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MICHAEL W. PERRY

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

MICHAEL W. PERRY AND A. SCOTT KEYS,

Defendants.

No.: CV 11-1309-R JC(x)

Honorable Manuel L. Real
Courtroom No. 8

DEFENDANT MICHAEL W. PERRY'S MEMORANDUM OF CONTENTIONS OF FACT AND LAW

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I. INTRODUCTION

Defendant Michael Perry is the former CEO and Chairman of IndyMac Bancorp, Inc. ("Bancorp"), and its wholly owned subsidiary, Indymac Bank, F.S.B. (the "Bank"). Like many other financial institutions, Bancorp and the Bank were unable to survive the global financial crisis of 2008. Bancorp's SEC filings fully and candidly disclosed the severe losses suffered by the company as a result of cataclysmic disruptions of the housing market, and contained extensive warnings about the risks the company faced in attempting to navigate through the nation's worst financial storm since the Great Depression.

Despite these extensive disclosures, which the SEC does not dispute, and despite the fact that the SEC takes no issue with Bancorp's accounting or financial reporting, the SEC has charged Mr. Perry with securities fraud based on a few alleged foot faults in Bancorp's disclosures during a 90-day period between February and May 2008. The SEC's claims are baseless. As explained below, to prove fraud the SEC has the burden of establishing that Mr. Perry made false or misleading statements; that such statements were material to a reasonable investor in light of the total mix of information available; and that Mr. Perry acted with scienter (or at least negligently). It cannot come close to meeting this burden.

The SEC cannot even satisfy its threshold burden of showing that the statements it challenges were false or misleading. For example, the SEC alleges that Mr. Perry concealed Bancorp's use of its Direct Stock Purchase Plan ("DSPP") to raise capital in 2008. Bancorp's Form 10-K filed on February 29, 2008, however, expressly disclosed Bancorp's current use of the DSPP, as well as the fact that Bancorp had routinely used the DSPP in the past to raise capital for the Bank. Bancorp also disclosed its use of the DSPP in a prospectus filed with the SEC on April 3, 2008. And Bancorp disclosed the precise amount of capital it had raised to date in 2008 through the DSPP in a Form 8-K issued on May 1.

The SEC further alleges that Bancorp misled investors by not disclosing in the 10-K that a February 19 internal forecast had projected that the Bank's capital ratio at the end of the first quarter might be right at or slightly below the 10 percent threshold for a "well-capitalized" institution under federal regulations. But there is no duty to disclose internal forecasts in the Ninth Circuit. And, in any event, the February 19 forecast had been superseded by the time the 10-K was filed: on February 29, the 10-K filing date, Bancorp projected that the Bank's capital ratio at March 31 would comfortably exceed the well-capitalized threshold. Notwithstanding that fact, Bancorp warned investors in the 10-K (and in a Form 8-K issued 17 days earlier) that the Bank was at risk of losing its well-capitalized status if industry conditions continued to worsen — and even disclosed a specific adverse scenario in which the Bank's capital ratio could fall below 10 percent. Bancorp thus more than satisfied its disclosure obligations even assuming the Ninth Circuit precedent was somehow not controlling.

The SEC additionally alleges that Mr. Perry fraudulently concealed a purported "backdating" of an $18 million capital contribution to the Bank. The evidence establishes, however, that the transaction was approved by Bancorp's principal federal regulator, the Office of Thrift Supervision ("OTS"), and with the full knowledge of its outside auditor, outside counsel and Audit Committee. Bancorp then duly reported its capital ratio as calculated in the manner approved by the OTS in its Form 10-Q for the quarter ended March 31, 2008. One would hardly embark on such a course if he were determined to commit fraud.

Nor will the SEC be able to prove, as it must, that any of the details at issue were material. Given the flood of negative information about the housing and mortgage markets in 2008, and Mr. Perry's explicit warning that IndyMac was "at the center of the storm" and similar disclosures, reasonable investors well understood Bancorp's risks and challenges. There will be no credible evidence that the additional details that the SEC now claims with 20/20 hindsight should have been disclosed would have been important to reasonable investors.

Even if the SEC could somehow show that Mr. Perry made false or misleading statements or omissions, and that such statements or omissions were material, it cannot prove that Mr. Perry acted with scienter. There is no evidence that any Bancorp employee, director, counsel or auditor advised Mr. Perry that *any* of the statements challenged by the SEC with the benefit of 20-20 hindsight were false, or that additional disclosures were required. To the contrary, the evidence is that Bancorp's disclosures were reviewed by a Disclosure Committee consisting of more than 20 senior company executives; by Bancorp's highly-qualified Audit Committee; by outside counsel at one or both of the two world-class law firms retained by Bancorp to advise it on securities and regulatory issues; and by Bancorp's outside auditor, Ernst & Young LLP ("E&Y"). Despite dozens of depositions, not a single witness has testified that he or she thought Bancorp's disclosures were false or misleading — much less that anyone raised such a concern with Mr. Perry. Likewise, hundreds of thousands of pages of documents have been produced in this case — including countless emails from Mr. Perry — but the SEC cannot point to a single document suggesting that Mr. Perry acted in anything other than the utmost good faith.

Mr. Perry's good faith is further demonstrated by the fact that he was Bancorp's largest non-institutional shareholder and did not sell a single share of his Bancorp stock in 2006, 2007, or 2008. Indeed, Mr. Perry *acquired* more than $1 million worth of new Bancorp stock in March 2007, and an additional $2.6million worth of Bancorp stock in February 2008, when he allegedly knew that Bancorp's financial situation was worse than Bancorp publicly disclosed. A defendant's stock acquisitions and absence of significant stock sales negate any inference of scienter. The evidence at trial will also show that Mr. Perry was not negligent with respect to any of the challenged disclosures in this case. Mr. Perry is thus entitled to judgment on the SEC's claims.

II. PLAINTIFF'S CLAIMS AND THEIR ELEMENTS

The SEC's Complaint asserts three claims for relief: (1) Fraud in the Offer or Sale of Securities under Section 17(a) of the Securities Act; (2) Fraud in Connection with the Purchase or Sale of Securities under Section 10(b) of the Exchange Act and Rule 10b-5 thereunder; and (3) Aiding and Abetting Violations of Commission Periodic Reporting Requirements under Section 13(a) of the Exchange Act and Rules 12b-20, 13a-1, 13a-11, and 13a-13 thereunder. The elements of these claims are as follows:

A. Claim 1: Alleged Violations of Section 17(a) of the Securities Act

To establish a section 17(a) violation, the SEC must prove that:

1. Mr. Perry signed or directly and substantially participated in the preparation of Bancorp registration statements or prospectuses;

2. Such documents contained untrue statements of material fact or omitted material facts necessary to keep the statements from being misleading, or Mr. Perry engaged in acts, practices, or courses of business that operated as a fraud in connection with the offer or sale of securities;

3. Mr. Perry acted with scienter (or was at least negligent); and

4. Mr. Perry used or caused the use of means or instruments of interstate commerce in the offer or sale of securities. *See* Ninth Circuit Manual of Model Jury Instructions: Civil § 18.1 (2007); 15 U.S.C. § 77q(a).

B. Claim 2: Alleged Violations of Section 10(b) of the Exchange Act and Rule 10b-5 Thereunder

To establish a claim for fraud in connection with the purchase or sale of securities, the SEC must prove that:

1. Mr. Perry made an untrue statement of a material fact or omitted a material fact necessary to keep the statements from being misleading, or engaged in acts, practices, or courses of business that operated as a fraud or deceit in connection with the purchase or sale of securities;

2. Mr. Perry acted with scienter; and

3. Mr. Perry used or caused the use of an instrumentality of interstate commerce to make an untrue statement or a material omission. *See* Ninth Circuit Manual of Model Jury Instructions: Civil § 18.1 (2007); 15 U.S.C. § 78j(b); *In re Worlds of Wonder Sec. Litig.*, 35 F.3d 1407, 1424 (9th Cir. 1994).

C. <u>Claim 3: Alleged Aiding and Abetting Violations of Section 13(a) of the Exchange Act and Rules 12b-20, 13a-1, 13a-11, and 13a-13 Thereunder</u>

To establish a claim for aiding and abetting a violation of Commission periodic reporting requirements, the SEC must prove that:

1. Bancorp violated Section 13(a) of the Securities Exchange Act, SEC Rule 12b-20, SEC Rule 13a-1, SEC Rule 13a-11, or SEC Rule 13a-13;

2. Mr. Perry had knowledge of Bancorp's violation and of his own role in furthering that violation; and

3. Mr. Perry provided substantial assistance in the purported violation. *See* 15 U.S.C. § 78t(e); *Ponce v. SEC*, 345 F.3d 722, 737 (9th Cir. 2003).

III. <u>MR. PERRY'S CONTENTIONS OF FACT AND LAW AND KEY EVIDENCE IN RESPONSE TO PLAINTIFF'S CLAIMS</u>

The SEC cannot prove any of the three critical elements of its fraud claims against Mr. Perry: it cannot establish that Mr. Perry made any false or misleading statements; it cannot establish materiality; and it certainly cannot establish that Mr. Perry acted with scienter.

The SEC's fraud claims can be grouped into the following general categories: (a) alleged concealment of Bancorp's use of the DSPP to raise capital; (b) alleged concealment of the risk that the Bank's capital ratio could fall below the 10 percent minimum for a well-capitalized institution; (c) alleged failure to update Bancorp's capital-ratio projections; (d) alleged fraudulent delay in the disclosure of a decision to suspend the payment of dividends on trust preferred securities; (e) alleged concealment of the purported "backdating" of an $18 million capital contribution from Bancorp to the Bank in May 2008; (f) alleged concealment of the fact that the OTS permitted the Bank to calculate its capital ratio as of March 31, 2008 without additional "risk weighting" for subprime assets; and (g) alleged making of fraudulent statements in Bancorp's DSPP prospectuses. Each of these claims lacks merit.

A. <u>No Fraud Concerning Capital Raising Through the DSPP</u>

1. No False or Misleading Statements

a. Contrary to the SEC's claim, Bancorp did not conceal its use of the DSPP to raise capital in 2008. Bancorp's Form 10-K dated February 29, 2008 disclosed that the DSPP was an ongoing program that provided Bancorp with the ability to raise capital quickly and conveniently. It further disclosed that Bancorp had raised more than $145 million through the DSPP in 2007 and more than $148 million through the program in 2006. Bancorp's DSPP prospectuses explained that Bancorp would use the DSPP to raise capital "from time to time."

b. The 10-K further disclosed that the DSPP was in current use as of February 29, 2008. It stated that Bancorp "has" a DSPP that "offers" investors the opportunity to purchase Bancorp common stock directly over the Internet, and that investors interested in purchasing more than $10,000 of Bancorp stock "can" participate in the DSPP waiver program. These statements are all in the present tense and belie the SEC's claim that Bancorp concealed its use of the DSPP.

c. The SEC contends that the 10-K should have explicitly stated that Mr. Perry had authorized raising up to $50 million in capital through the DSPP beginning in late February in light of Mr. Perry's statement in a February 12, 2008 shareholder letter that Bancorp's business plan for 2008 did not rely on raising capital. That very letter, however, specifically stated that Bancorp *might* have to raise capital if conditions amid the global financial crisis continued to deteriorate. A Form 8-K issued by Bancorp on January 15, 2008 likewise indicated that "raising capital" might be necessary. Moreover, as explained above, the 10-K clearly disclosed that the DSPP was in current use. Bancorp had no duty to state the specific date on which it had resumed raising capital through the program.

d. The SEC also argues that the DSPP disclosure in the 10-K was false and misleading because the 10-K stated that Bancorp "might" have to raise "very dilutive" capital on terms materially adverse to shareholders. But that disclosure was added late in the drafting process because Bancorp was investigating the possible need for a major transaction to raise $500 million or more of external capital on very dilutive terms. The disclosure was not intended to refer to Bancorp's much more modest and routine capital raising through the DSPP.

e. Indeed, the capital Bancorp raised through the DSPP was not "very dilutive." DSPP shares were sold at a mere 1–2 percent discount to market value and the evidence will show that even book value dilution from the DSPP during the first quarter of 2008 amounted to less than 3 percent.

2. Not Material

a. The SEC also cannot show that the alleged fraudulent omissions concerning the DSPP were material. A fact is material only if it would have "significantly altered the 'total mix' of information made available." *Basic Inc. v. Levinson*, 485 U.S. 224, 231–32, 108 S. Ct. 978, 983, 99 L.Ed. 2d 194, 208–09 (1988) (citation and quotation marks omitted). Mr. Perry will present expert testimony at trial that such materiality can be tested empirically by assessing whether corrective disclosures of information purportedly omitted from securities filings have a statistically significant negative stock-price impact. The SEC cannot demonstrate that any of the several disclosures concerning Bancorp's use of the DSPP during the relevant time period had such an impact here.

c. Indeed, when Bancorp disclosed the specific amount of capital it had raised through the DSPP in 2008 to date in a Form 8-K dated May 1, Bancorp's stock price actually *increased* by more than 20 percent. The SEC's own expert concedes that he has no basis to conclude that investors regarded Bancorp's use of the DSPP to raise capital for the Bank as material negative information that would adversely impact the company's stock price. One analyst, meanwhile, has testified that he regarded Bancorp's use of the DSPP to raise capital as a *positive* for the company. All of this evidence belies the SEC's assertion that Bancorp's alleged fraudulent statements and omissions concerning the DSPP were material.

3. No Scienter

a. Even if Bancorp had made material false or misleading statements concerning its use of the DSPP — and it did not — the SEC cannot prove that Mr. Perry acted with scienter.

b. Scienter is "a mental state embracing intent to deceive, manipulate, or defraud." *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 n.12, 96 S. Ct. 1375, 1381 n.12, 47 L.Ed.2d 668 (1976). Although reckless conduct can satisfy the scienter requirement, the Ninth Circuit has imposed a high standard for recklessness: for a statement or omission to be reckless, it must be "highly unreasonable . . . [,] involving not merely simple, or even inexcusable negligence, but an extreme departure from the standards of ordinary care, and which presents a danger of misleading buyers or sellers that is either known to the defendant or is so obvious that the actor must have been aware of it." *Ponce*, 345 F.3d at 729 (internal citations and quotation marks omitted).

c. There is no evidence that Mr. Perry acted with scienter here. As an initial matter, Mr. Perry put in place a robust disclosure-review process wherein Bancorp's SEC filings were extensively vetted by a committee of high-ranking company executives, by the company's outside counsel and by its independent auditors. Bancorp's Audit Committee — which consisted of a former E&Y Vice Chairman, a former prominent financial industry executive and a former Dean of the UCLA School of Management — also extensively reviewed drafts of Bancorp's filings. Mr. Perry's role in establishing this rigorous process is strong evidence that Mr. Perry acted with complete good faith.

d. Moreover, the SEC's scienter claim is belied by the fact that none of the individuals charged with reviewing Bancorp's SEC filings ever suggested to Mr. Perry that the 10-K disclosures concerning the DSPP were false, misleading or incomplete. *See, e.g.*, *Durgin v. Mon*, 659 F. Supp. 2d 1240, 1256 (S.D. Fla. 2009) *aff'd*, 415 F. App'x 161 (11 Cir. 2011) (no scienter where plaintiff made no allegations that "anyone advised Defendants or expressed concern to Defendants that the Company was engaging in fraud"). The SEC also has failed to adduce any evidence that Mr. Perry himself held such a belief. Accordingly, even if the SEC could somehow show that Bancorp's DSPP disclosures were false or misleading, and that they were material, it cannot meet its heavy burden of proving scienter.

<u>Key Evidence Negating SEC's DSPP Claim</u>: Exhibits 209, 593, 715, 722, 723, 734, 923; EY-IMB-WP-07-010462; Testimony of Michael Perry, Scott Keys, Pamela Marsh, Gregory Sosnovich, Kenneth Lehn, Dwight C. Smith III, Joseph Ventura, Hugh Grant, Robert Hunt, Dayton Lierley, Tsvetan Beloreshki; SEC's Responses to Mr. Perry's Requests for Admission No. 15–20 (May 14, 2012).

B. <u>No Fraud Concerning Disclosure of Capital Ratios</u>

The SEC also cannot prove fraud regarding Bancorp's disclosures concerning the Bank's capital ratios.

1. The SEC alleges that Bancorp knew on February 19, 2008 that the Bank's capital ratio at March 31, 2008 would be less than 10 percent and that Bancorp should have disclosed this purported "knowledge" in its Form 10-K dated February 29. This claim lacks merit, both legally and factually.

2. As an initial matter, Bancorp had no duty to disclose internal forecasts or projections. *See, e.g.*, *In re Verifone Sec. Litig.*, 11 F.3d 865, 867 (9th Cir. 1993). The February 19, 2008 document on which the SEC relies for its claim was precisely that. It is an email from Mr. Keys projecting, based on an anomalous one-day spike in interest rates on February 19, that the Bank's capital ratio at March 31 might be right at or just below 10 percent. Bancorp had no duty

to disclose this internal forecast.

3. The SEC's claim is also belied by the factual evidence. The one-day spike in interest rates on February 19 quickly eased. By February 21, Bancorp had generated a revised forecast projecting that the Bank's capital ratio at March 31 would be 10.15 percent. On February 29, the date the 10-K was filed, Bancorp's best forecast was that the Bank's capital ratio at quarter end would be 10.61 percent, 61 basis points above the well-capitalized minimum — without any contribution of capital that the company had been raising through the DSPP.

4. Moreover, as it turned out, the Bank *was* well capitalized as of March 31 and remained so well into June. There is simply no basis for the SEC's bald assertion that Mr. Perry knew the Bank would not be well capitalized at March 31 and concealed such information in the 10-K. And there certainly is no evidence that Mr. Perry acted with scienter.

5. The SEC's capital-ratio claim is further undermined by the fact that both the 10-K and the Form 8-K Bancorp issued on February 12, 2008 contained extensive disclosures concerning the risk that the Bank could cease to be well capitalized if economic conditions continued to worsen. Indeed, the 8-K specifically disclosed that adverse "interest rate fluctuations" — the very risk that materialized on February 19 — was one important factor that could jeopardize the Bank's well-capitalized status. The 8-K also disclosed that, in one adverse scenario, the Bank's capital ratio could fall to 9.78 percent by year-end — 22 basis points below the well-capitalized minimum. In light of these facts and disclosures, the SEC cannot prove that Bancorp made any false statement or omission in the 10-K concerning the Bank's capital ratio or capital position.

6. Finally, Mr. Perry will present expert testimony that Bancorp's capital ratio disclosures compared favorably with those of comparable institutions.

Key Evidence Negating SEC's Claim: Exhibits 563, 574, 711, 715; Testimony of Michael Perry, Scott Keys, Pamela Marsh, Edward Fleischman, Kenneth Lehn.

C. No Duty to Update Capital Ratio Projections

1. The SEC also contends that Bancorp had a duty to update its capital ratio forecasts because it was selling stock through the DSPP. That claim fails as a matter of law. The securities statutes "require only periodic not continuous disclosure." *Shurkin v. Golden State Vinters, Inc.*, 303 F. App'x 431, 433 (9th Cir. 2008). In recognition of this fact, the Ninth Circuit has never recognized a duty to update statements that were true when made. *See In re Foxhollow Tech., Inc. Sec. Litig.*, 359 F. App'x 802, 804 (9th Cir. 2009). Indeed, it stated last year that there is no such duty. *See Reese v. BP Exploration (Alaska) Inc.*, 643 F.3d 681, 693 (9th Cir. 2011) (defendant's "statement or omission must have been misleading at the time it was made; *liability cannot be imposed on the basis of subsequent events*") (emphasis added; citation and internal quotation marks omitted).

3. Even if there were a duty to update, it would not apply here. Courts that have recognized such a duty have held that it can apply only where "some continuing representation remains alive in the minds of investors when circumstances change." *Foxhollow*, 359 F. App'x at 804–05. There can be *no* such duty, however, where a company "disclaim[s] any obligation to update its forecasts." *Winick v. Pacific Gateway Exch., Inc.*, 73 F. App'x 250, 254 (9th Cir. 2003), *withdrawn on other grounds*, 80 F. App'x 1 (9th Cir. 2003). In that circumstance, a filer's "predictions regarding its ability to meet its future obligations could not have remained 'alive' in the minds of reasonable investors." 73 F. App'x at 254.

4. Bancorp's SEC filings and other disclosures expressly disclaimed any duty to update forecasts and other forward-looking statements. For example, its February 12 8-K provided that "readers are cautioned not to place undue reliance on forward-looking statements, which speak only as of the date they are made" and that "IndyMac does not undertake to update or revise forward-looking statements to reflect the impact of circumstances for events that arise after the date

the forward-looking statements are made." These disclaimers eliminated any possible duty to update pursuant to the Ninth Circuit's decision in *Winick*.

5. The absence of a duty to update is especially clear here because, as noted, Bancorp's filings and other disclosures contained specific warnings about risks that could adversely impact Bancorp's business plan and threaten the Bank's well-capitalized status. The February 12 8-K warned that Bancorp's capital ratios could be adversely impacted by a number of factors, including "interest rate fluctuations." It stated that "any of these factors could cause future results to vary from anticipated future results and consequently could have an adverse impact on the ability of the Bank to meet its future minimum capital requirements." An exhibit to the 8-K further disclosed an adverse scenario in which the Bank's capital ratio at year end could fall to 9.78 percent. Bancorp's February 29 10-K, meanwhile, contained 10 pages of detailed risk disclosures, some of which focused specifically on risks to the Bank's capital and liquidity positions.

6. Bancorp's resumption of DSPP stock sales in late February 2008 did not create a heightened duty to update its forecasts. In *In re Convergent Technologies Securities Litigation*, 948 F.2d 507 (9th Cir. 1991), plaintiffs alleged fraud because defendants did not disclose internal projections known to them at the time of a stock offering. The Ninth Circuit rejected this claim because defendant had no duty to disclose its projections. *Id.* at 516. The court similarly rejected plaintiff's contention that, because of the ongoing stock offering, "the defendants were obliged to release information as it became known to them." *Id.*; *accord Verifone*, 11 F.3d at 867. It is all the more clear that Bancorp had no duty to update its projections here given its express disclaimer of any such duty. *Winick*, 73 F. App'x at 254.

7. Finally, even if the SEC could somehow establish a duty to update, it again could not prove scienter as to Mr. Perry — or any other IndyMac official for that matter. Bancorp sought legal advice concerning whether DSPP sales

triggered some heightened disclosure duty. The response from counsel was that it did not. The fact that Bancorp sought legal advice on this issue is at odds with any possible inference of scienter. *See Bisno v. United States*, 299 F.2d 711, 719 (9th Cir. 1961) (reliance on advice of counsel and other professionals is evidence of "good faith which the trier of fact is entitled to consider on the issue of fraudulent intent"); *Howard v. SEC*, 376 F.3d 1136, 1147 (D.C. Cir. 2004) (reliance on counsel is "a relevant consideration in evaluating a defendant's scienter").

Key Evidence Negating SEC's Claim: Exhibits 723, 766; Bancorp's SEC filings.

D. Statements Not Actionable Under the "Bespeaks Caution" Doctrine

1. The SEC's claims based on Bancorp's projections and other forward-looking statements fail for the further reason that they are not actionable pursuant to the "bespeaks caution" doctrine. Under this doctrine a statement of belief or forward-looking statement is not actionable where, as here, it is accompanied by specific warnings and cautionary language. *See, e.g., Worlds of Wonder*, 35 F.3d at 1414–15. The doctrine applies in SEC enforcement actions. *See, e.g., SEC v. Merchant Capital, LLC*, 483 F.3d 747, 767 n.18 (11th Cir. 2007).

2. The bespeaks caution doctrine is based on the recognition that "predictive statements are just what the name implies: predictions." *Worlds of Wonder*, 35 F.3d at 1414 (citation omitted). As such, "any optimistic projections contained in such statements are necessarily contingent." *Id.* Sufficient cautionary language "renders the alleged omissions or misrepresentations immaterial as a matter of law." *In re Donald J. Trump Casino Sec. Litig.*, 7 F.3d 357, 371 (3d Cir. 1993); *accord Worlds of Wonder*, 35 F.3d at 1414 (citing cases).

3. Bancorp's statements of belief and projections here were true when made and were accompanied by extensive warnings and disclaimers. Accordingly, they are not actionable under the bespeaks caution doctrine.

Key Evidence Negating SEC's Claim: Bancorp's SEC filings.

E. <u>No Fraud Concerning the Suspension of Preferred Dividends</u>

1. On April 24, 2008, rating agencies downgraded certain bonds held by the Bank. The SEC alleges that Bancorp should have disclosed on April 24, 2008 that this downgrade would require the company to suspend the payment of dividends on preferred securities issued by Bancorp and the Bank.

2. The fundamental problem with this SEC claim is that no decision to suspend trust preferred dividends was reached by the company until May 8, two weeks after the bond downgrade. While Bancorp certainly viewed suspension of the dividends as an *option* in the days following the downgrade, that is very different from the company having made a definitive decision to that effect.

3. Indeed, the evidence will show that it took two weeks for Bancorp and its outside auditors to evaluate the impact of the bond downgrades. The company conducted extensive analysis of how the downgrades should be accounted for and prepared a number of internal forecasts to evaluate the potential impact on the Bank's capital ratio. As late as May 6, Bancorp's then CFO, Blair Abernathy, recommended against a suspension of the dividends, clearly reflecting that the matter was still under high-level review on that date.

4. Only on May 7 did outside counsel issue a legal opinion concluding that the company had the contractual right to suspend the payment of dividends and only on or about that date did Bancorp and E&Y complete their review of the impact of the downgrades. Suspension of the dividends was then presented to the Boards of Bancorp and the Bank, which approved the suspensions on May 8.

5. The Boards were the governing bodies of Bancorp and the Bank, and thus had ultimate authority over whether the dividends should or should not be paid. Bancorp duly disclosed the dividend suspensions two business days after the Boards acted in its Form 10-Q filed on May 12. This was well within the four business days permitted by SEC rules. *See* 17 C.F.R. § 240.13a-11; SEC Form 8-K. Contrary to the SEC's claim, there is simply no evidence of fraud.

6. Also fatal to the SEC's fraud claim on this issue is the fact that Bancorp sought and obtained legal advice regarding the timing and content of disclosures with respect to the bond downgrades and dividend suspensions. As a result, there can be no showing that Mr. Perry (or anyone else) acted with scienter.

Key Evidence Negating SEC's Claim: Exhibits 660, 728, 757, 832, 833, 840–46, 853, 870, 939, 940; IMTL002981142; Testimony of Michael Perry, Alan Talkington, Brett Cooper, Joseph Ventura, Pamela Marsh, Blair Abernathy.

F. No Fraud Concerning the $18 Million Capital Contribution

1. The SEC next contends that Mr. Perry engaged in fraud in connection with an $18 million capital contribution from Bancorp to the Bank on May 9, 2008. The SEC alleges that the $18 million contribution was fraudulently "backdated" to March 31 and that such purported "backdating" should have been disclosed. Once again, the facts belie the SEC's claim.

2. Bancorp had an internal policy requiring the CEO to take actions necessary to maintain the Bank's well-capitalized status. Pursuant to this mandate and with the Board's knowledge and consent, Mr. Perry authorized a $70 million capital contribution from Bancorp to the Bank on March 31, 2008, in the belief that this contribution would be sufficient to maintain the Bank's well-capitalized status as of that date. Bancorp had an additional $18 million available to contribute to the Bank on March 31, but did not contribute such amount based on its determination that $70 million would be sufficient.

3. However, on May 9, before IndyMac's books for the first quarter were closed, Bancorp became aware that its March 31 estimate might be incorrect. E&Y had identified a number of audit adjustments which, if recorded, might have caused the Bank's capital ratio to fall slightly below the 10 percent well-capitalized minimum based on estimates at the time.

4. The company thus determined on May 9 that $88 million was a better measure of the amount needed to keep the Bank well capitalized as of March 31.

Bancorp contributed an additional $50 million to the Bank on May 9 and sought guidance as to whether $18 million of that contribution could be included on the Bank's Thrift Financial Report ("TFR") for the first quarter for purposes of calculating the Bank's capital ratio as of March 31. Mr. Perry believed that this would be appropriate under principles of accrual accounting because Bancorp was committed to maintaining the Bank's well-capitalized status on March 31, had an additional $18 million available for contribution on that date, and would have contributed such additional amount on March 31 had it correctly estimated the amount of the Bank's capital need at the end of the first quarter.

5. On May 9, 2008, after consulting with outside counsel, Mr. Perry called Darrel Dochow, the OTS Regional Director for the Western Region, to see if this would be acceptable to the OTS. The OTS had jurisdiction over the Bank's TFR filings, and thus had authority to approve the methodology for calculating the Bank's capital ratio. Mr. Dochow responded that he had no objection to treating the $18 million as a capital contribution as of March 31 for purposes of calculating the Bank's first quarter capital ratio. Based on this approval, E&Y indicated that it likewise had no objection to treating the $18 million as a capital contribution as of March 31. The transaction was then fully vetted with and approved by Bancorp's Audit Committee on May 10. The process was transparent and flatly inconsistent with the notion that Mr. Perry engaged in fraud.

6. While the proper calculation of the Bank's capital ratio was a regulatory matter, the transaction was also appropriate under Generally Accepted Accounting Principles ("GAAP").

7. The SEC contends that Mr. Perry acted fraudulently because Bancorp did not disclose in its May 12 10-Q or in a related investor presentation that it had received permission from the OTS to include the $18 million as a capital contribution as of March 31. But Bancorp had no duty to disclose the specifics of how its capital ratio was calculated. The 10-Q duly disclosed that the Bank's

capital ratio at March 31 was 10.26 percent according to criteria approved by the OTS, and that the Bank thus was well capitalized as of March 31. There was nothing false or misleading about that disclosure.

8. The SEC's claim that Mr. Perry intended to conceal the Bank's tenuous hold on well-capitalized status is belied by the fact that the 10-Q specifically *highlighted* that risk. The 10-Q explained that, if the April bond downgrade discussed above had been a first-quarter event, then the Bank's capital ratio at March 31 would have been *9.27 percent* — 73 basis points below the well-capitalized minimum. This disclosure did far more to warn investors of the Bank's tenuous hold on well-capitalized status than anything Bancorp could have said regarding the $18 million transaction, which had a much lesser impact.

9. The 10-Q also specifically disclosed the risk that the Bank could lose its well-capitalized status and the possible adverse consequences of any such development. E&Y and the Audit Committee encouraged these frank negative disclosures, which were duly incorporated in the 10-Q. There was no fraudulent concealment concerning the tenuousness of the Bank's well-capitalized position.

10. Bancorp's investor presentation regarding the company's first quarter financial results also was not fraudulent. It stated that Bancorp contributed $88 million to the Bank during the first quarter. That statement was consistent with what the OTS had approved for TFR reporting and with principles of accrual accounting: under accrual accounting principles (as well as under GAAP), it is permitted — indeed required — for a company to take account of post-balance-sheet-date developments to determine the appropriate measure of its rights and duties on the balance sheet date. On May 12, the date Bancorp issued its first quarter financial statements, the correct measure of the Bank's capital need on March 31, 2008 was $88 million — not $70 million as the company had originally estimated. It was thus appropriate for Bancorp to refer to the entire $88 million ($70 million plus the additional $18 million) as a first quarter contribution.

11. The SEC apparently would prefer the investor presentation to have said that $88 million was contributed to the Bank "as of March 31" rather than "during the first quarter." But that is mere semantics. It does not come close to fraud, and no one who prepared or reviewed the draft presentation suggested to Mr. Perry that it did. In any event, the SEC cannot possibly show that such slightly different wording would have been material to a reasonable investor.

12. Finally, the $18 million transaction itself turned out to be immaterial. Once Bancorp closed its books and calculated its final first quarter numbers, those numbers reflected that the Bank's capital ratio at March 31 would have been slightly over 10 percent, even *without* the additional $18 million capital contribution. One of the SEC's experts has himself calculated that the ratio without the $18 million would have been 10.03 percent, *i.e.*, above the well-capitalized minimum. For this additional reason — lack of materiality — the SEC's fraud claim based on the $18 million contribution cannot withstand scrutiny.

Key Evidence Negating SEC's Claim: Exhibits 529, 604, 621, 625, 661, 700, 949, 1001, 1012, IMTL002974875–80; Testimony of Michael Perry, Blair Abernathy, Gregory Sosnovich, Dwight C. Smith III, Dayton Lierley, Darrel Dochow, Hugh Grant, Robert Hunt, Linda MacDonald; Kenneth Lehn.

G. No Fraud Concerning Risk Weighting of Subprime Assets

1. The SEC relatedly argues that Bancorp should have disclosed in its May 12 10-Q that the OTS had approved a change in how the Bank should "risk weight" its subprime assets. This claim too lacks merit.

2. Prior to the first quarter of 2008, Bancorp's SEC filings reported the Bank's capital ratio both with and without additional risk weighting for subprime assets. In late February 2008, however, the OTS advised the Bank that it no longer needed to calculate the ratio based on additional risk weighting for subprime assets. As a result, Bancorp only reported the Bank's capital ratio without additional risk weighting in its May 12, 2008 10-Q.

3. There is no basis for the SEC's claim that this was fraudulent. Bancorp's capital-ratio disclosure was entirely accurate. The 10-Q duly disclosed the Bank's capital ratio as calculated in accordance with criteria approved by its principal federal regulator. It did not disclose the alternative calculation *with* additional risk weighting for the simple reason that the OTS no longer required it.

4. The 10-Q contained no false or misleading statement concerning the Bank's capital ratio calculation. Indeed, it included a table comparing the Bank's capital ratio at March 31 without additional risk weighting to the ratios without additional risk weighting for prior quarters. This allowed investors to make an "apples to apples" comparison of how the Bank's capital ratio had declined from quarter to quarter during the course of the global financial crisis. No reasonable investor would have been misled by this, and, again, there certainly is no foundation for the SEC's allegation that Mr. Perry acted with scienter.

5. Nor is there any evidence that additional disclosure concerning what the OTS had approved in the way of how the Bank's capital ratio should be calculated would have meaningfully altered the total mix of information available to a reasonable investor. The material points for investors were that the Bank continued to be well capitalized at March 31 according to the criteria approved by its principal federal regulator, and that the Bank's hold on well-capitalized status was tenuous. Those facts were duly disclosed in the Form 10-Q that Bancorp filed on May 12. Accordingly, there is no basis for the SEC's fraud claim.

<u>Key Evidence Negating SEC's Claim</u>: Exhibits 563, 593, 636, 654; Testimony of Michael Perry, Scott Keys, Gregory Sosnovich, Kenneth Lehn.

H. <u>No Fraud Concerning the DSPP Prospectuses</u>

1. The SEC alleges that Bancorp's DSPP prospectuses were false and misleading because they purportedly did not disclose that funds raised through the DSPP would be contributed to the Bank or used to pay dividends on Bancorp's trust preferred securities. This claim, however, is belied by the fact that the

prospectuses disclosed that proceeds would be used "for general corporate purposes, including investment in our subsidiaries." Bancorp clearly disclosed that the Bank was its only significant asset and that its only significant obligation other than supporting the Bank was to pay dividends on trust preferred securities. Bancorp had no possible use of funds raised through the DSPP other than to make contributions to the Bank or to pay dividends. Indeed, Bancorp's February 12, 2008 8-K specifically disclosed that funds raised through the DSPP in 2007 had been contributed to the Bank, while the 10-K disclosed that capital contributions to the Bank were Bancorp's principal use of cash in 2005, 2006 and 2007.

2. More fundamentally, however, Mr. Perry cannot be liable for alleged false statements contained in the DSPP prospectuses because he neither signed, nor reviewed, nor approved those filings. Under both Rule 10b-5 and section 17(a), a person can be liable for a false or misleading statement only if he or she was the statement's "maker." *See, e.g., SEC v. Global Express Capital Real Estate Inv. Fund, I, LLC*, 289 F. App'x 183, 186 (9th Cir. 2008).

3. A statement's "maker" is the person with "ultimate authority over the statement, including its content and whether and how to communicate it." *Janus Capital Group, Inc. v. First Derivative Traders*, 131 S. Ct. 2296, 2302, 180 L.Ed.2d 166 (2011). Mr. Perry was not the "maker" of statements in the prospectuses under this standard.

4. While Mr. Perry was Bancorp's CEO, the prospectuses were not delivered in his name or signed by him, nor did he play any role in preparing or reviewing the documents. An executive officer who has no connection to a statement cannot be liable as its "maker." *See Reese*, 643 F.3d at 693 n.8 (no liability for false statements unless defendant is "alleged to have been intricately involved or to have substantially participated in the making of those misstatements").

5. The SEC alleges that the prospectuses were incorporated by reference in a June 2006 Registration Statement that Mr. Perry signed. But the SEC does

not allege that the Registration Statement itself contained anything false or misleading; only that the subsequently-issued prospectuses did. The prospectuses were issued more than a year *after* the Registration Statement was filed. Mr. Perry was not the "maker" of the prospectuses and thus cannot be liable for alleged false or misleading statements in them. Moreover, Mr. Perry obviously cannot have acted with scienter as to prospectus statements that he had no role in generating.

6. Finally, the prospectuses were drafted by outside counsel. Counsel thus implicitly advised that the "use of proceeds" disclosure complied with the securities laws. For this further reason, the SEC cannot make out a fraud claim.

<u>Key Evidence Negating SEC's Claim</u>: Exhibits 711, 775, 786, 795; Testimony of Michael Perry, Pamela Marsh, Joseph Ventura; SEC's Responses to Mr. Perry's Requests for Admission No. 21–22 (May 14, 2012).

I. <u>Stock Purchases and Absence of Stock Sales Negate any Possible Inference of Scienter</u>

1. As noted above, Mr. Perry did not sell a single share of his Bancorp stock in 2006, 2007 or 2008. To the contrary, he *acquired* more than $3.6 million of additional Bancorp stock in 2007 and 2008.

2. Courts routinely hold that stock purchases negate any inference of scienter. *See, e.g.*, *In re Bristol-Myers Squibb Sec. Litig.*, 312 F. Supp. 2d 549, 561 (S.D.N.Y. 2004) (defendants' increased holdings during class period were "wholly inconsistent with fraudulent intent"). Indeed, the Ninth Circuit has held that an inference of scienter is negated even where a defendant has engaged in "*minimal sales*" of stock. *Worlds of Wonder*, 35 F.3d at 1425 (emphasis added).

3. It is all the more clear that any such inference is negated as to Mr. Perry given that he made *no* sales of his Bancorp stock during the relevant period, and, indeed, substantially increased his stock ownership.

<u>Key Evidence Negating SEC's Claim</u>: Testimony of Michael Perry; SEC Form 4s (Mar. 23, 2007 and Feb. 15, 2008); SEC's Responses to Mr. Perry's

Requests for Admission No. 1–2, 4 (May 14, 2012).

J. <u>Transparent Management Style Negates any Inference of Scienter</u>

1. Mr. Perry's open and transparent management style further undermines the SEC's scienter claim. In fact, when it comes to disclosures, there are numerous examples of Mr. Perry's tendency to share more rather than less.

2. For instance, the Bank's OTS regulators expressed the view in 2008 that "management cooperation and transparency was very good and consistent with prior periods" and that Mr. Perry "provides periodic email updates to the OTS on all significant developments at IndyMac, *positive or adverse*, and the OTS has no management-related issues." To prevail on its "fraud" theory, the SEC would need to show that, at the same time Mr. Perry was sharing "all significant developments at IndyMac, positive or adverse" with the OTS, he was somehow hiding information from investors. Any such claim is implausible on its face.

3. Other examples of Mr. Perry's transparency include:

- On December 6, 2007, Mr. Perry frankly advised investors that IndyMac was "in the eye of the storm" wreaked by the global financial crisis.
- In his February 12, 2008 Annual Shareholders Letter, Mr. Perry said that "2007 was a terrible year for our industry, for IndyMac, and for you, our owners," and that "as IndyMac's CEO, I take full responsibility for the mistakes that we made."
- Mr. Perry instituted a Bancorp blog to keep investors abreast of developments, and provided for the issuances of several voluntary Form 8-Ks.
- In Bancorp's March 24, 2008 Proxy Statement, Mr. Perry told shareholders that if they were unhappy with his performance, they could vote against his re-election as director, and that he would then resign as CEO and voluntarily forfeit the right to his multi-million dollar severance package.

Such candor and acceptance of responsibility is entirely inconsistent with an inference of scienter.

Key Evidence Negating SEC's Claim: Exhibits 563, 1001; IMB-04-1222257; NEBOT_F_00095324; Form 8-Ks (Dec. 6, 2007 and Feb. 12, 2008); Proxy Statement, Schedule 14A (Mar. 26, 2008); Testimony of Michael Perry, Scott Keys, Pamela Marsh, Dayton Lierley.

K. No Negligence

1. Negligent conduct may be sufficient to support liability under section 17(a)(2) and 17(a)(3) of the Securities Act. To establish liability under the negligence standard, the SEC must prove that Mr. Perry failed to act with "reasonable prudence." *SEC v. Dain Rauscher, Inc.*, 254 F.3d 852, 856 (9th Cir. 2001). A defendant cannot be found negligent if he had a reasonable basis for his statements, and acted prudently and diligently in relying on the advice of others. *See, e.g.*, *Weiss v. SEC*, 468 F.3d 849, 855 (D.C. Cir. 2006); *SEC v. Shanahan*, 646 F.3d 536 (8th Cir. 2011).

2. For the reasons stated in sections III.A–J above, Mr. Perry cannot be held liable for negligence. The SEC cannot establish that any of the challenged statements in Bancorp's SEC filings and disclosures were false or misleading and material. Even if it could make those showings, the evidence will establish that Mr. Perry acted with reasonable prudence and in complete good faith.

Key Evidence Negating SEC Claim: *See* § III.A–J, *supra*.

L. No Aiding and Abetting

There is no basis for the SEC's claim that Mr. Perry aided and abetted securities law violations by Bancorp, as alleged in its Third Claim for Relief. Bancorp did not violate provisions of the securities laws precluding materially false or misleading disclosures. And Mr. Perry certainly did not know of and substantially participate in any purported violations. *See Ponce*, 345 F.3d at 737.

Key Evidence Negating the SEC's Claim: *See* § III.A–J, *supra*.

M. No "Scheme" Liability

The SEC cannot prevail on its claim that Mr. Perry engaged in a fraudulent "scheme" under Rule 10b-5(a) and (c) and § 17(a)(1) and (3) because the purported scheme does not "encompass[] conduct beyond [the] misrepresentations or omissions" alleged. *WPP Lux. Gamma Three Sarl v. Spot Runner, Inc.*, 655 F.3d 1039, 1057 (9th Cir. 2011). The SEC's claim also fails because Mr. Perry took no action for the "principal purpose and effect of creating a false appearance of fact in furtherance of [a] scheme to defraud." *Simpson v. AOL Time Warner Inc.*, 452 F.3d 1040, 1049 (9th Cir. 2006), *vacated on other grounds sub nom. Simpson v. Homestore.com, Inc.*, 519 F.3d 1041 (9th Cir. 2008).

Key Evidence Negating the SEC's Claim: *See* § III.A–J, *supra*.

N. No Basis for Disgorgement

1. Disgorgement is intended to prevent the retention of "*profits* realized from violations of the securities laws." *SEC v. Clark*, 915 F.2d 439, 453 (9th Cir. 1990) (emphasis added). Its purpose is "to deprive a wrongdoer of unjust enrichment, and to deter others from violating securities laws by making violations unprofitable." *SEC v. First Pac. Bancorp*, 142 F.3d 1186, 1191 (9th Cir. 1998).

2. The SEC cannot show a basis for disgorgement under this standard. Mr. Perry did not profit in any way from Bancorp's demise. To the contrary, he (a) acquired more than $1 million of Bancorp stock in 2007; (b) acquired more than $2.6 million of additional shares in February 2008; (c) did not sell a single Bancorp share in 2006, 2007 or 2008; (d) received no bonus for 2007 or 2008; and (e) voluntarily relinquished one million stock options in April 2008. Mr. Perry's holdings of Bancorp stock on December 31, 2006, just before the financial crisis, were valued at nearly $70 million, constituting the vast majority of his net worth. Mr. Perry lost virtually the full value of his Bancorp holdings when the company filed for bankruptcy in July 2008. Mr. Perry plainly has no "ill-gotten gains" to disgorge. Indeed, the SEC has acknowledged in interrogatory responses that it has adduced no evidence that Mr. Perry realized any ill-gotten gains.

Key Evidence Negating the SEC's Claim: Testimony of Michael Perry;

SEC Form 4s (Mar. 23, 2007 and Feb. 15, 2008); April 15, 2008 8-K; SEC's Third Amended Responses to Mr. Perry's Interrogatories No. 23–24 (May 14, 2012).

IV. EVIDENTIARY ISSUES

Mr. Perry anticipates that he may raise the following evidentiary issues:

A. Mr. Perry may move to exclude all or part of the expert report and rebuttal expert report of the SEC's "materiality" expert, Anthony Saunders, on the ground that it does not present admissible expert testimony.

B. Mr. Perry may seek to preclude the SEC from presenting evidence that Bancorp's Form 8-Ks issued on March 11, 2008 and May 1, 2008, and its Form 10-Q dated November 6, 2007 were false and misleading because no such claims were asserted in the SEC's Complaint.

C. Mr. Perry may move to preclude the SEC from introducing testimony of Bancorp stock analysts to the extent such analysts purport to offer expert testimony concerning what information was material to a reasonable investor.

D. Mr. Perry will have a number of foundation and/or hearsay objections to the SEC's proposed trial exhibits.

V. BIFURCATION OF ISSUES

Mr. Perry does not request bifurcation of any issues.

VI. JURY TRIAL

No party has requested a jury trial in this case.

VII. ATTORNEYS FEES

This case does not involve claims for attorneys' fees.

VIII. ABANDONMENT OF ISSUES

Mr. Perry is unaware of which, if any, issues the SEC may abandon at trial.

Dated: May 18, 2012

Respectfully submitted,

/s/ D. Jean Veta
D. Jean Veta
Counsel to Michael W. Perry