding the fact that Pam Marsh is reporting to you on the afternoon of February 29 that capital looks good -- capital looks solid. You thought it was prudent to continue to raise funds through the DSPP to hedge

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against this continued fluctuation in interest rates; correct?
A. Yes. We were pursuing a number of different factors to keep the institution safe and sound and well capitalized, one of which was continuing to raise capital through the direct stock purchase plan, and the other was, you know, I think shortly after this we submitted -- began discussions with our regulator about seeking a waiver to this one-time servicing cap which is really a nonsensical, artificial cut of our total risk-based capital.
Q. And a waiver of that MSR limit was never granted by OTS, was it?
A. It was not.
Q. I see.
A. As my -- per my recollection.
Q. I'd like to show you Exhibit -- previously marked as Exhibit 595.
A. Okay.
Q. Do you recognize this e-mail or this exhibit?
A. I do.
Q. All right. And, for the record, it's an e-mail dated March 5, 2008, from Mr. Perry to a number of members of the executive committee and to the board of IndyMac; correct?

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A. And a few other senior managers.
Q. All right. Do you recall the Thornburg's recent troubles at this time?
A. Just vaguely.
Q. What do you recall?
A. Well, that Thornburg was a large publicly-traded mortgage REIT. I want to say maybe even over 50 billion in assets, and they funded themselves with capital markets funding sources like repo funding, and my recollection is that those lenders forced them to repay those repo lines and liquidate collateral or they seized collateral because they couldn't repay the lines immediately and that at some point in there that Thornburg went bankrupt as a result of those activities.
Q. Did Thornburg's troubles impact IndyMac in any way?
A. Well, I think it was a bigger issue than Thornburg. I mean March 5 is 12 days before Bear Stearns failed and had to be rescued by the Federal Reserve. So everybody who is in financial services and especially those that were tied to capital markets and especially those who were tied to capital markets tied to housing and mortgage-related assets were having significant issues. You know, as a result of, you know, these activities which were worsening, my recollection

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is that I encouraged our team on March 11 -- I drafted an 8-K filing disclosing to the marketplace and our shareholders the worsening mortgage market and its impact on IndyMac and, in particular, it's negative impact on our 2/12 forecast.
Q. Do you recall what happened on IndyMac's stock price on that date?
MS. VETA: Which date?
MR. SEARLES: March 11.
THE WITNESS: No, I don't recall.
BY MR. SEARLES:
Q. At around this time, you said earlier in your testimony I believe this morning, that you believed it was unrealistic that IndyMac would be able to raise a big slug of capital in the range of half a billion dollars. Do you recall coming to that sort of a conclusion on or around this time period of early March of 2008?
A. I don't recall specifically when I came to that conclusion, but I know we pursued a couple of different transactions in the latter parts of '07, in particular, like the Aries deal and those deals kind of fell away. At one point, we pursued a deal with a private equity, Wilbur Ross and his firm, and a couple of other different people and they all kind of fell

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away, and it, you know, ultimately confirmed my view that that was not going to be -- raising a big slug of capital given the uncertainties in the overall economy and in housing and mortgage finance in particular and the secondary markets, and the uncertainties involving IndyMac, they were just too great at that point in time, you know, to have someone, you know -- it's rare to have someone do that like they had with Washington Mutual. Washington Mutual was a hundred year old institution. We were -- we had been a bank since 2000.
Q. Yeah, I remember them dearly.
You say these events of trying to raise capital through Aries and through Wilbur Ross confirmed your view that it was unrealistic to expect the bank would be able to raise half a billion in capital. When did you come to the view, that was subsequently confirmed by your efforts, that it was unrealistic to raise half a billion in capital?
MS. VETA: Object to the form.
THE WITNESS: I mean it -- you know, there's not like a -- I mean if you have a document that helps me refresh my memory, I'd be happy to do that. But, you know, after you kind of pursue a number of these and they never come to fruition, you start to come to that view. And then, you know, you just kind of look at it

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and say, how do investors get their arms around where housing prices are going to bottom. They still haven't bottomed, and we're sitting here in 2012. Right? So it was just those uncertainties that were out there in the marketplace, and my recollection, as I told you earlier in my testimony, is that after Washington Mutual's deal with -- I think that was TPG led in I want to say April of 2008, but I could be wrong about that. It could have been March, late March, or something. I don't recall another transaction of capital raising occurring until the federal government came in and recapitalized the entire banking system with TARP in later 2008. I could be wrong been that, but that's my recollection.
BY MR. SEARLES:
Q. Okay. And the Aries deal was in 2000 -- or the potential Aries deal was in 2007?
A. Late 2007.
Q. And the Wilbur Ross deal was when?
A. In 2008.
Q. Do you recall when?
A. March, April maybe.
Q. All right. In the absence of being able to raise a big slug of capital, this source of new capital at IndyMac would be the DSPP; correct?
A. Well, and shrinking the balance sheet and

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cutting the common dividend. So it was, you know, and, you know, getting out of a loss position and into a break even to a profit position. So it wasn't one thing. It was a lot of things, and we had to pursue all of them because we had to keep IndyMac Bank -- we had to do our best to keep it safe and sound and well capitalized.

Q. All right. Well, with respect to the exhibit before you, if you turn to the second page, paragraph 6, you're reporting on the capital raising efforts thus far under the DSPP, where you state, "We raised 11.2 million of capital through the DSPP plan last week, and we're trying to raise more this week." You mention about a potential risk of being shut out because of the Thornburg issue. And you say, "I have asked Pam to see if we can shorten the window period to one to two days."

How does that facilitate the ability for IndyMac to raise capital through the DSPP, shortening the window period?

A. Well, what it allows you to do is, let's say, at the beginning of the investment period, it used to be that it was a 12-day investment period, and if you set a threshold price at the beginning of the period, you couldn't change it for the whole 12 days. By having, you know, a shorter investment period, you could change

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it daily based upon the stock price -- your stock price.

Q. All right. Is it what you had been finding under this 12-day window that you weren't meeting the threshold?

MS. VETA: Object to the form.

THE WITNESS: I think the window was already shorter than 12 days at this point in time.

MR. SEARLES: All right.

THE WITNESS: So maybe it was three or four days. And, you know, when you're trying to keep an institution well capitalized, you don't want to be shut out of the market for even three or four days.

BY MR. SEARLES:

Q. Okay. What was ultimately the window period condensed to, do you recall?

A. My vague recollection is we could elect to do it daily. That was a part of the -- we had that kind of flexibility was built into the DSPP plan through some modification of the plan that we did in 2007.

Q. I see.

And you approved that modification?

A. I don't know that I was involved in those modification terms. I may or may not have been. I just don't remember.

Q. All right. The e-mail clearly indicates that

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you are somewhat involved and that you ask Ms. Marsh to see about shortening the window period.

MS. VETA: Object to the form.

THE WITNESS: No, I think those are two different issues. You asked me if I was involved in modifying the plan.

BY MR. SEARLES:

Q. Well, I think more of a proven --

MS. VETA: Let him finish -- let him finish his answer.

MR. SEARLES: Let me try to clarify my question, and then we can clarify the answer.

THE WITNESS: Okay.

BY MR. SEARLES:

Q. Were you involved in improving the modification to the window?

MS. VETA: Object to the form.

THE WITNESS: When it was modified in either the prospectus or the S-3 or whatever?

BY MR. SEARLES:

Q. I don't know. Just in terms of the window period being modified to one or two days.

A. Well, I think the program had the flexibility at this time to set the threshold price and the window at whatever you want it.

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Q. Okay. So it wasn't constrained by the terms of the S-3 or in the prospectus?

A. That's my understanding.

Q. All right. And were you aware of the fact that the window was then closed to or shortened to a period of just one day?

MS. VETA: Object to the form.

THE WITNESS: I don't know if it was one day or two days. It says one or two days here. But my vague recollection is we moved it to one or two days.

BY MR. SEARLES:

Q. All right. But did you have any role in approving that or authorizing that?

A. I mean right here I said that I asked Pam to explore whether we could move it to one or two days.

Q. All right. And it's your understanding she was successful or the bank was at least able to shorten the window?

A. That -- it was my vague understanding that the window could -- that we had the flexibility to have it be as short as a day.

Q. All right. And then going on to the rest of that sentence, you state, "We're going to try to raise 1 to 2 million every day this year through the DSPP regardless of price."

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Was that -- was that the plan going forward as of March 5, 2008?
MS. VETA: Object to the form.
THE WITNESS: Well, I mean I think, you know, as I've kind of testified to before, this was, you know, an extremely volatile period of time. And these were ad hoc solutions that were coming up. I wouldn't categorize this as a formal plan. I would categorize this as an ad hoc approach that we were taking at this moment that could change. We didn't go put a -- you know, in my recollection, together a formal plan together and get it certified that it's accurate, you know, bottoms up certification, SOX-type certification for our financial plan, and we didn't get it board approved. We were addressing issues given the volatile nature of the environment in an ad hoc way at this time.
BY MR. SEARLES:
Q. All right. So is it fair to say that it was your intent as of March 5, 2008, to try to raise 1 to 2 million every day under the DSPP regardless of price?
MS. VETA: Object to the form.
MS. MATELIS: Join.
THE WITNESS: I mean I think that I probably would have to state it more generally. I don't know whether that was my intent at that time. I don't

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remember. But it was my intent to do whatever it took to keep IndyMac Bank safe and sound and well capitalized because that was in the interest of our shareholders.
BY MR. SEARLES:
Q. All right. Well, I'm trying to tease out the distinction that you're appearing to be drawing between this isn't a plan --
A. Yes.
Q. -- or a formal plan, a formal board-approved plan.
A. Yeah.
Q. I'm trying to figure out apparently it's something different. Is it -- and that's why I'm using the word "intent." It's something other than a formal plan. I'm trying to figure out a word of common usage between us going forward. It was your at least hope to be able to have IndyMac raise between 1 and 2 million per day under the DSPP plan?
MS. VETA: Object to the form.
THE WITNESS: Yeah, you know, I mean if you ask me on -- you know, as I said on March 5, I don't recall whether that was my hope or my hope was do a billion of highly dilutive capital. Okay? But I think that we had adequately disclosed in both the 2/12 8-K and the 2/29 10-K that things may change, things may

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worsen, and we may have to raise severely dilutive capital. So I mean I think everyone understood that and that risk, and they also understood very clearly in 2007 and 2008 that we would have to do everything to keep IndyMac Bank safe and sound and well capitalized.
BY MR. SEARLES:
Q. All right. And the Exhibit 919, the summary of sales that we've looked at earlier on the DSPP where the sales conclude on May 9 just before the May 12 10-Q, it's fair to say on virtually a daily basis, if this summary were accurate or is accurate, that IndyMac was, in fact, trying to raise and was raising between 1 and 2 million a day under the DSPP; correct?
MS. VETA: Object to the form.
THE WITNESS: I think that's correct.
BY MR. SEARLES:
Q. Okay. This e-mail is directed, Exhibit 595, in part to the board; correct?
A. That's the one I just had?
Q. Right.
A. Yes.
Q. All right. Did you have the authority as the CEO and chairman of the board of IndyMac to authorize 1 to $2 million in sales under the DSPP on a daily basis?
MS. VETA: Object to the form.

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THE WITNESS: Well, the DSPP program was a board-approved plan in that each DSPP prospectus was board approved before we filed it. And so under that plan, I had the authority to issue up to the shares remaining in that prospectus.
BY MR. SEARLES:
Q. Okay. As a member of the board, you also had the authority, at least with your vote, to vote to approve the issuance of additional prospectuses and registering additional shares under the DSPP; correct?
MS. VETA: Object to the form.
THE WITNESS: Yeah, I mean I was in the vast minority on the board, right, at the holding company.
BY MR. SEARLES:
Q. Right.
But I recall I think you signed unanimous written consents authorizing, for example, the filing of the April 3 prospectus?
A. Probably. I just don't remember. I would think so.
Q. And you conclude this paragraph 6 -- counsel keeps thinking we're done.
MS. VETA: I keep seeing you move on to the next document.
BY MR. SEARLES:

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Q. You conclude your sentence, "We're going to try and raise 1 to 2 million every day this year through the DSPP . . . regardless of price."
The price is what? The stock price that you're referring to?
A. Yes.
Q. And the lower the stock price goes, the more dilutive the sales will be under the program; correct?
MS. VETA: Object to the form.
THE WITNESS: Depending upon what the book value per share is at that point in time. We were having losses that were also diluting book value per share.
BY MR. SEARLES:
Q. Okay. Those losses aren't recorded on a daily basis, are they?
A. They're not recorded on a GAAP basis on a daily basis, but they are on an economic basis occurring.
Q. All right. Well, if you're selling regardless of price, are you sort of abandoning at that point in time any concern about the dilutive effect of sales under the DSPP, you're willing to go as low as the stock goes?
MS. VETA: Object to the form.

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THE WITNESS: Yeah, I mean I -- this is a memo. You know, it's like -- you know, e-mail is like a verbal discussion. I don't know the answer to that question. I wasn't having to make that decision at this point in time, but I think we had adequately disclosed the risk in our 8-K filing on 2/12 and in our 10-K filing on 2/29, and in the shareholders letter and in my verbal discussions with equity analysts related to the 2/12 earnings release that we may have to raise severely dilutive capital if things worsened.
BY MR. SEARLES:
Q. In your March 11 8-K which you talked about the volatility of interest rates and the negative effect on the forecast, again, you didn't in that 8-K talk about the fact that IndyMac was, in fact, raising dilutive capital under the DSPP. You didn't update the market on that piece of news, did you?
MS. VETA: Object to the form.
MS. MATELIS: Join.
THE WITNESS: Let me first correct you. It wasn't as a result of interest rates. That was that unique servicing cap issue. It was a result of, you know, a total collapse of the market for mortgage-backed securities and mortgages in general and housing in general and, you know, the heart of the financial crisis

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occurring at that point with firms like Thornburg over 50 billion in assets going bankrupt and Bear Stearns having to be saved by the Fed. Those were all going on at the time and we were saying that that -- we were announcing to the market at that time that 2/12 forecast is going to be negatively impacted as a result of all these activities that were occurring in the marketplace.
With respect to the dilutive nature of the direct stock purchase plan, we didn't disclose that in that 8-K filing because we didn't feel it was material. So for example, this 11.2 million in stock that we had issued, I believe this was from 2/26 to 2/29. It was, you know, you like to use the beginning book value, the 16.60 at 12/31/07, it was dilutive a half of 1 percent to that book value per share, a half of 1 percent. And as I said, for the quarter, for the first quarter, it was dilutive about 46 cents.
MS. VETA: Are you finished with Exhibit 595, Mr. Searles?
MR. SEARLES: Yes, Ms. Veta.
BY MR. SEARLES:
Q. I'd like to show you what's been previously marked as Exhibit 791.
A. Okay.
Q. Do you recognize this e-mail or this exhibit,

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I'm sorry?
A. Yeah, I mean it's an e-mail from me to the executive committee and the board. I vaguely recall it, yes.
Q. All right. And this was dated March 12, 2008; correct?
A. Correct.
Q. About a week after the prior Exhibit 595 that we just looked at?
A. Right.
Q. And in paragraph 3, you're reporting to the board and the executive committee, "We've raised roughly 15 million in capital through the DSPP in the last few weeks, 2 million in the last two days, and are planning to raise 1 million a day from now through the end of April when we release Q1 '08 earnings."
Again, this was the expectation -- I'm trying to avoid the use of the word "plan," but this is the expectation going forward at this time?
MS. VETA: Object to the form.
THE WITNESS: Right. This is the, you know, ad hoc -- we're trying to address, you know, what I would consider to be, you know, a very challenging period for the entire financial services sector and, in particular, those related to mortgage banking, and we're

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dealing with the issues that we need to deal with to keep IndyMac safe and sound, IndyMac Bank safe and sound.
BY MR. SEARLES:
Q. All right. Continuing on the same line of questions showing you Exhibit 744.
A. Okay.
Q. Do you recognize this e-mail?
A. I do recognize this e-mail.
Q. All right. This is from yourself, dated March 20 -- excuse me, March 13, 2008, to IndyMac senior managers --
A. IndyMac senior managers and the board.
Q. -- and members of the board. Okay. The subject "Capital Raising Through the DSPP." Here in the second sentence, you report, "If we raise a million a day on average all year, we raise 260 million a year; 2 million, we raise 520 in a year and so on."
Again, not to use the word "plan," but this was the expectation going forward at this time in the middle of March, 2008, to raise 1 to 2 million a day under the DSPP for the remainder of the year?
MS. VETA: Object to the form.
THE WITNESS: No, I think that's too strong. It was the -- this was an incredibly uncertain time

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period. You didn't know when things were going to get better, if they were going to get better. It seemed every day something got worse, okay, during this time period. Or every week or every other week. Some new shoe dropped or some new foot dropped, and you were trying to address those on an ad hoc basis with the whole goal to keep IndyMac Bank safe and sound and well capitalized. And I think, you know, with respect to this issue, you can see that we were pursuing lots of different things. I think in the last document you showed me our plan to shrink the balance sheet was working. We were beating the forecast in terms of shrinking the balance sheet and building capital through -- through our capital shrinkage -- through our asset shrinkage plan. So we were pursuing lots of different things to keep IndyMac Bank safe and sound including multiple ways of raising capital.
So for example, if we raised a big capital raise which we disclosed, as I said, in the 2/12 8-K and the 2/29 10-K, and in the shareholders letter that we might have to raise significantly dilutive capital, if we raised a big slug of capital, we obviously wouldn't continue raising capital through the direct stock purchase plan. So we were pursuing every avenue within our realm to keep IndyMac Bank safe or sound with the

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idea clearly that the direct stock purchase plan, you know, as the stock price goes, you know, you have to measure book value, you know, at the right date, but if you measure book value, if the stock is well below it, that marginal capital that you're raising could be dilutive.
As we've discussed, it was not dilutive in the first quarter in any material way.
BY MR. SEARLES:
Q. You said earlier that in your view, confirmed by your experience with the Aries and Wilbur Ross deal, that raising a significant amount of capital, a big slug of capital to the tune of $500 million was not a reasonable expectation.
A. Yeah --
Q. At this time, on March 13, given that view, the source of capital is not the plan to continue as we just saw in an earlier exhibit, the plan to raise a million a day?
MS. VETA: Object to the form.
MS. MATELIS: Join.

BY MR. SEARLES:
Q. Or 1 to 2 million a day for the remainder of the year?

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MS. VETA: Object to the form.
THE WITNESS: No, I think, you know, as I said just a minute ago, we were belt and suspenders. We were trying to pursue all avenues of capital raising to keep IndyMac Bank well capitalized. I think the Wilbur Ross deal was later than this March 13 date. And yeah, I approached that very skeptical and then it got very serious and you get a little excited and then it doesn't happen. And then you approach another one and it gets very serious and then it doesn't happen. So, you know, eventually I think by the time after the May 12 call when I went on the road, as I said -- I think that was called Project Ironman that we did with JPMorgan, and we did a week's road show of extensive presentations with investors, and we were not successful in raising capital, it became clear to me that we had to pursue, you know, strictly the balance sheet shrinkage plan to keep IndyMac Bank as safe and sound as we possibly could.
BY MR. SEARLES:
Q. All right. In the spring, this time period of March of 2008, pending the hopeful execution of a raise of a big slug of capital through Wilbur Ross or some other --
A. Right.

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Q. -- equivalent entity, your backup plan was to continue to raise capital under the DSPP is at least one of your components for keeping IndyMac safe and sound; correct?
A. Yes.
MS. VETA: Mr. Searles, can we take a quick break when you get a minute?
MR. SEARLES: Sure.
MS. VETA: Is now okay?
MR. SEARLES: Yeah.
THE VIDEOGRAPHER: We're going off the record. This is the end of tape No. 4 in the continuing testimony of Mr. Mike Perry, volume 1. The time now is 3:41 p.m.
(Recess taken from 3:41 p.m. to 3:49 p.m.)
THE VIDEOGRAPHER: We are back on the record. This is the beginning of tape No. 5 in the continuing testimony of Mr. Michael Perry, volume 1. The time now is 3:49 p.m.
BY MR. SEARLES:
Q. Mr. Perry, when I was -- when we were discussing Exhibit 666 which was an e-mail that you wrote to Mr. Dochow and Mr. Hewes on March 26 of 2008, I'm not sure if you -- well, if you'd like to look at it, but in connection with our discussion on that

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exhibit you had mentioned that there was a memorandum of understanding that IndyMac had reached with OTS. What do you recall about that MOU?
A. Well, my counsel just refreshed me that that MOU didn't occur until June so I was, you know, remembering that wrong.
Q. I see.
A. So it was June.
Q. I saw the two of you whispering.
A. Yeah.
Q. Okay. All right.
A. But I mean I'd be happy to tell you what I remember about that.
MS. VETA: Let Mr. Searles ask the question and then you answer the question.
BY MR. SEARLES:
Q. Yeah, I was just curious as to whether there was one entered into, to your understanding, in the pre-May 12, 2008, time period. You don't recall any such one?
A. No.
Q. All right. I'm showing you what's soon to be marked as Exhibit 924.
(Exhibit No. 924 was marked for identification.)

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BY MR. SEARLES:
Q. Do you recognize this e-mail? I know the format is slightly different than the ones you're likely to be familiar with.
A. I mean I don't recognize it, but I have no doubt about its accuracy.
Q. Okay. It appears on March 18 of 2008 Pam Marsh is reporting to you and Mr. Keys an update on the capital raising via the DSPP, indicating how much has been raised over the -- she reports, "Through today we raised 22.5 million of new capital, issued 3.9 million shares at 5.70 a share, this is roughly diluted to book value of 49 cents per share," and you report, "Thanks, let's keep going, Mike." Correct?
A. That's correct.
Q. I'd like to show you what's been previously marked as Exhibit 797.
A. Okay.
Q. Do you recognize this exhibit?
A. Just vaguely, but I have no doubt it's accurate.
Q. All right. And you mentioned earlier this Washington Mutual capital infusion according to the headline here of $5 million? Do you recall that event happening?

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A. For some reason, I think -- I thought maybe the actual number might have been a little bigger than that. But --
Q. Okay.
A. -- just, in my mind, I remember it as being maybe 7 billion.
Q. Okay. We can agree at least it's a big slug of capital?
A. Big slug.
Q. All right. Do you recall whether this placed any pressure on IndyMac by its regulators to do the same thing or try to do the same thing?
A. As I previously testified, my vague recollection is that sometime -- and I could be wrong, just like I recalled the MOU being in March when it was in June, but my vague recollection is that Darrell Dochow called me after this capital was raised by WAMU in the days or few weeks after this and said, you know, this is what we want you to do too, but obviously it's scaled to our size versus a WAMU's.
Q. I see.
And your e-mail last in time at the top of the page of Exhibit 797, this is an e-mail April 7, 2008, and it's to the members of the board of IndyMac as well as the senior managers; correct?

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A. That's correct.
Q. And you state, "We will be reviewing our plans with you this Friday which basically" --
MS. VETA: I see Thursday, but that's okay.
MR. SEARLES: Scary things going on up at the top of my shoulders here.
BY MR. SEARLES:
Q. Let me try this again. "We will be reviewing our plans with you this Thursday which basically have us continuing to raise 1 to 3 million of capital a day through the DSPP for all of 2008."
Here you're using the word "plan" that I tried to avoid using with you in the past. What is it that you're referring to here when you say, "We will be reviewing our plans with you this Thursday"?
A. Well, the reason -- I mean you can call it plans or you can call it ad hoc, you know, decision making, but the issue was it was extremely volatile; right? We had lots of negative news in the marketplace. We've had that in the past. We had gone through the 1998 global liquidity crisis and everybody thought the world was going to end and then things recovered. And so we didn't know what was exactly going to happen. Potentially things could have recovered. They didn't with the benefit only of hindsight, you know, as we sit

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here in 2012. But, at this time, we didn't know and we had to, you know, essentially hope for the best and plan for the worst, and so what we were trying to do is build plans around the idea that we needed to keep raising capital to keep IndyMac Bank safe and sound.
Q. Okay. Do you recall building plans around that concept?
A. We built rough draft plans around that concept, but none of them reached the point where we had formally -- got them formally approved by our board or our regulators which is normally what we would do or get them certified. They were rough draft plans. They were not certified in the way we do them through the Sarbannes-Oxley-type certification process when we disclose them to investors, and that's, you know, really what you want to do when you're publicly releasing a plan.
And really at this point in time, you can see from the e-mails, our plans were all over the place; right? They were all in the direction of we've got to pursue lots of different things, shrinking the balance sheet, cutting dividend -- cutting the common dividend, cutting expenses, restructuring our business models, lots -- you know, raising capital in any way we can to keep the bank safe and sound.

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Q. With respect to a board-approved plan -- we'll get to this exhibit later, but do you recall OTS wanting IndyMac's board to approve an updated financial plan in or around the beginning of April, 2008?
A. I have a vague recollection of that. And it might have also involved whether we were rated a CAMELS 3 or a CAMELS 4, like doing sensitivity of that plan in those two different scenarios.
Q. All right. So you vaguely recall some board-approved plan?
A. Well, I don't know if I recall it being board approved, but board-reviewed plan. The plans we're talking about here are not even board-reviewed plans. They're, you know, ad hoc management plans that we're doing on the fly that are not being reviewed in as detail as the ones we would present to the board and our regulators and then even more detailed when we present them to shareholders and that we had adopted a process to -- similar to the SOX certification process for the plans that we disclose to shareholders.
Q. All right. We'll get to that exhibit a little bit later. I'd like to show you now Exhibit 798.
A. Okay.
Q. Do you recall the e-mail exchange reflected in Exhibit 798?

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A. I vaguely do, but I have no doubt that, you know, it's accurate and it's what we were discussing in my previous testimony that it confirms kind of my recollection that once Washington Mutual raised capital through its privately placed deal, that the OTS, you know, put some pressure on us to raise capital.
Q. All right. In the last e-mail in time at the top of the page of this exhibit, this is from you dated April 8, 2008, to the executive committee and board members again; correct?
A. That's correct.
Q. And you're saying, "Cynically I believe the OTS did not alert us to this transaction which would have got us moving a lot faster, nor really pressured us to raise capital until last Friday because they didn't want us to raise a big slug of capital before WAMU."
Do you recall the OTS on whatever date the previous Friday was from Tuesday April 8 pressuring IndyMac to raise capital?
A. You know, just as I discussed earlier, a vague recollection that I got a phone call saying -- from Darrell Dochow after Washington Mutual raised their capital saying, Mike, we want you guys to do your very best to try to raise capital in this similar size, and I said, you know, we'll do our best. We'll try to do

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that, but, you know, I don't know how realistic that is. Washington Mutual is a hundred-year-old franchise with a huge deposit franchise and other businesses besides mortgage lending. Our only business is mortgage lending.

Q. And what hung in the balance, if you recall, if IndyMac failed in raising a big slug of capital equivalent to a WAMU type deal?

MS. VETA: Object to the form.

THE WITNESS: Well, I think, you know, what I'm referring to here is kind of similar to, you know, what happened later in the year with the TARP capital where the treasury secretary put the pressure on the banks who didn't feel they needed the capital to take it even though they didn't feel they needed it because they wanted to have all those too-big-to-fail banks, you know, not show one weaker than the other. And so the idea that Washington Mutual had this done then put pressure on us to have our ratios be higher and until we did that, you know, people would say we would, you know, need, you know, need capital, even though, you know, as I note in the first e-mail, that I thought we had a viable plan to shrink the balance sheet and raise capital through the direct stock purchase plan and that was a better alternative far less dilutive to our

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shareholders than raising a big slug.

BY MR. SEARLES:

Q. All right. But again, I guess I wasn't clear in my question of what hung in the balance. Did you have an understanding after your speaking with Mr. Dochow on the phone where he told you to really try and raise a big slug of capital like WAMU, that if you failed to do so that you'd be downgraded to a CAMELS 4?

MS. VETA: Object to the form.

THE WITNESS: In kind of preparing for this, I have a little bit of a refreshed memory that there was some discussions along those lines that that was -- you know, if we don't raise a big slug by X date, but at some point in here, you know, I told Mr. Dochow I can't go out and raise capital till we have clarity as to what our first quarter results are, and we don't have our first quarter results yet. And that's why we didn't go out and raise capital and try to raise capital until we had our first quarter results done and a financial projection for the remainder of the year that had been audited and certified under the SOX process.

Because you can't go out with all the uncertainty in the marketplace and have uncertainty about what are you going to earn in the first quarter, what's your capital ratios going to be, you know, all

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those types of issues. Do you see what I'm saying?

BY MR. SEARLES:

Q. I do.

So when you say your memory was refreshed, you reviewed various documents in preparation for your deposition here?

A. That's correct.

Q. And then your memory is refreshed and you now have a current recollection of Mr. Dochow telling you in so many words that if IndyMac did not raise a big slug of capital prior to May 12, that it would be downgraded to a CAMELS 4?

MS. VETA: Object to the form. Mischaracterizes the witness' testimony.

MR. SEARLES: I'm just trying to clarify what your memory is refreshed to.

THE WITNESS: Yeah. Yeah. I would say refreshed a little vaguer than that, a little less specific than that, which would be that there were, you know, some posturing on the part of the OTS about a 3 versus a 4, but they hadn't taken the 3 off the table, you know, at this point in time. You know, we were still a well-capitalized institution, but there was some posturing that if we didn't raise it, there was a possibility that we'd be a 4. I don't recall it was a

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certainty.

BY MR. SEARLES:

Q. All right. Well, we'll probably walk through the same exhibits.

A. Okay. That's fine.

Q. And on this Exhibit 798, in the second e-mail at the bottom of the page, where this is another e-mail by yourself at 9:10 a.m. on April 8 --

A. Yeah.

Q. -- commenting on the Washington Mutual deal in the third paragraph, you state, "As a result, I told our team that it is a top priority to try and complete a transaction before we release earnings on May 12, and we'll be working around the clock to try to make this happen."

Why the deadline of May 12 at least at this time?

A. So this would be an example of you say something and then things change two days later. Okay? At some point between me saying this and our actual results -- I talked to Mr. Dochow and said it is just not realistic for us. We've got a ton of work to do to get our books closed, and it's not realistic for us to be out trying to raise capital with no numbers to provide anyone, investors. We need to focus on getting

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our books closed. Okay. And once we get our books closed and we get a solid financial projection that's been audited and reviewed under our process, then we can go out and raise capital. You're just going to have to wait, you know, because I can't get it done before we release first quarter earnings. Which is I think what they -- that was I think their push and I pushed back.

Q. And this was a telephone conversation you had with Mr. Dochow?

A. It could have been a telephone conversation. It could have been with other OTS people. You know, I don't recall. You know, it could have been in person with some of the other OTS people. I don't recall. It could have been an e-mail. I don't recall.

Q. I see.

But in some fashion, you communicated that to Mr. Dochow prior to May 12?

A. That's my recollection.

Q. Did you communicate that to him in April?

A. I don't recall specifically. I would think so because this is in April and we were working also on getting a road show presentation, you know, with JPMorgan to go out and try to raise a big slug of capital after May 12.

Q. All right. So it would have been shortly --

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shortly after Mr. Dochow pressured you, you pushed back?

A. At some point in the week or two, you know --

Q. All right.

A. -- after that. Not pushed back. I just told them the reality.

Q. What's soon to be marked as Exhibit 925.

(Exhibit No. 925 was marked for identification.)

BY MR. SEARLES:

Q. Never mind.

(Discussion off the record.)

MR. SEARLES: We'll forget that one.

BY MR. SEARLES:

Q. In the period from February 26 through May 12, what were the purposes of raising capital under the DSPP?

A. The purpose was to keep -- to contribute that capital down to the bank which was our, you know, only significant subsidiary to keep it safe and sound and well capitalized.

Q. When you say "safe and sound," is that different than well capitalized, or are the two equivalent terms?

A. The two are essentially equivalent.

Q. Okay.

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A. I mean there are other factors that are involved in safety and soundness, but that's a big one.

Q. All right. And when you say "keep it well capitalized," you're referring to the well capitalized regulatory status of the total risk-based capital ratio of over 10 percent?

A. I'm referring to all of the well-capitalized ratios. You had to be over on all three of them.

Q. Okay. All right. Any other purpose, capital raising under the DSPP other than to maintain the bank's well-capitalized status?

MS. VETA: Object to the form.

THE WITNESS: You know, I mean general corporate purposes of the holding company.

BY MR. SEARLES:

Q. Which would include what, if anything?

A. You know, minor expenses at the holding company, and other obligations at the holding company.

Q. And you reviewed your prior testimony before the Commission that Mr. Chung questioned you on?

MS. VETA: Object to the form.

THE WITNESS: You know, as we discussed, I reviewed minor segments of it last night.

BY MR. SEARLES:

Q. All right. Do you recall being questioned

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about the disclosures of the purposes of the fundraising under the DSPP program and stating, "I would expect there would be some pretty fulsome language about what the proceeds would be used for"?

A. Well, I did review that piece last night.

Q. Okay. We were both interested in that piece.

A. So --

MS. VETA: Let Mr. Searles ask you a question, and then you can answer it.

THE WITNESS: Okay.

BY MR. SEARLES:

Q. You recall giving that testimony?

A. Yes, with refreshed recollection of yesterday.

Q. All right. With respect to the prospectuses that were issued under the S-3 registration that had a use of proceeds language in it, did you ever review that language prior to the issuance of those prospectuses?

A. The ones in 2007 and 2008?

Q. Yes.

A. Not -- you know, not to my recollection.

Q. All right. And your testimony before when you said, "I would expect there to be some pretty fulsome language about what the proceeds would be used for," do you consider the disclosure that you now see is in the prospectuses of the general corporate purposes including

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"investment in our subsidiaries" to constitute that pretty fulsome language that you expected to see?
A. Well, I mean I've done some work subsequent to then, and I would say that I do think that that language is perfectly appropriate and described what the purpose was of our capital raising.
Q. Do you think the disclosure on the use of proceeds given the fact that it was, as you said, the purpose was principally to protect the bank's well-capitalized status that the disclosure could have been more fulsome than it was?
MS. VETA: Object -- object to the form.
THE WITNESS: I think that when you look at it -- you know, I'd step back for just a second. If you look at bank shelf registrations, that's pretty standard language, general corporate purposes and investment in subsidiaries. I looked. I found numerous ones.
BY MR. SEARLES:
Q. Did you know that at the time of the issuance of the prospectuses, or is this based on your subsequent investigation now that you've been --
A. It's subsequent investigation.
Q. I see.
A. And that's the -- and the reason that it is more general in nature for a bank is debt and equity are

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fungible. It's not like a non-financial company where you raise the capital to build a building. You, in a bank, you use a piece of equity and a piece of debt and a much bigger piece of debt to do anything so capital and debt, including deposits, are very fungible. Okay? And that's why there's a more general description. Plus in an S-3 filing, you incorporate by reference all of your, you know, public filings, all of your 8-Ks and 10-Qs and 10-Ks where we describe very clearly what we were doing with the DSPP capital raises.
Q. I see.
So it's your understanding that the prospectuses at issue incorporated by reference, for example, the February 12 8-K?
MS. VETA: Object to the form.
THE WITNESS: Well, I think there's some little technical issue of one 8-K that is filed versus incorporated by reference. But beyond that one, I think the rest of the 10-Qs and Ks are incorporated by reference and made incredibly clear what we were using the proceeds of the DSPP for.
BY MR. SEARLES:
Q. So is it your testimony that these prospectuses incorporated by reference all form 8-Ks but the February 12 8-K?

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MS. VETA: Object to the form.
THE WITNESS: I don't -- I'm not the secure -- legal securities expert. I don't know the answer to that.
BY MR. SEARLES:
Q. I see.
Well, at the time of the filing of these prospectuses before you got involved in this lawsuit, was it your understanding that the prospectuses incorporated by reference all of the company's filings including its Form 8-K such as the February 12 8-K?
MS. VETA: Object to the form.
THE WITNESS: Well, let's take the February 12 out of that. I did have an understanding that you incorporated by reference all the other documents and that's why a shelf registration, the language tended to be more boilerplate.
BY MR. SEARLES:
Q. When you say "more boilerplate," are you referencing use of proceed language or what do you --
A. Just in general a shelf registration was not -- you know, an S-3 shelf registration is not the same as an S-1 that incorp -- you know, it's a huge, thick document because it's supposed to stand on its own with current financial information, current risks, and

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everything else. An S-3 shelf registration, I was aware that that -- language in those tended to be more generic because of the fact that it incorporated by reference a lot of your other public filings.
Q. I see.
Again, with respect to -- this leads to another question so it's not totally facetious that I'm --
A. Okay.
Q. -- repeating this question, again.
But in 2008 when these prospectuses were filed, the April 3, the May 2 prospectuses, was it your understanding that they incorporated by reference the, for example, the February 12 8-K?
MS. VETA: Object to the form.
THE WITNESS: You know, as I said, I'm not a legal securities expert. It was my understanding that in general it incorporated by reference most of our major public filings.
BY MR. SEARLES:
Q. All right. And do you recall personally soliciting any legal advice from either inside or outside counsel as to whether IndyMac had a duty to correct the representations made on February 12, whether filed the April 3 prospectus or the May 2 prospectus?

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MS. VETA: Object to the form.
BY MR. SEARLES:
Q. Was that a --
A. There were a lot of parts of that. I think the one that I focused in on was the do I have -- can you repeat? Do I have any personal --
Q. Did you seek any legal advice, you personally, on the issue in light of the representations that IndyMac made to the market on February 12 --
A. Yeah, I mean --
Q. -- about its forecast and its business plan going forward and it would avoid raising dilutive capital and all of that by the time of April 3 or May 2 --
A. Yeah.
Q. -- where that forecast was inaccurate, at least to the extent IndyMac was now raising capital through the DSPP? Do you recall seeking any legal advice personally as to whether there's some duty to correct those prior representations?
MS. VETA: I'm going to object. Objection to the form of the question.
THE WITNESS: I think the answer is -- you know, the simple answer is no because that's not, you know, the role that I played in the disclosure process.

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I wasn't in the weeds of -- in 2007 and '8, and I had a really strong senior team of disclosure people internally, and they dealt directly with outside counsel on various matters, and I am, you know, aware through my preparations that they sought some advice with respect to certain aspects of our direct stock purchase plan.
BY MR. SEARLES:
Q. All right. And when you say you were aware that they had sought some advice in connection with your preparation, this is knowledge you gained after leaving IndyMac; is that correct?
A. Yeah. I mean some of it -- some of the -- I think there are, like, two key pieces that I recall in part of my preparation. One is in relation to a board member questioning whether we could continue to raise capital through the DSPP in April, sometime in April, if we were to receive a CAMELS 4, and I think we went out and got, you know, an opinion on that. My memory was refreshed with respect to that matter.
Q. Okay.
A. And then the other was one at some point when -- in 2007, when we were -- in the fall of 2007 when we were raising capital through the direct stock purchase plan, during that time period, about whether we had an obligation to update forecasts, and my

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recollection, my recollection is that counsel said that they didn't feel we had an obligation to update forecasts in interim periods because we had, you know, we had met the securities laws in terms of how we disclose forecasts.
Q. And having reviewed those documents, that refreshed your recollection of having some awareness of that advice in that time period of the fall of 2007?
A. Yes.
Q. All right. Okay.
Getting back to the fulsomeness of the disclosure of use of proceeds under the DSPP, I'd like to show you what will soon be marked as Exhibit 926, I believe.
(Exhibit No. 926 was marked for identification.)
BY MR. SEARLES:
Q. This is a -- Exhibit 926 is an e-mail with an attachment of an IndyMac sub-debt offering memoranda.
Do you recall anything about a subdebt offering memoranda being the subject of discussion in August of 2007?
A. Very vaguely.
Q. Do you know whether this subdebt offering memoranda went forward?

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A. I don't believe it did. Not to my recollection.
Q. I see.
What do you recall about it?
A. I'm not sure I've ever seen this, you know, or not. It's possible that I did. I just don't recall.
Q. Okay. Do you recall what the purpose of the subdebt offering was meant to address?
MS. VETA: Object to the form.
THE WITNESS: Well, it looks like it's a form -- I think subordinated debt accounted for tier two or total risk-based capital. So it would have been a form of capital raising.
BY MR. SEARLES:
Q. Okay.
A. I think so. I think.
Q. For the purpose of protecting the bank's regulatory capital status?
A. For the -- well, is this -- I didn't look to see if the offering was at the holding company. This is at the bank level so for the purpose of enhancing the bank's capital status, yes.
Q. Okay.
A. Keeping it well capitalized.
Q. All right. Similar to the purpose of the DSPP

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fundraising under the prospectuses that were issued in October?
A. Yes.
MS. VETA: Let me -- I'm going to object to the form of that question.
MR. SEARLES: Too late.
MS. VETA: I was waiting for you to finish your question, Mr. Searles, as you instructed.
MR. SEARLES: Thank you.
BY MR. SEARLES:
Q. We try to find humor where we can.
If I could direct your attention to page 19 of the --
A. Yeah, I read it.
Q. -- subdebt memoranda. And the use of proceeds language?
A. Yeah, I read it.
Q. Okay. Would you consider that a fulsome disclosure?
MS. VETA: Object to the form.
THE WITNESS: I mean I know what you're trying to get at here in terms of connecting the two dots, and here's my response on that. You're comparing apples and oranges. This is more of an S-1 filing. It's not a shelf registration. This is a document that has to

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stand on its own, much like the bank preferred deal that we did in May or June of 2007. An S-3 filing is a wholly different thing. If the SEC doesn't like S-3 filings, then they need to address that issue, but they shouldn't be penalizing companies because they follow the rules on your S-3 offerings. This is an S-1 or similar to an S-1. Okay?
The privately placed transaction of debt that we did in May, June of 2007 was also similar to an S-1. Those are different documents. They had a specific purposes for them, and even when you have those purposes, they don't necessarily come to fruition. They're just your best intent at the time.
BY MR. SEARLES:
Q. Well, the best intent at the time of this contemplated subdebt offering, according to the use of proceeds, was "The net proceeds of the notes would be used primarily for general banking and corporate purposes and to supplement the bank's regulatory capital base and increase the capital ratios of the bank for regulatory purposes."
A. Yeah --
MS. VETA: Wait. Let him ask his question.
BY MR. SEARLES:
Q. There's no similar disclosure in the

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prospectuses in connection with the DSPP program; correct?
MS. VETA: Object to the form --
THE WITNESS: I would complete --
MS. VETA: Let me make my objection and then you can answer.
Object to the form, asked and answered.
THE WITNESS: I would disagree because we said in the S-3 filings that they were for general corporate purposes and investment in subsidiaries. The only subsidiary of any significance is IndyMac Bank, and it was well known that the capital we were raising in the holding company was for contribution to the bank to keep the bank well capitalized, you know, and that was the case in any period of time, you know, in our past, and we disclosed that and those disclosures were incorporated by reference. Okay?
So I mean I think that you're just talking about different formats. This is an S-1-type format. Maybe it isn't an S-1, but it's an S-1-type format. That was the case with the bank preferred deal in May, June of 2007. The other is an S-3 format, and I would also point out that the law firm that drafts this document is the exact same law firm that drafts the direct stock purchase plan prospectus. So, obviously,

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in their judgment, they felt those were wholly consistent, and I do too.
BY MR. SEARLES:
Q. Would you say the S-1 is a standalone document unlike the S-3? Are you saying that since the S-1 is a standalone document, the use of proceeds language should be more fulsome?
MS. VETA: Object to the form, mischaracterizes the witness' testimony.
THE WITNESS: Everything should be more fulsome. You have in here risk factors that you don't see in an S-3 that are incorporated by reference from other public filings in the S-3.
BY MR. SEARLES:
Q. All right. And with respect to the S-3, with respect to the DSPP program, there are other documents, namely, the prospectuses that follow along from that; correct?
MS. VETA: Object to the form.
THE WITNESS: That's correct.
BY MR. SEARLES:
Q. All right. And the prospectuses have their own unique statement of use of proceeds in them; correct?
MS. VETA: Object to the form.

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THE WITNESS: The prospectuses -- that whole -- I don't know that whole legal process, and I'm not going to try to get into doing that because we -- you know, there was -- you know, we used the same counsel that drafted this, drafted our DSPP prospectuses. But my viewpoint is those are S-3 -- those DSPP prospectuses are under an S-3 shelf registration where all the documents which explain very clearly what we were using the proceeds for were incorporated by reference, and the language, as I said earlier in my earlier testimony, the use of proceeds language that we used in our S-3, I looked up some of them. Very similar to Goldman Sachs. Very similar to JPMorgan. Banks are different than non-financial institutions because proceeds are fungible because of the ability of banks to lever versus the ability of non-financial institutions to lever. That's why there's more specific language than let's say you're a non-financial company.

BY MR. SEARLES:

Q. When you say that the use of the DSPP proceeds for the purpose of protecting the bank's well-capitalized regulatory status was well-known, isn't it true that the first time that IndyMac disclosed that with any specificity was on May 1 of 2008 when it filed

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its 8-K in connection with the announcement of Keys' departure?

MS. VETA: Object to the form.

MS. MATELIS: Join.

THE WITNESS: That -- of the use proceeds of the DSPP, no, that's not true.

BY MR. SEARLES:

Q. For the purpose of protecting the capital ratio?

A. Absolutely not true. Go back to the 2/12 8-K that we filed for the year, and you'll see -- I recall in the PowerPoint because that's the document that I did the most. You'll see very clearly we showed the capital that was downstream from the holding company of the bank as a result of the direct stock purchase plan raising that we did in 2007 and its impact on keeping IndyMac Bank well capitalized.

Q. We looked at the 2/12 8-K before; didn't we?

A. Yeah.

Q. Can you show me where that is?

A. In the -- well, show me the PowerPoint presentation.

Q. Okay.

A. I think it's also in the headline of the shareholders letter. I may not be able to do it this

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quick, but we'll try. This page 2 right here, "As a result of raising 676 million of capital, we remained well capitalized despite a significant loss, and we have a realistic plan that we will expect will bolster capital ratios further in 2008."

Q. You're not stating there, though, that the effect of that capital raising was done for the specific purpose of keeping the bank well capitalized, or did you?

MS. VETA: Object to the form.

THE WITNESS: I mean I don't think it could be more clear, that title. "As a result of raising 676 million of capital, we remain well capitalized despite a significant 2007 loss, and we have a realistic plan that we expect will bolster capital ratios further in 2008."

BY MR. SEARLES:

Q. All right. Well, we continue to disagree on that.

MS. VETA: Take a vote.

MR. SEARLES: I'm sorry. You'll second that?

I'd like to show you what is soon to be marked as Exhibit 926.

MS. VETA: 927, I believe.

MR. SEARLES: 927.

(Exhibit No. 927 was marked for

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identification.)

BY MR. SEARLES:

Q. Do you recall this series of e-mails depicted in Exhibit 927?

A. I do.

Q. In the fall of -- in September of 2007, what were the discussions that IndyMac was having with Warburg about a potential investment in the bank or in IndyMac?

A. You know, I don't -- you know, it's been a long time, right? It's five years. I just have a vague recollection that they were interested in making an investment that would have been senior to a common equity but had common equity upside to it.

Q. I see.

From the e-mail chain, it sounds as if they were interested and you sort of backed away. Is that a fair summary of the e-mail exchange?

MS. VETA: Object to the form.

THE WITNESS: I would say that they -- you know, what we ended up doing instead of doing this transaction is we raised the direct stock purchase plan capital. And that, you know, was less dilutive than this transaction would have been over the long haul because of their upside I think of warrants, is my

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recollection, and we wouldn't have given up board seats. And in fact, the way that I know that they structured their other transactions after this, they invested in MBIA, and my recollection is it had a claw down where they kept diluting the existing shareholders even more as they put more capital in.

And I would have expected, you know, if we got further down the road discussing it with these guys, we would have had a similar-type of a transaction. But, you know, this is just like at the preliminary stage. I have no idea whether this transaction would have actually ever been consummated or not. This was a preliminary term sheet.

BY MR. SEARLES:

Q. I see.

In your -- the final e-mail in time depicted on the first page on September 6, you're responding to Dave Coulter. You say, "In addition, I asked Scott to talk to the regional director" -- this is in the second paragraph. "I asked Scott" -- you're referring to Scott Keys there, I assume?

A. Yes.

Q. -- "to talk to the regional director of the OTS who knows IMB well. Scott asked him point blank, 'Do you think we need to raise this capital,' and his

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response" -- this is I assume the regional director of OTS was, "No, we are comfortable with the current and projected capital levels."

In March and April of 2008, I believe we addressed earlier your recollection that the regional director of the OTS asked IndyMac to do everything it possibly can to try to raise a big slug of capital; right?

MS. VETA: Object to the form.

THE WITNESS: Yeah, I think it was the one that I recall specifically was after Washington Mutual raised its capital.

BY MR. SEARLES:

Q. Right.

The third paragraph, you say, "There are really three reasons to raise capital. One, you need to when your regulators are asking you to; two, you are pessimistic and think things are going to get worse and you want a big capital cushion; and, three, you want capital from smart players."

Do you see that language?

A. Yeah, I do.

Q. And you're advising or telling Mr. Coulter that if it were one or two, you're regulator is asking you to raise capital or your pessimistic and you have

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to, you're telling Mr. Coulter, I wouldn't invest.

Do you recall that dialogue with him?

MS. VETA: Object to the form.

THE WITNESS: Yeah, I wrote these statements at that time.

BY MR. SEARLES:

Q. All right. Again, did you have any concern about projecting to the market that IndyMac was being asked by its regulators to raise capital or that IndyMac is projecting to the market that things are pessimistic and needs to raise capital in connection with raising funds under the DSPP?

MS. VETA: Object to the form.

THE WITNESS: Can you be more specific about what time frame you're talking about?

BY MR. SEARLES:

Q. Well, we've gone through earlier exhibits where capital can be raised quietly under the DSPP. Bear Stearns is saying one of the good things about it is that it's not -- you don't Telegraph to the market when you're operating a waiver. Did you have any concerns during the latter half of '07, the beginning of -- the first half of 2008 about Telegraphing or alerting the market that IndyMac is not well capitalized, that it's not as strong as it's projecting

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itself to be by virtue of disclosing DSPP sales?

MS. VETA: Object to the form.

MS. MATELIS: Join.

THE WITNESS: That was a lot of stuff. Okay? And, you know, that was a big question with a lot of little parts in it. And, you know, the first thing that I would say is I just don't think it's fair to ask a question that is a big time frame because of the volatility of the environment. You know, you could ask me a month or a week or specifically, I'll try to address that question. I think the -- what was the other point that I wanted to make?

At no time was I trying to hide our direct stock purchase plan capital raising. Let me make that incredibly clear. Let me repeat it. At no time was I trying to hide our direct stock purchase plan capital raising. Never. Okay. I viewed the direct stock purchase plan capital raising as extremely positive to IndyMac. Okay? In terms of keeping IndyMac well capitalized and safe and sound and dilution related to it through the first quarter of 2008 to be immaterial, and it was immaterial.

BY MR. SEARLES:

Q. Were you surprised by the reaction of the analysts that we went through earlier, the Pam Marsh

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e-mail where she's summarizing the commentary on May 13 of the analyst reports citing as one of their two major concerns the dilutive capital raising under the DSPP?
MS. VETA: Object to the form.
THE WITNESS: What was the other concern?
BY MR. SEARLES:
Q. I don't remember. But remember that exhibit where we went through one of the two major concerns that were expressed in the analyst reports on May 13?
MS. VETA: If you're going to ask him about a document, let's put the document back in front of him.
MR. SEARLES: Well, can you do so?
MS. VETA: Sure.
MR. SEARLES: Exhibit 758. You can use our copy if you'd like.
MS. VETA: Here it is.
MR. SEARLES: Okay.
THE WITNESS: Can you repeat that question?
BY MR. SEARLES:
Q. I was struck by your comment that you viewed the capital raising under the DSPP as an entirely positive thing in light of that --
A. Through the end of the first quarter, yes.
Q. I'm asking you, then, with respect to this analyst's commentary on May 13, it doesn't appear to be

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in accord with your view of the positive aspect of capital raising under the DSPP. My question to you is were you surprised by the analysts' reaction to IndyMac's announcement of its capital raising under the DSPP?
A. Right.
MS. VETA: Object to the form.
THE WITNESS: So you're saying these two themes that were in here?
BY MR. SEARLES:
Q. Right.
A. The credit costs that could be worse than our forecast and concern with respect to impact on book value per share given the current stock price.
Q. Right.
A. So, in other words, not the trust preferred dividends suspend -- preferred dividends suspensions was not a concern, just to make that point.
Q. I'm not sure if that's what we were talking about. I think we were talking about raising capital under the DSPP. You were saying that you viewed it as an entirely positive thing, and I'm asking you whether you were surprised by analyst reaction --
A. Yeah, I --
Q. -- who didn't view it as a positive

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development?
MS. VETA: Object to the form.
THE WITNESS: I think what we're talking about here is the projection that we put out about continued dilution and more significant and material dilution post 5/12 that was concerning analysts, not what had occurred through that period of time in 2008. I mean there's a lot of evidence to support that. The 8-K that we filed on May 1 where we disclosed the DSPP capital that we raised and the stock price, my recollection is, moved up.
The analyst -- the Lehman analyst who didn't change his stock price target from before he knew about the DSPP capital raising to after the DSPP capital raising. I think that what you're seeing here on May 12 and 13 is just the reality of the fact that if we were going to stay well capitalized at this point in time, we were going to have to issue more dilutive capital and continue to do so throughout the year --
MR. SEARLES: Okay.
THE WITNESS: -- and that we put a new projection out on this date, 2/12 -- I mean 5/12 that showed the math of that and disclosed that to our shareholders that that was now our plan, okay, that we were going to do that going forward. And so I think

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it's the forward looking aspect of that that was a negative to the equity analysts and the market. But that's just the reality of the truth. You know, we didn't know it sooner than this either.
BY MR. SEARLES:
Q. All right. But your plan that was announced to the market on May 12 of raising equity -- or raising capital through the DSPP on a continuous basis throughout the remainder of 2008 to which the analysts reacted to, through the exhibits we saw earlier today, was, in fact, a plan that had been put in place by late February, early March; correct?
MS. VETA: Object to the form.
MS. MATELIS: Join.
THE WITNESS: No, I don't believe that's the case. I thought it was more late April, early May.
BY MR. SEARLES:
Q. We just went through --
A. And it wasn't finalized and it wasn't reviewed and approved by our board at that point in time.
Q. No, and that's why we were debating over whether it was a plan or a formal plan or an expectation or an intent. But I think through the e-mails we saw earlier today where you're saying on March 5, the plan, let's keep raising capital 1 to 3, 1 to $2 million per

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day for the rest of the year. Isn't that the plan, the same plan that was then finally disclosed to the market on May 12 to which the analysts are saying you're going to kill IndyMac's book value?

MS. VETA: Object to the form.

MS. MATELIS: Join.

THE WITNESS: Well, IndyMac's book value, I think that plan, as you showed me in a previous document, had the book value going from 10.90ish at the end of the first quarter where the direct stock purchase plan, as I have discussed, was not dilutive in any material way to book value per share in the first quarter of 2008 to something like $7 at the end of the year. Okay? You know, no one should have been surprised about the fact that we were having to continue to raise capital. We had disclosed, as we discussed at the beginning of your allegation period, that we might have to raise severely dilutive capital.

BY MR. SEARLES:

Q. Going back to Exhibit 927, if you turn to the second page, there's an e-mail --

MS. VETA: Do you have 927?

THE WITNESS: Yeah, I have it.

BY MR. SEARLES:

Q. -- from you to Mr. Coulter and Mr. Zilberman,

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September 4, 2007, at 10:32 p.m.

Do you see that?

A. I do.

Q. And in the fifth paragraph, you're saying, "Lastly, we're still struggling with the type of transaction proposed." You go on, "We're still concerned that the market might see this as a third industry bailout and a sign of weakness."

Did you have a concern that any transaction with Warburg would be interpreted by the market as a sign of weakness?

MS. VETA: Object to the form.

THE WITNESS: I mean I said that here. So I obviously must have had some concern that it would have been a sign of weakness. But here, you know, we're talking about a time period where we're expecting a modest loss in the third quarter. We had just raised a half a billion dollars of capital at the bank pre the crisis in May, June, 2007. Our capital ratios were incredibly strong at this point. We went and checked with our regulator and said, do you think we should do this capital raising, and he said, no, don't do it unless it's under, you know, we feel you guys or -- we feel that you're fine, which you never get regulators to say that. They never say that. He said that. Okay?

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And we feel that you're fine because we had -- we were fine. We had raised a ton of capital, and we were projecting a modest loss for the third quarter.

So we rejected this transaction because we felt the terms of it were not as good as raising capital through the direct stock purchase plan, and I -- instead I raised almost the exact same amount of capital we were going to raise through this activity through the direct stock purchase plan in September and October. And, in fact, the capital that we raised in May and September and October covered more than the losses that we suffered in 2007. That's rare for a financial institution who is involved in mortgage lending and the capital markets in 2007.

BY MR. SEARLES:

Q. With respect to the concern about a deal with Warburg being seen as a potential sign of weakness --

MS. VETA: Are you talking about in September of 2007?

MR. SEARLES: Yes. That's the document that's before us, Exhibit 927.

With respect to your statements to the market in February of 2009 --

MS. VETA: You mean February, 2008?

MR. SEARLES: Excuse me, February 2008.

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BY MR. SEARLES:

Q. During that period of time, your regulators during that period, February, March, April, weren't saying IndyMac's just fine; correct?

MS. VETA: Object to the form.

THE WITNESS: Well, I think --

MS. MATELIS: Join.

THE WITNESS: I think that's -- you know, what you see here is no one anticipated the magnitude of this financial crisis, and so you're seeing radical changes in people's views in the space of days and weeks and months, and that was the case with everyone. And that was no ill intent on anybody's part. It was just dealing with a major uncertainty of unprecedented nature.

BY MR. SEARLES:

Q. But given that in that time period, February, March, April, your regulator, the Office of Thrift Supervision, wasn't telling IndyMac you're just fine as they did in September of '07; correct?

MS. VETA: Object to the form.

MS. MATELIS: Join.

THE WITNESS: I mean that's correct because we had two unprecedented losses in the third and fourth quarter of '07 by then.

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BY MR. SEARLES:
Q. All right. Well, in connection with this sensitivity to have transactions will be viewed by the market, as reflected in this Warburg e-mail exchange with Mr. Coulter in September of '07, isn't the reason that you emphasized in the slide deck on February 12 due to our low stock price to book value --
MS. VETA: Wait. What page are you on?
MR. SEARLES: Page 6 of 39.
MS. VETA: Let him get to the place in the document.
MR. SEARLES: I don't know --
BY MR. SEARLES:
Q. If you'd like to --
A. I pretty much --
Q. That's what I figured. You probably pretty well know it.
Isn't the reason that you're emphasizing this point that "Due to the low stock price to book value per share, our 2008 plan does not rely on the capital market to raising capital." The purpose of making that statement to the market is that you wanted to project IndyMac as a strong financial institution that wouldn't need to rely on dilutive capital raising --
MS. VETA: Object --

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MR. SEARLES: -- weren't you trying to put the best face on IndyMac --
MS. VETA: Object --
MR. SEARLES: -- through these disclosures?
MS. VETA: Wait. Object to the form. I'm sorry that -- is your question over?
MR. SEARLES: Yes. Thank you.
THE WITNESS: Okay. So let me answer the question. I mean I don't see how you can put a best face on the kind of losses we suffered in the third and the fourth quarter. And I think we were very straightforward and transparent in how bad those losses were and how bad and difficult a time it was for IndyMac and the industry. I think that was incredibly clear to anybody by 2/12. I mean read that shareholders letter from cover to cover and how anybody could come away with anything other than this was an incredibly difficult time for IndyMac is impossible. What we're talking about here is saying, look, in trying to bolster capital ratios, we're going to do our very best to try to preserve shareholder value and book value per share while bolstering capital ratios. That's our plan, and there are many risks to that plan which we disclosed, and there are many uncertainties to that plan where it may not come to fruition and, in fact, we disclosed that

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it may not come to fruition and we may have to raise very dilutive capital. I mean, to me, that's about as clear as you can make it.
BY MR. SEARLES:
Q. So were you trying in the face of this unprecedented economic disruption and massive loss to IndyMac of, what is it, 509 million in that last quarter?
A. Something like that.
Q. Right.
Was it not the purpose in part of the February 12 8-K and the earnings release and the shareholder letter and the slide deck to present to the public that IndyMac had a, what it believed, to be a viable business plan that would allow the bank to survive?
MS. VETA: Object to the form.
THE WITNESS: Can you ask that question, again, because I think there was some wording in there that would cause me to answer the question a little differently. Can you repeat that one more time for me, please?
BY MR. SEARLES:
Q. Well, I'm not sure I can reiterate my question perfectly. But isn't one of the purposes of the

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earnings release on February 12 of 2008 in the face of this massive loss, this unprecedented loss of IndyMac of 509 million in the past --
A. In the fourth quarter.
Q. In the fourth quarter, notwithstanding that, you wanted to project to the market that IndyMac had a plan going forward for 2008 that would allow it to survive?
MS. VETA: Object to the form.
MS. MATELIS: Join.
THE WITNESS: We didn't project to the market. I didn't manufacture a plan. The plan that we presented to shareholders was a bottoms-up plan that I had no direct involvement other than the asset shrink -- the macro picture issue of asset shrinkage. That plan was rolled up division by division, unit by unit so there was no manipulation of that plan to present something that was other than what our management team felt was prudently the base case scenario for IndyMac on a go-forward basis.
BY MR. SEARLES:
Q. All right. And the base case scenario is in -- in the exhibit that's before you has this detailed 2008 financial forecast at the end that we went through before, and that base case scenario does not contemplate

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any issuance of shares under the DSPP program; correct?
MS. VETA: Object to the form.
THE WITNESS: It doesn't contemplate any issuance of shares because we said we were going to try to not dilute book value per share, but we issued many caveats including saying, you know, both in terms of saying that plans are plans and having forward looking statements and warnings related to that, that we had no obligation to update that plan. We disclosed that and that the plan may change and things may get much worse and we may have to raise severely dilutive capital. So I mean I think we got it all there.
BY MR. SEARLES:
Q. What was the purpose of including such a detailed plan for 2008 that's reflected in Exhibit 99.3 to Exhibit 711 that's before you?
MS. VETA: Object to the form.
BY MR. SEARLES:
Q. The last few pages of that exhibit? That was something new and different in terms of the detail in which IndyMac disclosed information to the market, was it not?
A. It -- I don't recall specifically. We had disclosed at least summary projections in many periods in the past. And, you know, my philosophy on financial

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projections is very simple which is, you know, if I owned a company and I went to the CEO and said, what are you going to earn next quarter and how are the results going to be next year, and he said, I know, but I'm not going to tell you, I would get rid of him, right, if I owned the company. And so my viewpoint is, you know, you wanted to have out there the projections that management was using. We were truly using these projections to run our business, and we wanted to be completely transparent with our shareholders, and I think it was especially to be completely transparent in this extremely tough and volatile period.
Q. Did you consider it a materially positive statement to the market that's reflected on Exhibit 6 of 39 of the slide deck that IndyMac due to its low stock price, its plan does not rely on the capital markets for raising capital?
MS. VETA: Object to the form.
MS. MATELIS: Join.
THE WITNESS: The --
BY MR. SEARLES:
Q. Did you consider that positive information to shareholders?
A. Well, you worded the question differently the second time, materially and positive are different

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questions.
Q. Okay. Let me go back to my first question then. Did you consider it a positive statement to the market that IndyMac due to its low stock price, its 2008 plan would not rely on the capital markets for raising capital?
MS. VETA: Object to the form.
THE WITNESS: I considered it a positive statement that we had a plan that allowed us to build back our capital -- that we felt was a realistic plan at the time that would allow us to build back our capital ratios by shrinking the balance sheet and eliminating the common dividend and not diluting shareholders from a book value per share standpoint. Things changed subsequent to this date, and we had to go out and raise capital through the direct stock purchase plan. And as we discussed, the capital that we raised in the first quarter for sure was not materially dilutive to shareholders in any way. It reduced book value per share 46 cents. You know, over $5 of book value per share was lost by realized losses, unrealized losses that flow through other comprehensive income and a small dividend that was paid out of retained earnings.
MR. SEARLES: I think we're up to 926?
THE REPORTER: 8.

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MR. SEARLES: 928.
(Exhibit No. 928 was marked for identification.)
THE WITNESS: Okay.
BY MR. SEARLES:
Q. Do you recall the e-mail depicted in Exhibit 928?
A. Generally I do.
Q. And who is Ashwin Adarkar?
A. He was an executive committee manager for IndyMac, and he handled kind of our MNA activity and our business incubation area.
Q. All right. With respect to the e-mail below, the section beginning with the P.S. in it --
A. Uh-huh.
Q. -- I'm going to paraphrase this just for the sake of expediency. But you're talking about this bet to be made that the bank will not need to raise additional capital. The housing market is near bottom. You go on to say, "In order to do this, we are going to need to have a very tight financial plan by quarter for 2008 and be prepared to share it with the market and express confidence in it when we release the first quarter earnings."
Do you recall making that statement?

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A. I don't recall those specific words, but I don't doubt that I wrote this e-mail.
Q. And did you consider it important to express confidence in IndyMac's 2008 plan when it was released to the market on February 12, 2008?
MS. VETA: Object to the form.
THE WITNESS: If that plan warranted confidence, yes. If it didn't, it didn't.
BY MR. SEARLES:
Q. Did you believe the plan warranted confidence?
A. At this point in time, I had no idea. It hadn't been developed yet.
Q. Do you recall expressing confidence in the business plan on February 12?
MS. VETA: Object to the form.
THE WITNESS: Yes, it was our best estimate of what was reality. It was a bottoms-up approach that I had no involvement in developing.
BY MR. SEARLES:
Q. All right. Unfortunately, we have --
A. You know, and I would point out here that, you know, you're talking on 1/4/2008, and I'm thinking book value per share at the end of '07 is going to be 21.88. I was five bucks wrong. That's how volatile the market was.

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Q. Okay.
MR. SEARLES: I think we need to change the tape.
THE VIDEOGRAPHER: We are going off the record. This is the end of tape No. 5 in the continuing testimony of Mr. Michael Perry, volume 1. The time now is 5:11 p.m.
(Recess taken from 5:11 p.m. to 5:21 p.m.)
THE VIDEOGRAPHER: We are back on the record. This is the beginning of tape No. 6 in the continuing testimony of Mr. Michael Perry, volume 1. The time now is 5:21 p.m.
BY MR. SEARLES:
Q. If you can -- 928, the one we were just looking at, in your e-mail to Mr. Adarkar in the second paragraph, second sentence, you're talking -- well, the first sentence, "I don't like the idea of a bunch of firms doing random due diligence without a term sheet. It creates the impression that we have to raise capital."
Did you have a concern about IndyMac creating an impression about having to raise capital leading into the beginning of 2008?
MS. VETA: Object to the form.
THE WITNESS: You know, I think you never want

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to be in a position that you have to raise capital, and I think, you know, as I said, pointed out to you before we broke, you know, we're sitting here and I'm thinking book value per share is 21.88, right, on January 4, 2008. So the things radically changed in the next few weeks in terms of the loss for the fourth quarter of 2007. So the thoughts that I have in this e-mail changed significantly as a result of learning what our fourth quarter of 2007 results were.
BY MR. SEARLES:
Q. Did that result in a change of your wish to avoid creating the impression of having to raise capital?
MS. VETA: Object to the form.
THE WITNESS: It resulted in a change that, you know, I think this memo is saying that capital is not as big an issue at this point in time, and capital became a bigger issue, and that's why we put together the 2/12 plan about shrinking the balance sheet, we were executing on that plan, in terms of shrinking the balance sheet and building capital ratios through doing that and, at this point, I don't think we had eliminated the common dividend, and we were executing on both of those two activities from 2/12 on.
BY MR. SEARLES:

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Q. Well, would you agree the February 12 earnings forecast that was presented on that date was designed in part to create the impression that IndyMac would not need to raise capital?
MS. VETA: Object to the form.
MS. MATELIS: Join.
THE WITNESS: No, I don't think it was designed -- it was designed to create a plan that was an alternative plan to issuing dilutive capital to book value per share and that we felt it was a plan that was viable and realistic at the time.
BY MR. SEARLES:
Q. In the fifth paragraph beginning with "It seems," in the middle of the paragraph, you have a sentence, "And I don't like this idea that due diligence is to confirm book value per share."
What was -- can you explain the concern that you had there?
A. I didn't really have a concern. I'm just saying, look, we're a public company, we have audited financial statements, we have reviewed quarterly financial statements. Our book value is our book value.
Q. In the P.S. paragraph, again, the portion that I previously read to you about expressing confidence in the -- when you release the first quarter earnings, you

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go on to say, "We believe we have adequate capital to weather this storm."
Did you believe that that was an important message to convey to the public?
MS. VETA: Object to the form.
THE WITNESS: You know, I mean I think you're asking me to take a January 4, 2004, statement which I said views changed as a result of the fact that we got clarity in terms of fourth quarter of '07 results in the coming weeks, and that view changed and, as a result of that change, we disclosed very clearly a significant loss in the fourth quarter of '07, and the steps that we were taking and why that loss occurred and the steps we were taking to keep IndyMac Bank safe and sound and protect that for shareholders.
BY MR. SEARLES:
Q. But did you believe that it would continue to be an important message to the public on February 12 that the bank believed it had adequate capital to weather this storm?
MS. VETA: Object to the form.
THE WITNESS: Did I believe that it -- only if it was true. Based on the projections that we had which were bottom up, it was true.
BY MR. SEARLES:

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Q. I'd like to show you what is soon to be marked Exhibit 929.
(Exhibit No. 929 was marked for identification.)
BY MR. SEARLES:
Q. Do you recognize this exhibit?
A. Yeah, I mean I recognize it, you know, in preparation for my deposition.
Q. And what do you recognize the exhibit to be?
A. It looks like it's a transcript of the earnings call that I did on 2/12 related to our fourth quarter 2007 earnings release.
Q. All right. Do you have any reason to doubt its accuracy?
A. No.
Q. Turning to page 8 of 16, on January 4 of 2008, you were stating to Mr. Adarkar that the company needs to be prepared to state -- to share its forecast for the market and express confidence in it. Looking at pages 8 of 16 of your earnings conference call in the second full paragraph, "So the bottom line is," are you with me?
A. If you turn to page 27, is that what you're --
Q. Well, it's on page 8 of 16 at the bottom.
A. 8 of 16 at the bottom. Okay.

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Q. And the second full paragraph, "So the bottom line is"?
A. Okay.
Q. And you're stating, "What if we're wrong?" And what you're stating here is that the number -- "I'm saying already that the number is very conservative. I would say almost double what it is expected to be." It's hard to paraphrase this. I apologize.
You go on in the fourth full paragraph. "As you can see" -- "and what you can see is that in our base gauge scenario projecting to make 13 million with 372 million in credit cost, and if capital ratios at the end of the year, 742 and 1213." And then you go on, "If things were to get 25 percent worse, you can see what the capital ratios are. It would take 200 percent worse which is essentially a tripling of our estimate for that to be well capitalized, unlimited true capital ratios." And you conclude, "And we don't believe we're going to be anywhere near the tripling of credit losses in 2008."
Is this an example of your expressing confidence in IndyMac's 2008 forecast?
MS. VETA: Object to the form.
THE WITNESS: No, I don't believe it is at all. I think it's an example of me explaining -- in fact, taking a base case that I was given and creating

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out of it myself a tripling of that base case in terms of the main variable that was negative, a tripling of credit losses, and saying, hey, if credit costs triple, we could be adequately capitalized.
BY MR. SEARLES:
Q. But then you conclude, "And we don't believe we're going to be anywhere near."
A. We don't because the base case was our best assumption at that point. But I went further than that in the PowerPoint slide that this is referring to, if you want to go to it, I did an adverse scenario tripling credit losses and disclosed that to shareholders and disclosed that we were adequately capitalized -- we would be adequately capitalized in that scenario.
Q. Why did you feel it important to include -- are these the earnings conference calls --
A. This is off of the --
MS. VETA: Wait. Let him ask his question, Mr. Perry.
BY MR. SEARLES:
Q. What you're stating through this -- this is a scripted piece, is it not?
A. No.
Q. You're just talking off the cuff?
A. Yes.

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Q. Well, why did you believe it was important to say at the conclusion of this scenario of tripling the credit cost, to emphasize at the conclusion of that, "And we don't believe we're going to be anywhere near the tripling of credit losses in 2008"?
A. Because the base case one was our best estimate. So I took and I was only given the base case by my team, and I took and tripled that in the disclosure that I made in the PowerPoint presentation and presented it to shareholders and showed that if they did triple from the base case best forecast, which we believed was the best estimate so all I was doing was repeating a fact. We believed the base case was the right case, not anywhere near tripling of it, but if it tripled, we could be adequately capitalized. I think that's -- how can you do more disclosure than that? I showed a scenario far worse than what we were forecasting as our most realistic scenario at that time.
Q. All right. I'd like to take a moment and show you what's been previously marked as Exhibit 712 which is the Form 10-K filed on May 12 of 2008. If you could -- I think through this you said you could explain to us your calculation of the dilutive effect of capital raising under the DSPP?
A. Yeah, I don't have all the math and a

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calculator here, but I can give you a good sense of it, I believe.
Q. Okay. If you could walk us through that analysis.
A. Okay. I think you want to turn to -- it's the --
MS. VETA: It's got a page number at the top.
THE WITNESS: Yeah. This consolidated statement of -- let me see if it's the same page. I've got to pull this one out of my pocket because I tore it out of the DSPP earlier. It doesn't look exactly -- this is -- no, I don't think this is the -- is this the -- this is 2007.
BY MR. SEARLES:
Q. Sorry.
A. I was, like, the numbers are not tying out for me.
Q. Sorry about that.
A. That's okay.
Q. It's not a set-up.
A. I was, like, gosh, I wasn't anywhere near the numbers.
Q. That would be a good trick. Hold on a moment. All right. Leaping forward a year.
A. Okay. It's going to be on page 70 -- not on

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your document. It's on page 74 of the actual page numbers. It's the consolidated statement of changes and shareholders equity and comprehensive income.
Q. Okay.
A. Okay. So what you want to do is you want to orient yourself to the shares -- to the line item that is about halfway down the page, balances at December 31, 2007.
Does everybody see that?
Q. Uh-huh.
A. Okay. And you have 80,000,885 shares outstanding, okay? And you have a billion -- total shareholders equity of a billion 344.
Do you see that number?
Q. Yes.
A. Okay. So book value per share mathematically, right, should be, you know -- somebody who has a calculator could do it, that should be our 16.60 starting point. Okay? Is the difference between those two. It should be pretty close if not right on. Okay?
Q. Okay.
A. And then at the end of the quarter, there's 87.8 million shares outstanding. So we issued new shares of just under 10 percent, right, like, you know, just under 9 percent actually. Okay? So we went from

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80 to 87. There's 7 million new shares through the direct stock purchase plan during the quarter, and that raised 39 million. Okay? And yes, that add --
Q. I'm sorry. Where is that?
A. 39 is all the way over to the right. 7,067,104. And then 39 -- those are --
Q. Okay.
A. 39 million. Okay? So If you look, you added equity, but you added it at a stock price lower than book value. So there is some dilution related to that, but the big dilution is coming from the net loss which was -- does anybody have that number? It's like 2 -- you know, it's a couple pages earlier. It's 227. So the 184 million negative is 2 --
Q. What page are you on? I'm sorry. Same page?
A. One page -- 103 of 131. It's 227, you know, when you convert that to per share; right? The 184. Okay?
Q. Yes.
A. The -- then you have the other comprehensive income has a net loss of these three numbers, 245 plus a plus 2. So it's a negative 243 million. So I mean I don't have the shares outstanding at --
Q. Where are you on the negative 243?
A. The negative 230 plus the negative 15 plus the

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2. This is the change that goes through other comprehensive income. So that's 243 million negative that reduced book value, okay, by 243 million so that's more than 2.27 a share. I don't have the exact number, but you could calculate it based on the same number of shares that you used to calculate the 2.27. 184 in the algebraic formula between the 184 million and the 2.27 gives you the shares outstanding average for the period. You use those same shares outstanding on the 243 million, and you'll come up with, my recollection is, like, $2.70 of dilution caused by the write-down of available for sale -- primarily available for sale mortgage-backed securities, the unrealized losses that flowed through other comprehensive income of equity.

So those two items are almost all of the dilution of book value and book value per share that occurred in the first quarter of 2008. I just -- you know, I don't have a calculator here or I could calculate it even more precisely. But you can also see just by the dollar amounts that the 39 million, you know, if you just -- if you issued 7 million new shares and you didn't get anything for them, the maximum dilution that that could be is like 8 percent; right? Just between 8 1/2 and -- between 8 and 9 percent. That's the maximum if you didn't get any capital, right,

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because you're issuing new shares with not any capital.

So this is -- you know, this is the math that I'm using here on this page to show that the direct stock purchase plan was not materially dilutive in the first quarter of 2008, and I used the same math in 2007.

Q. And this is an exercise that you did when in terms of going through this analysis?

A. This year.

Q. This year?

All right. And when you in the February 12 8-K were stating to the market IndyMac would avoid raising capital under the DSPP plan, again, you believed that to be a positive statement to the market?

MS. VETA: Object to the form.

MS. MATELIS: Join.

THE WITNESS: Well, I believe that we would try to not on the margin issue dilutive capital. But I also believed that issuing capital to keep IndyMac well capitalized was positive and that the minor amount of dilution, that was far less of a negative than the positive of keeping the bank well capitalized and safe and sound.

MR. SEARLES: Shall we go to 6:00?

MS. VETA: Are you okay with that?

THE WITNESS: Yeah, that's fine.

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BY MR. SEARLES:

Q. I'd like to show you what's been previously -- exhibit previously marked as Exhibit 716.

A. Okay.

Q. Do you recognize this exhibit?

A. Just vaguely.

Q. And what do you recognize it to be?

A. I believe this is our shelf registration under which we executed our direct stock purchase plan among, you know, the opportunity to raise other types of capital too.

Q. All right. This is the S-3 that we were talking about earlier as compared to the S-1?

A. I believe so, yes.

Q. And turning to page 104 of 106 of this document, it reflects your electronic signature?

A. It does.

Q. All right. And then on the next page, Exhibit 105, there's a power of attorney form, that second paragraph, "Pursuant to the requirements of the Securities Act of 1933, this registration statement has been signed by the following persons in the capacities indicated on June 30 of '06," and you see your name there again?

A. Yes.

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Q. On page 103 of 106, directing your attention to the language in the middle of the page above the parenthetical A, says, "For purposes of determining any liability under the Securities Act of 1933 to any purchaser, A, each prospectus filed by the registrant pursuant to 424(b)(3) shall be deemed part of the registration statement as of the date the filed prospectus was deemed part of and included in the registration statement."

Do you see that?

A. I do.

Q. Did you have that understanding when you signed this Form S-3?

MS. VETA: Object to the form.

THE WITNESS: I don't recall anybody pointing it out just the way you did just now so not in that way.

BY MR. SEARLES:

Q. Okay. You don't dispute that that's what the language --

A. No.

Q. -- states? Okay.

All right. And I'd like to show you two of the prospectuses at issue. One is Exhibit 775 previously marked.

A. Okay.

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Q. If you turn -- with respect to Exhibit 775, this is a prospectus dated for October 11, 2007.
Do you see that on the second page?
A. Okay.
Q. And --
A. 10th. But . . .
Q. Oh. I'm looking --
A. Maybe it's closing price.
Q. I'm looking at the dates on the second page.
A. Yeah, I'm sorry. You're right. October 11.
Q. I have no confidence in my ability to read any longer.
On the fourth page of the document, "About this prospectus," turning to that page -- it's actually the second physical page on the backside.
Do you see that?
A. Okay.
Q. I just want to direct your attention to under the section "About this prospectus," the first line states, "This document is called a prospectus and is part of a registration statement that we filed with the SEC relating to the shares of our common stock offered."
Do you see that language?
A. I do.
Q. Was that your understanding that the

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prospectus was part of the registration statement?
MS. VETA: Object to the form.
THE WITNESS: You know, I mean I don't know if the wording -- the actual wording part, but I understood that the prospectuses were being -- and I would have maybe said issuing under an S-3 shelf registration.
BY MR. SEARLES:
Q. Okay. It dovetails to some extent with what is stated in the form S-3 at page 103 that I directed your attention to.
A. Yes.
Q. And, again, under "Available information," second paragraph, the second sentence -- excuse me. Yes, second paragraph, second sentence, "This prospectus is a part of the registration statement."
It goes on from there. Do you see that?
A. Right.
Q. All right. And Exhibit 795 which is the --
A. But, you know, I mean on that about this prospectus, the second sentence is what I was discussing earlier when we were talking about this. This prospectus does not make -- does not include all of the information in the registration statement and provides you with a general description of the securities offered and the plan. The registration statement containing

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this prospectus include exhibits blah-blah-blah, and then it goes on to say, you know, that it incorporates other information by reference. You know, other publicly filed information.
Says, "When acquiring securities discussed in this prospectus, you should rely only on information provided in this prospectus including the information incorporated by reference." So those were the other points, you know, that I was making.
Q. Right.
Now, the reason I'm asking these questions is I assume you've read your summary judgment motion?
A. I have.
Q. All right. And you're arguing that under recent Supreme Court case called Janus that you're not liable because you didn't sign the prospectuses. You know that argument?
MS. VETA: Object to the form.
THE WITNESS: I know it generally.
BY MR. SEARLES:
Q. All right. And you don't dispute that you signed the registration statement; correct?
MS. VETA: Object to the form.
THE WITNESS: I don't dispute that.
BY MR. SEARLES:

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Q. All right. And you don't dispute the language that's reflected in the prospectuses part of the registration statement that you signed?
MS. VETA: Object to the form.
THE WITNESS: It looks like that language is correct.
BY MR. SEARLES:
Q. All right. And I'd like to show you Exhibit 795 previously marked. This is the prospectus for April 3 of '08. Just directing your attention to the same provisions that we just looked at in the previous prospectus.
Do you see that the same language --
MS. VETA: Do you have another copy?
MR. SEARLES: Oh, I'm sorry, yes.
THE WITNESS: Yes.
BY MR. SEARLES:
Q. Okay.
MR. SEARLES: Well, should we go off the record?
THE VIDEOGRAPHER: We are going off the record. The time now is 5:53 p.m.
(Discussion off the record.)
THE VIDEOGRAPHER: We are back on the record briefly at 5:54 p.m. This is the end of today's

deposition of Mr. Michael Perry. The total number of tapes used was six, and those original videotapes will be retained by Alderson Court Reporting of Washington, D.C. We are off the record again at 5:54 p.m.

(Whereupon at 5:54 p.m. the taking of the instant deposition ceased.)

CERTIFICATE OF DEPONENT

I hereby certify that I have read and examined the foregoing transcript, and the same is a true and accurate record of the testimony given by me. Any additions or corrections that I feel are necessary, I will attach on a separate sheet of paper to the original transcript.

_____
Signature of Deponent

I hereby certify that the individual representing himself/herself to be the above-named individual, appeared before me this _____ day of _____, 2012, and executed the above certificate in my presence.

_____
NOTARY PUBLIC IN AND FOR

_____
County Name

MY COMMISSION EXPIRES:

DEPOSITION OFFICER'S CERTIFICATION

I, Lisa Moskowitz, a Certified Shorthand Reporter in the State of California, certify:

That the foregoing proceedings were taken before me at the time and place therein set forth, at which time the witness was put under oath by me.

That the testimony of the witness and all objections made at the time of the examination were recorded stenographically by me and were thereafter transcribed.

That the foregoing is a true and correct transcript of my shorthand notes so taken.

I further certify that I am not a relative or employee of any attorney or of any of the parties, nor financially interested in the action.

I declared under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated this date: April 19, 2012.

_____
LISA MOSKOWITZ, CA CSR No. 10816
Registered Professional Reporter

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